

FEDERAL COURT OF AUSTRALIA

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

File number: VID 407 of 2015

Judge: **BROMWICH J**

Date of judgment: 17 October 2016

Catchwords: **CORPORATIONS** – banning orders and injunctions – hearing on appropriateness of orders and declarations proposed by plaintiff and personal defendants Mr Jamie McIntyre and Mr Dennis McIntyre – where personal defendants responsible for five unregistered managed investment schemes – where investor money mostly not recovered or recoverable – where personal defendants had history of financial mismanagement – relief agreed to entirely appropriate in the circumstances of financial incompetence of the personal defendants – disqualification order imposed banning both personal defendants from managing corporations for 10 years – injunction for 10 years imposed on both personal defendants prohibiting either of them from carrying on a business related to, concerning or directed to financial products or financial services, providing financial product advice, dealing in financial products or in any way holding themselves out as doing any of those things – any breach of 10-year disqualification/banning orders or 10-year injunctions a serious contempt of court which may warrant imprisonment

Legislation: *Corporations Act 2001* (Cth), ss 601ED, 601ED(1), 601ED(5), 761A, 911A, 911A(1), 911B(1), 1324(3), 1324(8)
Evidence Act 1995 (Cth), s 191
Federal Court of Australia Act 1976 (Cth), s 21

Cases cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564
Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378
Australian Securities and Investments Commission v Adler [2002] NSWSC 483; (2002) 42 ACSR 80
Australian Securities and Investments Commission v Chase Capital Management Pty Ltd [2001] WASC 27; (2001) 36 ACSR 778

Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd [2001] WASC 339
Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd [2016] FCA 292
Australian Securities and Investments Commission v Ostrava Equities Pty Ltd [2016] FCA 1064
Bank of Kuwait and the Middle East v Ship MV "Mawashi Al Gasseem" (No 2) [2007] FCA 815; (2007) 240 ALR 120
Capelli v Shepard [2010] VSCA 2; (2010) 29 VR 242
Forster v Jododex Australia Pty Limited (1972) 127 CLR 421
National Australia Bank Ltd v Norman [2009] FCAFC 152; (2009) 180 FCR 243
Re GDK Financial Solutions Pty Ltd; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd [2006] FCA 1415; (2006) 236 ALR 699
Registrar of Aboriginal and Torres Strait Islander Corporations v Murray [2015] FCA 346
Rural Press Limited v Australian Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53
Warramunda Village Inc v Pryde [2001] FCA 61; (2001) 105 FCR 437

Date of hearing: 17 October 2016

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 56

Counsel for the Plaintiff: Mr A Young QC with Mr S Hibble

Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the First and Second Defendants: Mr J Castelan

Solicitor for the First and Second Defendants: Parkston Lawyers

Solicitor for the Third,
Fourth, Fifth, Sixth, Seventh,
Eighth, Ninth and Tenth
Defendants:

HWL Ebsworth Lawyers

ORDERS

VID 407 of 2015

IN THE MATTER OF PROPERTY TUITION PTY LTD (ACN 129 421 281)

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

AND: **JAMIE NEVILLE MCINTYRE**
First Defendant

DENNIS HUGH MCINTYRE
Second Defendant

ARCHERY ROAD PTY LTD (ACN 162 921 735) (and others
named in the Schedule)
Third Defendant

JUDGE: **BROMWICH J**

DATE OF ORDER: **17 OCTOBER 2016**

Upon the basis of undisputed matters contained in a Statement of Agreed Facts, dated 12 October 2016, and Joint Submissions in writing, dated 14 October 2016,

THE COURT ORDERS AND DECLARES THAT:

Disqualification orders and financial services injunctions

1. Jamie Neville McIntyre is disqualified pursuant to sections 206D and 206E of the *Corporations Act 2001* (Cth) (*Corporations Act*) from managing corporations for a period of 10 years.
2. Dennis Hugh McIntyre is disqualified pursuant to sections 206D and 206E of the *Corporations Act* from managing corporations for a period of 10 years.
3. Jamie Neville McIntyre is restrained for a period of 10 years whether by himself, his servants, agents and employees or otherwise, from:
 - (a) carrying on a business related to, concerning or directed to financial products or financial services within the meaning of s 761A of the *Corporations Act*;
 - (b) providing any of the following services:

- (i) providing financial product advice within the meaning of s 761A of the *Corporations Act*;
 - (ii) dealing in financial products within the meaning of s 761A of the *Corporations Act*;
 - (c) in any way holding himself out as doing the things in paragraphs 3(a) or 3(b) above.
4. Dennis Hugh McIntyre is restrained for a period of 10 years whether by himself, his servants, agents and employees or otherwise, from:
- (a) carrying on a business related to, concerning or directed to financial products or financial services within the meaning of s 761A of the *Corporations Act*;
 - (b) providing any of the following services:
 - (i) providing financial product advice within the meaning of s 761A of the *Corporations Act*;
 - (ii) dealing in financial products within the meaning of s 761A of the *Corporations Act*;
 - (c) in any way holding himself out as doing the things in paragraphs 4(a) or 4(b) above.

Unregistered managed investment scheme orders and declarations

In these orders and declarations the following terms are defined:

21st Century Group involved:

- Archery Road Pty Ltd (Third Defendant);
- Secret Valley Estate Pty Ltd (Fourth Defendant);
- Kingsway South Holdings Pty Ltd (Fifth Defendant);
- Bendigo Vineyard Estate Pty Ltd (Sixth Defendant);
- Melbourne Tarniet Estate Pty Ltd (Seventh Defendant);
- Property Tuition Pty Ltd (Eighth Defendant);
- Education Holdings Pty Ltd (Ninth Defendant); and
- Sourcing Property Pty Ltd (Tenth Defendant).

Bendigo Vineyard Estate and Resort scheme involved:

- land located at 51 Andrews Road, Bendigo, Victoria 3551;
- “Bendigo Vineyard Estate and Resort Lot Reservation Agreement” (and attachments);
- Bendigo Vineyard Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd (as the scheme promoters/operators); and
- investors therein.

