FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v M101 Nominees Pty Ltd [2021] FCA 62

File number(s):	VID 524 of 2020
Judgment of:	**ANDERSON J**
Date of judgment:	4 February 2021
Catchwords:	**CORPORATIONS** – application by Australian Securities and Investments Commission to wind up First Defendant on just and equitable ground – considerations relevant to winding up companies – provisional liquidators expressed view that First Defendant is insolvent – winding up order made
Legislation:	*Corporations Act 2001* (Cth), s 461(1)(k)
Cases cited:	*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234 *Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2)* [2016] FCA 544 *Australian Securities and Investments Commission v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty* Ltd [2020] FCA 1166 *Australian Securities and Investments Commission v Merlin Diamonds Limited (No 3)* [2020] FCA 411 *Deputy Commissioner of Taxation v Ausmart Services Pty Ltd* [2018] FCA 1912
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	23
Date of hearing:	Determined on the papers
Counsel for the Plaintiff:	Jonathon Moore QC and Caryn van Proctor

Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Solicitor for the First and Third Defendant:	Ashurst
Solicitor for the Second Defendant:	Scanlan Carroll

ORDERS

VID 524 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**M101 NOMINEES PTY LTD** First Defendant
	JAMES PETER MAWHINNEY Second Defendant
	SUNSEEKER HOLDINGS PTY LTD Third Defendant

ORDER MADE BY: **ANDERSON J**

DATE OF ORDER: **29 JANUARY 2021**

THE COURT ORDERS THAT:

1. The First Defendant be wound up pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) (**Act**) on the ground that it is just and equitable.
2. Said Jahani and Philip Campbell-Wilson of Grant Thornton, registered liquidators, be appointed as joint and several liquidators of the First Defendant.
3. The Plaintiff's costs of and incidental to the winding up application be costs in the winding up of the First Defendant (taxed or as agreed) and reimbursed in accordance with s 466(2) of the Act.

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

REASONS FOR JUDGMENT

ANDERSON J:

INTRODUCTION

1 The Plaintiff (**ASIC**) seeks orders for the winding up of the First Defendant, M101 Nominees Pty Ltd (**M101 Nominees**), pursuant to s 461(1)((k) of the *Corporations Act 2001* (Cth) (**Act**), on the ground that it is just and equitable to do so. ASIC also seeks in its Originating Process dated 10 August 2020 other relief, including injunctions against the Second Defendant (**Mr Mawhinney**). Whether or not any such injunctions should be issued is yet to be heard and determined, and is not the subject of this judgment.

2 Further background to this proceeding is set out in my earlier judgment in this matter, which is published as *Australian Securities and Investments Commission v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd* [2020] FCA 1166; 147 ACSR 537 (***ASIC v M101***). This judgment assumes familiarity with the judgment in *ASIC v M101*.

3 On 29 January 2021, the solicitors for ASIC, M101 Nominees, Mr Mawhinney and the Third Defendant, Sunseeker Holdings Pty Ltd, informed my Chambers that agreement had been reached whereby those parties consented to M101 Nominees being wound up pursuant to s 461(1)(k) of the Act on the ground that it was just and equitable to do so. I was also informed by the provisional liquidators, Mr Said Jahani and Mr Phillip Campbell-Wilson of Grant Thornton, that they did not oppose the winding up of M101 Nominees.

4 The evidence relied upon by ASIC relevant to the application to wind up M101 Nominees relevantly comprised the following:

(1) affidavits of Ms Dayle Buckley affirmed 5 August 2020 (providing details of ASIC's investigation) and 27 November 2020 (providing information in relation to companies controlled by Mr Mawhinney, including IPO Wealth Holdings Pty Ltd and related entities (**IPO Wealth Group**) and IPO Capital Pty Ltd (**IPO Capital**)); and

(2) an affidavit of Mr Jason Tracy affirmed 24 November 2020 (providing an independent expert opinion in relation to the security held in respect of investments made by M101 Nominees) (**Expert Report**).

5 ASIC also relies on the report provided by the provisional liquidators pursuant to orders made on 13 August 2020 (**Provisional Liquidators' Report**).

6 Having considered the affidavits identified above and the Provisional Liquidators' Report, I determined that it was appropriate to exercise the discretion conferred by s 461(1)(k) of the Act to wind up M101 Nominees on the basis that I am of the opinion that it is just and equitable that the company be wound up.

