FEDERAL COURT OF AUSTRALIA

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

File number(s):	QUD 119 of 2020
Judgment of:	**DERRINGTON J**
Date of judgment:	14 October 2020
Catchwords:	**CORPORATIONS –** financial services and markets – financial services providers – licensing and regulation – requirement for licence – whether defendants were carrying on a financial services business by issuing financial products – whether loan agreements were financial products – consideration of whether investors intended their funds would be used to generate a return for them such that loans were actually facilities through which investors made a financial investment **CORPORATIONS** – winding up – just and equitable grounds – whether court has no confidence in management of company – company engaged in operating a financial service business without authorisation pursuant to a Australian Financial Services Licence – company operated without any appropriate financial governance or regulation – insolvent – company ordered to be wound up
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Corporations Act 2001* (Cth) ss 461(1)(k), 761E, 763A, 763B, 765A, 766C, 911A, 1041E, 1041H, 1101B, 1324 *Federal Court of Australia Act 1976* (Cth) s 21 *Corporations Regulations 2001* (Cth) r 7.1.06
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487 *Australian Securities and Investments Commission v Intertax Holdings Pty Ltd* [2006] QSC 276 *Australian Securities and Investments Commission v*

	Mauer-Swisse Securities Ltd (2002) 42 ACSR 605 *Australian Securities and Investments Commission v Secure Investments Pty Ltd* [2020] FCA 639 *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1)* (1986) 11 ACLR 566 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	110
Date of last submission/s:	7 October 2020
Date of hearing:	6 October 2020
Counsel for the Plaintiff:	Ms A Freeman
Solicitor for the Plaintiff:	Mr H Copley of the Australian Securities and Investments Commission
Counsel for the Defendants:	There was no appearance for the defendants

ORDERS

QUD 119 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**SECURE INVESTMENTS PTY LTD ACN 169 499 218** First Defendant
	AQULIA GROUP PTY LTD ACN 631 638 625 Second Defendant
	MUDASIR MOHAMMED NASEERUDDIN Third Defendant

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **14 OCTOBER 2020**

THE COURT ORDERS THAT:

1. It is declared that the first defendant, Secure Investments Pty Ltd, has acted in contravention of s 911A of the *Corporations Act 2001* (Cth) because between 13 May 2015 and 7 August 2019, it issued facilities through which persons ordinarily domiciled in Australia, including Mohammed Siddiqui, Mohammed Azim, Mohammed Dhedhy, Sabeen Shakoor Abdul, JB FAV Pty Ltd and MIM Super Fund, could make a financial investment and each of whom intended their financial investment to generate a financial return or benefit, and carried on a financial services business in this jurisdiction when it did not hold an Australian Financial Services Licence covering the provision of the financial services.

2. It is declared that the third defendant, Mr Mudasir Mohammed Naseeruddin, has acted in contravention of s 911A of the *Corporations Act 2001* (Cth) by arranging for the first defendant to issue facilities through which persons ordinarily domiciled in Australia, including Mohammed Siddiqui, Mohammed Azim, Mohammed Dhedhy, Sabeen Shakoor Abdul, JB FAV Pty Ltd and MIM Super Fund, could make a financial investment and each of whom intended their financial investment to generate a financial return or benefit, and carried on a financial services business in this jurisdiction when

he did not hold an Australian Financial Services Licence covering the provision of the financial services;

3. The defendants, by themselves, their servants and / or agents howsoever, are permanently restrained from and an injunction is granted permanently restraining them from carrying on a financial services business in this jurisdiction without holding an Australian Financial Services Licence covering the provision of the relevant financial services, including by:

   (a) dealing in a financial product;

   (b) promoting financial products;

   (c) providing financial services advice; and

   (d) promoting or carrying on any financial services business in Australia.

4. Pursuant to section 461(1)(k) of the *Corporations Act 2001* (Cth), the first defendant, Secure Investments Pty Ltd, be wound up.

5. Timothy Norman and Robert Woods of Deloitte Financial Advisory Pty Ltd be appointed as joint and several liquidators of the first defendant for the purposes of the winding up.

6. Pursuant to section 461(1)(k) of the *Corporations Act 2001* (Cth), the second defendant, Aquila Group Pty Ltd, be wound up.

7. Timothy Norman and Robert Woods of Deloitte Financial Advisory Pty Ltd be appointed as joint and several liquidators of the second defendant for the purposes of the winding up

8. Upon the appointment of Timothy Norman and Robert Woods as the liquidators of the second defendant, the Receivership of the second defendant shall terminate.

9. The costs of Timothy Norman and Robert Woods, as Receivers and Managers of the second defendant, be paid from the assets of the second defendant as are under the Receivers and Managers' control at the termination of that Receivership, in accordance with paragraph 8 (above), as a priority to any other costs

10. Paragraph 16 of the Orders of this Court made on 1 May 2020 is vacated.

11. The defendants are to pay the plaintiffs costs of this action, including any reserved costs, to be taxed.

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 these proceedings, the Australian Securities and Investments Commission (ASIC) initially sought declarations that the defendants contravened ss 911A, 1041E and 1041H of the *Corporations Act 2001* (Cth) (the Act), injunctions pursuant to ss 1101B(1) and 1324 of the Act restraining the defendants from engaging in the provision of financial services, and winding up orders in respect of the first and second defendant pursuant to s 461(1)(k) of the Act. Broadly speaking, ASIC alleged that the first defendant, Secure Investments Pty Ltd (Secure Investments), and the third defendant, Mr Mudasir Mohammed Naseeruddin (Mr Naseeruddin), carried on a financial services business without authorisation pursuant to an Australian Financial Services Licence (AFSL) in contravention of s 911A of the Act. ASIC also alleged that the defendants made false statements to induce potential investors to invest in building projects to be undertaken by Secure Investments or the third defendant, Aquila Group Pty Ltd (Aquila Group) in contravention of ss 1041E and 1041H of the Act.

2 None of the defendants appeared when the matter was called on for hearing, although it ought to be observed that Mr Naseeruddin was represented in the proceeding and indicated through his lawyers that he did not wish to participate in the hearing and would abide by any determinations and orders made by the Court.

3 At the hearing, ASIC adduced its evidence and sought judgment in respect of the claims articulated in the Originating Application. Relevantly, it relied upon the late affidavit of Mr Jarrah Nicholson (an investigator in the Financial Services Enforcement team at ASIC) of 1 October 2020, which deposed that on 24 September 2020 a brief of evidence was referred to the Commonwealth Director of Public Prosecutions (CDPP) seeking advice as to whether criminal charges ought to be preferred against Mr Naseeruddin. Although it was not stated in the affidavit, Ms Freeman of counsel for ASIC informed the Court that the matters which were the subject of the reference related to the same conduct which ASIC alleged in these proceedings contravened ss 1041E and 1041H of the Act. Ms Freeman further stated that the declarations of contravention of s 911A do not relate to the issues which have been referred to the CDPP. For these reasons, ASIC sought to adjourn the hearing and determination of its claims relating to the alleged contraventions of ss 1041E and 1041H until such time as it had

received advice from the CDPP. The Court should accede to ASIC's request. Civil courts are assiduously cautious about transgressing into the considerations of the criminal courts: *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, 493 [19]: and that caution extends to circumstances where the impugned conduct is that of a company and its director. Additionally, were consideration of the claims in relation to ss 1041E and 1041H to proceed, there is a risk that their determination in the present proceedings may be drawn into question by the results of any future criminal proceedings: *Australian Securities and Investments Commission v Intertax Holdings Pty Ltd* [2006] QSC 276, 8. That would not assist in preserving confidence in the administration of justice.

4 It follows that only those matters relating to the alleged contraventions of s 911A of the Act and the issue of whether Secure Investments and Aquila Group should be wound up on the just and equitable grounds are considered in this judgment.