Botanica scheme involved:

- land located at 805 Archer Road, Kialla, Victoria 3631;
- “Botanica Lot Reservation Agreement” (and attachments);
- Archery Road Pty Ltd, Property Tuition Pty Ltd, Education Holdings Pty Ltd (as the scheme promoters/operators); and
- investors therein.

Melbourne Grove Estate scheme involved:

- land located at 1491 Dohertys Road, Mount Cottrell, Victoria 3024;
- “Melbourne Grove Lot Reservation Agreement” (and attachments);
- Melbourne Tarniet Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd (as the scheme promoters/operators); and
- investors therein.

Oak Valley Lakes Estate and Resort scheme involved:

- land located at 124 Booth Road, Brookhill, Townsville Queensland 4816;
- “Oak Valley Lakes Lot Reservation Agreement” (and attachments);
- “Oak Valley Lakes Sourcing Property Agreement”;
- Kingsway South Holdings Pty Ltd, Sourcing Property Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd (as the scheme promoters/operators); and
- investors therein.

Secret Valley Estate scheme involved:

- land located at 1955 Old Sydney Road, Bylands, Victoria 3762;
- “Secret Valley Estate Lot Reservation Agreement” (and attachments);
- Secret Valley Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd; and
- investors therein.

5. The Court notes the following matters:

- (a) On 7 October 2015 the Court appointed Simon Alexander Wallace-Smith and Robert Scott Woods, of Deloitte, 555 Bourke Street, Melbourne, Victoria as joint and several provisional liquidators to each of the following Defendants (**Corporate Defendants**) pursuant to s 472(2) of the *Corporations Act*:
- (i) Archery Road Pty Ltd (ACN 162 921 735) - Third Defendant;
 - (ii) Secret Valley Estate Pty Ltd (ACN 602 817 532) - Fourth Defendant;
 - (iii) Kingsway South Holdings Pty Ltd (ACN 159 230 976) - Fifth Defendant;
 - (iv) Bendigo Vineyard Estate Pty Ltd (ACN 600 088 211) - Sixth Defendant;
 - (v) Melbourne Tarniet Estate Pty Ltd (ACN 603 945 393) - Seventh Defendant;
 - (vi) Property Tuition Pty Ltd (ACN 129 421 281) - Eighth Defendant;
 - (vii) Education Holdings Pty Ltd (ACN 129 551 917) - Ninth Defendant;
and
 - (viii) Sourcing Property Pty Ltd (ACN 602 474 779) - Tenth Defendant.
- (b) On 15 December 2015 Reports prepared and filed by the provisional liquidators with the Court on 15 December 2015 indicated that there was unlikely to be any property belonging to the schemes referred to above.
- (c) On 10 March 2016 the Court ordered that each of the Corporate Defendants be wound up by the Court pursuant to s 461(1)(k) of the *Corporations Act*.
- (d) On 10 March 2016 the Court appointed Simon Alexander Wallace-Smith and Robert Scott Woods, of Deloitte, 555 Bourke Street, Melbourne, Victoria as

joint and several liquidators to each of the Corporate Defendants (**Corporate Liquidators**).

- (e) The definitions in these orders of each of the following schemes does not in itself create any assets or liabilities of the schemes:
- (i) Bendigo Vineyard Estate and Resort scheme;
 - (ii) Botanica scheme;
 - (iii) Melbourne Grove Estate scheme;
 - (iv) Oak Valley Lakes Estate and Resort scheme; and
 - (v) Secret Valley Estate scheme.
6. The Court declares that the Bendigo Vineyard Estate and Resort scheme promoted and operated by Bendigo Vineyard Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd from August 2014 to 21 August 2015 was an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act*.
7. The Court declares that the Botanica scheme promoted and operated by Archery Road Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd from 28 November 2014 to 21 August 2015 was an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act*.
8. The Court declares that the Melbourne Grove Estate scheme promoted and operated by Melbourne Tarniet Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd from 16 March 2015 to 21 August 2015 was an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act*.
9. The Court declares that the Oak Valley Lakes Estate and Resort scheme promoted and operated by Kingsway South Holdings Pty Ltd, Sourcing Property Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd from November 2014 to 21 August 2015 was an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act*.
10. The Court declares that the Secret Valley Estate scheme promoted and operated by Secret Valley Estate Pty Ltd, Property Tuition Pty Ltd and Education Holdings Pty Ltd from December 2014 to 21 August 2015 was an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act*.

Unregistered managed investment scheme winding up orders

11. Pursuant to s 601EE of the *Corporations Act*, each of the schemes referred to in paragraphs 6 to 10 be wound up.
12. That Simon Alexander Wallace-Smith and Robert Scott Woods of Deloitte, 555 Bourke Street, Melbourne, Victoria, be appointed as joint and several liquidators for the purposes of winding up each of the schemes referred to in paragraphs 6 to 10 (**Scheme Liquidators**).
13. Pursuant to s 601EE(2) of the *Corporations Act*, and subject to any further order of the Court, the Scheme Liquidators have the powers set out in ss 477(1) and 477(2) of the *Corporations Act*.
14. For the avoidance of doubt, nothing in these orders invalidates any steps already taken in the liquidation of any of the Corporate Defendants.
15. Apart from their statutory responsibilities, the liquidators of the schemes are not liable to incur any expense in relation to the winding up of the schemes unless there is sufficient available property.
16. The Scheme Liquidators have liberty to apply.

Financial services declarations

17. The Court declares that the options in the Bendigo Vineyard Estate and Resort scheme, as set out in the “Bendigo Vineyard Estate and Resort Lot Reservation Agreement” (and attachments), issued between August 2014 and 21 August 2015 were financial products pursuant to s 763A of the *Corporations Act*.
18. The Court declares that the options in the Botanica scheme, as set out in the “Botanica Lot Reservation Agreement” (and attachments), issued between 28 November 2014 and 21 August 2015 were financial products pursuant to s 763A of the *Corporations Act*.
19. The Court declares that the options in the Melbourne Grove scheme, as set out in the “Melbourne Grove Lot Reservation Agreement” (and attachments), issued between 16 March 2015 and 21 August 2015 were financial products pursuant to s 763A of the *Corporations Act*.
20. The Court declares that the options in the Oak Valley Lakes Estate and Resort scheme, as set out in the:

- (a) “Oak Valley Lakes Lot Reservation Agreement” (and attachments); and
- (b) “Oak Valley Lakes Sourcing Property Agreement”

issued between November 2014 and 21 August 2015 were financial products pursuant to s 763A of the *Corporations Act*.

