

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2) [2021] FCA 247

File number(s): VID 228 of 2020

Judgment of: **ANDERSON J**

Date of judgment: 23 March 2021

Catchwords: **CORPORATIONS** – representations made to investors in promissory notes – representations made in promotional and marketing materials – representation that notes were comparable to, and of similar risk profile to, bank term deposits – representation that principal would be repaid in full – representation that notes were specifically designed for investors seeking certainty and confidence in investments and notes therefore carried no risk of default – representation that the “M Core Fixed Income Notes” were fully secured financial products – assessment of the terms of the promissory notes – assessment of expert evidence as to security position – assessment of report of provisional liquidators of the third defendant

**CORPORATIONS** – false, misleading or deceptive conduct – representations contravened s 1041H(1) of the *Corporations Act 2001* (Cth) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) – relevant principles concerning false, misleading or deceptive conduct – principles relevant to declarations – declarations made that conduct was in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth)

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), ss 12BB(1), 12DA(1), 12DB(1)(a), 12DB(1)(e), 12BAB(1)(b), 12BAB(7)(b), 12GBA, 12GD, 12GLA(2)(c), 12GLA(2)(d) and 12GLB  
*Corporations Act 2001* (Cth), ss 766C(1)(b), 769C, 1101B(1)(a), 1041H(1), 1041H(2)(a) and 1324  
*Federal Court of Australia Act 1976* (Cth), s 21

Cases cited: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130  
*Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932  
*Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494  
*Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306  
*Australian Securities and Investments Commission v Vocation Limited (in liq)* [2019] FCA 807  
*Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 187

Date of hearing: 15 February 2021

Counsel for the Plaintiff: Ms Caryn van Proctor

Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendants: The Defendants did not appear

# ORDERS

VID 228 of 2020

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

**AND:**                 **MAYFAIR WEALTH PARTNERS PTY LTD**  
First Defendant

**M101 HOLDINGS PTY LTD**  
Second Defendant

**M101 NOMINEES PTY LTD**  
Third Defendant

**ONLINE INVESTMENTS PTY LTD**  
Fourth Defendant

**ORDER MADE BY:**   **ANDERSON J**

**DATE OF ORDER:**   **23 MARCH 2021**

## THE COURT DECLARES THAT:

1.        During the period from 3 July 2019 to 16 April 2020 (**Relevant Period**), the Defendants represented to consumers that promissory notes called “M+ Fixed Income Notes” and “M Core Fixed Income Notes” (the **Mayfair Products**) were comparable to, and of similar risk profile to, bank term deposits (**Bank Term Deposit Representations**), when the Mayfair Products expose investors to significantly higher risk than bank term deposits, including by reason of the fact that:
  - (a)      the Mayfair Products lack the prudential regulations that apply to bank term deposits; and
  - (b)      accordingly, the Mayfair Products are not comparable to bank term deposits, and, as a consequence, the Defendants, in trade or commerce:
    - (a)      engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of s 1041H(1) of the *Corporations Act 2001* (**Corporations Act**) and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**);

- (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the ASIC Act; and
  - (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of s 12DB(1)(e) of the ASIC Act.
2. During the Relevant Period the Defendants represented to consumers that, on maturity of the Mayfair Products, the principal would be repaid in full (**Repayment Representations**), when investors in the Mayfair Products might not receive capital repayments at maturity because the Defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the Defendants did not have sufficient funds to repay investments at maturity, which right the Defendants have in fact exercised and, as a consequence, the Defendants, in trade or commerce:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of s 1041H(1) of the *Corporations Act* and s 12DA(1) of the *ASIC Act*;
  - (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the *ASIC Act*; and
  - (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of s 12DB(1)(e) of the *ASIC Act*.
3. During the Relevant Period the Defendants represented to consumers that the Mayfair Products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default (**No Risk of Default Representations**), when there was a risk that investors could lose some or all of their principal investment and, as a consequence, the Defendants, in trade or commerce:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of s 1041H(1) of the *Corporations Act* and s 12DA(1) of the *ASIC Act*;

- (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the *ASIC Act*; and
  - (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of s 12DB(1)(e) of the *ASIC Act*.
4. During the Relevant Period the First, Third and Fourth Defendants represented to consumers that the M Core Fixed Income Notes were fully secured financial products (**Security Representations**), when funds invested in M Core Fixed Income Notes were:
- (a) lent to Eleuthera Group Pty Ltd and not secured by first-ranking, unencumbered asset security or on a dollar-for-dollar basis or at all;
  - (b) used to pay deposits on properties prior to any security interest being registered; and
  - (c) used to purchase assets that were not secured by first-ranking, unencumbered asset security,
- and, as a consequence, the First, Third and Fourth Defendants, in trade or commerce:
- (d) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of s 1041H(1) of the *Corporations Act* and s 12DA(1) of the *ASIC Act*;
  - (e) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the *ASIC Act*; and
  - (f) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of s 12DB(1)(e) of the *ASIC Act*.

**THE COURT ORDERS THAT:**

- 5. The matter be listed for a case management hearing on a date to be fixed.
- 6. Liberty to apply.
- 7. Costs reserved.

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**) has, by way of its originating process dated 3 April 2020, commenced proceedings under:

- (a) ss 1101B, 1041H(1) and 1324 of the *Corporations Act 2001* (Cth) (**Corporations Act**);
- (b) ss 12DA(1), 12DB(1)(a), 12DB(1)(e), 12GBA, 12GD, 12GLA(2)(c), 12GLA(2)(d) and 12GLB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
- (c) s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

2 The originating process was accompanied by a concise statement dated 3 April 2020 which identified the claims ASIC makes against the Defendants.

3 The Defendants are the issuers and promoters of promissory notes called “M+ Fixed Income Notes” and “M Core Fixed Income Notes” (collectively, the **Mayfair Products**).

4 The First Defendant, Mayfair Wealth Partners Pty Ltd trading as Mayfair Platinum (**Mayfair**), promotes the Mayfair Products to investors in Australia by a number of means including brochures, emails and websites.

5 The Second Defendant (**M101 Holdings**) is the issuer of the M+ Fixed Income Notes (**M+ Notes**).

6 The Third Defendant (**M101 Nominees**) is the issuer of the M Core Fixed Income Notes (the **Core Notes**). On 13 August 2020, this Court made *ex parte* interim orders appointing Mr Said Jahani and Mr Philip Campbell-Wilson as joint and several provisional liquidators of M101 Nominees. Final orders for the winding up of M101 Nominees were made on 29 January 2021 in proceeding VID 524 of 2020 (the **Winding Up Proceeding**).

7 The Fourth Defendant, Online Investments Pty Ltd trading as Mayfair 101 (**Mayfair 101**), participated in the marketing of the Mayfair Products. Online Investments Pty Ltd is also the holding company of Mayfair and operates a website ([www.termdepositguide.com](http://www.termdepositguide.com)) which promotes and markets the Mayfair Products.

8 Mr James Mawhinney (**Mr Mawhinney**) is and was at all relevant times the sole director of each of the Defendants. Mr Mawhinney was not a party to this proceeding. In addition, Mr Mawhinney was at all relevant times:

- (a) the sole shareholder of the Fourth Defendant, Online Investments Pty Ltd, which at all relevant times was the sole shareholder of the First Defendant, Mayfair, and the Second Defendant, M101 Holdings; and
- (b) the sole shareholder of Mayfair Group Pty Ltd, which at all relevant times was the sole shareholder of the Third Defendant, M101 Nominees.

9 Mr Mawhinney was the directing mind and will, and the ultimate beneficiary, of each of the Defendants.

10 ASIC alleges that the Defendants engaged in conduct that was misleading or deceptive or likely to mislead or deceive (in contravention of s 1041H(1) of the *Corporations Act* and/or s 12DA(1) of the *ASIC Act*) and/or made false or misleading representations (in contravention of ss 12DB(1)(a) and (e) of the *ASIC Act*) that:

- (a) the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits (**Bank Term Deposits Representation**), when the Mayfair Products expose investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products lack the prudential regulations that apply to bank term deposits, and accordingly the Mayfair Products are not comparable to bank term deposits;
- (b) on maturity of the Mayfair Products, the principal would be repaid in full (**Repayment Representation**), when investors in the Mayfair Products might not receive capital repayments at maturity because the Defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the Defendants did not have sufficient funds to repay investments at maturity, which right the Defendants have in fact exercised;
- (c) the Mayfair Products carried no risk of default (**No Risk of Default Representation**), when in fact there was a risk that investors could lose some or all of their principal investment; and
- (d) that the Core Notes were fully secured financial products (**Security Representation**), when they were not.



- 11 On 16 April 2020, ASIC applied for various interlocutory injunctions. On that day, I made orders restraining the Defendants from using certain phrases in relation to advertisements related to the Defendants’ marketing of the Mayfair Products, and also required those entities to add certain notices on their websites and provide the notices to prospective investors: see *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494.
- 12 On 13 August 2020, ASIC filed an amended originating process in which it sought various declarations, pecuniary penalties, injunctions and other orders against the Defendants.
- 13 On 15 February 2021, the proceeding was listed for trial. Ms van Proctor of counsel appeared for ASIC. There was no appearance for the Defendants. The Defendants’ solicitors in correspondence dated 29 January 2021 informed the Court that the Defendants would be unrepresented at the hearing and on that basis the matter would proceed undefended. The solicitors further advised that “evidence in the Mayfair Proceeding be evidence in this proceeding [the Winding Up Proceeding] in relation to the permanent injunctions sought against Mr Mawhinney”. As a consequence, the matter proceeded before me undefended. I am satisfied that Mr Mawhinney, and his solicitors, were aware that the matter was listed for trial before me on 15 February 2021.
- 14 On 15 February 2021, I granted leave for ASIC to file a further amended originating application.
- 15 For the reasons that follow, I will make the declarations and orders sought by ASIC.

## **EVIDENCE**

- 16 ASIC tendered in evidence a Court Book (Exhibit A1) which included the following affidavits:
- (a) affidavits of Lisa Saunders dated 15 April 2020 (**First Saunders Affidavit**), 15 April 2020 (**Second Saunders Affidavit**), 20 August 2020 (**Third Saunders Affidavit**) and 10 December 2020 (**Fourth Saunders Affidavit**);
  - (b) affidavit of John Booth dated 22 July 2020 (**Booth Affidavit**);
  - (c) affidavit of Theo Wiggill dated 15 January 2021 (**Wiggill Affidavit**);
  - (d) affidavit of John Donald dated 21 December 2020 (**Donald Affidavit**);
  - (e) affidavit of Richard McMahon dated 12 August 2020 (**McMahon Affidavit**);

- (f) affidavits of Jason Tracy dated 14 August 2020 (**Tracy Affidavit**) and 11 December 2020 (**Second Tracy Affidavit**);
- (g) affidavit of Kerrie Campbell dated 21 August 2020 (**Campbell Affidavit**); and
- (h) affidavit of Nora Fairbanks dated 21 January 2021 (**Fairbanks Affidavit**).

17 ASIC also tendered as part of the Court Book the report provided by the provisional liquidators of M101 Nominees for the purposes of the Winding Up Proceeding (**Provisional Liquidators' Report**). The Provisional Liquidators' Report was annexed to a statement of a witness in this proceeding of Ms Jaime Asher. At the trial of this proceeding, Ms Van Proctor tendered the Provisional Liquidators' Report (together with other documents which were attached to Ms Asher's statement). The bundle of documents annexed to Ms Asher's statement was Exhibit A3.

18 On 2 February 2021, in the Winding Up Proceeding, I ordered that evidence filed in this proceeding is evidence in the Winding Up Proceeding in relation to ASIC's application in the Winding Up Proceeding for certain injunctions against Mr Mawhinney.

19 At the hearing, ASIC called evidence from Mr Robert Charadia and Ms Jaime Asher, who were investors in the Mayfair Products. I will refer to certain aspects of the evidence further below. However, I should state here that both Mr Charadia and Ms Asher gave compelling evidence. I accept their evidence as to the manner in which they were misled by the marketing and promotional material presented to them by the Defendants. The evidence of Mr Charadia and Ms Asher provides an additional foundation for the findings which I make below.

## **BACKGROUND**

20 The Defendants are part of a broader group of companies (the **Mayfair 101 Group**) with a common director, Mr Mawhinney. Mr Mawhinney is the sole director of each of the Defendants, namely Mayfair, M101 Holdings, M101 Nominees, and Online Investments Pty Ltd. The Mayfair 101 Group raised money through various investment products, and used that money to acquire real estate and invest in private equity ventures, often indirectly through loans to related entities.

21 During the period from 3 July 2019 to 16 April 2020 (**Relevant Period**), the Mayfair Products were marketed and promoted by the Defendants in a number of ways, including via:

- (a) Mayfair's websites, [www.mayfairplatinum.com.au](http://www.mayfairplatinum.com.au) and [www.mayfair101.com](http://www.mayfair101.com);

- (b) the website [www.termdepositguide.com](http://www.termdepositguide.com); and
- (c) newspaper advertising and online advertising, including the use of “sponsored link internet advertising” using (what are referred to as) specific “adwords”.

22 ASIC contends that the Mayfair Products were marketed to wholesale but inexperienced investors, at least a substantial subset of whom were unlikely to understand the significant risk associated with the Mayfair Products.

23 ASIC contends that the promotion engaged in by the Defendants gave rise to a number of misrepresentations.

## LEGAL PRINCIPLES

24 Section 1041H(1) of the *Corporations Act* provides:

A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

25 Section 1041H(2)(a) of the *Corporations Act* provides that “[t]he reference in [s 1041H(1)] to engaging in conduct in relation to a financial product includes (but is not limited to) ... dealing in a financial product”. “Dealing” in a financial product includes “issuing a financial product” “whether engaged in as principal or agent”: *Corporations Act*, s 766C(1)(b).

26 Section 12DA(1) of the *ASIC Act* provides:

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

27 Section 12BAB(1)(b) of the *ASIC Act* relevantly provides that “a person provides a financial service if they ... deal in a financial product”. The meaning of “dealing in a financial product” includes “issuing a financial product”: *ASIC Act*, s 12BAB(7)(b).

28 A “financial product” is defined in s 12BAA and includes a “facility through which, or through the acquisition of which, a person ... makes a financial investment” or “manages financial risk”: *ASIC Act*, s 12BAA(1)(a) and (b).

29 Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (**Dover**) at [92] (citing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

30 Sections 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* provide:

A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

...

(e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits ...

31 In *Dover*, O’Bryan J stated at [120]:

A contravention of [s 12DB(1)] of the ASIC Act attracts pecuniary penalties. Under s 12GBA, the Court may order the contravening party and (amongst others) a person knowingly concerned in the contravention to pay a pecuniary penalty.

32 The expression “financial services”, as used in s 12DB, has the same meaning and application discussed immediately above with respect to s 12DA(1).

33 Sections 1041H and 12DA(1) “prohibit conduct that is misleading or deceptive or likely to mislead or deceive, whereas s 12DB(1)(i) prohibits the making of a false or misleading representation”: *Dover* at [94]. Conduct “that contravenes ss 1041H and 12DA may involve, but need not involve, the making of a false or misleading representation”: *ibid*.

34 In the present case, though, the allegations do concern the making of allegedly false, misleading or deceptive representations.

35 In *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266, Yates J stated at [47]:

Although the [statutory language refers to] “misleading or deceptive conduct” and “false or misleading representations”, the cases establish that there is no material difference between these expressions in terms of their legal application: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 at [40]; *Australian Securities and Investments Commission v Westpac Banking Corporation* [2018] FCA 751; 266 FCR 147 at [2263].

36 In *Dover* at [98]-[101], O’Bryan J said:

The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu*

*Pty Ltd* (1982) 149 CLR 191 (***Puxu***) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (***Taco Bell***) at 200; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG Internet***) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:

- (a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (***Global Sportsman***) at 87; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).
- (b) Second, it is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.
- (c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.
- (d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].

In assessing whether conduct is likely to mislead or deceive, the courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual. As explained by the High Court in *Campomar*, the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the Court must consider whether the “ordinary” or “reasonable” members of that class would be misled or deceived (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. As observed by French CJ in *Campbell* at [25]:

Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error. It may be undertaken by reference to the public or a relevant section of the

public. In cases of misleading or deceptive conduct analogous to passing off and involving reputational issues, the relevant section of the public may be defined, according to the nature of the conduct, by geographical distribution, age or some other common attribute or interest. On the other hand, characterisation may be undertaken in the context of commercial negotiations between individuals. In either case it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective. (citations omitted)

The question whether conduct is misleading or deceptive, and thereby contravenes the statutory prohibition, is logically anterior to the question whether any person has suffered loss or damage by reason of the conduct: *Campbell* at [24] per French CJ; *TPG Internet* at [49]. As observed by French CJ in *Campbell* (at [28]):

Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

Similarly, where proceedings are brought by an enforcement agency, the Court has frequently imposed pecuniary penalties and other forms of relief for contraventions of the prohibition of misleading or deceptive conduct while expressly recognising that the conduct may not have caused loss: see for example *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [57]; *ASIC v GE Capital Finance Australia* [2014] FCA 701 at [90]; *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035; FCA 770 at [36]-[39].

37 I respectfully adopt as correct this summary of applicable principles by O'Bryan J in *Dover*.

38 ASIC makes the following further submissions in relation to the applicable legal principles.

39 ASIC submits that words used in advertising or promotional material are in many cases capable of conveying different meanings. ASIC submits that the question is whether the meaning said to be false or misleading is reasonably open and may be drawn by a significant number of persons to whom the presentation was addressed: citing *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; 381 ALR 507 at [23] and *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; 384 ALR 496 at [192]. The class of persons by reference to which the effect of the relevant conduct is to be assessed may be quite large. In particular, the relevant class may cover a wide range of people whose personal capacity, knowledge and experience may vary quite significantly. Where the statement is made to the public or a section of the public, the Court considers its effect upon ordinary or reasonable members of the class in question, all of whom are presumed to take

reasonable care to protect their own interests: citing *Australian Securities and Investments Commission v Vocation Limited (in liq)* [2019] FCA 807; 371 ALR 155 at [632].

