FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Marco (No 6) [2020] FCA 1781

File number:	WAD 481 of 2018
Judgment of:	**MCKERRACHER J**
Date of judgment:	7 December 2020
Date of publication of reasons:	11 December 2020
Catchwords:	**CORPORATIONS** – managed investment scheme – winding up – whether scheme amounted to managed investment scheme required to be registered under s 601ED(1) of the ***Corporations Act*** *2001* (Cth) – where the personal defendant executed declarations of trust with investors and pooled funds in personal bank accounts – where personal defendant used funds to participate in 'private placement programmes' – where personal defendant transferred funds to the corporate defendant to purchase real property and vintage cars – whether the conduct of both defendants constituted the operation of a managed investment scheme – in circumstances where the personal defendant considered the corporate defendant to be an extension of his business dealings **CORPORATIONS** – financial services business – whether the defendants carried on a financial services business – whether the defendants breached s 911A of the *Corporations Act* by not holding an Australian Financial Services License – whether the personal defendant was dealing in a financial product – whether the corporate defendants' holding of property assets formed part of the financial services business **CORPORATIONS –** final relief – winding up orders – contraventions of Ch 5C and Ch 7 of the *Corporations Act* – whether it is just and equitable that the scheme and the corporate defendant be wound up – whether receivers should be appointed on a final basis concurrently with liquidators – where receivers are necessary for identification and delivery up of scheme property **CORPORATIONS** – final relief – declarations – whether there is sufficient evidence to support the declarations

sought

CORPORATIONS – final relief – injunctions – where injunctions would expose the personal defendant to contempt of court for further contraventions – whether exposure to contempt of court for future contraventions is appropriate given the deliberateness and seriousness of the contraventions

CORPORATIONS – receivers – administrators – liquidators – where the corporate defendant is placed in voluntary administration by the personal defendant after the filing of the application for winding up – where the creditors of the corporate defendant resolve that it be wound up after the final hearing of the winding up application – where interim receivers were appointed to the whole scheme six months ago – whether the interim receivers should replace the voluntary administrators as liquidators of the corporate defendant – orders under s 467B of the *Corporations Act* – in circumstances where the appointment of a single insolvency practitioner to the whole scheme will save time and expense in the winding up

Legislation:

Acts Interpretation Act 1901 (Cth) s 2C

Australian Securities and Investments Commission Act 2001 (Cth) ss 19, 30, 33, Pt 3, Div 1

Corporations Act 2001 (Cth) ss 9, 19, 20, 435A, 435C(2), 436A, 439A, 439C(b), 439C(c), 440A(1), 440A(2), 461(1)(k), 462(2)(e), 464, 467B, 601EB, 601ED, 601ED(2), 601ED(2A), 601ED(4), 601ED(5), 601ED(8), 601EE, 601EE(1), 601EE(2), 761A, 761C, 761E, 761E(2), 761E(4), 763A(1)(a), 763B, 763B(a)(i), 763B(a)(iii), 763B(b), 764A, 766A, 766A(1)(b), 766C(1), 911A, 911A(1), 911A(2), 1101B(1), 1101B(1)(a)(i), 1012E(2), 1311(1), 1317E(3), 1323, 1324, 1324(1)(a), 1324B, 1656, 1657, Ch 5C, Ch 7

Federal Court of Australia Act 1976 (Cth) s 21

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)

Cases cited:

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2017) 254 FCR 68; [2017] FCAFC 113

Australian Competition and Consumer Commission v Renegade Gas Pty Ltd [2014] FCA 1135

Australian Competition and Consumer Commission v viagogo AG (No 3) [2020] FCA 1423

Australian Securities Commission v AS Nominees Ltd

(1995) 62 FCR 504

Australian Securities and Investments Commission v Arafure Equities Pty Ltd (2005) 56 ACSR 429; [2005] QSC 376

Australian Securities and Investments Commission v Carey (No 3) [2006] 2006 FCA 433

Australian Securities and Investments Commission v Carey (No 5) [2006] FCA 864

Australian Securities and Investments Commission v Chase Capital Management Pty Ltd (2001) 36 ACSR 778; [2001] WASC 27

Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd (2004) 187 FLR 270; [2004] WASC 241

Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2) [2019] FCA 398

Australian Securities and Investments Commission v Marco [2019] FCA 466

Australian Securities and Investments Commission v Marco (No 3) [2020] FCA 719

Australian Securities and Investments Commission v Marco (No 4) [2020] FCA 881

Australian Securities and Investments Commission v Marco (No 5) [2020] FCA 1512

Australian Securities and Investments Commission v Mercorella (No 2) (2006) 230 ALR 598; [2006] FCA 763

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd (2014) 103 ACSR 453; [2004] FCA 1387

Australian Securities and Investments Commission v Munro [2016] QSC 9

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

Australian Securities and Investments Commission v Ostrava Equities Pty Ltd [2016] FCA 1064

Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561; [2002] NSWSC 310

Australian Securities and Investments Commission v Sweeney [2001] NSWSC 114

Australian Securities and Investments Commission v Takaran Pty Ltd (2002) 170 FLR 388; [2002] NSWSC 834

Australian Securities and Investments Commission v Westpoint Corporation Pty Ltd (2006) 227 ALR 623; [2006] FCA 135

	Australian Softwood Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission) (1981) 148 CLR 121; [1981] HCA 49 *Baxter Global Investments Pty Ltd v Marco* [2020] NSWSC 1293 *BMI Ltd v Federated Clerks Union of Australia* (1983) 76 FLR 141 *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167 *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 *Citrix Systems Inc v Tele Systems Learning Pty Ltd (in liq)* (1988) 28 ACSR 529 *Clowes v Commissioner of Taxation* (Cth) (1954) 91 CLR 209; [1954] HCA 10 *Corporate Affairs Commission (NSW) v Transphere Pty Ltd* (1988) 15 NSWLR 596 *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2020] NSWSC 780 *Forster v Jododex* (1972) 127 CLR 421; [1972] HCA 61 *In the matter of Evcorp Grains Pty Ltd ACN 134 204 050 (No 2)* [2014] NSWSC 155 *In the matter of SPG Projects Pty ltd (in liq)* [2020] NSWSC 34 *Kirman v RWE Robinson and Sons Pty Ltd (in liq), in the matter of RWE Robinson and Sons Pty Ltd (in liq)* [2019] FCA 372 *Markopoulus v Marco* [2020] WASC 79 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53
Division:	General Division
Registry:	Western Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	141
Date of hearing:	28 and 29 October 2020
Counsel for the Plaintiff:	Mr J Halley SC with Mr M Sherman
Solicitor for the Plaintiff:	Australian Securities and Investments Commission

Counsel for the First Defendant:	Ms JA Thornton
Solicitor for the First Defendant:	MGM O'Connor Lawyers Pty Ltd
Counsel for the Voluntary Administrators of the Second Defendant:	Mr P Edgar
Solicitor for the Voluntary Administrators of the Second Defendant:	Thynne + Macartney
Counsel for the Interim Receivers (Excused after tendering affidavits):	Mr A Chai
Solicitors for the Interim Receivers (Excused after tendering affidavits):	Ashurst

ORDERS

WAD 481 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**CHRIS MARCO** First Defendant
	AMS HOLDINGS (WA) PTY LTD (RECEIVERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 164 700 485) Second Defendant
	AMS HOLDINGS (WA) PTY LTD (RECEIVERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 164 700 485) AS TRUSTEE FOR AMS HOLDINGS TRUST Third Defendant
	CAMERON HUGH SHAW, RICHARD ALBARRAN and MARCUS JON WATTERS OF HALL CHADWICK Interested Persons
ORDER MADE BY:	**MCKERRACHER J**
DATE OF ORDER:	**7 DECEMBER 2020**

THE COURT NOTES THAT:

A. For the purposes of these orders, 'the **Scheme**' means the managed investment scheme operated by the each of the defendants, whereby between 1 January 2014 and 31 October 2018:

(a) the first defendant obtained moneys from investors;

(b) the first defendant pooled the moneys in bank accounts, including the following accounts:

(i) Westpac Banking Corporation – BSB 036406, Account number 239817;

(ii) Westpac Banking Corporation – BSB 037131 Account number 684106;

(iii) Westpac Banking Corporation – BSB 037 131 Account number 693360;

(iv) Westpac Banking Corporation – BSB 037 165 Account number 857175; and

(v) Westpac Banking Corporation – BSB 736 053 Account number 654708;

(c) the first defendant represented and/or agreed with investors that the moneys were to be used as a proof of funds for investments and/or to fund investments;

(d) the first defendant represented and/or agreed with investors that in return for advancing funds, investors would receive a right to interest payments;

(e) the first defendant was to use the moneys as proof of funds for investments and/or to fund investments, with a view to generating a profit out of which interest payments were to be paid to investors;

(f) the first defendant transferred moneys to the second and/or third defendants with a view to purchasing real and/or personal property;

(g) the real and/or personal property of the second and/or third defendants purchased with the moneys that were transferred was to be available to meet liabilities to investors;

(h) the first defendant, second defendant and/or third defendant transferred, or expended moneys obtained from investors for private gain and/or for the private gain of related parties or associates; and

(i) the investors did not have day to day control over the use of the moneys.

THE COURT DECLARES THAT:

1. Each of the defendants, by investing client funds with the intention of generating a financial return, contravened the provisions of section 911A of the *Corporations Act 2001* (Cth) (the ***Corporations Act***) in that each carried on a financial services business without holding an Australian Financial Services Licence in the period between at least 1 January 2014 and 31 October 2018.

2. Each of the defendants operated the Scheme in contravention of section 601ED(5) of the *Corporations Act*, in circumstances where the Scheme was required to be registered under section 601EB of the *Corporations Act* in the period between at least 1 January 2014 and 31 October 2018.

THE COURT ORDERS THAT:

Receivership appointment orders

1. Pursuant to section 1101B(1) of the *Corporations Act*, Mr Robert Michael Kirman and Mr Robert Conry Brauer of McGrathNicol, Level 19, 2 The Esplanade, Perth, Western

Australia, be appointed as joint and several receivers and managers (**Receivers**), without security, of all property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, of:

(a) the first defendant and second defendant;

(b) the third defendant immediately prior to the appointment of voluntary administrators to the third defendant; and

(c) the Scheme,

together, the **Property**.

2. To the extent that it has not already occurred, each of the first defendant, the second defendant and the third defendant are to immediately give over possession of all their property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, together with all books and records relating to that property, to the Receivers.

3. The Receivers have the following powers:

(a) the power to do all things necessary or convenient to be done, in Australia and elsewhere, for or in connection with, or as incidental to the attainment of the objectives for which the Receivers are appointed including, without limitation, for the identification, preservation and securing of all of the Property for the benefit of creditors;

(b) the powers under section 1101B(8) of the *Corporations Act*;

(c) the powers set out in section 420 of the *Corporations Act* provided that wherever in that section the word 'corporation' appears, it shall be taken to refer to the first defendant, the second defendant, the third defendant and the Scheme; and

(d) the power to require, by request in writing, the first defendant and any employee, agent, banker, solicitor, stockbroker, accountant, consultant or other professionally qualified person who has provided services or advice to the first defendant, the second defendant or the third defendant to provide such reasonable assistance (including access to any documents, books or records to which the first defendant has a right of access or control) to the Receivers as may be required from time to time.

4. Upon being called upon to do so, the Receivers must deliver up that part of the Property that is property of the Scheme to the liquidators appointed under order 14 below.

Receivership remuneration and indemnity orders

5. The Receivers shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Receivers, together with all costs, expenses and disbursements.

6. The Receivers' remuneration is to be calculated on the basis of time reasonably spent by the Receivers and any partner or employee of the firm to which the Receivers are attached, at the standard rates of the Receivers' firm from time to time for work of that nature.

7. The Receivers' remuneration, costs, expenses and disbursements are to be paid from the Property.

8. The Receivers be indemnified from the Property against any claim, liability, proceedings, cost, charge or expense however arising and whether past, present or future, fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.

9. The above orders are not to affect the rights of any prior encumbrances over the Property, including the rights of any secured creditor.

10. For the avoidance of doubt, the entitlement of the Receivers to be paid or indemnified from the Property under orders 7 and 8 is not restricted or in any way limited by whether they are acting as receivers of property of the first defendant, the second defendant, the third defendant or the Scheme and they are entitled to treat the Property as a single combined pool of property for those purposes.

Termination of Interim Receivership

11. Immediately upon order 1 taking effect, the appointment of Mr Kirman and Mr Brauer as 'Individual Receivers' and as 'Corporate Receivers' pursuant to section 1101B(5) of the *Corporations Act* under orders 2 and 7 of the orders made on 27 May 2020 (the Interim Receivers) be terminated.

Windup up orders

12. Pursuant to section 601EE(2) of the *Corporations Act*, the Scheme be wound up.

13. Pursuant to sections 467B, 459B and 461(1)(k) of the *Corporations Act*, AMS Holdings (WA) Pty Ltd (ACN 164 700 485) be wound up.

14. If and to the extent required, pursuant to section 532 of the *Corporations Act*, leave be granted for Mr Kirman and Mr Brauer be appointed as joint and several liquidators (the **Liquidators**) of:

    (a) the Scheme; and

    (b) AMS Holdings (WA) Pty Ltd (ACN 164 700 485).

15. Upon the appointment of the Liquidators in accordance with order 14 above, the appointment of Cameron Shaw, Richard Albarran and Marcus Watters of Hall Chadwick as liquidators of the Second Defendant be terminated.

16. The asset preservation orders made on 1 November 2018 be vacated on the later of the appointment of the Liquidators pursuant to order 14 and the appointment of Receivers pursuant to order 1.

17. Pursuant to section 601EE(2) of the *Corporations Act*, and subject to any further orders of the Court:

    (a) the winding up of the Scheme be conducted as if the Scheme were a 'company' or 'corporation' for the purposes of the *Corporations Act* and the provisions of Parts 5.4B, 5.6, 5.7B and 5.9 of the *Corporations Act* and Schedule 2 to the *Corporations Act* (Insolvency Practice Schedule (Corporations)) applied to the winding up (with such modifications as are reasonably necessary in the circumstances);

    (b) the Liquidators of the Scheme have power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with the winding up of the Scheme, or incidental to the attainment of the winding up of the Scheme, including the functions and powers set out in Chapter 5 of the *Corporations Act* (as applicable) as if each reference there to a 'company' or 'corporation' was a reference to the Scheme (with such modifications as are reasonably necessary in the circumstances); and

    (c) without limiting the above, the Liquidators of the Scheme shall have the power to investigate or cause to be investigated any deficiency in the Scheme and to exercise the powers under Part 5.9 Division 1 of the *Corporations Act* as if the Scheme were a 'corporation' being wound up.