Background

5 As no defendant appeared at the hearing, ASIC's evidence remained uncontested and there was no contradictory material of any kind. Nor were any oral or written submissions made on behalf of the defendants as to the findings which should be made. It follows that matters deposed to in the affidavit evidence of ASIC's witnesses can be accepted as accurately identifying the facts on which any determinations are to be made and the following findings of fact are derived from that uncontested evidence.

The defendants

6 Secure Investments purported to carry on an investment business involved in property development. It was registered as a company on 12 May 2014, and Mr Naseeruddin has been its sole director and shareholder. He is also the sole signatory to its bank accounts.

7 Aquila Group carried on the business of a construction management company. It was registered as a company on 13 February 2019, and Mr Naseeruddin was, initially, its sole director and shareholder. On 25 February 2020, he resigned as the director and Mr Hassan Atik was appointed in his place. There is no evidence that Mr Atik was involved in any of the conduct of which ASIC complains in these proceedings.

Overview of ASIC's investigation

8 ASIC has been investigating various of the defendants since 19 December 2019 in relation to suspected contraventions of, *inter alia*, s 911A of the Act in relation to financial services provided by them from 1 July 2014.

9 The results of its investigation indicate that Mr Naseeruddin, on behalf of Secure Investments, promoted to potential investors the benefits of investing in or with that company. He did so by advising them that he would assist in establishing a self-managed superannuation fund (SMSF) for them into which they could transfer their existing superannuation entitlements, and that the SMSF would then lend those funds to Secure Investments. It is alleged that Mr Naseeruddin informed the potential investors that their investments would yield high returns, although he often gave different advice as to the expected rate or rates. In his affidavit of 29 April 2020, Mr Nicholson deposed that up to 28 SMSFs invested approximately $2.4m in or with Secure Investments from early 2017 to late 2019.

10 After ASIC commenced proceedings against Secure Investments in November 2019, Mr Naseeruddin, acting on behalf of Aquila Group, raised an additional $251,000 from three further investors. It is alleged that he informed these people that he could arrange for an early release of part of their superannuation funds on the condition that they invested the balance with Aquila Group for the purpose of property development. Three persons, being one couple and an individual, pursued that course of action and invested with Aquila Group. Again, Mr Naseeruddin provided assistance by establishing SMSFs for the parties and arranging for them to enter into loan agreements with Aquila Group.

The facts in detail

The absence of any relevant authorisation under an AFSL

11 ASIC's records reveal that at no time were any of the defendants authorised under or pursuant to an AFSL to issue a "financial product" as defined by s 766C of the Act and nor were they so authorised to carry on a financial business which involved the issuing of financial products. Those records indicate that Mr Naseeruddin had been appointed as an authorised representative of two AFSL holders and was authorised to provide financial advice and services at various times from 19 April 2018 to 7 January 2020, however, that authorisation did not entitle him to engage in the activities of which ASIC complains.

Carrying on the business of issuing financial products

12 Much of ASIC's evidence concerned the manner in which Mr Naseeruddin promoted Secure Investments and Aquila Group to potential investors. In the light of the confinement of issues to whether there had been a contravention of s 911A, there is no need to detail that evidence, save to the extent to which it impacts upon the nature of the investments which were held out as being available. Despite the large amount of information provided in the affidavits relied upon by ASIC, there was very little which was directed to the nature of the transactions which were entered into between Secure Investments or Aquila Group and the numerous investors. As can be seen from the discussion later in these reasons, this was an important issue in the proceedings.

13 In his affidavit of 29 April 2020, Mr Nicholson deposed to having obtained screen shots of Secure Investments' website as it existed from time to time. One of those revealed that, at the time of its activities which are the subject of these proceedings, Secure Investments held out to the public the following:

(a) In describing the nature of its business, Secure Investments stated:

> Since its inception in 2012, SPI has provided its clients with profitable returns and a variety of sound investment options. We have partnered with well-known developers and investment managers, in order to provide unprecedented service in Property Development and Investments.

(b) It identified the services which it purported to provide in the following terms:

> Secure Property Investments is a truly unique firm that offers all Australians the advantageous opportunity to invest directly into the booming Australian property market. Since its inception in 2012, SPI has provided its clients with profitable returns and a variety of sound investment options. We have partnered with well-known developers and investment managers, in order to provide unprecedented service in Property Development and Investments.

(c) As to the manner in which investment projects were identified, the website stated:

> These opportunities are then put through a rigorous process of due diligence before being selected for presentation to investors and distributors. We provide comprehensive support throughout every stage of the investment process including, if required, the ongoing management, rental and resale of investments. To date, the value of the property our clients have invested through us, is over AUD 40 Million across the Australian Property market.

14 In his affidavit of 31 July 2020, Mr Nicholson also annexed a promotional brochure of Secure Investments which he obtained from a Mr Anthony Dennison in the course of ASIC's investigation. It included statements which were similar or identical to those found on Secure Investments' website, and contained an artist's impression of several building developments

which the company claimed were its projects. Mr Dennison said, during an interview conducted by ASIC officers, that Mr Naseeruddin had given him several copies of this brochure to hand out at a funeral he was attending. It can be inferred that, as Secure Investments had taken the trouble to produce these documents, it would have used them in the course of its business by providing them to potential investors, including those who subsequently invested with it.

15 Although ASIC's investigation indicated that over 28 SMSFs transferred funds to Secure Investments, the evidence before the Court only included 17 loan agreements entered into between Secure Investments and 10 individuals or their superannuation funds over a period from 1 November 2014 to July 2019 (14 of those agreements were annexed to Mr Nicholson's affidavit of 31 July 2020). The following table identifies the name of the lender under the various loan agreements, the dates they were apparently entered into, the interest rate, and the project address identified in the agreements. Those entries that are starred are agreements where the only copy before the Court is unexecuted.

Identity of lender	**Date**	**Interest**	**Project address**
Mohammed Dhedhy*	17 December 2016	7-10%	Tarneit 5 Units
Muddasser Dhedhy*	17 December 2016	7-10%	Single Storey Units
Muzzammil Dhedhy*	15 August 2017	20%	Tarneit Units
Sabeen Shakoor Abdul	1 November 2015	20%	Mt Aitkin & Single Storey
Sabeen Shakoor Abdul	1 November 2016	20%	Bellin St Laverton
Sabeen Shakoor Abdul	1 November 2017	20%	1264 Portland Avenue Truganina/ 429 Morris Rd Truganina
Sabeen Shakoor Abdul	1 November 2018	20%	Duplex Hogan Street - Tarneit
Abdul Shakoor	1 November 2014	13.76%	Multi Unit site – Single Dwelling
Abdul Shakoor	1 November 2015	13.76%	Multi Unit site – Single Dwelling
Abdul Shakoor	1 November 2016	13.76%	Multi Unit site – Single Dwelling
Abdul Shakoor	1 November 2017	13.76%	Portland Ave & Donnybrook Rd
Sedat Yildrim / Sedat Yildrim Super Fund	1 December 2016	7%	Various development projects
MIM Super Fund	6 February 2019	10-12%	Morris Rd – Orchid drive
JB FAV Pty Ltd	1 July 2019	10-13%	Lot 623 Kinbrook Estate Donnybrook
Muhammed Duzgun / O&A Family Super Fund*	14 March 2018	7-10%	Multi-Unit Site & Single storey
SMZSMA Super Fund	13 May 2015	15%	149 Tessalar Rd Epping – 10 Units
SMZSMA Super Fund	1 March 2017	15%	429 Morris Rd Tarneit 5 units/ Paoir Crt Epping 21 Units

16 There was very little analysis by ASIC as to the nature and effect of the loan agreements, which is somewhat surprising given that its case now centres on whether these agreements constitute "financial products" under s 911A of the Act, rather than mere credit facilities. That being so it is necessary to consider the loan agreements before the court in some detail.

