

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3) [2020] FCA 1035

File number: QUD 707 of 2019

Judge: **DERRINGTON J**

Date of judgment: 22 July 2020

Catchwords: **CORPORATIONS** – managed investment scheme – winding up – whether scheme amounted to a managed investment scheme despite operators’ intent not to carry out promised investment – scheme determined to exist and ordered to be wound up

CORPORATIONS – persons operating unregistered managed investment scheme without authorisation under an Australian Financial Services Licence – persons engaged in providing financial services without authorisation – declarations and injunctions made

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) s 13
Corporations Act 2001 (Cth) ss 19, 33, 286, 461(1)(k), 588FDA, 601ED, 763A, 764A, 766A, 766C, 911A, 1101B, 1324
Superannuation Industry (Supervision) Act 1993 (Cth) ss 17A, 17B

Cases cited: *Australian Securities and Investments Commission v Arafura Equities Pty Ltd* (2005) 56 ACSR 429
Australian Securities and Investments Commission v Atlantic 3 Financial (Aust) Pty Ltd [2006] QSC 132
Australian Securities and Investments Commission v Comcash Australasia Pty Ltd (2004) 59 ACSR 632
Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd (2004) 187 FLR 270
Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd [2003] 1 Qd R 135
Australian Securities and Investments Commission v Hutchings (2001) 38 ACSR 387
Australian Securities and Investments Commission v Karl Suleman Enterprizes Pty Ltd (2003) 177 FLR 147
Australian Securities and Investments Commission v

MyWealth Protection [2020] FCA 1034
Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561
Australian Securities and Investments Commission v Takaran Pty Ltd (2002) 170 FLR 388
National Australia Bank Ltd v Norman (2009) 180 FCR 243

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: 145

Counsel for the Plaintiff: Ms A Freeman

Solicitor for the Plaintiff: Mr H Copley and Ms M Smith of Australian Securities and Investment Commission

Counsel for the First, Third, Fifth and Seventh Defendants: The first, third, fifth and seventh defendants did not appear

Counsel for the Sixth Defendant: The sixth defendant appeared in person

ORDERS

QUD 707 of 2019

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

AND: **MYWEALTH MANAGER FINANCIAL SERVICES PTY LTD
ACN 165 460 873**
First Defendant

MYWEALTH PROTECTION PTY LTD ACN 604 035 850
Second Defendant

3M FINANCIAL PLANNING PTY LTD ACN 616 597 856 (and
others named in the Schedule)
Third Defendant

JUDGE: **DERRINGTON J**

DATE OF ORDER: **22 JULY 2020**

THE COURT ORDERS THAT:

For the purpose of this Order:

“*The Act*” means *Corporations Act 2001* (Cth).

“*Dealing*” includes:

- (a) Removing, causing, procuring, assisting or permitting any Property in the possession or under the control of the defendants (as applicable) to be removed from Australia or from the jurisdiction of this Court; and/or
- (b) Selling, charging, mortgaging, encumbering, securing, diminishing, disposing of, parting with possession, making any declaration of trust in relation to, exercising any power to vary or modify any trust deed or any interest under any trust in relation to the defendants’ Property.

“*Property*” means all real or personal property, assets or interests in property of any kind, within or outside Australia including, by virtue of subsection 1323(2A) of the Act, any property held otherwise than as sole beneficial owner, but excluding the Sale Property.

“*Unregistered Scheme*” means all activities and arrangements whereby the first, third, fifth, sixth and seventh defendants and others associated with the said defendants, elicited or obtained funds from investors for the ostensible purpose of reinvesting, trading with and/or otherwise dealing with such funds for the purpose of providing a return to investors on the funds invested.

“*Investor Funds*” means monies provided to the defendants, whether directly, or through any of the other defendants, or the defendants’ authorised agents, servants and/or representatives for the ostensible purpose of reinvesting, trading with and/or otherwise dealing with such funds for the purpose of providing a return to the investors on the funds invested.

DECLARATIONS

1. It is declared that the First Defendant, MyWealth Manager Financial Services Pty Ltd, has acted in contravention of:
 - (a) s 601ED(5) of the Act because on and from 16 March 2016, the First Defendant failed to register the unregistered managed investment scheme (Unregistered Scheme) of which the First Defendant was operating and thereby operated a managed investment scheme contrary to s 601ED(5) of the Act;
 - (b) s 911A of the Act because it operated the Unregistered Scheme from 16 March 2016, when it did not hold an Australian Financial Services Licence.
2. It is declared that the Third Defendant, 3M Financial Planning Pty Ltd, has acted in contravention of:
 - (a) s 601ED(5) of the Act because on and from 16 March 2016, the Third Defendant failed to register the Unregistered Scheme of which the Third Defendant was operating and thereby operated a managed investment scheme contrary to s 601ED(5) of the Act;
 - (b) s 911A of the Act because it operated the Unregistered Scheme from 16 March 2016, when it did not hold an Australian Financial Services Licence.
3. It is declared that the Fifth Defendant, Mustafa Mohammed, has acted in contravention of:
 - (a) s 601ED(5) of the Act because on and from 16 March 2016, the Fifth Defendant failed to register the Unregistered Scheme of which the Fifth Defendant was operating and thereby operated a managed investment scheme contrary to s 601ED(5) of the Act.

- (b) s 911A of the Act because he operated the Unregistered Scheme from 16 March 2016, when he did not hold an Australian Financial Services Licence.
4. It is declared that the Sixth Defendant, Mahek Mustafa, has acted in contravention of:
- (a) s 601ED(5) of the Act because on and from 16 March 2016, the Sixth Defendant failed to register the Unregistered Scheme of which the Sixth Defendant was operating and thereby operated a managed investment scheme contrary to s 601ED(5) of the Act;
 - (b) s 911A of the Act because she operated the Unregistered Scheme from 16 March 2016, when she did not hold an Australian Financial Services Licence.
5. It is declared that the Seventh Defendant, Mubashir Mohammed, has acted in contravention of:
- (a) s 601ED(5) of the Act because on and from 16 March 2016, the Seventh Defendant failed to register the Unregistered Scheme of which the Seventh Defendant was operating and thereby operated a managed investment scheme contrary to s 601ED(5) of the Act;
 - (b) s 911A of the Act because he operated the Unregistered Scheme from 16 March 2016, when he did not hold an Australian Financial Services Licence.

RESTRAINT

6. The defendants, being MyWealth Manager Financial Services Pty Ltd, 3M Financial Planning Pty Ltd, Mustafa Mohammed, Mahek Mustafa, and Mubashir Mohammed and each of them, either by themselves, their servants and/or agents, are permanently restrained and an injunction be granted restraining them from carrying on a financial services business in this jurisdiction, without holding an Australian Financial Services Licence, including by:
- (a) dealing in a financial product;
 - (b) promoting financial products;
 - (c) providing financial services advice;
 - (d) promoting or carrying on any financial services business in Australia;
 - (e) receiving, soliciting, transferring or disposing of Investor Funds received in connection with the Unregistered Scheme;
 - (f) further promoting or operating the Unregistered Scheme;

- (g) doing any act in furtherance of or in connection with the Unregistered Scheme.
7. The defendants, being MyWealth Manager Financial Services Pty Ltd, 3M Financial Planning Pty Ltd, Mustafa Mohammed, Mahek Mustafa, and Mubashir Mohammed and each of them, either by themselves, their servants and/or agents, are permanently restrained from and an injunction be granted restraining them from:
- (a) holding out or representing that they are permitted or authorised to:
- (i) provide financial services advice;
 - (ii) deal in financial products;
 - (iii) promote financial products; and/or
 - (iv) otherwise carry on a financial services business within the meaning of Chapter 7 of the Corporations Act;
- when they are not so permitted or authorised to do so; and
- (b) holding out or representing that they are an authorised representative of an Australian Financial Services Licence holder when they are not an authorised representative of an Australian Financial Services Licence holder.

WINDING UP ORDERS

8. Pursuant to section 461(1)(k) of the Act, the first defendant, MyWealth Manager Financial Services Pty Ltd, and the third defendant, 3M Financial Planning Pty Ltd, be wound up.
9. Timothy Norman and Robert Woods of Deloitte Financial Advisory Pty Ltd (Liquidators) be appointed as joint and several liquidators of the first defendant, MyWealth Manager Financial Services Pty Ltd, and the third defendant, 3M Financial Planning Pty Ltd for the purposes of the winding up.
10. Pursuant to section 601EE(2) of the Act, the Unregistered Scheme be wound up.
11. Pursuant to s 601EE(2) of the Act:
- (a) the Liquidators be appointed to be take responsibility for ensuring that the Unregistered Scheme is wound up;
 - (b) the Unregistered Scheme be wound up as if:
 - (i) the Unregistered Scheme were a corporation; and
 - (ii) the provisions of parts 5.4B, 5.6 and 5.7B of the Act applied to the winding up.

COSTS

12. The defendants 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 In this action the Australian Securities and Investments Commission (ASIC) seeks orders in the nature of declarations and injunctions against the defendants in relation to their alleged operation of an unregistered managed investment scheme. The action was commenced against seven defendants, although only five remain. Those five were represented in one form or another during some of the interlocutory stages of these proceedings, however, over time their representation has dissipated with the result that none were represented by the time of trial. When the matter was called on for hearing, only the sixth defendant, Ms Mahek Mustafa, appeared. She appeared via the audio visual platform, Microsoft Teams, from India, where she now resides.
- 2 For the reasons which follow, ASIC is entitled to the declarations and injunctions sought by it. The first, third, fifth, sixth and seventh defendants all operated a managed investment scheme which, despite requiring registration under the *Corporations Act 2001* (Cth) (the Act), was not so registered. That amounted to a contravention of the Act, specifically s 601ED(5). The defendants also contravened s 911A of the Act by their operation of the scheme in the absence of authorisation to do so pursuant to an Australian Financial Services Licence (AFSL).
- 3 An unfortunate aspect of this case is that a significant number of investors in the scheme appear to have lost substantial amounts of their superannuation savings. Those investors were generally persons of vulnerability in relation to financial matters and their positions in life are such that they will not have any opportunity to recover their losses. An exacerbating circumstance is that the heavy losses sustained by the investors were not due to the materialisation of risks inherent in the nature of any investments made, but to the systematic misappropriation of funds by those operating the scheme. Whilst such conduct is not relevant to the technical issues of whether the provisions of the Act were breached, they are relevant to the question of whether the injunctive relief sought by ASIC should be granted.