Liquidation remuneration and indemnity orders

18. The Liquidators shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Liquidators, together with all costs, expenses and disbursements.

19. The Liquidators' remuneration is to be calculated on the basis of time reasonably spent by the Liquidators and any partner or employee of the firm to which the Liquidators are attached, at the standard rates of the Liquidators' firm from time to time for work of that nature.

20. The Liquidators' remuneration, costs, expenses and disbursements are to be paid out of the assets of the Scheme.

21. The Liquidators be indemnified from the assets of the Scheme (including the Property) against any claim, liability, proceedings, cost, charge or expense however arising and whether past, present or future, fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.

22. The above orders are not to affect the rights of any prior encumbrances over the assets of the Scheme, including the rights of any secured creditor.

23. For the avoidance of doubt, the entitlement of the Liquidators to be paid or indemnified from the assets of the Scheme under orders 19 and 20 is not restricted or in any way limited by whether they are acting as liquidators of the Scheme or AMS Holdings (WA) Pty Ltd (ACN 164 700 485) and they are entitled to treat the assets of the Scheme as a single combined pool of assets for those purposes.

Injunctive relief

24. Pursuant to section 1324 of the *Corporations Act*, the first defendant be permanently restrained from:

    (a) carrying on a financial services business in Australia without holding an Australian financial services licence covering the provision of the financial services; and

    (b) operating an unregistered managed investment scheme in contravention of section 601ED(5) of the *Corporations Act*.

Costs

25. The defendants pay the plaintiff's costs of the proceedings, including the costs of the plaintiff's interlocutory application filed on 12 December 2019 and ruled on in *Australian Securities and Investments Commission v Marco (No 3)* [2020] FCA 719, as taxed or agreed.

Miscellaneous

26. The Receivers and/or Liquidators and other parties have liberty to apply on short notice, including as to termination of the Receivers appointed under order 1 above.

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

REASONS FOR JUDGMENT

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MCKERRACHER J:

OVERVIEW

1 By an amended originating process filed on 28 May 2020 (the **Application**), the plaintiff (**ASIC**) seeks certain orders against the first defendant (**Mr Marco**) and the second and third defendants (**AMS**) to address asserted contraventions of:

(a) section 601ED(5) of the ***Corporations Act*** *2001* (Cth), which prohibits a person from operating a managed investment scheme that s 601ED(1) requires to be registered under s 601EB unless the scheme is so registered; and

(b) section 911A of the *Corporations Act*, which requires a person who carries on a financial services business to hold an Australian Financial Services Licence (**AFSL**) covering the provision of the financial services.

2 Ultimately after many hearings, the liability issues were not seriously in dispute. The main debate on this hearing was in relation to the appropriate relief.

3 It is clear that one or more of the defendants have contravened each of s 601ED and s 911A of the *Corporations Act*.

4 ASIC initially contended that the Court should grant the relief sought in prayers 17 to 32 of the Application, which broadly consists of:

(a) declaratory relief in respect of the contraventions outlined above (at [1]) pursuant to s 21 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth);

(b) orders for the appointment of receivers or trustees to the property of the defendants on a final basis pursuant to s 1101B(1) of the *Corporations Act*;

(c) orders providing for the winding up of the unregistered managed investment scheme operated by the defendants and the appointment of liquidators pursuant to ss 601EE and 461(1)(k) of the *Corporations Act*;

(d) an order pursuant to s 1324 of the *Corporations Act* providing for refunds to be made to investors;

(e) final injunctions against Mr Marco pursuant to s 1324 of the *Corporations Act* restraining conduct in contravention of the provisions above (at [1]); and

(f) publication orders pursuant to s 1324B of the *Corporations Act*.

5 There has been considerable debate (mostly but not exclusively from the defendants) as to the appropriate relief. Some concessions have been made by ASIC and the relief at [4(d)] is no longer pursued.

BACKGROUND

6 On 29 October 2018, ASIC commenced proceedings against the defendants and sought interim relief including asset preservation and disclosure orders. The Court made orders against the defendants pursuant to s 1323 of the *Corporations Act* on 1 November 2018, and ASIC's investigations into the affairs of the defendants continued for the next 12 months.

7 On 12 December 2019, ASIC filed an interlocutory process seeking an order for the appointment of interim receivers over the property of the defendants and leave to file an amended originating process in the form of the Application.

8 On 27 May 2020, I made orders appointing Mr Robert Michael Kirman and **Mr** Robert Conry **Brauer** of McGrathNicol as **Interim Receivers** and granting ASIC leave to file the Application. I also ordered the Interim Receivers to provide a report to the Court that addressed

a number of issues, including the identification of the assets and liabilities of the defendants, an opinion as to the solvency of the defendants, the likely return to creditors (including investors) in the event that any scheme operated by the defendants were to be wound up, and any other information necessary to enable the financial position of the defendants to be assessed. My reasons were published as *Australian Securities and Investments Commission v* ***Marco (No 3)*** [2020] FCA 719.

9 On 24 July 2020, the Interim Receivers filed an affidavit of Mr Brauer annexing a substantial and concerning report addressing the matters that were the subject of the 27 May 2020 orders (the **Interim Receivers' Report**). That affidavit is currently before the Court.

10 On 7 August 2020, orders were made by consent to facilitate the provision of the Interim Receivers' Report to the defendants' investors. Those orders also established a timetable for the hearing of this Application for final relief.

11 In summary form, ASIC alleges that each of the defendants operated a **Scheme** whereby investors would execute a **Declaration of Trust** with Mr Marco by which he guaranteed very attractive returns on maturity of the investment. Mr Marco is said to have represented that his ability to generate high returns was due to his access to, and participation in, overseas 'Private Placement Programmes'. In addition, the evidence to date has revealed that investor funds were used to purchase real estate and vintage cars by both Mr Marco and AMS, as well as in numerous related party transactions: *Marco (No 3)* (at [36]-[71]). At the time of delivering *Marco (No 3)*, the evidence suggest that the result of these activities was that as many as 132 investors were owed at least $240 million: *Marco (No 3)* (at [113]). Since then, significant work has been undertaken by the Interim Receivers, and recently the **Voluntary Administrators** of AMS. While the precise figures have varied across the different analyses, they all confirm a significant shortfall in the hundreds of millions of dollars now owing to investors.

12 Due to the nature of the defendants' submissions on the appropriate form of final relief, it is necessary to briefly address the position with respect to AMS. Mr Marco and his son, Mr Damon Marco are the **Directors** of AMS and Mr Marco is the sole shareholder. By a **Trust Deed** executed in July 2013, AMS became the trustee of the **AMS** Holdings **Trust**. It is in its capacity as trustee of the AMS Trust that AMS is also named as third defendant. The specified beneficiaries of the AMS Trust are Mr Marco and his wife. Mr Marco is also the appointor of the AMS Trust. On 24 September 2020, the Directors resolved to place AMS into voluntary

administration. By operation of cl 16 of the Trust Deed, AMS ceased to be the trustee of the AMS Trust on the day it entered administration. As appointor, Mr Marco does not appear to have named a new trustee. As will be seen, much of the dispute about the final relief concerns AMS' role in the contraventions that have been established essentially unopposed against Mr Marco. The interaction between ASIC's Application and the administration of AMS has also raised additional issues.

13 At an adjourned second creditors meeting on 26 November 2020, AMS' creditors resolved that AMS should be wound up, despite the recommendation of the Voluntary Administrators that a further amended Deed of Company Arrangement (**DOCA**) propounded by Mr Marco be approved. A significant contention for ASIC on the Application is that the Scheme and AMS be wound up and the Interim Receivers appointed as the liquidators. Upon the appointment of the Voluntary Administrators as **Voluntary Liquidators** of AMS only, ASIC filed an interlocutory application to the effect that, if successful in achieving the relief sought in the Application, that the Interim Receivers replace the Voluntary Liquidators as **Court-Appointed Liquidators** of AMS. In light of this, and further concerns on the part of ASIC that unnecessary expense would be incurred in the voluntary liquidation of AMS, I informed the parties that I would pronounce orders on the Application on 7 December 2020 and publish these reasons in due course. For convenience, and given the timing of events, the Voluntary Liquidators are referred to in these reasons primarily by their previous appointment as the Voluntary Administrators.

14 On 3 December 2020, a further application was filed by the defendants seeking variations to the asset preservation orders to permit payments by Mr Marco of significant sums for various legal fees and vehicle repairs. Over the course of the litigation, it has become a routine practice for variations to the asset preservation orders to be made by consent. It is clear that ASIC opposes this particular variation. In light of my decision to pronounce orders on ASIC's Application on 7 December 2020 which terminate the asset preservation orders, it is unnecessary to deal with the substance of the dispute. The questions as to the appropriateness of expenses incurred by the defendants is now a matter for the liquidators of the Scheme.

THE EVIDENCE

ASIC's evidence

15 In support of its Application, ASIC relies upon evidence provided by ASIC officers, four sample investors who contributed funds to Mr Marco, and forensic accounting experts

employed by KPMG. It also tenders a number of business records. Certain objections were taken and resolved by consent, with ASIC making a number of concessions.

16 ASIC relies upon the affidavit evidence of three of its officers:

(a) the affidavit of **Ms** Whee-Jong Michelle **Lim** (a senior lawyer employed by ASIC who was the project manager of the civil aspect of ASIC's investigation) dated 24 August 2020 (the **Lim Affidavit**). Ms Lim's evidence addresses investigations and enquiries undertaken by ASIC and the provenance of documents upon which ASIC relies, many of which are the subject of summaries provided in the Gomm Affidavit and Howman-Giles Report (referred to below);

(b) the affidavit of Mr Richard Warren Gomm (a senior investigator employed by ASIC) dated 25 August 2020 (the **Gomm Affidavit**). Mr Gomm summarises the contents of voluminous documents obtained by ASIC, particularly bank statements. The summary addresses payments and receipts into and out of bank accounts associated with Mr Marco and AMS. Mr Gomm's evidence also addresses in detail the process that he undertook in order to prepare his summary; and

(c) the affidavit of Ms Kylie Lorraine Lethorn (an Analyst employed by ASIC) dated 21 August 2020. Ms Lethorn gives evidence regarding the preparation of a document titled 'List of investors for KPMG'. That document was among the materials briefed to KPMG.

17 Additionally, ASIC reads the affidavits of four investor witnesses who give evidence about the circumstances in which they came to invest money with Mr Marco and the steps that were taken in order to formalise the investment. They are:

(a) the affidavit of **Mr** Ross Edward **Martin** (a 69 year old self-employed homeopath who invested funds with Mr Marco) dated 15 August 2020 (the **Martin Affidavit**);

(b) the affidavit of **Mrs** Lorraine **Morrison** (a 65 year old check-out operator and former teacher who invested funds with Mr Marco together with her husband Peter) dated 17 August 2020 (the **Lorraine Morrison Affidavit**);

(c) the affidavit of **Mr** Peter John **Morrison** (a 67 year old compliance officer with the City of Bunbury who invested funds with Mr Marco together with his wife Lorraine) dated 15 October 2020 (the **Peter Morrison Affidavit**); and

(d) the affidavit of **Mr** Michele Raffaele **de Marte** (a 53-year-old café and restaurant owner who invested funds with Mr Marco) dated 21 August 2020 (the **de Marte Affidavit**).

18 Those lay witnesses were not cross-examined once various objections were resolved.

19 ASIC also relies upon evidence provided by independent forensic accounting experts employed by KPMG. In particular, it read and relied upon:

(a) an affidavit of **Mr** Luke **Howman-Giles** (a partner in the forensic division of KPMG) dated 24 August 2020. Mr Howman-Giles annexes an expert report (the **Howman-Giles Report**), which addresses a series of questions regarding the number of investors who provided funds to Mr Marco, how much money was contributed by investors individually and as a group, how much money was received by each investor, how much money is still owed to each investor, and how much money was paid to and from bank accounts associated with related parties. Mr Howman-Giles also prepared tables for a number of calendar years, and a particular period from 11 April 2017 to 10 April 2018, which identify investors, the amounts they invested, the dates they contributed funds, the interest rate that applied to the investment, the term of the investment and whether the investor contributed money to Mr Marco directly or on behalf of a third party; and

(b) the affidavit of Mr Shaun Milligan (a former associate director in the forensic division of KPMG) dated 22 October 2020. Mr Milligan gives evidence about the conduct of certain data entry activities which informed the preparation of the Howman-Giles Report.

20 As is evident from the Lim Affidavit, many of the documents exhibited were obtained from the business records of Mr Marco or third-party financial institutions in response to compulsory notices issued pursuant to ss 19, 30 and 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***). The material gives a proper basis for the Gomm Affidavit and Howman-Giles Report.

The Interim Receivers' evidence

21 Various investors have contacted the Interim Receivers as a result of which they confirm the correctness of the substance of the Howman-Giles Report which concluded that there are 311 investors. The Interim Receivers did not undertake a complete reconciliation of all amounts

which would be carried out by a court-appointed liquidator before any amount was formally admitted as a debt or until any distribution methodology was determined.