17 The loan agreements were in substantially the same *pro forma* terms. The usual recital to the agreements was:

> WHEREAS
>
> The Borrower has requested the Lender to make available certain loans advances or financial accommodation to the Borrower for business purposes which the Lender has agreed to do subject to and upon the terms and conditions specified in this Loan Agreement.

18 On its face, this suggests that the agreements were such that a loan would be made to a borrower who agreed to repay it in accordance with the agreed terms. As such the loan documents have the appearance of mere credit facilities. Indeed, each agreement refers to itself as a "Loan Agreement", the investor is identified as "The Lender" and Secure Investments is identified as being "The Borrower". The amount of the loan is identified in the schedule and by the terms of the agreement the Borrower agrees that it has received it. Importantly, the Borrower agrees that it will repay the Lender upon the Repayment date as defined. It also covenanted to pay interest to the Lender from the date of the Advance to the Repayment Date. References are made to Higher and Lower Rates of interest "as set out in the schedule" although in no case are any such rates identified. Otherwise, the agreements contain standard terms and conditions which might ordinarily be found in loan agreements.

19 ASIC's written submissions contained the statement at [43]:

> The 14 loan agreements [annexed to Mr Nicholson's affidavit of 31 April 2020] each contained promised profit margin returns ranging from 7% to 20% with pay-out dates ranging from 2017 to no later than 2021.

20 That statement is not without difficulties. If it is intended to assert, as it appears to be, that "each" agreement contained a range of returns between 7% and 20%, it is wrong. The majority of the loan agreements contained a specific rate of interest which was payable being either 20%, 13.76%, or 7%. On the other hand some stated that the interest rate payable was 7 – 10%, 15 – 20% (corrected to 20%) or 10 – 12%. That said, the description of the rate of interest payable on the loan was somewhat obscure, being identified in the schedule as "Interest Rate / Profit Margin". A difficulty with this is that there is nothing in the terms and conditions that refers to the Lender being entitled to a Profit Margin. Indeed, there is no other mention of that phrase in the agreements at all.

21 Nevertheless, despite the form of the agreements, there exists some indications which suggest that they were merely a vehicle through which a different transaction was entered into. In its written submissions ASIC stated at [38]:

> All the loan agreements state that the money being invested was for property development being conducted by the first defendant.

22 While that submission is inaccurate, as the loan agreements did not contain any term which prescribed the purpose for which the loan was to be used, the schedule to the agreements did include an entry titled "Project Address" and adjacent to that was a description of what is presumed to be some development being or to be undertaken by Secure Investments. Some were in specific terms such as the address of a property, others a description of a development in a general location, and others were generic statements such as "Multi Unit site – Single Dwelling". The identification of a "Project Address" in the schedule is not related to any covenant in the terms of the agreement. There is no promise by the Borrower to use the funds at the particular project and nor is there anything in the terms which suggests that the funds will be used at that or some other project.

23 There was no direct evidence adduced by ASIC from many of the persons whose SMSFs lent money to Secure Investments. The affidavit of Mr Nicholson of 29 April 2020 which was prepared and originally used for obtaining interlocutory injunctions, contained a substantial amount of hearsay evidence from some investors. It was also tendered at the final hearing and, in the absence of objection to its contents, can be relied upon.

24 Mr Nicholson gave evidence that he had spoken to an investor, Mr Faiyaz Khan, who invested with Secure Investments through a SMSF called the SMZSMA Super Fund which Mr Naseeruddin helped establish. Mr Khan said that he had been told by Mr Naseeruddin that Secure Investments invested the money in a number of property developments around Victoria. The loan agreement between the SMZSMA Super Fund and Secure Investments was entered into on 13 May 2015 and was for an amount of $84,000. The loan agreement stated that the "Interest Rate / Profit Margin" was 15% and adjacent to the entry for project address were the words, "149 Tessalar Rd Epping 10 Units".

25 In 2019 a number of text messages were exchanged between Mr Khan and Mr Naseeruddin. They related to the identity of the location where Mr Khan's superannuation funds were supposedly invested. Mr Naseeruddin indicated that the funds were invested in three different projects of Secure Investments. ASIC seemed to rely upon this post contractual conduct as somehow evidencing the terms of the agreement or resolving ambiguities, however, its admissibility for that purpose is questionable: *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603.

26 Mr Nicholson also gave evidence that he spoke to a Mr Shakoor Abdul who, along with his wife, Ms Sabeen Shakoor Abdul, had also advanced money to Secure Investments. Mr Nicholson gave evidence of the content of that conversation, but none of it concerned the true or intended nature of the investment made with Secure Investments. Mr Shakoor Abdul invested his superannuation funds with Secure Investments in April 2013 through his SMSF, S&S Super Fund. He and his wife re-invested on several occasions. In total, Mr Abdul and his wife invested approximately $109,476 with Secure Investments.

27 One of the investors with Secure Investments in respect of whom direct evidence was adduced was Mr Mohammed Najeeullah Siddiqui. He said that he met Mr Naseeruddin through the Islamic community in mid-2017. At that time he was working part-time and his superannuation contributions were paid into an Islamic Retail Superannuation Fund. In his affidavit he deposed to the circumstances surrounding the making of an investment with Secure Investments in very general terms. He said that Mr Naseeruddin told him that if he invested his superannuation fund with Secure Investments his money would be invested in property, he would receive a guaranteed return of 10% per annum, and that the investment would be very safe. Mr Naseeruddin also said that the accountant for Secure Investments would take care of the taxation returns for the superfund. As a result Mr Siddiqui agreed to the establishment of a SMSF and to lend the entire fund to Secure Investments. In furtherance of this Mr Naseeruddin caused the NAJ Super Fund to be established for Mr Siddiqui.

28 The evidence does not disclose how Mr Siddiqui's SMSF made an investment in Secure Investments, although it can be assumed that a standard loan agreement was entered into. However, in a letter to the NAJ Super Fund dated 30 July 2019, Mr Naseeruddin stated that:

> SPI Group is pleased to inform that we could achieve an average ROI of 10% on the managed portfolio. This means distinct SMSF and Individual investors made 10% on their money that was invested with SPI Group.

29 The letter went on to identify that the NAJ Super Fund had made a 10% rate of interest on its investment, albeit prorated for the time invested. It went on to say:

> We at SPI Group are constantly pursuing greater returns for our portfolio and Investors. We are hoping to exceed the expectations on the returns in 2019.

30 ASIC also relied upon the evidence of Mr Mohammed Azim who had been approached by Mr Naseeruddin and who offered him the opportunity to invest with Secure Investments. Mr Azim knew Mr Naseeruddin and his family. He says that Mr Naseeruddin told him that he would set up a SMSF for him and that a cash management account had to be opened with Macquarie

Bank. Mr Azim handed to Mr Naseeruddin a cheque for $83,861.99 which he had obtained from his previous super fund. Subsequently, he received from Secure Investments and Mr Naseeruddin a Certificate of Registration of a Company called SMZSMA Investments Pty Ltd which had a commencement date of 20 January 2015. That company was apparently the trustee of Ms Azim's SMSF which was called the SMZSMA Super Fund. It can be seen that the same super fund was used as the vehicle for the investments of both Mr Azim and Mr Khan.

31 The SMSF initially entered into a loan agreement with Secure Investments on around 13 May 2015. It was in the same general form of loan agreement as identified above. The schedule identified that the "Interest Rate / Profit Margin" was 15% and that the Project Address was "149 Tessalar rd Epping 10 Units". As was the case with other loan agreements there was no term which created any covenant as to the use of the loan funds at the identified address. A subsequent and similar loan agreement was entered into on around 1 March 2017. The "Interest Rate / Profit Margin" was 15% and the project address was "429 Morris Road Tarneit 5 units and Paoir court Epping 21 Units".