21. The Court declares that the options in the Secret Valley Estate scheme, as set out in the “Secret Valley Estate Lot Reservation Agreement” (and attachments), issued between December 2014 and 21 August 2015 were financial products pursuant to s 763A of the *Corporations Act*.
22. The Court declares that between August 2014 and 21 August 2015 Bendigo Vineyard Estate Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:
 - (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Bendigo Vineyard Estate and Resort scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Bendigo Vineyard Estate and Resort scheme; and
 - (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product being options in the Bendigo Vineyard Estate and Resort scheme and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group’s computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;
 - (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);
 - (iv) articles published by companies in the 21st Century Group;

- (v) social media, including on a Facebook page called “21st Century Property” which was operated by Property Tuition Pty Ltd (Eighth Defendant);
 - (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
 - (vii) provision of a brochure entitled “Bendigo Vineyard Estate and Resort Due Diligence Kit” to prospective investors;
 - (viii) provision of a brochure entitled “Bendigo Vineyard Estate and Resort” to prospective investors; and
 - (ix) provision of a price list for the lots in the “Bendigo Vineyard Estate Concept Plan” to prospective investors.
23. The Court declares that between 28 November 2014 and 21 August 2015 Archery Road Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:
- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Botanica scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Botanica scheme; and
 - (b) provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product being options in the Botanica scheme and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group’s computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;
 - (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);

- (iv) articles published by companies in the 21st Century Group;
 - (v) social media, including on a Facebook page called “21st Century Property” which was operated by Property Tuition Pty Ltd (Eighth Defendant);
 - (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
 - (vii) provision of a brochure entitled “Shepparton Botanica Estate Due Diligence Kit” to prospective investors;
 - (viii) provision of a brochure entitled “Botanica Shepparton, Victoria, Discover How to Buy Without Loans” to prospective investors; and
 - (ix) provision of a price list for the lots in the “Botanica Concept Plan” to prospective investors.
24. The Court declares that between 16 March 2015 and 21 August 2015 Melbourne Tarniet Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:
- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Melbourne Grove scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Melbourne Grove scheme; and
 - (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product being options in the Melbourne Grove scheme and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group’s computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;

- (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);
 - (iv) articles published by companies in the 21st Century Group;
 - (v) social media, including on a Facebook page called “21st Century Property” which was operated by Property Tuition Pty Ltd (Eighth Defendant);
 - (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
 - (vii) provision of a brochure entitled “Melbourne Grove Due Diligence Kit” to prospective investors; and
 - (viii) provision of a price list for the lots in the “Melbourne Grove Concept Plan” to prospective investors.
25. The Court declares that between November 2014 and 21 August 2015 Kingsway South Holdings Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:
- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Oak Valley Lakes Estate and Resort scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Oak Valley Lakes Estate and Resort scheme; and
 - (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product being options in the Oak Valley Lakes Estate and Resort scheme and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group’s computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;

- (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);
- (iv) articles published by companies in the 21st Century Group;
- (v) social media, including on a Facebook page called “21st Century Property” which was operated by Property Tuition Pty Ltd (Eighth Defendant);
- (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
- (vii) provision of a brochure entitled “Townsville Oak Valley Lakes Estate Due Diligence Kit” to prospective investors;
- (viii) provision of a brochure entitled “Oak Valley Lakes Estate and Resort” to prospective investors;
- (ix) provision of an “Oak Valley Lakes Sourcing Fee Form” to prospective investors; and
- (x) provision of a price list for the lots in the “Oak Valley Lakes Concept Plan” to prospective investors.

26. The Court declares that between November 2014 and 21 August 2015 Sourcing Property Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:

- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Oak Valley Lakes Estate and Resort scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Oak Valley Lakes Estate and Resort scheme; and
- (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product being options in the Oak Valley Lakes Estate and Resort scheme and did so by making recommendations and stating opinions through:

- (i) contacting people on the 21st Century Group's computer database;
- (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;
- (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);
- (iv) articles published by companies in the 21st Century Group;
- (v) social media, including on a Facebook page called "21st Century Property" which was operated by Property Tuition Pty Ltd (Eighth Defendant);
- (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
- (vii) provision of a brochure entitled "Townsville Oak Valley Lakes Estate Due Diligence Kit" to prospective investors;
- (viii) provision of a brochure entitled "Oak Valley Lakes Estate and Resort" to prospective investors;
- (ix) provision of an "Oak Valley Lakes Sourcing Fee Form" to prospective investors; and
- (x) provision of a price list for the lots in the "Oak Valley Lakes Concept Plan" to prospective investors.

27. The Court declares that between December 2014 and 21 August 2015 Secret Valley Estate Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:

- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the Secret Valley Estate scheme; and/or
 - (ii) arranging for a person to issue financial products, being the options in the Secret Valley Estate scheme; and
- (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a

decision to acquire, vary or dispose of a financial product being options in the Secret Valley Estate scheme and did so by making recommendations and stating opinions through:

- (i) contacting people on the 21st Century Group's computer database;
- (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;
- (iii) seminars and events held by Property Tuition Pty Ltd (Eighth Defendant) and Education Holdings Pty Ltd (Ninth Defendant);
- (iv) articles published by companies in the 21st Century Group;
- (v) social media, including on a Facebook page called "21st Century Property" which was operated by Property Tuition Pty Ltd (Eighth Defendant);
- (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
- (vii) provision of a brochure entitled "Wallan Secret Valley Estate Due Diligence Kit" to prospective investors; and
- (viii) provision of a price list for the lots in the "Secret Valley Estate Concept Plan" to prospective investors.