40 A relevant representation may be as to a present state of affairs, or be as to a future matter. Where the representation is as to a future matter, s 12BB of the *ASIC Act* and s 769C of the *Corporations Act* apply. Section 12BB(1) of the *ASIC Act* provides:

If ... a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act)[,] and the person does not have reasonable grounds for making the representation[,], the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be misleading.

41 Section 12BB(2) of the *ASIC Act* provides:

For the purposes of applying [s 12BB(1)] in relation to a proceeding concerning a representation made with respect to a future matter by:

- (a) a party to the proceeding; or
- (b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

42 Section 769C of the *Corporations Act* provides:

For the purposes of [Chapter 7], or of a proceeding under [Chapter 7], if ... a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act)[,], and the person does not have reasonable grounds for making the representation[,], the representation is taken to be misleading.

43 ASIC submits that these provisions raise the presumption that a representation with respect to any future matter without reasonable grounds is misleading (and that evidence must be adduced to establish reasonable grounds).

44 I accept as correct the above submissions by ASIC on the applicable legal principles.

## **ASIC'S SUBMISSIONS**

### **Bank Term Deposits Representation**

45 ASIC submits that the statements made by the Defendants in the marketing and promotional material (including the application forms for the Mayfair Products) conveyed, separately and together, an impression that the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits.

46 ASIC submits that the Bank Term Deposits Representation was implied by, inter alia, the following:

- (a) the combination of words used in the marketing material, such as “term deposit alternative”, “term investment”, “fixed term”, “certainty” and “confidence”;
- (b) images used in the marketing material that replicate those found on bank websites marketing bank term deposits; and
- (c) sponsored link internet advertising conducted via the Google “AdWords” program and Bing “Ads” program, which included the use of:
  - (i) “meta-title tags” such as “term deposit rates – best term deposit options”;
  - (ii) domain names such as “term deposit guide”; and
  - (iii) “adwords” for sponsored searches, including “bank deposits” and “term deposits”.

47 The statements and images relied upon by ASIC are conveniently summarised as an annexure to ASIC’s amended submissions dated 9 February 2021. For clarity, that annexure is attached as Annexure A to these Reasons for Judgment, which sets out the statements and images relied upon by ASIC.

48 ASIC submits that the Bank Term Deposits Representation was made:

- (a) in relation to financial products, being the Mayfair Products, which are promissory notes;
- (b) by Mayfair in promoting the Mayfair Products, by M101 Holdings in the application form for the M+ Notes, by M101 Nominees in the application form for the Core Notes and by Mayfair 101 in promoting the Mayfair Products.

49 ASIC submits that the representation concerned the future performance of the Mayfair Products and was therefore as to a future matter. ASIC further submits that the Defendants have adduced no evidence to support a contention that they had reasonable grounds for making the representation. ASIC submits that there were no such reasonable grounds.

50 ASIC submits the Mayfair Products exposed investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products are debentures, and lack the prudential regulations that apply to bank term deposits. ASIC submits that, accordingly, the Mayfair Products are not comparable to bank term deposits.

51 ASIC submits that the making of the Bank Term Deposits Representation therefore constituted, under the relevant provisions set out above:



- (a) misleading or deceptive conduct;
- (b) a false or misleading representation that the Mayfair Products are of a particular standard, quality, value or grade; and
- (c) a false or misleading representation that the Mayfair Products have performance characteristics, uses or benefits equivalent or comparable to bank term deposits.

### **Repayment Representation**

52 ASIC submits that the statements made by the Defendants in the relevant promotional material conveyed, separately and together, an impression that, on maturity of the Mayfair Products, the principal would be repaid in full. ASIC contends that the Repayment Representation was implied by:

- (a) statements such as: “The Issuer is obligated to pay the quoted rates of interest and principal on the M+ Fixed Income product, regardless of the performance of its investments”, “Mayfair 101’s investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments” and “Mayfair Platinum is ... focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence”; and
- (b) the impression conveyed (as set out above) that the Mayfair Products were comparable to bank term deposits.

53 The statements relied upon by ASIC are set out in Annexure A to these Reasons for Judgment.

54 ASIC submits that the Repayment Representation was made:

- (a) in relation to financial products, being the Mayfair Products, which are promissory notes;
- (b) by Mayfair in promoting the Mayfair Products, by M101 Holdings in the application form for the M+ Notes, by M101 Nominees in the application form for the Core Notes and by Mayfair 101 in promoting the Mayfair Products.

55 ASIC submits that the representation concerned the future performance of the Mayfair Products and was therefore a representation as to a future matter. The Defendants have adduced no evidence to support a contention that they had reasonable grounds for making the representation. ASIC submits that there were no such reasonable grounds.

56 ASIC submits that the evidence establishes that investors in the Mayfair Products might not receive capital repayments at maturity because the Defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the Defendants did not have sufficient funds to repay investments at maturity, which right the Defendants have in fact exercised.

57 ASIC submits that the making of the Repayment Representation therefore constituted:

- (a) misleading or deceptive conduct;
- (b) a false or misleading representation that the Mayfair Products are of a particular standard, quality or value; and
- (c) a false or misleading representation that the Mayfair Products have performance characteristics, uses or benefits (being repayment of the principal in full).

#### **No Risk of Default Representation**

58 ASIC submits that the statements made by the Defendants conveyed, separately and together, an impression that the Mayfair Products carried no risk of default. The No Risk of Default Representation was implied by statements in certain marketing material, which was to the effect that the Mayfair Products were specifically designed for investors seeking “certainty and confidence in their investments”, that “Mayfair Platinum is ... focussed on providing investors with certainty in relation to their capital and interest payments”, and the impression conveyed (as set out above) that the Mayfair Products are comparable to bank term deposits.

59 The statements relied upon by ASIC are set out in Annexure A to these Reasons for Judgment.

60 ASIC submits that the use of the words “certainty” and “confidence” is likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk. ASIC submits that, in fact, the true position is that:

- (a) the Defendants had the contractual right to suspend redemptions of investments at maturity for an indefinite period of time because the Defendants did not have sufficient funds to repay the debts;
- (b) that right has now been exercised;

(c) such a right, coupled with the uncertainty of the financial position of the Defendants, exposes investors to the real risk that investors could lose some or all of their principal investment.

61 ASIC submits that those circumstances mean that the Mayfair Products cannot sensibly be said to give investors certainty. On the contrary, ASIC submits that the products have been “specifically designed” to produce a result that is quite uncertain for investors.

62 ASIC submits that the No Risk of Default Representation was made:

- (a) in relation to financial products, being the Mayfair Products, which are promissory notes;
- (b) by Mayfair in promoting the Mayfair Products, by M101 Holdings in the application form for the M+ Notes, by M101 Nominees in the application form for the Core Notes, and by Mayfair 101 in promoting the Mayfair Products.

63 ASIC submits that the representation concerned the future performance of the Mayfair Products and was therefore as to a future matter. The Defendants have adduced no evidence to support a contention that they had reasonable grounds for making the representation. ASIC submits that there were no such reasonable grounds.

64 ASIC submits that the evidence establishes that there was a risk that investors could lose some or all of their principal investment, and in fact are likely to do so.

65 ASIC submits that the making of the No Risk of Default Representation therefore constituted:

- (a) misleading or deceptive conduct;
- (b) a false or misleading representation that the Mayfair Products are of a particular standard, quality or value; and
- (c) a false or misleading representation that the Mayfair Products have performance characteristics, uses or benefits (ie that they carried no risk of default).

### **Security Representation**

66 ASIC submits that the statements made by the First Defendant (ie Mayfair) and the Third Defendant (ie M101 Nominees) also conveyed, separately and together, an impression that the Core Notes were fully secured financial products. ASIC submits that the Security

Representation was made expressly by statements in the marketing and promotional material for the Core Notes which included a key feature that the Core Notes were:

- (a) “supported by first-ranking, unencumbered asset security”;
- (b) “secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer’s dedicated M Core Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support”;
- (c) “the assets are revalued at least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Core Fixed Income notes.”

67 The statements relied upon by ASIC are set out in Annexure A to these Reasons for Judgment.

68 ASIC relies upon the expert report prepared by Mr Jason Tracy of Deloitte (**Expert Report**) which contains his expert opinion, relevantly, about the following matters relating to the Security Representation:

- (a) whether the debts owed to Core Note investors were “secured”, and, if so, what form did that security take and over what assets was there security;
- (b) the value of that security; and
- (c) the financial capacity of the related entities to repay the loans received from M101 Nominees being unknown.

69 The Expert Report was annexed to the Tracy Affidavit (being an affidavit of Mr Tracy affirmed 14 August 2020 and filed in this proceeding) and the Second Tracy Affidavit (being an affidavit of Mr Tracy affirmed 11 December 2020 and filed in this proceeding).

70 ASIC relies upon [2.11] – [2.14] of the Expert Report which concludes as follows with regard to the security in place:

2.11 While various security arrangements have been entered into between [the Security Trustee] as security trustee, M101 Nominees and the various trustees, it would appear, with one exception, that [the security trustee] does not have direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020.

2.12 It also appears that deposits were paid on properties in instances where there was no security registered on the PPSR in favour of [the security trustee] at the time of the deposit being paid, including at 31 December 2019 and 20 March 2020.

- 2.13 Further, in relation to the two related party loans, one of the loans appears to have had no security registered on the PPSR at 31 December 2019 and 20 March 2020, while the other appears to have a prior registered third party security at 20 March 2020.
- 2.14 Given the conclusions reached in Sections 2.11 to 2.13, in my opinion, there are a significant number of instances where Core Note investor security was not first ranking and the assets were not otherwise unencumbered at 31 December 2019 and 20 March 2020

71 ASIC relies upon [2.4] of the Expert Report which states:

In summary, it would appear that Core Note investor funds were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020.

72 ASIC relies upon the Expert Report which also sets out further concerns regarding the asset security values at [2.25] and [2.26]:

2.25 In the absence of a funds flow showing the receipt of Core Note investor funds and payment from the M101 Nominees bank account, it is unclear whether all the funds from Core Note investors have flowed to secured assets.

2.26 I have a number of concerns regarding the asset security values for Core Note investors:

- (a) There is a risk that prior registered security holders may be able to escalate their facilities and appoint receivers. In the event this happens, asset values and the recovery of funds to Core Note investors could be negatively impacted.
- (b) There is a risk given [Mayfair] was active in acquiring a large number of properties from October 2019 to April 2020 that these entities established a market price in an otherwise illiquid and small property market at Mission Beach. Consequently, there is a risk that the contract price in each sale contract is above market price in today's terms, negatively impacting the asset security values and recovery of funds to Core Note investors.
- (c) The deposits paid on the properties not settled totalling \$5,852,387 at 20 March 2020 may be at risk of forfeiture due to failure to complete, especially if significant additional funds of \$86,483,036 cannot be sourced to settle these transactions. It is unclear to me where these additional funds would come from.
- (d) The financial capacity of the related entities to repay the loans received from M101 Nominees is unclear in the absence of financial information outlining their financial position, historical and forecast performance.
- (e) The basis of the 4% uplift totalling \$2,983,400 at 20 March 2020 applied by M101 Nominees to the carrying value of the 119 real property assets, including Dunk Island[,], is not well supported by the documents made available to me. If this amount is excluded, there would appear to be a deficiency of \$2,732,540 to Core Note investors, assuming full recovery of all other secured assets in line with M101 Nominees report to [the security trustee] at 20 March 2020.

73 ASIC relies upon the results of the investigations of the provisional liquidators (and now liquidators) of M101 Nominees which are set out in the Provisional Liquidators' Report. ASIC referred in particular to [2] and [3] of the Provisional Liquidators' Report:

Despite 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 [the Core Notes] 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 (AIPAP)] over a number of entities/trusts, I note that in all instances except one, the AIPAP specifically excluded any real estate property. Effectively, the registered AIPAP secured little to no assets for [Core Notes] noteholders given the primary asset of these entities/trust [sic] was real estate property.

74 ASIC relies upon the fact that none of the matters which are the subject of the Expert Report, or the Provisional Liquidators' Report, have been contradicted or answered by the Defendants. That evidence is unchallenged.

75 ASIC submits that the Security Representation was made:

- (a) in relation to financial products, being the Core Notes, which are promissory notes; and
- (b) by Mayfair in promoting the Mayfair Products and by M101 Nominees in the application form for the Core Notes.

76 ASIC submits that the representation concerned the future performance of the Core Notes and was therefore a representation as to a future matter. The Defendants have adduced no evidence to support a contention that they had reasonable grounds for making the representation. ASIC submits that there were no such reasonable grounds.

77 ASIC submits that the expert evidence demonstrates that the Core Notes were not fully secured.

78 ASIC submits that the making of the Security Representation therefore constituted:

- (a) misleading or deceptive conduct;
- (b) a false or misleading representation that the Core Notes are of a particular standard, quality, value or grade; and

- (c) a false or misleading representation that the Core Notes have performance characteristics, uses or benefits (ie that the Mayfair Products were fully secured).

## CONSIDERATION

79 As I have mentioned above, the trial was undefended. As a consequence, there was no challenge to the evidence tendered by ASIC. There was no evidence tendered by the Defendants.

80 I directed that ASIC file a document which identified the precise pages of the Court Book which ASIC tendered in evidence in support of the relief claimed. ASIC filed such a document on 9 February 2021. I have read and considered the specific Court Book references identified by ASIC as comprising the evidence on which ASIC relies in these proceedings.

81 As this matter proceeded before me undefended, and there was no challenge to the evidence tendered by ASIC, I do not propose to set out in detail the substance of all of the extensive evidence relied upon by ASIC. In the circumstances, that would serve no purpose. I have identified above the evidence to which I have had regard in making the findings set out below. It is sufficient to set out below some examples of the evidence relied on by ASIC.

### Examples of the evidence relied on by ASIC as to the representations

#### *The Mayfair Platinum Website*

82 ASIC referred to an annexure to the First Saunders Affidavit, which was an extract from the “Mayfair Platinum Website”. An extract of that website produced to ASIC on 18 December 2019 stated:

#### **Cash and term deposit alternatives**

Mayfair Platinum offers income-producing investment opportunities for wholesale investors involving exposure to opportunities that are typically reserved for investment banks, stockbrokers, family offices and the ultra-wealthy.

Qualified investors can access term-based investment options starting from AU\$100,000 and ranging from 3 months to 5 years, with the option of monthly interest distributions.

(Bold text in the original.)

83 An extract of the Mayfair Platinum website retrieved by ASIC on 2 February 2020 stated that investors could:

Gain exclusive access to

- High yield term deposit alternatives

- Cash alternatives
- Income-producing investments
- High-yield investments
- Growth companies & sectors
- Fixed income products
- Managed funds
- Pre-IPO opportunities
- Retail bond opportunities
- Emerging markets

84 In respect of the M+ Notes product, the Mayfair Platinum website included the following table:

CURRENT RATES	
INVESTMENT TERM	FIXED INTEREST RATE (P.A)
3 months	3.65%
6 months	4.75%
12 months	5.45%
24 months	5.75%
36 months	6.00%
60 months	6.45%

85 The following words appeared adjacent to that table:

Take the first step towards boosting your income-generating potential for your idle money.

Investing in our M+ [Notes] product is a smart and effective way of earning competitive rates of return whilst official interest rates are at record-lows.

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

86 In respect of the Core Notes product, the Mayfair Platinum website included the following table:



CURRENT RATES	
INVESTMENT TERM	FIXED INTEREST RATE (P.A)
3 months	n/a
6 months	3.25%
12 months	3.95%
24 months	4.25%
36 months	4.50%
60 months	4.95%

87 The following words appeared adjacent to that table:

Activate your idle money and earn monthly distributions from a secured, asset backed, term-based investment product.

We invite you to invest in [the Core Notes], a secured, asset backed term-based investment product offered by a forward-thinking group that is working to drive positive change in the financial services and investment industry.

Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies.

88 The pages on the Mayfair Platinum website dedicated to the M+ and Core Notes products contained an “Income Calculator”. Users could insert the proposed “investment amount” per annum and the proposed “investment term”, and, depending on the relevant interest rate applied, the “Income Calculator” calculated the purported “monthly distribution” and “total interest earned” over the term. In fine print below the “Income Calculator”, the following text appeared:

Note: The results from this calculator should be used as an indication only, as they may not represent actual returns exactly. Information such as interest rates quoted, timing of interest payments, and default figures used in the relevant assumptions are subject to change.

89 The above examples are illustrative of other instances of the Mayfair Platinum website using expressions such as “High yield term deposit alternatives”, “Cash alternatives” and “Fixed income products”. ASIC’s evidence referred to and relied upon a number of such instances.

*The “Term Deposit Guide” website*

90 Another website operated by Online Investments Pty Ltd was “www.termdepositguide.com.au”. An extract of that website dated 11 December 2019 produced to ASIC shows that the website stated from 11 December 2019:

If you are about to invest \$100k-\$5m in a term deposit and want more than 3% p.a....talk to us first!

Join the hundreds of savvy **Aussie investors** that were tired of earning low interest rates on their term deposits, and have made the switch to **boost their investment returns** and upgrade their lifestyles.

...

Find out where Australian investors are parking their idle money to beat inflation and earn regular monthly income. Our dedicated Australia-based team has assisted hundreds of Australian investors, retirees, companies, individuals and more, to earn a better yield on their money. See if you qualify today!

(Bold text in the original.)

*The M+ Notes brochure*

91 There were various versions of the brochure for the M+ Notes product (dated between 3 July 2019 and 10 December 2019). Those brochures described the M+ notes as a “term-based investment opportunity exclusively available to wholesale investors”. A version of the brochure dated 3 July 2019 stated:

**Tired of earning minimal interest on your idle cash?**

**Congratulations on taking the first step towards boosting the income-generating potential of your idle money.**

Investing in [the M+] Notes is a smart and effective way of earning **competitive rates of return** whilst official interest rates are at record-lows.

We invite you to invest in [the M+] Notes and be part of a **forward-thinking group** that is **driving positive change** in the financial services and investment industry.

(Bold text in the original.)

