

FEDERAL COURT OF AUSTRALIA

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

- Appeal from: *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247;
Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2021] FCA 1630
- File number: VID 36 of 2022
- Judgment of: **JAGOT, O'BRYAN AND CHEESEMAN JJ**
- Date of judgment: 10 October 2022
- Catchwords: **CORPORATIONS** — appeal against findings of misleading and deceptive conduct arising from promotion of investment products — where appellants did not appear at first instance — no error in primary judge's findings of contraventions or assessment of witnesses — judge's discretionary assessment of penalty open although higher than penalty suggested by ASIC — broad injunction against publication of material set aside — appeal otherwise dismissed
- Legislation: *Acts Interpretation Act 1901* (Cth) ss 2, 7
Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA(1)(a)–(b), 12BAB(1)(b), 12BAB(7)(b), 12BB(1)–(2), 12DA(1), 12DB(1)(a), 12DB(1)(e), 12GBA, 12GBB, 12GBCA(2), 12GD, 327
Corporations Act 2001 (Cth) ss 553B(1), 708(8), 761G(4), 766C(1)(b), 769C, 1041H(1), 1041H(2)(a)
Evidence Act 1995 (Cth) ss 76, 79, 80, 91, 135, 140
Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)
Treasury Laws Amendment (2019 Measures No 3) Act 2020 (Cth) Sch 3
Federal Court Rules 2011 (Cth) rr 30.21(1)(b)(i), 39.05(a), 39.05(e)
Explanatory Memorandum, Treasury Laws Amendment (2019 Measures No 3) Bill 2019 (Cth)
Uniform Civil Procedure Rules 2005 (NSW) r 29.7
- Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017]

FCAFC 113; (2017) 254 FCR 68

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 159; (2017) 258 FCR 312

Australian Competition and Consumer Commission v Danoz Direct Pty Ltd [2003] FCA 881; (2003) 60 IPR 296

Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd [2015] FCA 274

Australian Competition and Consumer Commission v Pacific National Pty Ltd [2020] FCAFC 77; (2020) 277 FCR 49

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; (2020) 278 FCR 450

Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2) [2018] FCA 1748

Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73; (2018) 262 FCR 243

Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd [1997] FCA 871; (1997) 78 FCR 197

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 3) [2021] FCA 170; (2021) 150 ACSR 185

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932; (2019) 140 ACSR 561

Australian Securities and Investments Commission v Forge [2007] NSWSC 1489

Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd [2019] FCA 1514; (2019) 138 ACSR 395

Australian Securities and Investments Commission v MLC Nominees Pty Ltd [2020] FCA 1306; (2020) 147 ACSR 266

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279

Commissioner of Taxation v SNF (Australia) Pty Ltd [2011] FCAFC 74; (2011) 193 FCR 149

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

Finance Sector Union of Australia v Commonwealth Bank of Australia [2005] FCA 1847; (2005) 224 ALR 467
Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893; (2003) 130 FCR 424
House v The King [1936] HCA 40; (1936) 55 CLR 499
ICI Australia Operations Pty Ltd v Trade Practices Commission [1992] FCA 707; (1992) 38 FCR 248
In the matter of Anton Fabrications (NSW) Pty Ltd – Bentley Smythe Pty Ltd v Anton Fabrications (NSW) Pty Ltd [2011] NSWSC 186; (2011) 248 FLR 384
Lodhi v The Queen [2006] NSWCCA 121; (2006) 199 FLR 303
Mawhinney v Australian Securities and Investments Commission [2022] FCAFC 159
Polis v Zombor (No 5) [2022] FCA 122
R S Howard & Sons Ltd v Brunton [1916] HCA 21; (1916) 21 CLR 366
Rural Press Ltd v Australian Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53
Seltsam Pty Limited v McGuinness [2000] NSWCA 29; (2000) 49 NSWLR 262
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249
Stephens v The Queen [2022] HCA 31
University of Wollongong v Metwally [No 2] [1985] HCA 28; (1985) 60 ALR 68
Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; (2021) 284 FCR 24
Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491
Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661

Division: General Division
Registry: Victoria
National Practice Area: Commercial and Corporations
Sub-area: Regulator and Consumer Protection
Number of paragraphs: 283
Date of hearing: 22–26 August 2022

Counsel for the Appellants: Mr A Myers AC QC, Mr M Pearce SC, Mr A Weinstock,
Mr A Aleksov and Mr C P Thompson

Solicitor for the Appellants: Roberts Gray Lawyers

Counsel for the First Respondent: Mr T Sullivan QC, Mr D Barnett, Ms S Robb and Mr N Congram

Solicitor for the First Respondent: Australian Securities and Investments Commission

Counsel for the Second Respondent: The Second Respondent did not appear

ORDERS

VID 36 of 2022

BETWEEN: **MAYFAIR WEALTH PARTNERS PTY LTD ACN 168 878 779**
First Appellant

M101 HOLDINGS PTY LTD ACN 629 777 402
Second Appellant

ONLINE INVESTMENTS PTY LTD ACN 134 785 890
Third Appellant

AND: **AUSTRALIAN SECURITIES AND INVESTMENTS**
COMMISSION
First Respondent

M101 NOMINEES PTY LTD (ACN 636 908 159)
Second Respondent

ORDER MADE BY: **JAGOT, O'BRYAN AND CHEESEMAN JJ**

DATE OF ORDER: **10 OCTOBER 2022**

THE COURT ORDERS THAT:

1. The appellants be granted leave to rely on the Amended Notice of Appeal.
2. The injunction made in paragraph 6 of the orders made on 21 January 2022 be set aside.
3. The appeal otherwise be dismissed.
4. The appellants pay the first respondent's costs of the appeal as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

1. BACKGROUND TO THE APPEAL

1 These reasons for judgment relate to the second appeal arising from judgments below concerning investment schemes involving a company formerly known as Mayfair Wealth Partners Pty Ltd and now known as Australian Income Solutions Pty Ltd (to be referred to in these reasons by its trading name during the relevant period, **Mayfair Platinum**), and other companies **M101 Holdings** Pty Ltd, **M101 Nominees** Pty Ltd, and Online Investments Pty Ltd trading as Mayfair 101 (**Mayfair 101**).

2 The investment schemes involved the issue of promissory notes. M101 Holdings was the issuer of the “M+ Fixed Income Notes” (**M+ Notes**). M101 Nominees was the issuer of the “M Core Fixed Income Notes” (**Core Notes**). Mayfair 101 marketed the M+ Notes and the Core Notes (together, the **Mayfair products**). James Mawhinney was the sole director of each of the companies.

3 The reasons for judgment concerning the first appeal were published as *Mawhinney v Australian Securities and Investments Commission* [2022] FCAFC 159 (the **Mawhinney judgment**). Although the two appeals were heard together, they involve appeals from different judgments and distinct issues.

4 These reasons for judgment concern the orders the primary judge made consequential on *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247 (**J1**, also the **liability judgment**) and *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630 (**J2**, also the **penalty judgment**).

5 The **Mayfair parties** (the defendants below, the appellants and second respondent in the appeal) did not appear at the hearing leading to J1. Consequential on J1, the primary judge made declarations as sought by the Australian Securities and Investments Commission (**ASIC**) to the effect that, in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) the Mayfair parties (or a number of them) represented to consumers that:

- (1) the Mayfair products were comparable to, and of similar risk profile to, bank term deposits (the **Bank Term Deposit Representations**), when the Mayfair products expose investors to significantly higher risk than bank term deposits in various specified ways;
- (2) on maturity of the Mayfair products, the principal would be repaid in full (**Repayment Representations**), when investors in the Mayfair products might not receive capital repayments at maturity because the defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the defendants did not have sufficient funds to repay investments at maturity, which right the defendants have in fact exercised;
- (3) the Mayfair products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default (**No Risk of Default Representations**), when there was a risk that investors could lose some or all of their principal investment; and
- (4) the Core Notes were fully secured financial products (**Security Representations**), when funds invested in Core Notes were: (a) lent to Eleuthera Group Pty Ltd and not secured by first-ranking, unencumbered asset security or on a dollar-for-dollar basis or at all, (b) used to pay deposits on properties prior to any security interest being registered, and (c) used to purchase assets that were not secured by first-ranking, unencumbered asset security.

6 The Mayfair parties appeared at the hearing leading to J2. Consequential on J2, the primary judge made orders on 21 January 2022 to the effect that:

- (1) Mayfair Platinum pay a pecuniary penalty of \$10,000,000 in respect of its contraventions of s 12DB of the ASIC Act;
- (2) M101 Holdings pay a pecuniary penalty of \$8,000,000 in respect of its contraventions of s 12DB of the ASIC Act;
- (3) M101 Nominees pay a pecuniary penalty of \$8,000,000 in respect of its contraventions of s 12DB of the ASIC Act, such penalty not to be enforced under s 553B(1) of the Corporations Act;
- (4) Mayfair 101 pay a pecuniary penalty of \$4,000,000 in respect of its contraventions of s 12DB of the ASIC Act;
- (5) adverse publicity notices be published; and

(6) Mayfair Platinum, M101 Holdings, and Mayfair 101 be restrained from using certain specified phrases in any advertising, marketing or promotion.

7 The appellants (three of the defendants below), Mayfair Platinum, M101 Holdings and Mayfair 101, contend in this appeal that the primary judge erred on the basis of 36 grounds. The other defendant below, M101 Nominees, is now in liquidation and is the second respondent to the appeal. For convenience, the four defendant companies below are referred to as the appellants (or the Mayfair parties) except where it is necessary to distinguish between them.

8 The appeal proceeded on the basis of an Amended Notice of Appeal handed up in Court on the first day of the appeal hearing, a course which was not opposed by ASIC.

9 In common with our observations about the extensive grounds of appeal in the Mawhinney judgment, the numerous grounds raised in this appeal lack discrimination. They also fail to recognise the consequences of the forensic decision Mr Mawhinney made on behalf of the defendant companies below not to appear at the hearing leading to J1 and the importance of the principle of finality of litigation, one aspect of which is that a party is generally bound by its conduct below: *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491 at 497–498, *University of Wollongong v Metwally [No 2]* [1985] HCA 28; (1985) 60 ALR 68 at 71. As explained below, having not appeared at the hearing which led to J1, it is not apparent how the appellants can establish that the primary judge **erred** in not making findings or drawing conclusions in J1 which were never put to the primary judge. The fundamental issues which the appellants never confront are that it is not an error to admit evidence to which no objection is taken (subject to a few exceptions where the evidence is prohibited from admission, which is not the case here). It is not an error to make reasonably open findings of fact when no-one argues the finding should not be made based on other potentially contradictory but contestable evidence. It is not an error to not weigh potentially competing characterisations of facts when no argument is made about the characterisation.

10 During the course of the hearing of the appeal these issues were raised with the appellants and, in that context, the appellants were asked why they had not applied to set aside the declarations consequential on J1 under r 39.05(a) of the *Federal Court Rules 2011* (Cth) (the **Federal Court Rules**). Rule 39.05(a) provides that the Court may vary or set aside a judgment or order after it has been entered if “it was made in the absence of a party”. The appellants’ response was that the forensic decision had been made that an application under the rule was not available. It should also be noted that r 30.21 is to the same effect. It provides that if a trial proceeds in a

party's absence and during or at the conclusion of the trial an order is made, the party who was absent may apply to the Court for an order setting aside or varying the order and for the further conduct of the proceeding. The appellants made a forensic decision not to take these options.

11 It is difficult to escape the impression that Mr Mawhinney chose for the appellants not to apply to set aside the declarations made in their absence because that power is discretionary and it would have appeared unlikely that the Court would exercise a discretion in favour of the appellants when the most probable inference would have been that Mr Mawhinney decided they would be better served by not appearing at the liability hearing (see *Polis v Zombor (No 5)* [2022] FCA 122 at [43]–[44]). This reality, however, also exposes the problem on the appeal. An appeal to put arguments that could and should have been put to the primary judge, but which were not put due to a forensic decision seen to be to the advantage of the party at the time in not appearing at the hearing, cannot be used as a means to escape the principle of finality by attributing errors of the kind identified (that is, admitting evidence to which no objection is taken, making reasonably open findings of fact when no-one argues the finding should not be made based on other potentially contradictory but contestable evidence and not weighing potentially competing characterisations of facts when no argument is made about the characterisation).

12 The equivalent provision to r 30.21(1)(b)(i) in the *Uniform Civil Procedure Rules 2005* (NSW) (r 29.7) has been explained in these terms in *In the matter of Anton Fabrications (NSW) Pty Ltd – Bentley Smythe Pty Ltd v Anton Fabrications (NSW) Pty Ltd* [2011] NSWSC 186; (2011) 248 FLR 384 at [11]:

Turning then to the issue as to whether the application should be heard in the absence of Anton Fabrications, Rule 29.7 of the *Uniform Civil Procedure Rules 2005* (NSW) applies when a trial is called on and any party is absent. In those circumstances the Court may proceed with the trial generally, so far as concerns any claim for relief in the proceedings, or may adjourn the trial. If it is the defendant who fails to appear, then the plaintiff may prove its claim so far as the burden of proof lies upon it and if it proves its claim is entitled to the relief claimed and such other relief as is consistent therewith (see discussion in *Ritchie's Uniform Civil Procedure (NSW)*, referring to *Stone v Smith* (1887) 35 Ch D 188 and *Kingdon v Kirk* (1887) 37 Ch D 141).

13 This is consistent with the reasoning of the High Court in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279. By analogy in the present case, the appellants had not withdrawn their Response to ASIC's Amended Concise Statement. Accordingly, it could not be taken by their failure to appear that they did not rely on their Response to ASIC's Amended Concise Statement. ASIC therefore had to prove its

entitlement to the claimed relief. However, the appellants remained (and remain) bound by their conduct in not objecting to evidence or making arguments about the weight that ought to be given to evidence. They could apply to set aside the declarations made in their absence. But they cannot assert error by the primary judge merely because their absence made it easier for ASIC to adduce evidence and prove its case.

14 This is not to say that no appeal may be brought against orders made in the absence of a party, even a party which has made a forensic decision not to appear at the hearing. Rather, the focus of these observations is that the need for adherence to the principle of finality is acute in respect of those appeal grounds which concern the primary judge's alleged errors in admitting evidence or making factual findings based on the evidence below. It is not apparent how it can be said that the primary judge committed any error in this regard when the admissibility of the evidence and the weight which should be given to it was contestable and the appellants could and should have put their arguments as to both below.

15 Further, and relatedly, there is good reason for rr 39.05(a) and 30.21(1)(b)(i) to involve a discretionary decision, subject to appellate review only for an error of principle in the exercise of discretion in accordance with *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 505–506. A party that has chosen not to appear can seek to have orders made against them in their absence set aside. But it is not apparent how such a party can succeed in alleging error by a primary judge on the basis of evidentiary issues which could and should have been tested below (in contrast, for example, to legal issues not depending on evidence open to different characterisation). To conclude that a primary judge has erred in those circumstances would be to set the hearing below at naught. It would also be to confer an unwarranted forensic advantage on the party that chose not to appear below. Had the same arguments about the evidence been put below, the other party could have made its own forensic decisions, including the seeking of an adjournment and the adducing of further evidence. As a matter of principle, this loss of that opportunity (whether it would have been taken or not) speaks against any departure from the requirement of finality in litigation. It also speaks strongly against any conclusion of error on the part of the primary judge in respect of contestable evidentiary questions.

16 Taking into account these matters and the reasons below, we have concluded that the appeal must be dismissed, other than in respect of the injunction made on 21 January 2022 which should be set aside as it is too broad and unworkable.

2. PRIMARY JUDGE'S REASONING

2.1 Statutory context

17 ASIC alleged that the appellants engaged in conduct that was misleading or deceptive or likely to mislead or deceive (in contravention of s 1041H(1) of the Corporations Act and/or s 12DA(1) of the ASIC Act) and/or made false or misleading representations (in contravention of s 12DB(1)(a) and (e) of the ASIC Act) by making the Bank Term Deposit Representations, Repayment Representations, No Risk of Default Representations, and the Security Representations: J1 [10].

18 The primary judge identified the relevant statutory provisions at J1 [24]–[33] including:

- (1) Corporations Act, s 1041H(1): “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”;
- (2) Corporations Act, s 1041H(2)(a): “[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);
- (3) ASIC Act, s 12DA(1): “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”;
- (4) ASIC Act, s 12BAB(1)(b): “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);
- (5) ASIC Act, ss 12BAA(1)(a) and (b): a “financial product” includes a “facility through which, or through the acquisition of which, a person ... makes a financial investment” or “manages financial risk”; and
- (6) ASIC Act, ss 12DB(1)(a) and (e): “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 ...”.

19 The primary judge also identified that:

- (1) “[s]ection 769C of the Corporations Act provides: [f]or the purposes of [Chapter 7], or of a proceeding under [Chapter 7], if ... a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act)[,] and the person does not have reasonable grounds for making the representation[,], the representation is taken to be misleading”: J1 [42]; and
- (2) sections 12BB(1) and (2) of the ASIC Act provide that “[i]f ... a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act)[,], and the person does not have reasonable grounds for making the representation[,], the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be misleading” and that “person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary”: J1 [40]–[41].

20 It is not suggested that the primary judge misstated any applicable principle in J1. Accordingly, the primary judge identified at J1 [35]–[36] that:

- (1) “[a]lthough 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”, quoting *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; (2020) 147 ACSR 266 at [47] per Yates J;
- (2) “[t]he applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. 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)” quoting *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; (2019) 140 ACSR 561 per O’Bryan J at [98]. Further, that O’Bryan J in *Dover* also summarised the authorities at [98] as follows:
 - (a) “conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so”;
 - (b) “it is not necessary to prove an intention to mislead or deceive”;

- (c) “it is unnecessary to prove that the conduct in question actually deceived or misled anyone... The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself”; and
 - (d) “it is not sufficient if the conduct merely causes confusion”;
- (3) O’Bryan J in *Dover* continued in these terms at [99]:

... In assessing whether conduct is likely to mislead or deceive, the courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual... In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the Court must consider whether the “ordinary” or “reasonable” members of that class would be misled or deceived (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled.

2.2 Evidentiary context

21 The primary judge said this at J1 [79]–[81]:

As I have mentioned above, the trial was undefended. As a consequence, there was no challenge to the evidence tendered by ASIC. There was no evidence tendered by the Defendants.

I directed that ASIC file a document which identified the precise pages of the Court Book which ASIC tendered in evidence in support of the relief claimed. ASIC filed such a document on 9 February 2021. I have read and considered the specific Court Book references identified by ASIC as comprising the evidence on which ASIC relies in these proceedings.

As this matter proceeded before me undefended, and there was no challenge to the evidence tendered by ASIC, I do not propose to set out in detail the substance of all of the extensive evidence relied upon by ASIC. In the circumstances, that would serve no purpose. I have identified above the evidence to which I have had regard in making the findings set out below. It is sufficient to set out below some examples of the evidence relied on by ASIC.

22 These observations reflect the critical fact referred to above. The appellants decided not to appear at the hearing. There is no suggestion that this resulted from anything other than a forensic decision of Mr Mawhinney as to what he perceived at the time to be to the best advantage of the appellants.

23 The primary judge set out ASIC’s submissions. In that context, the primary judge noted that the statements and images relied upon by ASIC in its case were conveniently summarised as an annexure to ASIC’s amended submissions, at J1 [47]. His Honour reproduced that annexure as Annexure A to the reasons for judgment. A number of grounds of appeal are directed to Annexure A.

24 In considering ASIC’s case, the primary judge referred to examples of the marketing and related documents for the Mayfair products at J1 [82]–[109]. The primary judge also referred to the expert reports of Jason Tracy, chartered accountant, at J1 [68]–[72] and [110]–[129], as well as the report of the provisional liquidators of M101 Nominees at J1 [73] and [130]–[146].

25 The primary judge then made findings that each of the representations as ASIC had asserted had been made and were representations as to future matters taken to be misleading absent evidence to the contrary and otherwise were in fact misleading: J1 [148]–[176].

26 The primary judge then dealt with the issue of declaratory relief, making the declarations sought by ASIC at J1 [177]–[187].