28. The Court declares that between August 2014 and 21 August 2015 Property Tuition Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:

- (a) dealing in financial products by:
 - (i) issuing financial products, being the options in the:
 1. Bendigo Vineyard Estate & Resort scheme;
 2. Botanica scheme;
 3. Melbourne Grove scheme;
 4. Oak Valley Lakes Estate and Resort scheme; and/or
 5. Secret Valley Estate scheme; and/or

- (ii) arranging for a person to issue financial products, being the options in the:
 - 1. Bendigo Vineyard Estate & Resort scheme;
 - 2. Botanica scheme;
 - 3. Melbourne Grove scheme;
 - 4. Oak Valley Lakes Estate and Resort scheme; and/or
 - 5. Secret Valley Estate scheme; and

- (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of financial products being options in the:
 - (i) Bendigo Vineyard Estate & Resort scheme;
 - (ii) Botanica scheme;
 - (iii) Melbourne Grove scheme;
 - (iv) Oak Valley Lakes Estate and Resort scheme; and
 - (v) Secret Valley Estate scheme;and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group's computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;
 - (iii) seminars and events held by it and Education Holdings Pty Ltd (Ninth Defendant);
 - (iv) articles published by companies in the 21st Century Group;
 - (v) social media, including on a Facebook page called "21st Century Property" which was operated by it;
 - (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
 - (vii) provision of a brochure entitled "Bendigo Vineyard Estate & Resort Due Diligence Kit" to prospective investors;

- (viii) provision of a brochure entitled “Bendigo Vineyard Estate & Resort” to prospective investors;
- (ix) provision of a price list for the lots in the “Bendigo Vineyard Estate Concept Plan” to prospective investors;
- (x) provision of a brochure entitled “Shepparton Botanica Estate Due Diligence Kit” to prospective investors;
- (xi) provision of a brochure entitled “Botanica Shepparton, Victoria, Discover How to Buy Without Loans” to prospective investors;
- (xii) provision of a price list for the lots in the “Botanica Concept Plan” to prospective investors;
- (xiii) provision of a brochure entitled “Melbourne Grove Due Diligence Kit” to prospective investors;
- (xiv) provision of a price list for the lots in the “Melbourne Grove Concept Plan” to prospective investors;
- (xv) provision of a brochure entitled “Townsville Oak Valley Lakes Estate Due Diligence Kit” to prospective investors;
- (xvi) provision of a brochure entitled “Oak Valley Lakes Estate and Resort” to prospective investors;
- (xvii) provision of an “Oak Valley Lakes Sourcing Fee Form” to prospective investors;
- (xviii) provision of a price list for the lots in the “Oak Valley Lakes Concept Plan” to prospective investors;
- (xix) provision of a brochure entitled “Wallan Secret Valley Estate Due Diligence Kit” to prospective investors; and
- (xx) provision of a price list for the lots in the “Secret Valley Estate Concept Plan” to prospective investors.

29. The Court declares that between August 2014 and 21 August 2015 Education Holdings Pty Ltd contravened s 911A(1) of the *Corporations Act* in that it carried on a financial services business without holding an Australian financial services licence and without being exempt from holding an Australian financial services licence by:

- (a) dealing in financial products by:

- (i) issuing financial products, being the options in the:
 - 1. Bendigo Vineyard Estate & Resort scheme;
 - 2. Botanica scheme;
 - 3. Melbourne Grove scheme;
 - 4. Oak Valley Lakes Estate and Resort scheme; and/or
 - 5. Secret Valley Estate scheme; and/or
- (ii) arranging for a person to issue financial products, being the options in the:
 - 1. Bendigo Vineyard Estate & Resort scheme;
 - 2. Botanica scheme;
 - 3. Melbourne Grove scheme;
 - 4. Oak Valley Lakes Estate and Resort scheme; and/or
 - 5. Secret Valley Estate scheme; and
- (b) the provision of financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of financial products being options in the:
 - (i) Bendigo Vineyard Estate & Resort scheme;
 - (ii) Botanica scheme;
 - (iii) Melbourne Grove scheme;
 - (iv) Oak Valley Lakes Estate and Resort scheme; and
 - (v) Secret Valley Estate scheme;and did so by making recommendations and stating opinions through:
 - (i) contacting people on the 21st Century Group's computer database;
 - (ii) websites belonging to the 21st Century Group, including www.landbanking.com.au;

- (iii) seminars and events held by it and Property Tuition Pty Ltd (Eighth Defendant);
- (iv) articles published by companies in the 21st Century Group;
- (v) social media, including on a Facebook page called “21st Century Property” which was operated by Property Tuition Pty Ltd (Eighth Defendant);
- (vi) direct contact (in person or by telephone) with prospective investors by employees or agents of the 21st Century Group;
- (vii) provision of a brochure entitled “Bendigo Vineyard Estate & Resort Due Diligence Kit” to prospective investors;
- (viii) provision of a brochure entitled “Bendigo Vineyard Estate & Resort” to prospective investors;
- (ix) provision of a price list for the lots in the “Bendigo Vineyard Estate Concept Plan” to prospective investors;
- (x) provision of a brochure entitled “Shepparton Botanica Estate Due Diligence Kit” to prospective investors;
- (xi) provision of a brochure entitled “Botanica Shepparton, Victoria, Discover How to Buy Without Loans” to prospective investors;
- (xii) provision of a price list for the lots in the “Botanica Concept Plan” to prospective investors;
- (xiii) provision of a brochure entitled “Melbourne Grove Due Diligence Kit” to prospective investors;
- (xiv) provision of a price list for the lots in the “Melbourne Grove Concept Plan” to prospective investors;
- (xv) provision of a brochure entitled “Townsville Oak Valley Lakes Estate Due Diligence Kit” to prospective investors;
- (xvi) provision of a brochure entitled “Oak Valley Lakes Estate and Resort” to prospective investors;
- (xvii) provision of an “Oak Valley Lakes Sourcing Fee Form” to prospective investors;

- (xviii) provision of a price list for the lots in the “Oak Valley Lakes Concept Plan” to prospective investors;
- (xix) provision of a brochure entitled “Wallan Secret Valley Estate Due Diligence Kit” to prospective investors; and
- (xx) provision of a price list for the lots in the “Secret Valley Estate Concept Plan” to prospective investors.