22 The Interim Receivers also otherwise confirm the conclusions in their Report as addressed in *Australian Securities and Investments Commission v* ***Marco (No 5)*** [2020] FCA 1512 where I said (at [8]):

> On 24 July 2020, the Interim Receivers provided their report to the Court pursuant to the orders made on 27 May 2020 (the **Interim Receivers' Report**). The Interim Receivers' Report is annexed to the 2 October Lim Affidavit. Among other matters, the Interim Receivers' Report made the following salient observations:
>
> (a) 'Mr Marco has consistently stated in the Proceedings and in his dealings with the receivers that, in his view, he and AMS are in effect one and the same and should be viewed collectively as a representation of his business dealings. Mr Marco admits that all of AMS' assets were purchased from investor funds provided to him';
>
> (b) 'with the exception of a $0.6 million business loan from Westpac (secured against a property located on McDonald Street West, West Osborne Park, Western Australia), all of AMS' funding was via an undocumented, related party loan of investor monies from Mr Marco';
>
> (c) 'Mr Marco has informed the Receivers that there has been comingling of personal, investor and AMS funds in the bank accounts and that reconstructing separate accounts is unlikely to be possible';
>
> (d) 'The Receivers have not identified any evidence to suggest that AMS traded in its own capacity … Mr Marco has also stated that AMS undertook no activities in its own right';
>
> (e) there were 'limited records that have been maintained by Mr Marco to delineate between personal, investor or business funds';
>
> (f) the Interim Receivers' view of the estimated realisable value of Mr Marco and AMS' net asset and liability position on a consolidated basis showed a high case scenario of a shortfall of $221,667,012 and a low case scenario of a shortfall of $362,605,964;
>
> (g) in the Interim Receivers' view, investors were owed between $254.5 million (on Mr Marco's records) and $381.9 million (if an approximation of additional interest accrued was included up to the date of their appointment);
>
> (h) the Interim Receivers' analysis of the estimated realisable value of AMS' assets included $237,400 in loans and $12,667,273 in property; and
>
> (j) the Interim Receivers' analysis of the sources and uses of funds disclosed that '$18.4 million has been used to purchase, renovate or maintain property either directly by Mr Marco or indirectly by advancing funds to AMS or related parties'.

23 Since providing the redacted copy of the Interim Receivers' Report to investors, various investors have contacted the Interim Receivers as a result of which there have been meetings

and discussions. They were not identified by name but collectively represent approximately 49% of the total claims by investors and represent both small and large investors.

24 A number of common themes and concerns emerged from the separate meetings and discussions with these investors. The major matters which those investors who have contacted the Interim Receivers have raised are:

(a) whether and which of the assets and property identified in the Interim Receivers' Report will be available to meet the claims of investors;

(b) whether there are any other assets or property available to meet the claims of investors which are not identified in the Interim Receivers' Report (because they have not been located by the limited investigations conducted by the Interim Receivers to date);

(c) whether any assets or property held in the names of parties related to or associated with the defendants which may have been originally acquired with investor funds are available to meet the claims of investors;

(d) whether all available assets and property can be 'wrapped' or 'pooled' for the benefit of all investors, irrespective of whether they are presently held in the names of any one of the defendants;

(e) the speed and timing of any distributions to investors;

(f) the diversity of interests and views amongst the investors given that some are 'Mum and Dad' type investors who have potentially lost the majority of their retirement assets while others are more sophisticated investors who are financially less dependent on their potentially lost investments. It has been suggested that the former may prefer to receive distributions at the earliest opportunity, while the latter may prefer (or have a greater appetite) to wait to receive any distributions if that means an alternative, appropriate (and currently unidentified) plan to maximise investors' distributions can be developed in some way;

(g) how trust law principles apply and how the respective rights and entitlements of investors will be recognised and dealt with in any distribution. In particular:

    (i) Do all investors rank *pari passu* or will another approach to distribution be adopted such as that taken in *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2020] NSWSC 780?

    (ii) Will investors who have already been paid amounts equivalent to all (or substantially all) of their initial capital investment (and so are really claiming

promised returns on capital) be treated the same as investors who have not yet been paid any amounts to cover their initial capital investments, both in the context of voting and for the purposes of entitlements to distributions?

(h) investors wish to be kept regularly informed and involved in any major decisions that affect their potential distributions;

(i) avoiding or reducing unnecessary costs that do not benefit the investors; and

(j) the ability to pursue recovery actions, but in consultation with investors given concerns about costs and timing.

25 A number of these themes and concerns were raised at the first meeting of creditors of AMS convened by the Voluntary Administrators and held on 7 October 2020. The Interim Receivers were represented at the meeting and addressed a number of these matters.

26 During various meetings and telephone discussions with various investors (and often their lawyers), the view has been expressed by the Interim Receivers that if a liquidator were appointed, a committee of creditors would probably be formed.

27 The appointment of Voluntary Administrators to AMS resulted in the Interim Receivers receiving a significant number of queries from investors.

28 The appointment of the Voluntary Administrators to AMS has also significantly increased the level of activity and involvement required by the Interim Receivers. At the time the Interim Receivers' Report was submitted, the Interim Receivers had not anticipated that such a level of activity and involvement would be required.

29 The Interim Receivers have had to deal with and attend to a number of other matters since late July 2020. These matters have primarily related to monitoring the defendants' property portfolio to ensure that rent continued to be received and that arrears were brought up to date, liaising with debtors regarding outstanding balances, attending to insurance matters and securing moveable assets such as the motor vehicles identified in the Interim Receivers' Report, attending to matters arising from certain investor proceedings against the defendants (discussed further below), and dealing with issues in respect of expenses incurred by AMS including which of those would be met from the permitted weekly allowance of $2,750, and which would be met by the Interim Receivers. Prior to the appointment of the Voluntary Administrators, the Interim Receivers were concerned that not all funds from the permitted weekly allowance had been applied to expenses as required. Following the appointment of the

Voluntary Administrators, the Interim Receivers informed Mr Marco that it was not appropriate for him to continue to incur or meet such expenses and that expenses would be managed by the Interim Receivers.

30 At the time of the appointment of the Interim Receivers, there were two sets of proceedings on foot involving claims by separate investors against one or more of the defendants. The Interim Receivers have had to attend to various matters arising from these two proceedings.

31 The first proceeding involved an appeal by the defendants against the decision of Tottle J in the Supreme Court of Western Australia in *Markopoulus v Marco* [2020] WASC 79 to the Court of Appeal of the Supreme Court of Western Australia in proceedings CACV 39 of 2020. The Interim Receivers have had to deal with the solicitors for the defendants, **MGM** O'Connor Lawyers Pty Ltd, about whether the appeal proceedings ought to be continued and whether and how they would be funded. On 13 August 2020, Mr Marco (as appellant) discontinued the appeal. On 31 August 2020, on the application of the plaintiffs in the primary proceedings, Tottle J made orders requiring Mr Marco to, amongst other things, provide an account of monies provided by the plaintiffs to him.

32 The second proceeding involved proceedings in the Supreme Court of New South Wales against each of the defendants. The Interim Receivers have had to deal with MGM about whether these proceedings ought to be defended and whether and how they would be funded. The proceedings went to trial in September 2020. The defendants did not appear at the trial. On 22 September 2020, the judgment of Henry J in those proceedings was delivered: ***Baxter*** *Global Investments Pty Ltd v Marco* [2020] NSWSC 1293. The plaintiffs in *Baxter* have since applied for orders for the payment of the judgment sum out of Mr Marco's bank accounts and for a charging order against those accounts. The Interim Receivers have sought and been granted leave to file submissions opposing those orders. They have done so.

33 Shortly after the submission of the Interim Receivers' Report, MGM informed the Interim Receivers that all future contact with Mr Marco and Ms Marissen (Mr Marco's executive assistant) was to be made through them and not to those individuals directly. Therefore, since late July 2020, the Interim Receivers have had limited direct contact with Mr Marco, although they have not had any pressing need to do so.

34 The Interim Receivers have granted their consent, and indicated their ability to carry out the relief sought by ASIC should ASIC's orders be granted, including being appointed liquidators of the Scheme and AMS.

35 Mr Brauer also opines as follows:

> 42. Having acted as Interim Receivers and undertaken the matters outlined in the [Interim Receivers'] Report and this affidavit, Mr Kirman and I consider that we have detailed knowledge of the defendants' affairs, the alleged scheme and business conducted by them, and their property. We also consider that we have a good knowledge of the investor group and their main concerns and issues.
>
> 43. Given the intermingled nature of the affairs of the defendants, as described in more detail in the [Interim Receivers'] Report, I consider that it would be necessary and efficient (if not essential) that in any winding up of the scheme, the same appointees are able to deal with all property, assets and affairs that relate to the alleged scheme.

Voluntary Administrators' evidence

36 In an affidavit dated 27 October 2020, **Mr Shaw** of the Voluntary Administrators details the events of the administration of AMS. From their appointment on 24 September 2020, the Voluntary Administrators performed their statutory tasks in relation to AMS including conducting investigations into the affairs of the company. They carried out the following tasks:

(a) obtained the books and records of AMS;

(b) reviewed the books and records and investigated the financial position of AMS;

(c) completed searches of various statutory registers including the Personal Property Securities Register, ASIC company searches, director searches and director bankruptcy searches;

(d) reviewed the Interim Receivers' Report;

(e) reviewed the Howman-Giles Report;

(f) spot check audited the Howman-Giles Report;

(g) issued correspondence to all of the major banks to identify any pre-appointment bank accounts held in the name of AMS and requested bank statements from the same;

(h) issued correspondence to all of the major utility providers advising of their appointment and requested details of any accounts held in AMS' name;

(i) issued correspondence to the Office of State Revenue to identify any amounts outstanding in relation to land tax and payroll tax;

(j) completed motor vehicle registration searches in the name of AMS;

(k) liaised with the Directors and Interim Receivers in respect of AMS' affairs;

(l) convened and held an initial meeting of creditors on 7 October 2020;

(m) liaised with creditors and investors in the lead up to the initial meeting and reviewed their claims;

(n) reviewed all available details regarding any of AMS' assets;

(o) held meetings with Mr Marco as director of AMS;

(p) obtained appraisals on AMS' and the Directors' physical assets;

(q) investigated investments in financial instruments made by Mr Marco and reviewed the potential for recoveries from the same;

(r) investigated market rental rates for properties leased to related parties;

(s) conducted a preliminary assessment of the Directors' personal asset and liability positions;

(t) reviewed court applications and court orders with respect to Mr Marco and AMS;

(u) attended to the application for leave to proceed with legal proceedings made by ASIC: see *Marco (No 5)*;

(v) held meetings and telephone discussions with ASIC regarding the leave to proceed application;

(w) reviewed AMS' records for potential voidable transactions and other transactions that may require investigation based on the nature of AMS' business assets;

(x) undertook a solvency analysis and established a preliminary estimated date of insolvency for AMS;

(y) conducted investigations into officer offences and insolvent trading;

(z) reviewed AMS' financial statements;

(aa) conducted preliminary investigations into the Directors' and related parties' financial positions; and

(bb) conducted land title searches in the name of AMS, the Directors and related parties.

37 The Voluntary Administrators have issued formal requests for books and records of AMS to the following persons or entities:

(a) Mr Marco;

(b) Mr Damon Marco;

(c) the Interim Receivers:

(d) MGM;

(e) G Coyle & Associates:

(f) Metaxas Legal;

(g) Clairs Keeley Lawyers:

(h) US Department of Justice;

(i) Madans & Wheaton; and

(j) Kerman and Co.

38 Additional parties to which formal requests for books and records of AMS were sent to are as follows:

(a) Acapulco Trade & Investment;

(b) Andrew Purser;

(c) Anthony Kirkland-Jones;

(d) Armeli and Molony Lawyers;

(e) Beverley Marco;

(f) Cameron Luck;

(g) CFTX Hedge Fund;

(h) Chrysalis Capital Management;

(i) Deloitte;

(j) Dharja Kapoor;

(k) Ed Pollak;

(l) Eppner Consulting;

(m) Fairway Investments Ltd & Broadway Fair;

(n) HSBC Holdings;

(o) Ian Graydon;

(p) Kevin Lewis;

(q) Kirk Widener;

(r) Lorena Harvey - Rob Barclay;

(s) Lotusten Asset Management;

(t) MAS Real Estate;

(u) NAB;

(v) Norris Dominique;

(w) Patricia Markopoulous;

(x) Phoebe Ang & Kevin Lewis;

(y) Rainer Lampe;

(z) Rem Capital Florida;

(aa) Rem Capital Management;

(bb) Sergio Herrandiz Gil;

(cc) Stadden Forbes Wealth Management;

(dd) Stellar Group;

(ee) Steven Zielinski;

(ff) Talitha Marco;

(gg) Tony Tarky;

(hh) Westpac; and

(ii) Williams and Hughes Law.

39 The administration has moved very swiftly, including almost daily meetings with Mr Marco, and with investors and their solicitors. Many opinions and queries have been raised with the Voluntary Administrators.

40 On 25 September 2020, the Voluntary Administrators received two letters from ASIC regarding, among other things, the Voluntary Administrators' appointment and what involvement the Voluntary Administrators intended to take in these proceedings.

41 Extensive discussions with ASIC and a number of investors ensued on many topics regarding, *inter alia:*

(a) the role of the Voluntary Administrators as compared to the Interim Receivers;

(b) the statutory objectives and benefits of a voluntary administration, including the ability for stakeholders to participate in meetings and decision making, and if they wished to propose a DOCA;

(c) the fact that Mr Marco as a Director had communicated his intention to propose a DOCA;

(d) concerns from investors that the costs of running tandem processes (ie. the voluntary administration process and ASIC's winding up application) could result in a worse return for creditors and investors, especially given extensive preservation orders were already in place;

(e) questions whether Mr Marco might try to use the voluntary administration process to shield himself and his family from personal claims from the investors;

(f) questions from investors whether they would have a say in how AMS (and more broadly the Scheme the subject of these proceedings) could be efficiently wound up and the likelihood of Director cooperation to identify and realise more assets, more efficiently.

(g) questions from investors whether the voluntary administration process, or a DOCA if approved, would hinder ASIC's ability to investigate or prosecute its claims against Mr Marco generally; and

(h) the position that the Voluntary Administrators would take on ASIC's Application.

42 Much of this evidence does not need to be recorded in detail as the position taken by the Voluntary Administrators was one of neutrality and providing assistance to the Court. No other submissions were made. For present purposes it is sufficient to record that the result of the investigations of the Voluntary Administrators are contained in the separate reports as follows:

(a) The **Initial Report to Creditors** dated 29 September 2020 which:

(i) included the Declaration of Independence, Relevant Relationships and Indemnities (DIRRI);

(ii) advised of the Voluntary Administrators' appointment on 24 September 2020; and

(iii) gave notice that a first meeting of the creditors of AMS was scheduled to be held on 7 October 2020;

(b) the **Major Report to Creditors** dated 18 October 2020 which was produced in advance of the second meeting of creditors on 26 October 2020 and contains detailed analysis and opinions as to the affairs of AMS; and

(c) the **Supplementary Report to Creditors** dated 18 November 2020 which was produced in advance of the reconvened second creditors meeting on 26 November 2020 to inform creditors of further developments in the weeks since the adjournment of the 26 October 2020 meeting.

43 On 16 October 2020, the solicitors for Mr Marco provided written details of a proposed DOCA. At the date of the hearing, Mr Marco's DOCA proposal (including a subsequent amendment discussed further below) was the only DOCA proposal that had been received by the Voluntary Administrators.

