

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v MyWealth Protection Pty Ltd [2020] FCA 1034

File number: QUD 205 of 2020

Judge: **DERRINGTON J**

Date of judgment: 22 July 2020

Catchwords: **CORPORATIONS** – winding up on just and equitable ground – *Corporations Act 2001* (Cth) s 461(1)(k) – where director found to have been operating an unregistered managed investments scheme – where director no longer resides in the jurisdiction and no longer manages the company – where the company has not carried on any genuine business activities for a substantial period of time – where the company’s assets were dealt with in knowing contravention of freezing order – order made for the winding up of the company

Legislation: *Corporations Act 2001* (Cth) s 461(1)(k)

Cases cited: *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2) (2013) 93 ACSR 189
Australian Securities and Investments Commission v AGM Markets Pty Ltd (2018) 129 ACSR 335
Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3) [2020] FCA 1035
Australian Securities and Investments Commission v Planet Platinum Ltd [2015] VSC 682

Date of hearing: 13 July 2020

Registry: Queensland

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 33

Counsel for the Plaintiff: Ms A Freeman

Counsel for the Defendant: The defendant did not appear

ORDERS

QUD 205 of 2020

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

AND: **MYWEALTH PROTECTION PTY LTD ACN 604 035 850**
Defendant

JUDGE: **DERRINGTON J**

DATE OF ORDER: **22 JULY 2020**

THE COURT ORDERS THAT:

1. Pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) the defendant be wound up.
2. Timothy Norman and Robert Woods of Deloitte Financial Advisory Pty Ltd be appointed as joint and several liquidators of the defendant for the purposes of the winding up.
3. The defendant pay the plaintiff's costs of this application.

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

REASONS FOR JUDGMENT

DERRINGTON J:

INTRODUCTION

1 The Australian Securities and Investments Commission (ASIC) seeks orders that the defendant, MyWealth Protection Pty Ltd (MyWealth Protection) be wound up on just and equitable grounds and that Timothy Norman and Robert Woods of Deloitte Financial Advisory Pty Ltd be appointed as its joint and several liquidators.

2 The application came on for hearing together with the related proceedings, *Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd* (QUD 707 of 2019) (the Principal Proceedings). In those proceedings, Mr Mustafa Mohammed, the director of MyWealth Protection, along with other persons and entities associated with MyWealth Protection, including the company MyWealth Manager Financial Services Pty Ltd (MyWealth Manager), were all found to have conducted an unregistered managed investment scheme and to have done so without the authority of an Australian Financial Services Licence.

3 The circumstances of ASIC's actions against those other entities appear in the reasons for judgment in *Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035.

4 The evidence relied upon by ASIC to support the winding up of MyWealth Protection unequivocally required its winding up and, in the absence of any opposition, the necessary orders were made *in stanta*. These are the reasons for the making of those orders.

THE FACTS

5 As the reasons in the Principal Proceedings reveal, the defendants in that action established and operated an unregistered managed investment scheme. In general terms the scheme involved encouraging clients of the third defendant, 3M Financial Planning Pty Ltd, to abandon their commercial superannuation schemes, establish their own self-managed superannuation funds and invest their funds in MyWealth Manager. Mr Mohammed was also a director of that company. Unfortunately, although a significant number of persons invested in the scheme and approximately \$7million was received into it, the funds were not used for the promoted

purposes. The evidence established that nearly all of the investors' funds have been misappropriated by those operating the scheme.

6 During the course of ASIC's investigations into MyWealth Manager and others, which preceded the commencement of the Principal Proceedings, ASIC concluded that MyWealth Protection had been the recipient of substantial funds from the scheme. On 24 October 2019, ASIC's investigation formally included MyWealth Protection. It was then ascertained that the company received from MyWealth Manager approximately \$1.5million of funds from the scheme in the period from September 2017 until February 2019. The evidence suggests that MyWealth Protection and another company, Secure Investments Pty Ltd, used some of those funds to purchase a property at 490 Morris Road, Truganina, Victoria.