THE FACTS

Preliminary matters

4 On 17 June 2019, ASIC commenced a formal investigation pursuant to s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to suspected contraventions of the Act from 1 July 2014 onwards by:

- MyWealth Manager Financial Services Pty Ltd (ACN 165 460 873) (MyWealth Manager). It was incorporated on 23 August 2013. Until 1 July 2016, Mr Mustafa Mohammed was the sole director and secretary. From 1 July 2016, Abdul Mohammed has been the sole director and secretary, however to date he has denied any knowledge of his appointment and any involvement in the running of the company.
- 3M Financial Planning Pty Ltd (ACN 616 597 856). It has operated under the unregistered business name “Mcube Planners”. It is referred to in these reasons as “Mcube / 3M Financial”. Its incorporation occurred on 23 December 2016 and since that time Ms Mahek Mustafa has been the sole director, secretary and shareholder (although there is some indication that her appointment was backdated and that Mr Mubashir Mohammed was the director during the intervening period).
- Mr Mustafa Mohammed (Mustafa). He was the director and secretary of MyWealth Manager until July 2016 and has, at all relevant times been the director and secretary of MyWealth Protection Pty Ltd. ASIC alleges that Mustafa acted as a shadow director of MyWealth Manager after ceasing to officially occupy the position on the basis that he remained the sole signatory of its bank account, and executed documents on its behalf.
- Ms Mahek Mustafa (Mahek). She is the wife of Mustafa although she claims that she is estranged from him. As mentioned, she is the director and secretary of Mcube / 3M Financial, and she is also the director of a number of other Australian registered corporations. Her involvement in the activities of Mcube / 3M Financial is an important issue in the proceedings.
- Mr Mubashir Mohammed (Mubashir). He was a financial planner employed by Mcube / 3M Financial. ASIC alleges that he was also involved in the operations of MyWealth Manager.

As the individuals in this action have similar last names, I will refer to them by their first names so as to avoid confusion. I intend no disrespect by doing so. The parties, who respectively

comprise the first, third, fifth, sixth and seventh defendants, are referred to collectively in these reasons as 'the defendants'. The proceedings against the second and fourth defendants, MyWealth Protection Pty Ltd and Secure Investments Pty Ltd respectively, were dismissed by this Court on 13 December 2019.

The witnesses

5 ASIC called a number of witnesses in respect of whom it had filed affidavits of the evidence they would give. None of the witnesses were required for cross-examination and the affidavits were tendered without objection. They were:

- Five affidavits of Mr Jarrah Todd Wheeler Nicholson, an ASIC investigator, who provided extensive evidence of the investigations which were conducted and of the material and information collected;
- An affidavit of Ms Meaghan Lesley Brooks, also an ASIC investigator, who provided financial analysis of the bank accounts of the defendants and related entities;
- An affidavit of Mr Timothy Bryce Norman; and
- The affidavits of Ms Amy Huia, Mr Philip Burgess, and Ms Eunice Soler, each of whom invested in the scheme carried out by the defendants. Their evidence discloses in greater detail the specifics of the investment scheme perpetrated by the defendants.

Also before the Court was a report of Mr Timothy Norman and Mr Robert Woods, partners of Deloitte Financial Advisory Pty Ltd. Messrs Norman and Wood had been appointed as the receivers and managers of the assets of MyWealth Manager and of the assets of Mcube / 3M Financial on 21 November 2019. Pursuant to a further order on 13 December 2019, they were appointed as the receivers and managers of the assets of Mustafa, Mahek and Mubashir. Pursuant to several orders of this Court, the receivers and managers were required to prepare a report to the court in respect of their appointments. The evidence in the report was tendered as evidence without objection.

6 From this extensive affidavit material the following conclusions can be drawn as to the circumstances by which people were induced to invest in the alleged scheme.

The soliciting of investors

7 Ultimately, the defendants received investment funds from over 50 investors. The evidence does not directly establish how all of those investors were lured into the scheme, but there is

sufficient information to identify a general pattern. Those investors who swore affidavits each describe being approached by, or recommended to Mubashir, who variously held himself out to be a financial advisor of MyWealth Manager and or Mcube / 3M Financial.

8 Ms Soler was referred to Mubashir by an accountant at MyWealth Manager, who was recommended by a colleague of her husband. Mubashir arranged an initial meeting with Ms Soler and her husband at their residence on 14 December 2016. It appears from ASIC's investigations that many other investors were also clients of Mcube / 3M Financial in relation to other financial matters and the inference can be fairly easily drawn that those clients were targeted to invest in the scheme.

9 Ms Huia and Mr Burgess describe being introduced to Mubashir and Mustafa at a meeting of the Four Winds Foundation (a charity organisation) held at Ms Huia's residence on 5 February 2017. Mr Burgess recalled that sometime in late 2017 Mubashir then attended his and his wife's residence to discuss their superannuation investments.

10 Mubashir's *modus operandi* was that he would tell the potential investors of the advantages of investing in MyWealth Manager. The exact manner in which it was described seemed to vary but it was apparently regularly referred to as a fund manager or property investment portfolio.

11 Mubashir would guarantee that returns on any investment with MyWealth Manager would be high (6% to 10% in the case of Ms Huia, 8% to 10% in the case of Ms Soler, and 10% to 12% in the case of Mr Burgess). At these meetings, Mubashir gave various assurances to the investors, such as that the investment was secure because it would not be subject to "stock market fluctuations" (as deposed to by Ms Huia and Mr Burgess); that the cost of the land would be enough to refund investors if "things went south" (as deposed to by Ms Soler); and that MyWealth Manager was "backed by AMP" (as deposed to by Ms Soler).

12 The nature of the property development which it was said would be engaged in was somewhat unclear, although it included residential developments.

13 The only substantial funds which the individuals targeted by Mubashir had were their interests in public or industry superannuation funds, the control of which was vested in the funds' trustees. In order to invest those funds with MyWealth Manager, the investors were advised by Mubashir to establish a self-managed superannuation fund (SMSF) and with control of that fund they could then make their desired investment. Each of the investors who gave an affidavit describes a similar initial meeting with Mubashir, at which he would encourage them

and their spouse to set up a SMSF and invest in property development through MyWealth Manager.

14 It appears that Mubashir would typically meet with potential investors several times, often at their own residence. Ms Huia, Mr Burgess and Ms Soler each agreed to follow Mubashir's advice and invest their superannuation funds through MyWealth Manager.

Setting up a SMSF

15 Following these initial meetings, Mubashir arranged for a SMSF to be set up for each investor and their spouse. Broadly speaking, a SMSF is a private superannuation fund which is managed directly by its members. More specifically, a superannuation fund is a SMSF if it satisfies the conditions set out in ss 17A and 17B of the *Superannuation Industry (Supervision) Act 1993* (Cth), relevantly:

- (a) It has fewer than 5 members;
- (b) Each director of the body corporate trustee of the fund is a member of the fund and each member of the fund is a director of the body corporate trustee; and
- (c) No trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund.

16 For each investor, a company was created named “[Family name] Family Super Pty Ltd”, with the investor and their spouse appointed as directors of this company. Each investor signed a trust deed provided by Mubashir, which appointed that company as the corporate trustee of their newly created SMSF named “[Family name] Family Super Fund”. In some cases the investors were also required to sign a trustee declaration in the form provided by the Australian Taxation Office. The three investors who gave evidence recall Mubashir requesting they leave the documents undated.

17 The trust deed provided to Ms Solar and her husband on 5 January 2017 purports to have been created by “battalion legal”. The trust deeds provided to Ms Huia and her husband on 7 July 2017, and Mr Burgess and his wife in late 2017, are in different terms, and purport to have been prepared by Alavia Business Services Pty Ltd and McMasters Lo Andrawis Lawyers Pty Ltd.

18 The precise terms of the trust deed are immaterial. However, Ms Huia and Mr Burgess depose that Mubashir instructed them to sign the deed without any explanation as to the nature of the document. It is clear that Ms Huia and her husband did not understand the nature of the

document they were signing as they unnecessarily signed several of the schedules to the superannuation fund trust deed, which comprised of *pro forma* documents, such as a sample product disclosure statement, a sample minutes of meeting of directors, and a binding death benefit nomination form. Each of these schedules contained placeholder names which did not relate to their SMSF. For example, the name of the trustee was listed in the schedules as “Sample Pty Ltd (Sample Trustee Company)”.

19 Whilst it is not entirely clear on the material before the Court, it appears that when the SMSFs were registered with the Australian Taxation Office, the listed “contact details” for the trustee of each superannuation fund were not those of the associated investor, but rather a PO Box associated with MyWealth Manager.

Opening of a Macquarie cash management account

20 In each instance, without the knowledge of the investor, a Macquarie Bank cash management account was opened in the name of the SMSF. An account was opened for the Euruf Family Super Fund (Ms Soler) on 4 January 2017, for the Huia Family Super Fund on 6 August 2017 and for the Burgess Family Super Fund on 31 December 2017.

21 ASIC’s investigations reveal that this was done by an accountant, Sohail Merchant (Mr Merchant) of Alavia Financial Services, on standing instructions from Mustafa and Mahek. On the account application form, Mr Merchant was listed as an authority on the account. In each instance, the contact details provided were not those of the investor. The mobile number provided was that of Mubashir, and the email address was that of Mr Merchant.