7 As a consequence, on 29 January 2021, I made the following orders:

> 1. The First Defendant be wound up pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) (**Act**) on the ground that it is just and equitable.
>
> 2. Said Jahani and Philip Campbell-Wilson of Grant Thornton, registered liquidators, be appointed as joint and several liquidators of the First Defendant.
>
> 3. The Plaintiff's costs of and incidental to the winding up application be costs in the winding up of the First Defendant (taxed or as agreed) and reimbursed in accordance with s 466(2) of the Act.

8 These are my reasons for making the above orders.

WINDING UP ON THE JUST AND EQUITABLE GROUND

9 Section 461(1)(k) of the Act 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 the company be wound up".

10 The "classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case": *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234; 93 ACSR 189 (***ActiveSuper***), [19].

11 It has "long been established that a company may be wound up where there is "a justifiable lack of confidence in the conduct and management of the company's affairs" and thus a risk to the public interest that warrants protection": *ActiveSuper*, [19] (internal quotations in the original; citations omitted).

12 A "risk to the public interest may take several forms": *ActiveSuper*, [23]. For example, "a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public": ibid. Alternatively, "it might be justified in order to prevent and condemn repeated breaches of the law": ibid.

13 A "stronger case might be required where the company was prosperous, or at least solvent": *ActiveSuper*, [24] (citations omitted). "Solvency, however, is not a bar to the appointment of

a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act": *ActiveSuper*, [24] (citations omitted).

14 These principles from *ActiveSuper* have been cited with approval in a number of judgments of this Court: for more recent judgments, see eg *Australian Securities and Investments Commission v Merlin Diamonds Limited (No 3)* [2020] FCA 411 at [39] (O'Bryan J) and *Deputy Commissioner of Taxation v Ausmart Services Pty Ltd* [2018] FCA 1912 at [25] (Yates J). The relevant principles were also set out by Moshinsky J in *Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2)* [2016] FCA 544 at [14] to [26].

DISPOSITION

15 Having considered the above principles concerning whether the Court ought exercise its discretion to wind up a company under s 461(1)(k) of the Act on the just and equitable ground, and having considered the evidence identified in the above affidavits and the Provisional Liquidators' Report, I am satisfied that there is ample evidence to justify a lack of confidence in the conduct and management of M101 Nominees' affairs. I am satisfied, based upon the evidence relied upon by ASIC, that there is a risk to the public interest that warrants protection and that such protection can best be provided by ordering the winding up of M101 Nominees. I am also satisfied, based on the evidence and, in particular, the Provisional Liquidators' Report, that M101 Nominees has at all times been and remains insolvent.

16 It is unnecessary to set out in detail the submissions and extensive evidence filed by ASIC which underpins that state of satisfaction. The following examples will suffice.

17 *First*, the evidence relied upon by ASIC in support of this final relief is materially the same as the evidence relied upon in support of its application for interim relief, which resulted in the appointment of provisional liquidators to the First Defendant, and which is detailed in *ASIC v M101*. In that judgment, I set out various matters, including some of ASIC's concerns regarding M101 Nominees' conduct: see eg *ASIC v M101* at [1]-[41]. None of those matters have been addressed, let alone answered, by the Defendants.

18 *Second*, the results of the investigations of the provisional liquidators are set out in the Provisional Liquidators' Report. It is sufficient to refer to the Executive Summary of that report, which provides (among other things):

> Despite [M101 Nominees] clearly advertising to potential investors that their

investment would be supported by 'first ranking, registered security' and 'the assets are otherwise unencumbered' in my opinion this did not occur. In reality the majority of the funds invested were provided to a related entity, Eleuthera Group Pty Ltd ("Eleuthera Pty Ltd") on an unsecured loan basis for a term of 10 years at a rate of 8% p.a. [M101 Nominees] did not hold any security over the assets of Eleuthera.

As part of the investment agreement with M Core noteholders, a Security Trustee was appointed to protect investors' rights and was responsible for taking security over various related entities/trusts which held assets that were purchased largely from the funds advanced by [M101 Nominees] via Eleuthera. Despite the Security Trustee taking an [all present and after-acquired property (**AllPAP**)] over a number of entities/trusts, I note that in all instances except one, the AllPAP specifically excluded any real estate property. Effectively, the registered AllPAP secured little to no assets for M Core noteholders given the primary asset of these entities/trust was real estate property.