92 The version of the brochure dated 3 July 2019 included the following table:

## Current Rates

Investment Term	Fixed Interest Rate (per annum)	July Promotion Fixed Interest Rate (ends 31st July 2019)
3 months	3.75%	<b>4.25%</b>
6 months	4.10%	<b>4.60%</b>
12 months	4.80%	<b>5.30%</b>
60 months	5.45%	<b>5.95%</b>

These rates are exclusively available for wholesale clients investing in M1 Notes.

93 The version of the brochure dated 10 December 2019 included the following table:

Current Rates	
Investment Term	Fixed Interest Rate *Offer ends 31st Dec 2019
3 months	<b>3.65%</b>
6 months	<b>4.75%</b> <b>5.45%*</b>
12 months	<b>5.45%</b> <b>5.95%*</b>
24 months	<b>5.75%</b>
36 months	<b>6.00%</b>
60 months	<b>6.45%</b> <b>6.95%*</b>

These rates are exclusively available for wholesale clients investing in M+ Fixed Income.

94 Above this table, the version of the brochure dated 10 December 2019 stated:

### Tired of term deposits?

**Congratulations on taking the first step towards boosting the income-generating potential of your idle money.**

Investing in our M+ Fixed Income product is a smart and effective way of earning **competitive rates of return** whilst official interest rates are at record-lows.

We invite you to invest in M+ Fixed Income and be part of a **forward-thinking group** that is **driving positive change** in the financial services and investment industry.

(Bold text in the original.)

95 The brochure included a section titled “Frequently Asked Questions”. The version of the brochure dated 10 December 2019 included the following:

**Why should I choose Mayfair Platinum?**

The Mayfair 101 group was established in 2009 and has assets spanning 11 countries across a diverse range of sectors, including financial services, wealth management, technology, property and emerging markets. Our capital management strategy provides considerable geographic, industry & sector, business maturity, and currency diversification, which is a key reason why investors entrust their funds with us.

**Is Mayfair Platinum regulated?**

Yes. Mayfair Wealth Partners Pty Ltd (t/a Mayfair Platinum) is a corporate authorised representative (#00176207) of Quattro Capital Pty Ltd, which holds an Australian Financial Services Licence (#334653).

**How can you pay fixed interest rates higher than the banks?**

The interest rates we offer our investors are facilitated by the Mayfair 101 group’s capital management strategy. The group carefully selects opportunities to invest in that provide strong yields, capital growth, and refinancing opportunities that enable us to support principle [sic] and interest repayments to our investors.

**Is the Issuer a bank?**

No. However, many M+ Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts. We operate by accessing capital from third parties (our investors), paying our investors for access to that capital, and utilising that capital to grow the Mayfair 101 group.

**Are my returns tied to the Issuer's investment performance?**

No. The Issuer is obligated to pay the quoted rates of interest and principal on the M+ Fixed Income product, regardless of the performance of its investments.

...

**What are the risks?**

Investors should be mindful that, like all investments, there are risks associated with investing in our M+ Fixed Income product. Risks to take into consideration include general investment, lending, liquidity, interest rate, cyber, related party transactions and currency risks.

**Can I withdraw my money out early if I need to?**

Yes, although redemptions are subject to liquidity and other applicable terms. Please note this may be subject to a 1.5% early withdrawal and liquidity fee. Please provide 30 days’ notice in writing for amounts up to \$1m. For amounts above \$1m simply email your Client Relationship Manager and they will advise a repayment schedule within 2 business days.

**Is the M+ Fixed Income product covered by the Australian Government’s Financial Claims Scheme (FCS)?**

The Australian Government’s Financial Claims Scheme (FCS) (or ‘Government Guarantee’) doesn't cover investments made in our M+ Fixed Income product. The

Financial Claims Scheme has a limit of \$250,000 per account holder per bank, and the banks have a bailout limit of just \$20b per bank. Be mindful that bank investments above \$250,000 aren't covered by the Financial Claims Scheme, which is a reason why M+ Fixed Income is worth considering for larger investment amounts.

### *The Core Notes brochure*

96 There were various versions of the brochure issued in relation to the Core Notes product. The title page of the brochures dated between 28 October 2019 and 12 December 2019 described the Core Notes as a “secured, asset-backed, term-based investment opportunity exclusively available to wholesale investors”.

97 The versions of the Core Notes brochure dated between October 2019 and December 2019 stated:

#### **Tired of term deposits?**

**Activate your idle money and earn monthly distributions from a secured, asset-backed, term-based investment product.**

Investing in our M Core Fixed Income product is a smart and effective way of earning **competitive rates of return** and **monthly income** whilst interest rates are at record lows. We invite you to invest in M Core Fixed Income, a **secured, asset-backed term-based investment product** offered by a forward-thinking group that is working to drive **positive change** in the financial services and investment industry.

(Bold text in the original.)

98 The brochures contained a table of “Current Rates”. The table which appeared in the brochure dated 12 December 2019 was as follows:

<b>Current Rates</b>	
<b>INVESTMENT</b>	<b>FIXED INTEREST RATE</b>
6 months	3.25%
12 months	3.95%
24 months	4.25%
36 months	4.50%
60 months	4.95%

These rates are available for wholesale investors investing in our M Core Fixed Income product.

99 The various versions of the Cores Notes brochure contained answers to “Frequently Asked Questions” which were substantively the same. In this respect, the version of the brochure dated 28 October 2019 relevantly stated the following:

### **How is the M Fixed Income product secured?**

The M Fixed Income product is secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer's dedicated M Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.

A third party security trustee, PAG Holdings Australia Pty Ltd, (ACN 636 870 963, AFSL Auth. Rep. No. 001278649) of Perpetuity Capital Pty Ltd (ABN 60 149 630 973, AFSL 405364), as trustee of the Mayfair Platinum Secured Notes Security Trust, administers the secured pool of collateral assets on behalf of investors, and the assets are revalued at least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Fixed Income notes.

...

### **Is Mayfair Platinum regulated?**

Yes. Mayfair Wealth Partners Pty Ltd (t/a Mayfair Platinum) is a corporate authorised representative (#00176207) of Quattro Capital Pty Ltd, which holds an Australian Financial Services Licence (#334653).

### **How can you pay fixed interest rates higher than the banks?**

The interest rates we offer our investors are facilitated by the Mayfair 101 group's capital management strategy. The group carefully selects opportunities to invest in that provide strong yields, capital growth, and refinancing opportunities that enable us to support principle [sic] and interest repayments to our investors.

### **Are my returns tied to the Issuer's investment performance?**

No. The Issuer is obligated to pay the quoted rates of interest and principal on the M Fixed Income product, regardless of the performance of its investments.

### **Is the Issuer a bank?**

No. However, many M Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts. We operate by accessing capital from third parties (our investors), paying our investors for access to that capital, and utilising that capital to grow the Mayfair 101 group.

...

### **What are the risks?**

Investors should be mindful that, like all investments, there are risks associated with investing in our M Fixed Income product. Risks to take into consideration include general investment, lending, liquidity, asset, interest rate, cyber, related party transactions and currency risks.

...

### **Can I withdraw my money out early if I need to?**

Yes, although redemptions are subject to liquidity and other applicable terms. Please note this may be subject to a 1.5% early withdrawal and liquidity fee. Please provide 30 days' notice in writing for amounts up to A\$1m. For amounts above A\$1m simply email your Client Relationship Manager and they will advise a repayment schedule

within 2 business days.

**Is the M Fixed Income product covered by the Australian Government's Financial Claims Scheme (FCS)?**

The Australian Government's Financial Claims Scheme (FCS) (or 'Government Guarantee') doesn't cover investments made in our M Fixed Income product. The Financial Claims Scheme has a limit of A\$250k for each account holder per bank, and the banks have a bailout limit of just A\$20b per bank. Be mindful that bank investments above A\$250k aren't covered by the Financial Claims Scheme, which is a reason why M Fixed Income is worth considering for larger investment amounts.

***Newspaper advertisements***

100 Mayfair Platinum published a newspaper advertisement in relation to the Core Notes. The advertisement stated:

5.45%<sup>P.A</sup> 12 MONTHS FIXED RATE

IT'S ARRIVED

Introducing M Core Fixed Income

The Mayfair 101 Group is delighted to announce the release of a new investment product that caters to investors seeking a strong yield from a secured investment product. With interest rates at record lows and investor sentiment shifting away from traditional financial institutions towards non-bank fixed income providers, Mayfair Platinum is delighted to make this new product available to Australian wholesale investors (not available to retail investors).

101 The advertisement continued:

M Core Fixed Income provides a fixed monthly income at competitive interest rates backed by dollar-for-dollar security over assets held by the Mayfair 101 Group of companies.

102 The advertisement stated that the "key features" of the Core Notes were as follows:

- Secured with dollar-for-dollar asset backing
- Supported by first-ranking security
- AU \$250k minimum investment
- Fixed interest rates
- Monthly interest payments available
- No setup or maintenance fees
- Dedicated Client Relationship Manager
- Individual, Company, Trust & Self-Managed Superannuation Fund (SMSF) compatible
- Available exclusively to Australian wholesale investors
- Early redemption available (subject to liquidity and other applicable terms)

103 The Third Saunders Affidavit records that the above advertisement was published in the following newspapers between 22 November 2019 and 18 December 2019:

- (a) in the Australian Financial Review, on 22 November 2019, 25 November 2019, 27 November 2019, 3 December 2019 and 4 December 2019;
- (b) in the Cairns Post, on 26 November 2019, 4 December 2019 and 10 December 2019;
- (c) in Brisbane’s The Courier Mail, on 2 December 2019 and 10 December 2019;
- (d) in The Sydney Morning Herald, on 25 November 2019, 4 December 2019 and 10 December 2019; and
- (e) in The West Australian, on 27 November 2019 and 18 December 2019.

104 There were a number of other advertisements distributed by email. By way of example, in November 2019, an advertisement was sent to subscribers to “Switzer”, “Momentum Media/Nest Egg” and Mayfair Platinum. That advertisement stated in relation to the Core Notes product (among other things):

The Mayfair 101 Group is delighted to announce the release of a new investment product that caters to investors seeking a **strong yield from a secured investment product**.

With interest rates at record lows and investor sentiment shifting away from traditional financial institutions toward fixed income providers, Mayfair Platinum is delighted to make this new product available to Australian wholesale investors.

...

M Core Fixed Income provides a **fixed monthly income** at competitive interest rates backed by **dollar-for-dollar security** over assets held by the members of the Mayfair 101 Group of companies.

Key features include:

- Supported by first-ranking, otherwise unencumbered asset security
- A\$250k minimum investment
- Fixed interest rates
- Monthly interest payments
- No setup or maintenance fees
- Dedicated Client Relationship Manager
- Individual, Company, Trust & Self-Managed Superannuation Fund (SMSF) compatible
- Available exclusively to wholesale investors
- Early redemption available (subject to liquidity and other applicable terms)[.]



(Bold text in the original.)

***Sponsored link advertising***

105 ASIC relied on evidence concerning the search results retrieved by the website www.google.com (**Google**) (and other similar search engines), when users searched for terms such as “term deposits”, “term deposit” and “bank term deposits”.

106 By way of example, a search for the phrase “term deposits” using Google (which was conducted by ASIC on 13 December 2019) retrieved a range of search results. However, the first search result listed was a hyperlink to Mayfair Platinum’s website. Moreover, a search for the phrase “term deposit” (conducted by ASIC on 24 January 2020) retrieved, as the first and second listed search results respectively, a link to the Mayfair Platinum website and a link to the Mayfair 101 website. A similar search was conducted by ASIC on 21 February 2020, and the first listed search result was a link to “www.termdepositguide.com” and the second listed search result was a link to the Mayfair Platinum website. The fourth listed search result was a link to the Commonwealth Bank’s term deposit product.

107 On 30 January 2020, ASIC issued to Mayfair two statutory notices, requesting information and books in relation to the marketing and promotion of the M+ Notes or the Core Notes. The response to those notices stated that Mayfair submitted keywords to certain internet platforms “as suggestions for triggering text advertisements to appear in internet search results”. The response noted that “which advertisements are displayed are ultimately at the platform operator’s (Google’s or Microsoft’s) discretion (based on the results of the relevant ... algorithm)”. The response stated that:

The keywords (individual, and in different combinations and syntaxes) which the Mayfair 101 Group provided to [Google and Microsoft-related platforms] for sponsored link advertising in respect of [the Core Notes and the M+ Notes (among others)] during the [period 1 March 2017 to 30 January 2020 and 22 June 2019 to 30 January 2020] were numerous - over 1 million, leading to advertisements for [websites promoting those products] appearing over 13 million times in internet search results.

108 The response to ASIC also produced certain reports. Those reports set out the “keywords” submitted to Google and Microsoft, and which were to be used in the above manner. As a consequence, the evidence discloses that those keywords directed internet users to websites promoting the Core Notes and the M+ Notes. Those keywords included (among many others) keywords such as: “best term deposits”, “bank of Melbourne term deposits”, “national Australia bank term deposit”, “term deposit”, and “term deposit rates”.

109 In these circumstances, it is tolerably clear that the Defendants’ marketing strategy was addressed to persons searching for a term deposit in order to divert them to the Defendants’ websites. Those websites had labels (which were referred to as “meta-title tags”) which included words such as “best term deposit”.

### **Evidence concerning the Core Notes product**

#### ***Expert report of Mr Jason Tracy of Deloitte***

110 ASIC filed and relied upon an expert report of Mr Jason Tracy dated 12 June 2020. Mr Tracy is a Partner at Deloitte Financial Advisory Pty Ltd (**Deloitte**).

111 Mr Tracy is a Chartered Accountant, having been admitted as a member of Chartered Accountants Australia and New Zealand. He is also a Registered Liquidator. Mr Tracy has in excess of 20 years’ experience in the external administration of corporate entities and the assessment of entities on behalf of financial institutions and other debt providers. Mr Tracy has experience in providing expert evidence in matters concerning the financial performance and position of corporate and other entities, as well as insolvency-related matters.

112 Mr Tracy was asked to give his opinion on (among other things) whether the debts owed to the Core Note investors (being the holders of the relevant notes issued by M101 Nominees) are secured and, if so: (a) what form does that security take; (b) over what assets is there security; and (c) what is the value of that security.

113 It is apparent from Mr Tracy’s report that he was given a raft of documentation, including underlying contractual documents, which were produced to ASIC in the course of ASIC’s investigation.

114 On the question of whether the Core Notes were secured and supported by “first ranking, unencumbered asset security”, Mr Tracy’s 12 June 2020 report stated:

While various security arrangements have been entered into between [a Security Trustee], M101 Nominees and [certain] trustees, it would appear, with one exception, that [the Security Trustee] *does not have direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020.*

It also appears that deposits were paid on properties in instances where *there was no security registered* on the PPSR in favour of [the Security Trustee] at the time of the deposit being paid, including at 31 December 2019 and 20 March 2020.

Further, in relation to ... two related party loans, one of the loans appears to have had *no security* registered on the PPSR at 31 December 2019 and 20 March 2020, while the other appears to have a *prior registered third party security* at 20 March 2020.

... [I]n my opinion, *there are a significant number of instances where Core Note investor security was not first ranking and the assets were not otherwise unencumbered at 31 December 2019 and 20 March 2020.*

...

*In summary, it would appear that Core Note investor funds were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020.*

(Emphasis added.)

115 That conclusion was supported by a comprehensive and sophisticated analysis of the complex arrangements established by M101 Nominees. In this respect, by way of summary, Mr Tracy’s report dated 12 June 2020 stated the following.

116 Mr Tracy stated that the Mayfair Platinum Group comprises a number of corporate and trust entities associated with Mr James Mawhinney. The principal activities of the Mayfair Platinum Group include raising monies from “wholesale investors” through issuing the Core Notes. The monies raised by way of the Core Notes were ultimately directed towards (a) the acquisition of real property assets in Mission Beach, Queensland; (b) making deposits on real properties; and (c) providing loans to related parties.

117 Mr Tracy stated that the Core Notes “were promoted to investors as “a secured, asset backed, term-based investment”, with a key feature being that they were supported by “first ranking, unencumbered asset security” ...” (internal quotations in the original).

118 Mr Tracy noted that, as at 20 March 2020, it appeared that Core Notes investors’ funds had been directed towards the acquisition of (a) 119 real properties, including Dunk Island in Queensland; (b) paying deposits on 111 real properties not settled; and (c) providing two loans to related parties.

119 Mr Tracy undertook a detailed review of the structure of the various entities associated with Mr Mawhinney. Mr Tracy records the following in relation to these various entities.

120 In respect of Sunseeker Holdings Pty Ltd (**Sunseeker Holdings**), Mr Mawhinney was the sole director and shareholder. Sunseeker Holdings is the trustee of the “Sunseeker Trust” and holds units issued by various trusts (which are referred to below).

121 In respect of M101 Nominees, as indicated earlier in these reasons, it was the issuer of the Core Notes.

122 In respect of Eleuthera Group Pty Ltd (**Eleuthera**), Mr Mawhinney was the sole director. The shareholders in this entity were Online Investments Pty Ltd (which held 95% of the shares) and Schammer Pty Ltd (which held 5% of the shares). Mr Mawhinney is the sole director and shareholder of Online Investments Pty Ltd. (Mr Mawhinney is not a director or shareholder of Schammer Pty Ltd.) Mr Tracy states that the activities of Eleuthera are unknown, but it borrowed money from M101 Nominees (which is referred to in more detail below).

123 In respect of Mainland Property Holdings Pty Ltd (**MPH**), Mr Mawhinney was its sole director. Sunseeker Holdings is its sole shareholder. It is the trustee of the “Mission Beach Property Trust” (**MBPT**).

124 There are then a series of entities which are called Mainland Property Holdings No 2 Pty Ltd and Mainland Property Holdings No 3 Pty Ltd (etc), which are sequentially numbered up to Mainland Property Holdings No 12 Pty Ltd. Each of the entities – ie Mainland Property Holdings No 2 Pty Ltd through to Mainland Property Holdings No 12 Pty Ltd – had the same structure. Mr Mawhinney was the relevant entity’s director, Sunseeker Holdings was the relevant entity’s shareholder, and the relevant entity was the trustee of a trust that was named “Mission Beach Property Trust”, with those trusts numbered 2 to 12. By way of example, Mainland Property Holdings No 3 Pty Ltd was the trustee of the “Mission Beach Property Trust 3” and Mainland Property Holdings No 4 Pty Ltd was the trustee of the “Mission Beach Property Trust 4” (etc).