22 None of the investors knew about the need for, or existence of, this cash management account. As Ms Soler deposed in her affidavit at [22] and [27]:

22. I [did] not know much about how self-managed superannuation funds work and we were reliant on the advice of Mubashir, who told us that it was like our current fund, we would roll our money into the new SMSF and the money would be invested and managed by MyWealth Manager. We did not know you needed a bank account.

...

27. I don’t recall ever being asked to set up an account with Macquarie. I did not sign any documents authorising any accounts with any banks on my behalf...

23 Similarly, Mr Burgess deposed that he did not recall signing any documents to apply for a Macquarie bank account to be opened for his SMSF and he did not receive any bank statements for the Macquarie bank account opened for his SMSF.

24 The evidence in the affidavits of Mr Nicholson supports the conclusion that the above processes were applied in relation to each of the investors in the scheme. He noted that from documentation obtained in relation to 55 of the SMSFs which invested in the scheme, the email contact address for the Macquarie Bank accounts did not belong to the relevant investor. Further, in respect of the contact phone numbers for those bank accounts, 30 were of the same number, another 6 were of a different number and three others also had the same number. This is sufficient to reach the conclusion that Mubashir, Mustafa and Mahek adopted the same practice in relation to each of the investors in that they caused a bank account to be opened for each of the SMSFs of which they had access and control.

Transfer of funds from existing superannuation fund to SMSF

25 Following the creation of their SMSF, it appears each investor in some way authorised the transfer of funds from their current superannuation fund to the newly created SMSF. Ms Soler deposes to having signed a transfer form on 12 January 2017. The form she and her husband signed was one produced by her current superannuation fund, which was provided to them by Mubashir with the details already completed. Mr Burgess did not recall what documents he and his wife signed. Ms Huia's affidavit refers to signing some documents on 7 August 2017 for the purpose of moving her superannuation money. She also recalls receiving a cheque in the mail for the amount she authorised to be withdrawn from her superannuation funds which she delivered to Mcube / 3M Financial's office.

The loan to MyWealth Manager

26 Shortly after setting up their SMSF and "rolling over" their superannuation funds, the investors were then requested to sign a loan agreement, which provided for the loan of capital to "MyWealth" funded from the newly established SMSF. Ms Soler recalls signing the agreement on 18 January 2017, while Ms Huia and Mr Burgess do not recall the date on which they signed.

27 The investigations of ASIC and the receivers and managers disclose that the loan document signed by each investor was in substantially the same form. Again, the terms of this agreement are largely immaterial, however it is important to note the following features which were common to all three agreements:

- (a) The loan agreement was for a term of two or three years (Ms Huia's agreement had a loan repayment date of 36 months from the date of execution which was defined as 15 September 2020, Ms Soler's agreement had a loan repayment date

of 24 months from the date of execution with no loan repayment date inserted, and Mr Burgess' agreement had a loan repayment date of 36 months from the date of execution which was defined as 19 March 2021);

- (b) The interest rate provided generally matched the guaranteed returns promised by Mubashir in the initial meeting (Ms Huia and Ms Soler's agreement specified an interest rate of 8% - 10%, while Mr Burgess' agreement had a "corrected" interest rate of 10% - 12%);
- (c) The purpose of the loan was "for general investment and related purposes" ; and
- (d) The "borrower" was ambiguously specified.

28 In respect of this last feature, each agreement listed "My Wealth" as the borrower on the cover page to the agreement. On the execution page, Ms Huia's agreement listed the Borrower again as "My Wealth", and Mubashir signed the agreement purportedly as sole company director and company secretary. Ms Soler's agreement listed the borrower as "[insert name of borrower]" on the execution page, and was signed by Mustafa. Mr Burgess' agreement was executed by "MyWealth Protection" and Mubashir signed as the sole company director and secretary. From this it appears that funds may have been lent variously to MyWealth Protection and MyWealth Manager.

The purported purpose of the investment

29 It appears that most investors were led to believe that the money advanced to "My Wealth" was to be invested in land development in Victoria. The specifics of the investment appear to have remained vague. For example, Ms Huia deposed at [16] of her affidavit:

From what [Mubashir] told me about the investment, I believe it was a company of Mustafa's that was conducting the building construction. I wasn't given any specific details about what company was doing the building construction or where the building construction was. When Des asked [Mubashir] for specific details about what my superannuation money would be used for and where the building construction was, [Mubashir] provided vague answers and changed the subject.

30 Similarly, Ms Soler deposed that Mustafa represented that he was investing the funds in several land development projects in Victoria. Mr Burgess deposed that it was never clear what MyWealth was going to do with the funds, but that he knew that Mustafa was involved in building and developing houses.

31 It appears therefore that investors were generally lead to believe that the funds provided to "My Wealth" from their superannuation were to be used in land development projects. At the very

least the statement in the loan documents that the moneys lent were to be used for “general investment and related purposes” is consistent with what the investors were told and with the notion that the money was being invested on their behalf. Similarly, the inclusion of a range of interest payable on the loan suggests that the lender was entitled to the benefit of the funds invested by MyWealth rather than to a pre-determined rate of return which the putative borrower was obliged to pay.

Documents received by investors following investment

32 Neither Ms Huia nor Mr Burgess received any documents from MyWealth Manager following their investment. Ms Soler however received, in late February 2017, a “Welcome Letter” and an “Investment Agreement” from MyWealth Manager which set out the details of her and her husband’s investment. That document has a “MyWealth Manager” heading and indicates that a new “Company Perpetual Investment account” was set up for Ms Soler’s SMSF on 15 February 2017. The relevant investment details were as follows:

Investment type: Company Deposit (capital guaranteed investment in managed property syndicate)

Investment returns: 8% to 10% per annum

...

Investment Guarantee: Investment Capital and Growth Guaranteed by MyWealth Manager

...

Security: The investment is secured by a right over the property units to protect investors [sic.] capital. My Wealth owns the units in M&M Property Trust.

33 The document purports to have some connection to AMP as the title is “AMP Flexible – Investment Series 2”. Indeed, Ms Soler deposed that Mubashir represented that the money would be invested in land development “in collaboration with AMP”.

34 Ms Soler also received an “Interim Investment Report” from MyWealth Manager dated 15 September 2017. It stated that Ms Soler’s SMSF had received an investment return of \$12,540 for the period 15 February 2017 to 15 August 2017. Ms Soler received a further “Interim Investment Report” from MyWealth Manager dated 15 August 2018, which stated that her SMSF had received an investment return of \$37,620 for the period 15 February 2018 to 15 August 2018. From ASIC’s investigations, these interim reports appear to have been fabricated or false.

Closing the Macquarie cash management account

35 On 20 December 2018, Ms Huia and Ms Soler both received a letter from Macquarie bank stating a Macquarie cash management account in the name of their SMSFs had been closed and enclosed a cheque for the closing balance. Mr Burgess received the same letter on 19 June 2019. This was the first time the investors became aware of the existence of these cash management accounts.

36 The opening statement for Ms Huia's account showed an initial deposit of \$140,000 on 11 September 2017. The next transaction was a funds transfer to MyWealth Manager in the amount of \$136,700 on 13 September 2017, which correlates to the loan amount.

37 The opening statement for Ms Soler's account showed an initial deposit of \$253,000. Several transactions are then recorded transferring funds to MyWealth Manager (\$4,400 on 8 February 2017) and Secure Investments (12 transactions of \$20,000 from 9 February 2017 to 28 February 2017, totalling \$240,000). The total debits to the account were \$244,400, which does not correlate to the loan amount of \$250,800.

38 The opening statement for Mr Burgess' account showed an initial deposit of \$72,000 on 12 February 2018 and a further deposit of \$72,933.64 on 9 March 2018. There are then three transactions showing a transfer of funds to MyWealth manager on 9 March 2018 and 19 March 2018 for the amounts of \$72,000, \$70,500 and \$2,200, totalling \$144,700. This does not correlate to the loan amount of \$144,000.

39 At around the same time other investors received letters from Macquarie Bank to similar effect.

The use of the investors' funds

40 The evidence as to the total funds received by MyWealth Manager from investors is not unequivocal. ASIC's preliminary investigations indicate that from 17 December 2016 to 26 August 2019, MyWealth Manager received \$7,051,191.53 in deposits from bank accounts held by SMSFs. The Receiver's report, which investigated the period from 17 March 2016 to 31 May 2019, indicates this figure may be \$6,818,379.25. Ultimately, the variance is not material to the issues in this case. However, it is apparent that large amounts of money were directed into the account of MyWealth Manager from the SMSFs between 2016 and 2019.

41 However, the accumulation of funds in the account of MyWealth Manager was not unexpected in the context that the investors had been told their funds would be invested by that company

in property developments. Indeed, it appears from the Receivers' report that the following properties in Victoria were likely purchased with investors funds:

- (1) A property on Albert Road, South Melbourne, purchased by MyWealth Manager on 5 August 2016 for \$570,000 (expected realisable value after sale costs is \$317,500);
- (2) A property on Morris Road, Truganina, purchased by MyWealth Protection and Secure Investments on 29 August 2017 for \$615,000;
- (3) A property on Cayleys Road, Werribee South, purchased by Mustafa on 15 February 2017 for \$850,000 (expected realisable value after sale costs is \$320,000);
- (4) A property on Lansdowne Parade, Tarneit, purchased by Mubashir on 31 May 2018 (expected realisable value after sale costs is \$125,000); and
- (5) A property on Flamingo Drive, Golden Beach, purchased by MyWealth Protection on 29 October 2017 for \$13,000 (expected realisable value after sale costs is nil).

42 ASIC and the Receivers have not been able to identify any evidence of any returns being repaid to investors, although \$457,269 was used by MyWealth Manager to repay investments to four investors. Despite what may have appeared on statements to some investors, it does not appear that any of them received interest on their investment. That is not surprising given that MyWealth Manager did not actually engage in any development activity.