27 The appellants appeared at the penalty hearing leading to J2.

3. EVIDENTIARY APPEAL GROUNDS – LIABILITY HEARING

28 The structure of the submissions for the appellants discloses the problem with their conception of the appeal. In their submissions they deal first with certain evidentiary appeal grounds (grounds 9, 10, 12, 13, 14 and 15).

29 To the extent that they relate to J1, grounds 9 and 10 are that the primary judge erred in admitting Mr Tracy’s reports into evidence (being the report dated 12 June 2020 and the supplementary report dated 12 August 2020).

30 As ASIC submitted, however, it is not an error by the primary judge to have admitted into evidence expert reports to which no objection was taken. The exclusionary rule in s 76 of the *Evidence Act 1995* (Cth) (the **Evidence Act**) operates when objection is taken. This is because, as noted in *Seltsam Pty Limited v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262 at [149] (cited with approval in *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74; (2011) 193 FCR 149 at [26]):

[i]n the ordinary course, the words “not admissible” in the Evidence Act, including in the opinion rule found in s70 to which s79 is an exception, means “not admissible over objection”, in accordance with the practice of the courts of which the Parliament was

aware when it passed the Evidence Act. (See *R v Reid* (1999) NSWCCA 258 at [5]).

31 As noted, this is not a case where the appellants appeared but without legal representation below. It is a case where it must be inferred that the appellants deliberately decided not to appear before the primary judge for their own forensic advantage. Having done so and not objected to the admission of any evidence, the appellants cannot maintain that the primary judge erred by admitting into evidence an expert report which, in part or whole, did not comply with s 79 of the Evidence Act (“[i]f a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge”). The question whether an expert report complies with s 79 is usually contestable. Given that the appellants chose not to appear, the primary judge was not bound to scrutinise the expert evidence to ensure that every passage admitted strictly complied with s 79. It might be that in a case of manifest non-compliance, a primary judge in the same position might choose to exclude the evidence of their own motion. But this is not such a case and, even in such a case, the discretion of the primary judge would be broad in circumstances of deliberate non-appearance and resulting non-objection to expert evidence.

32 What certainly cannot be said is that the primary judge erred in admitting the evidence merely because the appellants belatedly see fit to put the kind of submissions about s 79 in this appeal which they could have put before the primary judge in the liability hearing. As noted, the effect of so doing is to clothe the almost inevitable consequence of their non-appearance with the mantle of “error” by the primary judge, when this cannot be so. It is also to deny ASIC the forensic opportunity it otherwise would have had below of seeking to supplement the evidence including by tendering documents, adducing oral evidence or, following an adjournment, tendering further reports or documents.

33 The same conclusion applies to ground 12 to the effect that the primary judge should have excluded the expert reports of Mr Tracy under s 135 of the Evidence Act at the liability hearing leading to J1 as they were based on incomplete information, contained provisional opinions only, were based on incorrect instructions, and were said to erroneously conclude that investor funds were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020. All of these propositions are contestable. If the appellants wanted to challenge the admission of the reports, they had to do so in the liability hearing before the primary judge leading to J1. “It is not, however, for the trial judge to raise and determine questions of admissibility”: *Harrington-Smith on behalf of the Wongatha People*

v State of Western Australia (No 7) [2003] FCA 893; (2003) 130 FCR 424 at [13]. The appellants are bound by their lack of objection to the evidence before the primary judge.

34 Apart from this, the grounds are without substance. The reports were based on Mr Tracy’s expertise. The fact that some parts of the reports were based on incomplete or provisional information was acknowledged in the reports. The reports were admissible and it was a matter for the primary judge as to what weight to give to them. In circumstances where there was no objection to the reports and no argument about their weight, the primary judge was not bound to discount their weight.

35 The same conclusion applies to ground 13, which makes the equivalent complaint about the admission and use of the report of the provisional liquidators of M101 Nominees in the liability hearing leading to J1.

36 Grounds 14 and 15 suffer from the same problem. They are that the primary judge “erred by adopting conclusions of ultimate fact and of law from the Tracy Reports and the M101 PL Report [the provisional liquidators’ report about M101 Nominees] and by failing to reach his own conclusions of ultimate fact and of law” and erred in making various factual findings “based on opinions expressed in the Tracy Reports and the M101 PL Report and in not finding in respect of each such fact that [ASIC] had failed to prove it to the requisite standard under s 140 of the Evidence Act”.

37 However, in the circumstances discussed above, the various reports were properly in evidence. Further, the primary judge was entitled to give to those reports such weight as he saw fit in those same circumstances. The reports were not subject to the ultimate issue rule which was abolished by s 80 of the Evidence Act. The primary judge used the expert reports as he was entitled to do, amongst other evidence, to make his factual findings. So much is clear from J1 where the primary judge said at [147]:

I make the following findings in relation to the evidence tendered by ASIC and applying the principles relevant to misleading or deceptive conduct under the *Corporations Act* and the *ASIC Act* as stated in *Dover* at [98]–[101].

38 The evidence tendered by ASIC was not confined to the expert reports.

39 The notion that the primary judge strayed from the fundamental requirement that ASIC had to prove its case on the balance of probabilities in accordance with s 140 of the Evidence Act is untenable. Again, the appellants overlook the legal consequences of their decision not to appear at the hearing before the primary judge. The required approach described in *Anton Fabrications*

and *Banque Commerciale* (see above) does not mean that a judge who is satisfied that a party has deliberately chosen not to appear must scrutinise the evidence adduced for the purpose of proof for any arguable ground of inadmissibility, conceive of arguments that might have been put as to the weight to be given to such evidence that the party might have made had they appeared, or of arguments that might have been put as to why certain findings should not be made. The judge in such a circumstance might choose to do so, but is under no duty to perform that function on the party's behalf.

4. ISSUES AS TO THE LIABILITY JUDGMENT

4.1 Overview

40 Appeal grounds 1 to 8 also concern the liability judgment leading to J1. They are to the effect that the primary judge erred in finding the various representations were made and were misleading.

41 In large part, these grounds depend on the evidentiary challenges discussed and dismissed above. To that extent, these grounds also must fail. Moreover, there is much to be said for the view that in circumstances where the appellants had ample opportunity to seek orders from the primary judge setting aside or varying the declarations because they were made in the appellants' absence but made a deliberate forensic decision not to do so (because, in all likelihood, no discretion to that effect would be exercised in the appellants' favour), the appellants ought not to be able to characterise any aspect of the declarations as involving error by the primary judge.

42 In any event, the complaints are without merit. The evidence supported the making and falsity of the representations. Each relevant document has to be considered as a whole. Selecting some isolated statement or another as exculpatory, as the appellants do, is impermissible.

43 In the course of argument, the appellants advanced some sweeping assertions, including that ASIC had now abandoned the Repayment Representations and the No Risk of Default Representations or impermissibly sought to deviate from its pleaded case, and also that ASIC had now abandoned reliance on the summary of statements and images in Annexure A to J1. The former assertion is discussed and rejected below. The latter assertion is also incorrect. ASIC relied on Annexure A at trial (see J1 [47], [53], [59], [67], [148], [156], [167]). ASIC continues to do so. The examples provided by ASIC in its appeal submissions are from Annexure A. ASIC is not abandoning Annexure A at all. It is merely not itself burdening this

Court with an obligation to deal with every entry in Annexure A. It was then for the appellants to point to some material in Annexure A or otherwise that would indicate error by the primary judge. The appellants have not done so.

44 As noted earlier, the primary judge reproduced examples of the evidence relied on by ASIC as to the representations made by the appellants (J1 [82]–[109]). The examples were drawn from five sources: the Mayfair Platinum website (operated by Mayfair Platinum, J1 [4]), the “Term Deposit Guide” website (operated by Mayfair 101, J1 [7]), the M+ Notes brochure, the Core Notes brochure and newspaper advertisements published by Mayfair Platinum. In respect of the examples referred to by the primary judge, the appellants submitted that:

The five examples yield 24 discrete statements taken from nine sources (the Mayfair Platinum website, the Term Deposit Guide website, the two brochures and five newspaper advertisements), plus a further five terms used in the sponsored link advertising (AdWords).

...

This leaves the 24 statements from the nine sources identified in the first four examples identified by ASIC ... It is unclear, however, whether ASIC’s case is confined to those 24 statements from those nine sources. ASIC also says it relies on all the evidence it identified at trial. In its submissions in respect of particular representations, ASIC relies on one further source and six further statements which are not included in the four examples.

Given that this is a case where representations are not said to be express but rather to be implied and conveyed by a number of different statements drawn from different sources, it is essential that the totality of the evidence relied on as conveying those representations be identified with clarity and precision. At least Annexure A had the virtue of identifying all the evidence ASIC relied on at trial for the making of the alleged representations. On appeal it is unclear what that evidence is.

45 We reject the submission. It involves a combination of misattributed action and wrong consequence. As noted, ASIC relied on Annexure A and continues to do so. The primary judge plainly considered all of the statements in Annexure A in their actual context in the material. As will be explained, the appellants have not demonstrated any error in the primary judge’s reasoning or conclusions.

46 In particular, we do not accept that the primary judge failed to consider the statements on which ASIC relied in context. The primary judge did not accept ASIC’s case “uncritically”, overlook evidentiary shortcomings, or reach conclusions inconsistent with the evidence. The primary judge did find that the evidence established that the alleged misrepresentations were made separately and together by the statements on which ASIC relied as set out in Annexure A to his reasons: J1 [148], [156], [161], [167]. It is also not the case that the findings as to the separate

conveyance of the misrepresentations are untenable. ASIC's case is not to be understood as being that each statement in a single document would have been considered out of its context and, without any context, as conveying the relevant misrepresentation. That is not what the primary judge's findings at J1 [148], [156], [161], [167] mean. The "separate and together" description operates on a document-by-document basis, not a statement-by-statement basis. So much is apparent from the presentation of the statements on a document-by-document basis in Annexure A to J1.

47 It may be accepted that the primary judge's reasons do not isolate each statement found to separately convey the relevant misrepresentation. But that is not the essence of the appellants' complaint. In any event, a number of the statements as they appear in a single document which would be read in the context of the document as a whole do separately convey the relevant misrepresentations. For example only, each of the primary brochures for the M+ Notes and the Core Notes respectively convey each of the misrepresentations relevant to that product (that is, all four misrepresentations for the Core Notes but not the Security Representations for the M+ Notes). Accordingly, there is no error disclosed in the primary judge's findings in this regard.

48 Insofar as the concept of the marketing material "together" conveying the misrepresentations is concerned, and as discussed below, the primary judge's reasons expose the documents and the statements in them which led his Honour to his findings. It is not open to the appellants to seek to run an inadequate reasons ground in respect of J1 in circumstances where that issue is not raised in any of their 36 grounds with numerous sub-grounds.

49 In determining whether the contraventions occurred, the primary judge was not bound to consider whether the statements in Annexure A were made as a part of one or more courses of conduct. In any event, as we have said, each of the primary brochures for the M+ Notes and the Core Notes respectively convey each of the misrepresentations relevant to the respective products. The appellants' submissions that: (a) "the statements contained in the brochure for the M+ Notes were not made in the same course of conduct as the statements in the Core Notes brochure. Statements from the two brochures therefore cannot be combined to create the impression of one of the alleged representations", and (b) "for any combination of statements to create the impression of one of the alleged representations, it must be established that they were all made to at least one person. If some were made to some people and others to other people, they cannot be combined to create the impression of one of the alleged representations" are beside the point. It is obvious that the M+ Notes brochure and the Core Notes brochure do

not need to be combined to result in the misrepresentations. Had the primary judge committed that error, he would not have dealt separately with the Security Representations which apply only to the Core Notes.

50 The primary judge did not fail to identify the target audience, as alleged by the appellants. That contention is irreconcilable with the primary judge's correct identification of the applicable principles including at J1 [36], in particular the reference to *Dover* and its description of the persons or class of persons to whom the representations are conveyed. It was not in dispute before the primary judge that the obvious target audience, as asserted by ASIC, was the class of potential investors in the products (see J1 [173]). As discussed below, the appellants' reliance on the operation of ss 708(8) and 761G(4) of the Corporations Act to support the argument that the target audience of the representations were "experienced investors" and "sophisticated investors" (in the sense of being financially sophisticated) is misplaced. The primary judge's references to the misrepresentations being made to "consumers" does not mean that he failed to recognise that the representations were directed to the class of potential investors. It merely recognises that the members of this class are consumers.

51 The appellants' unrealistic approach to appellate review is disclosed, for example, in their criticism of the primary judge for saying at J1 [162] that "the use by the Defendants in the marketing material for the Mayfair Products of the words "certainty" and "confidence" is likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk of default". The primary judge was not deviating from the concept of the ordinary and reasonable class member. He had already expressly accepted that proposition at J1 [37] by adopting the applicable principles as summarised in *Dover*. The primary judge acknowledged ASIC's submission to the effect that the "relevant class may cover a wide range of people whose personal capacity, knowledge and experience may vary quite significantly": J1 [39]. The appellants' attribution to his Honour of the application of a test of the "gullible and credulous consumer" is untenable.

52 The fact that the primary brochures for the M+ Notes and the Core Notes respectively refer to the relevant promissory deed and include a declaration section with 11 dot points including "[t]he Applicant agrees to the terms of, and to be bound by, the Note Deed [and the Security Trust Deed]" (only the Core Notes brochure refers to the Security Trust Deed), and that these documents were available to and executed by investors, does not assist the appellants. Both are complex legal documents. The problem is that no ordinary and reasonable member of the class

of potential investors could have expected that the products, as marketed, would be subject to a provision in the terms of cl 5.6 of the Secured Promissory Note Deed Poll as set out by the primary judge at J1 [157] (that is, that the issuer would have such a wide discretion to defer repayment of the principal).

53 It is also not material that the investors did not give evidence that they were induced to make the investments by reason of the pleaded misrepresentations. As summarised in *Dover* (at [103], [105]):

[103] The defendants' second and third arguments about the purported difference in approach in cases involving communications to a group of persons and communications to individuals is based on a misunderstanding of what was decided in *Campomar* [*Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45] and related cases...the central issue raised by the statutory prohibitions is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error. Conduct is misleading or deceptive or likely to mislead or deceive if it has that *tendency*; it is not necessary to show that the conduct has had that effect (that is, that a person has in fact been misled). Third, *Campomar* explains that proof of that *tendency* will often differ depending on whether the conduct involves a communication to a group of persons or a communication to individuals. The High Court referred with approval (at [100]) to the observations of Deane and Fitzgerald JJ in *Taco Bell* [*Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 170; (1982) 42 ALR 177] (at 202) that, in cases involving express untrue representations made to identified individuals, the process of deciding whether the conduct was misleading or deceptive may be direct or uncomplicated. It was not suggested, however, that it was necessary to show that the individual concerned was actually misled. The High Court contrasted such cases with cases in which a representation is made to a wider group of persons, including the public or a section of it. The Court observed (at [101]) that in such cases, the sufficiency of the nexus between the conduct and the likelihood of misconception and error must be approached at a level of abstraction. The contrast drawn by the Court was not to the effect that, in the former case, it was necessary to prove that individuals were misled whereas, in the latter case, that was unnecessary. In both cases, it was only necessary to prove the sufficiency of the tendency of the conduct to lead people into error. However, proof of that tendency in the case of communications to a group is necessarily undertaken at a level of abstraction that is not present in the case of communications to an individual.

...

[105] ... The misleading or deceptive conduct was complete, and the false or misleading representation was made, when *Dover*, through its authorised representatives, communicated the Client Protection Policy to clients in a manner that would be expected to bring the document to their attention: cf *Thompson v Riley McKay Pty Ltd (No 2)* (1980) 29 ALR 267 at 273 per Franki J and 276 per Deane J. In that case, which concerned a criminal prosecution for a contravention of s 53(a) of the *Trade Practices Act 1974* (Cth) (the predecessor of s 29(1)(a) of the Australian Consumer Law and s 12DA(1) of the ASIC Act), Deane J observed (at 276):

It is implicit in the ordinary use of the word “represent” that there be an intended representee, to whom the relevant representation is directed. That intended representee may be an identified person, as in the case of a representation made to a particular person in a letter, or unidentified, as is commonly the case with a representation made in an advertisement to be disseminated by the mass media. There is not, however, implicit in the word “represent” any requirement that the representation actually reach, or be understood by, the intended representee. The act of representing is complete once the subject matter is irrevocably set forth or disseminated upon the course which is intended to lead to the intended representee or representees.

54 We also do not accept a proposition the appellants made repeatedly that the judgment is “irregular” because it does not identify who committed the contraventions. The judgment identifies that all defendants below made the Bank Term Deposit Representations, the Repayment Representations, and the No Risk of Default Representations, but only three (Mayfair Platinum, M101 Nominees, and Mayfair 101) made the Security Representations. The appellants are right that the judgment and declarations reflect a conclusion of joint liability, but this goes nowhere. Based on various examples of alleged misattribution of responsibility by the primary judge to the wrong defendant below, the appellants submitted, for example, that:

His Honour made no findings of involvement by some defendants in the contraventions of others and ASIC made no case to that effect. By failing to consider which defendant made which alleged representations and by merely lumping them all in together and making them jointly liable for all the representations (except for M101 Holdings and the Security Representations), his Honour also failed to engage in the necessary evaluation of the evidence required for determining whether the defendants made any of the alleged representations.

55 It is correct that ASIC’s case did not depend on the involvement of any one party in the conduct of another in the sense described in *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661. It is not the case, however, that the primary judge simply “lumped” all defendants below together. As we have said, this is inconsistent with the exclusion of M101 Holdings from liability for the Security Representations. In circumstances where the appellants chose not to appear below, the primary judge did not err in finding that the defendants, in effect, were jointly engaged in the promotion of the Mayfair products. This finding was proper in circumstances where the Mayfair products were marketed as products of the Mayfair Group.

56 We also do not accept that J1 is inconsistent in respect of whether the misrepresentations were singular or plural. The misrepresentations were conveyed multiple times by making the marketing material available to the class of potential investors. And as the appellants conceded

(properly), “the declarations of contraventions state all the representations in the plural and so it must be accepted that his Honour found that the representations were made multiple times”.

57 The fact that the primary judge did not, because he could not, determine the number of contraventions is immaterial. As further discussed below, if the number of contraventions can be identified then any declaration should do so. If, however, the number of contraventions cannot practically be identified, then a declaration is not “irregular” or invalid for that reason. Neither proposition supports the conclusion that the primary judge failed properly to evaluate the evidence of the contravening conduct. Given the repetitiveness of aspects of the appellants’ submissions, we must reiterate in respect of these complaints also that it is not open to the appellants to seek to run an inadequate reasons ground in respect of J1 in circumstances where that issue is not raised in any of their 36 grounds with numerous sub-grounds.

4.2 Bank Term Deposit Representations (grounds 1, 2 and 17)

58 The Bank Term Deposit Representations were not that the M+ Notes and Core Notes were the same as bank term deposits. The Bank Term Deposit Representations identified in the Amended Concise Statement at [9] were that “the defendants, in the course of trade or commerce, made representations to consumers that the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits”.

59 The primary judge had regard to these facts, amongst others at J1 [82]–[104].

60 First, the Mayfair Platinum website said:

Cash and term deposit alternatives

...

Qualified investors can access term-based investment options starting from AU\$100,000 and ranging from 3 months to 5 years, with the option of monthly interest distributions.

61 It also said at a later point in time:

Gain exclusive access to

- High yield term deposit alternatives

...

62 The website included tables for each of the Core Notes and the M+ Notes which were headed “Current Rates” and which set out investment terms between three and 60 months and the applicable “Fixed Interest Rate (P.A)”

63 In respect of the M+ Notes product, the Mayfair Platinum website said:

Take the first step towards boosting your income-generating potential for 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.

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

64 In respect of the Core Notes product, the Mayfair Platinum website said:

Activate your idle money and earn monthly distributions from a secured, asset backed, term-based investment product.

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.

