

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Kaur [2023] FCA 599

File number: WAD 293 of 2020

Judgment of: **JACKSON J**

Date of judgment: 7 June 2023

Catchwords: **CORPORATIONS** - operation of unregistered managed investment scheme in contravention of s 601ED(5) of the *Corporations Act 2001* (Cth) - carrying on financial services business without an Australian Financial Services Licence in contravention of s 911A of the *Corporations Act* - investor funds advanced in the form of loans - investor funds were to be pooled and invested into real property projects managed by second defendant - some investor funds or scheme property used by first defendant for benefit of herself and other defendants - many investors not repaid - capital invested likely to have been lost - fourth defendant as director of second defendant breached duty of care and diligence - parties have agreed to entry of judgment against defendants and to facts of contravening conduct - winding up unregistered managed investment scheme - disqualification from managing corporations - appointment of receivers

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) Division 1, Part 3  
*Corporations Act 2001* (Cth) ss 9, 19, 180, 206C, 206G, 459B, 461, 464, 601ED, 601EE, 761E, 763A, 763B, 764A, 766A, 766B, 766C, 911A, 1101B, 1311, 1317E, 1317H, 1317J, 1323, 1324  
*Evidence Act 1995* (Cth) s 191  
*Superannuation Industry (Supervision) Act 1993* (Cth) s 10

Cases cited: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405  
*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234  
*Australian Securities and Investments Commission v Adler* [2002] NSWSC 483  
*Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* [2005] NSWSC 1065  
*Australian Securities and Investments Commission v Hutchings* [2001] NSWSC 522

*Australian Securities and Investments Commission v Managed Investments Ltd (No 10)* [2017] QSC 96  
*Australian Securities and Investments Commission v Marco (No 6)* [2020] FCA 1781  
*Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052  
*Australian Securities and Investments Commission v McDougall* [2006] FCA 427  
*Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035  
*Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310  
*Australian Securities and Investments Commission v White* [2006] VSC 239  
*Australian Securities and Investments Commission v Woolridge* [2019] FCAFC 172  
*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  
*Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438  
*Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited* [2010] FCA 58; (2010) 183 FCR 10  
*Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106  
*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129  
*Sheahan v Verco* [2001] SASC 91; (2001) 79 SASR 109

Division: General Division  
Registry: Western Australia  
National Practice Area: Commercial and Corporations  
Sub-area: Corporations and Corporate Insolvency  
Number of paragraphs: 58  
Date of hearing: Determined on the papers  
Counsel for the Plaintiff: Mr J Moore SC with Ms S Hooper  
Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendants: Mr H West

Solicitor for the Defendants: Hall & Wilcox

# ORDERS

WAD 293 of 2020

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

**AND:**                **MONICA KAUR**  
First Defendant

**MKS PROPERTY INVESTMENTS DEVELOPMENTS PTY  
LTD (ACN 120 157 002)**  
Second Defendant

**PARADISE PROPERTY GROUP PTY LTD (ACN 150 632 303)**  
Third Defendant

**SADU SINGH**  
Fourth Defendant

**MELVIN PAUL SINGH**  
Fifth Defendant

**STEPHANIE POH KIM LEE**  
Sixth Defendant

**ORDER MADE BY: JACKSON J**

**DATE OF ORDER: 7 JUNE 2023**

## THE COURT NOTES THAT:

- A. For the purposes of these orders, 'the **Scheme**' means the unregistered managed investment scheme operated by the first and second defendants, whereby between at least 1 March 2017 and 16 December 2020:
- (a) the first and second defendants obtained monies from investors;
  - (b) the first and second defendants pooled that money in bank accounts, including the following accounts:
    - (i) Bendigo & Adelaide Bank account [redacted];
    - (ii) Bendigo & Adelaide Bank account [redacted];
    - (iii) Commonwealth Bank of Australia account [redacted]; and
    - (iv) Commonwealth Bank of Australia account [redacted];

- (c) the first and second defendants represented and/or agreed with investors that the monies were to be invested into real property projects managed by the second defendant;
- (d) the investors did not have day to day control over the use of the monies;
- (e) the first and second defendants represented and/or agreed with investors that in return for advancing monies, investors would receive a right to interest payments;
- (f) the second defendant was to use the monies to purchase, develop and sell real property, with a view to generating a profit, out of which interest payments were to be paid to investors; and
- (g) the first defendant distributed the monies to:
  - (i) the second defendant for the purchase, development and sale of real property;
  - (ii) related parties, including the third, fifth and sixth defendants; and
  - (iii) herself and the fourth defendant for personal use.