32 Evidence was also given by Mr Muhammed Duzgun, being another investor with Secure Investments. His superannuation was previously managed by AMP and he had no experience in the operation of SMSFs. He knew Mr Naseeruddin through family connections. In 2018 Mr Naseeruddin told him words to the effect that he had commenced a property development fund which invested in residential buildings and he could guarantee returns of 15%. Mr Naseeruddin further told Mr Duzgun that in order to invest in the fund he was required to establish a SMSF. As a consequence of what he was told Mr Duzgun, along with his brother Abdurrahim Duzgun and his sister-in-law Tular Urer, agreed to invest with Secure Investments. A SMSF for all three of them was established, or apparently established, under the name "O & A Family Super Fund" and their combined contributions were $175,055. It appears that Mr Naseeruddin also established a cash management account with Macquarie Bank for the O & A Family Super Fund. The funds in the cash management account were transferred to Secure Investments, although the authority for that to occur was not clear. Mr Duzgun said that he had no idea about the transfer of funds from that account to Secure Investments and he did not authorise it. For present purposes there is no need to make any finding in relation to that matter. Mr Duzgun subsequently received a copy of an unexecuted loan agreement from Mr Naseeruddin which is in the same general form as that identified above. The "Interest Rate / Profit Margin" was identified as 7% to 10% yearly and the project address is "Multi-Unit Site

& Single Storey". Other than is identified above there is no evidence as to the true nature of the transaction between Secure Investments and Mr Duzgun's SMSF.

Relevant legislative provisions

33 It is necessary to identify and say a little about the statutory provisions on which ASIC relies for the relief which it seeks in these proceedings.

34 In relation to the injunctive relief it relies upon the powers conferred on the Court in s 1101B of the Act which relevantly provides:

> **1101B Power of Court to make certain orders**
>
> *Court's power to make orders in relation to certain contraventions*
>
> (1) The Court may make such order, or orders, as it thinks fit if:
>
> (a) on the application of ASIC, it appears to the Court that a person:
>
> (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services;
>
> …
>
> *Examples of orders the Court may make*
>
> (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
>
> (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
>
> (i) a provision or provisions of this Chapter; or
>
> (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or
>
> …
>
> (e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and
>
> (f) an order restraining a person from providing any financial services that are specified in the order; and

35 Similarly in relation to the power of the Court to restrain conduct which is in contravention of the Act, s 1324 provides:

> **1324 Injunctions**
>
> (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

(a) a contravention of this Act; or

(b) attempting to contravene this Act; or

(c) aiding, abetting, counselling or procuring a person to contravene this Act; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

(f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

36 Although the power in this section is stated in broad terms, there is little doubt that the Court should generally consider whether the granting of an injunction would have some utility or would serve some purpose within the contemplation of the Act, such as where there is a risk of future contraventions: *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605, 614 [37]-[38]. It is also now well established that although the requirements for exercising the equitable power to grant injunctions, such the existence of a serious question to be tried and a favourable balance of convenience, are not directly relevant to the power under s 1324(4) to grant interim injunctions, the interests of justice will usually require that these matters be taken into account. That is so even where the protection of the public is said to be involved: *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1)* (1986) 11 ACLR 566, 570 – 571.

37 ASIC also seeks declarations relating to the conduct of Secure Investments and Mr Naseeruddin and, in doing so, relies on s 1101B of the Act and s 21 of the *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*). Section 21 provides:

21 Declarations of right

(1) The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A suit is not open to objection on the ground that a declaratory order only is sought.

38 The power in s 21 is broad and the subject of few restraints. However, it is generally acknowledged that it should only be exercised when there is a real and not theoretical issue to be determined and the party seeking relief has a real and genuine interest in its determination:

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, 437 – 438. Where, however, the application for a declaration is at the suit of a government regulator, the concept of "a real and genuine interest" is far wider than is the case where the litigation is between two private entities. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (*ABCC v CFMEU*), the Court said at 87 [93]:

> Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2007] ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

39 In addition, ASIC relies upon the wider power of the Court under s 1101B to make any order which it sees fit where it is satisfied that a relevant contravention has occurred. To this extent, it was submitted that the Court's power under s 1101B might be easily used for making declarations. Whilst it can be accepted the Court's power in that section is easily enlivened, the essential question is whether the power should be exercised in the circumstances of the case and, for present purposes, the answer to that question is necessarily guided by the above passage from *ABCC v CFMEU*.

Consideration of the relief sought by ASIC

Declarations concerning contravention of s 911A

40 ASIC's main claim was that Secure Investments and Mr Naseeruddin contravened s 911A of the Act in that they engaged in the business of providing financial services (as that term is defined in the Act) without the relevant authorisation. The applicable part of s 911A(1) provides:

> **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.

41 The provision of a financial service is defined in s 766A as including the provision of financial advice and the dealing in a financial product. The expression "dealing" is defined by s 766C as including the "issuing of a financial product". That section also provides that arranging for a person to issue a financial product is also a dealing in a financial product unless the action concerned amounted to providing financial product advice: s 766C(2) of the Act.

42 In its written submissions, ASIC submitted that the concept of arranging for a person to issue a financial product includes being involved in "the chain of events leading to the relevant dealing if it is of sufficient importance that without that involvement the transaction would probably not have taken place, the involvement significantly adds value for the investor and the arranger receives benefits from the transaction." This statement was taken from the *ASIC Regulatory Guide Number 36* at RG 36.43. Although there was no debate about that issue in this case, for present purposes the width of the words used in s 766C(2) of the Act may encompass the activities referred to in the regulatory guide.

43 Section 761E of the Act is concerned with identifying when a financial product is "issued" to a person. It relevantly provides:

> **761E Meaning of issued, issuer, acquire and provide in relation to financial products**
>
> *General*
>
> (1) This section defines when a financial product is issued to a person. It also defines who the issuer of a financial product is. If a financial product is issued to a person:
>
> (a) the person acquires the product from the issuer; and
>
> (b) the issuer provides the product to the person.
>
> *Issuing a financial product*
>
> (2) Subject to this section, a financial product is issued to a person when it is first issued, granted or otherwise made available to a person.
>
> …
>
> *Issuer of a financial product*
>
> (4) Subject to this section, the issuer, in relation to a financial product issued to a person (the client), is the person responsible for the obligations owed, under the terms of the facility that is the product:
>
> (a) to, or to a person nominated by, the client; or
>
> (b) if the product has been transferred from the client to another person and is now held by that person or another person to whom it has subsequently been transferred—to, or to a person nominated by, that person or that other person.

44 The meaning of "financial product" is provided by s 763A of the Act in wide terms:

> **763A General definition of financial product**
>
> (1) For the purposes of this Chapter, a financial product is a facility through which, or through the acquisition of which, a person does one or more of the following:
>
> (a) makes a financial investment (see section 763B);

45 ASIC also relied upon s 763B of the Act in relation to when an investor makes a financial investment:

> **763B When a person makes a financial investment**
>
> For the purposes of this Chapter, a person (the investor) makes a financial investment if:
>
> (a) the investor gives money or money's worth (the contribution) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

46 However, s 765A of the Act specifies a list of things which are not "financial products" for the purposes of Chapter 7. Included in that list is a "credit facility within the meaning of the regulations": s 765A(1)(h)(i) of the Act.

47 Regulation 7.1.06 of the *Corporations Regulations 2001* (Cth) provides in relation to a credit facility:

> **7.1.06 Specific things that are not financial products: credit facility**
>
> (1) For subparagraph 765A(1)(h)(i) of the Act, each of the following is a credit facility:
>
> (a) the provision of credit:
>
> (i) for any period; and
>
> (ii) with or without prior agreement between the credit provider and the debtor; and
>
> (iii) whether or not both credit and debit facilities are available; and
>
> (iv) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
>
> (v) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (bb), (f), (g), (h) or (j) of the Act; and
>
> (vi) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or

> predominant purpose of which is, or is intended to be, the provision of credit;

48 Relevantly to the circumstances of the present matter, the expression "credit" for the purposes of reg 7.1.06 means a contract, arrangement or understanding under which one person incurs a deferred debt to another person and includes a financial benefit arising from or as a result of a loan: reg 7.1.06(3).