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

65 As noted by the primary judge at J1 [88], the pages on the Mayfair Platinum website dedicated to the M+ and Core Notes products contained an “Income Calculator”. Users could insert the proposed “investment amount” per annum and the proposed “investment term” and, depending on the relevant interest rate applied, the “Income Calculator” calculated the purported “monthly distribution” and “total interest earned” over the term.

66 The M+ Notes brochure said the product was a “term-based investment opportunity”. Statements in the brochure included (emphasis in the original):

Tired of term deposits?

Congratulations on taking the first step towards boosting the income-generating potential of your idle money.

Investing in [the M+ Notes] 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 [the M+ Notes] and be part of a **forward-thinking group** that is driving **positive change** in the financial services and investment industry.

67 The M+ Notes brochure had a section titled “Frequently Asked Questions” which included:

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.

Is the Issuer a bank?

No. However, many M+ Fixed Income 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+ Fixed Income 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+ Fixed Income 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+ Fixed Income 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+ Fixed Income 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+ Fixed Income is worth considering for larger investment amounts.

68 The Core Notes brochure described the Core Notes as a "secured, asset-backed, term-based investment opportunity".

69 The Core Notes brochure included this (emphasis in the original):

Tired of term deposits?

Activate your idle money and earn monthly distributions from a secured, asset-

backed, term-based investment product.

Investing in our M Core Fixed Income 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 M Core Fixed Income, **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.

70 The Core Notes brochure had a section titled “Frequently Asked Questions” which included:

How is the M Core Fixed Income product secured?

The M Core Fixed Income 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 dollar-for-dollar secured asset support for each dollar of M Core Fixed Income notes.

...

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 M Core Fixed Income product, regardless of the performance of its investments.

Is the Issuer a bank?

No. However, many M Core Fixed Income 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 M Core Fixed Income 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 M Core Fixed Income 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 Core Fixed Income 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 M Core Fixed Income is worth considering for larger investment amounts.

71 There were a number of advertisements published about the Core Notes. These included such statements as:

- (1) "5.45%^{P.A} 12 MONTHS FIXED RATE";
- (2) "a new investment product that caters to investors seeking a strong yield from a secured investment product. With interest rates at record lows and investor sentiment shifting away from traditional financial institutions towards non-bank fixed income providers, Mayfair Platinum is delighted to make this new product available to Australian wholesale investors (not available to retail investors)"; and
- (3) "M Core Fixed Income provides a fixed monthly income at competitive interest rates backed by dollar-for-dollar security over assets held by the Mayfair 101 Group of companies".

72 There was a "Term Deposit Guide" website operated by Mayfair 101 (www.termdepositguide.com.au) which said (emphasis in original):

If you are about to invest \$100k-\$5m in a term deposit and want more than 3% p.a....talk to us first!

Join the hundreds of savvy **Aussie investors** that were tired of earning low interest rates on their term deposits, and have made the switch to **boost their investment returns** and upgrade their lifestyle.

...

Find out where Australian investors are parking their idle money to beat inflation and earn regular monthly income. Our dedicated Australia-based team has assisted hundreds of Australian investors, retirees, companies, individuals and more, to earn a better yield on their money. See if you qualify today!

73 The meaning conveyed when a product is marketed as an “alternative” to some other product may be that the products are different (eg, Coke and Fanta) or that they are similar (eg, Coke and Pepsi). An “alternative to” a bank term deposit might convey that the product is nothing like a bank term deposit or that the product is similar to a bank term deposit in critical respects. Context is all important.

74 With respect to context, the primary judge also had regard to the fact the Mayfair parties engaged in what is known as “sponsored link advertising” (at J1 [105]–[109]). This sponsored link internet advertising was conducted via the Google “AdWords” program and Bing “Ads” program, and included the use of “meta-title tags” such as “term deposit rates – best term deposit options” and “adwords” for sponsored searches, including “bank deposits” and “term deposits”. His Honour found (at J1 [109]) that the Mayfair parties’ marketing strategy was addressed to persons searching the internet for term deposit products in order to divert them to the Mayfair parties’ websites.

75 Contrary to the appellants’ submissions, the “whole thrust” of the brochures and marketing material summarised above was not to emphasise the differences between the Mayfair products and bank term deposits. The higher interest rates offered did not convey a riskier product. To the contrary, the message conveyed was that the products offered a higher interest rate than bank term deposits with a similar risk as bank term deposits. The documents identified the products as “term-based investment options” offering “monthly interest payments”. The marketing is directed at people who are “tired” of earning minimal returns from their term deposits with banks. The message was that the products are a non-bank offered alternative to a bank term deposit. The differentiating feature conveyed is not the higher risk profile, but the higher interest rates. This message was reinforced by the statement that the “[i]ssuer is obligated to pay the quoted rates of interest and principal on the [M+/M Core] Fixed Income product, regardless of the performance of its investments”. Even the question and answer “[h]ow 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...” reinforce the message of a similar risk to a bank term deposit. The answer was not, for example, that the products carried more risk than a term deposit in terms of payment of interest and repayment of principal, but that the strategy was different. The same applies to the question and answer

“[i]s the Issuer a bank? No. However, many M+ Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts”. The message is that the relevant difference is the interest rates able to be paid, not the risks of the products. The anodyne answers such as “[i]nvestors should be mindful that, like all investments, there are risks associated with investing in our M+ Fixed Income product” and “[y]es, although [early] redemptions are subject to liquidity and other applicable terms” do nothing to convey that the products involve a fundamentally different risk profile from a bank term deposit.

76 Accordingly, and contrary to the appellants’ submissions, each document as a whole did convey the impression that the Mayfair products were comparable to, and of similar risk profile to, bank term deposits. The fact that the documents disclose that the Mayfair products are not bank term deposits may be accepted, but is beside the point. In conveying that the Mayfair products were an alternative to bank term deposits, the documents also conveyed that the products were comparable to, and of similar risk profile to, bank term deposits. That is, in the overall context, the documents were not saying that these were products not comparable to and not offering a similar risk profile to bank term deposits. The whole point of the “alternative” message was to convey that the products were comparable to, and of similar risk profile to, bank term deposits, and because they were not bank term deposits they could offer higher interest rates than currently offered by bank term deposits.

77 It is appropriate to address ground 17, other than ground 17(d), in conjunction with grounds 1 to 8. Ground 17 is as follows:

In finding that the alleged representations were false, the learned judge erred in:

- (a) failing to consider the evidence that the Mayfair Products were marketed exclusively to “wholesale clients” within the meaning of s 761G of the Corporations Act;
- (b) failing to consider the evidence that the investors who gave evidence were all “wholesale clients” within the meaning of s 761G of the Corporations Act and most were wealthy and experienced investors;
- (c) failing to consider that none of the investors who gave evidence for the first respondent said they were induced to invest in the Mayfair Products by any of the alleged representations;
- ...
- (e) failing to consider that the material which promoted the Mayfair Products made clear the products were only available for subscription by wholesale investors, contained warnings about the risks of the products, said the issuer was not a bank and that the products were not covered by the Financial Claims Scheme (the

Federal Government guarantee for bank deposits);

- (f) failing to consider objectively and fairly the true nature of the representations and the context in which they were made.

78 Each of those stated grounds should be rejected for the following reasons.

79 First and foremost, each of the grounds is a contention that the primary judge failed to consider certain matters. As explained earlier, in circumstances where the appellants elected not to participate in the trial, and for that reason no submissions were made to the primary judge in the terms now set out in the above grounds, there can be no error in the primary judge failing to consider the matters stated.

80 Second, it should not be inferred that the primary judge was unaware that the Mayfair products were only available to persons who qualify as “wholesale investors”, using the language of the Mayfair brochures and marketing material. That was stated expressly in that material and referred to by the primary judge in his reasons. Further, the primary judge referred expressly to ASIC’s submission that the Mayfair products were marketed to wholesale but inexperienced investors, at least a substantial subset of whom were unlikely to understand the significant risk associated with the Mayfair products (J1 [22]).

81 Third, the appellants’ reliance on the fact that the Mayfair products were only available to persons who qualify as “wholesale investors” is misplaced. It can be accepted that persons who qualify as “wholesale investors”, as defined in respect of the Mayfair products, would meet the definition of “sophisticated investors” in s 708 of the Corporations Act and the definition of “wholesale clients” in s 761G of the Corporations Act. As such, certain provisions of the fundraising law in Ch 6D of the Corporations Act, and certain provisions of the financial services law in Ch 7 of the Corporations Act, were inapplicable to the Mayfair products. However, neither s 1041H(1) of the Corporations Act nor ss 12DA(1) and 12DB(1)(a) and (e) of the ASIC Act were rendered inapplicable.

82 The appellants repeatedly elide the concept of a “wholesale investor” with a “sophisticated investor” in an ordinary sense of a financially sophisticated person. The elision is invalid. The definition of “wholesale investor” used in respect of the Mayfair products is only that the person:

- (1) wishes to invest \$500,000 or more; or
- (2) has net assets of \$2.5 million or above; or

(3) has a gross income of \$250,000 per annum or above for the last two years.

83 It cannot be assumed that all people who meet one of those criteria have knowledge or experience in respect of financial products. Nor can it be assumed that that class of person did not include numerous persons who were dependent on the accuracy of the marketing material the appellants chose to promulgate.

84 Moreover, on the unchallenged evidence before the primary judge, investors in the Mayfair products included:

- (1) a retired medical practitioner with a self-managed superannuation fund who managed most of his money and had 30 years' experience investing in the share market relying, however, on expert advice (with the exception of a five year period where he personally managed his share portfolio) and did not consider himself a sophisticated investor as his goal was to preserve capital as much as possible;
- (2) an engineer with a self-managed superannuation fund managed by a third party adviser who invests some part of his and his wife's personal funds as a hobby; and
- (3) an information officer at a university who won a large amount of money in a lottery and had no investment experience apart from acquiring blue chip shares after the lottery win and whose investment experience was otherwise limited to properties and a bank term deposit.

85 As to the appellants' contention that the representations must be considered in the context in which they were made, the relevant context included the fact that historically low interest rates were being offered on bank term deposits. The interest rates being offered in respect of the Mayfair products were comparable to what an investor could previously obtain from a bank term deposit. The thrust of the marketing was that the Mayfair products offered investors the level of (higher) interest rates they had historically been able to obtain on bank term deposits, but could no longer, and that was because of Mayfair's unique non-bank investment strategy, not because of a fundamentally different risk profile of the products. As ASIC submitted, the:

marketing strategy for the Notes as demonstrated by the examples referred to above was to play on the perception that bank term deposit rates were too low even given the low risk profile. This was achieved by conveying that higher returns could be had without taking on a materially higher level of risk.

86 The appellants' proposition that, in assessing the characteristics of the ordinary member of that class of investor, it is reasonable to assume an ability to read and understand documents like

the promotional material in this case and at least a basic level of financial literacy, including an understanding that higher return means higher risk also, has to be considered in the actual context. It is not that ordinary and reasonable members of the class could not be expected to read and understand the promotional material. Nor is it that these notional persons are to be attributed with a lack of basic financial literacy. It is that the class included ordinary and reasonable people who would take the marketing material at face value and, considered as a whole, the marketing material was conveying that this was an investment for a term comparable to a bank term deposit with a similar level of risk, when that was demonstrably false.

87 In the overall context, the repeated description of the Mayfair products as “term-based investment options” is not neutral. It contributed to the message conveyed that the products were comparable to a bank term deposit. Similarly, the statement that the issuer is obligated to pay interest and repay principal irrespective of the performance of the underlying investments may be correct at one level, but is grossly misleading in fact (as, if the investments did not perform and the issuer experienced liquidity issues, they had a wide discretion to defer repayment of the principal) and does have a bearing on whether the investment is comparable to a bank term deposit. This is a key feature of bank term deposits to which the Mayfair products were being compared in the marketing material.

88 It does not matter that the investors who gave evidence did not say that they had understood the material as conveying the representations as pleaded and as found to have been conveyed. As noted, the test is objective. Moreover, there was evidence in the liability hearing that Mr Booth, one of the investors, thought he was investing in a product that “was comparable to or similar to an investment in a term deposit, and had a similar level of risk to a term deposit”.

89 Accordingly, and as ASIC also submitted (using “sophisticated” in the ordinary sense rather than as per the statutory quantification), the:

category of reasonable members of the class to whom the publications are directed cannot be taken to encompass only sophisticated and exclude unsophisticated investors. Even if it be assumed a sophisticated investor would understand that the Notes carried a materially higher risk than bank term deposits, that position does not translate to unsophisticated investors.

90 The appellants accept that, if made, the Bank Term Deposit Representations were false. It follows that there is no need to consider the operation of s 769C of the Corporations Act and s 12BB of the ASIC Act, which concern representations with respect to future matters.

91 For these reasons, grounds 1, 2 and 17 (other than 17(d)) of the appeal must be rejected.

4.3 Repayment Representations (grounds 3 and 4)

92 The Repayment Representations identified in the Amended Concise Statement at [12] were that “the defendants, in the course of trade or commerce, made representations to consumers that on maturity the principal would be repaid in full”. In the Amended Concise Statement at [14], ASIC alleged that the Repayment Representations were false, misleading or deceptive for two reasons:

- (1) investors in the Mayfair products might not receive capital repayments at maturity or at all; and
- (2) at maturity and even after a valid withdrawal notice, Mayfair could elect to extend time for repayment to investors for an indefinite period of time.

93 The primary judge found (at J1 [156]) that the Repayment Representations were made through statements in the promotional material such as the following:

- (1) under the heading “Are my returns tied to the Issuer’s investment performance?”, the relevant promotional materials stated that “the issuer is obligated to pay the quoted rates of interest and principal on the [M+ Notes and the Core Notes], regardless of the performance of its investments”;
- (2) “Mayfair 101’s investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments”; and
- (3) “Mayfair Platinum is ... focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence”.

94 The primary judge also found (at J1 [157]) that the Repayment Representations were false, misleading or deceptive because investors in the Mayfair products might not receive capital repayments at maturity by reason of the fact that the appellants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time.

95 The latter finding was a reference to terms contained within the Promissory Note Deed Poll (being the Deed Poll containing the contractual terms governing the M+ Notes) and the Security Promissory Note Deed Poll (being the Deed Poll containing the contractual terms governing the Core Notes). Clause 5 of each Deed Poll were in materially the same terms, and it is convenient to refer to the Promissory Note Deed Poll. Clause 5.1 provided that noteholders may require their notes to be redeemed on the maturity date by submitting a withdrawal notice

30 days prior to the maturity date. The maturity date was defined as the last day of the note term. Clauses 5.5 and 5.6 provided as follows:

5.5 Payment

- (a) Upon redemption of any Notes, the Company shall pay the Noteholder the total amount of the Monies Owing on those Notes calculated as at the Withdrawal Date. Payment shall be due on the Payment Date (or any extension to the Payment Date made under clause 5.6).
- (b) Payment shall be made, by the Payment Date (or any extended Payment Date under clause 5.6), by telegraphic transfer to a bank account specified by the Noteholder to the Company in writing.

...

5.6 Payment Date extension

- (a) The Company may at any time, extend the Payment Date if:
 - (i) the Company, in its reasonable opinion, considers that it does not have sufficient Liquidity to fund the redemption;
 - (ii) the Company has received multiple Withdrawal Notices in a short period which will impact its Liquidity; or
 - (iii) the Company considers that if the redemption is paid on the Payment Date, it may affect the Company's Liquidity to pay future anticipated redemptions of other Noteholders' Notes.
- (b) Any extension of the Payment Date will be made 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 Company reasonably anticipates.
- (c) If the Company extends a Payment Date, the Company 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 such time as the Monies Owing are repaid in full.

96 The "Payment Date" was defined as follows:

Payment Date means the later of:

- (a) the date which is 10 Business Days following the conclusion of the calendar month in which the Withdrawal Date falls; and
- (b) any extension to that date made under clause 5.6.

97 It is apparent from the primary judge's reasoning that his Honour understood the Repayment Representations to be representations about the terms of the Mayfair products and the contractual obligations of the issuers: that on maturity the principal would be repaid. The primary judge found, as alleged by ASIC, that the representation was false, misleading or

deceptive because the issuers had a contractual right to defer repayment at maturity for reasons of liquidity.

98 The appellants do not challenge the primary judge’s finding at J1 [157], but challenge the finding at J1 [156] that the Repayment Representation was made. The appellants’ arguments misunderstand the primary judge’s findings and reasoning, and conflate the Repayment Representations with the No Risk of Default Representations.

99 The appellants submitted that words such as “certainty” and “confidence” in the marketing material may have induced the gullible and credulous consumer into believing the investment would “definitely be repaid in full”, but that it is implausible in the extreme to say that this would have had the same effect on the wholesale client or sophisticated investor. Again, the elision between a wholesale and a sophisticated investor (as meaning a person with experience and knowledge of financial products) is invalid. In any event, we reject the argument. The product brochures and marketing material conveyed in clear terms that the Mayfair products were fixed term products, repayable upon maturity (the expiry of the fixed term) and there was nothing in the material to alert investors to the possibility that the issuer had the right to defer repayment at maturity.

100 As observed by the primary judge (at J1 [156]), the representation was reinforced by the statement that repayment was not contingent on the performance of the investments. Even if this was correct on one level, it was grossly misleading on another because, if the issuers suffered liquidity problems or were of the view that the redemption would impact liquidity in one of the ways contemplated by the Deed Poll, then they had broad powers to defer repayment of principal. The statement in the marketing material that “redemptions are subject to liquidity and other applicable terms” does not assist the appellants, but is part of the problem. The statement was in the broader context of a question “[c]an I withdraw my money out early if I need to?” and the full answer was:

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.

101 This conveys only that early redemption could be delayed due to liquidity issues and other terms but that the principal would be repaid in accordance with a payment schedule. There is no suggestion that, at the end of the term, there was a material risk of deferred repayment of

the principal if the appellants did not have the liquidity to repay the principal or reached the discretionary opinions allowed for by cl 5.6, as described at J1 [157].

102 There is no “air of unreality” about the primary judge’s conclusions. Rather, unreality infects the appellants’ case. The unreality is exposed in the appellants’ false analogy that the:

... idea of an investment promoter representing that the investment will be repaid in full is a bit like a motor car trader representing the car will never break down. Even if the trader says that, everybody – even the gullible and credulous consumer – knows there is a risk that every car will break down.

103 The analogy betrays the appellants’ misunderstanding of the primary judge’s reasoning. If the appellants’ investment products were a car, they would have had an in-built failure mechanism inconsistent with the concept of an investment for a “term” comparable or similar to a bank term deposit. The products were nothing like a term deposit (or any form of reasonably reliable car) and bore no resemblance to their marketing in that the contractual terms gave the issuers the right to defer repayment of the principal for an indefinite period. The fundamental problem is that the marketing related to one kind of product (one comparable to a fixed term bank deposit) whereas the Mayfair products were of a different ilk (one in which repayment of the principal depended on, amongst other things, liquidity).

104 The appellants’ submissions about the newspaper advertisements are also misplaced. The fact that the impugned statements appear near the end does not negate the misrepresentation. Nor does the fact that the following statement appears before the impugned statements:

If you are considering making the switch to a non-bank alternative to achieve a better return on your idle money, you should remember that all investments carry a level of risk and you should be comfortable with the investment strategy of the company you choose to invest with.

105 The advertisements must be considered as a whole. The first newspaper advertisement in evidence said:

Invest smarter

Why low interest rates are forcing investors to look beyond the banks

Dear Investor,

The RBA has held the official cash rate of interest at an all-time low of just 1.0% and thousands of Australian investors, including retirees, self-managed superannuation funds (SMSFs), companies and individuals, are now left stranded earning less than 2.0% on their idle cash.

HOW MAYFAIR PLATINUM CAN HELP

Mayfair Platinum is a dedicated investor-facing division of the Mayfair 101 group, an international investment and corporate advisory group with offices in Melbourne, Sydney and London. We specialise in providing qualified investors with income-generating investment products to help them

keep ahead in the low rate environment.

...

LOW RATES HAVE TAKEN THEIR TOLL

...

We have heard of these frustrations and many more from Australian investors

CREATING WIN-WIN OUTCOMES

Whether you choose to move your money to us or another alternative, interest rates appear unlikely to increase for some time. We are big believers in creating win-win outcomes for our investors as we have considerable 'skin in the game' with each investment.