**THE COURT DECLARES THAT:**

1. The first and second defendants, by operating the Scheme, contravened the provisions of s 911A(1) and s 911A(5B) of the *Corporations Act 2001* (Cth) in that each carried on a financial services business without holding an Australian Financial Services Licence (AFSL) in the period between at least 1 March 2017 and 16 December 2020.
2. The first and second defendants operated the Scheme in contravention of s 601ED(5) and s 601ED(8) of the *Corporations Act*, in circumstances where the Scheme was required to be registered under s 601EB of the *Corporations Act* in the period between at least 1 March 2017 and 16 December 2020.
3. The first defendant, by advising clients to set up self-managed superannuation funds (SMSF) with the view of the SMSF investing monies with the second defendant and earning a fee for that advice, contravened the provisions of s 911A(1) and s 911A(5B) of the *Corporations Act* in that she carried on a financial services business without holding an AFSL in the period between at least 1 March 2017 and 16 December 2020.

4. The fourth defendant, by deferring all matters regarding the affairs of the second defendant to the first defendant, contravened the provisions of s 180(1) of the *Corporations Act* in the period between at least 1 March 2017 and 16 December 2020.

## THE COURT ORDERS THAT:

### Receivership

5. Pursuant to s 1101B(1) and s 1323(1)(h) of the *Corporations Act*, David Hodgson and Andrew Hewitt, of Grant Thornton, be appointed as joint and several receivers and managers (**Receivers**), without security, of all property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, of:
  - (a) the first and fourth defendants; and
  - (b) the Scheme;including, for the avoidance of doubt, the Commonwealth Bank account held in the name of the fifth defendant the account number for which ends in #1240 (**Account #1240**), the Commonwealth Bank account held in the name of the sixth defendant the account number for which ends in #4312 (**Account #4312**), and the property located at 4 Karimba Street Wanneroo in the name of the fifth defendant (**Karimba St**) (together, the **Property**).
6. Each of the first and fourth defendants are to immediately give over possession of all their property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, together with all books and records relating to that property, to the Receivers.
7. Each of the fifth and sixth defendants are to immediately give all books and records relating to Account #4312 and Account #1240 to the Receivers.
8. The fifth defendant is to, on request of the Receivers, do all things necessary to effect the transfer to, and the taking of possession by, the Receivers of Karimba St, together with all books and records relating to Karimba St.
9. The Receivers have the following powers:
  - (a) the power to do all things necessary or convenient to be done, in Australia and elsewhere, for or in connection with, or as incidental to the attainment of the objectives for which the Receivers are appointed including, without limitation,

for the identification, preservation and securing of all of the Property for the benefit of creditors;

- (b) the powers under s 1101B(8) of the *Corporations Act* provided that wherever in that section the word 'financial services licensee' appears, it shall be taken to refer to the first defendant, the fourth defendant and the Scheme;
  - (c) the powers set out in s 420 of the *Corporations Act* provided that wherever in that section the word 'corporation' appears, it shall be taken to refer to the first defendant, the fourth defendant and the Scheme;
  - (d) the power to require, by request in writing, the first defendant and fourth defendant and any employee, agent, banker, solicitor, stockbroker, accountant, consultant or other professionally qualified person who has provided services or advice to the first defendant or the fourth defendant to provide such reasonable assistance (including access to any documents, books or records to which the first and fourth defendants have a right of access or control) to the Receivers as may be required from time to time.
10. Upon being called upon to do so, the Receivers must deliver up that part of the Property that is property of the Scheme to the liquidators appointed pursuant to paragraph 19 below.