The misuse of the investors' funds

43 The large majority of the funds received by MyWealth Manager from the SMSFs was transferred to the other defendants for purposes that had nothing to do with developing properties or generating returns for investors. During the period from 17 December 2016 to 26 August 2019, Mustafa received \$1,370,208 (plus an additional \$585,486.70 to an account held by him in Dubai), Mahek received \$754,032, Mubashir received \$1,788,511 and Mcube / 3M Financial received \$283,096.

44 In addition, the following payments were made to parties that appear to be related to Mustafa:

- Payments totalling \$1,554,000 were made to MyWealth Protection Pty Ltd, a company of which Mustafa is the director;
- Payments totalling \$255,035 were made to 361 Degrees Real Estate for the purchase of two further properties, which have not yet settled;
- Payments totalling \$380,030 were made for the purchase of a property in India;

- Payments totalling \$25,000 were made in connection with M&M Investors Pty Ltd, a company of which Mustafa was a director; and
- Payments totalling \$70,070 were made in connection with Gold Bits Coin Pty Ltd, a company of which Mustafa and Mubashir are directors;

45 The Receivers report that there is at least \$3,075,188.74 in transactions between the defendants and individuals and their immediate family, which needs to be investigated further.

46 The investors have lost most, if not the entirety, of their superannuation savings through investing in the scheme described above. Some investors have attempted on multiple occasions to have their money returned, or recouped, however those attempts have proven unsuccessful.

Authorisation of the defendants to conduct the scheme

47 None of the defendants have ever held an AFSL, nor have any of them been an authorised representative of an AFSL holder which permitted them to deal in interests in a managed investment scheme or operate one.

Conduct of the investigation to date

48 As previously outlined, ASIC commenced its investigation into the above scheme on 17 June 2019. On 3 July 2019, Mustafa and Mahek left Australia and have not returned. Mubashir similarly left Australia on 20 November 2019 and has not returned.

49 Since commencing its investigation, ASIC has conducted examinations pursuant to s 19 of the ASIC Act with Mubashir, Ira-Hine Chapman (the office manager for Mcube / 3M Financial), Angel Witika (an employee of Mcube / 3M Financial), Anthony Dennison (another employee of Mcube / 3M Financial), and a voluntary interview with Mr Merchant. ASIC has attempted to question Mahek, however she has not complied with ASIC's notices requiring her to attend an examination. Mahek was also given notices under s 33 of the ASIC Act to produce documents relating to ASIC's investigation. As at the date of trial she had failed to comply with those notices.

50 On 21 November 2019, by order of this Court, receivers and managers were appointed to MyWealth Manager and 3M. Similarly on 13 December 2019, receivers and managers were appointed to manage the affairs of Mustafa, Mahek and Mubashir.

THE LAW

51 ASIC's main claim is focused upon the alleged contravention of s 601ED and s 911A of the Act. Central to the issues in this case is the former which reads:

601ED When a managed investment scheme must be registered

(1) Subject to subsections (2) and (2A), 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.

...

(5) 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.

52 Relevantly, the following definitions in the Act are applicable in relation to the operation of s 601ED:

managed investment scheme means:

- (a) a scheme that has the following features:
 - (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
 - (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
 - (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or ...

interest in a managed investment scheme (including a notified foreign passport fund) means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

53 For present purposes it is only necessary to refer to a small portion of s 911A as follows:

911A Need for an Australian financial services licence

(1) Subject to this section, a person who carries on a financial services business in this

jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

54 Other provisions relevant to the granting of relief are considered below.

CONSIDERATION

The evidence

55 The evidence before the Court was largely uncontested. The only exception is that Mahek provided what she said was an affidavit which, despite its form and content, was admitted into evidence. She further filed what she said was a chronology of events although it was unsupported by evidence in many respects. Mahek was cross-examined about her involvement in the scheme. Generally she denied that she was aware of it and eschewed any involvement in its operation. As is discussed below, her evidence was wholly unreliable and should be rejected. It was inconsistent in many parts and, indeed, the more Mahek spoke the more she revealed her close involvement in the operations of Mcube / 3M Financial and her awareness of its activities. That was not surprising given that she was the company's sole director, secretary and shareholder and was held out to the public as being its director and a financial adviser.

56 Otherwise, the evidence on which the Court can act was from ASIC's investigators, the receivers and managers who had been appointed to the assets of some of the defendants, and three persons who had invested in the scheme. It is not unfair to observe that the available evidence concerning the operation of the scheme is somewhat thin. That should not be taken as being a criticism of ASIC or its investigators. It is apparent that the books and records of the corporate defendants were not maintained in accordance with the legislative requirements or anything approaching it. ASIC's investigators have acquired documents from third parties such as banks and financial institutions so as to be able to trace the movement of funds to some extent and have also been able to ascertain the occasions on which real property was acquired. However, the material relating to the operation of the scheme is meagre, although that is not surprising as it seems sufficiently apparent that the scheme as promised did not, in fact, exist and those promoting it did not apparently have the intention of undertaking the investments which they informed the investors would be pursued. Each of Mustafa, Mahek and Mubashir were served with notices pursuant to s 19 of the ASIC Act requiring their attendance for examination. Only Mubashir complied. A notice under s 33 of the ASIC Act was given to Mcube / 3M Financial on 28 August 2019 and, despite assurances that it would be complied with, as of the trial that company had not produced any documents.

57 Although receivers and managers were appointed to the corporate entities they were unable to ascertain a great deal of information from the directors or the books and records of the defendant companies. They gave evidence that the corporate defendants did not maintain books and records as required by s 286 of the Act that correctly recorded and explained its transactions, financial position and performance. The directors of the corporate entities refused to comply with their obligations to assist the receivers and managers and failed to respond to their requests for information.

58 It follows that some of the findings which underpin the conclusions reached arise by inference. In this respect it is to be observed that the defendants were given an opportunity to file and serve any evidence on which they intended to rely. Save for Mahek, they chose not to do so and they gave no explanation as to why they did not. They did not allege that they were without funds to do so and, given the large amount of money which they have misappropriated to themselves, it would seem that they had the means to do so if they wished. It follows that to a very large extent, ASIC's evidence was not contested in any way.

59 It was submitted by ASIC that the individual defendants, Mustafa, Mahek and Mubashir "fled" the country shortly before ASIC's application for interlocutory injunctions was to be heard and that they have deliberately remained out of the jurisdiction. On the material that is a reasonable conclusion and the submissions should be accepted, not in the least because they all appear to have abandoned their erstwhile businesses here. Although Mahek denied that she had fled Australia and was deliberately staying away, that should be rejected. She is the holder of two passports, one Indian and one Australian. She regularly engages in international travel and, as the evidence before this Court reveals, she was prepared to travel to Australia at short notice to deal with matters concerning the business of Mcube / 3M Financial. Although she asserted that illness prevented her travelling to Australia for the hearing, she produced no sufficient evidence in support of that contention.

The scheme alleged by ASIC

60 In brief, the scheme as asserted by ASIC was constituted by some or all of the following:

- (a) The clients of Mcube / 3M Financial and others were given advice as to the alleged benefits of investing with MyWealth Manager which was held out as being a vehicle for the investment of funds for "general investment and related purposes" or for property development and other commercial purposes. An

attraction of the investment was the promised receipt of returns which were well above those which might be obtained from other investments.

- (b) The clients were induced to invest in MyWealth Manager by using their superannuation funds and, in particular, by ceasing their involvement in industry or other public funds, and establishing SMSFs which they would then control.
- (c) Mahek and Mustafa arranged for the clients to establish a SMSF for the purpose of investing in MyWealth Manager. A bank account, controlled by some of the defendants, was established for the reception of the clients' money from their previous superannuation funds.
- (d) The clients invested in MyWealth Manager by entering into loan agreements with it and funds were transferred by use of the bank accounts to MyWealth Manager.
- (e) The funds of more than fifty SMSFs totalling approximately \$7million were received by MyWealth Manager.

61 It is not suggested by ASIC that the scheme as promoted by the defendants was carried into effect. On the contrary, ASIC's case is that the funds were misappropriated by the defendants and used for their own purposes. As the evidence before this Court discloses, this was, indeed, what happened to the funds. That aside, on the evidence adduced at the hearing, and for the reasons that follow, ASIC established that the arrangement which was put in place constituted a managed investment scheme within the meaning of the definition in the Act.

Was the arrangement a managed investment scheme?

62 A central issue is whether the arrangement which the defendants put in place was a managed investment scheme within the scope of s 601ED(1).

Were contributions made to a scheme?

63 In ascertaining whether the arrangement was a managed investment scheme, an initial question is whether it can be said that the clients of Mcube / 3M Financial and their SMSFs "contributed money" to acquire interests in a scheme. The concept of a scheme was discussed by Barrett J in *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388 (*ASIC v Takaran*) at 393 [15]:

The essence of a "scheme" is a coherent and defined purpose, in the form of a

“programme” or “plan of action”, coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan. In some cases, the scope of the scheme will readily be gathered from some constitutive document in the nature of a blueprint setting out all relevant matters. In others, there may be no writing or such as there is may tell only part of the story, leaving the remainder to be supplied by necessary implication from all the circumstances. Profit-making will almost invariably be a feature or objective of the kind of scheme with which the s 9 definition of “managed investment scheme” is concerned, given the definition’s references in several places to “benefits”. Whatever is incidental and necessary to the pursuit of the profit (or “benefits”) will therefore be comprehended by the scheme, including, it seems to me, steps sensible to counter risk of loss (or detriment). Every cogent plan caters for – or, at least, recognises and takes into account – contingencies of an adverse kind.

64 The scheme which ASIC alleges existed, as identified above, falls easily within the above description. The evidence establishes that the investors contributed to the scheme. The arrangement was that the clients of Mcube / 3M Financial were told to establish a SMSF so that they could then invest the fund with MyWealth Manager. It seems that the investment was to occur by way of a loan to that entity. On one view it might be thought that such a process did not give rise to a “contribution” as such. The Oxford English Dictionary defines the verb “contribute” as being “To give or pay jointly with others; to furnish to a common fund or charge” or “To give or furnish along with others to a collective stock”. The requirement that an investor “contribute” is therefore suggestive that they are not acting or intending to act alone and independently in the payment of money so as to simply recover a return on their own investment. A private loan from one person to another suggests an independent act rather than one whereby a contribution is made. However, the mechanism by which an investor will contribute to a scheme does not appear to be material as to whether the scheme exists: *Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd* (2004) 187 FLR 270 (*ASIC v Emu Brewery*); *Australian Securities and Investments Commission v Hutchings* (2001) 38 ACSR 387.