125 In respect of Mayfair Asset Holdings Pty Ltd, Mr Mawhinney was the sole director and Sunseeker Holdings was its sole shareholder. It was the trustee of the “Mayfair Island Trust”.

126 In respect of Jarrah Lodge Holdings Pty Ltd, Mr Mawhinney was the sole director and shareholder. It acted as the trustee of the “Jarrah Lodge Unit Trust No 1”.

127 In Mr Tracy’s report dated 12 June 2020, Mr Tracy refers to these entities collectively as the “Mayfair Platinum Group”. In respect of these entities, Mr Tracy stated that:

- (a) As at 20 March 2020, entities in the Mayfair Platinum Group had purchased and settled on a total of 119 real property assets, with a total value of \$54,085,011. These properties are all located within the Mission Beach region of Queensland, specifically: Dunk Island; Mission Beach (30 properties); Mission Beach South (49 properties); Wongaling Beach (35 properties); El Arish (2 properties); Bali Hay (1 property); and Bingil Bay (1 property).

- (b) In addition to these settled real property assets, entities in the Mayfair Platinum Group appear to have paid deposits on a further 111 real properties, collectively valued at \$92,335,423. Deposits paid totalled \$5,852,387, resulting in an additional funding requirement of \$86,483,036 to settle these real property assets.
- (c) As at 20 March 2020, M101 Nominees had lent \$1,257,108 to Eleuthera and \$8,258,325 to the trustee of the Jarrah Lodge Unit Trust No 1.

128 To assess the security position, Mr Tracy reviewed various documents made available to him by ASIC and searches undertaken by Mr Tracy's staff at Deloitte. As to the security, Mr Tracy's 12 June 2020 stated the following:

- (a) In respect of the cash held in M101 Nominees' bank account, as at 31 December 2019 and 20 March 2020, this cash appeared to be secured. That is, this cash was the subject of security deeds which granted security to the relevant security trustee by M101 Nominees in respect of the cash held. The cash held in M101 Nominees' bank account at 31 December 2019 was \$5,274,908. However, as at 20 March 2020, the cash held in M101 Nominees' bank account had reduced to \$572,561. Mr Tracy stated in respect of this cash that, "[g]iven the security was in place prior to 31 December 2019 and 20 March 2020, it appears to me that this asset is secured", but Mr Tracy noted that he did "not have bank statements to verify the bank account balances at those dates".
- (b) In respect of a loan to Eleuthera by M101 Nominees, Mr Tracy stated that this loan was "not secured at 31 Dec 2019 or 20 Mar 2020". Mr Tracy stated that his "searches of the PPSR have not identified any security interest registered against Eleuthera in favour of [the Security Trustee]", but he "identified interests registered in favour of Fuji Xerox Australia Pty Ltd and Fuji Xerox Finance Ltd". Mr Tracy concluded this loan "does not appear to be secured". Mr Tracy stated:

The loan agreement between M101 Nominees and Eleuthera (a related party) is titled Facility Agreement. The facility agreement does not detail any information relating to proposed security arrangement in respect to the loan, nor does it detail the purpose of the loan. The loan commenced on 18 October 2019, has a limit of \$250m, attracts an interest rate of 8.0% per annum and is for an initial term of 10 year with an option to extend. Full repayment is due before the expiry date, unless otherwise agreed in writing between the lender and the borrower.

As an aside, it should be noted that the "Facility Agreement" between Eleuthera and M101 Nominees was annexed to an affidavit of Ms Dayle Buckley of ASIC dated 5 August 2020. The Facility Agreement does not appear to make provision for security

to be granted to M101 Nominees in return for M101 Nominees' loan to Eleuthera. The word "Facility" is defined in the Facility Agreement as "the facility provided to the Borrower by the Lender pursuant to this Agreement for an unsecured loan by the Lender to the Borrower up to the Facility Limit".

- (c) In respect of "[r]eal properties and deposits paid on properties but not settled", Mr Tracy concluded as follows:

While various security arrangements have been entered into between [the] security trustee, M101 Nominees and the various trustees, it would appear, with one exception, that [the security trustee] does not have direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020.

It also appears that deposits were paid on properties in instances where there was no security registered on the PPSR in favour of [the security trustee] at the time of the deposit being paid, including at 31 December 2019 and 20 March 2020.

Mr Tracy continued:

In respect to assets held in Mainland Property Holdings Pty Ltd (MPH) ATF Mission Beach Property Trust (MBPT) (82 properties, 30 deposits paid on properties not settled at 20 March 2020), I comment as follows: ... Except for one real property at 999 Seaview Street, Mission Beach, [the security trustee] did not have direct first mortgage security over the other properties held in MBPT at 31 December 2019 or 20 March 2020. *In fact, it appears that a third party lender, Naplend Pty Ltd (Naplend)[,] has first registered mortgages on all titles except for one title, where it appears Australia and New Zealand Banking Group Ltd (ANZ) is first registered at 31 December 2019 and 20 March 2020.*

...

In respect to assets held in Mainland Property Holdings No 2 Pty Ltd (MPH2) ATF Mission Beach Property Trust No 2 (MBPT2) (24 properties, 54 deposits paid on properties not settled at 20 March 2020), I comment as follows: ... [the security trustee] does not have direct first mortgage security over any of the properties held in MBPT2 at 31 December 2019 or 20 March 2020. *In fact, it appears that a third party lender, Naplend[, ] has first registered mortgages on all titles.*

...

In respect to assets held in Mainland Property Holdings No 3 Pty Ltd (MPH3) ATF Mission Beach Property Trust No 3 (MBPT3) (11 properties and 19 deposits paid on properties not settled at 20 March 2020), ... [the security trustee] does not have direct first mortgage security over any of the properties held by MBPT3 at 31 December 2019 or 20 March 2020. *In fact, it appears that a third party lender, Naplend[, ] has first registered mortgages on all titles.*

...

In respect to assets held in Mainland Property Holdings No 8 Pty Ltd ATF Mission Beach Property Trust No 8 (MBPT8) (1 property at 20 March 2020),

... [the security trustee] does not appear to have first registered security at 31 December 2019 or 20 March 2020. According to the PPSR it appears [the security trustee]'s security was registered on 23 April 2020 and 15 May 2020 respectively, being after the date the property appears to have been acquired *and after AllPAAP security was registered by Naplend and the Trustee for Naplend No 13. In the absence of a priority deed or other instrument giving priority it would appear the security interests of Naplend are ahead of Core Note investors.*

...

In respect to the asset held in Mayfair Asset Holdings Pty Ltd (MAH) ATF Mayfair Island Trust (MIT) (1 property at 20 March 2020), ... [the security trustee] does not have direct first mortgage security over the property held by MIT at 31 December 2019 or 20 March 2020. *In fact, it appears that a third party, Family Islands Group Pty Ltd (Family Group) has registered mortgages on all titles.*

...

In respect to the assets held [by various other relevant trusts], I comment as follows:

- (a) According to the PPSRs it appears in all instances that [the security trustee]'s security was registered on 23 April 2020 and 15 May 2020 being after the date the deposits appear to have been paid in respect to properties not settled.
- (b) Based on the information made available to me there is a significant risk that [the security trustee] did not have first security at 31 December 2019 and 20 March 2020 despite deposits on properties not settled having been paid.
- (c) In respect to the deposits paid on properties not settled, I am concerned that these may be at risk of forfeiture for failure to complete on the real property transactions.

...

In respect to assets held in Jarrah Lodge Holdings Pty Ltd ATF Jarrah Lodge Unit Trust No 1 (JLUT), ... [the security trustee] does not appear to have first registered security. According to the PPSR it appears [the security trustee]'s security was registered on 16 April 2020, 23 April 2020 and 15 May 2020, all being after the date the loan appears to have been made and *after AllPAAP security was registered by Naplend ... on 23 December 2019 over JLUT.*

...

In summary, it would appear that Core Note investor funds were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020.

(Emphasis added.)

129 The Defendants have not filed any lay or expert evidence which responds to Mr Tracy's Expert Report.

***Report of the provisional liquidators***

130 On 13 August 2020, provisional liquidators were appointed to M101 Nominees. The Court also Ordered that, within 42 days, the provisional liquidators were to provide to the Court a report as to the provisional liquidation of M101 Nominees, which addressed:

- (a) the identification of the assets and liabilities of M101 Nominees;
- (b) an opinion as to the solvency of M101 Nominees;
- (c) an opinion as to the value of the assets of M101 Nominees;
- (d) an opinion as to the likely return to creditors, if M101 Nominees was to be wound up;
- (e) an opinion as to whether M101 Nominees has proper financial records;
- (f) any other information necessary to enable the financial position of M101 Nominees to be assessed;
- (g) any suspected contraventions of the *Corporations Act* by M101 Nominees; and
- (h) any suspected contraventions of the *Corporations Act 2001* by the director of M101 Nominees.

131 On 24 September 2020, the provisional liquidators of M101 Nominees, Mr Said Jahani and Mr Philip Campbell-Wilson of Grant Thornton, provided a report to the Court, pursuant to the Court's Orders dated 13 August 2020.

132 As to each of the issues which the Provisional Liquidators' Report was required to report on, the provisional liquidators set out a number of matters.

133 The provisional liquidators referred to certain "key events" as follows:

- 25. Based on my investigations to date, a timeline of the key events of [M101 Nominees], and in some cases the broader Mayfair 101 Group, from incorporation up to the date of my appointment is noted below:
  - a. **18 October 2019** – [M101 Nominees] was incorporated and immediately began raising funds from investors via internet and newspaper advertisements. [M101 Nominees] offered a term-based investment option and made monthly interest payments on this product to [Core Notes] noteholders;
  - b. **18 October 2019** – [M101 Nominees] entered into a loan agreement with Eleuthera to provide a facility of up to \$250 million at an interest rate of 8% p.a, calculated and paid monthly in arrears within 30 days of the end of each calendar month. The loan term is 10 years and it is unsecured. While the loan agreement is not clear as to the purpose and use of the funds that are to be provided by [M101 Nominees], my investigations and discussions with [Mr Mawhinney] indicate that Eleuthera was used as a



treasury entity, where funds were received from [M101 Nominees] as well as other fund raising vehicles and then transferred to other entities within the Mayfair 101 Group to make various investments;

- c. **24 October 2019** – [M101 Nominees] entered into a General Security Deed with the Security Trustee ... The role of [the security trustee] in their capacity as Security Trustee is to act on behalf of the security beneficiaries, being the holders of the [Core Notes] raised by [M101 Nominees]. [The security trustee] was provided various securities ..., *although of concern ..., the security granted to them (with the exception of Mainland Property Holdings Pty Ltd ATF the Mission Beach Property Trust) under the terms of the General Security Deeds, specifically excluded real estate property (which makes up the majority, if not all of the assets owned by the various trusts)*;
- d. **November & December 2019** – [the security trustee] registered a number of securities (“AllPAPs”) on the Personal Property Security Register (“PPSR”) against a number of entities across the Mayfair 101 Group *noting the above mentioned exclusion for real property ...*;
- e. **December 2019** – various entities in the Mayfair 101 Group had previously entered into contracts to purchase a number of properties at Mission Beach in Queensland. These properties were due to settle in December 2019 and beyond, however the Mayfair 101 Group did not have sufficient funds to settle these properties as they fell due. As a result, the Mayfair 101 Group borrowed funds from a private lender Naplend Pty Limited (“Naplend”) to fund the settlement of these properties.

The Naplend loan was at a rate of 24% p.a for a term of 4 months. However, it is now in default and this rate has increased closer to c. 40%. This facility was increased on a number of occasions to meet the ongoing financial obligations of the Mayfair 101 Group on various property settlements. *As security for the funds lent to the Mayfair 101 Group, Naplend was provided a first ranking mortgage over all of the Mission Beach properties owned by the Mayfair 101 Group, excluding one property that [the security trustee] took a direct security over ...*

The balance due on the Naplend loan as at September 2020, as advised by the Receivers of the various entities/trusts is c.\$20 million. I have been unable at this time to verify the amount owing to a current loan statement;

- f. **23 December 2019** – security provided to Naplend was registered on the PPSR in relation to the following entities[:] Mainland Property Holdings Pty Ltd, Mainland Property Holdings No 2 Pty Ltd, Mainland Property Holdings No 3 Pty Ltd, Mainland Property Holdings No 8 Pty Ltd and Jarrah Lodge Holdings Pty Ltd as trustee[s] for the [relevant] respective trusts ...;
- g. **31 December 2019** – Eleuthera ceased making interest payments due to [M101 Nominees] in respect of the loan facility agreement. Based on my review of [M101 Nominees]’s Xero records, these outstanding interest payments were accrued and are showing as accounts receivable in the Balance Sheet of [M101 Nominees]. I note that Eleuthera made payments to [M101 Nominees] after this date. I have questioned this with [Mr Mawhinney] who has not been able to provide me with an explanation for these payments at the date my report was being finalised. I can only assume the payments related to a reduction in the principle [sic]

amount borrowed, which is how it has been recorded in [M101 Nominees]'s Xero account;

- h. **11 March 2020** – properties at Mission Beach remained unsettled and the Mayfair 101 Group had insufficient funds to settle these properties by the due date. At this time it also had insufficient funds to pay redemptions to noteholders of [M101 Nominees]. Accordingly, redemptions were suspended due to liquidity issues. Redemptions are requests for payment from noteholders in respect of their invested capital invested either at maturity or prior to maturity;
- i. **16 April 2020** – On the application of ASIC, the Federal Court made orders restraining entities within the Mayfair 101 Group from promoting and advertising select products, including the [Core Notes] offered by [M101 Nominees]. They also ordered a disclaimer to be included on their website and to be provided to each prospective new investor;
- j. **April 2020** – properties at Mission Beach remained unsettled and the Mayfair 101 Group were unable to advertise to seek new investors;
- k. **May/June 2020** – Distribution[s] for June 2020 and all future distributions to [Core Notes] noteholders were suspended and interest capitalised until further notice. Distributions relate to the monthly interest amounts paid to noteholders. I note that the May 2020 distributions were paid in June 2020;
- l. **May 2020** – A deed of variation was executed with the mortgagee of Dunk Island agreeing to a revised repayment schedule and the future sale of a 10 hectare parcel of land back to the mortgagee for \$4.5 million subject to various conditions;
- m. **July 2020** – the entities in the Mayfair 101 Group failed to meet the interest payments due to Naplend;
- n. **July 2020** – instalment payments owed to the mortgagee of Dunk Island as part of the amended vendor finance facility were not made;
- o. **July 2020** – the vendors of Dunk Island who provided a vendor finance facility and consequently held a first ranking mortgage entered into possession of Dunk Island ...;
- p. **2 July 2020** – Receivers appointed by [a different security trustee,] Vasco[,] as security trustee over various entities in the IPO Wealth Group. The Receivers have subsequently been appointed as Liquidators over other entities in the same IPO Wealth Group;
- q. **10 July 2020** – [the security trustee for the Core Notes] applied to the Court regarding securities it had failed to register on the PPSR within the prescribed legal period and requested that these be backdated and registered at 30 June 2020 ...
- r. **30 July 2020** – the Court granted the request from [the security trustee] ... to have the security registered on the PPSR as at 30 June 2020 subject to certain conditions;
- s. **13 August 2020** – I was appointed Joint and Several Provisional Liquidator of [M101 Nominees] following an ASIC investigation and application to the Court;

- t. **19 August 2020** – McGrath Nicol were appointed as Joint and Several Receivers and Managers of five entities in the Mayfair 101 Group where Naplend held first ranking securities over the real estate located at Mission Beach; and
- u. **9 September 2020** – Philip Campbell Wilson and I were appointed Joint and Several Receivers and Managers over 15 entities in the Mayfair 101 Group by [the security trustee].

(Emphasis added.)

134 As to the identification of the assets and liabilities of M101 Nominees, the provisional liquidators stated that the “key asset is a c.\$63.5 million loan due from a related entity, Eleuthera” and the “liabilities largely consist of amounts outstanding to [Core Notes] noteholders (c.\$61.8 million)”. As to M101 Nominees’ financial statements, the Provisional Liquidators’ Report stated:

- 29. I make the following comments regarding [M101 Nominees]’s Profit and Loss summary based on my review of the transactions processed through the Xero file. I note that the financial accounts were not adequately maintained following 30 June 2020 and therefore I have not included them for the purpose of my analysis:
  - a. The income recorded relates to interest income from Eleuthera which was either paid or accrued in the accounts ... [I]nterest due on the Eleuthera facility is 8% p.a and the facility to Eleuthera was funded from funds borrowed from [Core Notes] noteholders. I note that interest amounts have accrued from December 2019 (as they were not paid) and are shown as an account receivable in the Balance Sheet.
  - b. The interest paid is made up of interest distributions made to noteholders. The terms of the fixed interest investment offered to [Core Notes] noteholders included monthly distributions on funds invested. On average, approximately \$190,800 in interest payments were made each month to [Core Notes] noteholders.
  - c. The consulting and accounting expenses shown are [M101 Nominees]’ portion of the expenses that were reimbursed to Eleuthera. As Eleuthera operated as the main treasury entity for the Mayfair 101 Group, it attended to payment of the majority of operating expenses on behalf of [M101 Nominees] and [M101 Nominees] then reimbursed Eleuthera.
  - d. ‘Other Expenses’ are made up of[:] bank fees, office expenses and subscriptions.

135 As to the value of M101 Nominees’ assets, the provisional liquidators stated that, in their opinion, “the realisable value of the assets including the loan from Eleuthera are nil”.