Did Secure Investments and Mr Naseeruddin contravene s 911A?

49 It is not in doubt that at all relevant times neither Secure Investments nor Mr Naseeruddin held an AFSL and nor were they authorised to carry on a financial services business in Australia which involved the issuing of a financial product.

50 ASIC submitted that they did carry on a financial services business in contravention of s 911A by issuing financial products to investors, being the loan agreements which individuals or their SMSFs entered into with Secure Investments. It submitted that these were not within the meaning of the expression "credit facility" as used in s 765A because the definition in reg 7.1.06 excludes credit facilities if they are "financial products" within the meaning of ss 763A and 763B of the Act. For the purposes of this case, the arrangements between the investors and Secure Investments would be a facility through which a financial investment was made, and therefore "financial products", if, as per s 763B:

(d) the investors gave money or money's worth (the contribution) to Secure Investments (s 763B(a)); and

(e) the investors intended that Secure Investments would use the contribution to generate a financial return, or other benefit, for them (even if no return or benefit was in fact generated) (s 763B(a)(ii)); and

(f) the investors had no day-to-day control over the use of the contribution to generate the return or benefit (s 763B(b)).

51 There is no doubt that the first requirement is satisfied. The investors, be it the individuals or their SMSF's, gave money to Secure Investments. The transfers were made via the Macquarie Bank cash management accounts which Mr Naseeruddin established for each of the SMSFs. There is also no doubt that the third element is satisfied. The individuals and SMSFs did not have any control at all over the use of the contribution. The money was received by Secure Investments and the investors had no *de jure* or *de facto* involvement in how it was used.

52 The major issue is whether it is possible to extract from the evidence which ASIC adduced sufficient facts to be able to conclude that the investors intended that Secure Investments would use the contributions to generate a financial return for them. In this respect it is inappropriate to rely solely upon the loan agreements as encapsulating an arrangement which amounted to a "financial product". A mere loan agreement between a borrower and lender by which money is lent in return for its repayment together with interest is unlikely to satisfy the requirement that it was intended that the contribution would be used by the Borrower to generate a financial return for the lender. In the ordinary course, a borrower uses borrowed funds for their own purposes to generate a benefit for themselves and the interest rate is the price paid for the use of the funds.

53 However, the circumstances of this case show that the answer to the question of what was the intended use of the funds is not to be limited to a consideration of the terms of the loan agreements. It is to be answered in the context of all of the relevant circumstances, including what the investors were told about the transaction. That seems to be somewhat axiomatic. If reliance is to be placed upon the intention of the borrowers, evidence of the cause of their alleged beliefs would naturally be centrally relevant. In that respect it is somewhat strange that there is little, if any, evidence from the investors of the circumstances in which they entered into the relevant transactions insofar as those circumstances may elucidate what they were told of the nature of the investment. That is even true in relation to those investors who provided affidavit evidence. As it is, the matter needs to be approached by way of inference from the surrounding circumstances. Nevertheless, and despite the absence of direct evidence, it is possible to conclude that the investors did intend that Secure Investments would use their funds to generate a financial return for them.

54 In considering the material it must be kept in mind that Secure Investments' operation in relation to soliciting investors and entering into loan agreements was not a model of sophistication or precision. The materials before the Court show that its business records were poorly kept and the provisional liquidators were unable to reconcile important parts of the business and, in particular, the manner in which the so-called investments on behalf of contributors were made. Despite the business allegedly being one which provided investment opportunities for investors, it is apparent that no investor files of any substance were maintained. It is also apparent that the part of the business which involved investing the money from the lenders was inadequately documented. It is relevant that Mr Naseeruddin and Secure Investments were afforded the opportunity to respond to ASIC's claims and although they

possessed knowledge which might have otherwise explained the circumstances of the investments, they chose not to advance any evidence or explanation. Be that as it may, an analysis of the relevant circumstances leads to the conclusion that in the overall arrangements between the parties it was intended that Secure Investments would use the investors' funds to generate profits for them.

55 The first relevant consideration, albeit at the more general level, is the content of the public statements which Secure Investments made as to the nature of its operations. On its website and in the brochures which it obviously disseminated in the course of its business, Secure Investments identified that it provided clients with investment options and profitable returns in respect of property development. The options which it promoted concerned what it identified as, "investing directly" in the property market. That indicated that the proposed investment involved the use of the investor's funds in a particular way and, most likely, in the acquisition of interests for them in property or in property development. It also conveyed the notion that the investor would secure the benefits of positive fluctuations, if any, arising from a successful development, even if it omitted any mention that a direct investor will also be subject to the consequences of an unsuccessful project. Similarly, the indication in the various public statements that Secure Investments supports the investments by ongoing management and resale is suggestive of the individual investors having interests in the developments.

56 In the context of Secure Investments' asserted investment offerings, the identification of particular properties, developments or type of developments in the loan agreements attracts some rationality. On their face they are random statements in the loan schedule which have no correlation with any covenant or obligation of either borrower or lender. When, however, it is understood Secure Investments was offering "direct" investments in property development it can be sufficiently inferred that the identified project or projects were where the direct investment was intended to take place. Only in this way can meaning be given to these important words adjacent to the entry "Project Address". Were it otherwise, those words would be meaningless and, given that they are not part of the pro forma wording of the agreement and are specifically agreed upon between the parties, it is self-evident that they were not intended to be ignored or to be otiose. This conclusion adds weight to the view that the arrangement between Secure Investments and each of the investors was wider than that which was apparent on the face of the covenants in the loan agreements.

57 Similarly, as the above table discloses, in a number of loan agreements the rate of interest payable was identified as being between a range such as 7% to 10% or 10% to 12%. Again, in the context of the terms of the loan agreements this lacks any rationality in a legal logical sense. The expressed obligation of the borrower is to pay interest in accordance with the rate specified in the schedule and, on their face, those agreements where there was a range do not specify a particular rate. However, if it was the expectation of the parties that the investor had directly invested in a project, the expressed range of percentages can be discerned as being the scope of the expected profit. This conclusion is fortified by the use of the expression "Interest Rate / Profit Margin", in the schedules of the loan agreements. That strongly suggests that the return to be received by the investors on the capital advanced was not merely interest, but was to be part of the profit derived from the identified building project. Again, to refer to the return as a "profit margin" would be meaningless unless it were accepted that the loan agreements were part of a larger arrangement than that expressed by the terms of the written documents.

58 To the above can be added some examples of what investors were told by Mr Naseeruddin on behalf of Secure Investments. In his affidavit, Mr Siddiqui deposed that he was told by Mr Naseeruddin that his superannuation fund would be invested in property and that is consistent with the transaction being more than a mere loan on which interest was paid. Similarly, Mr Duzgun also advised that Mr Naseeruddin told him that he had started a property development fund which invested in residential building and could guarantee a 15% return. The use of the word "fund" further suggests that the investment transaction was to be more than a mere loan.

59 From time to time Secure Investments by Mr Naseeruddin sent correspondence to some of the investors in relation to their alleged return on investments. An example is the letter to Mr Siddiqui of 30 July 2019 in which it was said:

> I Naseer Mohammed Director of Secure Investments Pty Ltd, trading as SPI Group express my gratitude toward all our investors for their past year investments.
>
> The annual performance report marks another successful year for the company and the investors. A detailed report of individual Super Fund performance and the Property Industry is outlined below.
>
> …
>
> SPI Group is pleased to inform that we could achieve an average ROI of 10% on the managed portfolio. This means distinct SMSF and individual investors made 10% on their money that was invested with SPI Group.
>
> …
>
> We at SPI Group are constantly pursuing greater returns for our portfolio and Investors.