Costs orders

- 30. The costs orders in order 2 of the orders made on 8 September 2015 and order 4 of the orders made on 10 March 2016 be vacated.
- 31. Jamie Neville McIntyre and Dennis Hugh McIntyre pay the Plaintiff’s costs of the proceeding fixed in the sum of \$50,000.

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

REASONS FOR JUDGMENT

(Revised from transcript)

BROMWICH J:

Introduction

- 1 At the hearing of this matter on 17 October 2016 on the appropriateness of the agreed declarations and orders proposed by the parties, I made the orders attached to these reasons and gave ex tempore reasons which have been revised from the transcript and appear below.
- 2 On 6 August 2015, the plaintiff, the Australian Securities and Investments Commission (ASIC) moved this Court for and obtained ex parte orders dispensing with the service requirements that applied to the initiating process in order to accelerate bringing these proceedings. Ancillary orders were made at the same time for the surrender of the passports of the two natural person defendants, Jamie Neville McIntyre and Dennis Hugh McIntyre. The other eight defendants are companies of which the first defendant, Mr Jamie McIntyre, was a shadow director and the second defendant, Mr Dennis McIntyre, was a formally appointed director.
- 3 These proceedings concern five different managed investment schemes which were required to be registered under s 601ED of the *Corporations Act 2001* (Cth) but were not. The five illegal managed investment schemes were operated by Mr Jamie McIntyre and Mr Dennis McIntyre through various of the eight corporate defendants. Investor funds of almost \$7 million have been lost and very little is ever likely to be returned. On 7 October 2015, this Court ordered the appointment of Simon Wallace-Smith and Robert Woods from Deloitte as joint and several **provisional liquidators** of the eight corporate defendants.
- 4 Each of those companies was ordered to be wound up by this Court on 10 March 2016 on the recommendation of the provisional liquidators. By a further amended originating process filed on 15 March 2016, ASIC applied, inter alia:
- (1) to have the five unregistered managed investment schemes wound up;
 - (2) for liquidators to be appointed to supervise the winding up;
 - (3) for declaratory relief in relation to the conduct of the companies associated with those schemes;

- (4) for orders banning Mr Jamie McIntyre and Mr Dennis McIntyre from managing corporations;
- (5) for orders that Mr Jamie McIntyre and Mr Dennis McIntyre be permanently restrained from operating a financial services business; and
- (6) for costs.

Interlocutory relief was also sought and obtained to bring the operation of the five schemes to an immediate halt.

5 The matter was originally set down for a contested hearing for three days commencing on 17 October 2016. However, following mediation in late September 2016, Mr Jamie McIntyre and Mr Dennis McIntyre effectively capitulated in the face of what seems to have been the inevitable prospect of success by ASIC. Accordingly, the matter was listed for the purposes of satisfying the Court that the relief agreed to between each of them and ASIC was necessary and appropriate.

6 For the reasons that follow, I am so satisfied and with some formal adjustments will make the orders and declarations agreed upon.

7 The eight corporate defendants have not formally appeared and have not opposed any of the relief sought. To the contrary, the provisional liquidators have made suggestions as to variations to the formal orders that should be made in relation to appointing them to supervise the winding up of the five schemes.

8 The relief hearing proceeded upon the basis of the tender of a statement of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth) signed on behalf of ASIC and on behalf of Mr Jamie McIntyre and Mr Dennis McIntyre. Also tendered by consent was a 15 December 2015 report by the provisional liquidators. The only written submissions before the Court were joint submissions made on behalf of ASIC and on behalf of Mr Jamie McIntyre and Mr Dennis McIntyre. Mr Anthony Young QC appeared for ASIC and supplemented the written submissions with concise and helpful oral submissions. There were no further oral submissions made on behalf of Mr Jamie McIntyre and Mr Dennis McIntyre.

Relief sought

9 As already indicated, but for completeness, ASIC seeks the following relief, which is agreed to by Mr Jamie McIntyre and Mr Dennis McIntyre and not opposed by the liquidators of the eight corporate defendants:

- (1) banning orders disqualifying Mr Jamie McIntyre and Mr Dennis McIntyre from managing corporations for 10 years;
- (2) injunctions forbidding Mr Jamie McIntyre and Mr Dennis McIntyre from directly or indirectly carrying on a business related to, concerning or directed to financial products or services such as those described in s 761A of the *Corporations Act*;
- (3) declarations that each of the five schemes were unregistered managed investment schemes;
- (4) orders that the five schemes be wound up and that the liquidators of the eight corporate defendants also be appointed as liquidators of those schemes, together with related orders as to the powers granted to achieve that outcome;
- (5) declarations that the options in each of the schemes were financial products pursuant to s 763A of the *Corporations Act*;
- (6) declarations that various of the corporate defendants contravened s 911A(1) of the *Corporations Act* by reason of carrying on a financial services business without an Australian financial services licence or exemption from having such a licence, by dealing in financial products and providing financial advice by means such as those already referred to; and
- (7) finally, vacating prior costs orders and ordering Mr Jamie McIntyre and Mr Dennis McIntyre to pay ASIC's costs fixed in the sum of \$50,000.

10 I give below the reasons about the appropriateness and necessity of the relief sought, as agreed by the parties.

Land banking schemes as managed investment schemes

11 Chapter 5C of the *Corporations Act* regulates managed investment schemes. Section 601ED(1) provides as follows:

Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:

- (a) it has more than 20 members; or

- (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
- (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.