7 On 19 April 2018, MyWealth Protection was deregistered for failure to pay its annual review fee within 12 months from the due date.

8 On 3 July 2019, Mr Mohammed departed from Australia and has not returned since.

9 On 23 September 2019, an application was received by ASIC for the reinstatement of MyWealth Protection. It included a letter signed by Mr Mohammed confirming that he was a permanent resident of 22 Cayleys Road, Werribee South, Victoria. That statement was untrue when it was made and it remains untrue. The evidence before the Court shows that Mr Mohammed had been in the country for only 38 days during the 18 months prior to his departure on 3 July 2019 and, as mentioned, he has been absent since that date.

10 Nevertheless, based on Mr Mohammed's false statement the company was reinstated the following month.

11 On 19 November 2019, ASIC brought an application for interlocutory and final injunctions against MyWealth Protection and other related persons and entities. Although it was successful against most of the related entities, it did not succeed against MyWealth Protection.

12 Between 28 November 2019 and 2 December 2019, MyWealth Protection and Secure Investments Pty Ltd sold the property at 490 Morris Road and the sum of \$270,013 of the proceeds was received by MyWealth Protection. It would appear that the reinstatement of MyWealth Protection had been effected for the purposes of facilitating the sale of that property.

13 On 30 January 2020, freezing orders were made against MyWealth Protection, restraining it from removing from Australia or diminishing or dealing with its assets including money in its bank account with the National Australia Bank.

14 On 27 March 2020, five unauthorised withdrawals were made from that NAB account totalling \$50,000. They occurred via an internet banking facility and ASIC's investigations reveal that the IP address of the computer used to make the transfers was located in India, where Mr Mohammed, being the signatory to the account and the holder of the account ID, was believed to be residing.

15 Other than the above, the evidence establishes that MyWealth Protection has not engaged in any other business transaction since the sale of the property.

THE LAW

16 ASIC seeks to invoke the power of the Court under s 461(1)(k) of the *Corporations Act 2001* (Cth) (the Act) to wind up MyWealth Protection on the grounds that it would be just and equitable to do so. It is not contentious that ASIC has standing to apply for such an order: ss 462(2) and 464 of the Act.

17 The power under s 461(1)(k) is exercisable where the Court has a justified lack of confidence in the conduct and management of the company's affairs giving rise to a real risk to the public interest: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189 [20] (*ActiveSuper (No 2)*).

18 In *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at 469 – 470 [119], Warren J identified several fundamental principles with respect to winding up companies in the just and equitable ground, being:

- (a) The facts need to establish that the Court cannot have confidence in the conduct and management of the affairs of the company;
- (b) The circumstances need to be such as to demonstrate that there exists a risk to the public if the company were allowed to continue in operation such that the winding up ought to occur for the protection of the public; and
- (c) The Court will be reluctant to wind up a solvent company.

19 In relation to this latter point, the solvency of a company is not a bar to it being wound up under the just and equitable ground and, indeed, where a company has engaged in repeated and

numerous breaches of the Act, that is “precisely the situation where a solvent company should be wound up”: *Australian Securities and Investments Commission v Planet Platinum Ltd* [2015] VSC 682 [95]. Similarly, a solvent company may be wound up on the just and equitable grounds where to do so would prevent the repeated or threatened future breach of the law or where the management of the company is effectively non-existent or incompetent or there is a justified lack of confidence in it: *Australian Securities and Investments Commission v AGM Markets Pty Ltd* (2018) 129 ACSR 335, 349 [75].

20 With respect to the issue of a lack of confidence in the affairs and management of the company in *ActiveSuper (No 2)* at 195 [21] Gordon J observed:

In relation to the first, a lack of confidence may arise where, “after examining the entire conduct of the affairs of the company” the court cannot have confidence in “the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company”...