Mayfair Platinum is also focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence.

INVESTORS ARE FORCED TO SEEK ALTERNATIVES

...

Investors are now forced to look for alternatives to keep ahead financially and maintain their lifestyles. Otherwise they risk going backwards by doing nothing

THE SHIFT TOWARDS NON-BANK ALTERNATIVES

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

...

MAKING THE SWITCH

If you are considering making the switch to a non-bank alternative to achieve a better return on your idle money, remember that all investments carry a level of risk and you should be comfortable with the investment strategy of the company you choose to invest with.

GET STARTED

...

106 The second newspaper advertisement in evidence is similarly formatted and contains similar information including that:

Investing has changed

Why low interest rates are forcing investors to look beyond the banks

...

THE SHIFT TOWARDS NON-BANK ALTERNATIVES

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

...

CREATING WIN-WIN OUTCOMES

Whether you choose to move your money to us or another alternative, interest rates appear unlikely to increase for some time. We are big believers in creating win-win outcomes for our investors as we have considerable ‘skin in the game’ with each investment.

Mayfair Platinum is also focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence.

107 The third newspaper advertisement in evidence is similarly formatted and contains similar information including that:

Invest where the top 1% do

Why low interest rates are forcing investors to look beyond the banks

...

THE SHIFT TOWARDS NON-BANK ALTERNATIVES

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

...

CREATING WIN-WIN OUTCOMES

Whether you choose to move your money to us or another alternative, interest rates appear unlikely to increase for some time. We are big believers in creating win-win outcomes for our investors as we have considerable ‘skin in the game’ with each investment.

Mayfair Platinum is also focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence.

108 In the context of the statement in this advertisement under “Making the Switch” that “[i]f you are considering making the switch to a non-bank alternative to achieve a better return on your idle money, remember that all investments carry a level of risk and you should be comfortable with the investment strategy of the company you choose to invest with”, the message is clear. You can be comfortable with investing in the Mayfair Platinum products as they provide higher interest rates than bank term deposits with certainty and confidence in relation to capital and interest payments.

109 Again, it does not matter that the investors who gave evidence did not say they had read these advertisements. The advertisements were part of the suite of marketing material used to market the products and the act of marketing conveyed the representations for the purpose of liability. Reliance is a question for damages (and, to some extent, penalty), not liability. In any event, it should be inferred from the evidence that some members of the class had regard to the advertisements.

110 The appellants placed reliance on the facts that:

- (1) the application form for the Notes, contained within the product brochures, contained declarations to the effect that the Notes were issued on the terms of the Promissory Note Deed Poll (governing the M+ Notes) and the Security Promissory Note Deed Poll (governing the Core Notes) and the applicant agreed to be bound by the terms of the Note Deed; and
- (2) the Deed Polls were available to prospective investors.

111 Those facts do not undermine the primary judge's findings. The declaration in the brochures is one of 11 dot points which appears after the bank account details and before the place for signature. The declaration is that the investor applies for the notes in the amount specified and in accordance with the (relevant) Deed Poll. The brochure does not disclose the fact that the issuer, in accordance with cl 5.6 of the Deed Poll, can indefinitely defer repayment in a wide range of circumstances depending on the mere opinion of the issuer about liquidity.

112 There was nothing in the brochures and marketing material that alerted potential investors to the terms of cl 5.6. To the contrary, and as found by the primary judge, the whole tenor of the marketing messages was that the Notes were alternatives to, in the sense of being similar to, bank term deposits. As observed by the Full Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 278 FCR 450 at [25]:

A question that commonly arises is whether a publication or communication is misleading when it contains a misleading statement in one place but also contains another statement, perhaps in a different place in the publication or communication, which remedies the misleading character of the first statement. Ultimately, the question is one of overall assessment of the publication or communication. The correct approach was summarised by Edelman J in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647; [2016] FCA 196 (at [214]) (upheld in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; 351 ALR 584; [2017] FCAFC 224, noting that there was no challenge to his Honour's relevant statements of principle (recorded at [158]):

One consequence of the need to consider the conduct in light of all relevant

circumstances is that any allegedly misleading representation must be read together with any qualifications and corrections to that statement. Hence, although a qualification to a statement might be effective to neutralise an otherwise misleading representation, this might not always be so, particularly if the misleading representation is prominent but the qualification (often linked to the representation by an asterisk) is not: *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1; 205 ALR 402; [2003] FCAFC 289 at [37] (Stone J). As Keane JA expressed the point, the qualifications must have “the effect of erasing whatever is misleading in the conduct”: *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [83].

113 As stated earlier in these reasons, the Deed Polls were complex documents. In our view, reasonable members of the class of persons who were qualified to invest in the Mayfair products would have formed the mistaken impression from the brochures and marketing material that the funds invested would be repaid upon maturity, and would not have understood that the issuers had the right to defer repayment for liquidity reasons. The declaration in the brochures, which contained reference to the Deed Polls, would not have alerted the reasonable person to that fact.

114 For these reasons, grounds 3 and 4 of the appeal must be rejected.

4.4 No Risk of Default Representations (grounds 5 and 6)

115 The No Risk of Default Representations were identified in the Amended Concise Statement at [15] and [16] in the following terms:

15. The marketing and promotional material for the Mayfair Products included statements that the products were specifically designed for investors seeking “certainty and confidence in their investments”.
16. By engaging in the conduct in paragraph 15, the defendants, in the course of trade or commerce, made representations to consumers that the Mayfair Products carried no risk of default (**No Risk of Default Representations**).

116 The primary judge found (at J1 [161]) that the marketing material for the Mayfair products conveyed the No Risk of Default Representations and referred to the following examples from that material:

- (a) the Mayfair Products were “specifically designed for investors seeking certainty and confidence in their investments”;
- (b) “Mayfair Platinum is ... focused on providing investors with certainty in relation to their capital and interest payments”;
- (c) the impression conveyed that the Mayfair Products are comparable to bank term deposits (as referred to above in relation to the Bank Term Deposits Representation);
- (d) investors would “earn better rates of return on their idle money by focusing on

certainty, transparency, and exceptional customer service”;

- (e) the representation that the Core Notes were a “secured, asset-backed, term-based investment opportunity”, were “[s]upported by first-ranking, unencumbered asset security”, and the Core Notes had “dollar-for-dollar secured asset support for each dollar of [the Core Notes]”;
- (f) in the “FAQs” section of the M+ Notes and the Core Notes brochures, under the heading “What are the risks?”, the brochures merely referred to “general investment, lending, liquidity, interest rate, cyber, related party transactions and currency risks”. The brochure said nothing of the material risks which, for example, are set out in the Expert Report [Mr Tray’s Report] and the Provisional Liquidators’ Report. On the evidence tendered by ASIC, those risks have materialised.

117 His Honour concluded (at J1 [162]) that the use in the marketing material for the Mayfair products of the words “certainty” and “confidence” is likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk of default.

118 His Honour also concluded that the No Risk of Default Representations were false, misleading or deceptive because:

- (1) (at J1 [163]) the issuers had a contractual right to suspend redemptions of investments at maturity for an indefinite period of time if the issuers did not have sufficient funds to repay the investors; and
- (2) (at J1 [164]) the uncertainty of the financial position of the issuers exposed investors to a real risk that investors could lose some or all of their principal investment.

119 The primary judge declared at [3] of his orders accompanying J1 that the appellants:

represented to consumers that the Mayfair Products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default (**No Risk of Default Representations**), when there was a risk that investors could lose some or all of their principal investment....

120 This amalgamation of the alleged conduct and the alleged representation is not the subject of complaint by the appellants in the appeal. The declaration reflects the case as pleaded and argued by ASIC before the primary judge. The appeal, accordingly, has proceeded on the common assumption that the No Risk of Default Representations were that the appellants “represented to consumers that the Mayfair Products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default”.

121 The marketing material supports the conclusion that the Repayment Representations were conveyed to ordinary or reasonable members of the class of wholesale investors to whom the

representations were directed. It may be accepted that no ordinary and reasonable consumer would understand that the notion that an investment “would be repaid in full” involved a 100 per cent guarantee of repayment. As ASIC acknowledged, even with a bank term deposit there is a risk of an unforeseen circumstance of such calamitous impact that the principal cannot be repaid. That knowledge underpins the disclosure in the marketing material that under the Australian Government’s Financial Claims Scheme the Australian Government guarantees bank term deposits up to \$250,000 per account holder per bank. But allowance for the unforeseeable effects of catastrophe is not the point in this case.

122 We do not consider the primary judge to have found to the contrary when (at J1 [162], for example) he said that the use of the words “certainty” and “confidence” in the marketing material for the Mayfair products is likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk of default. In so saying, the primary judge was applying the same approach as an ordinary or reasonable consumer to whom the marketing was directed would have taken. That person would not consciously turn their mind to the obvious proposition that nothing in life is certain (except death and taxes as Benjamin Franklin would have it). The ordinary or reasonable consumer to whom the marketing was directed must be taken to operate on the basis of the ordinary and reasonable human standard of certainty, which can mean only practical certainty, not absolute certainty. The proposition that the “principal investment would definitely be repaid in full at maturity”, in the overall context of the primary judge’s findings, means that, according to the ordinary and reasonable human standard of practical certainty, the principal would be repaid.

123 The concept of “no risk of default” must be understood in the context of the representation as a whole and on the basis of the ordinary human experience of notions of certainty. The No Risk of Default Representations were that the Mayfair products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default. The causal connection between the “investors seeking certainty and confidence in their investments” and the “no risk of default” exposes that the representation is made in an ordinary, human context and understanding of causation and certainty.

124 We are not in the realm of scientific absolutes, but practical certainty. In this context, the No Risk of Default Representations could not mean that it was impossible for there to be any default in the payment of interest or repayment of principal in respect of any investment in the

Mayfair products. That would be inconsistent with ordinary human experience of the degree of practical certainty which humans assume to apply in ordinary human affairs. The No Risk of Default Representations, properly construed, mean that the Mayfair products were specifically designed for investors seeking certainty and confidence in their investments and (relatedly), according to the ordinary and reasonable human standard of practical certainty, carried no risk of default.

125 The falsity of the No Risk of Default Representations lies in the unbridgeable chasm between the marketing of a product as specifically designed for investors seeking certainty and confidence in their investments which therefore carried no risk of default (that is, there was a practical certainty of no default) and the reality disclosed in the evidence, as found by the primary judge at J1 [164], that the “financial position of the [appellants] exposed investors to a real risk that investors could lose some or all of their principal investment”. There was no challenge to that finding.

126 Contrary to the appellants’ submissions, the references to risk in the marketing material did not negate the representation. The anodyne reference that the Mayfair products “like all investments” had associated risks, and the generalised reference thereafter that risks “to take into consideration include general investment, lending, liquidity, interest rate, cyber, related party transactions and currency risks”, did nothing to expose the real risk of default, as found by the primary judge.

127 Again, the analogy that the appellants proposed, that “it is as if the motor car trader actually said there was a risk the car would break down but was then held to have engaged in misleading or deceptive conduct for saying there was no risk of a breakdown”, is false. Informing a consumer that all cars carry a risk of breakdown in the ordinary course may well be misleading if the car being sold is a lemon with an inherent propensity to break down.

128 The primary judge was right to conclude that the No Risk of Default Representations were made by the appellants. As we have said, that conclusion is sufficiently justified on the basis of the detailed contractual terms as described at J1 [157] which are irreconcilable with the No Risk of Default Representations.

129 For these reasons, grounds 5 and 6 of the appeal must be rejected.

4.5 Security Representations (grounds 7 and 8)

130 The Security Representations were identified in the Amended Concise Statement at [22A] and [22B] in the following terms:

22A. The marketing and promotional material for the M Core Fixed Income Notes included statements that the M Core Fixed Income Notes were:

- (a) “supported by first-ranking, unencumbered asset security”;
- (b) “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.”; and
- (c) “the assets are revalued at least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Core Fixed Income notes.”

22B. By engaging in the conduct in paragraphs 4 and 22A, the defendants, in the course of trade or commerce, made representations to consumers that the M Core Fixed Income Notes were fully secured financial products (**Security Representations**).

131 The primary judge found (at J1 [167] and [168]) that the brochure and marketing material in respect of the Core Notes conveyed, separately and together, an impression that the Core Notes were fully secured financial products in the terms alleged by ASIC.

132 The primary judge also found that the Security Representations were false, misleading or deceptive. In so finding, the primary judge relied on his findings concerning the structure of the investments made by the issuer of the Core Notes, M101 Nominees, and the security held by the issuer. Those findings were based on the reports of Mr Tracy and the provisional liquidators of M101 Nominees which were received in evidence (see at J1 [110]–[146]). For the purposes of these grounds of appeal, the key findings were:

- (1) (at J1 [99]) as disclosed by the Core Notes product brochure, the principal security for the Core Notes was effected through a Security Trust Deed entered into between M101 Nominees and PAG Holdings Australia Pty Ltd as security trustee for the benefit of noteholders;
- (2) (at J1 [73], [122], [128], [133], [134] and [145]), the majority of investors’ funds were provided to a related entity, Eleuthera Group Pty Ltd, on an unsecured loan basis;

- (3) (at J1 [118]) investors' funds had been directed towards the acquisition of (i) 119 real properties, including Dunk Island in Queensland; (ii) paying deposits on 111 real properties not settled; and (iii) providing two loans to related parties;
- (4) (at J1 [123]–[127]) the real properties and deposit interests were held in a series of unit trusts;
- (5) (at J1 [114] and [128(c)]) while various security arrangements had been entered into between the security trustee, M101 Nominees and the various trustees of the unit trusts, the security trustee did not have direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020 (with one exception) and deposits were paid on properties in instances where there was no security registered on the Personal Property Security Register in favour of the security trustee at the time of the deposit being paid; and
- (6) (at J1 [128(c)]), the following third parties held registered mortgages on all titles to real property ranking ahead of Core Note investors: Naplend Pty Ltd, Family Islands Group Pty Ltd and Australia and New Zealand Banking Group Ltd.

133 On the basis of the evidence, the primary judge concluded (at J1 [171]):

I accept Mr Tracy's expert opinion that, to the extent that there was security over units in various trusts (the trustees of which owned properties), such security was of little moment when, as stated by Mr Tracy, the relevant properties (with the exception of one property) have been mortgaged to a third party. The unchallenged evidence is that those third parties hold first registered mortgages.

134 The primary judge declared at [4] of his orders accompanying J1 that Mayfair Platinum, M101 Nominees and Mayfair 101:

represented to consumers that the M Core Fixed Income Notes were fully secured financial products (**Security Representations**), when funds invested in M Core Fixed Income Notes were:

- (a) lent to Eleuthera Group Pty Ltd and not secured by first-ranking, unencumbered asset security or on a dollar-for-dollar basis or at all;
- (b) used to pay deposits on properties prior to any security interest being registered; and
- (c) used to purchase assets that were not secured by first-ranking, unencumbered asset security ...

135 The appellants acknowledged that M101 Nominees made statements about the security for the Core Notes: that it was first-ranking, that it was registered, that it was over three classes of asset – Australian real estate, other assets and cash – that those assets were otherwise

unencumbered and that there was “dollar-for-dollar security”. The appellants submitted, however, that ASIC’s allegation at [22B] of the Amended Concise Statement does not have any clear meaning and must be rejected for that reason. The submission is obtuse and we reject it. ASIC’s allegation at [22B] is informed by the allegation at [22A] and is to be understood in a commercially realistic manner, consistently with the conclusion of the primary judge.

136 The product brochure for the Core Notes commences with the description of the investment product as “a secured, asset-backed, term based investment”. The description is reinforced by further statements that the Core Notes are “supported by first-ranking, unencumbered asset security” and are:

... 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.

137 The impression conveyed by those statements is that the assets in respect of which the funds were invested were fully secured. In that context, “fully secured” conveys the notion that the investment assets are protected, by means of first-ranking registered security, from being sold or otherwise dealt with in a manner that would prejudice the investors’ secured interest in the assets.

138 The appellants’ second submission was that the statements it made about security were not false. The appellants did not dispute (in any material way) the facts stated above concerning the security arrangements. The appellants submitted:

Funds raised by M101 Nominees from the issue of the Core Notes were paid to Sunseeker, which paid them to the trustees of the land holding trusts for subscription to units in the trusts. The trustees in turn used the funds to acquire the real estate. Sunseeker gave the security trustee registerable charges over the units in the trusts to secure the noteholders’ funds. The charges were registered on the Personal Property Security Register. There was no evidence that any other security was given over those units. Some of the real estate had been separately mortgaged, in one case to secure vendor finance and in other cases to secure bridging finance from Naplend Pty Ltd used to settle the purchases of some properties.

139 The central contention advanced by the appellants was that investors’ funds were applied to subscribe for units in trusts, which in turn applied those funds to acquire real property or pay deposits for real property. The relevant investment assets were the units in the trusts and the security trustee held a charge over those units. The appellants argued that they never represented that first-ranking security would be held over the underlying real property and deposit interests.

140 We reject that contention. The primary judge correctly found that the ordinary and reasonable members of the class to whom the Mayfair products were marketed would have understood from the marketing material that the Core Notes were a fully secured investment product. The meaning that was conveyed by that material was that the investment assets were protected, by means of first-ranking registered security, from being sold or otherwise dealt with in a manner that would prejudice the investors' secured interest in the assets. That was not the case. The investment assets were not protected. The security structure put in place allowed each of the trusts to grant first-ranking security over their assets, thereby diluting the security held by the security trustee over the units in the trusts. The primary judge was correct to conclude (at J1 [171]) that the security held by the security trustee "was of little moment when, as stated by Mr Tracy, the relevant properties ... have been mortgaged to a third party".

141 The appellants criticised various aspects of the Tracy reports. However, none of the criticisms relate to Mr Tracy's evidence with respect to the security structure, as discussed above. That evidence is sufficient to sustain the primary judge's conclusion that the Security Representations were false, misleading or deceptive, and the declaration made by the primary judge.

142 It is not to the point that the security structure might have been a "perfectly conventional way of dealing with such an investment". The class of potential investors was told in the marketing materials that the Core Notes were secured by an otherwise unencumbered pool of assets in respect of which first-ranking, registered security interests had been granted. As such, the representation was conveyed that the Core Notes were fully secured. However, the Core Notes were not fully secured. In fact, the security was potentially worthless. It was potentially worthless because the only first-ranking security the investors had was via the security trustee over the units in the property holding trusts and the security arrangements enabled the trustees of the trusts to grant other first-ranking or multiple secured interests over the assets held by the trusts. In and of itself, this is grossly misleading. When it is read with the statement that the pool of assets was "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", the falsity of the representation of a fully secured investment is exacerbated. It is not in dispute that, other than in one case, the security was over the units in the trusts, and not over the real estate held by the trusts.

143 These facts alone, which in no way depend on opinion evidence of Mr Tracy or the provisional liquidators, validate the primary judge’s conclusion that the Security Representations were false and misleading. The other findings of the primary judge were unnecessary to support the conclusion he reached. ASIC is right to submit that the fundamental problem is that, contrary to the Security Representations, the value of the security which existed for the investors was liable to be diminished at any time by any encumbrance which the trustees of the unit trusts chose to grant over the real estate owned by the trust. That potential meant that the investments in the Core Notes were not fully secured – in fact the investments may or may not have been fully secured from day to day depending on the decisions of the trustees of the unit trusts to encumber or not to encumber the real estate assets beneficially owned by the trusts.

144 Paragraph 22C of the Amended Concise Statement is that “the Security Representations were as to a future matter and the defendants did not have reasonable grounds for making it”. We agree. The Security Representations spoke to the ordinary and reasonable member of the class of potential investors both at the time made and for the life of each investment. This must be so because the very point of security is that it exists for the life of the investment. We reject the appellants’ contrary submissions. The statement that “[t]he M Core Fixed Income product is secured by a pool of assets in respect of which first-ranking registered security interests have been granted” would not be understood by an ordinary and reasonable member of the class of potential investors as speaking only as at the date of publication of the brochure. It would not occur to any ordinary and reasonable member of the class of potential investors that the security arrangement could change after they read the brochure and before they invested (unless they were specifically informed about the change) or after they invested without their knowledge or consent. The whole point of security is that it remains effective for the life of the investment. The appellants’ submission would mean that an investor could read the brochure one day and invest the next, but in the interim period the security arrangement could fundamentally change, without the representation being misleading. That is untenable.