12 Section 601ED(5) provides as follows:

A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

13 In *National Australia Bank Ltd v Norman* [2009] FCAFC 152; (2009) 180 FCR 243, Gilmour J at 274-5 [118]-[129] summarised this regime, referring to prior authority. In further summary, what is required is that there is a coherent program or plan of action or the like by which funds are pooled in furtherance of a common enterprise. That is the characteristic of a scheme applying ordinary concepts. The schemes detailed below clearly meet that description. Accordingly, it is clear that each of the five schemes was required to be registered by s 601ED(1) of the *Corporations Act* and a failure to do so was a contravention of s 601ED(5).

Overview of present and past contraventions

14 The five managed investment schemes all provided what are known as land banks, by which investors provide the funding for the sale of land and its development and then share in the profits after sale. The schemes were as follows:

	Scheme Name	Approximate Commencement Date	Moneys Invested
(1)	Bendigo Vineyard Estate project	August 2014	\$3,025,805
(2)	Oak Valley Lakes Estate and Resort	November 2014	\$703,697
(3)	Botanica	28 November 2014	\$372,175
(4)	Secret Valley Estate project	December 2014	\$2,429,515
(5)	Melbourne Grove Estate	16 March 2015	\$127,000
		Total	\$6,658,192

15 The detail of how the schemes operated can be illustrated by reference to the first in time, the Bendigo Vineyard Estate project. Since at least August 2014 that project was promoted/operated by the sixth defendant, Bendigo Vineyard Estate Pty Ltd, together with the eighth and ninth corporate defendants, to members of the public under a program or plan

of action known as land banking. Bendigo Vineyard Estate Pty Ltd acquired a property at 51 Andrews Road, Bendigo, Victoria. A concept plan, being an unregistered plan of subdivision, was prepared for that land which divided it into 638 proposed residential lots of which a maximum of 50%, that is 319 lots, were to be sold to investors prior to that plan being approved by the City of Greater Bendigo Council.

16 Investors would be offered the opportunity to purchase an option over a specified lot (being a proposed land parcel on the plan) at an agreed price which gave them the right to purchase that nominated lot once the plan was registered. The option would be for a period of 20 years, followed by a further extension of five years, if necessary. Bendigo Vineyard Estate Pty Ltd was to develop the land, including doing all things necessary to have it rezoned to residential land, registering the concept plan and meeting all the costs of doing this. The option holders would ostensibly benefit by being able to purchase the said lots at a price below what the lot might be expected to sell for once the land was rezoned to residential land.

17 Bendigo Vineyard Estate Pty Ltd and the other two corporate defendants promoted the Bendigo Vineyard Estate project to investors by means of contacting people on a database, through websites, through seminars and events, by articles published, by social media, including on a Facebook page called “21st Century Property”, by direct contact in person or by telephone with prospective investors by employees or agents, by the provision of brochures and by the provision of a price list for the lots.

18 In promoting the Bendigo Vineyard Estate project, Bendigo Vineyard Estate Pty Ltd and the eighth and ninth corporate defendants and their officers, employees and agents gave prospective investors recommendations or statements of opinion, or reports to the same effect. This was intended to influence a person in making a decision about the options or could reasonably be regarded as having been intended to have such an influence, and thereby issued, varied and/or disposed of the options. Between at least August 2014 and 21 August 2015, Bendigo Vineyard Estate Pty Ltd and the other two corporate defendants sold 120 options to 87 investors for a total of \$3,025,805.

19 The sale of the options was effected by investors paying an option fee known as a “lot reservation fee” and entering into lot reservation agreements. Those agreements included terms by which Bendigo Vineyard Estate Pty Ltd indemnified the investor in respect of expenditure, project expenses and other costs associated with the project, and agreed to

implement the option, the project and all other activities contemplated by the agreement. The investor agreed to pay the option fee and do all things and sign all documents as may reasonably be required of it. Bendigo Vineyard Estate Pty Ltd would use its best endeavours to develop the land in accordance with the concept plan, incur the expenses associated with the project, carry out any other act or thing reasonably required to carry out the project and be responsible for project administration.

20 The option fee was paid by investors to Bendigo Vineyard Estate Pty Ltd into a bank account. The investors who bought options paid money or money's worth as consideration to acquire rights to benefits produced by the project. Their option fee was pooled or used in a common enterprise, supposedly to produce financial benefits or benefits consisting of rights or interests in the projects for themselves. The investors did not have day-to-day control over the project. In promoting and operating the project, Bendigo Vineyard Estate Pty Ltd and the other two corporate defendants were expecting to make a profit from the operation of it.

21 The project was not registered as a managed investment scheme under s 601EB of the *Corporations Act*.

22 While Bendigo Vineyard Estate Pty Ltd and the other two corporate defendants were promoting the project, Mr Jamie McIntyre and Mr Dennis McIntyre were the only directors of those companies and were aware of and facilitated the operation and promotion of the project.

23 The project will not be completed and the options cannot be completed on their terms. None of the holders of options have received any refund of the options fees paid. The liquidators of the three companies operating and promoting this scheme found that the reasons for those entities failing were poor strategic management of the business and/or inadequate cash flow or high cash use. As I understand, it has never been determined where all the money went.

24 Essentially the same course of conduct took place for each of the other four schemes. A total of 152 investors have lost most or all of their money.

25 Additionally, Mr Jamie McIntyre has been a company director and secretary of five companies that were wound up in either 2002 or 2003. All five of those companies were wound up for reasons that included poor financial control, including lack of records, and three of them also for reasons of poor strategic management of the business.

26 In *Australian Securities and Investments Commission v 21st Century Academy Pty Ltd* (ACN 100 673 818) and *Jamie Neville McIntyre* (20 June 2005), Merkel J made declarations that 21st Century Academy Pty Ltd, with which Mr Jamie McIntyre was associated, had contravened s 911A of the *Corporations Act* by arranging, promoting and holding live seminars in Australia to members of the public and publishing and promoting a book by which financial and related advice was given without the required Australian financial services licence. Mr Jamie McIntyre was found to have been knowingly concerned in, and a party to, each of those contraventions and to have provided a financial service on behalf of that company in contravention of s 911B(1) of the *Corporations Act*.