### **Receivership remuneration and indemnity**

- 11. The Receivers shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Receivers, together with all costs, expenses and disbursements.
- 12. The Receivers' remuneration is to be calculated on the basis of time reasonably spent by the Receivers and any partner or employee of the firm to which the Receivers are attached, at the standard rates of the Receivers' firm from time to time for work of that nature.
- 13. The Receivers' remuneration, costs, expenses and disbursements are to be paid from the Property.
- 14. The Receivers be indemnified from the Property against any claim, liability, proceeding, cost, charge or expense however arising and whether past, present or future,

fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.

15. The above orders are not to affect the rights of any prior encumbrancer over the Property, including the rights of any secured creditor.
16. For the avoidance of doubt, the entitlement of the Receivers to be paid or indemnified from the Property pursuant to the orders above is not restricted or in any way limited by whether they are acting as receivers of property of the first defendant, the fourth defendant or the Scheme and they are entitled to treat the Property as a single combined pool of property for those purposes.

### **Winding up orders**

17. Pursuant to s 601EE(2) of the *Corporations Act*, the Scheme be wound up.
18. Pursuant to s 461(1)(k) of the *Corporations Act*, the second defendant be wound up.
19. Pursuant to s 472(1) of the *Corporations Act*, the Receivers be appointed as joint and several liquidators (**Liquidators**) of:
  - (a) the Scheme; and
  - (b) the second defendant.
20. The asset preservation orders made on 16 December 2020 (as varied from time to time) in respect of the first, second and fourth defendants be vacated on the appointment of the Liquidators pursuant to paragraph 19 and the appointment of Receivers pursuant to paragraph 5.
21. Pursuant to s 601EE(2) of the *Corporations Act*, and subject to any further orders of the Court:
  - (a) the winding up of the Scheme be conducted as if the Scheme were a 'company' or 'corporation' for the purposes of the *Corporations Act* and the provisions of Parts 5.4B, 5.6, 5.7B and 5.9 of the *Corporations Act* and Schedule 2 to the *Corporations Act (Insolvency Practice Schedule (Corporations))* applied to the winding up (with such modifications as are reasonably necessary in the circumstances);
  - (b) the Liquidators of the Scheme have power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with the winding



up of the Scheme, or incidental to the attainment of the winding up of the Scheme, including the functions and powers set out in Chapter 5 of the *Corporations Act* (as applicable) as if each reference there to a 'company' or 'corporation' was a reference to the Scheme (with such modifications as are reasonably necessary in the circumstances); and

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

### **Liquidation remuneration and indemnity orders**

- 22. The Liquidators shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Liquidators, together with all costs, expenses and disbursements.
- 23. The Liquidators' remuneration is to be calculated on the basis of time reasonably spent by the Liquidators and any partner or employee of the firm to which the Liquidators are attached, at the standard rates of the Liquidators' firm from time to time for work of that nature.
- 24. The Liquidators' remuneration, costs, expenses and disbursements are to be paid out of the assets of the Scheme and/or the second defendant.
- 25. The Liquidators be indemnified from the assets of the Scheme (including the Property) and the second defendant against any claim, liability, proceeding, cost, charge or expense however arising and whether past, present or future, fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.
- 26. The above orders are not to affect the rights of any prior encumbrancer over the assets of the Scheme, including the rights of any secured creditor.
- 27. For the avoidance of doubt, the entitlement of the Liquidators to be paid or indemnified from the assets of the Scheme pursuant to the orders above is not restricted or in any way limited by whether they are acting as liquidators of the Scheme or the second defendant and they are entitled to treat the assets of the Scheme as a single combined pool of assets for those purposes.

## **Injunctive relief**

28. The first defendant be permanently restrained from:
- (a) carrying on a financial services business in Australia; and
  - (b) operating an unregistered managed investment scheme in contravention of s 601ED(5) of the *Corporations Act*.