145 There were no reasonable grounds to make the Security Representations when the value of the security was subject to the capacity of the trustee of the unit trust to encumber the real estate assets of the unit trust at any time.

146 ASIC also alleged in [22D] of the Amended Concise Statement that, in the alternative to [22C], the Security Representations were false, misleading or deceptive or likely to mislead or deceive consumers because:

- (a) funds invested in M Core Fixed Income Notes were lent to Eleuthera Group Pty Ltd and not secured by first-ranking, unencumbered asset security or on a dollar-for-dollar basis or at all;
- (b) funds invested in M Core Fixed Income Notes were used to pay deposits on properties prior to any security interest being registered;
- ((c)) funds invested in M Core Fixed Income Notes were used to purchase assets that were not secured by first-ranking, unencumbered asset security.

147 This is an alternative case. The primary judge accepted the primary case put in [22C] at J1 [175]. That conclusion involves no error. The primary judge also accepted the alternative case at J1 [176], although it is not apparent whether this involved [22D] (a), (b) and (c) or (a), (b) or (c). Consistent with our reasoning above, the proposition in (c) alone was sufficient to falsify the Security Representations. As a result, the appellants' submissions about uncompleted contracts of sale, subordination to the Naplend mortgages, and the unsecured loan to Eleuthera Group Pty Ltd are immaterial.

148 It is also not correct that the "real question about security in this case is whether the dollar-for-dollar representation was false", as submitted by the appellants. The appellants might wish that to be so as it enables them, *ex post facto*, to dispute the opinion evidence of Mr Tracy and the provisional liquidators that there was not dollar-for-dollar security at all times. This is not the real issue in the case. It is a distraction. The real issue is that the representation made was that the investments were fully secured by first-ranking dollar-for-dollar security over an unencumbered pool of assets made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash when the appellants accept that, other than in one case, the security was over units in unit trusts in circumstances where nothing prevented the trustees of the unit trusts from encumbering the real estate assets owned by the trusts. The representations were false because the value of the security was subject to the capacity of the trustees to grant other interests over the underlying assets of the unit trusts. It follows that the appellants' submissions about the value of the underlying real estate assets despite the interests granted over them are immaterial.

149 We do not agree with the appellants that ASIC's submission, that it would not matter if there always was dollar-for-dollar security because the fundamental problem of the security arrangements was "the subordination to, and liability to be eroded by another security interest", was "odd". The "oddness" is said to be that ASIC is saying that "the dollar-for-dollar security representation was false even if there always was dollar-for-dollar security because of the theoretical possibility that there could not have been". This is incorrect. ASIC was and is saying

that the Security Representations were false, misleading or deceptive or likely to mislead or deceive because the structure of the security arrangements (enabling the trustees of the unit trusts to grant interests over the assets held by the unit trusts when the investors had security only over the units in the unit trusts) was irreconcilable with the representation conveyed that an investment in the Core Notes was fully secured.

150 For these reasons, grounds 7 and 8 of the appeal must be rejected.

4.6 Ground 17(d)

151 Ground 17 has been addressed earlier, save for ground 17(d). Paragraph 17(d) alleges error by the primary judge in “finding that Mr Charadia and Ms Asher were misled by marketing and promotional material about the Mayfair Products”. At J1 [19] the primary judge said:

[19] At the hearing, ASIC called evidence from Mr Robert Charadia and Ms Jaime Asher, who were investors in the Mayfair Products. I will refer to certain aspects of the evidence further below. However, I should state here that both Mr Charadia and Ms Asher gave compelling evidence. I accept their evidence as to the manner in which they were misled by the marketing and promotional material presented to them by the Defendants. The evidence of Mr Charadia and Ms Asher provides an additional foundation for the findings which I make below.

152 It is not apparent why the primary judge is said to have erred in this regard. The appellants’ main complaint seems to be that the witnesses did not give evidence that “anything in the promotional material led [them] to think the Mayfair products were of comparable risk to bank term deposits”. However, the evidence was that Mr Charadia found Mayfair Platinum via its webpage in circumstances where he was looking for a better interest rate than his bank could provide on the basis that he “didn’t want to take a risk with the money”. Ms Asher gave evidence that she had always previously invested in term deposits or high interest savings accounts but because bank interest rates were low she did a search on Google and discovered Mayfair Platinum. She wanted to put her money away for a six month term deposit as she was an extremely conservative investor. She was given a brochure about Mayfair Platinum. This evidence provides a sufficient basis for the inferences the primary judge drew at J1 [19].

4.7 Form of the declarations (ground 18)

153 Ground 18 in the Amended Notice of Appeal contends that the declarations of contraventions should be set aside because: “(a) they fail to state the gist of the contravening conduct, (b) they are not based on a concrete or established situation, and (c) they are not attached to specific facts”. We disagree. The declarations do not suffer from these deficiencies. This is not to say

that in a case where it is practical to identify the contravening conduct with a greater level of specificity or to identify each contravention by reference to the conduct of each person or to identify the precise number of contraventions, that is not the preferable course. Declarations should be framed with the greatest degree of specificity possible. Our point is that in all of the circumstances of the present case, the primary judge did not err in making the declarations in the terms he did. It is not enough that an appellate court might think the declarations could be better expressed. Without error, the appellate court cannot interfere.

5. ISSUES AS TO THE PENALTY JUDGMENT

5.1 The applicable penalty provisions

154 In respect of the penalty judgment, a number of the appeal grounds concern the construction or effect of the applicable penalty provisions in the ASIC Act. It is convenient to refer to those provisions at the outset and explain one aspect of the legislative history.

155 The provisions governing the imposition of pecuniary penalties for contraventions of (amongst other provisions) s 12DB of the ASIC Act were amended by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (**Strengthening Penalties Act**) with effect on 13 March 2019. The contravening conduct in this proceeding occurred from 3 July 2019 and is therefore governed by the amended provisions. The provisions as enacted were as follows:

12GBA Declaration of contravention of civil penalty provision

Application for declaration of contravention

- (1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.
- (2) ASIC must make the application within 6 years of the alleged contravention.

Declaration of contravention

- (3) The Court must make the declaration if it is satisfied that the person has contravened the provision.
- (4) The declaration must specify the following:
 - (a) the Court that made the declaration;
 - (b) the civil penalty provision that was contravened;
 - (c) the person who contravened the provision;
 - (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

- (5) The declaration is conclusive evidence of the matters referred to in subsection (4).

Meaning of civil penalty provision

- (6) The following provisions are civil penalty provisions:
 - (a) a provision of Subdivision C;
 - (b) a provision of Subdivision D (other than section 12DA);
 - (c) a provision of Subdivision GC.

12GBB Pecuniary penalty orders

Application for order

- (1) ASIC may apply to a Court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.
- (2) ASIC must make the application within 6 years of the alleged contravention.

Court may order person to pay pecuniary penalty

- (3) If a declaration has been made under section 12GBA that the person has contravened the provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate (but not more than the amount specified in section 12GBC).
- (4) An order under subsection (3) is a pecuniary penalty order.

Determining pecuniary penalty

- (5) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered because of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

12GBC Maximum pecuniary penalty

The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

12GBCA Pecuniary penalty applicable

Pecuniary penalty applicable to the contravention of a civil penalty provision - by an individual

- (1) The pecuniary penalty applicable to the contravention of a civil penalty provision by an individual is the greater of:
 - (a) the penalty specified for the civil penalty provision; and

- (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3.

Pecuniary penalty applicable to the contravention of a civil penalty provision - by a body corporate

- (2) The pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate is the greatest of:
 - (a) the penalty specified for the civil penalty provision, multiplied by 10; and
 - (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
 - (c) either:
 - (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
 - (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units - 2.5 million penalty units.

Contrary intention

- (3) This section applies in relation to a contravention of a civil penalty provision by an individual or a body corporate unless there is a contrary intention under this Act in relation to the penalty applicable to the contravention. In that case, the **penalty applicable** is the penalty specified for the civil penalty provision.

156 Soon after the enactment of the Strengthening Penalties Act, it was recognised that the newly enacted provisions contained a drafting error. Each of ss 12GBCA(1)(a) and (2)(a) included the phrase “the penalty specified for the civil penalty provision”, but no penalty had been specified for any of the civil penalty provisions rendering the phrase inoperative. The Treasury Laws Amendment (2019 Measures No 3) Bill 2019 (Cth) contained proposed amendments (Items 2 and 3 of Sch 3) to address the drafting error. The accompanying Explanatory Memorandum stated, in respect of the proposed amendments:

- 3.7 Part 1 also corrects a drafting error in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*. The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 sought to introduce a stronger penalty framework into the Australian Securities and Investments Commission Act 2001 by increasing civil penalty amounts and expanding the methods by which a civil penalty could be calculated. However due to a drafting error, this outcome was not achieved.
- 3.8 The amendments address the drafting error by clarifying that the maximum pecuniary penalty for the contravention of a civil penalty provision is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. These amendments ensure the Government’s objectives of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* are achieved. [Schedule 3, items 2 and 3, paragraphs 12GBCA(1)(a) and 12GBCA(2)(a) of the Australian Securities and Investments Commission Act

2001]

- 3.9 The amendments to correct the error in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* apply from the day Schedule 2 to that Act commenced. The retrospective application of the amendments is consistent with the Government’s intention to strengthen corporate and financial sector penalties and ensures that a period does not exist where the affected parties could avoid penalties for contravening civil penalty provisions. [Schedule 3, item 9, section 326 of the Australian Securities and Investments Commission Act 2001].

157 The *Treasury Laws Amendment (2019 Measures No 3) Act 2020* (Cth) (**amending Act**) was enacted on 22 June 2020. Items 2 and 3 of Sch 3 replaced ss 12GBCA(1)(a) and (2)(a) with “5,000 penalty units” and “50,000 penalty units” respectively. Item 9 of Sch 3 inserted s 327 into the ASIC Act which provides as follows:

The amendments made by items 2 and 3 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* apply in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurred or occurs wholly on or after the commencement of Schedule 2 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.

Note: Schedule 2 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* commenced on 13 March 2019.

158 By s 2(1) of the amending Act, the foregoing amendments commenced on 23 June 2020.

5.2 Retrospectivity issue (grounds 22 and 23)

159 Grounds 22 and 23 concern the amendment to s 12GBCA(2)(a) of the ASIC Act made by item 3 of Schedule 3 to the amending Act. The contention advanced by the appellants is that, while s 327 of the ASIC Act provides that the amendment to s 12GBCA(2)(a) is applicable to contravening conduct that occurs on and after the commencement of the Strengthening Penalties Act (13 March 2019), s 327 should be construed such that the amendment is not applicable to contravening conduct that is the subject of legal proceedings that were commenced before the amendment took effect (22 June 2020).

160 The primary judge summarised the legislative history at J2 [77]–[79]. His Honour then continued:

[80] For contraventions between 1 July 2017 and 30 June 2020, a penalty unit was \$210.30. Accordingly, the maximum penalty specified in s 12GBCA(2)(a) of the *ASIC Act* for a single contravention of s 12DB committed in that period is \$10.5 million.

[81] ASIC submits, and the Defendants agree, that the amendment to s 12GBCA(2)(a) operates retrospectively, in the sense that a court must treat its operation as having commenced on 13 March 2019: s 327 of the *ASIC Act*.

- [82] The relevant conduct in the present case first took place on 3 July 2019.
- [83] The Defendants submit that legislation which gives retrospective operation to penal legislation, such as the amending legislation in this case, is not within the power of the Commonwealth Parliament. However, the Defendants concede, that the decision of the High Court in *Polyukhovic v Commonwealth* (1991) 172 CLR 501 binds this Court such that it cannot be said that the retrospective operation of s 12GBCA(2)(a) is beyond the power of the Commonwealth Parliament. The Defendants formally make the submission that the amending legislation is beyond the power of the Commonwealth Parliament to preserve their right to press this argument in the High Court of Australia, should the need arise.
- [84] The only point of contention between the parties in relation to the retrospective operation of s 12GBCA(2)(a) is whether the amendment applies to proceedings commenced prior to the amendment taking effect, as is the case here.
- [85] The Defendants contend that the amendment affected by s 327 of the *ASIC Act* does not apply to these proceedings which arise from conduct which occurred between 13 March 2019 and 23 June 2020. The Defendants submit that s 327 of the *ASIC Act* is silent with respect to the process pertaining to legal proceedings commenced before 23 June 2020. In the Defendants' submission, s 327 of the *ASIC Act* should be read subject to s 7(2) of the *Acts Interpretation Act 1901* (Cth) (*AIA*). That section provides that the amendment of an Act or part of an Act does not affect, among other things, any legal proceeding, and such a legal proceeding may be continued or enforced as if the Act or part of the Act had not been repealed or amended. However, s 2(2) of the *AIA* provides that "the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention". The Defendants accept that the Parliament may alter rights in extant litigation with retrospective force if there is such a contrary intention.

161 The relevant provisions of the *Acts Interpretation Act 1901* (Cth) (the **Acts Interpretation Act**) relied on by the appellants are as follows:

2 Application of Act

- (1) This Act applies to all Acts (including this Act).
- (2) However, the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention.

...

7 Effect of repeal or amendment of Act

...

No effect on previous operation of Act or part

- (2) If an Act, or an instrument under an Act, repeals or amends an Act (the *affected Act*) or a part of an Act, then the repeal or amendment does not:
- (a) revive anything not in force or existing at the time at which the repeal or amendment takes effect; or

- (b) affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the affected Act or part; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

162 Accordingly, ss 7(2)(b) and (e) provide that the amending Act does not affect the previous operation of the affected Act or part or any legal proceeding. These provisions, however, operate subject to a contrary intention as provided for in s 2(2).

163 The primary judge concluded that s 327 as inserted into the ASIC Act by the amending Act evinced a contrary intention: J2 [87]–[92].

164 The appellants contend that the primary judge erred as his conclusion:

- (1) overlooked the general principle that legislation is not to be construed as retrospective to any greater extent than the clearly expressed intention of the legislature indicates: *R S Howard & Sons Ltd v Brunton* [1916] HCA 21; (1916) 21 CLR 366 at 371;
- (2) overlooked that for a retrospective amendment to a federal criminal statute to apply to proceedings on foot at the time of the amendment, there must be “clear words” or “a clear advertence” to the existing proceedings: *Lodhi v The Queen* [2006] NSWCCA 121; (2006) 199 FLR 303 at [35] and [55];
- (3) wrongly relied on the Explanatory Memorandum as there was no period before the amendment when penalties could be avoided as penalties were always able to be assessed under ss 12GBCA(2)(b) or (c) while no amount was specified under s 12GBCA(2)(a); and
- (4) wrongly relied on the Explanatory Memorandum to overcome the absence of express words or necessary implication in s 327, as the Explanatory Memorandum cannot supply the missing words needed to apply the amendment retrospectively to extant proceedings.

165 After the appeal hearing, further submissions were filed concerning the recent High Court decision in *Stephens v The Queen* [2022] HCA 31. The majority (Keane, Gordon, Edelman and Gleeson JJ) discussed the principles of construction that relate to the retrospective operation of legislation, concluding that (at [33]–[36], citations omitted):

- [33] Shorn of difficult-to-draw distinctions and difficult-to-apply nomenclature, the underlying principle concerning how to interpret the temporal operation of legislation is based on reasonable expectations. As H L A Hart explained, “the reason for regarding retrospective law-making as unjust is that it disappoints the justified expectations of those who, in acting, have relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts”. The reasonable expectations of the public give rise to a presumption against interpreting the enactments of Parliament in a manner “that would conflict with recognized principles that Parliament would be prima facie expected to respect”. In this context, what is a “reasonable expectation” will necessarily be informed by fundamental principles of criminal law, the accusatorial process, and the law in force at the relevant time.
- [34] The force of this presumption may depend upon the circumstances: “[t]he inhibition of the rule is a matter of degree, and must vary *secundum materiam* [according to the circumstances]”. The more fundamental the rights, and the greater the extent to which they would be infringed by a retrospective or retroactive law, the less likely it is that such an intention will be ascribed to Parliament. Conversely, the less a provision would defeat reasonable expectations, and the less injustice it would cause, the less force there will be in the presumption against retrospective operation. Thus, the force of the presumption is reduced where the “wrongful nature of the conduct ought to have been apparent to those who engaged in it”. And the presumption will often have little or no force in relation to future trials where the law affects rights and interests only slightly and indirectly, such as by the common iterative process of adjusting legal rules of evidence or procedure in the conduct of trials.
- [35] The presumption against retroactive operation of a statute does not apply in an all-or-nothing manner. A statute is not to be construed as retroactive “to any greater extent than the clearly expressed intention of the Legislature indicates”. An example of this is the decision of the Court of Criminal Appeal of New South Wales in *Lodhi v The Queen*. The question in that case was whether the primary judge should have quashed counts on an indictment that alleged terrorist offences under ss 101.4, 101.5, and 101.6 of the *Criminal Code* (Cth), as amended by the *Anti-Terrorism Act 2005* (Cth). Section 106.3 was subsequently introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), and relevantly provided that the amendments applied to “offences committed ... before the commencement of [s 106.3]”.
- [36] Section 106.3 was plainly intended to have retroactive operation. But the issue was whether it applied to the applicant, since the amendments came into force after the applicant had pleaded to the charges against him, and hence after his trial had commenced. Spigelman CJ (with whom McClellan CJ at CL and Sully J agreed) held that despite the words of s 106.3 the provision nevertheless did not extend to those offences committed before the commencement of s 106.3 “on which criminal issue was joined before the commencement of the

section” on the basis that:

“Parliament is ‘prima facie expected to respect’ the principle that a statute will not retrospectively alter a criminal offence where a trial has commenced”.

166 In *Stephens*, s 80AF of the *Crimes Act 1900* (NSW) came into force after the defendant had entered a plea and the trial had commenced. The new provision relieved the Crown of the obligation to prove the precise time the offence occurred for each count in child sexual offence cases. The majority said at [38]:

... to construe s 80AF as being *completely* retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented. It would not merely mean that the law concerning s 81 of the *Crimes Act* was altered retroactively for future trials. It would have the effect of changing that law for extant proceedings, including those that commenced before s 80AF came into force such as Mr Stephens’ trial, where forensic decisions including a plea of guilty or not guilty or the scope of cross-examination of witnesses may have been made in reliance upon the previous law. And it would do so without any indication in the text, context, or purpose of s 80AF that this was intended. Indeed, it would do so in the teeth of textual indications to the contrary.

167 The majority concluded at [45]–[46]:

[45] On its proper interpretation, s 80AF does not operate with respect to trials that had already commenced when the section came into force. Moreover, on its terms, s 80AF may be invoked only at the commencement of a trial, not after the trial has already commenced. Two considerations support this conclusion.

[46] First, s 80AF(2) states that a person “may be prosecuted”. That phrase is apt to refer to the *commencement*, not the *continuation*, of the criminal proceedings in which an accused is tried. Secondly, ss 80AF(1)(a) and 80AF(2) apply so that “a person may be prosecuted” where, amongst other things, it is “uncertain as to when during a period conduct is alleged to have occurred”. That uncertainty appears textually expressed as uncertainty prior to the commencement of the prosecution, rather than an ambulatory concern with uncertainties that arise during trial so that an accused person can *continue to be* prosecuted. It suggests a reference to uncertainty of the Crown prior to the commencement of the prosecution.

168 It is apparent that, as in all such cases, *Stephens* depended on the particular words used in the relevant provision.