136 As to the solvency of M101 Nominees, the provisional liquidators stated that they believed M101 Nominees was “insolvent since inception and remains insolvent at the date of [the

provisional liquidators’] report”. As to solvency, the provisional liquidators stated the following:

87. The [provisional liquidators’] analysis indicates that from 30 November 2019, [M101 Nominees] held between \$0.05 and \$0.25 of current assets for every \$1 of current liabilities. This indicates that [M101 Nominees] lacked sufficient liquid assets to cover its obligations as they fell due. However, I note that this test alone is not a true reflection of [M101 Nominees’] solvency due to the timing of receipts and payments into/from [M101 Nominees’] bank account as a result of:
  - a. All funds received from noteholders being advanced to Eleuthera under the terms of the facility on average within a few days of being received. Unless funds were received and held at month end (i.e. 30/31st) the cash position as at month end for Balance Sheet/ratio analysis purposes does not reflect the average cash/current asset position of [M101 Nominees] within the month; and
  - b. Eleuthera only transferred funds to [M101 Nominees’] bank account the day before/day payments were due to [Core Notes] noteholders. Again, unless these funds were received and held at month end then they would not show that [M101 Nominees] had sufficient funds to meet these payments.
88. I also note that ... current liabilities would increase by c. \$27.1 million to \$57 million, if [Core Notes] noteholders with a 12 month maturity profile were appropriately reclassified from noncurrent liabilities to current liabilities.
89. I also note that the above ratio does not reflect the deterioration in [M101 Nominees’] ability to make noteholder payments from June 2020 onwards. As [M101 Nominees] accrued the interest receivable (and not paid) from Eleuthera on the Balance Sheet as a current asset, the effect of which was an increase in the current assets at a time the current liabilities were also increasing (as payments to noteholders were not being made).
90. ... 98% of [M101 Nominees] assets comprise of a debt due from Eleuthera ... I have serious concerns about Eleuthera’s ability to repay the debt. The effect of which would be to significantly impact [M101 Nominees’] net asset position (resulting in a c.\$65,324,000 net liability being reported as at 13 August 2020), if the Eleuthera loan was fully provisioned.

...
91. The sales recorded within the profit and loss (exported from Xero), comprise of interest income received from Eleuthera. The interest income received was the only income of [M101 Nominees]. It did not have the capacity to generate any income in its own capacity as it did not hold any income generating assets in its own name. As such, [M101 Nominees] was heavily dependent on Eleuthera’s financial capacity in order to make any redemptions or disbursements to noteholders.

...
93. ... [I]t is apparent that [M101 Nominees] did not hold sufficient cash to meet its current liabilities at any point from November 2019 onwards. This is an indicator of insolvency as [M101 Nominees] is unable to attend to payments as and when

they fall due. This is evident by discussions with [Mr Mawhinney] who stated [M101 Nominees] struggled to pay redemptions or distributions in March 2020 and June 2020 respectively. This is largely due to [M101 Nominees'] dependency on Eleuthera for funds, and Eleuthera's inability to meet repayments (from December 2019 onwards) due to its financial commitments to the broader Mayfair 101 Group.

...

101. Based upon the information presently available and reviewed by me ... regarding the sustainability of [M101 Nominees'] business and funding model, it is my view that [M101 Nominees] is insolvent and has been since inception. My conclusion is based on the following:
- a. [M101 Nominees] did not maintain adequate current assets to be able to meet its current liabilities as and when they fell due;
  - b. As detailed throughout my report, I have concerns over the recoverability of [M101 Nominees'] main asset, the loan from Eleuthera. If a bad debt provision was made against this loan to accurately reflect its recoverability, which in my opinion is appropriate at this time, this would result in [M101 Nominees] recording a significant net liability position on the Balance Sheet;
  - c. The structural impediment created by virtue of [M101 Nominees] having borrowed funds [from noteholders] primarily on 6-12 month terms but advanced the majority of those funds on a 10 year facility to a related party [namely, Eleuthera];
  - d. The cash flow analysis indicates that at no point from November 2019, did [M101 Nominees] hold sufficient cash to attend to the payment of its current liabilities, including attending to the distributions to noteholders;
  - e. The creditors of [M101 Nominees] were beginning to age, with a significant portion outstanding for 2 months. The ageing will continue to deteriorate as distributions to [Core Notes] noteholders remain suspended and capitalised;
  - f. Special arrangements were entered into with [Core Notes] noteholders regarding the suspended redemptions and capitalised interest due to [M101 Nominees'] liquidity issues;
  - g. [M101 Nominees] has previously and as I understand, still is, trying to source additional funding to meet outstanding payments of the Mayfair 101 Group (relating to settling properties at Mission Beach). Mayfair 101 Group's inability to raise additional funds has a direct flow-on effect within [M101 Nominees] as it is highly dependent on intercompany funds; and
  - h. [M101 Nominees] did not have any income-producing assets in its own right and was highly dependent on a single related entity, Eleuthera, for cash injections. In addition, Eleuthera also maintained a small cash balance and was also reliant on intercompany loans which were used to fund investments in illiquid and/or for the most part, non-income producing assets.

144. It is my opinion [that M101 Nominees] has been trading insolvent since incorporation on the basis that it did not have a sustainable business model. Noteholders were investing predominantly for periods of 6 or 12 months, however the loan agreement with the related entity, Eleuthera (which [M101 Nominees] was advancing funds to) had a maturity term of 10 years. On this basis, the funds forwarded to Eleuthera were not due back to [M101 Nominees] for 10 years, meaning [M101 Nominees] would not have adequate funds to repay [Core Notes] noteholders as their debentures matured or fell due.

145. This conclusion is evidenced by [the provisional liquidators' solvency analysis] which shows that at no time over the period since incorporation did [M101 Nominees] have sufficient current assets to discharge its current liabilities.

138 As to the likely return to M101 Nominees' creditors, the provisional liquidators estimated a "[n]il return to creditors from the assets of [M101 Nominees]".

139 As to the completeness of M101 Nominees' financial records, the provisional liquidators had "not been provided with all the books and records of [M101 Nominees] including the email server of [M101 Nominees]", and could not "form an opinion at this time as to their completeness".

140 As to other information required by the provisional liquidators to enable the financial position of M101 Nominees to be assessed, the provisional liquidators stated that they were "still awaiting further books and records from [Mr Mawhinney] to finalise ... investigations".

141 As to any suspected contraventions of the *Corporations Act*, the provisional liquidators stated that they believed a "number of contraventions of [the *Corporations Act*] have been made by [M101 Nominees] and [Mr Mawhinney]". The provisional liquidators stated:

... as part of my review into the affairs of [M101 Nominees], I have concerns over [Mr Mawhinney]'s acts and dealings in related entities, which have had an impact (either directly or indirectly) on [M101 Nominees] and the noteholders, including but not limited to:

- a. Entering into a loan with Naplend (at an initial interest rate of 24% p.a increasing to over 40% p.a now the loan is in default) in his capacity as director of various Mainland Property Holdings entities, Jarrah Lodge Holdings Pty Ltd and Mayfair Group Pty Ltd on unfavourable terms. The effect of this was to significantly diminish the equity available to noteholders/[the security trustee] by providing Naplend with a first-ranking mortgage over all the various real property assets located in Mission Beach and owned by the [relevant] trusts ...;
- b. Not taking appropriate steps to ensure that the Mayfair 101 Group entities had sufficient assets available to meet their liabilities as and when they fell due. As an example, [Mr Mawhinney] advised that the entities entered into the loan agreement with Naplend (discussed above), as the Mayfair 101 Group had insufficient cash resources to meet upcoming settlements of properties. The facility with Naplend was viewed by [Mr Mawhinney] as a bridging loan to

allow further fundraising activities to take place to secure additional investor funds to allow settlement of properties and repay the Naplend loan;

- c. Failing to ensure appropriate first ranking mortgages were issued to [the security trustee] over the individual real estate assets purchased by the various trusts to the detriment of the [Core Notes] noteholders ... [T]he [all present and after-acquired property] charges provided to the Security Trustee specifically excluded real estate as part of the collateral;
- d. For the purpose of reporting to the Security Trustee and effectively the [Core Notes] noteholders, revaluing the Dunk Island asset by c.\$18.2 million based upon a contingent sale agreement regarding the sale of 10 hectares back to the Family Island Group for \$4.5 million. No formal independent valuation was carried out to support this revaluation;
- e. Transferring funds between entities in the Mayfair 101 Group in circumstances where it does not appear due care or consideration was given as to that entity's ability to repay the loan. As an example, Eleuthera was provided with loans totalling \$63.5 million by [M101 Nominees] in circumstances where I do not believe it has the capacity to repay these loans;
- f. Providing loans to family members from Mayfair 101 Group's funds. As an example, I note that the Balance Sheet of Eleuthera that formed part of the exhibits to an ASIC affidavit showed that a loan of \$100,000 was provided to Inga Tamminga, [Mr Mawhinney]'s sister. This loan was not contained within the updated Balance Sheet provided to me by [Mr Mawhinney] following my appointment; and
- g. Using funds advanced from [M101 Nominees] (and other related entities) to Eleuthera for [Mr Mawhinney]'s personal expenses and incurring high corporate expenses during a time when cash resources were limited. I have been provided with a copy of the bank statements of Eleuthera and note that:
  - i There are a significant amount of transactions which appear to be personal expenses of [Mr Mawhinney] and/or related parties. Examples include: Ubereats, Myer, Woolworths; and
  - ii During the period 1 January 2020 to 31 March 2020 c. \$85k of travel expenses were incurred which appear to relate to business class airfares and five star hotels.

142 As to the security held on behalf of noteholders, the provisional liquidators stated:

- 38. Despite not being an asset of [M101 Nominees], given the Company's liabilities largely consist of amounts due to [Core Notes] noteholders, in my opinion it is important to give consideration to the security that has been provided to [Core Notes] noteholders via the Security Trustee ... from other entities in the ... Mayfair [101] Group (as guarantors of the debt owed to M Core noteholders) ...
- 39. Based on my review of the Product Offer Document and discussions with [Mr Mawhinney], I understand that there are three classes of potential security that can be used to secure [Core Notes] noteholder funds, being[:] Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors. The Product Offer Document states that:

“The M Fixed Income product is secured by a pool of assets in respect of which first-ranking, registered security interest have been granted. The assets are

otherwise unencumbered ..., and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the issuer's dedicated M Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.”

40. I have undertaken a review of all known security held by [the security trustee] on behalf of the [Core Notes] noteholders in accordance with the above statement.
41. While the Security Trustee held a first ranking [all present and after-acquired property] over 15 of the 16 trust entities on behalf of the [Core Notes] noteholders, I note that the terms of the individual General Security Deeds between each trust and [the security trustee] (with the exception of Mainland Property Holdings Pty Ltd) stated that security was given for all assets *excluding 'the legal and/or beneficial interest in any and all real estate held from time to time' by the trust. Effectively, [the security trustee] had no right to take any security over the real estate assets which were purchased using the [Core Notes] noteholder funds.* Given the only assets of the trusts were real estate property, it is implausible that the security provided to [the security trustee] excluded real estate assets.
42. This may create a scenario that any unsecured creditors of the trusts may also have a competing claim with that of the Security Trustee on behalf of the [Core Notes] noteholders. However, it may be feasible that following the sale of the Queensland real estate assets, any surplus that may become available after the discharge of the mortgagee's debt, will be held in cash. As a consequence, the cash / bank account would be subject to the [security trustee]'s security / AllPAP ...
43. On the basis of the above, any claims [Mr Mawhinney] has made to investors or potential investors regarding [the Core Notes] noteholder funds being secured may be deceptive and misleading on the basis that *investor funds are not supported by first-ranking, unencumbered asset security or alternatively what security was granted, had negligible value.*

(Emphasis added.)

143 The Provisional Liquidators' Report continued:

118. Based upon the information available to me at the date of this report, it is my opinion that [Mr Mawhinney] may have been in breach of Section 180 of the [Corporations Act 2001] as a result of:
  - a. Failing to advise unsophisticated investors of the risks of the products being offered ... Whilst [Core Notes] noteholders typically met the legal definition of a 'sophisticated investor', their characteristics frequently were more reflective of a retail investor. I have reviewed evidence gathered by ASIC as part of their investigations in which investors advised they were misled into thinking the product offered by [M101 Nominees] was similar to that of bank term deposits and had no risks. *In reality, the funds invested into [M101 Nominees] were advanced to a related entity of [M101 Nominees] (unsecured) on terms which put investor funds at significant risk.*
  - b. Not ensuring that [Core Notes] noteholders were given security over the assets their funds were used to purchase. I note that [Core Notes] noteholders were advised in the FAQ of the information booklet for the product that they would be provided with 'first ranking, registered security' and 'the assets are otherwise unencumbered'. *However, the General Security Deed between the trusts and [the security trustee] state*



*that the AllPAP provided to [the security trustee] on behalf of the [Core Notes] noteholders excluded real estate assets (noting this is the only asset type held by the trusts). Furthermore, the assets were clearly not “unencumbered” as mortgages were held by Naplend and the Family Islands Group over the real estate.*

- c. Despite [this], failing to ensure that a number of AllPAPs were registered by [the security trustee] on the PPSR within the prescribed period ... [The security trustee] failed to correctly register a number of AllPAPs pursuant to Section 588FL of the Act and as such had to apply to the Court for rectification orders.
- d. Failure to ensure that the appropriate security was taken out to protect [M101 Nominees’] interest in the loan provided to Eleuthera. Given the significant sums advanced to Eleuthera it would be appropriate for the loan to be a secured loan and the security registered on the PPSR. I note that no related or third party holds any security over the assets of Eleuthera.
- e. Continuing to advance further funds to Eleuthera in 2020 under the terms of the facility at a time when Eleuthera was not meeting its interest payment obligations.
- f. Paying redemptions of noteholders from other noteholder investments. I note that on 15 January 2020 [M101 Nominees’] bank balance was \$12,943.76. In the period from 15 January 2020 to 21 January 2020 [M101 Nominees] received \$152,174 from noteholders and \$590,000 from Eleuthera. Also during the period, \$700,000 was paid in redemptions and \$50,000 paid to Eleuthera leaving a balance as at 21 January 2020 of \$4,552.92. As such, c. \$160,000 of investor funds was used to meet redemption payments during this time. I expect that this issue would have been further exacerbated, had it not been for the high volume of cash transfers between [M101 Nominees] and Eleuthera. That is:
  - i [M101 Nominees] raised funds from [Core Notes] noteholders which it advanced as a loan to Eleuthera via funds transfer;
  - ii Whenever [M101 Nominees] had to make a repayment or distribution to [Core Notes] noteholders, it relied on a repayment (funds transfer) back from Eleuthera to fund such payment; and
  - iii *Given Eleuthera was not generating any external income, I believe that the funds used to pay [Core Notes] noteholders were either sourced from their original funds or those of M+ [Notes] noteholders mixed into the Eleuthera bank account.*

(Emphasis added.)

144 The Provisional Liquidators’ Report further stated:

As part of my investigations I have reviewed the product brochure provided to noteholders by [M101 Nominees] and Statement of Noteholder Secured Monies provided to [the security trustee]. In taking into account the activities of [M101 Nominees] and the use of noteholders funds (the loan to Eleuthera) as detailed in this report, it is my view that [Mr Mawhinney] was in breach of Section 1041H of the Act for the following reasons:

- a. The product brochure states in the FAQ section that a key feature of the product is that it is supported by ‘first ranking, registered security’ and ‘the assets are otherwise unencumbered’ on a dollar for dollar basis. *My investigations show that neither [M101 Nominees], nor Security Trustee held ‘first-ranking security’ over any assets of substantive value. First ranking mortgages were issued to Family Islands Group and Naplend over various properties rendering the statement that ‘the assets are otherwise unencumbered’ false;*
- b. I have reviewed witness statements and affidavits prepared as part of the ASIC investigations and note that some of these investors disclosed to [M101 Nominees] that they were in the market for a term deposit and had come across the product while searching for a term deposit. It was disclosed that they only sought to invest for a short period and did not have an appetite for risk. They were assured by [M101 Nominees] that it was a term deposit product with no risk. During these discussions, the investor was not made aware that there was a chance they may lose their money, nor that [M101 Nominees] had the right to suspend redemptions or capitalise interest[.]

(Emphasis added.)

145 On the basis of the matters set out above, the executive summary of the Provisional Liquidators’ Report concluded as follows:

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 [Core Notes] 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 [Core Notes] 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 position 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 [Core Notes] noteholders) would receive no return. However, the [Core Notes] 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 [Core Notes] 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 [Core Notes] noteholders were funded out of funds raised from other [Core Notes] noteholders or to a lesser extent M+ [Notes] 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 [Mr Mawhinney] primarily in relation to Section 180 and 1041H of the Act ...

146 The Defendants have not provided any adequate answer to the issues raised by the Provisional Liquidators' Report. They have not filed any evidence which responds to these matters.

## **FINDINGS IN RESPECT OF REPRESENTATIONS**

147 I make the following findings in relation to the evidence tendered by ASIC and applying the principles relevant to misleading or deceptive conduct under the *Corporations Act* and the *ASIC Act* as stated in *Dover* at [98]-[101].

### **Findings in respect of Bank Term Deposits Representation**

148 The matters set out above provide ample evidence to satisfy me that statements made by the Defendants in the marketing and promotional material in respect to the Mayfair Products conveyed, separately and together, an impression that the Mayfair Products were comparative to, and of similar risk profile to, bank term deposits. I am satisfied that Ms Saunders' evidence establishes that the statements and images relied upon by ASIC (and referred to in Annexure A to these Reasons for Judgment) were made.

149 These matters represented to consumers the Bank Term Deposit Representation, as alleged by ASIC in the further amended originating process.

150 I am satisfied on the evidence that the Bank Term Deposit Representation was made in circumstances where the Mayfair Products expose investors to significantly higher risk than bank term deposits, including by reason of:

- (a) the matters referred to in the Expert Report and the Provisional Liquidators' Report, which opinions I accept. By way of example, the Provisional Liquidators' Report records that the issuer of the Core Notes, M101 Nominees, "has been insolvent since inception and remains insolvent"; and
- (b) the fact that the Mayfair Products lack the prudential regulations that apply to bank term deposits.

151 I am also satisfied on the evidence tendered by ASIC that the Bank Term Deposits Representation was made in relation to financial products (being the Mayfair Products, which are promissory notes). They were made by Mayfair in promoting the Mayfair Products, by M101 Holdings in the application form for the M+ Notes, by M101 Nominees in the application form for the Core Notes, and by Mayfair 101 in promoting the Mayfair Products.