## **Disqualification order**

29. Pursuant to s 206C of the *Corporations Act*:
- (a) the first defendant be disqualified from managing corporations for life with effect from the date of this order.
  - (b) the fourth defendant be disqualified from managing corporations for 15 years from the date of this order.

## **Asset preservation orders**

30. Paragraphs 6 and 7 made on 16 December 2020 (**Principal Orders**) (as varied from time to time) against the third, fifth and sixth defendant are vacated.
31. Until further order of the Court, pursuant to s 1323 of the *Corporations Act* and s 23 of the *Federal Court of Australia Act 1976* (Cth):
- (a) the third defendant is to hold the amount of \$80,000 in the ANZ Bank account held in its name, the account number for which ends in #3206, and is restrained from withdrawing, transferring or otherwise disposing of or dealing with those monies;
  - (b) subject to paragraph 32 below, the fifth defendant (by himself, his related entities or agent) is restrained from dealing in any property (as defined in the *Corporations Act*) in which he has any legal or equitable interest as at the date of this order, including, the property located at 3 Nelson Street, Inglewood and shares in Melvin Singh Super Pty Ltd and Auspicious Finance Pty Ltd (the **Melvin Singh Property**) by:
    - (i) removing, or causing or permitting the Melvin Singh Property to be removed from Australia;
    - (ii) selling, charging, mortgaging or otherwise dealing with, disposing of and/or diminishing the value of the Melvin Singh Property;

- (iii) causing or permitting to be sold, charged, mortgaged or otherwise dealt with, disposed of, or diminish the value of the Melvin Singh Property;
  - (iv) without limiting the terms of sub-paragraphs (i) to (iii) above, incurring new liabilities after the date of this order that are secured against the Melvin Singh Property including, without limitation, liabilities incurred either directly or indirectly, through the use of a credit facility, a drawdown facility or a re-draw facility against the Melvin Singh Property; and
  - (v) without limiting the terms of sub-paragraphs (i) to (iv) above, withdrawing, transferring or otherwise disposing of or dealing with, any monies available in any account with any bank, building society or other financial institution (in Australia and elsewhere) as at the date of this order;
- (c) the fifth defendant is to deposit the net proceeds of the sale of the business of Penguin (WA) Pty Ltd into a bank account in his name, which is subject to the above sub-paragraph (b); and
- (d) the sixth defendant (by herself or her agent) is restrained from withdrawing, transferring or otherwise disposing of or dealing with, any monies available in any account with any bank, building society or financial institution in Australia, in which she has any legal or equitable interest as at the date of this order.

32. Paragraph 31(b) above does not:

- (a) apply to property (as defined in the *Corporations Act*) purchased, secured or otherwise obtained by the fifth defendant after the date of this order;
- (b) apply to any income, salary, bonus, dividends or interest or any other amount distributed to, or received or earned by the fifth defendant after the date of this order;
- (c) prevent the fifth defendant from opening a new bank account;
- (d) prevent the fifth defendant from causing Penguin (WA) Pty Ltd to complete the sale of its business;
- (e) prevent any bank, building society or financial institution from exercising any right of set-off which it may have in respect of a facility afforded by it to each or any of the defendants prior to the date of this order;