21 To that it might be added that where the evidence clearly establishes that a company is being used as a vehicle to achieve a dishonest purpose, good grounds would exist for winding it up on the just and equitable grounds despite its solvency.

CONSIDERATION

22 ASIC submitted that an important consideration in this application was the contravention by MyWealth Protection of the injunction restraining it from dealing with its money. It emphasised that at the time of the making of the orders, Mr Mohammed and MyWealth Protection were represented by legal practitioners and were given copies of the orders made by the Court. The company was also represented when those freezing orders were continued on both 18 February 2020 and 3 March 2020.

23 In the circumstances of the present case there is no reason to believe that Mr Mohammed and MyWealth Protection were unaware of the orders of the Court and their effect of restraining the distribution of company funds. Despite that, they have caused five unauthorised withdrawals totalling \$50,000 to be made. As Mr Mohammed was the sole signatory to the account and held the relevant user ID for it, it appears to be fairly clear that he and, through him, the company deliberately contravened the court’s orders which prohibited them dealing with those funds.

24 The evidence also shows that Mr Mohammed sought to obfuscate the reason for the transfers. The withdrawals were described in the internet account as being “commissions”. ASIC has

undertaken a careful investigation as to the identity of the recipients of the funds and has ascertained that none of the persons who received them had undertaken any work for Mr Mohammed or for MyWealth Protection. In most cases it appears that the money was paid to persons in Australia as part of money lending transactions which had their origin in India.

25 ASIC has also identified that MyWealth Protection received substantial sums from MyWealth Manager which had been misappropriated from the managed investment scheme. ASIC has also established that from 5 June 2017 to 28 June 2019, withdrawals were made from the MyWealth Protection bank accounts as follows:

- \$57,200 in total transferred to Mahek Mustafa (the wife of Mr Mohammed);
- \$82,000 in total transferred to Mr Mohammed;
- \$531,258 in total transferred to 361 Degrees Real Estate.

26 The latter transfer consisted of three separate payments occurring in September 2017, which appear to have been deposits for the purchase of three separate parcels of land by MyWealth Protection. One of those contracts did not proceed and the other two have not finalised.

27 For the following reasons, ASIC's submissions should be accepted and MyWealth Protection ought to be wound up on the just and equitable grounds.

28 It is undoubtedly correct that the Court cannot have confidence in the management of MyWealth Protection. Mr Mohammed, its sole director, has not been in the country since 3 July 2019 and it can be accepted that he now has no meaningful involvement in it. It should also be accepted that he made false representations to ASIC in order to have the company reinstated. He represented that his permanent address was at 22 Cayleys Road, Werribee South, Victoria, when that was demonstrably not the case. It is also apparent the reinstatement occurred only so that Mr Mohammed could cause the company to transfer property which it owned or in which it had an interest.

29 It is further apparent that MyWealth Protection does not operate from its registered address or identified principle place of business and has not done so since January 2019. Apart from being used as a conduit for the transfer of funds, it has no business and it is to be recalled that it was deregistered for 18 months prior to October 2019.

30 There is also a strong likelihood that MyWealth Manager has a legitimate claim to funds which were held by MyWealth Protection. This is because Mr Mohammed, who was a director of

both, would appear to have caused the initial transfer of funds to be made to MyWealth Protection as part of a misappropriation of funds from the managed investment scheme.


31 In addition it is fairly clearly established on the evidence that MyWealth Protection, by Mr Mohammed, acted in breach of the restraining orders made by this Court when, on 27 March 2020, it transferred the amount of \$50,000 to five persons in five separate transactions.

CONCLUSION

32 It follows that it can be safely concluded that the company is effectively non-operational, it is without any adequate management, to the extent that it undertakes activities it does so in breach of Court orders of which it is aware, and to permit it to continue in existence will present a significant risk to members of the public. It is appropriate and necessary to terminate its existence.

33 It follows that MyWealth Protection Pty Ltd should be wound up pursuant to s 461(1)(k) of the Act.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington.

Associate: 

Dated: 22 July 2020