152 I am also satisfied that the Bank Term Deposits Representation concerns the future performance of the Mayfair Products and was therefore a representation as to a future matter. The nature of the representation itself, being a representation to attract investors to an investment, ensures the representations should be characterised as representations as to a future matter.

153 As stated above, s 769C of the *Corporations Act* and s 12BB of the *ASIC Act* provide that, if a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act), and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading.

154 The Defendants have adduced no evidence to support a contention that they had reasonable grounds for making the Bank Term Deposits Representation. I find that there were no such reasonable grounds. In the absence of such reasonable grounds, the conduct which I have referred to in respect of the Bank Term Deposit Representation is therefore deemed, pursuant to s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, to be misleading.

155 Notwithstanding the operation and effect of the deeming provisions in s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I am, in any event, satisfied on the evidence tendered by ASIC that the Bank Term Deposits Representation in relation to the Mayfair Products was misleading or deceptive and created a false and misleading impression that the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits. I am satisfied on the evidence that the Mayfair Products exposed investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products are debentures, and lack the prudential regulations that apply to bank term deposits. In light of the evidence relied on by ASIC, the Mayfair Products are not comparable to, or a proper alternative to, bank term deposits.

### **Findings in respect of Repayment Representation**

156 I am satisfied on the evidence tendered by ASIC that the statements made by the Defendants in the relevant promotional material conveyed, separately and together, an impression that, on maturity of the Mayfair Products, the principal invested would be repaid in full. I am satisfied that the statements relied upon by ASIC (and referred to in Annexure A to these Reasons for Judgment) were made and that statements such as the following created the impression that, on maturity of the Mayfair Products, the principal would be repaid in full:

- (a) under the heading “Are my returns tied to the Issuer’s investment performance?”, the relevant promotional materials stated that “the issuer is obligated to pay the quoted rates of interest and principal on the [M+ Notes and the Core Notes], regardless of the performance of its investments”. That answer was unqualified and is highly misleading. An honest representation would have been that investors’ returns were absolutely tied to the relevant issuer’s investment performance. Instead, the relevant promotional material referred to the *obligation* to pay returns, which of course says nothing about the relevant issuer’s *capacity* to pay returns. That capacity was inextricably tied to the performance of investments made by the relevant issuer and, based on the evidence relied on by ASIC, those investments should be characterised as highly speculative;
- (b) “Mayfair 101’s investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments”; and
- (c) “Mayfair Platinum is ... focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence”.

157 These representations were made in circumstances where investors in the Mayfair Products might not receive capital repayments at maturity because the Defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the Defendants did not have sufficient funds to repay investments at maturity. The Defendants have, in fact, exercised that right. To give but one example, the terms of the “Core Notes” are set out in a “Secured Promissory Note Deed Poll” (**Deed Poll**) entered by M101 Nominees on 24 October 2019. The Deed Poll included a term that M101 Nominees could “at any time, extend the Payment Date” of an investor’s redemption payment, if M101 Nominees:

- (a) “in its reasonable opinion, consider[ed] that it [did] not have sufficient Liquidity to fund the redemption”;
- (b) “received multiple Withdrawal Notices in a short period which [would] have a negative impact on its Liquidity”;
- (c) “consider[ed] that if the redemption [was] paid on the Payment Date, it may [have] affect[ed] [M101 Nominees’] Liquidity to pay future anticipated redemptions of other Noteholders’ Notes”.

158 In these circumstances, the Repayment Representation – ie that, on maturity of the Mayfair Products, the principal would be repaid in full – was misleading or deceptive. It created the false and misleading impression that, on maturity of the Mayfair Products, the principal would be repaid in full.

159 I am satisfied that the Repayment Representation was a representation which concerned the future performance of the Mayfair Products and was therefore a representation as to a future matter. Pursuant to s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, if a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act), and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading. The Defendants have adduced no evidence that they had reasonable grounds for making the Repayment Representation. Accordingly, pursuant to these deeming provisions, I find that there were no such reasonable grounds and, as a result, the Repayment Representation is taken to be misleading.

160 In any event, even putting to one side the deeming provisions in s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I am satisfied that the evidence establishes that the Repayment Representation was misleading or deceptive conduct or a false and misleading representation

that the Mayfair Products are of a particular standard, quality or value, or had particular performance characteristics or benefits, when in fact the evidence establishes that investors in the Mayfair Products might not receive capital repayments at maturity. This is because the Defendants had a contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the Defendants did not have sufficient funds to repay at maturity, which right the Defendants exercised on or around 11 March 2020.

### **Findings in respect of the No Risk of Default Representation**

161 I am satisfied on the evidence tendered by ASIC that the statements relied upon by ASIC (and set out in Annexure A to these Reasons for Judgment) were made. I am satisfied those statements conveyed, separately and together, an impression that the Mayfair Products carried no risk of default. I am satisfied that the No Risk of Default Representation was made by these statements in the marketing material. By way of example, the marketing material included the following representations:

- (a) the Mayfair Products were “specifically designed for investors seeking certainty and confidence in their investments”;
- (b) “Mayfair Platinum is ... focused on providing investors with certainty in relation to their capital and interest payments”;
- (c) the impression conveyed that the Mayfair Products are comparable to bank term deposits (as referred to above in relation to the Bank Term Deposits Representation);
- (d) investors would “earn better rates of return on their idle money by focusing on certainty, transparency, and exceptional customer service”;
- (e) the representation that the Core Notes were a “secured, asset-backed, term-based investment opportunity”, were “[s]upported by first-ranking, unencumbered asset security”, and the Core Notes had “dollar-for-dollar secured asset support for each dollar of [the Core Notes]”;
- (f) in the “FAQs” section of the M+ Notes and the Core Notes brochures, under the heading “What are the risks?”, the brochures merely referred to “general investment, lending, liquidity, interest rate, cyber, related party transactions and currency risks”. The brochure said nothing of the material risks which, for example, are set out in the Expert Report and the Provisional Liquidators’ Report. On the evidence tendered by ASIC, those risks have materialised.

162 I find that the use by the Defendants in the marketing material for the Mayfair Products of the words “certainty” and “confidence” is likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk of default.

163 I am satisfied on the evidence that the Defendants had a contractual right to suspend redemptions of investments at maturity for an indefinite period of time if the Defendants did not have sufficient funds to repay the investors. I am also satisfied that the Defendants have now exercised that right to suspend redemptions.

164 I am satisfied on the evidence that the uncertainty of the financial position of the Defendants exposed investors to a real risk that investors could lose some or all of their principal investment. I am satisfied on the evidence that the Mayfair Products cannot be described as giving investors “certainty”. I am satisfied that the Mayfair Products have been, in fact, designed by the Defendants to produce a result which is uncertain for investors and could not on any reasonable view be described as an investment with no risk of default.

165 I am satisfied that the No Risk of Default Representation which was made in relation to the Mayfair Products relates to future performance and was therefore a representation as to a future matter. The Defendants have not adduced any evidence to establish that they had reasonable grounds for making the No Risk of Default Representation. I find that there were no such reasonable grounds. As a consequence, pursuant to the deeming provisions in s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I find that the No Risk of Default Representation was misleading and deceptive.

166 In any event, putting aside the deeming provisions in s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I am satisfied on the evidence that ASIC has established that the No Risk of Default Representation was misleading or deceptive or was a false and misleading representation that the Mayfair Products carried no risk of default.

### **Findings in respect of the Security Representation**

167 I am satisfied on the evidence tendered by ASIC that the statements relied upon by ASIC (and set out in Annexure A to these Reasons for Judgment) were made by the First and Third Defendants. I am satisfied that those statements conveyed, separately and together, an impression that the Core Notes were fully secured financial products.



168 I am satisfied on the evidence that the Security Representation was made expressly by statements of the First and Third Defendants in the relevant marketing and promotional material for the Core Notes, which included statements that:

- (a) the Core Notes were a “secured, asset-backed, term-based investment opportunity”;
- (b) the Core Notes were “supported by first-ranking, unencumbered asset security”;
- (c) the Core Notes were:

...secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer’s dedicated M Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.

... the assets are revalued at least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Fixed Income notes.

169 I have set out above extracts of the Expert Report of Mr Tracy. I have considered the Expert Report which contains Mr Tracy’s expert opinion in relation to whether the debts owed to Core Note investors were “secured”, the form of that security and over what assets there was security, the value of that security, and the likelihood of repayment of loans received from M101 Nominees from related entities.

170 I accept the expert opinion of Mr Tracy at [2.11] – [2.14] and the conclusion at [2.24] of the Expert Report (which are set out above). That conclusion was to the effect that Core Note investor funds were not generally supported by first-ranking unencumbered asset security at 31 December 2019 and 20 March 2020.

171 I accept Mr Tracy’s expert opinion that, to the extent that there was security over units in various trusts (the trustees of which owned properties), such security was of little moment when, as stated by Mr Tracy, the relevant properties (with the exception of one property) have been mortgaged to a third party. The unchallenged evidence is that those third parties hold first registered mortgages.

172 I also accept Mr Tracy’s expert opinion in respect of concerns regarding the asset security value, as set out at [2.25] and [2.26] of the Expert Report. The concerns identified by Mr Tracy in these paragraphs of his Expert Report raise considerable doubt about the asset security values and the recovery of funds for Core Note investors.

173 I also accept the results of the investigation of the provisional liquidators (and now liquidators) of M101 Nominees, which are set out in the Provisional Liquidators' Report and referred to earlier in these reasons. In particular, I accept the provisional liquidators' opinion that, notwithstanding the advertising to potential investors that their investments would be supported by "first-ranking, registered security" and "the assets are otherwise unencumbered", that did not occur. I accept the provisional liquidators' opinion that the majority of funds invested were provided to a related entity, Eleuthera, on an unsecured loan basis for a term of 10 years at a rate of 8% per annum and that M101 Nominees did not hold any security in respect of its loan to Eleuthera.

174 I am satisfied on the evidence that the Security Representation was made in relation to financial products, being the Core Notes, which are promissory notes. I am satisfied that the Security Representation was made by Mayfair in promoting the Mayfair Products and by M101 Nominees in the application form for the Core Notes.

175 I am satisfied that the Security Representation was made in relation to the future performance of the Core Notes and was therefore a representation as to a future matter. The Defendants have adduced no evidence to establish that they had reasonable grounds for making the Security Representation. I find that there were no such reasonable grounds. Accordingly, pursuant to s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I find that the Security Representation was misleading.

176 In any event, putting aside the deeming provisions in s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I am satisfied on the evidence that ASIC has established that the making of the Security Representation was misleading or deceptive or was a false or misleading representation that the Core Notes are of a particular standard, quality, value or grade, or had performance characteristics or benefits, which they did not possess.

## DISPOSITION

### Declarations sought by ASIC

177 ASIC seeks by its proposed orders various declarations and orders from the Court as follows:

#### THE COURT DECLARES THAT:

1. On each occasion during the period from 3 July 2019 to 16 April 2020 (**Relevant Period**) that the defendants represented to consumers that promissory notes called "M+ Fixed Income Notes" and "M Core Fixed Income Notes" (the **Mayfair Products**) were comparable to, and of similar risk profile to, bank term deposits

**(Bank Term Deposit Representations)**, when the Mayfair Products expose investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products lack the prudential regulations that apply to bank term deposits, and accordingly the Mayfair Products are not comparable to bank term deposits, the defendants, in trade or commerce:

- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of section 1041H(1) of the *Corporations Act 2001 (Corporations Act)* and section 12DA(1) of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*;
  - (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of section 12DB(1)(a) of the ASIC Act; and
  - (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of section 12DB(1)(e) of the ASIC Act.
2. On each occasion during the Relevant Period that the defendants represented to consumers that on maturity of the Mayfair Products, the principal would be repaid in full (**Repayment Representations**), when investors in the Mayfair Products might not receive capital repayments at maturity because the defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time, including where the defendants did not have sufficient funds to repay investments at maturity, which right the defendants have in fact exercised, the defendants, in trade or commerce:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of section 1041H(1) of the Corporations Act and section 12DA(1) of the ASIC Act;
  - (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of section 12DB(1)(a) of the ASIC Act; and
  - (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of section 12DB(1)(e) of the ASIC Act.
3. On each occasion during the Relevant Period that the defendants represented to consumers that the Mayfair Products were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default (**No Risk of Default Representations**), when there was a risk that investors could lose some or all of their principal investment, the defendants, in trade or commerce:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of section 1041H(1) of the Corporations Act and section 12DA(1) of the ASIC Act;
  - (b) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were

of a particular standard, quality, value or grade, in contravention of section 12DB(1)(a) of the ASIC Act; and

- (c) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of section 12DB(1)(e) of the ASIC Act.

4. On each occasion during the Relevant Period that the First, Third and Fourth Defendants represented to consumers that the M Core Fixed Income Notes were fully secured financial products (**Security Representations**), when funds invested in M Core Fixed Income Notes were:

- (a) lent to Eleuthera Group Pty Ltd and not secured by first-ranking, unencumbered asset security or on a dollar-for-dollar basis or at all;
- (b) used to pay deposits on properties prior to any security interest being registered; and
- (c) used to purchase assets that were not secured by first-ranking, unencumbered asset security,

the First, Third and Fourth Defendants, in trade or commerce:

- (d) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in relation to financial services, in contravention of section 1041H(1) of the Corporations Act and section 12DA(1) of the ASIC Act;
- (e) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products were of a particular standard, quality, value or grade, in contravention of section 12DB(1)(a) of the ASIC Act; and
- (f) in connection with the supply or possible supply of financial services, made a false or misleading representation that the Mayfair Products had performance characteristics or benefits, in contravention of section 12DB(1)(e) of the ASIC Act.

...

178 ASIC by its further amended originating process filed 15 February 2021 sought to rely upon the Court's power to issue declarations pursuant to s 21 of the *FCA Act*, s 1101B(1)(a) of the *Corporations Act* and/or s 12GBA of the *ASIC Act*. ASIC seeks that the Court make various declarations pursuant to these statutory provisions in respect to the conduct of the Defendants which, as stated above, has been found by the Court to have contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act*.

179 ASIC invites the Court to stand over for further hearing the issue of any civil penalty or other relief which ASIC may seek based upon the findings made by the Court in this judgment.

### **Statutory provisions and principles**

180 Section 21 of the *FCA Act* provides:

## 21 Declarations of right

- (1) The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
- (2) A suit is not open to objection on the ground that a declaratory order only is sought.

181 Section 1101B(1)(a)(i) of the *Corporations Act* provides:

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 [Chapter 7 of the *Corporations Act*], or any other law relating to dealing in financial products or providing financial services ...

182 Section 12GBA(1) of the *ASIC Act* provides that “ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision”. Section 12GBA(6) provides that “a provision of Subdivision D (other than section 12DA)” is a “civil penalty provision”. ASIC seeks declarations in respect of ss 12DB(1)(a) and (e) of the *ASIC Act*, which appear in Subdivision D of Division 2 of Part 2 of that legislation.

183 Section 12GBA(3) provides that the “Court must make the declaration if it is satisfied that the person has contravened the provision”. Section 12GBA(4) provides that:

The declaration must specify the following:

- (a) the Court that made the declaration;
- (b) the civil penalty provision that was contravened;
- (c) the person who contravened the provision;
- (d) the conduct that constituted the contravention.

184 The discretion to make declarations is wide: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 (*Jododex*). In *Jododex* at 437-438, Gibbs J held that, before making declarations, three requirements should be satisfied:

- (a) the question must be a real and not theoretical one;
- (b) the applicant must have a real interest in raising it; and
- (c) there must be a proper contradictor – that is, “someone presently existing who has a true interest to oppose the declaration sought”.

185 In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, Mason CJ and Dawson, Toohey and Gaudron JJ stated:

It is now accepted that superior courts have inherent power to grant declaratory relief.

It is a discretionary power which “[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.” However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have “a real interest” and relief will not be granted if the question “is purely hypothetical”, if relief is “claimed in relation to circumstances that [have] not occurred and might never happen” or if “the Court’s declaration will produce no foreseeable consequences for the parties”.

(Citations omitted.)

### **Consideration**

186 I am satisfied that the requirements as to declarations stated above have been satisfied in the present case. I am satisfied that:

- (a) the proposed declarations sought by ASIC identify with precision the conduct that contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*;
- (b) those declarations are directed to the determination of an extant controversy rather than any abstract or hypothetical question;
- (c) ASIC has a real interest in seeking the declarations and the declarations being made. ASIC is also given the power to apply to the Court under s 1101B(1)(a)(i) of the *Corporations Act* and s 12GBA(1) of the *ASIC Act*;
- (d) the Defendants are each a proper contradictor because they are the subject of the declarations.

187 I am satisfied on the evidence that it is appropriate to make the declarations substantially in the form sought by ASIC in this case. Accordingly, I will make declarations. I will also make the further orders sought by ASIC.

I certify that the preceding one hundred and eighty-seven (187) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate:

A handwritten signature in black ink, consisting of a large, stylized letter 'R' followed by a small dot.