65 In any event, on the material in this case there is sufficient to infer that the investors intended to invest the funds from their SMSF in MyWealth Manager along with others such that the accumulated funds could be applied to various land development ventures or building constructions. It appears from the affidavits of two of the investors that they were informed that the object of establishing a SMSF was so that they could invest in the “MyWealth property portfolio” which, it can be inferred, was MyWealth Manager and that the return on the investment would be between 6% and 10% or 10% to 12% per annum payable at the end of three years. The fact that investors were induced to lend funds on the basis of a return between an identified range lends support to the view that the transaction was not merely one of a loan,

but an investment in an arrangement where the return was uncertain. The loan agreements also stated that the funds were lent to MyWealth Manager for the purposes of being used for “general investment and related purposes”. That is also indicative that the funds were, in effect, to be used for investing on behalf of the lender.

66 Further, in Mahek’s chronology she outlined what she said she had been told by her husband Mustafa. It included the assertion that “My Wealth Manager would be fund Management Company and Mudasir (sic) Company are the Builders.” In the context of the case, this can be interpreted as being an assertion that MyWealth Manager was to take the form of an investment company and, in the course of its business, it would engage the company owned and operated by Mubashir to undertake the building work. For present purposes the first part of the assertion that MyWealth Manager was a fund management company is important as it indicates a process whereby investor funds are accumulated for investment. That would appear to be consistent with the statements of the investors.

67 One of the investors received a document referred to as an “investment agreement”. It was on the letterhead of MyWealth Manager. It contained statements that the amount being invested was \$250,800 and that the “minimum amount is \$50,000 in this scheme”; that the investment type was “Company Deposit (capital guaranteed investment in managed property syndicate) with investment returns being “8% to 10% per annum”; and that, “This investment is secured by a right over the property units to protect investors capital. My Wealth owns the units in M&M Property Trust”. Whilst it is doubtful that any of the statements accurately identified the nature of any intended investment or the circumstances of the same, they are indicative of the nature of the representations which would have been made to the investors as to the manner in which funds were to be used, being the investment of accumulated funds. The document appears to be a *pro forma* document, which also indicates that it was used generally by the defendants in the carrying out of their scheme.

68 After querying the status of their investment, one of the investors received a document entitled “Interim Investment Report” which tended to indicate that the transaction was in the nature of an investment rather than merely a loan. It stated, amongst other things, “We are delighted to welcome you on board of (sic) the investors looked after professionally by My Wealth Manager Financial Services Pty Ltd”. It purported to provide an identification of the investment returns for the client’s superannuation fund and indicated the length of time of the next investment

period. This further evidences the existence of an accumulation of investors' funds by MyWealth Manager.

69 In these circumstances, the inference can be sufficiently drawn that the scheme which the defendants promoted to Mcube / 3M Financial's clients was that they would contribute money to MyWealth Manager along with other investors for the purposes of carrying out investment for which they would be entitled to returns.

70 The requirement that there be contributions to the scheme is satisfied in this case.

Benefits

71 An arrangement will be a scheme even if the promised benefits are ultimately illusory. If by misrepresentation the scheme's promoter asserts that the investor will acquire rights which are greater than are actually legally available and those asserted rights bring the arrangement within the definition of a scheme, the arrangement will nevertheless constitute be a managed investment scheme: *ASIC v Emu Brewery* [92]. So much was explained by Douglas J in *Australian Securities and Investments Commission v Comcash Australasia Pty Ltd* (2004) 59 ACSR 632. That case was not entirely dissimilar to the present in that persons were induced to establish their own SMSFs and to place their entitlements from other funds into them. The funds would be placed in a bank account which was operated by the promoters of the scheme. The promoters of the scheme represented that the funds would be invested in joint ventures in the Commonwealth of Dominica which would generate returns of around 6% to 11%. The investors were also told they could borrow a portion of their funds from the joint venture for a period of 25 years. As it transpired there were no investments made in the Commonwealth of Dominica or elsewhere and the money was dissipated by the promoters, including to themselves. Douglas J considered whether the matter should be treated merely as one of a fraud perpetrated on the investors rather than a scheme or programme of action in relation to a managed investment. His Honour said at 635 – 636 [14] – [15]:

[14] ... In other words it would not be a case where the contributors actually acquired rights to benefits produced by the scheme in spite of the objective effect of the scheme documentation. The use of the words "whether the rights are actual ... or not" in para (a)(i) of the definition is against such an argument and the authorities suggest that schemes run by promoters who deliberately squander the investments trusted to them are nevertheless treated as "managed investment schemes": see, for example, *Australian Securities and Investments Commission v Hutchings* (2001) 38 ACSR 387; [2001] NSWSC 522 and *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561; [2002] NSWSC 310. Similarly, where schemes appear to be nonsensical, see *Australian Securities and Investments Commission v Young* (2003) 173 FLR 441; [2003] QSC 29 at [22]–[25].

[15] As the Court of Appeal said in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2003] 1 Qd R 135; (2000) 158 FLR 220; 35 ACSR 620; [2000] QCA 452 at [6]:

[6] The rights which the investors acquire when they pay money in are rights to have the scheme operate in accordance with the agreements they have made and to be paid moneys due ... Of course, participation may produce no benefit for an investor, but loss only: it would, however, be perverse to read the expression "to acquire rights to benefits produced" as excluding from the definition any scheme of investment which is not bound to produce benefits.

72 As his Honour held, it is appropriate to look at how the scheme was promoted and ascertain whether the apparent object was for persons to acquire rights to benefits produced by the scheme.

73 As the facts detailed above reveal, the investors were offered the benefit of interest returns on the amount invested. Whilst it is more than probable that those involved in the promotion of the scheme at no time held the intention to invest the funds in a way that would result in such returns, that does not prevent a finding that the scheme had the feature that the investors contributed money as consideration to acquire rights to that benefit. In the circumstances of this case this requirement was also met.

The pooling of funds

74 Element (ii) of the definition of managed investment scheme requires that the funds are to be pooled or used in a common enterprise. The authorities in relation to this issue indicate that the requirement may be satisfied by the actual pooling of the funds: *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2003] 1 Qd R 135, 145; such that the requirement can be satisfied by determining what actually occurred with the funds: *National Australia Bank Ltd v Norman* (2009) 180 FCR 243. Alternatively, it seems to be sufficient if the funds are paid to the promoter of the scheme who intends to pool the funds and does in fact do so. See also *ASIC v Takaran*, 391-393 [13].

75 Here the material sufficiently evinces that the funds were pooled in the account of MyWealth Manager. The evident intention of the scheme, at least as it was promoted to the investors was for those funds to be used for investments. It can be inferred that the investors were aware that their contributions to MyWealth Manager were not capable of being used, by themselves, to engage in development projects and it must have been axiomatic that other investors would contribute other funds for that purpose. It can also be seen from the account of MyWealth Manager, which was exhibited to the ASIC affidavits, that the funds from the investors were accumulated in that account to some degree. As mentioned previously, ASIC's investigation

revealed that an amount of at least \$6.8million was transferred from the Macquarie Bank cash management accounts established for the SMSFs to MyWealth Manager's account. It is true that the funds were relatively quickly disbursed by the defendants for their own purposes once they reached the account, however, for present purposes there is sufficient to conclude that pooling of funds occurred.

Producing benefits

76 It can also be accepted that the purpose of the investors' contributions to MyWealth Manger was to produce the financial benefits which were expected or promised to them in the nature of investment returns from the use of the funds in development projects. Those who were to receive the benefit were those who advanced the funds.

77 It is true that, in the period between March and November 2018, four investors had their investment returned to them. The evidence as to why this occurred was not clear but the inference is that the investors sought to recover their funds for investment elsewhere. It is not irrelevant that the repayment of these funds only occurred by MyWealth Manager using the investment of other investors. At all events, these were the only investors to whom funds were apparently repaid.

78 Regardless of the repayment of some funds, ASIC has established that the purpose of the contributions was to produce benefits as required by the definition.

No day-to-day control

79 It is apparent from the above discussion that the investors were not to have day-to-day control over the operation of the scheme. As the scheme was promoted, it was MyWealth Manager which would make the overriding investment decisions. No part of the scheme involved decisional or managerial input from the investors. It follows that this element of the definition is also satisfied in the present case.

Conclusion as to the existence of a managed investment scheme

80 In light of the above evidence, ASIC has established that the arrangement undertaken by the defendants was a managed investment scheme within the meaning of that term as it is used in the Act. Whilst that conclusion is, in part, supported by inferences from the largely uncontested facts, they form a sufficiently sound foundation for it.

Was the managed investment scheme required to be registered?

81 Pursuant to s 601ED(1) of the Act, the managed investment scheme was required to be registered if it satisfied any of the three conditions therein identified. In this case, subparagraph (a) was met in that the scheme had more than 20 members. A member is a person who holds an interest in the scheme. The evidence disclosed that around 55 entities, being the corporate trustees of the SMSFs, invested in the scheme. The interest which they held was the right to the return of their investment along with the periodical payment of the returns which were to be generated by the commercial activity in which MyWealth Manager was to engage.

82 In the result, the evidence adduced by ASIC supports the conclusion that the managed investment scheme established by the defendants was one which required registration.

83 ASIC also established that it was not registered.

Who operated the managed investment scheme?