27 In *Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd* [2016] FCA 292 handed down on 23 March 2016, Beach J made declarations that between 24 June 2015 and 10 September 2015, the eighth and ninth defendants had contravened s 911A(1) of the *Corporations Act* by carrying on the business of providing financial services, namely, the provision of financial product advice, by making recommendations or statements of opinion intended to influence people (or which could be reasonably regarded as being intended to have such an influence) in making a decision to acquire, vary or dispose of a financial product.

28 This was done by way of making recommendations and stating opinions at seminars on property investment and to the public and related activities. As already noted, both the natural person defendants were either a shadow director or director of that company.

29 I now turn to the disqualification or banning orders sought.

30 In the very recent decision of Davies J in *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064 at [57] to [60], her Honour referred to prior authority on banning orders, or disqualification orders as they are also known. In particular, there was a list of considerations restated by Gordon J in *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [220], which was quoted and applied. I propose to do the same.

31 Gordon J in *Murray* listed 15 considerations, as follows, drawn from the prior case of *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 in which Santow J set out principles applicable to making a disqualification order. Gordon J restated those principles and considerations as follows:

- (1) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.
- (2) Disqualification orders are designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.
- (3) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.
- (4) A disqualification order is protective against present and future misuse of the corporate structure.
- (5) The order has a motive of personal deterrence, though it is not punitive.
- (6) The objects of general deterrence are also sought to be achieved.
- (7) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.
- (8) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty.
- (9) In assessing the appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.
- (10) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.
- (11) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.
- (12) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 are influential. The criteria were character of the offenders, nature of the breaches, structure of the companies and the nature of their business, interests of shareholders, creditors and employees, risks to others from the continuation of offenders as company directors, honesty and competence of offenders, hardship to offenders and their personal and commercial interests and offenders' appreciation that future breaches could result in future proceedings.
- (13) Factors which lead to the imposition of the longest periods of disqualification (of 25 years or more), were large financial losses, high propensity that defendants may engage in similar activities or conduct, activities undertaken in fields in which there was potential to do great financial damage, lack of contrition or remorse, disregard for law and compliance with corporate regulations, dishonesty and intent to defraud and previous convictions and contraventions for similar activities.
- (14) In cases in which the period of disqualification ranged from 7 to 12 years, the factors included serious incompetence and irresponsibility, substantial loss,

defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty, continued, knowing and wilful contraventions of the law and disregard for legal obligations and lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.

- (15) The factors leading to the shortest disqualifications, that is disqualification for up to three years, were although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated, the defendants had no immediate or discernible future intention to hold a position as a manager of a company and the defendant had expressed remorse and contrition, acted on the advice of professionals and had not contested the proceedings.

32 Looking at those different criteria, I am satisfied that while there is no *evidence* of dishonesty, the incompetence and serious irresponsibility of Mr Jamie McIntyre and Mr Dennis McIntyre, the disregard for legal obligations and the substantial losses suffered by investors is such that public protection and deterrence, both general and specific, in particular, demands such a lengthy period of disqualification from managing any company. Ten years appears to be entirely within what was contemplated, particularly in the 14th of those 15 categories. In fact, they fall squarely within it.

Injunctions

33 In relation to injunctions pursuant to s 1324 of the *Corporations Act*, s 1324(3) provides that such orders can be made by the consent of all parties to the proceedings and s 1324(8) provides that ASIC (or any other person) must not be required to give any undertaking as to damages.

34 The corporate defendants have contravened s 911A 10 times in two separate proceedings within the last 12 months. Mr Jamie McIntyre and Mr Dennis McIntyre were directors of each of those corporate defendants when those s 911A contraventions occurred.

35 Having regard to the principles already referred to, the parties agreed and submitted that each of the two natural person defendants, Mr Jamie McIntyre and Mr Dennis McIntyre, should be restrained for 10 years from:

- (1) carrying on a business related to or concerning or directed to financial products or services within the meaning of s 761A of the Act; or
- (2) providing any of the following services:
 - (a) providing financial product advice within the meaning of s 761A of the Act; or

- (b) dealing in financial products within the meaning of that provision; or
- (3) in any way holding themselves out as doing either of those things.

36 In my view, that restraint, similar to the disqualification, is entirely appropriate given the seriousness of the conduct and the severe damage that has been occasioned to so many individual investors.

Declaratory relief

37 Declaratory relief must focus on the determination of legal controversies, not abstract or hypothetical questions. Declaratory relief is not appropriate for circumstances that have not occurred and might never happen, or if a declaration will produce no foreseeable consequences for the parties: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

38 Care needs to be taken in granting declaratory relief which affects other parties because it may be incorrectly taken to have been made following an adjudication by the court on the merits, rather than being as a result of agreed facts and submissions, and consent orders and declarations. It follows that declaratory relief should be confined to the proceedings and the parties at hand: see *Bank of Kuwait and the Middle East v Ship MV "Mawashi Al Gasseem" (No 2)* [2007] FCA 815; (2007) 240 ALR 120 at 126 [25]. None of those sorts of problems appear to be present and the form of the declaratory relief sought appears to be entirely confined to the immediate parties, including the corporate parties.

39 It appears to have been long established that a declaration usually cannot be made in the absence of a contradictor. This long-standing position was considered by the High Court in *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-8, in which it was found "in general" to be a requirement to be satisfied before the discretion is exercised. However, this is not as onerous as it first appears when regard is had to what is meant by the presence of a contradictor. For the reasons that follow, it does not even mean that a contradictor appears at the hearing of the application, let alone that a party opposes the making of the declarations. Consent is no barrier to relief being granted.

40 The Full Court considered the requirement of a contradictor in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378 in the context of a grant of power under s 21 of the *Federal Court of Australia Act 1976* (Cth). Their Honours noted at 382 [14] that: "[t]here is a difference between having an

interest to oppose the granting of declaratory relief and, having that interest, choosing whether or not to oppose the granting of that relief”.

41 The Full Court in *MSY Technology* held at 387 [30] that the requirement for a contradictor was met if there was a party who had an interest to oppose the declaratory relief sought. This was necessary as well because it went to the existence of federal jurisdiction to exercise the power and, in that case, under s 21 of the *Federal Court of Australia Act 1976* (Cth) due to the jurisdictional need for a controversy between parties, even if resolved after the commencement of proceedings: see *MSY Technology* at 385 [20].