Dated: 23 March 2021

ANNEXURE A

Bank Term Deposit Representations

Description	Statement	Evidence	Pinpoint Reference
<i>Mayfair Platinum Website</i>			
Landing page live from 16/08/19 produced to ASIC by Mayfair Wealth	<i>"term-based investment options", "3 months to 5 years, with the option of monthly interest distributions", "cash investment alternatives", "income-producing investments" and "high yield investments"</i>	LS57 – Third Saunders Affidavit	CB tab 13.1, page 1245
Web capture produced to ASIC by Quattro on 18 December 2019	<i>"cash and term deposit alternatives", "term-based investment options", "3 months to 5 years with the option of monthly interest distributions", "High yield term deposit alternatives", "Cash alternatives", "high yield investments" and "Fixed income products"</i>	LS32 – First Saunders Affidavit	CB tab 6.32, page 558
ASIC web capture dated 02/04/20	<i>"term-based investment options" and "3 months to 5 years, with the option of monthly interest distributions"</i>	LS47 – First Saunders Affidavit	CB tab 6.47, page 737
ASIC web capture dated 02/04/20	<i>"high yield term deposit alternatives", "cash alternatives", "high yield investments" and "fixed income products"</i>	LS47 – First Saunders Affidavit	CB tab 6.47, page 738
Web capture produced to ASIC by Quattro on 18 December 2019	<u>M+ Fixed Income Notes</u>  the table of current rates and references to <i>"Investing in our M+ Fixed Income product is a smart and effective way of earning competitive rates of return whilst official interest rates are at record-lows"</i> and <i>"Low interest rates have resulted in much needed innovation within the financial services industry to fill the gaps left by the banks, both in</i>	LS32 – First Saunders Affidavit	CB tab 6.32, page 559, 561
ASIC web capture dated 02/04/20		LS47 – First Saunders Affidavit	CB tab 6.47, page 739



Description	Statement	Evidence	Pinpoint Reference
	<i>terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies”.</i>		
Web capture produced to ASIC by Quattro on 18 December 2019	<u>M Core Fixed Income Notes</u> the table of current rates and references to “ <i>term-based investment product</i> ” and “ <i>Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wider opportunities for investors and companies.</i> ”	LS32 – First Saunders Affidavit	CB tab 6.32, page 559
ASIC web capture dated 02/04/20		LS47 – First Saunders Affidavit	CB tab 6.47, page 740
Web capture produced to ASIC by Quattro on 18 December 2019	“ <i>minimum investment</i> ”, “ <i>minimum term</i> ”, “ <i>fixed rate of return</i> ”, “ <i>no setup or maintenance fees</i> ” and “ <i>covered by Government Financial Claims Scheme</i> ”.  [Note: Mayfair does not represent that their products are covered by the Government Financial Claims Scheme]	LS32 – First Saunders Affidavit	CB tab 6.32, page 560, 566
ASIC web capture dated 02/04/20		LS47 – First Saunders Affidavit	CB tab 6.47, page 741
Web capture produced to ASIC by Quattro on 18 December 2019	<u>M+ Fixed Income Notes</u> “ <i>If you are looking for a high yield term deposit or cash alternative for your idle money to keep ahead in this low rate environment</i> ”.	LS32 – First Saunders Affidavit	CB tab 6.32, page 561
	M+ Fixed Income Calculator	LS32 – First Saunders Affidavit	CB tab 6.32, page 562

Description	Statement	Evidence	Pinpoint Reference
	<u>M Core Fixed Income</u> the table of current rates and references to “ <i>term-based investment product</i> ” and “ <i>Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies</i> ”.	LS32 – First Saunders Affidavit	CB tab 6.32, page 563
	M Core Fixed Income Calculator	LS32 – First Saunders Affidavit	CB tab 6.32, page 564
	“ <i>term deposit and cash alternatives</i> ” and “ <i>fixed income product</i> ”.	LS32 – First Saunders Affidavit	CB tab 6.32, page 565
ASIC web capture dated 02/04/20	the reference to “ <i>M+ Fixed Income is an effective way of earning competitive rates of return whilst official interest rates, cash deposit rates and term deposit rates are at record-lows</i> ”.	LS47 – First Saunders Affidavit	CB tab 6.47, page 736
	references to “ <i>High yield term deposit alternatives</i> ”, “ <i>Cash alternatives</i> ” and “ <i>Fixed income products</i> ”.	LS47 – First Saunders Affidavit	CB tab 6.47, page 738
<i>Term Deposit Guide Website</i>			

Description	Statement	Evidence	Pinpoint Reference
Landing page live from 11 December 2019 produced to ASIC by Mayfair Wealth	<i>"If you are about to invest \$100k-\$5m in a term deposit and want more than 3% p.a. ... talk to us first!"</i>	LS58 – Third Saunders Affidavit	CB tab 13.2, page 1247
ASIC web capture dated 26/02/20	<i>"Join the hundreds of savvy Aussie investors that were tired of earning low interest rates on their term deposits, and have made the switch to boost their investment returns and upgrade their lifestyles"</i>	LS31 – First Saunders Affidavit	CB tab 6.31, page 555
ASIC web capture dated 27/03/20		LS46 – First Saunders Affidavit	CB tab 6.46, page 733
ASIC web capture dated 2/04/20		LS49 – First Saunders Affidavit	CB tab 6.49, page 752
ASIC web capture dated 26/02/20		the meta-title tag <i>"Term Deposit Rates – Best Term Deposit Options"</i>	LS31 – First Saunders Affidavit
Landing page live from 11 December 2019 produced to ASIC by Mayfair Wealth	<i>"Find out where Australian investors are parking their idle money to beat inflation and earn regular monthly income. Our dedicated Australia-based team has assisted hundreds of Australian investors, retirees, companies, individuals, and more, to earn a better yield on their money"</i>	LS58 – Third Saunders Affidavit	CB tab 13.2, page 1247
Landing page live from 11 December 2019 produced to ASIC by Mayfair Wealth	<i>"No setup fees" and "3 month – 5 year options" and the testimonial "We were looking for that "something" better</i>	LS58 – Third Saunders Affidavit	CB tab 13.2, page 1247

Description	Statement	Evidence	Pinpoint Reference
ASIC web capture dated 26/02/20	<i>than what the banks were offering, to look after our hard-earned cash ... and without hesitation will be rolling over</i>	LS31 – First Saunders Affidavit	CB tab 6.31, page 556
ASIC web capture dated 27/03/20		LS46 – First Saunders Affidavit	CB tab 6.46, page 734
ASIC web capture dated 2/04/20		LS49 – First Saunders Affidavit	CB tab 6.49, page 753, 754
Landing page live from 11 December 2019 produced to ASIC by Mayfair Wealth	<i>“Join the hundreds of savvy Aussie investors that were tired of earning low interest rates on their term deposits”</i>	LS58 – Third Saunders Affidavit	CB tab 13.2, page 1248
ASIC web capture dated 26/02/20		LS31 – First Saunders Affidavit	CB tab 6.31, page 557
ASIC web capture dated 27/03/20		LS46 – First Saunders Affidavit	CB tab 6.46, page 735
ASIC web capture dated 2/04/20		LS49 – First Saunders Affidavit	CB tab 6.49, page 754, 755
<i>M+ Fixed Income Notes brochure</i>			

Description	Statement	Evidence	Pinpoint Reference
Version 1 dated 03/07/19	<i>"A term-based investment opportunity"</i>	LS59 – Third Saunders Affidavit	CB tab 13.3, page 1249, 1250
Version 2A dated 31/07/19		LS60 – Third Saunders Affidavit	CB tab 13.4, page 1258, 1259
Version 2B dated 31/07/19		LS61 – Third Saunders Affidavit	CB tab 13.5, page 1267, 1268
Version 2C dated 31/07/19		LS62 – Third Saunders Affidavit	CB tab 13.6, page 1276, 1278
Version 3A dated 13/08/19		LS63 – Third Saunders Affidavit	CB tab 13.7, page 1285, 1286
Version 3B dated 13/08/19		LS64 – Third Saunders Affidavit	CB tab 13.8, page 1294, 1295

Description	Statement	Evidence	Pinpoint Reference
Version 3C dated 13/08/19		LS65 – Third Saunders Affidavit	CB tab 13.9, page 1303, 1304
Version 4 dated 27/08/19		LS66 – Third Saunders Affidavit	CB tab 13.10, page 1312, 1313
Version 6 dated 16/09/19		LS67 – Third Saunders Affidavit	CB tab 13.11, page 1321, 1322
Version 7 dated 1/10/19		LS68 – Third Saunders Affidavit	CB tab 13.12, page 1330, 1331
Version 8(2) dated 22/10/19		LS69 – Third Saunders Affidavit	CB tab 13.13, page 1339, 1340
Version 9 dated 6/11/19		LS70 – Third Saunders Affidavit	CB tab 13.14, page 1348, 1349

Description	Statement	Evidence	Pinpoint Reference
Version 10 dated 10/12/19		LS5 – First Saunders Affidavit	CB tab 6.5, page 205, 206
Version 1 dated 03/07/19	<p><i>“Tired of earning minimal interest on your idle cash?”</i>, <i>“Congratulations on taking the first step towards boosting the income-generating potential of your idle money”</i>, <i>“no setup or maintenance fees”</i>, <i>“fixed interest rates”</i>, <i>“monthly interest payments”</i> and the table of current rates</p>	LS59 – Third Saunders Affidavit	CB tab 13.3, page 1250
Version 2A dated 31/07/19		LS60 – Third Saunders Affidavit	CB tab 13.4, page 1259
Version 2B dated 31/07/19		LS61 – Third Saunders Affidavit	CB tab 13.5, page 1268
Version 2C dated 31/07/19		LS62 – Third Saunders Affidavit	CB tab 13.6, page 1277
Version 3A dated 13/08/19		<p><i>“Tired of term deposits?”</i>, <i>“Congratulations on taking the first step towards boosting the income-generating potential of your idle money”</i>, <i>“no setup or maintenance fees”</i>, <i>“fixed interest rates”</i>, <i>“monthly interest payments”</i> and the table of current rates</p>	LS63 – Third Saunders Affidavit
Version 3B dated 13/08/19	LS64 – Third Saunders Affidavit		CB tab 13.8, page 1295
Version 3C dated 13/08/19	LS65 – Third Saunders Affidavit		CB tab 13.9, page 1304

Description	Statement	Evidence	Pinpoint Reference
Version 4 dated 27/08/19		LS66 – Third Saunders Affidavit	CB tab 13.10, page 1313
Version 6 dated 16/09/19		LS67 – Third Saunders Affidavit	CB tab 13.11, page 1322
Version 7 dated 1/10/19		LS68 – Third Saunders Affidavit	CB tab 13.12, page 1331
Version 8(2) dated 22/10/19		LS69 – Third Saunders Affidavit	CB tab 13.13, page 1340
Version 9 dated 6/11/19		LS70 – Third Saunders Affidavit	CB tab 13.14, page 1349
Version 10 dated 10/12/19		LS5 – First Saunders Affidavit	CB tab 6.5, page 206
Version 1 dated 03/07/19	<i>“many M1 Notes investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts”</i>	LS59 – Third Saunders Affidavit	CB tab 13.3, page 1253



Description	Statement	Evidence	Pinpoint Reference
Version 2A dated 31/07/19		LS60 – Third Saunders Affidavit	CB tab 13.4, page 1261
Version 2B dated 31/07/19		LS61 – Third Saunders Affidavit	CB tab 13.5, page 1270
Version 2C dated 31/07/19		LS62 – Third Saunders Affidavit	CB tab 13.6, page 1279
Version 3A dated 13/08/19		LS63 – Third Saunders Affidavit	CB tab 13.7, page 1288
Version 3B dated 13/08/19		LS64 – Third Saunders Affidavit	CB tab 13.8, page 1297
Version 3C dated 13/08/19		LS65 – Third Saunders Affidavit	CB tab 13.9, page 1306
Version 4 dated 27/08/19	<i>“many M+ Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts”</i>	LS66 – Third Saunders Affidavit	CB tab 13.10, page 1315
Version 6 dated 16/09/19		LS67 – Third Saunders Affidavit	CB tab 13.11, page 1324

Description	Statement	Evidence	Pinpoint Reference
Version 7 dated 1/10/19		LS68 – Third Saunders Affidavit	CB tab 13.12, page 1333
Version 8(2) dated 22/10/19		LS69 – Third Saunders Affidavit	CB tab 13.13, page 1342
Version 9 dated 6/11/19		LS70 – Third Saunders Affidavit	CB tab 13.14, page 1351
Version 10 dated 10/12/19		LS5 – First Saunders Affidavit	CB tab 6.5, page 208
<b><i>M Core Fixed Income Notes Brochure</i></b>			
Version 1 dated 28/10/19	<i>"A term-based investment opportunity"</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1357
Version 2 dated 31/10/19		LS72 – Third Saunders Affidavit	CB tab 13.16, page 1366
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1375

Description	Statement	Evidence	Pinpoint Reference
Version 4 dated 10/12/19	<p><i>"Tired of term deposits? Activate your idle money and earn monthly distributions from a secured, asset-backed, term-based investment product", "Fixed interest rates", "Monthly interest payments" and "No setup or maintenance fees" as well as the current rates table</i></p>	LS74 – Third Saunders Affidavit	CB tab 13.18, page 1384
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 260
Version 1 dated 28/10/19		LS71 – Third Saunders Affidavit	CB tab 13.15, page 1358
Version 2 dated 31/10/19		LS72 – Third Saunders Affidavit	CB tab 13.16, page 1367
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1376
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1385
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 261

Description	Statement	Evidence	Pinpoint Reference
Version 1 dated 28/10/19	<i>"many M Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts"</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1360
Version 2 dated 31/10/19	<i>"many M Core Fixed Income investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts"</i>	LS72 – Third Saunders Affidavit	CB tab 13.16, page 1369
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1378
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1387
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 263
<b>Newspaper advertisements</b>			
<i>"It's Arrived – Introducing M Core Fixed Income"</i>	<i>"5.45% P.A. 12 months fixed rate"</i>  <i>"With interest rates at record lows and investor sentiment shifting away from traditional financial institutions towards non-bank fixed income providers".</i>  <i>"fixed monthly income", "fixed interest rates", "monthly interest payments available" and "no setup or maintenance fees".</i>	LS80 – Third Saunders Affidavit	CB tab 13.24, page 1414

Description	Statement	Evidence	Pinpoint Reference
<i>"Invest smarter – Why low interest rates are forcing investors to look beyond the banks"</i>	<i>"The RBA has held the official cash rate of interest at an all-time low of just 1.0% and thousands of Australian investors, including retirees, self-managed superannuation funds (SMSFs), companies and individuals, are now left stranded earning less than 2.0% on their idle cash".</i>	LS35 – First Saunders Affidavit	CB tab 6.35, page 599
<i>"Investing has changed – Why low interest rates are forcing investors to look beyond the banks"</i>	<i>"The shift towards non-bank alternatives" and "Low interest rates have resulted in much-needed innovation within the financial services industry to fill the gaps left by the banks, both in terms of investment products and also deployment of capital. Non-bank alternatives have created wide opportunities for investors and companies".</i>	LS76 – Third Saunders Affidavit	CB tab 13.20, page 1399
<i>"Invest where the top 1% do – Why low interest rates are forcing investors to look beyond the banks"</i>	<i>"term-based investment options" and "monthly interest payments".</i>	LS78 – Third Saunders Affidavit	CB tab 13.22, page 1406
<b><i>Email advertisements sent to subscribers of Switzer, Momentum Media, Nest Egg and/or Mayfair Platinum</i></b>			
<i>"Why low interest rates are forcing investors to look beyond the banks"</i> sent to subscribers during August 2019	<i>"The Reserve Bank of Australia has held the official cash rate of interest to an all-time low of just 1.0%. This means that thousands of Australian investors – including retirees, self-managed superannuation funds (SMSFs), companies and individuals are now left stranded earning less than 2.0% on their idle cash" and "Mayfair Platinum ... have developed our product offering to cater to investors seeking income-producing alternatives in the low-rate environment"</i>	LS102 – Third Saunders Affidavit	CB tab 13.46, page 1521
<i>"Get ahead in this low interest rate environment and earn a fixed rate of 6.45% p.a. for a 6-month investment period"</i> sent to subscribers during September 2019	<i>"Get your money working harder for you and make the switch. 6 month fixed rate of return 6.45% PA", "Fixed interest rates from 3.75%-6.45% p.a.", "investment terms for 3, 6, 12, 24 &amp; 60 months", "no setup or maintenance fees" and "monthly income distributions available"</i>	LS103 – Third Saunders Affidavit	CB tab 13.47, page 1523

Description	Statement	Evidence	Pinpoint Reference
"The new face of investment – Mayfair Platinum" sent to subscribers during October 2019	"Experience the new face of investment and get ahead in this low interest rate environment with access to income-generating investments", "investment term" and "fixed interest rate" as well as the table of current rates	LS104 – Third Saunders Affidavit	CB tab 13.48, page 1525
"It's Arrived – Introducing M Core Fixed Income" email sent to subscribers during November 2019	"With interest rates at record lows and investors sentiment shifting away from traditional financial institutions toward fixed income providers", "M Core Fixed income provides fixed monthly income at competitive interest rates backed by dollar-for-dollar security", "fixed interest rates", "monthly interest payments" and "no setup or maintenance fees"	LS105 – Third Saunders Affidavit	CB tab 13.49, page 1527, 1528
"It's Arrived – Introducing M Core Fixed Income" email sent to subscribers during November 2019	"M Core Fixed Income is a smart way to earn a competitive yield on idle money in the current low interest environment", "investment term", "standard fixed interest rate" and "promotional rates" as well as the table of rates	LS106 – Third Saunders Affidavit	CB tab 13.50, page 1530, 1531
<b>Sponsored Link Internet Advertising</b>			
Web capture of Google search results - search term "term deposits" 13/12/19	"Term Deposit Alternative – 3.65%-6.45% Fixed Rates" and "Term Deposit Calculator".	LS82 – Third Saunders Affidavit	CB tab 13.26, page 1422
Web capture of Google search results – search term "term deposit" 24/01/20	"Term Deposit Alternative – 3.65% - 6.45% Fixed Rates" "Term Deposit Alternative – We are shaking up the industry"	LS26 – First Saunders Affidavit	CB tab 6.26, page 542
Web capture of Google search results – search term "term deposit" 29/01/20	"Term Deposit Alternative – 3.65%-6.45% Fixed Rates" and "Calculator"	LS83 – Third Saunders Affidavit	CB tab 13.27, page 1425