44 At the hearing, counsel for the Voluntary Administrators indicated the possibility that an investor-led DOCA may be proposed at the second creditors meeting. Indeed, Mr Shaw deposed in his affidavit that the prospect of an investor-led DOCA, as well as general creditor sentiment, formed the basis for his recommendation that the second meeting should be adjourned to 26 November 2020. As has subsequently been revealed by a further affidavit of Ms Lim filed in support of ASIC's recent interlocutory process referred to above (at [13]), the Voluntary Administrators completed the Supplementary Report to Creditors. The Supplementary Report to Creditors included a timeline of the various DOCA proposals put forward which is reproduced below. Significantly, no investor-led DOCA proposal has been proposed:

Date	Event/Action
14 October 2020	• Original DOCA proposal received from Mr Marco ("the Original DOCA")
18 October 2020	• Major Report to Creditors is dispatched
22 October 2020	• Initial Meeting of the [committee of inspection] was held and o Members noted the DOCA proposal in its current form is unsatisfactory
23 October 2020	• Revised DOCA proposal received from Mr Marco ("the First Revised DOCA")
26 October 2020	• Second meeting of creditors was held and adjourned for the following reasons: o To provide the Administrators opportunity to analyse the First Revised DOCA; o To provide an opportunity for an alternate DOCA to be put forward; and o To consider the merits of any DOCA proposal put forward
6 November 2020	• Second Meeting of the Committee of Inspection was held o Committee Members noted the First Revised DOCA proposal was unsatisfactory
18 November 2020	• Revised DOCA received from Mr Marco ("the Second Revised DOCA''), which considered input from investors.

45 As the above timeline indicates, Mr Marco has put forward three DOCA proposals in the administration of AMS:

(a) the **Original DOCA** dated 14 October 2020 on which the Voluntary Administrators provide their recommendation in the Major Report to Creditors;

(b) the **First Revised DOCA** dated 23 October 2020 which was communicated to creditors in a circular of the same date which included an observation that the creditors may wish to adjourn the second creditors meeting (which they did); and

(c) the **Second Revised DOCA** dated 18 November 2020 on which the Voluntary Administrators provided their recommendation in the Supplementary Report to Creditors ahead of the reconvened second creditors meeting on 26 November 2020.

46 It should be noted that each iteration of Mr Marco's DOCA proposals included a set of conditions precedent requiring:

(a) ASIC's Application being unsuccessful or the Court otherwise enabling the DOCA to be effectuated according to its terms;

(b) the asset preservation orders to be lifted to allow deed administrators to deal with relevant property; and

(c) AMS being reinstated as trustee of the AMS Trust.

47 On the Voluntary Administrators' analysis in the Major Report to Creditors, based on the terms of the Original DOCA, creditors were estimated to receive a slightly greater return compared to an immediate winding up for the following reasons:

(a) the Original DOCA scenario allowed for less litigation costs required to pursue alleged loan accounts as they were to be excluded;

(b) the Original DOCA allowed for a lower amount of professional fees due to a shorter anticipated time frame to realise the assets than proceeding to liquidation;

(c) the Original DOCA provided greater certainty for creditors i.e. identifying the assets that are available for realisation;

(d) a liquidation would require the liquidators to conduct extensive investigations at additional cost and would likely result in protracted litigation which would likely reduce any returns to creditors; and

(e) the DOCA was likely to bring the return to creditors forward as it reduces the risk of the Directors:

(i) contesting the current Application;

(ii) appealing any adverse judgement; and

(iii) opposing all subsidiary litigation in respect to the collection of other assets (e.g. loans and bequeathed property).

48 The Voluntary Administrators identified the following issues with the Original DOCA proposal:

(a) the Original DOCA contemplated use of AMS, the AMS Trust and some personal assets of Mr Marco for future trading of investments, of which the Voluntary Administrators were not supportive due to the:

(i) inability to confirm the parties to the contract prior to submitting for due diligence and illustrating proof of funds;

(ii) uncertainty in respect of the nature of the investment and underlying instruments subject to the trade; and

(iii) uncertainty on the requirements to perform such trading, including proper licensing;

(b) the proposal failed to include a number of personal assets that may become available in a liquidation scenario;

(c) the proposal failed to include eight debtors (mostly related parties) that would be available in a liquidation scenario; and

(d) liquidators would be able to pursue Mr Damon Marco for insolvent trading and voidable transactions in a liquidation scenario.

49 Based on the above analysis, the Voluntary Administrators formed the opinion that they could not recommend the Original DOCA and that, failing alternative or improved DOCA proposals, it was in the creditors' interests for AMS to be wound up.

50 Echoing these views, on 21 October 2020, the Interim Receivers sent a circular to investors regarding Mr Marco's Original DOCA proposal, expressing their opinion as creditors of AMS that they would not vote in favour of the Original DOCA proposal, that the creditors should vote for an adjournment of the second meeting of creditors, and commenting on the difference in estimated realisations between the Major Report and the Interim Receivers' Report.

51 At the meeting of the Committee of Inspection on 22 October 2020, numerous concerns were aired about the Original DOCA and the prospect of an investor-led DOCA was foreshadowed

with the proviso that more time was needed. For these reasons, the Voluntary Administrators recommended, and the creditors resolved, to adjourn the second meeting to 26 November 2020.

52 The only new proposal brought forward was Mr Marco's Second Revised DOCA. It is included in the Supplementary Report to Creditors which also includes a series of background statements to the Second Revised DOCA which relevantly noted that:

> 5. An objective of the DOCA is to bring in all reasonably recoverable money and assets that were purchased with money given to [Mr] Marco and given to [AMS], including all money and assets put by [Mr] Marco and [AMS] into trusts and to [related parties], which can be identified to produce the best net return to creditors … to form a consolidated pool of funds for distribution in a consistent manner…
>
> …
>
> 7. It is critical to the DOCA's success, and the advantage of a DOCA over a winding up, that the DOCA must include a mechanism for engaging with the [related parties] and for getting in money (or assets purchased with it / traceable proceeds) that may still be reasonably available without requiring protracted and expensive litigation.

53 The terms of the Second Revised DOCA are then set out in full (where 'Recipients' refers to related parties):

Deed Administrators & proponent	1. Richard Albarran, Cameron Shaw and Marcus Watters would be the Deed Administrators. 2. This DOCA proposal is made by Chris Marco and supersedes previous proposals made by him.
Deed Administrators' Powers	3. Powers of the Deed Administrator are as set out in Schedule 8A (2) of the *Corporations Regulations 2001* (Cth), with the following limitation: Except with the approval of the Court, of the committee of inspection (**COI**), or of a resolution of the creditors, the Deed Administrators must not compromise a debt if the amount claimed is more than $100,000
COI	4. A COI will be formed and should be engaged to assist the Deed Administrators, including when considering terms of settlement of recoveries against Mr Marco and the Recipients to consider other options before incurring substantial legal and other costs. 5. [8A-11(a)] The COI must have at least 3 members and there is no upper limit on the maximum number of members in the COI. 6. [8A-11(b)] The creditors and investors in the Scheme must appoint the members in a meeting of creditors. Mr Marco as the sole shareholder of the Company is taken to have resolved to abide that appointment. 7. Insolvency Practice Rule 80-5(2) applies to the COI as if references to a creditor are references to a creditor or an investor in the Scheme. 8. [80-5(3)] A COI meeting should be held within 4 weeks of the commencement of the DOCA. 9. [80-5(3)] At any given COI meeting a date range is to be agreed upon by the COI members and the Deed Administrators as to when the next COI meeting is to be held. 10. [80-5(6)] The COI may act by a majority of its members present at a

	meeting, but must not act unless a majority of its members are present. 11. [80-5(7)] If a member of the COI is a body corporate, the member may be represented at meetings of the COI by an individual authorised in writing by the member for the purposes of this DOCA term. 12. Insolvency Practice Rule 80-10 applies to the COI as if references to a creditor are references to a creditor or an investor in the Scheme. 13. Other terms governing how the COI works are as set out in Schedule 8A(11)(d), (e) and (f). 14. A member of the COI must not directly or indirectly derive any profit or advantage from the external administration of the Company unless creditors resolve to allow it or a court grants leave to derive the profit or advantage
Conditions of the DOCA to continue	15. ASIC's application to wind up the Company / Scheme is unsuccessful or other Court orders are made confirming/ enabling the DOCA to be formed and effectuated according to its terms as approved by resolution upon the second meeting for the Company. 16. The Asset Preservation Orders are revised to enable the Deed Administrators to deal with assets, or lifted. 17. Court approval for the Company to remain or be reinstated as Trustee of the AMS Holdings Trust, or orders with similar effect to enable the Deed Administrators to deal with the Trust's assets. 18. Thereafter, the DOCA terms being satisfied including the promises for Mr Marco to cooperate and for Mr Marco and Recipients to contribute assets to the Deed Fund without requiring litigation and without delay.
Who is in control of the Company during the DOCA	19. The suspension of the powers of the directors remain in place until the end of the DOCA. Once the DOCA is effectuated, the Company will be wound up (as taken to have resolved for a voluntary winding up). 20. If an alternative director/s and/or if appointor of the Trust are able to be found, and those replacements are acceptable to the COI, then the replacements are to be appointed to those roles and Chris Marco and Damon Marco are to resign or otherwise be removed from those roles.
New Liabilities	21. To be met by the Company as and when due by the Company
Trust & Personal Assets included in the Deed Fund (to be realised by the Deed Administrators)	22. Company Properties A, B. C, D, E, F, G, H, I, J and K as detailed in Section 5.8.1 and any other real property identified by the Deed Administrators; 23. Mr Marco's personal Property Interest D as detailed in Section 5.9.3 and any other real property identified in Mr Marco's name by the Deed Administrators excluding Mr Marco's interest in Property Interest B and Property Interest C. 24. The Deed Administrators must engage licensed real estate agent(s) to sell the above properties for the best possible price within a reasonable period, and will keep the COI informed of progress and developments. 25. Subject to any priority claim or set-off right by the bank/ registered mortgagee, all monies in the five (5) Westpac bank accounts in Mr Marco's name excluding the funds held in a bank account held jointly by Mr Marco and Beverley Marco. 26. Mr Marco must transfer all shares held in any company (whether publicly listed or private), all units or other interest in any trust, and all other interests in property or security, as directed by the Deed Administrators from time to time for realisation and contribution of net proceeds into the Deed Fund, including (without limitation) in respect of the following: (a) All interests in Fairway (b) CFXT Hedge Fund

	(c) The loans to Andrew Purser and security related to that loan (d) Recovery of deposit paid to Patricia Markopoulus (French Street) (e) Choses in action (if any exist) against Ian Graydon (f) Choses in action (if any exist) against Steve Zielinski (g) Choses in action (if any exist) against Steve Bogar 27. The following vehicles: (a) Ford Falcon XY GTHO Phase III (1971) (b) Chrysler Charger VH E49 (1972) (c) Holden Monaro GTS HQ Coupe (1971) (d) Holden Torana Liftback LX SS A9X (1977) (e) Holden Torana "Bathurst" LJ GTR XU-1 (1972) (f) Holden HSV GTSR W1 (2017) (g) Holden HSV GTSR Maloo Ute (2017) (h) Chrysler Jeep Trackhawk (2018) (i) Mercedes GLC 220D wagon (2016), unless it is dealt with in the Conference with Talitha Marco (j) Any other vehicle identified by the Deed Administrators as owned by Mr Marco excluding the Datsun 260z Coupe (1975). 28. Damon Marco must also transfer all shares held in companies as directed by the Deed Administrators from time to time for realisation and contribution of net proceeds into the Deed Fund. 29. All [Private Placement Programme] investments/ proceeds however returned. 30. To the extent monies from the Scheme or Scheme Assets are still held by the Recipients (being Chris Marco, Damon Marco, Talitha Marco, Gaye Marco, Ian Graydon, Steve Zielinski, Steve Bogar and Linda Marissen) have not been dissipated and are reasonably recoverable and saleable for a net return to the Deed Fund, the Recipients must account for that and repay money to the Deed Fund on terms agreed with the Deed Administrators (as detailed in the process below).
Claims against the Recipients	31. The process for the Deed Administrators to negotiate and, if possible, reach settlements with the Recipients for commercial recovery to the Deed Fund is as follows: (b) Within 2 months of the DOCA's commencement, each of the Recipients must meet with the Deed Administrators for a mediation or settlement conference (the Conference), and participate faithfully to settle all potential claims to Scheme Assets on commercial terms. (c) Mr Marco must use his best endeavours and cooperate with the Deed Administrators to procure each of the Recipients' attendance. In doing so, Mr Marco makes clear that he cannot force a Recipient to a Conference, but the intention/ expectation is to achieve this. (d) Each attendee can be legally represented if they wish. (e) No less than 7 days prior to the Conference, the Recipient must complete and deliver to the Deed Administrators a Statement of Financial Position (**SOFP**) showing all assets, income and liabilities of that person. This is to enable the Deed Administrators to make commercial decisions upon the Conference as to the likelihood of net recovery and the benefits of a settlement. (f) The Deed Administrators will, if directed by the COI for any Recipient, confer with the COI regarding offers made by Recipients and the Deed Administrators' recommendation about any settlement before it is finalised . However, the Deed