169 In *Lodhi* at [35] and [55] Spigelman CJ said (McClellan CJ at CL and Sully J agreeing):

[35] The principle of legality so understood supports the reasoning in *Reid v Reid* [(1886) 31 Ch D 402], *Lauri v Renad* [[1892] 3 Ch 402] and *Moss v Donohoe* [*Moss & Phillips v Donohue* [1915] HCA 61; [1915] HCA 62; (1915) 20 CLR 615] that an overtly retrospective statute, which may have the effect of making past acts criminal, will not be understood to be applicable to criminal proceedings that have already been instituted, unless the Court can identify express words or a necessary intention that that is the intention of Parliament.

...

...

[55] The very structure of s8 [as it appeared in the Acts Interpretation Act at the time, now s 7], providing as it does for distinct matters, reflecting in this regard the legislative regimes common in Interpretation Acts throughout Australia, itself suggests that, at least in a criminal context, a clear advertence to existing legal proceedings should exist before the Court concludes that there is a legislative intention to the contrary of s8(e). ...

170 The effect of s 327, which commenced on 23 June 2020, is that the amendment to (relevantly) s 12GBCA(2)(a) applies to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurred or occurs wholly on or after 13 March 2019. The issue is whether the amendment applies to a proceeding for conduct constituting the contravention of the provision where the conduct occurred after 13 March 2019 and the proceeding was commenced before 23 June 2020.

171 The primary judge was correct in his conclusion that the amending Act evinces an intention, contrary to ss 7(2)(b) and (e) of the Acts Interpretation Act, that the amendment to s 12GBCA(2)(a) is applicable to contravening conduct that occurred on and after 13 March 2019, notwithstanding that proceedings were commenced in respect of the conduct before the amending Act commenced. That intention is apparent from both the legislative purpose and context. The legislative purpose is identified in the Explanatory Memorandum as being to correct a drafting error and to ensure “that a period does not exist where the affected parties could avoid penalties for contravening civil penalty provisions”. As to statutory context, the amendment concerns the applicable civil penalty for a contravention of a statutory prohibition, not the terms of the statutory prohibition. The considerations informing the outcomes in *Lodhi* and *Stephens*, while relevant, do not apply with the same force. It is one thing for a person to make forensic decisions in circumstances where an offence did not previously exist or could not be proved but for the amending provision. It is another to suggest conflict with the principle of legality merely because conduct, which was always contravening conduct and clearly intended to be subject to a civil penalty, is subject to a particular penalty by reason of the amending Act.

172 In support of the grounds of appeal, the appellants submitted that there was no period in which a penalty could not be imposed but for the amending Act. They submitted that while s 12GBCA(2)(a) as first enacted had no operation, that did not affect the operation of ss 12GBCA(2)(b) and (c). The burden of the argument was that there was no necessity to give

the amendment retroactive operation in respect of proceedings that were commenced before the amending Act. It is unnecessary to reach a concluded view on that question. Regardless of whether s 12GBCA(2) could be given operation before its amendment by the amending Act, there is a sufficient contrary intention disclosed in s 327 of the ASIC Act to displace ss 7(2)(b) and (e) of the Acts Interpretation Act. Section 327 must be construed as meaning that the amending Act applies in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurred wholly on or after 13 March 2019, whether or not the proceeding in relation to the contravention was commenced before 23 June 2020. In the context of the enactment of s 327 the provision contains a sufficiently clearly expressed legislative intention to so apply.

173 For these reasons, grounds 22 and 23 in the Amended Notice of Appeal are rejected.

5.3 Declared contraventions issues (grounds 24 to 26)

174 Grounds 24 to 26 in the Amended Notice of Appeal concern the declarations made by the primary judge at the conclusion of the liability hearing. The appellants contend that the primary judge had no power under s 12GBB of the ASIC Act to impose penalties in respect of the declared contraventions because the declarations made on 23 March 2021 did not comply with s 12GBA in that:

- (1) by declaring that the Mayfair parties jointly or collectively committed the contraventions, they failed to specify the person who committed the contravention, contrary to s 12GBA(4)(c);
- (2) by declaring an indeterminate number of contraventions, they failed to specify the conduct that constituted the contraventions, contrary to s 12GBA(4)(d);
- (3) the declarations lack sufficient specification of the relevant conduct, based on facts found and conclusions reached;
- (4) the declarations declare that the Mayfair parties are jointly liable for the contraventions and so supply no basis for the imposition of individual penalties for each of the Mayfair parties as required by s 12GBB; and
- (5) the declarations declare an indeterminate number of contraventions, and so supply no basis for the assessment of penalties for each contravention as required by s 12GBB.

175 In the alternative, the appellants contend that the primary judge should have held that he could not impose pecuniary penalties on the Mayfair parties in respect of the declared contraventions under s 12GBB of the ASIC Act because:

- (1) the declarations are not self-contained and intelligible;
- (2) the declarations attribute legal consequences to events without specific delineation;
- (3) the declarations lack sufficient specification of the relevant conduct, based on facts found and conclusions reached;
- (4) the declarations declare that the Mayfair parties are jointly liable for the contraventions and so supply no basis for the imposition of individual penalties for each of the Mayfair parties as required by s 12GBB; and
- (5) the declarations declare an indeterminate number of contraventions, and so supply no basis for the assessment of penalties for each contravention as required by s 12GBB.

176 As set out earlier, s 12GBB(3) of the ASIC Act provided at the relevant time that if a declaration has been made under s 12GBA that the person has contravened the provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate (but not more than the amount specified in s 12GBC). Section 12GBA provides that:

- (1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.

...

Declaration of contravention

- (3) The Court must make the declaration if it is satisfied that the person has contravened the provision.
- (4) The declaration must specify the following:
 - (a) the Court that made the declaration;
 - (b) the civil penalty provision that was contravened;
 - (c) the person who contravened the provision;
 - (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

- (5) The declaration is conclusive evidence of the matters referred to in subsection (4).

177 The appellants' grounds of appeal proceed from a misunderstanding of the requirements of ss 12GBA and 12GBB and the relationship between the two provisions. It can be accepted that, as specified in s 12GBB(3), the making of a declaration under s 12GBA that a person has contravened a civil penalty provision is a precondition to the imposition of a pecuniary penalty on that person in respect of that contravention. It can also be accepted that s 12GBA(4) stipulates certain requirements in respect of a declaration of contravention (and s 12GBA(5) stipulates that the declaration is conclusive evidence of those matters). However, that is the extent of the statutory proscriptions in respect of the framing of the required declarations. Further, as is made clear by s 12GBB(5), the facts and matters that are relevant to the determination of a penalty to be imposed under s 12GBB(3) extend beyond the matters required to be included in the declaration under s 12GBA(4).

178 Turning to s 12GBA, the appellants' arguments of non-compliance are unfounded. The declarations made by the primary judge reflect his Honour's findings in J1. In respect of the requirements of s 12GBA(4) the declarations identify, relevantly, that:

- (1) ss 12DB(1)(a) and (e) of the ASIC Act were contravened;
- (2) each of the Mayfair parties made the Bank Term Deposit Representations, the Repayment Representations and the No Risk of Default Representations, but only Mayfair Platinum, M101 Nominees and Mayfair 101 (and not M101 Holdings) made the Security Representations; and
- (3) the conduct that constituted the contraventions was the making of the representations to consumers during the period from 3 July 2019 to 16 April 2020, in circumstances where the representations were false, misleading or deceptive for the reasons stated in the declarations.

179 In their terms, the declarations do specify the person who contravened the provision and the conduct that constituted the contravention. Nothing in s 12GBA precludes the making of declarations in respect of either multiple parties or an indeterminate number of contraventions. The indeterminacy of the number of contraventions of a civil penalty provision does not mean that the conduct that constituted the contravention has not been identified as required by s 12GBA(4)(d).

180 The number of contraventions of a civil penalty provision is, of course, a necessary consideration in the imposition of pecuniary penalties under statutory provisions such as s 12GBB. We agree with the principle expressed by Wigney J in *Australian Securities and*

Investments Commission v Westpac Banking Corporation [2019] FCA 2147 at [268] (citing with approval *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [227]) that:

other than where there is a specific statutory provision which permits the imposition of a single penalty in respect of multiple contraventions, or perhaps in cases where the parties agree to the imposition of a single penalty for practical or pragmatic reasons, separate penalties should be imposed for each contravention.

181 We also agree with the statement of the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 (*ABCC v CFMEU*) at [149] that:

In an appropriate case, however, the Court may impose a single penalty for multiple contraventions where that course is agreed or accepted as being appropriate by the parties. It may be appropriate for the Court to impose a single penalty in such circumstances, for example, where the pleadings and facts reveal that the contraventions arose from a course of conduct and the precise number of contraventions cannot be ascertained, or the number of contraventions is so large that the fixing of separate penalties is not feasible, or there are a large number of relatively minor related contraventions that are most sensibly considered compendiously. As revealed generally by the reasoning in *Commonwealth v Director, FWBII* [*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482], there is considerably greater scope for agreement on facts and orders in civil proceedings than there is in criminal sentence proceedings. As with agreed penalties generally, however, the Court is not compelled to accept such a proposal and should only do so if it is considered appropriate in all the circumstances. It is also at the very least doubtful that such an approach can be taken if it is opposed or the proceedings are defended.

182 In *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 3)* [2021] FCA 170; (2021) 150 ACSR 185, O’Byrne J noted (at [20]–[22]):

[20] As recognised by the Full Court in *ABCC v CFMEU*, there have been many cases in which a single pecuniary penalty has been imposed on a respondent in respect of multiple contraventions of the relevant law, including by the High Court in *TPG Internet* [*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640]. It may be that many of those cases fall within the two qualifications identified by the Full Court, recognising that a single penalty that is imposed by an order of the court may implicitly be the sum of the individual penalties for many contraventions. Subsequent to *ABCC v CFMEU*, the Full Court in *Yazaki Corporation* imposed an aggregate single penalty for five contraventions of the *Competition and Consumer Act 2010* (Cth), but articulated the individual penalty for each contravention.

[21] The conclusion that a statutory power to impose a pecuniary penalty does not permit the imposition of a single penalty for multiple contraventions is a different principle to that propounded by ASIC: that where there are numerous contraventions arising from separate acts, the starting point is that each contravention should attract a separate penalty arising from that contravention.

There is no such “starting point”. The statutory task requires the court to consider whether it is appropriate to impose a penalty for every contravening act or omission. Applying the course of conduct principle, a court may conclude that it is not appropriate. That was expressly recognised by the Full Court in *ABCC v CFMEU*...

[22] The point emphasised by the Full Court in *ABCC v CFMEU* is the importance, in exercising the statutory power to impose a pecuniary penalty, to identify the number of contraventions that have occurred and relevant differences between the contraventions. Unless the number of contraventions is identified, at least to the extent of identifying a minimum number of contraventions, it is not possible to determine whether the aggregate penalty to be imposed is within the statutory maximum, and it is not possible to assess whether the penalty is appropriate taking into account the statutory maximum.

183 None of the foregoing principles undermine the conclusion that the declarations made by the primary judge satisfied the requirements of s 12GBA(4) and, as such, were lawfully made. Section 12GBA(4) does not say that the number of contraventions must be identified. It says that the conduct that constituted the contravention must be identified. Given the interrelationship between ss 12GBA and 12GBB, it is no doubt desirable for declarations made under s 12GBA to describe the contravening conduct with reasonable specificity. That has the benefit that, by virtue of s 12GBA(5), the declaration is conclusive evidence of the matters stated. It is also the case, as stated by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [89], that a declaration that a person has contravened a statutory prohibition should indicate the gist of the findings that identify the contravention. Declarations must be “informative as to the basis on which the Court declares that a contravention has occurred” and “should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act”: *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 per Gordon J (at [83]). The declaration should accurately reflect the contravening conduct in a concise way: *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; (2003) 60 IPR 296 per Dowsett J at [260]. Within those parameters, though, the Court has a broad discretion in the framing of declarations.

184 It is also necessary to have regard to the obligation imposed by s 12GBA(3) that the “Court must make the declaration if it is satisfied that the person has contravened the provision”. That paramount duty governs the proper construction of s 12GBA(4). The effect is that the Court must frame a declaration as best it can in the circumstances to satisfy s 12GBA(4). This duty necessarily overrides the kind of discretionary considerations to which a court might previously

have given weight in declining to make a declaration, not only in respect of utility, but also any practical incapacity to identify the number of contraventions.

185 As such, the declarations satisfy the precondition to the imposition of pecuniary penalties under s 12GBB(3). In exercising the discretionary power in s 12GBB to impose a pecuniary penalty, the primary judge was required to have regard to, amongst a wide range of facts and matters, the number of contraventions. But the appellants are wrong to contend that the failure to include a reference to the number of contraventions in the declarations had the result that the primary judge had no power under s 12GBB.

186 The appellants' criticisms of the declarations must also be considered in light of the fact that the proceeding was undefended when the declarations were made. Moreover, after the declarations were made, as we have said, the appellants could have applied to set aside or vary the declarations under rr 30.21(1)(b)(i) or 39.05(a) of the Federal Court Rules. The fact that such an application is likely to have failed because the appellants made a deliberate forensic decision not to defend the proceeding until the penalty stage exposes the importance of the observation in *ABCC v CFMEU* extracted above that whether proceedings are defended or not is an important factor in determining the scope of action available to a court without committing error.

187 The fact that in the penalty hearing ASIC applied to vary the declarations under r 39.05(e) of the Federal Court Rules (the slip rule) and the primary judge refused to do so does not mean that ASIC tacitly conceded that the declarations were flawed. At J2 [169] the primary judge said:

I also reject the Defendants' submission that the declarations made are invalid because the declarations do not specify how many contraventions occurred. I accept ASIC's submission that the authorities reveal that courts have adopted a common sense approach in which declarations identify the nature of the contraventions and a period of time in which the contraventions occurred, without attempting to specify the number of contraventions which happened in that period if that is not practical. That is all that is required of the declarations at the liability phase of the proceeding. The Court will then, in the penalty phase of the proceeding, make an assessment of the number of contraventions without the need to specify the precise number of contraventions: See *ASIC v Allianz Australia Insurance Limited* [2021] FCA 1062 per Allsop CJ, order 3(d) and order 6(d) and at [123] and [124], and O'Bryan J in *Dover*, order 1 and [24(b)] and [48], and *Optus [Australian Competition and Consumer Commission v Optus Mobile Pty Limited]* [2019] FCA 106] per Murphy J at [44].

188 We reject the appellants' contention that the "declarations declare that the Mayfair Parties are jointly liable for the contraventions and so supply no basis for the imposition of individual

penalties for each of the Mayfair Parties as required by s 12GBB”. In support of the contention, the appellants referred to *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312. In *Cement Australia*, the relevant provision was s 76(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) (formerly the *Trade Practices Act 1974* (Cth)) which provided that if the Court was satisfied that a person had contravened a relevant provision, “the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate”. The Full Court of this Court held that s 76(1) did not permit the imposition of a single joint and several penalty against multiple respondents given the statutory text: [376]–[392].

189 Contrary to the appellants’ contention, the declarations did not declare the Mayfair parties “jointly liable” for the contraventions. The declarations declared that “the Defendants”, meaning each of the Mayfair parties (as referred to in the relevant declaration), had contravened the relevant civil penalty provision (ss 12DB(1)(a) and (e)). As stated by the primary judge (at J2 [168]), if the facts, as found by the Court, are that multiple defendants engaged in contravening conduct, then there is nothing impermissible in the declarations reflecting contraventions made by multiple subjects engaging in contravening conduct. His Honour imposed penalties on each of the Mayfair parties for their individual contraventions, not in respect of any notion of “joint liability”.

190 For these reasons, grounds 24 to 26 in the Amended Notice of Appeal must be rejected.

5.4 Approach to J1 factual findings (grounds 19 to 21)

191 Grounds 19 to 21 in the Amended Notice of Appeal allege that the primary judge erred in finding in J2 that the appellants were bound by all factual findings in J1 and not only those findings which were the basis of the declared contraventions.

192 These grounds of appeal concern the primary judge’s reasons in J2 at [65]–[74]. As there recorded, the appellants, in cross-examination of Mr Tracy, and in the documents which they tendered in the penalty hearing, sought to challenge the findings made in the liability hearing. The appellants argued that it was open to them to contest all facts already found by the Court in the liability hearing other than the findings of fact which were the basis for the declared contraventions. The primary judge rejected that contention, concluding (at J2 [74]):

It is not permissible for the Defendants in the penalty phase of the proceeding to seek to challenge the findings of fact already made in the liability phase of the proceeding.

It is also not permissible for the Defendants in the penalty phase of the proceeding to seek to have the Court make findings of fact which contradicts findings of fact made at the Liability Hearing. ... If the Defendants wish to challenge the correctness of the findings made in the Liability Judgment then the proper forum for that to take place is an appeal from the Liability Judgment. Subject to the Defendants' right of appeal, the Defendants are bound at the Penalty Hearing by my previous findings in the Liability Judgment ...

193 In *Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489 at [35], White J said that a judge in such a circumstance:

[must] decide the questions of penalty (including whether any banning order should be made and, if so, for what period), on the basis of the declared contraventions ..., and the findings of fact made ... as the basis upon which the declarations of contravention were made. As the defendants are entitled to make submissions and to adduce evidence on the question of penalty (including whether any banning order should be made and, if so, for what period), they are entitled to be heard as to whether the evidence led [in respect of the issue of liability] warranted the adverse findings made ... (whether as to credit or facts other than credit), provided that they do not thereby seek to impugn the findings of fact which were the basis for the declared contraventions. The defendants are also entitled to adduce further evidence on the question of penalty, but such further evidence could not be relied upon to seek to impugn the findings of fact which are the basis of the declared contraventions.

194 In *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467 at [6] Merkel J took a stricter view based on the interest in the finality of litigation and related discretionary considerations, saying:

... During the course of the penalty hearing the respondents sought to raise a number of matters relating to liability that had not been raised at the hearing on liability. In so far as those matters could have been tested or met by FSU adducing, or challenging, evidence in relation to those matters, it is not appropriate to allow them to be raised at the penalty hearing: see *Park v Brothers* [2005] HCA 73 at [33]–[34]. As a consequence, at the penalty hearing I ruled that the evidence filed by the respondents for the purposes of that hearing, which was also capable of being relevant to liability, was to be received only in relation to the quantum of any penalty, and not in relation to the liability of CBA in respect of that penalty. The main reason for that ruling was that the issue of liability had been determined in the reasons for judgment on the basis of the pleadings and evidence before the Court at trial, as well as on the basis of the manner in which the respective parties chose to conduct their cases at trial. In those circumstances, it would be unfair to FSU if the respondents' evidence at the penalty hearing was able to be relied upon, directly or indirectly, in relation to liability, absent applications to amend the pleadings and to re-open the respondents' case. No such applications were made.

195 We prefer the approach in *Finance Sector Union* to that in *Forge*. It would have been unfair to ASIC and contrary to the interests of justice to permit the appellants to challenge facts found in the liability hearing in the penalty hearing when they made a deliberate forensic decision not to appear in the liability hearing.

196 The same considerations of the importance of the finality of litigation arise in this case. The appellants chose not to appear at the liability hearing. Irrespective of the width of the doctrine of issue estoppel on which it appears from J2 [74] that the primary judge principally relied, the appellants should not have been permitted to challenge the factual findings in the liability hearing. In this regard, it should be noted that the primary judge was aware of *Finance Sector Union* as ASIC had relied on it as recorded at J2 [69]–[70]. *Finance Sector Union* is principally based on considerations of fairness, not issue estoppel. As explained in relation to grounds 19 to 21 above, the appellants have not identified a particular factual finding in J1 which they say was not the basis of the declarations. Accordingly, there cannot be any material error arising from these grounds. Even if we had been persuaded that the primary judge’s approach to the factual findings in J1 was wrong on the basis of the operation of the doctrine of issue estoppel, this is a case where the approach was plainly right as a matter of fairness. Even without a notice of contention from ASIC in this respect, we would not interfere with the primary judge’s decision in all of these circumstances.