My investigations show that of the c.$63.5 million advanced to Eleuthera by [M101 Nominees] and $44.4 million advanced by M101 Nominees to Eleuthera, only c.$62.9 million was used to make real estate asset purchases. The remaining funds were provided to other entities in the M101 Group as inter-company loans and also used to pay a large amount of operating expenses of the Mayfair 101 Group (c.$21.7 million in FY20). I have been unable to determine as part of my review how the funds provided as inter-company loans to other entities in the Group were used.

[M101 Nominees'] key asset is the outstanding loan due from Eleuthera. As part of my investigations, I have reviewed the financial positon of Eleuthera and it is my opinion that the likelihood of any recovery by [M101 Nominees] of the Eleuthera loan is low due to:

a. The majority of entities that are indebted to Eleuthera are the subject of separate insolvency proceedings in which steps are currently being taken to sell these entities' assets for the benefit of their secured creditors;

b. A number of the remaining entities that are indebted to Eleuthera are based overseas and the exact nature and recoverable value of these assets are unclear; and

c. [M101 Nominees'] entitlement to recover the funds due from Eleuthera, if any asset recoveries are made, will need to be shared pro-rata with all other creditors of Eleuthera.

It is my preliminary finding that in a winding up proceeding, creditors of [M101 Nominees] (effectively the M Core noteholders) would receive no return. However, the M Core noteholders may receive via the Security Trustee a partial return from the assets of other entities in the Mayfair 101 Group subject to the realisation process currently being undertaken in separate insolvency proceedings.

My overriding conclusion on [M101 Nominees] is that the business model of [M101 Nominees] was not sustainable. This is on the basis that M Core noteholders were investing predominantly for periods of 6 or 12 months, however the loan agreement with Eleuthera had a term of 10 years. On this basis, [M101 Nominees] would not have adequate funds to repay any contributions as they fell due and as such [M101 Nominees] has been insolvent since inception and remains insolvent as at the date of this report.

It is my opinion that distributions and redemptions paid to M Core noteholders were funded out of funds raised from other M Core noteholders or to a lesser extent M+

> noteholders. There was a high level of frequency of fund transfers between [M101 Nominees] and Eleuthera which has masked the extent of this issue.
>
> My investigations have uncovered a number of contraventions of the Corporations Act 2001 by both [M101 Nominees] and the Director primarily in relation to Section 180 and 1041H of the Act …

19 None of these matters have been answered by the Defendants.

20 *Third*, matters referred to in the Provisional Liquidators' Report are consistent with matters addressed by the affidavit of Mr Jason Tracy affirmed 24 November 2020, which provided an independent expert opinion in relation to the security held in respect of investments made by M101 Nominees. Aspects of Mr Tracy's opinion were set out at [23]-[25] of *ASIC v M101*. The matters addressed by Mr Tracy's expert opinion have not been answered by the Defendants.

21 *Fourth*, ASIC submits, and I agree, that:

(1) the concerns expressed in Mr Tracy's Expert Report and the Provisional Liquidators' Report (referred to above) support the winding up of M101 Nominees;

(2) the evidence of the provisional liquidators shows that M101 Nominees has at all times been and remains insolvent, which further supports the winding up of M101 Nominees;

(3) there is a justifiable lack of confidence in the conduct and management of M101 Nominees' affairs and thus a risk to the public interest that warrants protection arising from, among other things:

   (a) the unsustainable nature of M101 Nominees' business model and accordingly its insolvency since inception;

   (b) the nature of M101 Nominees' business model, which the evidence indicates involved distributions and redemptions being paid to some investors from funds raised from other investors;

   (c) the likelihood that investors will not receive payments of interest and have been and will remain unable to redeem their investments; and

   (d) the apparent contraventions of the Act by M101 Nominees and its director.

22 *Fifth*, the Defendants have consented to the First Defendant being wound up on the just and equitable ground. The provisional liquidators also do not oppose the winding-up of M101 Nominees.

23 For these reasons, in my opinion, it is just and equitable that M101 Nominees be wound up.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate:

Dated: 4 February 2021