	Administrators are not bound by the opinion of any COI member. (g) If the Deed Administrators reach a settlement with a Recipient, then the terms must be formalised in a standard form settlement deed including, without limitation, an express term that the settlement is based on the truth and accuracy of the SOFP and, if the SOFP is incomplete or wrong in a material respect, then that will be a breach of the DOCA and paragraph 40 of this DOCA proposal will apply. Otherwise, the settlements will be final and include mutual releases after full performance by the Recipients. (h) If a Recipient fails to attend a Conference, or if a settlement is not achieved, or if a deed of settlement with a Recipient is formed but then terminated by the Deed Administrators due to the Recipient's breach, then the Deed Administrators can take such action against the Recipient the Deed Administrators deem appropriate, including suing any Recipient, after conferring with the COI. If despite Mr Marco's endeavours, a Recipient refuses to participate in a Conference, then that will be a breach of the DOCA that could justify termination of the DOCA if elected by the Deed Administrators, having conferred with the COI, or if voted by the creditors. (i) To avoid doubt, the Conference with Talitha Marco and any settlement must include the Mercedes GLC 22D Wagon held by her if that vehicle is still retained by her, unless the COI agree otherwise.
Chris Marco's and Company assets that are excluded from forming assets available for realisation	32. Chris Marco's entitlement to monies held in Chris & Beverley Marco's joint account (estimated balance $13,219); 33. Chris Marco's interests in Property Interest B; 34. Chris Marco's interests in Property Interest C ; 35. The 1970 Datsun 260z Coupe (1975).
Monitoring and ongoing conditions	36. The properties at … [Property Interest B and C] are not to be sold until dealt with either by Court Order, a Personal Insolvency Agreement or a Trustee in Bankruptcy. 37. The Datsun 260z is not to be sold until dealt with either by Court Order, a Personal Insolvency Agreement or a Trustee in Bankruptcy, with a security registrable on the PPSR to be granted to the Deed Administrators for the purposes of preserving the vehicle (as opposed to sale) until such time as the vehicle is dealt with in this manner. 38. Mr Marco must sign a personal undertaking not to deal with the above property inconsistently with the above paragraphs (in addition to freezing/ preservation orders already in place in any event). 39. If a Trustee in Bankruptcy or PIA Trustee is appointed, the Deed Administrators will work together with them to the extent reasonable and consistent with the objects of this DOCA to achieve a timely realization of assets, always with any question of law able to be resolved by application to the Court.
Consequence of non-compliance	40. If: - The Company or Mr Marco is unable to comply with any fundamental provisions of the DOCA; or - The Deed Administrators form the view that the Company or Mr Marco is unlikely to be able to comply with the terms of the DOCA; or - If there is other breach of a material term, such as the requirements for the Recipients,

	then the Deed Administrators are entitled to convene a COI meeting or a meeting of the Company's creditors to consider whether to: (a) Vary the DOCA; or (b) Terminate the DOCA (with or without a creditors' resolution); or (c) Enforce the terms of the DOCA. 41. If the DOCA is terminated, then the creditors who voted in favour of the DOCA will be taken to have consented to the Deed Administrators being appointed as Liquidators to wind up the Scheme. 42. Any settlements reached with Recipients before the termination is intended to remain binding and enforceable according to their terms. 43. If the DOCA is terminated, the Scheme will otherwise be wound up and action will be taken against any Recipient or other person as deemed appropriate by the Liquidators.
Claims subject to DOCA and making claims	44. The following be entitled to prove in the DOCA: (a) Creditors proving for debts incurred by the Company on or before 24 September 2020; and (b) Investors in the Scheme. 45. The Deed Administrators are to seek the Court's order on the methodology of how investor claims should be adjudicated upon/ quantified for distributions from the Deed Fund. This application will be brought promptly and the Deed Administrators will confer with the COI about making an interim distribution as quickly as reasonably possible after Court confirmation of the formula.
Secured Creditor Conditions	46. The DOCA does not: (a) Release the debts of secured creditors (other than to the extent of any shortfall in their security). (b) Restrict rights of secured creditor to realise or otherwise deal with their security except to the extent the secured creditor voted in favour of the DOCA or released its security.
Distribution of Deed Fund	47. The Deed Administrators must apply the Deed Fund as and to achieve the steps described in this DOCA proposal and in the order of priority specified in Sections 556, 560 or 561 of the Act as if the Company, Trust and Scheme assets and creditors (including investors with standing as creditors as determined by the Court) were assets and creditors as defined in Section 9, Chapter 5 and relevant Regulations of the Act.
Nature and duration of moratorium	48. There is to be a complete bar on claims against the Company, the Trust and the Scheme while the DOCA is operational (excluding secured claims as detailed above).
Extent of release by creditors	49. Completion of the DOCA according to its terms results in full and final satisfaction of all claims against the Company, the Trust and the Scheme (excluding secured creditors as detailed above). 50. For the avoidance of doubt, the DOCA does not release creditors' / investors claims (if any) against Chris Marco personally or any parties other than the Company, the Trust and the Scheme. Claims against Mr Marco personally may be dealt with by a Trustee in Bankruptcy or a PIA Trustee. That is - proving under the DOCA will not itself prevent lodging a proof of debt in any Bankruptcy or PIA process. 51. Effectuation of this DOCA will mean that the Deed Administrators will not pursue the directors for legal claims, and the Deed Administrators

	acknowledge that they will not be able to pursue any voidable and/or insolvent transactions, including preference claims and other recovery actions against creditors.
Court Orders	52. Court orders will include amending existing freezing orders (to enable property to be dealt with by the Deed Administrators) and to enable dealing with trust property and the terms of the DOCA described herein to achieve the objectives described herein. 53. The Administrators' legal costs of obtaining Court approval will be paid from Scheme money and must not exceed $45,000 (plus GST) unless otherwise approved by the COI, creditors or the Court. 54. Contribution of real property by the Company is subject to a Court order approving and empowering the Deed Administrators to deal with the Trust assets (as part of the Scheme Assets) 55. Contribution of Mr Marco's assets and choses in action into the Deed Fund is subject to a Court order approving and empowering the Deed Administrators to deal with Mr Marco's assets (as part of the Scheme Assets).
Ongoing cooperation by Mr Marco	56. Mr Marco is required to sign documents and do such things as reasonably required by the Deed Administrators from time, to time to effectuate timely sale of the assets being contributed into the Deed Fund. 57. In addition to any other term of this DOCA proposal, Mr Marco promises to sign such documents and to do such things as reasonably required by the Deed Administrators from time to time to effectuate the terms and transactions contemplated by the DOCA. 58. For all Scheme assets and any asset or money not specifically listed in the DOCA proposal that derives from money contributed to the Scheme, including any product described by Mr Marco as Private Placement Programs, Mr Marco promises to provide all reasonable assistance, to sign such documents and to do such things as reasonably required by the Deed Administrators from time to time to investigate and recover money to the Deed Fund in a timely manner. 59. Legal fees incurred by Mr Marco's lawyers in order to comply with the terms of the DOCA or in his defence of litigation and any claim for reasonable living expenses are to be paid out of the Deed Fund as: (a) Ordered by the Court; or (b) Agreed by the COI. Paragraph (a) acknowledges the orders already in place in the ASIC proceedings for payment of Mr Marco's reasonable legal costs which will continue and living expenses, and that further orders may be sought from/ made by the Court.
Other	60. The DOCA obligations will be deemed to be satisfied when all amounts required to be paid have been paid and the DOCA obligations of all parties complied with to the satisfaction of the Deed Administrators, having conferred with the COI. Once all DOCA obligations are satisfied and the Deed Administrators have distributed the Deed Fund the Deed Administrators will effectuate the Deed. The Company will then be taken to have resolved to be voluntarily wound up by the Deed Administrators as liquidators. The Company will not continue under the operation of the directors. 61. The Deed Administrators are able to remit unclaimed monies to ASIC under Section 544 of the Act as if the reference to a liquidator was to them.

54 In the Voluntary Administrators' opinion, the advantages of the Second Revised DOCA include that it:

(a) contains a mechanism that allows for a mediation or settlement conference with the recipients of funds or assets. This should in turn allow for the efficient recovery or settlement of any traceable assets or claims and thus avoid protracted and expensive litigation;

(b) is likely to engender greater assistance from investment providers and Mr Marco in the realisation of investment assets;

(c) allows for the possible appointment of a trustee to Mr Marco that would co-exist together and would not undermine the DOCA;

(d) allows for significant input and engagement from any committee of inspection;

(e) means there is likely to be less legal proceedings and consequently likely lower professional fees;

(f) is structured to avoid excessive legal costs and delays allowing a quicker anticipated return to creditors;

(g) provides for a greater estimated return to creditors than liquidation;

(h) whilst the proposal fails to include some of Mr Marco's personal assets and Beverley Marco's personal assets that ASIC have applied to be incorporated in the winding up of the Scheme, the DOCA provides for preservation of Mr Marco's assets until they are dealt with by a trustee in bankruptcy, or a trustee under a personal insolvency agreement, or a court; and

(i) the DOCA does not preclude ASIC from undertaking further investigations into the actions of the Directors and pursuing any claim that may therefore arise, which may include those breaches identified at Section 8.1 of the Report.

55 The Voluntary Administrators also identified a number of shortcomings in the Second Revised DOCA:

(a) recipients of funds/assets do have the ability to refuse to participate in a mediation or settlement conference, and also to refuse to provide a statement of financial position which may result in an extended timeframe to recover any funds/assets;

(b) the deed administrators might need to seek creditor approval to vary the DOCA due to non-compliance of the related party, within the process detailed in the DOCA;

(c) the exact terms of any proposal for a personal insolvency agreement for Mr Marco are unknown;

(d) liquidators would be able to pursue Mr Damon Marco for insolvent trading and voidable transactions in a liquidation scenario; and

(e) there is a risk that a party may apply to overturn the DOCA pursuant to s 445D of the *Corporations Act*.

56 Based on these competing considerations, the Voluntary Administrators formed the opinion that it was in the interests of creditors that the Second Revised DOCA be approved. Particular regard appears to have been had to the ability of the deed administrators under the proposal to pursue related parties (recipients) for recovery and that the methodology set out for mediation or settlement conferences provides a framework to commence the process.

57 Despite this recommendation, the creditors of AMS resolved on 26 November 2020 that AMS be wound up pursuant to s 439(c) of the *Corporations Act*. As previously noted, these matters have been brought to the Court's attention by ASIC's subsequent application. An affidavit sworn by Ms Lim on 2 December 2020 annexes a Form 509D 'Notice of Special Resolution to wind up a company' and a Form 505 'External Administration or Controllership – Appointment of an administrator or controller' which confirms that the Voluntary Administrators have been appointed as the Voluntary Liquidators of AMS. The affidavit did not annex any minutes of the 26 November 2020 creditors meeting.

AN UNREGISTERED MANAGED INVESTMENT SCHEME

58 Section 601EE(1) of the *Corporations Act* relevantly provides that if a person operates a managed investment scheme in contravention of s 601ED(5), ASIC may apply to have the scheme wound up. Section 601EE(2) gives the Court the power to make any orders it considers appropriate for the winding up of the Scheme. Section 601ED(5) of the *Corporations Act* provides that '*[a] person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under s 601EB unless the scheme is so registered*'. It is not in dispute that the Scheme alleged to have been operated by the defendants was not registered under s 601EB and Ms Lim gives evidence to confirm this.

59 A '*managed investment scheme*' is defined in s 9 of the *Corporations Act*. The definition relevantly has three positive elements and contains a number of presently inapplicable exclusions at sub-ss (c)-(n). The positive elements of the definition are as follows:

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

…

60 Section 601ED(1) of the *Corporations Act*, which imposes a registration requirement in respect of certain managed investment schemes that meet the above definition, provides as follows:

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.

61 Section 601ED(2) and s 601ED(2A) are not presently relevant. Section 601ED(4) of the *Corporations Act* sets out rules for working out how many members a scheme has for the purposes of the section. It is in the following terms:

(4) For the purpose of this section, when working out how many members a scheme has:

(a) joint holders of an interest in the scheme count as a single member; and

(b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:

(i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or

(ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.

62 As a drafting note under the prohibition in s 601ED(5) confirms, a failure to comply with s 601ED(5) is presently an offence by virtue of s 1311(1) of the *Corporations Act*. Section 601ED(8) provides that a person contravenes that subsection if the person contravenes subs (5). Section 601ED(8) is accompanied by a drafting note which indicates that the subsection is a civil penalty provision as a result of s 1317E of the *Corporations Act*. Section 601ED(8) is identified in the table of civil penalty provisions contained in s 1317E(3) of the *Corporations Act*, but s 601ED(5) is not.

63 The introduction of the offence and civil penalty provisions into s 601ED referred to above occurred as a result of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (the **Amending Act**). The relevant provisions of the Amending Act commenced on 13 March 2019 after the asset preservation and freezing orders were made. The application and transitional provisions which were introduced into the *Corporations Act* by Sch 1, Pt 2, cl 146 of the Amending Act, and now appear in s 1656 and s 1657 of the *Corporations Act*, provide that the amendments:

> apply in relation to the commission of an offence [or to the contravention of a civil penalty provision] if the conduct constituting the commission of the offence [or the contravention of the civil penalty provision] occurs wholly on or after the commencement day.

64 As the impugned conduct occurred before 1 November 2018 when the asset preservation orders were made, the new civil penalty provisions do not apply here. Accordingly, ASIC seeks only the relief available under s 601EE in relation to contraventions of s 601ED, namely, that the Scheme be wound up.

65 The definition of 'managed investment scheme' in s 9 of the *Corporations Act* requires the identification of a '[a] scheme'. In ***Australian Softwood*** *Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission)* (1981) 148 CLR 121, Mason J (with whom Gibbs CJ and Stephen J agreed) observed (at 129) by reference to *Clowes v Commissioner of Taxation* (Cth) (1954) 91 CLR 209 (at 225) that 'all that the word "scheme" requires is that there should be "some programme, or plan of action"'. In *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388; [2002] NSWSC 834, Barrett J discussed the nature of a 'scheme' (at [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…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).

66 The evidence clearly establishes that such a program or plan of action existed. There was evidence of:

(a) the provision and execution of a large number of investment documents consisting of Declarations of Trust, investment confirmation letters and investment summaries (including those exhibited to the investor affidavits, those identified in Pt 3.2 of the Howman-Giles Report and the primary documents themselves as exhibited to the Lim Affidavit);

(b) the receipt of funds from investors by Mr Marco into bank accounts held in his name (as addressed in Pt 4 of the Howman-Giles Report and [74]-[98] of the Gomm Affidavit, and evidenced in the bank statements exhibited to the Lim Affidavit);

(c) the circumstances in which funds were provided by four sample investors, being Mr Martin, Mr and Mrs Morrison and Mr de Marte; and

(d) the transfer and application of investor funds by all three defendants (as addressed in [74]-[147] of the Gomm Affidavit and evidenced in the primary bank statements exhibited to the Lim Affidavit).