> We are hoping to exceed the expectations on the returns in 2019.

60 Self-evidently, that letter indicates that the transaction between Secure Investments and Mr Siddiqui's SMSF was a form of investment in a fund rather than a loan. The assertion that the investment was in a managed portfolio and that higher rates of return might be achieved are not consistent with the transaction between the parties being that which is reflected in the terms of the loan agreement. There is, of course, some danger in analysing post-contractual conduct as a means of interpreting an agreement, but here the conduct is not relied upon for interpreting the terms of the written agreement, but as evidence of what Mr Naseeruddin and Secure Investments had told investors was the nature of the investments into which they were entering. The terms of the above letter support the inference that the investors had been informed that their funds would be invested for them in property development from which returns would be generated.

61 Mr Siddiqui received a further letter on 28 August 2019 which was addressed to "Dear Investors" and which stated, *inter alia*:

> Firstly, we would like to thank you for your support thus far with us. We value your support and are always striving to achieve the best for our investors.
>
> …
>
> As a result of this, we have fragmented the investor pool and allocated individual account managers to those groups. These manager [(*sic*)] will be your first point of contact, any enquiry you have needs to be channelled through these account managers.
>
> ….
>
> Additionally, in accordance with our company policy, we would only be sending you the letter of investment highlighting your return on investment once a year.

62 Again, this letter is inconsistent with the relationship between Secure Investments and its investors being that of only lender and borrower. To suggest that Secure Investments is striving to do its best for the investors is to assert that it is managing their funds such that the returns, including any increased returns, belong to them. That is reinforced by the reference in the last paragraph to the highlighting of the return on investment in that year. That would be otiose if the return on the investment was merely the interest rate stipulated in the loan agreement.

63 The above is also consistent with the letter received by Mr Azim from Secure Investments dated 24 June 2019, which stated in respect of the investment of the SMZSMA Super Fund:

> As per the above breakdown currently SPI Group borrowed $155,890.44 from SMZMA [(*sic.*)] Super Fund which is invested in a direct property development project.

64 Again, the reference to a direct investment in property development is consistent with the foregoing analysis. It is also entirely inconsistent with the relationship between Secure Investments and its investors being only one of borrower and lender.

65 It must be kept in mind that the investments made by Mr Siddiqui, Mr Azim and Mr Duzgun through their superannuation funds were all documented in a standard form loan agreement. However, the evidence of communications from Secure Investments demonstrates that the transaction which they understood they were entering into was one which had been promoted to them as a direct investment of their funds in property from which a return would be generated for them. There is sufficient evidence to infer that this reflected the general operation of Secure Investments' business.

66 In summary, an inference is open on the uncontested evidence before the Court that Secure Investments and Mr Naseeruddin promoted to investors the opportunity to directly invest in particular building developments through Secure Investments, which would attempt to generate a return on the capital advanced to it. The public information which Secure Investments made available and the correspondence sent to the investors was consistent with the investments being of that nature. The evidence from some of the investors reveals that certain matters represented to them by Mr Naseeruddin were also consistent with this conclusion. Moreover, the unusual aspects of the loan agreement can only be rationalised on that basis. It follows that the requirement of s 763B(a)(ii) of the Act is satisfied with the consequence that the investments made with Secure Investments were "financial products" within the meaning of s 763A and were not credit facilities within the meaning of reg 7.1.06.

67 As Secure Investments was the entity responsible for the obligations owed under the terms of the facility which was the financial product, it was the issuer of it within the meaning of s 761E(4) of the Act.

68 The necessary conclusion is that Secure Investments was carrying on a financial services business by issuing financial products to investors. It held itself out as being engaged in the business of providing direct property development investment opportunities for investors and the evidence discloses that it received approximately $2.4 million in funds from 28 different SMSFs in the period from early 2017 to late 2019. Its conduct of issuing those financial products was repetitive and continuing for commercial or business purposes and was done in order to derive income. As such, it was engaged in those activities for the purpose of carrying

on a business. As it was not authorised pursuant to any relevant AFSL to carry on that business, Secure Investments contravened the prohibition in s 911A of the Act.

The involvement of Mr Naseeruddin

69 ASIC submitted that by reason of Mr Naseeruddin's conduct arranging for Secure Investments to issue the agreements which constituted the financial products he was a person who fell within the definition of dealing in a financial product. There is no need in this case to determine whether the statement in the *ASIC Regulatory Guide Number 36* at section RG36.43 as identified above correctly defines the boundaries of what is within the concept of arranging for a person to issue a financial product. Here, Mr Naseeruddin was solely responsible for promoting the financial product by informing the investors of the opportunity to invest in the several building projects, organising the creation of SMSF's and corporate trustees and the production of loan agreements between Secure Investments and the investors. He was not merely a go-between for Secure Investments and the investors. His conduct was integral to the bringing of the agreements into effect. That being so he undoubtedly arranged the issuing of the agreements and, pursuant to s 766C(2) of the Act, was therefore issuing them.

70 During some of the relevant period Mr Naseeruddin was the authorised representative of Dover Financial Advisors Pty Ltd and La Verne Capital Pty Ltd, each of which held AFSLs which permitted them to deal in a financial product by applying, acquiring and disposing of financial products. He had the same authorisations as the AFSL holders he represented. However, neither of the AFSL holders had authorisation to issue a financial product under the Act and, consequently, nor did Mr Naseeruddin.

Conclusion on conducting a financial services business

71 It follows from the above that both Secure Investments and Mr Naseeruddin were engaged in conducting a financial services business in Australia which consisted of issuing financial products through which financial services investments were made by investors for a return despite not holding any authorisation to do so. That conduct was in contravention of s 911A of the Act.

The appropriate relief

72 It follows that the declarations sought by ASIC ought to be made. It has a genuine interest in the protection of the legitimacy of financial markets and in this case its investigations have uncovered a flouting of the licensing requirements in relation to the issuing of financial

products. It is entitled to curial vindication of its actions in pursuing the breaches of the Act which it has established. Further, the conduct of Secure Investments and Mr Naseeruddin was contumacious given that the latter, who had some authority to give financial advice, can be taken to have known of the licensing requirements and the making of declarations will record the Court's disapproval of that conduct. On this foundation the powers under both s 21 of the *Federal Court Act* and s 1101B of the Act are enlivened and there is no reason why the declaratory relief should not be granted.

73 ASIC also seeks injunctions restraining Secure Investments and Mr Naseeruddin from engaging in the contravening conduct of carrying on a financial services business in Australia whilst not authorised pursuant to an AFSL. As has been discussed above, the Court's powers under ss 1101B and 1324 of the Act to grant injunctions in relation to such conduct are wide. Here the contravening conduct has been established against both parties and the power to restrain them is enlivened.

74 In the granting of injunctions, there is no requirement that the Court be convinced that the parties against whom they are sought intend or threaten to continue to contravene the Act: s 1324(6). Indeed, the Court may grant an injunction against a company even where a winding up order has already been made against it: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181, 295 [623]. As is the case in relation to the exercise of the power to grant declarations, the Court may exercise its power to grant an injunction as a means of expressing its disapproval of the contravening conduct. The conduct here was serious and undermined the integrity of the financial market and this provides appropriate justification as to why the Court should publically deprecate it by making the requested orders.

75 It is not irrelevant that neither Secure Investments nor Mr Naseeruddin made any attempt to explain or justify their conduct. Whilst they ultimately did not mount any defence to ASIC's proceedings, they did not acknowledge that their conduct contravened the Act in the manner alleged. Indeed, the evidence disclosed that even after ASIC had commenced investigating them in relation to the impugned conduct, Mr Naseeruddin established a second company, being Aquila Group, and commenced a similar undertaking using it. It follows that there is good reason to believe that he would attempt to repeat the contravening conduct were an injunction not granted. Similar considerations apply to Secure Investments which was the

corporate entity through which Mr Naseeruddin pursued his contravening conduct and in respect of which he remains a director.