- (f) prevent the fifth defendant from incurring any liability after the date of this order;
- (g) prevent the fifth defendant offering any property (as defined in the *Corporations Act*) purchased, secured or otherwise obtained by the fifth defendant after the date of this order as security for any liability;
- (h) apply to any dealing in any property (as defined in the *Corporations Act*) of the third defendant or Futuristic Construction Pty Ltd (**Company Property**);
- (i) prevent the third defendant or Futuristic Construction Pty Ltd from, or prevent the fifth defendant from causing or being involved in the third defendant or Futuristic Construction Pty Ltd:
  - (i) removing, or causing or permitting any Company Property to be removed from Australia;
  - (ii) selling, charging, mortgaging or otherwise dealing with, disposing of and/or diminishing the value of any Company Property;
  - (iii) causing or permitting to be sold, charged, mortgaged or otherwise dealt with, disposed of, or diminish the value of any Company Property;
  - (iv) incurring new liabilities including, without limitation, liabilities incurred either directly or indirectly, through the use of a credit facility, a drawdown facility or a re-draw facility against any Company Property;
  - (v) withdrawing, transferring or otherwise disposing of or dealing with, any monies available in any account with any bank, building society or other financial institution (in Australia and elsewhere); or
  - (vi) paying income, salaries, bonuses, dividends or interest to any person; or
- (j) prevent MPS (WA) Pty Ltd as trustee for the MPS Trust from, or the fifth defendant from being involved in, distributing to any beneficiary of the MPS Trust any dividends or other amounts paid to MPS (WA) Pty Ltd as trustee for the MPS Trust by the third defendant or Futuristic Construction Pty Ltd.

### **Costs**

33. The first, second and fourth defendants pay the plaintiff's costs of the proceedings, as taxed or agreed.

## Other

34. The plaintiff must provide to the Receivers/Liquidators all documents obtained by the plaintiff during its investigations, including but not limited to:
- (a) documents produced to the plaintiff in response to notices issued pursuant to s 19, s 30 and s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*);
  - (b) transcripts of examinations conducted by staff of the plaintiff pursuant to s 19 of the *ASIC Act*; and
  - (c) (to the extent permitted, reasonable and/or appropriate) documents otherwise produced voluntarily to the plaintiff during its investigations or obtained by the plaintiff through the exercise of some other power.
35. The Receivers, the Liquidators and the parties have liberty to apply.

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

## REASONS FOR JUDGMENT

### JACKSON J:

- 1 In this case the first defendant, Monica Kaur, gave advice to potential investors which, in many cases, led them to do two things. The first was to set up their own self-managed superannuation funds (**SMSFs**) and to roll funds from existing superannuation accounts and other sources into those SMSFs. The second thing Ms Kaur advised investors to do was to use the funds so gathered to invest with a company she controlled, the second defendant, **MKS Property Investments Developments Pty Ltd**. Funds were to be pooled with the funds of other investors and invested in property development. The investors were to be paid a fixed return on the funds they invested, under instruments characterised as loan agreements, with the fixed return characterised as interest.
- 2 Over \$10 million was invested in this way. Some investors have been repaid but many more have not. For those in the latter class, most of the capital invested is likely to have been lost. The chances of recovery of any funds have been significantly reduced by the failure of Ms Kaur and MKS to keep proper financial records. That is exacerbated by the fact that Ms Kaur used investor funds for her own benefit and for the benefit of members of her family. The retirement savings of hundreds of people are likely to have been impacted. All the while, Ms Kaur and MKS received over \$1 million in fees for the advice and services they provided.
- 3 The plaintiff (**ASIC**) brought this proceeding alleging that in giving that advice and in operating the scheme that has been described (**Scheme**), Ms Kaur and MKS were carrying on a financial services business without the necessary Australian Financial Services Licence (**AFSL**), and were operating an unregistered managed investment scheme in breach of s 601ED of the *Corporations Act 2001* (Cth). The third defendant, Paradise Property Group Pty Ltd, is a company controlled by the fifth defendant, Ms Kaur's son Melvin Singh. Paradise Property Group and Melvin Singh are defendants because they appear to have received investor funds or property that was acquired with such funds. The fourth defendant, Sadu Singh, is Ms Kaur's husband and is presently the sole director of MKS. He holds 50% of the issued shares in MKS, with Ms Kaur holding the other 50%. ASIC claims that Sadu Singh left all of the affairs of MKS to Ms Kaur, and so breached s 180(1) of the *Corporations Act*, which imposes a duty of care and diligence on the directors of corporations. The sixth defendant, Stephanie Lee, is Ms Kaur's daughter and appears to have received a gift of investor funds.