67 The first element of the '*managed investment scheme*' definition contained in s 9(a)(i) of the *Corporations Act* requires that people contribute money or money's worth. Investors have contributed a great deal of money to the Scheme operated by the defendants. The Howman-Giles Report and the Gomm Affidavit address investor receipts by reference to primary financial records obtained by ASIC and exhibited to the Lim Affidavit. The findings of the Howman-Giles Report are summarised at [1.6.13] (Table 2), where Mr Howman-Giles concludes that investors contributed some $261.5 million to Mr Marco. The detailed findings of Mr Howman-Giles' financial analysis are further addressed in Pt 5.2 of his Report, which incorporates analysis of deposits, withdrawals, rollovers and re-allocations. Mr Howman-Giles identifies a gross investment amount of $2.647 billion (at [5.2.2] (Table 15)) and a net amount presently owing to investors of $256.18 million (at [5.2.19]-[5.2.20] (Table 19)). It is important to understand, however, that the gross amount is calculated by inclusion of many 'rolled over'

initial investments which were compounded on returns as high as 7% (in many cases close to every quarter) for a number of years.

68 The first element of the '*managed investment scheme*' definition also requires that money or money's worth be contributed as consideration to acquire rights (interests) to benefits produced by the scheme. The word '*interest*' in this context is also defined in s 9 as follows:

> ***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).

69 Schemes involving the contribution of money for a fixed interest return are capable of engaging this aspect of s 9(a)(i) of the 'managed investment scheme' definition. In this regard the observations of Davies AJ (at [27]-[28]) in *Australian Securities and Investments Commission v* ***Pegasus*** *Leveraged Options Group Pty Ltd* [2002] NSWSC 310 are pertinent to the present case:

> 27 In the present case, the investors invested in a scheme. They did not merely make individual loans to Pegasus at interest. In each case, the investors understood that the moneys would be used with other moneys in some money-making programme or plan of action…
>
> 28 … In each case, the investor was informed and understood that the ability of Pegasus to pay the specified rate of interest would result from a dealing with the moneys in the manner which was represented to the investor. It was obvious to each investor that the rate of interest offered was not a normal rate of interest. That rate of interest was understood to be achievable only by the carrying out by Pegasus of its represented programme or plan of action.

(see also the authorities cited in *Pegasus* at [31] and *Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd* (2004) 187 FLR 270 at [90]-[96].)

70 Additionally, in *Pegasus*, that was so even where '*there was no describable activity which was likely to produce a return …*' in the amount promised (at [19]).

71 The terms of the primary investment documents exhibited to the Lim Affidavit, the evidence contained in the investor affidavits, the financial analysis at Pt 5.2 of the Howman-Giles Report, and the primary financial records obtained from the defendants upon which the Howman-Giles Report is based demonstrate that people contributed money or money's worth as consideration to acquire rights (interests) to benefits produced by the Scheme. In particular, the Declarations of Trust exhibited to each of the investor affidavits provide for a rate of return of 7% on the principal investment with a maturity date falling just over three months after the commencement date. The investment type in each case is listed as 'Private Placement'. There

is no doubt that investors executed these documents and transferred funds to Mr Marco on the understanding that they were acquiring rights to benefit from what appeared to be a lucrative and somewhat exclusive investment scheme.

72 The second element of the '*managed investment scheme*' definition, contained in s 9(a)(ii) of the *Corporations Act*, requires that '*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 who hold interests in the scheme. By reference to the investor affidavits (particularly the de Marte Affidavit at [25], [34] and [57], the Lorraine Morrison Affidavit at [23], the Peter Morrison Affidavit at [27] and the Martin Affidavit [43]) investors understood their funds would be pooled to produce financial benefits. Further, this would be the only reasonable inference. There was no reason to think that these investors were just gifting their funds to Mr Marco, nor does the evidence so suggest. The Gomm Affidavit (at [74]-[98]) and the primary financial documents upon which Mr Gomm's summary is based establish that investor funds were in fact pooled in accounts held under Mr Marco's name from which investor payments, transfers to AMS for the acquisition of property, and related party transactions were made.

73 The final element of the 'managed investment scheme' definition, contained in s 9(a)(iii) of the *Corporations Act*, requires that '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)'. The investor evidence (particularly the de Marte Affidavit at [52], the Lorraine Morrison Affidavit at [41], the Peter Morrison Affidavit at [43] and the Martin Affidavit [42]) shows that the investors did not regard themselves as having practical control over the funds they contributed to Mr Marco once they were provided to him. Regardless of the investor perceptions, their lack of control reflects the practical reality, evidenced in the primary investment documents, that Mr Marco effectively controlled investor funds once they were placed into his bank account.

74 As noted, under s 601ED(1)(a) of the *Corporations Act* a managed investment scheme is required to be registered under s 601EB if it has more than 20 members. Clearly this one did as the business records tendered by ASIC and the summary of those records contained within the Howman-Giles Report demonstrate. Mr Howman-Giles was able at [1.6.8] (Table 1) of his Report to identify 311 investors in the period between 1 January 2010 and 1 November 2018. That number is broken down by reference to particular calendar years at [1.6.41] (Table 7), which discloses that investor numbers comfortably exceeded the 20 member threshold in each

year from 2013 (at some point) to 2018. The effect of the primary business records upon which ASIC relies, and the summary contained in Mr Howman-Giles Report, is that the defendants also cannot take the benefit of the exception in s 1012E(2) of the *Corporations Act* for small scale offerings of financial products. Nor have the defendants sought to do so.

75 These factors and evidence establish that an unregistered managed investment scheme existed and on this basis, it was not seriously contested that Mr Marco contravened s 601ED(5). However, in the course of discussions on the final form of declarations and orders to be made, it was contended that the contravention was not made out with respect to AMS because it did not operate the Scheme. In short, the defendants say that only Mr Marco received funds from investors for the purpose of operating the Scheme. The fact that some investor funds were then transferred to AMS to purchase various property (whether as trustee or otherwise) does not, it is said, establish that AMS was also operating the Scheme along with Mr Marco.

76 For the following reasons, and relying on the clear statements in *Pegasus* and the recent decision in *Australian Securities and Investments Commission v **MyWealth** Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035 as to the meaning of 'operate' in the context of s 601ED(5), the submission cannot be accepted. Both Mr Marco and AMS operated the Scheme that was required to be registered under s 601EB, that was not so registered in contravention of s 601ED(5).

77 The defendants do not contest the evidence from both the Interim Receivers and the Voluntary Administrators that Mr Marco has repeatedly told them that the affairs of AMS should be treated as 'one and the same' with his personal affairs and that they 'should be viewed collectively as a representation of his business dealings'. Rather, they argue that this fact does not support the inference that AMS also operated the Scheme.

78 It is nonetheless necessary to set out some of the key findings of the Interim Receivers and the Voluntary Administrators in their investigations into the defendants. In the Major Report to Creditors the Voluntary Administrators observed that:

> [AMS] was primarily utilised as an asset holding entity which did not trade, other than receiving property related income i.e. rent. **Mr Marco advised our office that the purpose of [AMS] was to purchase residential and commercial property for the benefit of investors**. Almost all funding for the purchase of property by [AMS] was sourced from pooled investor funds, the majority of which was from investors who had provided money to Mr Marco in a personal capacity.
>
> (Emphasis added.)

79 In their Report, the Interim Receivers stated that:

> The Receivers have not identified any evidence to suggest that [AMS] traded in its own capacity. The Australian Business Number used by AMS was registered to the [AMS Trust] and the property business appears to have been operated exclusively through the [AMS Trust]. Mr Marco has also stated that AMS undertook no activities in its own right.

And further that:

> AMS should be considered an extension of Mr Marco's business and therefore both entries should be reviewed on a consolidated basis.

80 The defendants contend that while the above statements may reflect the views of the various insolvency practitioners and even Mr Marco himself, they do not reflect the legal position which is that only Mr Marco received funds and agreed to terms with investors such that the Scheme was operated by him alone. This view does not accord with the language of the statute, nor its application in *Pegasus* and *MyWealth*.

81 In *Pegasus*, Davies AJ observed (at [55]) that:

> The word "operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. **The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme**. The Oxford English Dictionary gives these relevant meanings:
>
> "5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work.
>
> 6. To cause or actuate the working of; to work (a machine, etc.). Chiefly *U.S.*
>
> 7. To direct the working of; to manage, conduct, work (a railway, business, etc.); to carry out or through, direct to an end (a principle, an undertaking, etc.). orig. *U.S.*"
>
> (Emphasis added.)

82 Drawing on this reasoning, Derrington J in *MyWealth* said (at [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: [*Pegasus*]. 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.
>
> (Emphasis added.)

83 These decisions make it clear that an entity's involvement in a scheme need not encompass *all* of the conduct necessary to the scheme in order for it to 'operate' the scheme for the purpose of s 601ED(5). Here, by Mr Marco's own admission, AMS used investor funds to purchase residential and commercial properties for the benefit of investors. In this sense, the actions of AMS were directed to producing the purported benefit which investors had contributed money or money's worth as consideration to acquire. This finding is only strengthened by the analyses of the Interim Receivers and Voluntary Administrators which confirms that AMS never traded in its own right and further that it was essentially propped up by numerous transfers of investor funds from Mr Marco.

FINANCIAL SERVICES BUSINESS WITHOUT AN AFSL – s 911A

84 Section 1101B(1)(a)(i) of the *Corporations Act* relevantly provides that the Court may make such order, or orders, as it thinks fit if, on the application of ASIC, it appears to the Court that a person has contravened a provision of Ch 7 (Financial services or markets).

85 Section 911A(1) of the *Corporations Act*, which appears in Ch 7 (Financial services or markets), provides that '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'. Sub-section 911A(2) provides a number of presently inapplicable exceptions to the requirement in s 911A(1). The phrase 'financial services business' is defined by s 761A to mean '*a business of providing financial services*'.

86 Section 766A of the *Corporations Act* identifies the circumstances in which a person provides a financial service. Relevantly, a person provides a financial service under s 766A(1)(b) if they '*deal in a financial product*'.

87 Division 3 of Ch 7 defines the phrase 'financial product' in a number of different respects, including specific inclusions and exclusions, as well as a general definition. The general definition and one of the specific inclusions are presently relevant and it is not seriously contested that the interests that investors received from the Scheme constituted financial products. It is also relevant to note that both avenues for satisfying the definition of financial product are alternatives and do not give rise to material differences in subsequent analysis.

88 As to the specific inclusion, s 764A relevantly provides:

> **764A Specific things that are financial products (subject to Subdivision D)**
>
> (1) Subject to Subdivision D, the following are financial products for the

purposes of this Chapter:

…

(ba) any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied:

(i) an interest in the scheme;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

…

89 It will be recalled from the above analysis that the Scheme operated by the defendants satisfied s 601ED(1)(a) by having more than 20 members. None of the specific exclusions in subdiv D are presently applicable, nor was it contended that any are.

90 Section 763A(1)(a) of the *Corporations Act* contains the general definition of '*financial product*', and relevantly provides that for the purposes of Ch 7 a '*financial product*' is a facility through which, or through the acquisition of which, a person makes a financial investment. Section 763B(a) of the *Corporations Act* relevantly provides that a person makes a financial investment if the investor gives money or money's worth to another person and the other person:

(i) … 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); …

It is also a requirement that 'the investor has no day-to-day control over the use of the contribution to generate the return or benefit': s 763B(b).

91 The concept of 'dealing' in a financial product under s 766A(1)(b) is given its meaning by s 766C which relevantly provides that:

(1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:

(a) applying for or acquiring a financial product;

(b) issuing a financial product;

(c) in relation to securities and interests in managed investment schemes – underwriting the securities or interests;

(d) varying a financial product;

(e) disposing of a financial product;

92 With respect to the concept of 'issuing' further guidance is given by s 761E(4) which relevantly provides that:

> 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… the client: …

93 The concept of '*carrying on business*' is given content by s 761C of the *Corporations Act* and Pt 1.2, Div 3 of the *Corporations Act*. In particular, s 19 provides that:

> A reference to a business of a particular kind includes a reference to a business of that kind that is part of, or is carried on in conjunction with, any other business.

Section 20 provides that:

> A reference in this Act to a person carrying on a business, or a business of a particular kind, is a reference to the person carrying on a business, or a business of that kind, whether alone or together with any other person or persons.

Finally, Section 2C of the ***Acts Interpretation Act*** *1901* (Cth) provides that:

> [i]n any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.

94 The evidence of all witnesses and all records is unequivocal in demonstrating that all relevant actions were conducted by Mr Marco, but that he was also the guiding mind and will of (and controlled) AMS in both its capacities. To the extent actions were performed using AMS, those actions were controlled by Mr Marco. AMS only acted on direction from Mr Marco and at his instance.

95 The defence has called no evidence at all in this final hearing in which relief was sought against all defendants. No conclusion is sensibly open, other than that all actions performed by AMS in both capacities were performed at the relevant times at the instance of, and jointly with, Mr Marco. I consider that the position of the respective defendants cannot be relevantly distinguished. Liability is established against all of them. In light of the following matters and for the same reasons that the defendants all carried on a managed investment scheme, but also

by reference to the definition of persons in s 2C of the *Acts Interpretation Act,* it has been established that the defendants all carried on a financial services business.

96 Mr Marco provided financial services by dealing in financial products. He issued financial products to investors based upon evidence of:

(a) the provision and execution of investment documents;

(b) the receipt of funds from investors by Mr Marco into bank accounts held in his name; and

(c) the circumstances in which funds were provided by four of Mr Marco's investors.

97 As a result of these activities Mr Marco made available a facility through which, or through the acquisition of which, investors made a financial investment. In particular:

(a) investors gave money or money's worth to Mr Marco for the purposes of s 763B(a)(i) of the *Corporations Act*;

(b) Mr Marco used the contributions of investors to generate a financial return or other benefit for investors for the purposes of s 763B(a)(ii) of the *Corporations Act* in the limited sense that investor funds were used to finance withdrawals and some small returns were derived from investment activities undertaken by Mr Marco and AMS; and

(c) I infer from the investor affidavits, the terms of the primary investment documents, and the circumstances of a large number of financial contributions having been made by investors that investors intended that Mr Marco would use the contribution they provided for the benefit of investors even if no return or benefit was in fact generated for the purposes of s 763B(a)(iii) of the *Corporations Act*.

I also infer from the same unchallenged material, and for the purposes of s 763B(b) of the *Corporations Act*, that investors did not have day-to-day control over the use of the contributions to generate the return or benefit.

98 It is alternatively also the case, for the reasons expressed in relation to s 601ED that investors were entitled to interests in the Scheme such that Mr Marco was dealing in a financial product pursuant to s 764A(i)(ba).

99 Based upon evidence as to quantum, number, and frequency of deposits and withdrawals (including the material set out in Pt 5.2 of the Howman-Giles Report) and investor evidence as

to the circumstances in which funds were invested, it is clear that the systematic issuing of financial products amounted to the carrying on of a business.