197 Accordingly, grounds 19 to 21 in the Amended Notice of Appeal must be rejected.

5.5 Further Tracy report (ground 11)

198 Ground 11 in the Amended Notice of Appeal alleges that the primary judge erred in admitting into evidence at the hearing on penalty the report of Mr Tracy dated 14 September 2020 because it was relevant to liability, ASIC had failed to adduce it at the liability hearing, and its admission into evidence at the penalty hearing enabled ASIC to “mend its hand on liability” after judgment on liability had been given.

199 The ground makes little sense. In their submissions the highest the appellants put it is that the report of Mr Tracy dated 14 September 2020 (a second supplementary report) “was only marginally relevant, if at all, to penalty”. The acceptance that it was open to the primary judge to conclude that this report had some relevance, even if only marginal, to penalty was sufficient to make the report admissible. There can be no error in admitting a report of marginal relevance to penalty at a penalty hearing. ASIC also did not need to “mend its hand on liability” after judgment on liability had been given. The declarations had been made. The facts founding the declarations could not be challenged. The facts otherwise found in J1 should not have been permitted to be challenged in the exercise of discretion. Accordingly, there was no error in the primary judge admitting Mr Tracy’s report of 14 September 2020.

200 For these reasons, ground 11 in the Amended Notice of Appeal must be rejected.

5.6 ASIC's Roadmap of Oral Submissions in Reply (ground 16)

201 Ground 16 in the Amended Notice of Appeal alleges that the primary judge erred in receiving in the course of ASIC's oral reply submissions in the penalty hearing a 63 page document headed "ASIC's Roadmap of Oral Submissions in Reply".

202 As ASIC submitted, however, this document was not evidence. It identified evidence already admitted in this proceeding which were relevant to the appellants' challenges during the penalty hearing to findings in J1. As ASIC also put it:

The table in the roadmap... did not refer to evidence in the Mawhinney proceeding – it referred to findings made in the Liability Judgment that were challenged by the appellants during the penalty hearing. The table listed the findings in the Liability Judgment that were challenged by the appellants on penalty and provided references to the evidence that supported those findings in the event that (contrary to ASIC's position) the appellants were able to challenge them at the penalty stage. There is no procedural unfairness to the appellants in ASIC using the table for that purpose.

203 As ASIC also explained, another table in the roadmap did refer to findings in the related Mawhinney proceeding. ASIC (belatedly, it should be said) conceded before the primary judge that his Honour could not rely on findings in the Mawhinney proceeding as the basis for findings in this proceeding given s 91(1) of the Evidence Act ("[e]vidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding"). ASIC then explained that, on the basis of this concession, it included a table in the roadmap which identified the findings in the Mawhinney proceeding that ASIC had referred to in its reply submissions together with references to evidence in the Mayfair Proceeding (being evidence admitted at the liability hearing) that supported the same findings being made in respect of penalty.

204 There was nothing improper in that course. While it would have been preferable for ASIC to have immediately recognised the effect of s 91 of the Evidence Act and provided its roadmap of evidence in the proceeding (excluding any oral evidence given during the hearing) before or at the beginning of the hearing, the appellants were represented before the primary judge by senior counsel and three junior counsel. The appellants could have sought whatever further opportunity they thought was required to adequately deal with the roadmap. Not having done so, the appellants cannot now complain that it was intrinsically unfair for them to have to deal with "such a volume of material so late in the day". The appellants also cannot complain that they did not get the opportunity to cross-examine witnesses who had given affidavits in the

liability hearing in which they did not appear. The appellants are stuck with the fact that they did not appear at the liability hearing and its consequences.

205 For these reasons, ground 16 in the Amended Notice of Appeal must be rejected.

5.7 Matters not established by the evidence (ground 27)

206 Ground 27 in the Amended Notice of Appeal alleges that the primary judge erred in determining penalties by taking into account the following matters which, the appellants allege, were not established by the evidence:

- (1) the contraventions were very serious and have exposed investors to very substantial losses from which many investors will never recover financially;
- (2) the representations were grossly misleading and calculated to mislead investors as to the nature and extent of the risk of the Mayfair products;
- (3) the representations in respect of the Core Notes were particularly egregious in light of the evidence of the provisional liquidators that the second respondent had been insolvent since inception;
- (4) the representations in respect of the Core Notes were particularly egregious in light of the evidence of Jason Tracy that investor funds were generally not supported by first ranking unencumbered assets security;
- (5) investors' funds were being invested in highly speculative ventures and are now lost or are very likely to have been lost; and
- (6) the Mayfair parties deliberately misled investors into investing in the Mayfair products under the belief they would be low risk when in fact the Mayfair products were highly speculative and carried very substantial risk.

207 The ground of appeal suffers from the overriding problem that the above matters were established by the evidence adduced at the liability hearing, which evidence was accepted by the primary judge. As discussed, the appellants elected not to attend and participate in the liability hearing.

208 In respect of ground 27(a), the primary judge concluded (at J2 [239]) that he was "satisfied on the evidence tendered in the Liability Hearing and in the Penalty Hearing that the nature and extent of the Defendants' contravening conduct is very serious and has exposed investors in

the Mayfair Products to very substantial losses from which many investors will never financially recover”.

209 In respect of the conclusion, the appellants submitted that:

An objective assessment of the representations, in the context in which they were made and having regard to the audience to whom they were directed, results in the conclusion that, if they were misleading at all, they were not grossly misleading. It is not seriously misleading to represent to a wholesale client or sophisticated investor that there is no risk that an investment will be lost or that an investment is comparable to a bank term deposit when it is offered by a non-bank without the Government guarantee for bank deposits, with a higher interest rate than bank term deposits, and accompanied by various warnings of risks.

and further submitted:

It was not proved there have been any losses. There was no evidence before the Court of any losses from the M+ Notes. The only evidence concerning the Core Notes was from Mr Tracy and the provisional liquidators and it was incomplete and out of date. The penalty hearing was held in September and October 2021 but the latest financial information was from June 2020. There was no basis before the Court to assess losses, not even to make an approximate assessment or to speculate whether or not investors will financially recover their losses. ASIC gave no explanation at the penalty hearing for why it did not file updated financial information.

210 The first submission is merely a restatement of contentions advanced in respect of earlier grounds of appeal, which we have rejected. The submission also ignores the basis for the primary judge’s characterisation of the conduct, which was that the conduct represented the products as “being low risk, safe, certain or secure and akin to term deposits when in fact the Mayfair Products exposed investors to significantly higher risk than term deposits”: J2 [239]. As ASIC also submitted, the Security Representations were not false merely because “the security trustee had registered some securities late”. They were false because, given the true nature of the security, the funds from the Core Notes were not supported by first-ranking, unencumbered security on a dollar-for-dollar basis.

211 The characterisation of the seriousness of the conduct was a matter for the overall evaluation of the primary judge. An appellate court would not lightly interfere with such an evaluative characterisation without any underlying error being established. No such underlying error has been established.

212 As to the second submission, the primary judge found that the investors in the products were exposed to very substantial losses. The primary judge did not need to find that such losses had in fact been realised to conclude that this exposure existed. To be exposed to loss does not necessarily mean that the loss has in fact occurred. It means that there is a real or not trivial

risk of loss. In this case, there was more than enough evidence to prove that there was a real exposure of investors to substantial losses. The appellants required Mr Tracy for cross-examination. At J2 [59] the primary judge referred to Mr Tracy's evidence that:

...

- (f) Mr Tracy also said that he expressed concerns in relation to the properties which were acquired in the Mission Beach region, which occurred in a relatively short period of time. Mr Tracy stated that the acquisition of properties in this manner led to a commensurate increase in the value of the properties at that time.
- (g) Mr Tracy said that he was concerned about the financial capacity of some of the parties to be able to repay their loans and, in particular, Eleuthera which, based on his review of its balance sheet, showed a negative net asset position indicating a potential issue around the repayment of that loan.

...

- (n) Mr Tracy was asked a series of questions in relation to the security arrangements and the nature of the assets that were secured by the charges in the unit trust. Mr Tracy stated that the real estate was not directly secured and that the investor money which was used to acquire the real estate was ultimately mortgaged to Naplend. Mr Tracy maintained that this is what was described in the reports of the security trustee and what he relied upon when forming conclusions which ultimately made up his reports. Mr Tracy identified that any value which could be ascribed to the units would be an amount which would include the property, less any liabilities against that property. Mr Tracy maintained that the properties that were held by the unit trust had some value based on the representations that were made in the reports of the security trustee, but maintained that he was unable to confirm the value of the properties.
- (o) It was put to Mr Tracy that paragraph 16 of his First Expert Report, which had a missing comma misled him into believing that there were two classes of assets, being Australian real estate and cash. Mr Tracy disagreed with that assertion. Mr Tracy said that he filed a further affidavit with respect to that specific question where he acknowledged that there appeared to be a typographical error, but, in any case, it did not impact the analysis that he undertook and what he represented in respect to the security that related to the trusts.
- (p) Mr Tracy said that what had been represented to him was that the investor funds had been used to acquire real estate, pay deposits, and make loans, but that the principal asset, was the real estate. Mr Tracy stated that his concern was that the real estate was left in a position where it was able to be mortgaged to a third party, and the lack of security back to the investors over that property created a significant security risk for those investors.

213 The primary judge did not err in accepting Mr Tracy's evidence at J2 [61]. Moreover, the primary judge was also right to make the following observations based on the evidence at J2 [240]–[241]:

...M101 Nominees is in liquidation with the provisional liquidators estimating a nil return to Core Note investors. M101 Holdings has suspended redemptions in the M+ Notes since 11 March 2020. ASIC submits that the Mayfair Products raised approximately \$140 million from 281 investors. This is based upon the total numbers of investors, and the quantum of funds that investors have invested into the M Core Notes and the M+ Notes, which has been deposited in the affidavit of Lisa Saunders dated 15 April 2020. These figures were provided by Quattro Capital Group Pty Ltd, a corporate authorised representative of Mayfair Platinum (as was the trading name of the First Defendant, Mayfair Wealth Partners Pty Ltd at the relevant time). I find the number of investors and the amount of funds invested into the Mayfair Products to be accurate.

The Provisional Liquidators' Report identifies that the M Core Note and the M+ Note holders should expect a nil return or should not expect any recoveries from the assets of M101 Nominees. The evidence of Mr Tracy, in his Expert Reports, also identifies that the investors were at a real risk that they could lose some or all of their principal investment. The evidence of Mr Tracy was that investor funds were generally not supported by first-ranking unencumbered asset security, and to the extent there was security over units in various trusts the noteholders did not hold direct first-ranking asset security over the Australian real property assets, which were the primary assets of each trust. I find that based on the evidence of Mr Tracy, the Provisional Liquidators' Report and the evidence of the six investors tendered by ASIC, that the investors' funds are lost and will not be recovered, or are very likely to be lost.

214 ASIC was not bound to provide more up to date evidence. If the appellants wished to challenge the ongoing validity of the evidence of ASIC, they had every opportunity to do so. The primary judge was entitled to rely on the evidence he had before him.

215 As ASIC also submitted, there was evidence before the primary judge that all repayments of principal had been suspended in circumstances where:

- (1) Mr Booth invested \$750,000, which comprised 30 per cent of his superannuation investment portfolio, in the Core Notes; and
- (2) Mr Charadia invested \$500,000 in the M+ Notes which was not repaid. He is an unemployed, single parent to three children for whom he is a full-time carer and is unable to work for health reasons including a brain tumour.

216 In respect of ground 27(b), the primary judge concluded (at J2 [239]) the representations as found in J1 "were grossly misleading and calculated to mislead investors as to the nature and extent of the risk of the Mayfair Products". That was an inference obviously open to the primary judge. The primary judge did not err in drawing it.

217 In respect of ground 27(c), the primary judge found (at J2 [239]) that the "[r]epresentations in respect of the Core Notes were particularly egregious in light of the evidence of the provisional liquidators (which I accept) that M101 Nominees had been insolvent since inception". In

support of that ground, the appellants submitted that the evidence at the penalty hearing showed that the provisional liquidators' opinion that M101 Nominees had been insolvent since inception was wrong. The appellants' submission is founded on the proposition that the provisional liquidators' opinion was based on a misunderstanding of cl 2 of the Eleuthera Facility Agreement as providing for advances repayable in 10 years, whereas in truth the loan agreement provided for advances of shorter duration (specifically 12 months or such other period as is agreed in writing).

218 The reality of the evidence, however, is as summarised by ASIC:

...the internal accounts for M101 Nominees showed:

- (a) Current assets of \$2.5 million, comprising some \$5,000 of cash and a \$2.5 million receivable from Eleuthera in respect of interest;
- (b) Non-current assets of \$65 million, made up principally of amounts owing from Eleuthera. ...the classification of those debts as non-current (which is also reflected in the Eleuthera accounts...) suggests that none of those amounts were repayable within 12 months;
- (c) Current liabilities of \$35 million, including over \$30 million in current obligations to Noteholders; and
- (d) Non-current liabilities of a further \$31 million to Noteholders (a substantial proportion of which fell due within 12 months and therefore more appropriately classified as current).

Moreover, and consistent with this, the cash flow analysis indicated that at no point from November 2019 onwards did M101 Nominees hold sufficient cash to attend to the payment of its current liabilities.

... On the face of it, M101 Nominees had no ability to look to Eleuthera in the short term for anything more than \$2.5 million, and yet had short term obligations of \$35 million (or more).

219 We agree with ASIC that:

...there was ample basis to conclude that M101 Nominees was always insolvent save for its ability to suspend redemptions. The real point is that the only prospects for M101 Nominees being able to repay Core Noteholders was the receipt of further subscription monies.

220 The primary judge was not bound to accept the submissions for the appellants with respect to the question of insolvency. There is no error in the primary judge having accepted the evidence of the provisional liquidators and making the finding that the evidence showed that M101 Nominees had been insolvent since inception.

221 In respect of ground 27(d), the primary judge found (at J2 [239]) that the representations in respect of the Core Notes were particularly egregious in light of the evidence of Mr Tracy that

investor funds were generally not supported by first-ranking unencumbered assets security. As we understand it, this complaint is based principally on the appellants' "missing comma" theory about Mr Tracy's evidence. The appellants cross-examined Mr Tracy regarding his report of 14 September 2020 (the admission of which was subject to the rejected complaint in ground 11), as J2 [59(o)] discloses:

It was put to Mr Tracy that paragraph 16 of his First Expert Report, which had a missing comma misled him into believing that there were two classes of assets, being Australian real estate and cash. Mr Tracy disagreed with that assertion. Mr Tracy said that he filed a further affidavit with respect to that specific question where he acknowledged that there appeared to be a typographical error, but, in any case, it did not impact the analysis that he undertook and what he represented in respect to the security that related to the trusts.

222 The primary judge accepted Mr Tracy's evidence. No error has been demonstrated in doing so.

223 In respect of ground 27(e), the primary judge found (at J2 [240]) that investors' funds were being invested in highly speculative ventures and are now lost or are very likely to have been lost. The appellants' submission that there was "no evidence the funds had been invested in highly speculative assets. The evidence was that they had been invested in real estate in a tourist area in far north Queensland, which Mr Tracy said had been booming during the pandemic" is hopeless. There was evidence of the highly speculative nature of the investments. As ASIC said, the Mayfair products were for investment terms of three months to five years. Yet funds from the investors were being used to support a long-term (15 year plus) proposal to turn the effectively defunct areas of Dunk Island and Mission Beach into a tourism destination. This resulted in a mismatch between the issuers' liabilities (where obligations to investors had to be met in the short to medium term) and assets (whereby any gains from invested funds would be realised over the long term). This mismatch rendered the products highly speculative and the evidence showed that investors' funds have been lost or are likely to be lost.

224 In respect of ground 27(f), the primary judge found (at J2 [242]) that the appellants "deliberately mislead [sic] investors into investing in the Mayfair Products under the belief they would be of low risk when in fact the Mayfair Products were highly speculative and carried very substantial risk". According to the appellants, there is no evidence that the appellants deliberately misled investors, this was never alleged by ASIC, and was not put to Mr Mawhinney in cross-examination at the penalty hearing.

225 As ASIC submitted, however: (a) as deliberateness is always relevant to penalty, procedural fairness did not require ASIC to plead specifically that the contravening conduct involved a

particular state of mind on the part of Mr Mawhinney; (b) the corporate entities must be taken to have engaged deliberately in the conduct and there was no requirement for ASIC to put to Mr Mawhinney (a non-party) that he subjectively intended to mislead potential investors; and (c) ASIC was entitled to submit, as it did, that a relevant factor in the assessment of penalty was the deliberateness of the appellants' conduct.

226 We agree with ASIC that the finding of deliberately misleading conduct was able to be made from the very nature of the conduct: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at [131]. Mr Mawhinney's contrary belief defies the reality of the marketing of the products compared to their true character.

227 For these reasons, ground 27 in the Amended Notice of Appeal must be rejected.

5.8 Irrelevant considerations (ground 28)

228 Ground 28 in the Amended Notice of Appeal alleges that the primary judge considered irrelevant matters in his assessment of the pecuniary penalties which also had not been proved, being: (a) Mr Mawhinney has shown no remorse for the contravening conduct of the Mayfair parties, and (b) Mr Mawhinney has not sought to co-operate with ASIC.

229 The impugned findings are made at J2 [249]. It is apparent that the real point the appellants seek to make is that while remorse is a mitigating factor, lack of remorse is not an aggravating factor. The primary judge did not misuse Mr Mawhinney's lack of remorse or lack of co-operation. His Honour said at J2 [255]:

I approach the question of penalty, taking account the deliberate misleading and deceptive conduct, the lack of co-operation in this proceeding, the significant effect that the Defendants' conduct has had on a number of investors and the Defendants' complete lack of remorse, wrongdoing and regret. These features of the Defendants' conduct bear upon the level of deterrence required.

230 This was orthodox. As explained in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24 at [153]:

... a contravener who has displayed no contrition or remorse, and no insight into their contravening conduct, would generally expect a higher penalty than would a contravener who has shown genuine contrition and remorse and good prospects of rehabilitation. That is because the requirement of specific deterrence is generally considered to be greater in the case of a contravener who has shown no contrition or insight into their offending behaviour.

231 As to Mr Mawhinney’s purported co-operation, as ASIC submitted, complying with compulsory notices is not co-operation. Further, the:

appellants did not consent to any orders or declarations being made against them in this proceeding. They did not accept liability at any stage and did not save the community the costs and uncertainty of a trial. Instead, they elected not to defend the liability hearing and then in the penalty hearing and in this appeal contested all of the relief sought by ASIC.

232 For these reasons, ground 28 in the Amended Notice of Appeal must be rejected.

5.9 Failure to consider relevant matters (ground 29)

233 Ground 29 in the Amended Notice of Appeal alleges that, in assessing pecuniary penalty, the primary judge failed to consider a series of relevant matters “established by the evidence”.

234 The first matter is that “the Mayfair Parties had a compliance culture”. The primary judge did not fail to consider this matter. He considered the appellants’ submission that they had a compliance culture at J2 [216] by rejecting it at J2 [244].

235 The second matter is that each of the statements contained in Annexure A to J1 had been “reviewed and approved by the solicitors for the Mayfair Parties”. Again, the primary judge recorded the Mayfair parties’ submissions on that issue at J2 [214]–[216] and ASIC’s submissions at J2 [222]–[224]. At [223], the primary judge recorded ASIC’s submission that:

the authorities make clear, that reliance on legal advice is not a discounting factor of any material weight in respect of penalty: *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 at [309]–[310] (Wilcox, French and Gyles JJ); *Visy Paper Pty Ltd v ACCC* [2005] FCAFC 236; 224 ALR 390 at [49]; *ACCC v Jetstar (No 2)* [2017] FCA 205 at [31]–[32]. In *Consumer Affairs Victoria v Vic Solar Pty Ltd (No 4)* [2021] FCA 449, O’Byrne J at [39] said that “independent legal advice ... is generally considered not to be a mitigating factor of any material weight”.

236 It is apparent from the primary judge’s conclusion at J2 [244] that his Honour gave that factor no material weight in the circumstances of the case. There is no error in doing so.

237 The third matter is that “the solicitors for the Mayfair Parties also approved the security arrangements”. This contention is subsumed into the discussion above about legal advice.

238 The fourth matter is that the “Security Trustee approved the security arrangements”. This is immaterial. The security trustee was not responsible for the marketing of the products.