Description	Statement	Evidence	Pinpoint Reference
	<i>"Term Deposit Alternative – We are shaking up the industry"</i>		
Web capture of Google search results – search term "Mayfair Platinum" 06/02/20	<i>"Mayfair Platinum – Try a Term Deposit Alternative"</i>	<b>LS29</b> - First Saunders Affidavit	CB tab 6.29, page 550
Web capture of Google search results – search "term deposits" 21/02/20	<i>"Term Deposits Rates Low? – Earn 3%+ PA. Setup in 24 hours"</i> <i>"Term Deposit Alternative – 3.65% to 6.45% Fixed Rates"</i>	<b>LS27</b> – First Saunders Affidavit	CB tab 6.27, page 544
Web capture of Google search results – search "bank term deposits" 21/02/20	<i>"Term Deposits Rates Low? – Earn 3%+ PA. Setup in 24 hours"</i> <i>"Tired of Term Deposits? – Looking For A Better Rate?"</i>	<b>LS28</b> – First Saunders Affidavit	CB tab 6.28, page 547
Web capture of Bing search results – search "term deposit" 25/02/20	<i>"Term Deposit Guide – Tired of Lousy Term Deposits?"</i>	<b>LS84</b> – Third Saunders Affidavit	CB tab 13.28, page 1428
Web capture of Bing search results – search "bank term deposits" 27/03/20	<i>"Term Deposit Guide – Tired of Lousy Term Deposits?"</i>	<b>LS85</b> – Third Saunders Affidavit	CB tab 13.29, page 1431
Web capture of Bing search results – search "term deposits" 27/03/20	<i>"Term Deposits – Term Deposit Guide – Get Term Deposits 3% + P.A."</i>	<b>LS86</b> – Third Saunders Affidavit	CB tab 13.30, page 1435

Description	Statement	Evidence	Pinpoint Reference
Web capture of Bing search results – search “term deposits” 27/03/20	“ <i>Term Deposit Guide – Your Path to Better Returns</i> ”	LS30 – First Saunders Affidavit	CB tab 6.30, page 4612
<i>‘Adwords’ or keywords via Google AdWords</i>			
Mayfair Group’s Search Keyword Report for June 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Deposit interest rates</i></li> <li>4. <i>Deposit rates</i></li> <li>5. <i>Deposit account</i></li> <li>6. <i>Deposit accounts</i></li> <li>7. <i>Cash investments</i></li> <li>8. <i>Bank deposit</i></li> <li>9. <i>Fixed term.</i></li> </ol>	LS87 – Third Saunders Affidavit	CB tab 13.31, page 1438
Mayfair Group’s Search Keyword Report for July 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Bank deposit</i></li> <li>4. <i>Deposit rates</i></li> <li>5. <i>Deposit interest rates</i></li> <li>6. <i>Deposit accounts</i></li> <li>7. <i>Cash investments</i></li> <li>8. <i>Fixed term.</i></li> </ol>	LS88 - Third Saunders Affidavit	CB tab 13.32, page 1446
Mayfair Group’s Search Keyword Report for August 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Deposit accounts</i></li> <li>4. <i>Deposit rates</i></li> <li>5. <i>Deposit interest rates</i></li> <li>6. <i>Bank deposit</i></li> <li>7. <i>Cash investments</i></li> </ol>	LS89 – Third Saunders Affidavit	CB tab 13.33, page 1454



Description	Statement	Evidence	Pinpoint Reference
	8. <i>Fixed term.</i>		
Mayfair Group's Search Keyword Report for September 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Fixed deposit</i></li> <li>4. <i>Deposit rates</i></li> <li>5. <i>Deposit interest rates</i></li> <li>6. <i>Deposit accounts</i></li> <li>7. <i>Bank deposit</i></li> <li>8. <i>Cash investments</i></li> <li>9. <i>Fixed term.</i></li> </ol>	LS90 – Third Saunders Affidavit	CB tab 13.34, page 1462
Mayfair Group's Search Keyword Report for October 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Deposit</i></li> <li>4. <i>Deposits</i></li> <li>5. <i>Deposit rates</i></li> <li>6. <i>Deposit interest rates</i></li> <li>7. <i>Deposit accounts</i></li> <li>8. <i>Bank deposit</i></li> <li>9. <i>Cash investments</i></li> <li>10. <i>Fixed term.</i></li> </ol>	LS91 – Third Saunders Affidavit	CB tab 13.35, page 1469
Mayfair Group's Search Keyword Report for November 2019	<ol style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Bank deposit</i></li> <li>4. <i>Deposit</i></li> <li>5. <i>Deposits</i></li> <li>6. <i>Deposit rates</i></li> <li>7. <i>Deposit interest rates</i></li> <li>8. <i>Deposit accounts</i></li> </ol>	LS92 – Third Saunders Affidavit	CB tab 13.36, page 1477

Description	Statement	Evidence	Pinpoint Reference
	<ul style="list-style-type: none"> <li>9. <i>Savings</i></li> <li>10. <i>Savings account</i></li> <li>11. <i>Saving interest rates</i></li> <li>12. <i>High interest savings</i></li> <li>13. <i>High yield savings</i></li> <li>14. <i>Cash investments</i></li> <li>15. <i>Term investments</i></li> <li>16. <i>Fixed income</i></li> <li>17. <i>Fixed term.</i></li> </ul>		
Mayfair Group's Search Keyword Report for December 2019	<ul style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Savings account</i></li> <li>4. <i>Savings interest rates</i></li> <li>5. <i>High yield savings</i></li> <li>6. <i>Bank deposit</i></li> <li>7. <i>Deposit interest rates</i></li> <li>8. <i>Deposit rates</i></li> <li>9. <i>Deposit accounts</i></li> <li>10. <i>Fixed deposit rates</i></li> <li>11. <i>Cash investments</i></li> <li>12. <i>Term investments</i></li> <li>13. <i>Fixed income</i></li> <li>14. <i>Fixed term.</i></li> </ul>	LS93 – Third Saunders Affidavit	CB tab 13.37, page 1496
Mayfair Group's Search Keyword Report for January 2020	<ul style="list-style-type: none"> <li>1. <i>Term deposit</i></li> <li>2. <i>Term deposits</i></li> <li>3. <i>Bank deposit</i></li> <li>4. <i>Deposit rates</i></li> <li>5. <i>Deposit interest rates</i></li> <li>6. <i>Interest rates</i></li> </ul>	LS25 – First Saunders Affidavit	CB tab 6.25, page 526

Description	Statement	Evidence	Pinpoint Reference
	<ul style="list-style-type: none"> <li>7. <i>Savings interest rates</i></li> <li>8. <i>Savings account</i></li> <li>9. <i>Cash investments</i></li> <li>10. <i>High yield savings</i></li> <li>11. <i>Term investments</i></li> <li>12. <i>Fixed income</i></li> <li>13. <i>Fixed deposit rates</i></li> <li>14. <i>Fixed term.</i></li> </ul>		
<b><i>'Adwords' or keywords via Bing Ads</i></b>			
Bing Keyword Report for June 2019	<ul style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ul>	LS94 - Third Saunders Affidavit	CB tab 13.38, page 1513
Bing Keyword Report for July 2019	<ul style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ul>	LS95 – Third Saunders Affidavit	CB tab 13.39, page 1514
Bing Keyword Report for August 2019	<ul style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ul>	LS96 – Third Saunders Affidavit	CB tab 13.40, page 1515

Description	Statement	Evidence	Pinpoint Reference
Bing Keyword Report for September 2019	<ol style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ol>	LS97 – Third Saunders Affidavit	CB tab 13.41, page 1516
Bing Keyword Report for October 2019	<ol style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ol>	LS98 – Third Saunders Affidavit	CB tab 13.42, page 1517
Bing Keyword Report for November 2019	<ol style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ol>	LS99 – Third Saunders Affidavit	CB tab 13.43, page 1518
Bing Keyword Report for December 2019	<ol style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> <li>4. <i>Deposit account</i></li> <li>5. <i>Deposit interest</i></li> <li>6. <i>Deposit rates.</i></li> </ol>	LS100 – Third Saunders Affidavit	CB tab 13.44, page 1519
Bing Keyword Report for January 2020	<ol style="list-style-type: none"> <li>1. <i>Bank deposit</i></li> <li>2. <i>Term deposit</i></li> <li>3. <i>Term deposits</i></li> </ol>	LS101 – Third Saunders Affidavit	CB tab 13.45, page 1520

Description	Statement	Evidence	Pinpoint Reference
	4. <i>Deposit account</i> 5. <i>Deposit interest</i> 6. <i>Deposit rates.</i>		

### Repayment Representation

*\*Also refer to the table regarding the Bank Term Deposit Representation, the No Risk of Default Representation and the Security Representation.*

Description	Statement	Evidence	Pinpoint Reference
<i>M+ Fixed Income Notes brochure</i>			
Version 1 dated 03/07/19	<i>"Is the Issuer's Investment performance tied to my returns?            No. Unlike a Managed Investment Scheme, the Issuer is            obligated to pay the quoted rates of interest and principal on            M1 Notes, regardless of the performance of its investments"</i>	LS59 – Third Saunders Affidavit	CB tab 13.3, page 1252
Version 2A dated 31/07/19		LS60 – Third Saunders Affidavit	CB tab 13.4, page 1261
Version 2B dated 31/07/19		LS61 – Third Saunders Affidavit	CB tab 13.5, page 1270
Version 2C dated 31/07/19		LS62 – Third Saunders Affidavit	CB tab 13.6, page 1279
Version 3A dated 13/08/19		LS63 – Third Saunders Affidavit	CB tab 13.7, page 1288

Description	Statement	Evidence	Pinpoint Reference
Version 3B dated 13/08/19	<p><i>“Are my returns tied to the Issuer’s investment performance? No. The Issuer is obligated to pay the quoted rates of interest and principal on the M+ Fixed Income product, regardless of the performance of its investments”</i></p>	LS64 – Third Saunders Affidavit	CB tab 13.8, page 1297
Version 3C dated 13/08/19		LS65 – Third Saunders Affidavit	CB tab 13.9, page 1306
Version 4 dated 27/08/19		LS66 – Third Saunders Affidavit	CB tab 13.10, page 1315
Version 6 dated 16/09/19		LS67 – Third Saunders Affidavit	CB tab 13.11, page 1324
Version 7 dated 1/10/19		LS68 – Third Saunders Affidavit	CB tab 13.12, page 1333
Version 8(2) dated 22/10/19		LS69 – Third Saunders Affidavit	CB tab 13.13, page 1342
Version 9 dated 6/11/19		LS70 – Third Saunders Affidavit	CB tab 13.14, page 1351
Version 10 dated 10/12/19		LS5 – First Saunders Affidavit	CB tab 6.5, page 208

Description	Statement	Evidence	Pinpoint Reference
<b><i>M Core Fixed Income Notes Brochure</i></b>			
Version 1 dated 28/10/19	<i>"Are my returns tied to the Issuer's investment performance? No. The issuer is obligated to pay the quoted rates of interest and principal on the M Fixed Income product, regardless of the performance of its investments"</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1360
Version 2 dated 31/10/19	<i>"Are my returns tied to the Issuer's investment performance? No. The issuer is obligated to pay the quoted rates of interest and principal on the M Core Fixed Income product, regardless of the performance of its investments"</i>	LS72 – Third Saunders Affidavit	CB tab 13.16, page 1369
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1378
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1387
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 263

**No Risk of Default Representations**

Description	Statement	Evidence	Pinpoint Reference
<b><i>Mayfair 101 Group corporate brochure</i></b>			

Description	Statement	Evidence	Pinpoint Reference
Mayfair 101 Group corporate brochure	<p><i>"Mayfair 101 provides a selection of investment banking-style services that build value for shareholders and investors ... providing consistent, reliable investor returns"</i></p> <p><i>"we aim to deliver consistent, reliable returns to our investors and clients"</i></p> <p><i>"Mayfair 101's model has proven itself as a reliable alternative to the banks in generating returns for investors against this sustained backdrop of low interest rates in Australia and the UK" and "Mayfair 101's strength lies in our investment banking-style ecosystem, commitment to consistent, reliable returns for investors"</i></p> <p><i>"... Mayfair 101's investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments. By investing with Mayfair Platinum, Mayfair 101's investor facing division, qualified investors can gain access to ..."</i></p>	LS34 – First Saunders Affidavit	CB tab 6.34, page 590, 591, 592, 594
<b>Newspaper advertisements</b>			
<i>"Invest smarter – Why low interest rates are forcing investors to look beyond the banks"</i>	<i>"Mayfair Platinum is also focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence".</i>	LS35 – First Saunders Affidavit	CB tab 6.35, page 599
<i>"Investing has changed – Why low interest rates are forcing investors to look beyond the banks"</i>		LS76 – Third Saunders Affidavit	CB tab 13.20, page 1399
<i>"Invest where the top 1% do – Why low interest"</i>		LS78 – Third Saunders Affidavit	CB tab 13.22, page 1406



Description	Statement	Evidence	Pinpoint Reference
<i>rates are forcing investors to look beyond the banks”</i>			
<i>Auto-responder emails sent to investors submitting an enquiry via the Mayfair Platinum or Term Deposit Guide website</i>			
From 28 August 2019	<i>“earn better rates of return on their idle money by focusing on certainty, transparency, and exceptional customer service”</i>	LS107 – Third Saunders Affidavit	CB tab 13.51, page 1533
From 7 August 2019		LS108 – Third Saunders Affidavit	CB tab 13.52, page 1535

#### Security Representation

Description	Statement	Evidence	Pinpoint Reference
<i>M Core Fixed Income Notes Brochure</i>			
Version 1 dated 28/10/19	<i>“A secured, asset-backed, term-based investment opportunity exclusively available to wholesale investors”</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1357
Version 2 dated 31/10/19		LS72 – Third Saunders Affidavit	CB tab 13.16, page 1366
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1375
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1384

Description	Statement	Evidence	Pinpoint Reference
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 260
Version 1 dated 28/10/19	<i>“a secured, asset-backed, term-based investment product”</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1358
Version 2 dated 31/10/19		LS72 – Third Saunders Affidavit	CB tab 13.16, page 1367
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1376
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1385
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 261
Version 1 dated 28/10/19	<i>“Supported by first-ranking, unencumbered asset security (see FAQs)”</i>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1358
Version 2 dated 31/10/19		LS72 – Third Saunders Affidavit	CB tab 13.16, page 1367

Description	Statement	Evidence	Pinpoint Reference
Version 3 dated 6/11/19		LS73 – Third Saunders Affidavit	CB tab 13.17, page 1376
Version 4 dated 10/12/19		LS74 – Third Saunders Affidavit	CB tab 13.18, page 1385
Version 5 dated 12/10/19		LS10 – First Saunders Affidavit	CB tab 6.10, page 261
Version 1 dated 28/10/19	<p><i>“How is the M Fixed Income product secured?”</i></p> <p><i>The M Fixed Income product is secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer’s dedicated M Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.</i></p> <p><i>A third party security trustee, PAG Holdings Australia Pty Ltd, (ACN 636 870 963, AFSL Auth. Rep. No. 001278649) of Perpetuity Capital Ltd (ABN 60 149 630 973, AFSL 405364), as trustee of the Mayfair Platinum Secured Notes Security Trust, administers the secured pool of collateral assets on behalf of investors, and the assets are revalued at</i></p>	LS71 – Third Saunders Affidavit	CB tab 13.15, page 1360

Description	Statement	Evidence	Pinpoint Reference
	<i>least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Fixed Income notes."</i>		
Version 2 dated 31/10/19	<i>"How is the M Core Fixed Income product secured?</i>	<b>LS72</b> – Third Saunders Affidavit	CB tab 13.16, page 1369
Version 3 dated 6/11/19	<i>The M Core Fixed Income product is secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer's dedicated M Core Fixed</i>	<b>LS73</b> – Third Saunders Affidavit	CB tab 13.17, page 1378
Version 4 dated 10/12/19	<i>Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.</i>	<b>LS74</b> – Third Saunders Affidavit	CB tab 13.18, page 1387
Version 5 dated 12/10/19	<i>A third party security trustee, PAG Holdings Australia Pty Ltd, (ACN 636 870 963, AFSL Auth. Rep. No. 001278649) of Perpetuity Capital Ltd (ABN 60 149 630 973, AFSL 405364), as trustee of the Mayfair Platinum Secured Notes Security Trust, administers the secured pool of collateral assets on behalf of investors, and the assets are revalued at least yearly to ensure dollar-for-dollar secured asset support for each dollar of M Core Fixed Income notes."</i>	<b>LS10</b> – First Saunders Affidavit	CB tab 6.10, page 263
<b>Mayfair Platinum Website</b>			
Web capture produced by Quattro Capital Group Pty Ltd to ASIC on 18/12/19	<i>"a secured, asset-backed, term-based investment product"</i>	<b>LS32</b> – First Saunders Affidavit	CB tab 6.32, page 559, 563
ASIC web capture dated 02/04/20		<b>LS47</b> – First Saunders Affidavit	CB tab 6.47, page 740

Description	Statement	Evidence	Pinpoint Reference
Web capture produced by Quattro Capital Group Pty Ltd to ASIC on 18/12/19	<i>"Secured by a collateral asset pool" and "Dollar-for-dollar secured asset backing"</i>	LS32 – First Saunders Affidavit	CB tab 6.32, page 560, 566
ASIC web capture dated 02/04/20		LS47 – First Saunders Affidavit	CB tab 6.47, page 741
<b>Newspaper advertisements</b>			
<i>"It's Arrived – Introducing M Core Fixed Income"</i>	<i>"a new investment product that caters to investors seeking a strong yield from a secured investment product"</i>  <i>"M Core Fixed income provides a fixed monthly income at competitive interest rates backed by dollar-for-dollar security over assets held by the Mayfair 101 Group of companies"</i>  <i>"Secured with dollar-for-dollar asset backing"</i>  <i>"Supported by first-ranking security"</i>	LS80 – Third Saunders Affidavit	CB tab 13.24, page 1414
<b>Email advertisements sent to subscribers of Switzer, Momentum Media, Nest Egg and/or Mayfair Platinum</b>			
<i>"It's Arrived – Introducing M Core Fixed Income"</i> email sent to subscribers during November 2019	<i>"a new investment product that caters to investors seeking a strong yield from a secured investment product"</i>  <i>"M Core Fixed income provides a fixed monthly income at competitive interest rates backed by dollar-for-dollar security over assets held by the members of the Mayfair 101 Group of companies"</i>	LS105 – Third Saunders Affidavit	CB tab 13.49, page 1527
<i>"It's Arrived – Introducing M Core Fixed Income"</i> email		LS106 – Third Saunders Affidavit	CB tab 13.50, page 1530

Description	Statement	Evidence	Pinpoint Reference
sent to subscribers during November 2019	<i>"Supported by first-ranking, otherwise unencumbered asset security".</i>		