100 While it may have been the case that the positive acts of 'dealing' in the financial products (whether by issuing or varying them) were performed by Mr Marco in his personal capacity, and while Mr Marco represented to investors that their funds would be used in 'private placement programmes' in which he alone would partake, it is clear that AMS' property holdings formed an essential element of the business as a whole. This is demonstrated by the evidence as to the transfer and application of investor funds, between and by both defendants, as addressed at [74]-[147] of the Gomm Affidavit and evidenced in the primary bank statements exhibited to the Lim Affidavit. While AMS' role in the Scheme may have been completely internal and not 'investor-facing' its operation of the Scheme was central to Mr Marco's ability to deal in the interests created by the Scheme such that it also carried on the financial services business: *MyWealth* (at [125]) and *Australian Securities and Investments Commission v Arafure Equities Pty Ltd* (2005) 56 ACSR 429; [2005] QSC 376 (at [30]).

101 Such a view also accords with Mr Marco's own understanding of AMS as an extension of his own business dealings. It is clear that the financial services business was carried on by both Mr Marco and AMS in the sense contemplated by s 19 and s 20 of the *Corporations Act*. This, of course, is not a conclusion on whether or not assets in the name of AMS are all held on behalf of investors or otherwise. That will be for separate determination.

102 The defendants did not hold an AFSL at any relevant time.

103 It follows that liability against all defendants is established.

RELIEF

The defendants' submissions on relief

104 The defendants' submissions went primarily to relief, not liability. It was the precise, rather than the general nature of the relief, which attracted comment. I will not re-iterate all the written contentions as by the time of the hearing the arguments and evidence had become more refined. But the contentions for the defence included some helpful statements of principle which were not opposed by ASIC.

105 Mr Marco opposed most of the declarations and orders sought in the Application on the basis that they were imprecise in form, gave rise to conflicting relief, were materially unsupported,

and unworkable from the perspective of any distributions to be made. With the modifications ASIC has now made, I do not consider these criticisms remain valid.

106 As to declarations, Mr Marco acknowledges that the Court has a wide discretionary power to make declarations under s 21 of the *Federal Court Act*: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (at [90]-[93]). He argues, and I accept, that for the Court to make a declaration the Court must be satisfied of the following requirements:

(a) the question must be a real and not a hypothetical or theoretical one;

(b) the applicant must have a real interest in raising it; and

(c) there must be a proper contradictor: *Forster v Jododex* (1972) 127 CLR 421 (at 437-438).

107 Mr Marco observes also (and I accept) that, in addition, before a court makes declarations of breaches of provisions of the *Corporations Act* it should be satisfied:

(a) first, that there is sufficient supportive evidence to satisfy the Court that it should make the declarations sought in regard to breaches of the C*orporations Act* to the standard identified in *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J (at 361-362); see also *BMI Ltd v Federated Clerks Union of Australia* (1983) 76 FLR 141 (at 152-153); *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* (2014) 103 ACSR 453 per Gordon J (at [64]) and *Australian Securities and Investments Commission v Munro* [2016] QSC 9 (at [47]); and

(b) second, that the declarations are specifically informative as to the basis upon which the court declares that a contravention of the *Corporations Act* has occurred. There should be appropriate and adequate particulars of how and why the impugned conduct is a contravention of the *Corporations Act*: *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (at [90]); *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd* [2014] FCA 1135 per Gordon J (at [66]); and *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167 (at [35]);

108 Mr Marco also opposes the continued appointment of receivers to his assets. By way of final relief, ASIC now seeks the appointment of the Interim Receivers on a permanent basis by replacing their interim appointment under s 1101B(5) (as ordered in *Marco (No 3)*) with a final

appointment under s 1101B(1) as the **Scheme Receivers**. Mr Marco says that such an ongoing appointment is unnecessary in circumstances where the Interim Receivers have completed the task they were required to do in terms of the orders made in *Marco (No 3)*; they have identified, preserved and secured Mr Marco's property and provided their Report to the Court.

109 The proposed orders for the appointment of receivers in the Application are open-ended, requiring further orders for variation or termination. They have no end date or other means of ascertaining when the receivership will finish or be completed. Mr Marco says this is unsatisfactory particularly in relation to the continued appointment over his personal assets, as **Individual Receivers** if, and once, the Scheme property has been identified and secured.

110 Mr Marco also opposes an order that the Individual Receivers' costs and expenses be paid from his property as sought in the Application. The Individual Receivers' costs and expenses should continue to be paid by ASIC, he argues, consistent with the orders made in *Australian Securities and Investments Commission v* ***Marco (No 4)*** [2020] FCA 881 (as discussed at [33]). The prejudice to creditors is manifest. In regard to the proposed orders sought appointing the receivers to AMS on a final basis (the **Corporate Receivers** and, together with the Individual Receivers, the Scheme Receivers), Mr Marco says it is unclear how the Corporate Receivers' orders and the winding up orders are proposed to coexist.

111 The defendants' arguments against the winding up of AMS are somewhat inconsequential given the subsequent appointment of the Voluntary Liquidators. However the legal argument will be set out nonetheless, as it was put before events overtook it. The defendants contended that it is not desirable, necessary, nor appropriate that AMS be wound up, for the following reasons:

(a) the Voluntary Administrators have been appointed to AMS pursuant to a resolution of the Directors in accordance with s 436A of the *Corporations Act*. Section 436A is found in Pt 5.3A of the *Corporations Act*;

(b) the object of Pt 5.3A of the *Corporations Act*, as set out in s 435A, is:

> to provide for the business, property and affairs of an insolvent company to be administered in a way that;
>
> (i) maximises the chances of the company or as much as possible of its business, continuing in existence; or
>
> (ii) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate

winding up of the company.

(c) the outcome of the administration of a company can be either that:

(i) a DOCA is executed by both the company and the deed's administrator; or

(ii) the company's creditors resolve under s 439C(b) that the administration should end; or

(iii) the company's creditors resolve under s 439C(c) that the company be wound up: s 435C(2).

112 Mr Marco says that having regard to the provisions of s 440A(1) and s 440A(2) of the *Corporations Act*, and in circumstances where there may be a possibility of a better return for creditors of AMS through the administration process, the administration should be allowed to proceed and there should be no order, at least at this stage, for the winding up of AMS. Similarly, until the administration process has been completed, an order for the winding up of the Scheme may prejudice the ability of the Voluntary Administrators to seek to recover increased funds for the investors.

113 For quite detailed reasons which no longer require examination, Mr Marco opposes the proposed order sought in the Application directing repayment to investors. This has now been abandoned by ASIC for the reason that if it succeeds, liquidators will deal with creditors under the provisions of the *Corporations Act*.

114 Finally, Mr Marco argues that it is not clear either from the Application or ASIC's submissions what ASIC proposes in regard to the current asset preservation orders which have been in place since November 2018: *Australian Securities and Investments Commission v Marco* [2019] FCA 466, as varied in March and September 2019. Those orders were obtained pursuant to s 1323 of the *Corporations Act*. The original application filed on 29 October 2018 sought the asset preservation orders as 'interim relief'. The purpose of orders under s 1323 is self-evidently to protect the interests of persons by preserving assets until an investigation, prosecution, or proceeding is completed so that the assets will be available to meet the claims of certain alleged aggrieved persons: *Australian Securities and Investments Commission v Carey (No 5)* [2006] FCA 864 (at [18]); *Australian Securities and Investments Commission v Carey (No 3)* [2006] 2006 FCA 433 (at [26]-[27]).

115 In circumstances where ASIC seeks final relief by way of:

(a) the winding up of the Scheme and AMS; and

(b) the appointment of Individual Receivers and the Corporate Receivers under s 1101B(1) of the *Corporations Act*;

Mr Marco says it is not appropriate for the s 1323 asset preservation orders to remain in place. He says they should be vacated.

116 Mr Marco opposes any orders that the defendants pay ASIC's costs of these proceedings. He seeks an order that all reserved costs be vacated and each party bear their own costs.

Declaratory and injunctive relief

117 In relation to the matters to be noted by the Court, Mr Marco makes the point that the time for operation of the Scheme should be specified because some investors started as early as 2005 and, secondly, makes the point that there is no evidence that AMS operated the Scheme. On the second point, I have found to the contrary, such that I think the notation is correct.

118 I agree with Mr Marco's submission in relation to the timing, which should be specified. The appropriate timing having regard to the findings made above is that relevant conduct at the appropriate scale occurred in the period from at least 1 January 2014 until 31 October 2018, such that those dates should be inserted after the word 'whereby' in the second line of what it is that the Court is noting. A similar reference to those dates should be inserted at the end of declaration 1 and declaration 2, that is, 'in the period between at least 1 January 2014 and 31 October 2018'.

119 As to the injunctive relief, although the defendants submit that in light of the declarations, it should not be granted as it would simply be repetitive and would expose contraveners to risks of contempt of court, in my view, this is an appropriate case for the grant of an injunction. I note the approach taken by Burley J in *Australian Competition and Consumer Commission v viagogo AG (No 3)* [2020] FCA 1423, where his Honour considered that injunctive relief was appropriate having regard to the deliberateness of the conduct of the respondent in that case, including that senior management was aware of the conduct and did not correct it (at [138]). In this regard, the investor updates forwarded by Mr Marco indicate a lack of willingness to recognise the reality of the financial circumstances and the contraventions which have been established with clarity for some time.

120 The Court has power under s 21 of the *Federal Court Act* to grant declaratory relief. As observed in *Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114 (at [30]), it is beyond contest that a superior court of record has plenary jurisdiction to make a

declaratory order concerning contravention of the *Corporations Act* (citing *Australian Softwood* per Gibbs CJ (at 125 and *Corporate Affairs Commission (NSW) v Transphere Pty Ltd* (1988) 15 NSWLR 596 per Young J at 209). In circumstances where contraventions have been established and declarations would have utility, including by identifying contravening conduct and recording the Court's disapproval of that contravening conduct, the Court ought to grant declaratory relief: *Australian Securities and Investments Commission v* ***Ostrava Equities*** *Pty Ltd* [2016] FCA 1064 per Davies J (at [51]).

121 The Court also has power under s 1324 of the *Corporations Act* to grant injunctive relief on the application of ASIC. That power is enlivened where a person has engaged in conduct that constitutes a contravention of the *Corporations Act* and may be exercised if, in the opinion of the Court, it is desirable to do so: see s 1324(1)(a). In the present case, because the relief ASIC seeks is framed by reference to the restraint of future contraventions of the *Corporations Act*, rather than in terms which prohibit the carrying on of a financial services business or managed investment scheme *per se*, considerations of the kind outlined in [53] of *Ostrava Equities* and similar cases are inapplicable.

122 In circumstances where a contravention has been identified, it is appropriate for the Court to restrain the defendants from committing future contraventions of a similar kind. That is especially so in circumstances where there is evidence before the Court to suggest that the defendants may continue to engage in the impugned conduct if such orders are not made. There is evidence to this effect in the Lim Affidavit at [42] and exhibited in '*Folder N – Mr Stephen Tangney – Notice P00216850 documents*'.

123 The declaratory and injunctive relief sought by ASIC will be granted.

Winding up of the scheme and appointment of liquidators and receivers

124 Orders are sought by ASIC in accordance with s 1101B(1)(a)(i) of the *Corporations Act* in relation to the appointment of Scheme Receivers on a final basis and s 601EE(1) and s 461(1)(k) in relation to its application for orders that the unregistered managed investment Scheme and AMS in both its capacities be wound up (respectively). In particular:

(a) s 601EE(1) provides that if a person operates a managed investment scheme in contravention of s 601ED(5) ASIC may apply to have the scheme wound up and s 601EE(2) provides that the Court may make any orders it considers appropriate for the winding up of the scheme;

(b) s 461(1)(k) provides that the Court may order the winding up of a company if the Court is of opinion that it is just and equitable that AMS be wound up; and

(c) s 1101B(1)(a)(i) provides that the Court may make such order or orders as it thinks fit if on the application of ASIC, it appears to the Court that a person has contravened a provision of Ch 7.

125 Further considerations must also now be factored into the analysis by virtue of the appointment of the Voluntary Administrators as Voluntary Liquidators of AMS by special resolution at the resumed second creditors meeting on 26 November 2020. In its recent application in response to those events, ASIC relies on s 467B of the *Corporations Act* for an order that the Interim Receivers be appointed as the Court-Appointed Liquidators, such that the appointment of the Voluntary Liquidators is terminated. Section 467B provides as follows:

> **467B Court may order winding up of company that is being wound up voluntarily**
>
> The Court may make an order under section 233, 459A, 459B or 461 even if the company is already being wound up voluntarily.

126 Although s 467B is not a source of power to order a winding up, it confirms the Court's power to order a winding up even if the company is already being wound up voluntarily: *In the matter of SPG Projects Pty Ltd (in liq)* [2020] NSWSC 34 per Gleeson J (at [6]), citing *Citrix Systems Inc v Tele Systems Learning Pty Ltd (in liq)* (1988) 28 ACSR 529 per Moore J (at 535). The practical effect of such an order is that the court-appointed liquidator supersedes the voluntary liquidator: *In the matter of* ***Evcorp Grains*** *Pty Ltd ACN 134 204 050 (No 2)* [2014] NSWSC 155 per Brereton J (at [5]).

127 Turning to the winding up of AMS on the 'just and equitable ground' under s 461(k) (and s 467B), s 462(2)(e) and s 464 of the *Corporations Act* make clear that ASIC has standing to seek such an order if it is investigating, or has investigated, under Pt 3, Div 1 of the *ASIC Act* matters being, or connected with the affairs of a company. It is well established that ASIC may apply for the winding up of a company on the '*just and equitable ground*' on the basis of public interest considerations: see, for example, *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 per Finn J (at 530G-531G). In the present case, *Pegasus* provides a compelling analogy. In *Pegasus*, Davies AJ granted a winding up on application by ASIC, having referred (at [91]) to observations of Owen J in *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* [2001] WASC 27 (at [75]) to the effect that

'[t]he public interest justifies intervention where, among other things, it is required for investor protection and where there has been regular or repeated breaches of the law'.