239 The fifth matter is that “in so far as any security interests were registered late, that was a default by the Security Trustee and was not shown to have caused any harm”. This is immaterial.

240 The sixth matter is that “the freezing of redemptions of M+ Notes and Core Notes in March 2020 was largely caused by the impact on tourism of the coronavirus pandemic, including its impact on tourism assets, and was in accordance with regulatory guidance given” by ASIC. In fact, the primary judge accepted Mr Tracy’s evidence at J2 [59(j)] that “it was too far a stretch” to conclude that the presence of the pandemic would significantly impact the value of these assets. The primary judge also referred to ASIC’s submission at J2 [230] that:

the evidence from the provisional liquidators supported a conclusion that M101 Nominees was insolvent from the outset. Eight reasons for the provisional liquidators’ views are summarised at [101] of the Provisional Liquidators’ Report. ASIC submits that none of those reasons concerned the impact of the COVID-19 pandemic or the effect of orders made by this Court.

241 It is apparent that the primary judge, in accepting the provisional liquidators’ evidence, rejected the appellants’ attribution of blame to the pandemic.

242 The seventh matter is that ASIC’s “enforcement action deprived the Mayfair Parties of the opportunity to recapitalise and maintain the viability of the investment schemes during the pandemic”. It can hardly be said the primary judge did not consider this matter (the primary judge recorded the Mayfair parties’ submission at J2 [219]). Rather, it must be inferred he rejected it in his rejection of Mr Mawhinney’s evidence at J2 [64] which should be quoted in full:

I did not find Mr Mawhinney to be a credible witness. Mr Mawhinney refused to make even the most obvious concessions to the failures of the Mayfair Group of companies to make disclosure to investors of the risks faced by them in investing in the Mayfair Products. Mr Mawhinney sought to rely upon legal advice obtained by the Mayfair Group of companies to justify the failure of the promotional material to explain adequately the risks that investors faced in investing in the Mayfair Products. The impression I obtained from Mr Mawhinney’s demeanour in giving evidence was that Mr Mawhinney was determined to allocate blame for the substantial losses incurred by investors to ASIC for taking enforcement action against Mr Mawhinney and the Mayfair Group of companies. Mr Mawhinney refused to accept that investors did not have first-ranking security over real property assets. Mr Mawhinney refused to accept any responsibility for the substantial losses sustained by investors as a consequence of his and the Mayfair Group of companies investment decisions. Mr Mawhinney was determined to inform the Court why he and the Mayfair Group of companies were not at fault. Mr Mawhinney refused to accept that the investments made by the Mayfair Group of companies were highly speculative and that this fact had not been disclosed in the promotional and marketing material to investors. Mr Mawhinney’s evidence was not honest and truthful.

243 The eighth matter is that ASIC’s “enforcement action exposed the second respondent and related party purchasers to default on outstanding contracts of sale and to the potential consequences of loss of deposits and damages claims for breach of contract, dangers which

Jason Tracy warned against in his first two reports”. This can be rejected on the same basis as the seventh complaint. In any event, it is not a material factor in favour of the appellants.

244 The ninth matter is that “to avoid the possibility of defaulting on outstanding contracts of sale, the second respondent and related party purchasers obtained short-term bridging finance from Naplend Pty Ltd”. The need for the short term loan from Naplend was considered, but was far from a mitigating factor. It was a need driven by the speculative structure of the investment scheme, see: J2 [59(h), (n)], [63(e), (m), (o), (u)], [219]. The idea that the primary judge did not have regard to this is unsustainable.

245 The tenth matter is that ASIC’s:

enforcement action deprived the second respondent and related party purchasers of the opportunity to raise funds to discharge the bridging finance, which then became locked it [sic] in at the default rate of interest of 48per cent per annum, consuming equity in the Core Notes investment scheme and diminishing the value of the securities held by the Security Trustee.

246 This rises no higher than the seventh matter rejected above.

247 The eleventh matter is that “all the investors who gave evidence were “wholesale clients” within the meaning of s 761G of the Corporations Act and most were wealthy and experienced investors”. The primary judge was not bound to accept, and must be inferred not to have accepted, that all investors were wealthy and experienced. Otherwise, the contention that the primary judge did not consider that the investors had to be “wholesale investors” given the liability judgment and the references in J2 [63(a), (j)] and [134] is untenable. In any event, the critical attribute in the present context is investment experience and knowledge, not wealth. Satisfaction of the statutory attribute of being a “wholesale client” is not an indicia of investment experience and knowledge.

248 The twelfth matter is that “investors who gave evidence on behalf of the appellants said they understood the risks of investing in the Mayfair Products”. The primary judge must have had regard to this evidence given his statement at J2 [254] that “[t]here are 281 investors (less those investors who the Defendants tendered affidavits from) that have been likely affected by the contravening conduct of the Defendants”. The fact that some investors understood what they were investing in was not a material mitigating factor.

249 The thirteenth matter is that:

the material which promoted the Mayfair Products made clear the products were only

available for subscription by wholesale investors, contained warnings about the risks of the products, said the issuer was not a bank and that the investment products were not covered by the Financial Claims Scheme (the Federal Government guarantee for bank deposits).

250 The primary judge had regard to the statements in the liability judgment. The primary judge was rightly not satisfied that these statements negated the misrepresentations. As such, the statements could not be a material mitigating factor.

251 The fourteenth matter is that “none of the investors who gave evidence said they had been induced by any of the alleged representations into investing in the Mayfair Products”. This is not to the point. As ASIC said in respect of the investors who gave evidence for the appellants (but which applies to this proposition as well):

It did not negate the primary judge’s findings that the representations were made, or that they were false and misleading, or that investors were likely to have been misled. Nor did it bear upon the nature of the appellants’ conduct or the extent of any losses suffered. It had no relevance to the assessment of penalties.

252 For these reasons, ground 29 in the Amended Notice of Appeal must be rejected.

5.10 Aggravating factors (ground 30)

253 Contrary to ground 30 in the Amended Notice of Appeal, it cannot be inferred that the primary judge treated as aggravating factors: (a) “the appellants’ reliance on legal advice concerning the promotional material for Mayfair Products”, (b) Mr Mawhinney’s lack of remorse, or (c) Mr Mawhinney’s failure to cooperate with ASIC. The primary judge rightly refused to make the findings the appellants sought and then used his findings as a reason not to accept that the asserted facts operated to mitigate the appellants’ culpability.

254 For these reasons, ground 30 in the Amended Notice of Appeal must be rejected.

5.11 Mr Mawhinney’s evidence (grounds 31 to 33)

255 Grounds 31 to 33 in the Amended Notice of Appeal allege that the primary judge erred in: (a) finding that Mr Mawhinney refused in cross-examination to accept that investors did not have first-ranking security over real estate assets, (b) not finding that Mr Mawhinney repeatedly acknowledged that investors did not have first-ranking security over real estate assets, and (c) finding Mr Mawhinney’s evidence was not honest and truthful.

256 The allegations of error are unsustainable. The primary judge did say at J2 [64] that “Mr Mawhinney refused to accept that investors did not have first-ranking security over real property assets”. However, this is a mere slip. The primary judge was grappling with the

inconsistencies in Mr Mawhinney’s evidence: (a) refusing to accept any issue of concern with the fact that third party security was able to be granted over the real property assets held by the unit trusts which could reduce the value of the investors’ security over the units on the basis this was a “calculated risk and a low risk”, and (b) insisting that there were no misrepresentations about the security, and yet also saying the following in this exchange with the primary judge:

Mr Mawhinney, did you think it relevant to tell the investors that insofar as they had security over real property, it was just one property, and what the value of that property was?---Your Honour, it’s a good question. Our objective with the overall project was, with the Napla [Naplend] facility, for this to be a short-term, interim bridging facility to assist us with settling properties. Thereafter, as the project developed and as – no, actually, over time – the assets developed in value. **We had in fact set the structure up since inception to allow for the properties to be mortgaged**, such that over time, if we did seek to bring in place an institutional investor or even multiple institutional investors, that that could take place either at the first mortgage level or, in fact, at the unit trust level where, say, another private equity firm could come in and maybe buy 30 per cent of the units in each unit trust. **So the structure allowed for that and it was by design since inception.**

257 How this could be reconciled with other evidence that Mr Mawhinney gave is not apparent. For example, Mr Mawhinney was involved in these exchanges during cross-examination:

But not having first-ranking security direct over real property exposed the investors to the risk which eventuated that the real property could be used to secure directly third-party loans?---No, I disagree completely.

...

That was a risk that investors faced, wasn’t it, that that could happen? That’s - - -?---There’s many – there’s many risks associated with any investment, but it was a very calculated and managed risk.

...

Just try and focus on my question, Mr Mawhinney: did you think that the prospect that your group of companies would grant direct security over the real estate, thereby diminishing the value of security the investors had over the units, would never happen?---No. no, I disagree. It was a calculated risk and a low risk, at that, as Mr Moore – sorry, Mr Pearce – touched on earlier today. The LVR of the Napla [Naplend] loan was well under 30 per cent, if I recall correctly.

And when you realised you were going to give direct security to Napla [Naplend] over the real estate, thereby devaluing the value of the security of the units, did you disclose that immediately to investors – prospective investors?---There was no requirement to, Mr Moore. The – the assets that secured the noteholders was not necessarily diminished. If the moneys received from Napla [Naplend] was then advanced towards settling further properties, then the security pool would continue to, I guess, swell and increase in size over time. And it was all in - - -

...

You didn't think it relevant to tell investors that that security wasn't over real estate, it was over units in a trust that owned real estate; that that real estate was itself going to be the subject of first-ranking security to someone else. You didn't think it relevant to disclose that to investors?---Our alpha document provided all the required disclosures.

258 The inconsistency and profound implausibility of this evidence speaks for itself.

259 The reference to Mr Mawhinney's demeanour in J2 [64] does not disclose error merely because the hearing occurred over a video-conference. The primary judge was not precluded from taking into account Mr Mawhinney's demeanour in making his assessment at J2 [64]. We refuse the invitation to view a recording of Mr Mawhinney's evidence to assess his demeanour for ourselves. It is obvious from J2 [64] that the focus of the primary judge was on the disturbingly unsatisfactory content of Mr Mawhinney's evidence. The content justified the conclusions. It included, for example: (a) his view that the appellants had complied with all disclosure requirements (contrary to J1), (b) he disclosed that enabling the granting of mortgages over the underlying real estate assets was part of the design of the investments since inception, despite also saying this was a calculated and low risk, and (c) his refusal to accept that there was anything wrong with telling investors that the security was over Australian real estate assets when that was a single property only because "it wasn't required, and our legal advisors did not advise us of having any legal obligation to do so, given that section 708 doesn't require any disclosures to wholesale clients".

260 The adverse credit finding at J2 [64] involved no error.

261 For these reasons, grounds 31 to 33 in the Amended Notice of Appeal must be rejected.

5.12 Penalty manifestly excessive (ground 34)

262 Ground 34 is that the penalties were manifestly excessive.

263 We disagree.

264 First, to the extent that this ground depends on the other alleged errors which have been rejected, it cannot succeed.

265 Second, in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [60] the Full Court of this Court said:

... the Court is not assisted by Optus' citation of penalties imposed in other cases, where the combination of circumstances were different from the present, as if that citation is apt to establish a "range" of penalties appropriate in this case. As Middleton J rightly said in *ACCC v Telstra Corporation Ltd* (2010) 188 FCR 238 at [215]:

It is apparent that there are many difficulties in simply referring to penalties previously imposed for contraventions of legislation in widely differing circumstances or in circumstances where some of the factors are similar but others dissimilar to those of the present proceeding. In each case, the Court must take into account the deterrent effect of the penalty and the fact that the penalties “should reflect the will of Parliament that the commercial standards laid down in the Act must be observed but not be so high as to be oppressive”: see *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR 40-091 at 17,896.

266 In *Volkswagen* at [211] another Full Court made the same point that each penalty case turns on its own facts.

267 *Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd* [2019] FCA 1514; (2019) 138 ACSR 395 and *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)* [2018] FCA 1748 are not comparable cases. In *Gallop* the potential loss was far less ([301]) and the maximum penalty for an individual involved in a contravention was \$360,000 ([279]). In *We Buy Houses* the maximum penalty for the corporation was \$1.1 million per contravention ([37]). The facts bear no similarity to the present case.

268 Third, it is also not the case that the total amount of the penalties ASIC sought but to which the appellants did not agree (\$12 million) discloses that the total imposed by the primary judge (\$30 million) is manifestly excessive and warrants appellate intervention. The High Court explained in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [48] that a “court is *not* bound by the figure suggested by the parties. The court asks “whether their proposal can be accepted as fixing an appropriate amount” and for that purpose the court must satisfy itself that the submitted penalty is appropriate”. The primary judge considered ASIC’s submission, saying at J2 [256]:

I am of the view that the penalties sought by ASIC are insufficient and do not fully recognise the serious nature and the extent of the loss and harm caused by the contravening conduct. The penalties sought by ASIC are not, in my view, sufficiently high to deter repetition of the contravening conduct by the Defendants and any would-be contraveners...

269 The primary judge did not commit any error in so concluding. His Honour was entitled to conclude that ASIC’s suggested penalties were well below the appropriate range having regard to the nature and circumstances of the contraventions.

270 Fourth, the appellants’ contentions of excessive penalties do not confront the reality that the maximum penalty per contravention for a corporation was \$10.5 million: J2 [253]. The

penalties imposed on each appellant do not equal the maximum for a single contravention for any appellant in circumstances where the primary judge had regard to the s 12GBB(5) considerations at J2 [176] and [255], and said at J2 [254] and [255] that: (a) “[t]here are 281 investors (less those investors who the Defendants tendered affidavits from) that have been likely affected by the contravening conduct of the Defendants”, (b) “the likely number of contraventions is very high, but cannot be conclusively established”, and (c) “the deliberate misleading and deceptive conduct, the lack of co-operation in this proceeding, the significant effect that the Defendants’ conduct has had on a number of investors and the Defendants’ complete lack of remorse, wrongdoing and regret... bear upon the level of deterrence required”.

271 Fifth, manifest excessiveness is a conclusion of error based on the penalty imposed as described in *House v The King* at 505, *Reckitt Benckiser* at [55]–[56] and *Volkswagen* at [202]–[213]. Given the maximum penalty and the large but indeterminate number of contraventions, the penalties the primary judge imposed were not manifestly excessive.

272 For these reasons ground 34 in the Amended Notice of Appeal must be rejected.

5.13 Adverse publicity order (ground 35)

273 Ground 35 in the Amended Notice of Appeal, which contends that the adverse publicity orders imposed by the primary judge should be set aside, may readily be rejected. The adverse publicity notices had utility. The primary judge dealt with this issue at J2 [267]–[269]. The primary judge was right to conclude at J2 [269] that:

adverse publicity orders in the form proposed by ASIC are appropriate to protect the public and inform the public of the Defendants’ contravening conduct as found in the Liability Judgment and in this Penalty Judgment. The adverse publicity orders are, in my view, necessary in order to better inform the public of the Defendants’ contravening conduct which Mr Mawhinney and the Defendants have sought to downplay in public statements and on the Mayfair 101 website.

274 In respect of the Mayfair 101 website downplaying the contraventions see J2 [202].

5.14 Injunction (ground 36)

275 Ground 36 in the Amended Notice of Appeal relates to the injunction the primary judge made on 21 January 2022. The injunction restrains the appellants from using any of certain phrases in any advertising, promotion or marketing by those parties. The phrases are: (a) “bank deposit”, with the exception of statements to the effect that the products are not, and are not comparable to, a bank deposit, (b) “certainty”, with the exception of statements to the effect that the products lack certainty, (c) “fixed term”, with the exception of statements to the effect

that the products are not, and are not comparable to, fixed term investments, (d) “term deposit”, with the exception of statements to the effect that the products are not, and are not comparable to, a term deposit, and (e) “term investment”, with the exception of statements to the effect that the products are not, and are not comparable, to a term investment.

276 At J2 [266] the primary judge said:

I am satisfied on the evidence filed in this proceeding, both in the liability phase and in the penalty phase, that there is a utility and purpose in restraining the First, Second and Fourth Defendants from using the prohibited phrases in advertising, promotion or marketing undertaken by the First, Second and Fourth Defendants including on their website or through any online search platform advertisements. I am satisfied that such injunctions are necessary to protect the public from the First, Second and Fourth Defendants engaging in future contravening conduct.

277 The breadth of the injunction is problematic in that it does not relate to any particular product and does not confine the use of the phrases to the description of a product. The injunction refers to “the products” without defining them. The injunction also, for example, prevents the use of the word “certainty”, with the exception of statements to the effect that the products lack certainty. But the word “certainty” and words to that effect might properly be used to describe other aspects of products which have nothing to do with the payment of interest and repayment of principal.

278 Under s 12GD(1), if the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of a provision of Div 2 of Pt 2 of the ASIC Act (or other defined conduct of an ancillary or accessorial kind), the Court may grant an injunction in such terms as the Court determines to be appropriate. That language mirrors the terms of s 80(1) of the CCA. The legislative history of that latter provision makes clear that the terms of an injunction need not be confined to enjoining contravening conduct: *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCAFC 77; (2020) 277 FCR 49 at [343] per Middleton and O’Bryan JJ. In *ICI Australia Operations Pty Ltd v Trade Practices Commission* [1992] FCA 707; (1992) 38 FCR 248, Lockhart J described the power under s 80(1) as giving the Court capacity to formulate the appropriate remedy to suit the needs of the case (at 258), while Gummow J observed that the terms of an injunction would not be appropriate if the conduct enjoined does not have the relationship required by s 80 with a contravention of the Act (at 267). Subsequently, in *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* [1997] FCA 871; (1997) 78 FCR 197, Merkel J said (at 202):

The width of the power conferred by s 80 and its public interest character obviously give the Court great amplitude in determining appropriate injunctive orders in a particular case. However there are limitations on the Court's power under the section. Confinement of the power by reference to the scope and purpose of the TPA, and in particular s 80, is one limitation on the power. However, there are at least two further limitations. The power to make orders under s 80 is only enlivened in a proceeding which alleges that there has been a contravention of a provision of Pt IV, IVA or V of the TPA. As was said by Gummow J in *ICI* at 267, the terms of an injunction granted under s 80 must, on their face, operate upon a range of conduct which has "the relationship required by s 80 with contravention of the Act". Irrespective of whether the injunction is sought or granted under s 80(1) or s 80(1AA), there must be a nexus between the conduct alleged or found to constitute the relevant contraventions and the injunctions granted.

279 The alternative sources of power available to the primary judge in ss 1101B and 1324 of the Corporations Act are subject to similar considerations (see the discussion in the Mawhinney judgment at [155]–[164], and particularly at [158]).

280 In the present case, we consider that the breadth of the injunction is such that it cannot be said to have a sufficient connection with contraventions of the ASIC Act. The injunction restrains the use of specific words untethered to any particular products or context, and therefore without a sufficient nexus to contravening conduct.

281 We have considered whether the injunction could be reframed to avoid these kinds of problems. We are not persuaded it can or should be done in the context of this appeal on the basis of the information available to us. This is not because the injunction penalises one appellant for the contraventions of others, as all were found to have contravened other than in respect of the Security Representations. Nor is it so much that the injunction lacks utility as proposed in ground 36. The problem is that the injunction is so broad that it exposes an error of principle in the primary judge having made it in those terms.

282 Given the challenge made to the injunction and the supporting submissions which focus on the breadth of its terms, we consider that appellate intervention is warranted to this limited extent to set aside the injunction.

6. CONCLUSIONS

283 For the reasons given, the injunction should be set aside, but the appeal otherwise dismissed. The appellants should pay ASIC's costs of the appeal.

I certify that the preceding two hundred and eighty-three (283) numbered paragraphs are a true copy of the Reasons for Judgment of the

Honourable Justices Jagot, O'Bryan
and Cheeseman.

Associate:

A handwritten signature in cursive script, appearing to read 'Jagot.', positioned to the right of the word 'Associate:'.

Dated: 10 October 2022