42 I interpret the requirement for a contradictor to be no more than a joined party having an interest to oppose declaratory relief, and encompassing a range of responses from a respondent or defendant from outright opposition, to not turning up despite knowing that a declaration was to be sought, especially if there was precise knowledge of the date of the hearing of the application.

43 It cannot be, for example, that a choice made not to participate puts a respondent or defendant in a better position than one who attends and presents arguments against relief being granted. Once the formal but indispensable requirement of a contradictor is met (and therefore the requirements of a controversy and jurisdiction are met), a question remains as to whether the discretion to grant declaratory relief should be exercised in the circumstances of the case at hand. In particular, there must be some utility to making the declaration sought because, as the Full Court has pointed out, it is not appropriate to use a remedy of declaration merely to be a summary recording of conclusions reached in reasons for judgment: see *Warramunda Village Inc v Pryde* [2001] FCA 61; (2001) 105 FCR 437 at 440 [8] (cited with approval in *MSY Technology* at 388 [35]).

44 In *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53, utility was found in making declarations by consent because the degree to which the ACCC had succeeded had changed at different stages of the proceedings and it was “*convenient to have set out in the declarations not only the basis for the primary liability and accessorial liability found, but also the basis for the penalties ordered as it must now be understood*”: at 92 [95]. Thus, the making of declarations as part of a judgment arrived at by consent makes clear the basis for the remedies that follow, provided, as made clear, there has not been an adjudication on the merits.

45 In part, meeting that requirement is sought to be achieved in this case by making it clear that the situation was arrived at by consent and by agreement on the facts. In this case, because the orders for disqualification and the injunctions that have been made relate to the involvement of the two natural person individuals and the conduct of the companies, the declarations form a particularly useful function, and appropriate function in this case, by spelling out just what these companies have done and failed to do with these two individuals effectively at the helm of the companies concerned. Therefore, there is a proper basis for giving the declaratory relief sought in this case.

Winding up orders and appointment of liquidators

46 I was directed by Mr Young QC to four authorities on winding up managed investment schemes.

47 In *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* [2001] WASC 27; (2001) 36 ACSR 778 at 792-5 [72]-[88], Owen J considered submissions and authority to the effect that once jurisdiction was enlivened under s 601ED giving rise to a prima facie requirement for a winding up, that position could readily be confirmed by reference to the public interest akin to the just and equitable ground for winding up a company. His Honour accepted that approach and those reasons.

48 The same conclusion was reached in *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 per Pullin J (later a judge of appeal), at [65] to [70], and also by Finkelstein J in *Re GDK Financial Solutions Pty Ltd; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd* [2006] FCA 1415; (2006) 236 ALR 699 at 704 [16].

49 In *Capelli v Shepard* [2010] VSCA 2; (2010) 29 VR 242 at 265 [104] the Victorian Court of Appeal accepted that the long history of case law informing winding up of companies properly informed the decision to wind up a registered managed investment scheme. Their Honours noted that where the entity was, on unchallenged evidence, plainly insolvent, and no replacement for it was identified, no alternative proposal advocated and the scheme was not otherwise viable and its management had broken down, there was no error in winding it up over opposition.

50 Having regard to those authorities and the terms of the legislation and the facts and circumstances of this case, the decision to appoint a liquidator and to have a winding up is not

a marginal decision and any real sense of discretion is somewhat illusory in all the circumstances.

51 There is not the slightest doubt that each of the five managed investment schemes must be wound up. I therefore make those orders and the necessary ancillary orders to appoint the liquidators and give them the powers that they will need.

Costs

52 The costs orders agreed to are reasonable and proportionate, being a lump sum of \$50,000 and vacating prior costs orders made.

Additional comment post ex tempore judgment

53 At the time of giving judgment I indicated that, for completeness, a copy of the statement of agreed facts would be attached to these reasons. On reflection, I do not think that is necessary.

54 It is apparent that both Mr Jamie McIntyre and Mr Dennis McIntyre are, at the very least, completely financially incompetent. Unless they acquire new skills and the capacity for diligence and competence in the 10 years during which they are now disqualified and therefore banned from managing corporations (whether formally or informally) and in the 10 years that they are now prohibited from providing financial advice or dealing in financial products, each of them will be a menace to the investing public. There is no evidence to suggest that such successful reform is likely.

55 In all the circumstances, any breach of the 10 year banning orders and 10 year injunctions will be likely to be treated as a very serious contempt of this Court, with a high risk of imprisonment. That naturally extends to online activity, including websites which in any way hold either of Mr Jamie McIntyre and Mr Dennis McIntyre out, directly or indirectly, as carrying on a business related to, concerning or directed to financial products or financial services or providing services which entail providing financial product advice or dealing in financial products.

56 It would be wise for ASIC to ensure that a copy of these reasons and the orders and declarations made on 17 October 2016 are personally served on each of Mr Jamie McIntyre and Mr Dennis McIntyre, that their attention is drawn to the preceding two paragraphs in particular, and that a record is kept of that taking place.

I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate: 

Dated: 28 October 2016

SCHEDULE OF PARTIES

VID 407 of 2015

Defendants

- Fourth Defendant: SECRET VALLEY ESTATE PTY LTD (ACN 602 817 532)
- Fifth Defendant: KINGSWAY SOUTH HOLDINGS PTY LTD (ACN 159 230 976)
- Sixth Defendant: BENDIGO VINEYARD ESTATE PTY LTD (ACN 600 088 211)
- Seventh Defendant: MELBOURNE TARNIET ESTATE PTY LTD (ACN 603 945 393)
- Eighth Defendant: PROPERTY TUITION PTY LTD (ACN 129 421 281)
- Ninth Defendant: EDUCATION HOLDINGS PTY LTD (ACN 129 551 917)
- Tenth Defendant: SOURCING PROPERTY PTY LTD (ACN 602 474 779)