128 I am satisfied that the evidence clearly establishes that similar considerations are equally applicable in the present proceedings such that both the Scheme and AMS ought be wound up. The authorities on orders under s 467B disclose the requirement for a 'good reason' to justify the replacement of the voluntary liquidator: *Evcorp Grains* (at [9]-[10]). In this case, the good reasons are obvious and numerous. At present, the Voluntary Liquidators are appointed to AMS alone in circumstances where Mr Marco is the only significant creditor of the company in the ordinary sense. The claims of investors to the assets of AMS in a winding up are contingent at best. What is important in circumstances where there is an interconnection and overlap and mixed assets, is that there be a single insolvency controller appointed to liquidate the assets as a whole, including the personal assets covered by the Scheme to ensure that it is done in a just and equitable manner and to minimise unnecessary cost. That, for example, was the approach taken by Siopis J in *Australian Securities and Investments Commission v* ***Westpoint*** *Corporation Pty Ltd* [2006] FCA 135, where his Honour said (at [19]-[21] and [32]-[36]):

> 19 Senior Counsel for ASIC, made submissions in support of the appointment of Mr Herbert and Mr Read as liquidators. He submitted that the company is part of a group comprising a large number of companies and Mr Herbert and Mr Read were already in control of Westpoint Management Pty Ltd - another of the companies in the group. He submitted that a factor which should be taken into account in considering whether to appoint Mr Read and Mr Herbert, is that the affairs of Westpoint Management Pty Ltd and the company are substantially intertwined, and that the on-going investigations would be assisted if there was one set of liquidators in respect of both companies. Further, he submitted that the appointment of the same persons as liquidators to the companies in a group of companies would be more efficient and would reduce the costs of the administration. It was in the interests of creditors, generally, if expenses were reduced.
>
> 20 Senior counsel also submitted that there was no real conflict between the roles which Mr Herbert and Mr Read might have to perform as liquidators of the company and as provisional liquidators of Westpoint Management Pty Ltd. He submitted that the authorities are to the effect that it is desirable that where companies in a group go into liquidation, to the extent that it is possible to do so without there being a real conflict of interest, one liquidator should be appointed to the companies in liquidation. Mr Colvin SC relied upon the following observations of Lehane J in the case of *Re Chilia Properties Pty Ltd, (admin apptd)* (1997) 154 ALR 179 at 180 *('Chilia')*:
>
> > '*...it is well established that in the absence of any real, as opposed to theoretical, conflict of interest it is generally desirable that the external administration of a group of companies should be placed in the hands of one administrator.*'
>
> 21 Mr Colvin SC further submitted that, where there were dealings within a group

of companies between companies that were under the effective control of the same persons, in assessing real conflict, a distinction should be drawn between dealings which affected the interests of external creditors and other external interests, and those which did not. Mr Colvin SC also submitted that it is well accepted that the courts would appoint a single liquidator to a group of companies, notwithstanding that there might be some possible theoretical conflict, on the basis that if a real conflict emerged during the course of the administration, that the liquidator could then make alternative arrangements as to how to deal with the real conflict. The fact that there might be a theoretical conflict should not be an inhibition on the appointment of a single liquidator.

…

32 First, I agree that the observations made by Lehane J in *Chilia*, referred to above, state the principles to be applied in this case. The principles are also reflected in the following observations by Hoffmann J (as he then was) in *Re Arrows* Ltd [1992] BCC 121, which were cited with approval by Warren J in *Sisu Capital*:

> '*...It is by no means uncommon in the case of the insolvency of a substantial group of companies for cross-claims and conflicts of interest to arise between companies within the group. That does not usually deflect the court from appointing a single firm of insolvency practitioners in the first instance to deal with the whole insolvency of the group, leaving the question of potential conflict of interests to be dealt with if and when it arises.*'

33 I accept the arguments advanced by Mr Colvin SC and Mr Thomson that in the situation where there is no obvious and real conflict but there is a possibility of a theoretical conflict, a court should not thereby be inhibited from appointing a single set of liquidators when that would advance the efficiency of the liquidation, and result in fewer fees being charged in respect of the liquidation.

34 I am not satisfied that on the evidence that is before me that there is any real conflict in the sense that that concept is recognised in the cases. There is no evidence the appointment of Mr Herbert and Mr Read to the position of liquidators of the company would adversely affect the interests of external creditors or other external interests. The evidence of Mr Francis as to the inter-relationship between Westpoint Management Pty Ltd and the company does not demonstrate any such prejudice.

35 I am also confident that in the event that any real conflict does emerge that the liquidators will approach the Court and seek directions in relation to how to deal with that conflict, as is foreshadowed in the authorities.

36 Second, as to the question of the extent of work that has already been done, I accept that the administrators have done some good work in relation to the investigation of the affairs of the company as is evidenced by the draft report to creditors of 13 February 2006, exhibited to the affidavit of Mr Francis. However, as is recognised in that document itself, the amount of work which will be required to be done in the conduct of a liquidation of this size and of this complexity would be substantially more than has already been done. Therefore, the fact that there has been some work done in investigating the affairs of the company, does not, in my view, operate as a decisive factor in favour of appointing the administrators as liquidators.

(see also *Australian Securities and Investments Commission v Mercorella (No 2)* [2006] FCA 763).

129 Relevant also, particularly to the creditors will be the fact that the Voluntary Administrators incurred costs in excess of $500,000 during the administration and have a potential cost estimate as high as $1.5 million for the winding up of AMS, as deposed by Mr Shaw. This highlights the importance of the insolvency proceeding as efficiently as possible. The Interim Receivers have been in place since May 2020, as distinct from the Voluntary Administrators who were appointed at Mr Marco's request in late September 2020. There is no doubt that it is more efficient for a single insolvency practitioner to be appointed across all the potential assets forming part of the Scheme. It is conventional to appoint ASIC's nominee and particularly so in this case where a substantial amount of work has already been carried out by the Interim Receivers. Further, there has clearly been duplication in the work of the Interim Receivers and the Voluntary Administrators to date which has given rise to unnecessary costs. Certainly, the Interim Receivers have an advanced understanding of the affairs of AMS and the Scheme, which is a relevant consideration for their appointment: see *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2)* [2019] FCA 398 per Derrington J (at [4]) and, of course, Siopis J in *Westpoint*.

130 There is no doubt that this case calls out for the same insolvency practitioners to be appointed to all of the relevant constituent elements of the Scheme. For Mr Marco, it was contended that there was concern that because the Interim Receivers were appointed by ASIC, they might not be independent. While it is true that the Interim Receivers were appointed on ASIC's application, they were actually appointed by the Court as independent Interim Receivers for the purpose of preparing a Report for the benefit of the Court. There is no reason at all to consider they have not discharged their obligations to date objectively in accordance with their professional obligations. At the same time, the Voluntary Administrators were appointed on the application of Mr Marco, a director of AMS. To the extent that there could be any potential perceived concern it might more readily look to be in the case of that appointment, although I hasten to add there is no reason to consider that there is any concern on the face of either appointment. There is no doubt that each has independent obligations and responsibilities and there is no doubt that there is an absence of evidence that either is relevantly compromised in any way. But any concern about the independence of the Interim Receivers is without foundation: see *Westpoint* (at [38]).

131 As to Mr Marco's concerns about the interaction between Court-Appointed Liquidators, Scheme Receivers and the existing asset preservation orders, ASIC's current form of relief adequately provides for their consistent operation. It is entirely appropriate in the interim

period for sufficient provision to be made to enable the party the subject of the asset preservation orders to continue to pay legal expenses and to continue to draw amounts to meet normal living expenses. Such provision for personal expenses is a fundamental component of the regime under s 1323 of the *Corporations Act* for circumstances where the Court has not determined the final merits of a particular dispute. Ultimately though, the reality is that Mr Marco has personally guaranteed each of the Declarations of Trust. Unless the declarations can be set aside, the inevitable result will be bankruptcy and the protection afforded under the *Bankruptcy Act 1966* (Cth). That also, of course, will give Mr Marco protection in the event that he cannot meet certain specified debts. It would appear inevitable that the guarantees will be drawn upon, given the very substantial deficit in funds available for investors. In terms then of the ongoing interrelationship between the Scheme Receivers and the Court-Appointed Liquidators, the position is clear that the Scheme Receivers will deliver up that part of the property, that is the property of the Scheme to the liquidators and that the asset preservation orders will lapse upon the later appointment of the Scheme Receivers and Court-Appointed Liquidators.

132 As to the appointment of the Scheme Receivers, which Mr Marco opposes particularly in relation to his personal assets, it is entirely appropriate and conventional where there will be no asset preservation orders on an ongoing basis. Receivers and liquidators can be concurrently appointed in appropriate circumstances : see, for example, *Kirman v RWE Robinson and Sons Pty Ltd (in liq), in the matter of RWE Robinson and Sons Pty Ltd (in liq)* [2019] FCA 372. Here, the role of the Scheme Receivers is to secure, identify and deliver up all Scheme property to the Court-Appointed Liquidators. While there is merit in Mr Marco's contention that ASIC's relief does not provide for a termination of the receivership and it is unclear what their ongoing role will be after delivery up of the Scheme property, the practical reality is that both appointments will be carried out by the same insolvency practitioners (the current Interim Receivers). It is not the case that the concurrent appointments will occasion unnecessary duplication or cost, rather it is a prudent approach to ensuring that the appointed insolvency practitioner is sufficiently empowered to do what is necessary to bring the Scheme to an end and return available funds to investors. This being said, Mr Marco will have liberty to apply on any matter at short notice, and specifically in relation to the ongoing appointment of the Scheme Receivers (or specifically their capacity as Individual Receivers).

133 I accept ASIC's submission that orders 10 and 23 are appropriate for the purpose of protecting what otherwise might be rather a sterile argument about whether or not the liquidators were

able to look to particular assets or not for the purpose of their remuneration on the basis that they might be assets of the Scheme or assets of AMS, given the manner in which AMS was operating and its involvement in the Scheme.

134 As it has been established that the defendants have contravened s 601ED(5) and s 911A of the *Corporations Act*, it is appropriate to exercise the discretion conferred under each of the provisions above to make orders for the appointment of receivers to the defendants on a final basis and for the winding up of both the unregistered managed investment scheme and AMS. Many of the factors which weigh in favour of the exercise of each of those discretions have been traversed previously, for example in *Marco (No 3)* (at [108]-[127]).

135 It is appropriate to make orders for the orderly cessation of the Scheme and the winding up of AMS because of the:

(a) persistence and seriousness of the contraventions at issue;

(b) evident shortfall in investor funds;

(c) absence of any reasonably foreseeable prospect of a significant return to investors;

(d) evidence of related party and personal expenditure from investor funds; and

(e) deficiencies in record keeping as to investor entitlements.

136 Orders are sought pursuant to s 1324B of the *Corporations Act* for the publication of a newspaper notice in a form to be approved by the Court. The power in s 1324B is enlivened in circumstances where the Court is satisfied that a person has engaged in conduct constituting a contravention of, relevantly, Ch 5C (which encompasses s 601ED(5)). ASIC has prepared a draft notice and provided a copy to the defendants and the Interim Receivers.

137 In relation to the publication orders, I am not satisfied that they are desirable. It will add further cost and further reduce the funds available to creditors. The proceedings have had ample publicity.

138 As to costs, the defendants contended that because ASIC narrowed the scope of its relief, the defendants should be entitled to costs or some reduction in costs. I cannot accept that submission. Mr Marco has put ASIC to proof on every aspect of this proceeding until the very last moment. There have been no relevant admissions and even in the context of submissions concerning the orders to be made, it was contended that there was no proof of contraventions by AMS in either of its capacities. It is clear that ASIC has gone to extraordinary lengths to

examine and bring before the Court the very complex and unsatisfactory affairs that have been involved in this financial exercise. ASIC has been required to lead all evidence necessary to prove its case. It is true that it has made concessions in relation to the relief, but I do not think these are such that warrant a reduction in the costs that it should be awarded. These concessions have clearly been on issues subsidiary to the primary relief of winding up which ASIC has pressed for since May 2020.

139 It is necessary to say something about the costs of the Interim Receivers. Ms Thornton for the defendants made the submission, correctly, that against ASIC's opposition, I made orders that ASIC be responsible for certain costs of the Interim Receivers for the reasons given in *Marco (No 4)* (at [12]-[33]). Senior counsel for ASIC made the point that ASIC had not paid costs to the Interim Receivers beyond the cost of preparation of the Interim Receivers' Report. Although the Interim Receivers have been paid for the costs of preparation of their Report, which was certainly a substantial task, the Interim Receivers have done additional work on the basis that they have no present entitlement from ASIC and if they wish to agitate that matter, they will have to raise it with the Court, as matters currently stand. Senior counsel for ASIC made clear that the Interim Receivers were prepared to continue to act in circumstances where ASIC had made no commitment to meet their costs beyond the preparation of the Interim Receivers' Report. Additionally, the Interim Receivers were represented at the hearing, with their counsel electing to read their evidence and then be excused. Clearly they have had (and will continue to have) the opportunity to be heard on the issue. Notwithstanding this, I note that ASIC has sought orders which would protect the Interim Receivers beyond simply the preparation of the Interim Receivers' Report. Although I had concerns initially about the costs of appointing receivers detracting from the availability of funds for creditors, now that the matter has reached this stage of finality, in my view, it is appropriate to make the conventional orders as reflected by order 7. That does not mean, however, that I have ruled on whether ASIC be entitled to recover, on the assessment of its costs, the disbursements incurred in paying the Interim Receivers for preparation of the their Report. That is a matter which should be separately addressed in light of my firm view that those costs should not be borne by creditors.

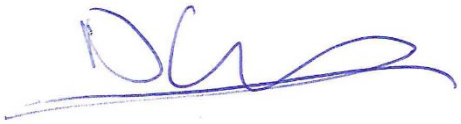
140 Finally, I note ASIC's observation that while the relief which has been sought is partly for the benefit of investors, partly for the protection of other members of the community, and partly as a way of precluding ongoing activity of this nature by the defendants, those investing with Mr Marco or at least some of them, must surely have known that promises made were too good to be true. The expectation of receiving extremely high interest returns from investments, when

those returns were far beyond those normally available is not something to be completely overlooked. To some extent, some investors at least should surely have realised that such promises were too good to be true and took unnecessary risks. That said, Mr Marco's unlawful conduct and attitude to financial affairs have apparently caused financial loss and no doubt related hardship to investors on a scale rarely seen.

CONCLUSION

141 Relief largely in the form sought by ASIC with some modification following the defence submissions and subsequent applications will be granted.

I certify that the preceding one hundred and forty-one (141) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McKerracher.



Associate:

Dated: 11 December 2020