84 By its originating application, ASIC seeks relief in the form of declarations to the effect that MyWealth Manager, Mcube / 3M Financial, Mustafa, Mahek, and Mubashir operated the managed investment scheme in contravention of s 601ED(5). Unusually, in its written submissions ASIC refers to a number of the defendants as “being involved in the operation” of the managed investment scheme. That infers reliance on s 79 of Act which imposes liability on persons who are “involved in a contravention”. However, none of the requirements for establishing accessorial liability were mentioned and it may be that no distinction is intended to be drawn by that use of language.

85 The word “operate” in s 601ED(1) does not refer to the identity of the person who owned the scheme, rather it refers to those acts which constitute the management or carrying out of the activities of the scheme as a matter of ordinary parlance: *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561. However, the section does not only apply to people who, by themselves, perform all of the activities which constitute the carrying out of the scheme. A person will operate a managed investment scheme if they perform an act or some of the acts which constitute its carrying on, so long as the act or acts are directed to that end. In this case, the scheme was carried on by the defendants acting together, even though each had different, albeit sometimes overlapping, roles to perform.

86 In considering the operation of the scheme it is necessary to keep in mind that those involved in the operation of MyWealth Manager and Mcube / 3M Financial were not concerned to

strictly observe the boundaries of corporate activity and obligations. It is apparent that Mustafa acted in the business and operations of Mcube / 3M Financial even though he was neither a director nor employee of that company. It would also seem to be apparent that Mubashir acted for MyWealth Manager at the same time as acting for Mcube / 3M Financial and in undertaking the same tasks.

MyWealth Manager

87 MyWealth Manager was one of the entities which operated the scheme. It was the repository of the investment funds and it received them into its accounts. In all, it received approximately \$6.8million into its bank account over a period from 17 March 2016 to 31 May 2019. As the scheme was promoted, it was to use the funds to invest in development projects in order to produce a return for the investors. It was held out by Mustafa and Mubashir, and allowed itself to be held out by them, as being a secure and profitable property development option for SMSF investors, which would return between 6% and 10%.

88 On one view it might also be said that MyWealth Manager undertook some steps in carrying out its purported investment strategy by acquiring property or interests in properties. The evidence shows that on 5 August 2016, it purchased a property at 148-160 Albert Road, South Melbourne for \$570,000. Of that sum it paid \$115,406 on 22 July 2016 as a deposit. There is sufficient evidence to warrant the conclusion that the property was paid for with the funds received from investors. The property was not developed in any way and it remains in the ownership of MyWealth Manager. Whilst the operators of the scheme were generally acting in a dishonest manner, in the absence of evidence to the contrary it can be presumed that MyWealth Manager acquired this parcel of land in furtherance of the investment plans which had been promoted to investors. All of the defendants had the opportunity to adduce evidence that the money spent on these properties was the result of their misappropriation of investors' funds but, not surprisingly, no such evidence materialised. The inference from the evidence is that the payment of money and the acquisition of land were steps taken in carrying out the activities of the scheme.

89 ASIC has established that MyWealth Manager operated the unregistered managed investment scheme.

Mcube / 3M Financial

90 The actions of Mcube / 3M Financial which ASIC assert had the result that it too operated the managed investment scheme related to it soliciting investors for the scheme and assisting them to establish a SMSF. On the evidence before the Court it is pellucid that the clients of Mcube / 3M Financial were targeted as potential investors in the scheme. Those clients, many of whom lacked any real financial literacy, engaged Mcube / 3M Financial for the purpose of providing financial advice. Rather than giving them independent and careful advice it, through Mubashir and Mahek, steered those clients towards the establishment of a SMSF so that they might invest in MyWealth Manager. The clients were referred to MyWealth Manager for discussions about how they could invest in it. The clients were also introduced to Mr Merchant, an accountant, who would prepare the documentation to establish the SMSFs and corporate trustees. Mr Merchant also set up Macquarie Bank cash management accounts which were attached to the SMSFs, although the clients were unaware of this. It is not irrelevant that the process of establishing those accounts included Mr Merchant providing to Macquarie bank, email addresses which were not those of the clients and telephone numbers which belonged to Mubashir.

91 The features of the scheme which rendered it a managed investment scheme included the element of soliciting clients who would invest their funds with MyWealth Manager. The solicitation of the clients was an essential part of it and it is apparent that the role of Mcube / 3M Financial was to undertake that task. That alone is sufficient to establish that it also operated the managed investment scheme: *Australian Securities and Investments Commission v Karl Suleman Enterprizes Pty Ltd* (2003) 177 FLR 147.

92 As ASIC identified, Mcube / 3M Financial was also the recipient of significant sums from MyWealth Manager. Despite investigation by ASIC and the receivers and managers of the companies, the reason for the transfers to it of those funds was not capable of explanation. The records of MyWealth Manager and Mcube / 3M Financial are so poor and so lacking that it is not possible to identify any reason why the transfers would have been intended to discharge any obligation owed to MyWealth Manager. Nevertheless, and again in the absence of evidence to the contrary, the transfers can be regarded as having been made for the purposes of investing funds to generate returns for the scheme. None of the defendants have suggested that the transfer was for any other purpose and it ought to be assumed, where it is possible to do so, that the parties were acting lawfully and in accordance with their obligations. Although it is not essential to the outcome of this case, it can be concluded that Mcube / 3M Financial

also operated the scheme by receiving funds and investing them in accordance with the representations made.

Mr Mustafa Mohammed

93 Mustafa was clearly operating the managed investment scheme. He was the sole director, secretary and shareholder of MyWealth Manager up until July 2016. Although he formally resigned from that position the evidence before the Court indicates that he remained in control of the company thereafter. The evidence also establishes that the presently identified director of MyWealth Manager on the ASIC database has consistently denied any knowledge of the company and its activities. It seems that he may have been made the director of the company without his knowledge.

94 Despite his formal resignation as director, Mustafa remained the sole signatory to the company's bank account. In addition, subsequent to 1 July 2016 he continued to enter into contracts for and on behalf of the company in the capacity of its director and secretary. These contracts included loan agreements with investors and the purchase of real property. The investors who have provided affidavits in these proceedings also detail dealing with Mustafa in 2017 in relation to the establishment of their SMSF and investing their superannuation with MyWealth Manager. One referred to Mustafa informing her of the types of developments which MyWealth Manager was undertaking or intending on pursuing.

95 ASIC's investigations also reveal that the staff of Mcube / 3M Financial were of the understanding that Mustafa was in charge and control of MyWealth Manager, being the entity which they were advising their clients to invest with. The evidence establishes that there was a close connection between Mcube / 3M Financial which was controlled by Mahek and MyWealth Manager which was controlled by her husband, Mustafa and it seems that for a time both companies operated from the same premises. The observations of Mcube / 3M Financial's staff that Mustafa was operating MyWealth Manager during the relevant period should be accepted.

96 It was in the operation of MyWealth Manager's bank account that Mustafa seemed to be most involved. In the period from 17 December 2016 to 2 August 2019 he transferred the sum of \$889,808 into one account held by him and \$480,400 into another. The investigations of the receivers and managers disclose that the purpose of the transfers is unknown and the records of the company are inadequate to allow any identification of the reason for them. Mustafa has been asked on a number of occasions to explain the transfers but he has provided no response.

97 The receivers have also discovered that in the period from April 2017 to September 2019 a total of \$109,563.76 was paid out of the MyWealth Manager bank account to the mortgagee of the property at 22 Cayleys Road, Werribee South, Victoria, which is a building owned by Mustafa.

98 It can be concluded that Mustafa was at the centre of the managed investment scheme, that he was one of the organisers of it and he controlled its operation and, in particular, by controlling the distribution of funds which were received from investors. These circumstances sufficiently establish that he was operating the scheme.

Ms Mahek Mustafa

99 Mahek can also be said to have operated the managed investment scheme. In her evidence she denied any knowledge of it, claimed that she did not participate in it, and asserted that she did not know what was happening in Mcube / 3M Financial. She claimed that she was only acting at her husband's behest in anything that she did.

100 Mahek's evidence was unreliable and ought to be rejected. She was not a credible witness. In reaching this decision it should be recognised that she is obviously an intelligent and capable person. She acknowledged that her education included having the qualifications of a Bachelors of Commerce majoring in Accounting, a Master's in Education, a Diploma in IT and a Diploma in Financial Planning. These qualifications enable her to understand the nature of the business which she was operating and the nature of the transactions Mcube / 3M Financial were engaging in and recommending to its clients.

101 Although in the course of her evidence she claimed ignorance of the operations of Mcube / 3M Financial, that evidence also should be rejected. The foundation for that rejection can be derived largely from her own evidence in that, despite her initial absolute denial of any relevant involvement in the business of Mcube / 3M Financial, during the course of her evidence she revealed that she was well aware of its business, its operations and what activities were engaged in by those employed by it

102 That apart, the fact that Mahek was the sole director, secretary and shareholder of Mcube / 3M Financial tends to suggest that she had more involvement in the company and its operation than she now admits. Given her qualifications it is apparent that she would have been acutely aware of the obligations of being a director of a company and at no point did she suggest to the contrary. Indeed, the evidence disclosed that she was or had been a director of numerous

companies apart from Mcube / 3M Financial. Further, evidence from those who dealt with Mcube / 3M Financial indicate that she was in control of the company and its business operations. Some investors claimed that they had discussions with her in relation to the advice that they establish SMSFs. In his s 19 examination, Mubashir stated that Mahek provided financial advice to clients. Mr Merchant, the accountant who had a close relationship to Mahek and Mustafa, stated that he was referred clients from Mcube / 3M Financial to prepare documentation for the establishment of their SMSFs. He also said that he had standing instructions from Mahek to use Mubashir Mohammed's phone number on the application forms for the establishing of a Macquarie Bank cash management account for the clients. This evidence was not disputed by Mahek.

103 The authority of Mahek to give such instructions on behalf of her company is supported by the company's web site which was also in evidence before the court. That site contained the ubiquitous page with "Our Team Members" and the first identified was Mahek, who was described as "Director / Financial Advisor".