4 ASIC and the defendants have agreed on the orders that are appropriate to be made to resolve the proceeding. With one exception, I have decided to make the orders largely in the terms sought. The orders appear at the beginning of these reasons. In summary, they include:

- (a) declarations of contravention;
- (b) the appointment of receivers and managers over the property of Ms Kaur, Sadu Singh and the Scheme;
- (c) the winding up of the Scheme and of MKS, with the persons to be appointed as receivers also to be appointed as liquidators;
- (d) disqualification of Ms Kaur for life and Sadu Singh for 15 years from managing corporations (this is the exception, in that ASIC seeks disqualification of Sadu Singh, effectively, for life);
- (e) a permanent injunction restraining Ms Kaur from carrying on a financial services business in Australia and from operating an unregistered managed investment scheme in contravention of s 601ED(5) of the *Corporations Act*; and
- (f) vacation or in some cases modification of asset preservation orders and travel restraint orders which the Court made at the outset of the proceeding.

5 The essential principles that govern the Court's approach to consent orders in these circumstances were conveniently summarised by Gordon J in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [70]-[73]. Importantly, even though the parties may have reached agreement, the Court must still be satisfied that the orders are within its power and appropriate to make: *Coles* at [71]. But once so satisfied, the Court should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where (as here) all parties are legally represented: *Coles* at [72]. There is a well-recognised public interest in the settlement of cases in circumstances such as these: see *Coles* at [70]. The Court is also entitled to treat the consent of the defendants as an admission of all facts necessary or appropriate to the granting of the relief sought against them: *Coles* at [73]. The grant of declarations of contravention on the application of ASIC can serve an important law enforcement purpose: *ASIC v McDougall* [2006] FCA 427 at [55] (Young J).

6 In order to assist the Court to decide the matter in accordance with these principles, the parties have provided a statement of agreed facts under s 191 of the *Evidence Act 1995* (Cth) and joint submissions and joint supplementary submissions. While the Court is not required to accept the statement of agreed facts uncritically, in this case I do accept it as proof of the facts it

contains. It is credible and cogent and its effect is that evidence to prove those facts is not necessary: *Evidence Act* s 191(2); and see *Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited* [2010] FCA 58; (2010) 183 FCR 10 at [35] (Stone J). The statement of agreed facts is annexed to these reasons and I will not describe the facts in detail save as necessary to resolve the particular issues addressed below. The overview given at the beginning of these reasons is sufficient to indicate the nature of the conduct which ASIC impugns and which the defendants accept breached the *Corporations Act*.

7 I turn now to consider a number of specific questions raised by the orders the parties seek.

### **Did Ms Kaur and MKS operate a managed investment scheme?**

8 Section 601ED(1)(a) of the *Corporations Act* relevantly requires a managed investment scheme to be registered if it has more than 20 members. Section 601ED(5) prohibits a person from operating a managed investment scheme in a relevant jurisdiction unless it is registered. To do so is an offence, and contravention of s 601ED(5) is also a contravention of s 601ED(8), which is a civil penalty provision: s 1311(1); s 1317E. The statement of agreed facts establishes that neither Ms Kaur nor MKS registered any managed investment scheme. But were they operating one in the first place?

9 Section 9 of the *Corporations Act* relevantly defines 'managed investment scheme' (in paragraph (a) of the definition) as a scheme that has the following features:

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

10 On one view, the way in which investors contributed funds as summarised above does not give rise to a scheme with all of these features. That is because the advances they made can be characterised as individual loans to MKS rather than 'contributions': see *ASIC v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035 at [64] (Derrington J). A private loan by one person suggests an independent act as compared with where a contribution is made,



suggesting a collective act: *MyWealth* at [64]. On this view, a managed investment scheme may not exist here if investors are perceived as having made independent, private loans.