Winding up

76 As mentioned previously, at the conclusion of the hearing ASIC sought orders which differed from that sought in the prayer for relief in the Originating Application, primarily because it did not presently wish to pursue the relief relating to matters which overlapped with the issues which might arise in any criminal proceedings against Mr Naseeruddin. That included conduct which was allegedly engaged in by him together with Aquila Group. Consequently, no declaration or injunction arising from any allegedly unlawful conduct was sought against that company. Despite that, ASIC persisted in seeking orders that both Secure Investments and Aquila Group be wound up on the just and equitable grounds. The difficulty which arises in relation to the latter company is that ASIC now seeks such orders despite it not seeking any other relief or findings in relation to that company's conduct which would underpin or justify the winding up. In this respect there appears to be something of a disconnect between the primary relief now sought in relation to the conduct of Secure Investments and Mr Naseeruddin on the one hand and the relief which is sought against Aquila Group. Nevertheless, despite the alteration in the manner in which ASIC has sought to advance its case, it is possible to conclude that both companies should be wound up on the just and equitable grounds even in the absence of any specific findings of contravention of the Act by Aquila Group.

Secure Investments

77 There are patently good grounds for winding up Secure Investments on the just and equitable grounds as it is palpable that the Court cannot have any confidence in the conduct and management of its affairs. In the first instance that conclusion is supported by its prolonged conduct in contravention of s 911A of the Act. The conduct was not transitory or undertaken mistakenly, but was a deliberate course of conduct which by its director, Mr Naseeruddin, it ought to have known was in breach of the Act.

78 The evidence before the Court also demonstrated that Mr Naseeruddin, as the director of Secure Investments, has failed to comply with notices served on him by ASIC under the *Australian Securities and Investments Commission Act 2001* (Cth) seeking the provision of information relating to the company's affairs. The notices are in no way onerous and Mr Naseeruddin has not advanced any reason for not complying with his statutory duty to respond to them. In the circumstances, this gives rise to a strong inference that he is attempting to conceal from ASIC

the manner in which Secure Investments' business was conducted. See generally the reasons for decision in *Australian Securities and Investments Commission v Secure Investments Pty Ltd* [2020] FCA 639. Mr Naseeruddin and, through him, Secure Investments, have continued their refusal to provide information concerning the operation of the company's affairs and this is further evidenced by Mr Naseeruddin's refusal to cooperate with the provisional liquidators of Secure Investments since their appointment in May 2020.

79 It is also apparent that Secure Investments has ceased to carry on business, having vacated its erstwhile office premises in March 2020, and there is no evidence that it intends to continue its undertaking. Certainly, its sole director and shareholder, Mr Naseeruddin, has not suggested to the contrary.

80 The provisional liquidators' report in relation to Secure Investments was critical of its past management. In particular, their analysis of the company's affairs led them to observe that it had not complied with the management requirements of the Act. They said at paragraph 8.1 of their report:

> **8.1 Existence of books and records**
>
> …
>
> In our opinion Secure Investments may not have maintained their books and records in accordance with Section 286 of the Act. This opinion is based upon our review of the accounting records maintained by Xero and the director's failure to respond by the director to requests from the Provisional Liquidators…

81 Further, the provisional liquidators raised concerns in their report as to the veracity of the company's financial records. They noted that one of the deficiencies was the extensive number of manual adjustments to the financial accounts, particularly regarding related party and director's loan receivables. It was further observed that extensive changes had been made in February 2020 to transactions dating back to 2018. This evidence is sufficient to draw the inference that Mr Naseeruddin's management of Secure Investments was, at best, inept and dubious.

82 Secure Investments is insolvent. It was as at the date of the appointment of the provisional liquidators and was more than likely insolvent well before then. This conclusion is supported by Mr Naseeruddin's admission in a s 19 examination that the company owed investors more than $2 million but it did not have the assets to pay that amount such that he would be required to rely upon members of his family to repay the amounts owing.

83 The evidence in Mr Nicholson's initial affidavit also reveals that Secure Investments' financial management was poor. The available accounts show that significant amounts of money held by the company have been paid to Mr Naseeruddin and related entities with very little description of those transactions in the records and no identifiable corporate purpose. Similarly, the evidence from the provisional liquidators' report reveals that, in the period from 1 July 2016 to 1 May 2020, Secure Investments by Mr Naseeruddin made the following disbursements of funds in its account as follows:

(a) $1,153,310.30 – to himself and members of his family;

(b) $55,518.19 – to High Protection Services Pty Ltd;

(c) $520,249.29 – to his family trust for investment in an entity referred to as Dome Securities.

84 There is nothing to suggest that the payments were for Secure Investments' purposes or were to discharge its obligations to the recipients of those funds. ASIC has also identified that Mr Naseeruddin caused payments to be made from several SMSFs directly into his personal accounts in an amount of $32,000 in the period from 16 November 2017 to 10 January 2020.

85 Despite ASIC's investigations and the inquiries of the provisional liquidators, neither Secure Investments nor Mr Naseeruddin have provided any adequate explanation for these transactions. This adds to the conclusion that the company had no or very poor financial management or control in relation to the money which it received.

86 The above matters are more than sufficient to conclude that the Court cannot have any confidence in the management of the affairs of Secure Investments by Mr Naseeruddin. There is no justification for its continued existence and it ought to be wound up on the just and equitable grounds.

Aquila Group

87 The evidence now apparently relied upon by ASIC relating to the affairs of the Aquila Group is substantially different to that relied upon in relation to Secure Investments. Whilst, at this stage, ASIC does not seek any injunctions or declarations against the company which might have provided a platform for a winding up order, it can be inferred that it relies in some general way on the evidence before the Court as indicating that there can be no confidence in the management of its affairs. Despite the lack of any useful articulation by ASIC as to the manner

in which the evidence might be marshalled in support of a winding up order, the following matters sufficiently appear from the material to justify that result.

88 Firstly, until recently, Mr Naseeruddin had been the sole director and shareholder of the company. The evidence shows that whilst ASIC was investigating him and Secure Investments, Aquila Group was established and, so it appears from the evidence, it proceeded to engage in much the same business as Secure Investments. Although in its embryonic stage, Aquila Group's business model only differed from that of Secure Investments by reason that it promoted the investments which could be made on behalf of investors with the additional assertion that the arrangements it put in place would entitle the investor to an early release of funds from their superannuation. ASIC submitted that the promised early release of funds was "unlawful". Unfortunately, that serious allegation was unaccompanied by any attempt to identify the relevant statutory provisions concerning access to superannuation funds or any explanation as to why the arrangements that were put in place contravened those provisions in the circumstances of the present matter. In the absence of any appropriate submission in support of that assertion, there is no need to consider it further.

89 Nevertheless, the financial management of Aquila Group under the control of Mr Naseeruddin replicated that of his erstwhile stewardship of the affairs of Secure Investments. That is to say that, whilst Mr Naseeruddin and Aquila Group received funds from investors for investing in building developments, those investments did not materialise. The funds were used for other purposes and dispersed without any proper recording of the transactions which justified such payments.

90 The evidence disclosed that there were three people who were induced to invest in or with Aquila Group although two, being Sandra Joy Kelly and Troy Brent Edwards, are de-facto partners and invested by way of a joint SMSF called the SK & TE Super Fund. The third investor was Mary Jones who invested through the NSMJ Super Fund. These persons gave evidence by affidavit in the proceedings

91 Ms Jones is an Aboriginal woman who was located in Bourke, New South Wales. At the relevant time she had found herself in a difficult financial position and towards the end of 2019 required $5,000 to pay her outstanding bills. She spoke to Mr Anthony Dennison, an advisor at Mcube Financial Planners, who advised her that he could arrange for her to receive money from her superannuation fund and that the rest would be invested. He referred her to Mr Naseeruddin who was to put the necessary arrangements in place. He received a 2%

commission from Mr Naseeruddin for doing so. It is not entirely clear what other motivation Mr Dennison would have had to refer clients to a person such as Mr Naseeruddin given the failings of Secure Investments to that point in time.