104 The falsity of Mahek's evidence that she was not involved with the operation of Mcube / 3M Financial is also established by the company's staff, many of whom stated that they reported to her and that she, along with Mubashir, were the key decision makers of the company and dealt with the provision of financial advice. It can also be accepted that she was responsible for the hiring of staff and, in particular, she interviewed and engaged Ms Angel Witika as the Customer Relations Manager. Whilst Mahek initially denied interviewing Ms Witika, she subsequently acknowledged that some form of discussion or interview occurred. Her evidence in relation to this issue was somewhat incredible, as was most of her other evidence.

105 Although Mahek left Australia and returned to live in India in the latter part of 2019, it is apparent that she maintained control over the company and its operations. Although she denied that was so, it transpired that she had weekly telephone conversations with Ms Hine Chapman, the Office Manager of the business. Although she attempted to minimise the relevance of this conduct to the extent that it related to the operation of the company, her attempts to do so should be rejected. In this context it is relevant that when a person who raised issues on social media about Mcube / 3M Financial and its business, she flew to Australia to confront that person on the basis that she did not want anyone disparaging her business. If, as she asserted, she had little to do with the company or its affairs it is surprising that she would undertake such action. It also transpired that she controlled a second group of persons in India who apparently

undertook work for Mcube / 3M Financial. This group called “Power Planning” prepared documentation for the transactions into which the company and its clients entered. It also prepared statements of advice for the clients based on information provided by Mcube / 3M Financial. In her evidence Mahek acknowledged that she had a role in ensuring that the services were properly provided to Mcube / 3M Financial.

106 Mahek was also the sole signatory to the bank account of Mcube / 3M Financial and the evidence shows that a total of \$283,096 was transferred from the MyWealth Manager account into it. Those funds were then withdrawn for unknown purposes. In the circumstance of this case, a clear inference arises that she was an essential part of the managed investment scheme and that she would have been well aware that the funds received into the Mcube / 3M Financial account had been derived from its clients SMSFs.

107 Similarly, in the period from 17 December 2016 to 26 August 2019, a total of \$754,032 was transferred from the MyWealth Manager bank account into her personal account. Most of those deposits were for amounts of \$10,000 or less. They were largely disbursed on day-to-day expenses or transferred to a linked or associated account. Although in her evidence she denied knowledge of the origin of the funds, that too is not credible. As mentioned she is an intelligent and resourceful person and it is most unlikely that she would not have discovered the origin of the funds in her account when the statements of account quite clearly show that they were deposited by MyWealth Manager.

108 The evidence also disclosed that after the commencement of ASIC’s investigation, notices pursuant to s 33 of the ASIC Act were issued to Mcube / 3M Financial. These were responded to by Mahek who claimed that she was unable to produce the required documents because she was in India. When ASIC inquired whether her business manager, Mubashir would be able to produce them she responded by saying:

The financial statements cannot be produced by my business manager and I cannot involve him in my business financials.

109 I accept the submission made on behalf of ASIC that this was an admission that Mahek managed and controlled the business of Mcube / 3M Financial.

110 On 15 October 2019, Mahek’s legal representatives advised that she anticipated being in a position to comply with the s 33 Notice by 5 November 2019, however no response has ever been provided by her.

111 There is not a skerrick of evidence to support Mahek's assertion that she was not involved in the business and that it was being operated at the behest of Mubashir or Mustafa. On the contrary, the evidence strongly supports the conclusion that she was in control of the company's business and part of the operation of the scheme.

112 It might be observed that, on occasion, Mahek, had glimpses of her own culpability in relation to the funds of the clients of Mcube / 3M Financial being lost. She acknowledged that she had been negligent in relation to their affairs and that she should have paid more attention to her clients' interests. Whilst the evidence tends to disclose that she was rather more than negligent in relation to her clients' affairs, her acknowledgement of the same seems somewhat inconsistent with her assertions that she had very little to do with the operation of the business. If her involvement was as she asserted, being that the business was really operated by her husband and Mubashir, she would have no culpability because she had no obligations.

113 The above evidence supports the conclusion that Mahek personally operated the managed investment scheme. It is clear that she was responsible for identifying potential investors and inducing them to invest with MyWealth Manager. It is also clear that she dealt with the funds which were accumulated in the scheme. Despite her protestations to the contrary, it is also clear that she was well aware of the operation of her company and that it acted as she directed. It is a necessary inference that in her capacity as the director of the company she made the decisions which caused the company to engage in the act of soliciting clients to invest in MyWealth Manager. Although her acts did not completely relate to those features of the scheme which cause it to come within the definition of a "managed investment scheme", she nevertheless operated an essential part of it: *Australian Securities and Investments Commission v Atlantic 3 Financial (Aust) Pty Ltd* [2006] QSC 132 [19].

Mr Mubashir Mohammed

114 There is also little doubt that the activities of Mubashir amounted to his operation of the managed investment scheme.

115 The uncontested evidence is that he was the primary contact for most of the clients of Mcube / 3M Financial and that, in many cases, it was he who advised that they should create a SMSF and then invest their funds with MyWealth Manager. In undertaking those tasks it may well be that he was fulfilling his duties as an employee of Mcube / 3M Financial and that may be so despite it appearing that the advice was both egregiously wrong and inappropriate. Nevertheless, that was not the extent of his conduct in relation to the scheme.

- 116 As mentioned previously Mubashir's phone number was used for the purposes of the Macquarie cash management accounts which were associated with the SMSFs. That was important for the operation of the scheme such that MyWealth Manager could cause the transfer of funds to it. Mubashir's participation in the transfer of funds would have been necessary because he would receive an authorisation code for the purposes of undertaking internet transfers. Although Mubashir claimed that he was authorised to transfer money out of the accounts of the SMSFs, there is evidence that the accounts were established without the knowledge of the investors who were unaware that he had access to their funds. The facts demonstrate Mubashir's close involvement in the activities of carrying the scheme into effect. Moreover, they demonstrate that the activities engaged in by Mubashir were for purposes other than performing his obligations as an employee of Mcube / 3M Financial.
- 117 Mubashir was also involved in entering into loan contracts on behalf of MyWealth Manager with the clients of Mcube / 3M Financial and, so it seems, liaising with investors in the scheme. In the course of his s 19 examination he, at first, denied that he had executed any loan agreements on behalf of MyWealth Manager, but after being shown an example he admitted that he had executed a number of them for the company. It was also demonstrated that he provided investment reports to investors from MyWealth Manager. Although technically an employee of Mcube / 3M Financial, the evidence reveals that he received commissions from MyWealth Manager for causing his clients to invest their super funds with the latter. Again, in his examination he initially denied receiving any such commissions but subsequently admitted that he had.
- 118 In accordance with the unfortunate pattern of behaviour by MyWealth Manager, significant amounts of money were transferred from it to Mubashir's account. From 17 December 2016 to 26 August 2019, a total of \$1,376,100 was paid into one account and a further \$412,411 into a second account. Whilst it is apparent that the funds may have been misappropriated by him, in the absence of any evidence to the contrary, it can be inferred that they were transferred into his account for undertaking the investments which the investors were led to believe were to occur. In that sense his actions in dealing with the funds can be said to be part of the operation of the scheme. That inference can be loosely supported by the fact that on 7 May 2018 MyWealth Manager gave to Mubashir a cheque in the sum of \$50,000 and on 31 May 2018, he signed a contract to purchase a property at 24 Lansdowne Parade, Tarneit, Victoria. The deposit for this property was \$42,500. On the presumption that these facts were regular, the

acquisition of the property can be regarded as having been for the purposes of the scheme and that Mubashir's conduct was in the carrying out of the scheme.

119 On 20 November 2019, being the day before the first return date of ASIC's interlocutory applications seeking interim injunctions and freezing orders in relation to the defendants, Mubashir left the jurisdiction and has remained overseas ever since. He has not sought to participate in the proceedings before this court and his continued absence from the country can be taken as being not inconsistent with the truth of the allegations which ASIC has made against him.

120 It is to be recalled that Mubashir was an employee of Mcube / 3M Financial from about 2017 and prior to that he was an employee of MyWealth Manager. To some extent that might limit his liability under s 601ED(1) as subsection (6) provides that a person is not operating a scheme merely because they are acting as an agent or employee of another person. However, as the above facts demonstrate, his activities in relation to the scheme extended well beyond those of an employee of Mcube / 3M Financial. The evidence reveals that he was in the position of a promoter of the scheme and was someone who received the benefit of the funds which it produced. In that sense his conduct was not merely as an employee.

121 It can be concluded that Mubashir also operated the managed investment scheme.

Conclusion as to the identity of the scheme's operators

122 It being uncontentious that the managed investment scheme was required to be registered but had not been, it follows that each of MyWealth Manager, 3M Financial, Mustafa, Mahek, and Mubashir were persons who operated the scheme in contravention of s 601ED(5). ASIC is entitled to the declarations which it seeks in that respect.

Contravention of s 911A

123 It is now appropriate to turn to the second part of ASIC's claim, namely that the defendants contravened s 911A of the Act by engaging in the unauthorised provision of financial services.

124 As is identified previously, s 911A requires that a person who carries on a financial services business in Australia must hold an AFSL covering the provision of the financial services. The expression "Financial services business" is defined as a business of providing financial services. Section 766A of the Act provides that a person provides a financial service if they deal with a financial product and, by s 766C, dealing includes applying for, acquiring or issuing a financial product. The expression "financial product" is wide and, by s 763A includes a facility through which a person makes a financial investment. Section 764A(1)(ba) provides

that financial products include an interest in a managed investment scheme that is not a registered scheme.

125 Here the evidence establishes that none of those who operated the managed investment scheme held an AFSL authorising them to carry on the business of providing financial services by dealing in interests in an unregistered managed investment schemes or operating it. They each dealt in the financial product because they issued interests in the managed investment scheme. The evidence is sufficient to reach the conclusion that all of the defendants participated in the operation of the scheme as a whole even if they performed separate tasks for the purposes of facilitating the clients of Mcube / 3M Financial to enter into loan agreements with MyWealth Manager. The three individuals acted together to conduct the scheme by which the rights, illusory as they probably were, were issued to the investors. It follows that they were all engaged in dealing in interests in a managed investment scheme and, not holding any entitlement under an AFSL to do so, contravened s 911A: *Australian Securities and Investments Commission v Arafura Equities Pty Ltd* (2005) 56 ACSR 429, 439 [30]. For the same reasons each operated the managed investment scheme despite not having any authorisation to do so under an AFSL and that also constituted a breach of s 911A.

126 The result of the above is that ASIC is entitled to declaratory relief in relation to the contraventions of s 911A.

Injunctive relief

127 In its originating application ASIC also sought wide-ranging injunctive relief enjoining the defendants from carrying on a financial services business in Australia or from holding themselves out as doing so.

128 There is no doubt that in the circumstances of the contraventions in this case the Court's power to grant injunctive relief under s 1101B(1)(a)(i) and s 1324 of the Act is enlivened. As was submitted by ASIC, the conduct in question occurred over a period of three years during which time none of the defendants held an appropriate authorisation such that they have all engaged in persistent contraventions of the Act. It was also submitted that the defendants all provided advice to the clients of Mcube / 3M Financial in relation to SMSFs when they were not authorised to do so. That breach was also made out.

129 In considering whether to grant injunctive relief it is relevant that the evidence tends to reveal that the contraventions in question were part of an orchestrated plan to misappropriate the funds

of the investors for the benefit of the three individuals. That plan involved the making of representations to the clients of Mcube / 3M Financial as to the benefits which were said to be available from investing with MyWealth Manager. The material which has been placed before the Court, and which has not been contradicted, shows that the representations were false when they were made. The conduct which was engaged in by the defendants was of the most serious kind, directed as it was to the misappropriation of the superannuation savings of vulnerable people. It is difficult to image a clearer case for the granting of injunctive relief. That being so, injunctions should be granted to ensure that no further people suffer at the hands of the defendants as the result of the provision of financial services.

130 It is relevant that the three individual defendants have left the jurisdiction and it is not likely that they will return. Whilst that may be a reason for not granting an injunction, their conduct was so egregious that the mere possibility that it might be repeated should be prevented. In any event, there is no requirement for the granting of an injunction that the person to be restrained intends to engage in the conduct again: s 1324(5).

131 In the circumstances, ASIC has made out a case for the granting of injunctions in the terms sought by it.

Winding up of MyWealth Manager and Mcube / 3M Financial

132 ASIC also seeks relief by way of the winding up of the first defendant, MyWealth Manager and of the third defendant, Mcube / 3M Financial, on the just and equitable grounds.

133 Some of the principles relating to the exercise of power under s 461(1)(k) of the Act were referred to in the decision in a related matter: *Australian Securities and Investments Commission v MyWealth Protection* [2020] FCA 1034 at [17] – [21] in the following terms:

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)*).

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.

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].

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”...

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.

An absence of confidence in the management of the companies

134 The findings which have been made previously in these reasons render it axiomatic that the Court cannot have faith in the management of the affairs of either company. The current director of MyWealth Manager is not aware that he had been appointed as a director and has no knowledge of it, its affairs or of the action before the Court. It can readily be accepted that, despite that which appears on the ASIC records, he has no meaningful involvement in the company’s management. It seems that he has been purportedly appointed without his knowledge. The circumstances give rise to the strong inference, which should be accepted, that Mustafa lodged documentation with ASIC to prevent him being identified as a director but he has, nevertheless, continued to operate the company as a shadow director. That latter fact was established by his continued control over and use of the company’s bank account and that he continued to execute documents on its behalf as its director well after he had ostensibly been replaced. The attempted obfuscation of the management and control of the company, itself, provides a good reason for winding it up.

135 Further, on the assumption that Mustafa remains a or the director of MyWealth Manager, the fact that he now obviously resides in India supports the conclusion that he is no longer disposed to have any interest in its operation.

136 Mahek is the current director, secretary and shareholder of Mcube / 3M Financial. She also resides in India and has also been absent from the jurisdiction since July 2019. There is nothing to suggest that she will return to Australia and, given the seriousness of the allegations made against her and established in these proceedings, it is most unlikely that she ever will. As mentioned previously, she has been delinquent in her responsibilities regarding Mcube / 3M Financial. She caused it to unlawfully operate an unregistered managed investment scheme, the ultimate object of which was to misappropriate the superannuation savings of vulnerable people. She has neglected to cause the company to comply with its obligations to respond to notices issued by ASIC on it. In her capacity as a director she has failed to attend at a s 19 examination. The only conclusion that can be drawn from the evidence is that Mahek cannot be trusted to cause the company to act in accordance with its statutory obligations.

137 As is also mentioned above, the financial books and records of MyWealth Manager and Mcube / 3M Financial were not maintained in accordance with the requirements of s 286 of the Act. Putting aside the fact that this establishes a rebuttable presumption of insolvency, the maintenance of appropriate financial records is essential for the proper administration of any company and that is particularly so when the management needs to occur through an external administrator such as a receiver or liquidator. In this matter, the receivers and managers have had great difficulty in ascertaining the companies' dealings and, as appears to be so often the case, the existence of inadequate books has operated to conceal misconduct in the companies' management and affairs. The receivers and managers have not had sufficient power or time to determine a clear picture of the affairs of the companies and they are of the opinion that the appointment of liquidators is required to enable that to occur. That should be accepted.

138 ASIC further submitted that the solvency of each of MyWealth Manager and Mcube / 3M Financial is unclear. Although MyWealth Manager may potentially have about \$400,000 in equity in a property in South Melbourne, it is also likely to owe at least \$6.8million to the investors who lent money to it. Further, the receivers and managers have identified that its bank accounts has a balance of under \$1.00 (as of 21 November 2019). In addition it has no business from which there is any prospect of realising funds in order to meet the debts which it owes to investors. As Mustafa has misappropriated most of the funds from the company, there is no real prospect that it is solvent. The receivers and managers have identified that Mcube / 3M Financial has a debit of \$19.09 in its only bank account (as at 21 November 2019), and a photocopier, but no other assets. On the material before the Court, which the company has had an opportunity to contest but did not, it is more than likely that its clients will have

substantial claims against it in relation to the inappropriate advice provided to them and that those claims will have some arguable basis for them. Further, it received up to \$283,096 from MyWealth Manager which, on the evidence, was probably derived from investors' funds. Neither ASIC nor the receivers and managers have been able to identify any rationale within the books and records for that transfer. It is more than likely that the company will be obliged to repay that money. It is likely that it is insolvent and there was no evidence to suggest to the contrary.

139 The evidence also makes clear that both MyWealth Manager and Mcube / 3M Financial were parties to the operation of the unlawful managed investment scheme and, in that capacity, caused substantial amount of investor funds to be misappropriated to themselves and to related entities in disregard of the obligations owed to the investors. Importantly, the transfers occurred without any supporting documentation and, in the absence of any elucidation by the defendants, it can be inferred that no innocent explanation for the transfers exist. As has been discussed above, the payments to Mustafa, Mahek and Mubashir were substantial and unjustifiable in any commercial sense. The money was received from the investors for the purpose of investing in development or building projects. Rather than undertaking those tasks the money was dissipated by the defendants soon after it was received and neither ASIC nor the receivers and managers have been able to discover any genuine attempt to engage in any investments. ASIC submitted that this gives rise to a *prima facie* breach of s 1041G of the Act which prohibits engaging in dishonest conduct in relation to a financial product in the course of carrying out a financial services business. Again, that submission should be accepted and particularly so in the absence of any explanation to the contrary.

140 ASIC submitted that, in the absence of evidence as to the purpose of the transfers from MyWealth Manager to Mustafa and Mubashir, the transfers of funds could properly be treated as unreasonable director-related transactions pursuant to section 588FDA of the Act. There is also force in that submission but, as ASIC further submits, the appointment of liquidators would be necessary to allow any appropriate investigation to be undertaken to ascertain the reasons for the transfer of more than \$3million to those persons and their immediate family. A liquidator would then be able to reach an informed decision as to whether the transactions were voidable under the Act. This also is a strong reason for winding up each company.

141 As a matter of reality, the evidence strongly suggests that many millions of the investors' money has been lost. The only process by which the true circumstances can be revealed is by

the appointment of liquidators who can investigate the transfers and, if possible, pursue recovery proceedings. It follows that it is in the best interests of creditors, including investors, and also in the public interest that the winding up orders be made.

142 The only conclusion which can possibly be reached is that the Court can have no confidence in the conduct or management of the companies. They have not been appropriately conducted and there is no likelihood of them being properly administered in the future. If anything, their continued existence exposes members of the public to the risk of loss of funds at the hands of Mubashir and Mahek and their continuing mismanagement. All of the circumstances point inexorably to the making of orders that the companies, MyWealth Manager and Mcube / 3M Financial, be wound up on the just and equitable grounds pursuant to s 461(1)(k) of the Act.

143 The current receivers and managers of these companies ought to be the liquidators to carry out the winding up.

Winding up of the scheme

144 Above it has been concluded that the managed investment scheme was operated without it being registered contrary to s 601ED(5). *Prima facie*, it follows that it ought to wound up pursuant to s 601EE(2). There is no countervailing reason why such an order should not be made and the liquidators of the first and third defendants should also be appointed to wind up the scheme.

Costs

145 There is no reason why ASIC should not have their costs of the action against each of the defendants.

I certify that the preceding one hundred and forty-five (145) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Derrington.

Associate:

Dated: 22 July 2020

SCHEDULE OF PARTIES

QUD 707 of 2019

Defendants

Fourth Defendant: SECURE INVESTMENTS PTY LTD ACN 169 499 218

Fifth Defendant: MUSTAFA MOHAMMED

Sixth Defendant: MAHEK MUSTAFA

Seventh Defendant: MUBASHIR MOHAMMED