92 In any event, Ms Jones engaged with Mr Naseeruddin and she sent to him details of her superannuation with First State Super which indicated that she had a balance of approximately $47,500. Mr Naseeruddin told Ms Jones that he would organize the establishment of a SMSF. He also sent her a number of forms to sign for the purposes of the alleged investment. One was a loan agreement between the new corporate trustee of Ms Jones' new SMSF and Aquila Group. Ms Jones signed that document on 9 December 2019. That loan agreement had similar inconsistencies to those into which Secure Investments entered with its investors, although with some slightly clearer statement of the overarching purpose. The document itself is poorly drafted and, perhaps, deliberately so. The schedule contains a number of sections referred to as Parts. The Eighth Part is as follows:

> **Eighth Part - Rate of Interest/ Profit**
>
> * NSMJ Pty Ltd, will act as a silent share holder in the project.
>
> The company is entitled to 7% - 10% of the profit on their Money that comes from the sale of the project after all costs and expenses.
>
> The profit will be distributed as Interest return as the agreement is an unsecured loan with a personal guarantee from the borrower.
>
> - ***The address for the property is Lot 623 Kinbrook Estate Donnybrook***

93 The main reference in the terms of the agreement to "Eighth Part" is found in cl 3 which provides:

> The Borrower must pay interest on the Total Moneys outstanding from time to time at the Non Default Rate specified in the Eighth Part of the Schedule, such interest to be calculated on the Total Moneys and to be paid in the manner specified in the Ninth Part of the Schedule.

94 It is also referred to in cl 6.2 where reference is made to the "Overdue Interest specified in the Eighth Part".

95 It is plain that the Eighth Part does not specify any Non Default Rate or Overdue Interest rate. Further, the expression "7% to 10% of the profit on their Money that comes from the sale of the project" is ambiguous and may refer to the profit which might be received from the project. However, in her affidavit Mr Jones identified the terms of the agreement between herself and

Secure Investments being to the effect that the rate of return on the investment was 7% to 10% and it is assumed that was intended to be an annual return.

96 The reference in the Eighth Part of the schedule to the property located at Lot 623 Kinbrook Estate, Donnybrook, is not connected to any term of the agreement and nor is there any covenant that the money advanced by the lender under the agreement was to be invested in that parcel of land. Nevertheless, in the circumstances of this case, including the manner in which Mr Naseeruddin had preciously conducted the affairs of Secure Investments, it can be inferred that the arrangement purported to involve or at least suggest some direct investment by Ms Jones' SMSF in property development. In a general way that gives some meaning to the statement that the trustee of the superfund, NSMJ Pty Ltd, would act as a silent shareholder in the project.

97 In the purported organising of the investment for Ms Jones, Mr Naseeruddin facilitated the establishment of a SMSF for her as well as a Macquarie Bank cash management account. Subsequently, she received the sum of $5,000 as an early release from her superannuation. She did not receive any further funds from Aquila Group. She received no interest on her investment and the capital was not returned.

98 To similar effect are the circumstances of Sandra Kelly and Tony Edwards. It appears that Mr Edwards was experiencing financial difficulties in the period leading up to Christmas 2019 and sought to withdraw $10,000 from his superannuation fund. Ms Kelly and Mr Edwards were also referred to Mr Naseeruddin by Mr Dennison. Mr Naseeruddin informed them that he could arrange for an early release of funds from their superannuation if they invested the remainder in a unit development with Aquila Group. They were advised by Mr Naseeruddin to establish a SMSF for the purpose of the investment.

99 Mr Naseeruddin established a SMSF for them as well as a cash management account with Macquarie Bank. He also arranged for the money which they held in separate retail superannuation funds to be rolled into the SMSF. Ms Kelly contributed $108,747.34 and Mr Edwards contributed $92,683.04 and these funds were received into the cash management account. In January 2020, the sum of about $201,000 was transferred from the SMSF's cash management account to Mr Naseeruddin. Ms Kelly and Mr Edwards both received $5,000 from Aquila Group as an early release of their superannuation fund.

100 As far as the evidence discloses, Mr Naseeruddin provided no loan agreements to Ms Kelly and Mr Edwards in relation to the proposed investment. Instead they were provided a "Client Engagement Letter" with Mr Naseeruddin identified as their Director/Financial Advisor/Property Investment Manager.

101 Ms Kelly and Mr Edwards did not receive any return on their investment and nor did they receive the return of their capital.

The dispersal of funds collected by Aquila Group

102 On 1 May 2020, the provisional liquidators of Secure Investments were also appointed as the receivers and managers of the property of Aquila Group. They provided a report to the Court on which ASIC relied in these proceedings. The report shows that rather than the investors' funds being invested in any building developments, Mr Naseeruddin caused the funds to be paid to Secure Investments, himself, his family and entities associated with him. Aquila Group had no investments or building projects from which returns to the investors might be made. The receivers and managers are also of the opinion that if the company is wound up, a number of the transfers of funds out of the company may be attacked as voidable transactions which may be recovered by a liquidator.

103 Whilst Aquila Group did pay three $1,000 deposits on some parcels of land it did not make any further payments as required under the contracts of sale and it has no funds with which to complete the acquisitions.

Lack of appropriate management

104 As was the case with Secure Investments, there appears to be a complete lack of any competent financial management by Aquila Group in relation to the funds received from investors. Despite extensive investigations by the receivers and managers, there are insufficient recordings of the company's financial transactions to ascertain any reason as to why the funds were disposed of as they were. The description of the transfer of money from Aquila Group's account are limited and do not identify the foundation for the transfers. Importantly, the receivers and managers have not been able to identify any property purchased by use of the investors' funds.

105 In general terms the receivers and managers opine that Aquila Group also failed to maintain its books and records in accordance with the requirements of s 286 of the Act and their evidence supports that conclusion. It has no substantial funds or assets but does have significant

liabilities. It is not likely to be solvent and there was no suggestion that it was. It does not appear to presently carry on any business and it has no employees.

106 The current director of Aquila Group is a Mr Atik who was appointed on 25 February 2020. Despite that he did not obtain control of the company's only bank account from Mr Naseeruddin until 24 or 25 April 2020. He informed ASIC that he was gifted the company by Mr Naseeruddin who said that he had personal issues and wanted to get out of the business. Mr Atik advised that the company had only completed one project and held no assets or properties.

No opposition to winding up

107 Recently, Mr Atik indicated that he did not wish to participate in the current proceedings through his company and that he did not wish to defend the application to wind it up. That was not surprising given its extensive liabilities and lack of assets or funds.

Aquila Group ought to be wound up

108 In the above circumstances it is axiomatic that the Court can have no confidence at all in the management of Aquila Group. Its financial affairs are largely concealed by a failure to maintain proper books and records, although those which have been identified have no apparent legitimate basis. The director who controlled it when many questionable transactions occurred has abandoned it and the current director has no interest in it. It is likely that it is insolvent and it no longer carries on business. Winding up may afford liquidators the opportunity to recover some funds on behalf of the company's creditors. In these circumstances orders should be made for its winding up on the just and equitable grounds and the current receivers should assume the position of liquidators at which time their role as receivers and managers will come to an end.

Revocation of travel restraint order

109 On 1 May 2020 this Court made orders restraining Mr Naseeruddin from leaving Australia. ASIC seeks orders terminating the effect of that order and given that it initiated these proceedings the Court should accede to that request.

Costs

110 There is no reason why ASIC should not have the costs of the action and, given that the involvement of the receivers and managers was essential, they should have their costs to be paid from the assets under their control and that they be paid as a priority over any other costs.

I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 15 October 2020