11 Nevertheless, the legal form of the manner in which funds are provided is not determinative. In *ASIC v Hutchings* [2001] NSWSC 522, Windeyer J found that a managed investment scheme existed in a situation where the people operating it obtained funds by borrowing money from members of the public at very high interest rates. The features of the scheme that persuaded his Honour that it met the definition included that the investors were told that their contributions would be pooled and used in a common enterprise to provide financial benefits to them. The lenders had no control over the operation of the scheme. So the criteria in paragraphs (ii) and (iii) of the definition were met. The question, then, was whether the investors had contributed their money as consideration to acquire rights to benefits produced by the scheme, that is, whether the criterion in paragraph (i) was satisfied. Windeyer J was persuaded that they had because '[s]o far as the lenders were concerned the feature of the scheme was that they would receive rights to interest produced by the scheme of pooled borrowings, which borrowings were able to be invested so as to produce remarkable returns owing to the skill of Hutchings': *Hutchings* at [13]. In other words, there was a link between the returns to be produced by the use that was to be made of the pooled funds, and the interest that was to be payable to the individual investors: see also *ASIC v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310 at [27]-[31] (Davies AJ).

12 I am satisfied that there was also such a link here. The statement of agreed facts establishes that the essence of the Scheme was that MKS pooled funds from investors, it then used the money to develop property, and the investors collected a guaranteed return, for example 20% paid at maturity. The purpose of the investors' advances of funds was to produce financial benefits from various property development projects which were used to pay those guaranteed returns. The link between the returns and the profits to be earned from the property developments was made explicit. For example, in 2017 Ms Kaur gave an interview published on the internet in which she said that (statement of agreed facts para 11(c)):

what she 'basically' did was 'pool in funds from investors, either cash or from their self-managed superannuation funds. I then use the money to do property developments. I do all the work and my investors just collect a guaranteed [return] of 12 per cent per annum'.

13 It does not matter that the investors did not have a legally enforceable right to a direct share in the benefits produced by the property developments; paragraph (i) of the definition of 'managed

investment scheme' makes it clear that the 'right' in question need not be enforceable. I am satisfied that what was being promised to investors from the Scheme was, in substance, a right to participate at fixed rates of return in the profits to be earned from property developments that were conducted with investors' pooled funds. That is so even though the instrument the investors signed characterised their legally enforceable right to a return as a right to interest on a loan.

- 14 The Scheme therefore satisfies the definition of managed investment scheme. By operating the Scheme without being registered, Ms Kaur and MKS breached s 601ED(5). The parties seek a declaration of contravention of that subsection, but it is not a civil penalty provision (instead, contravention of it is an offence under s 1311(1)). Section 601ED(8) is the civil penalty provision in s 601ED, although (perhaps confusingly), it is contravened if a person contravenes s 601ED(5). That is, the substantive obligation appears in s 601ED(5), but a contravention of that is also a contravention of s 601ED(8), and only s 601ED(8) is a civil penalty provision. Section 1317E(1) and s 1317E(2) are quite specific in requiring the Court to make a declaration of contravention if it is satisfied that a civil penalty provision has been contravened, and in requiring the Court to specify the civil penalty provision that has been contravened. As a result, the declaration the parties seek will be modified, slightly, to declare that MKS and Ms Kaur contravened s 601ED(8) as well as s 601ED(5).

#### **Did MKS and Ms Kaur carry on a financial services business?**

- 15 A person who carries on a financial services business in the jurisdiction must hold an AFSL covering the provision of financial services: *Corporations Act* s 911A(1). Failure to comply is an offence (s 1311(1)) and a contravention of s 911A(1) is a contravention of s 911A(5B), which is a civil penalty provision: see s 1317E.
- 16 MKS and Ms Kaur did not have any AFSL. But the question of whether they carried on a financial services business requires consideration of a notoriously dense tangle of defined terms found in Chapter 7 of the *Corporations Act*.
- 17 A person provides a financial service if they, amongst other things, provide financial product advice or deal in a financial product: s 766A(1). Section 766B(1) provides that a person gives financial product advice if they recommend or state an opinion which is 'intended to influence a person ... in making a decision in relation to a particular financial product' or could reasonably be regarded as intending to have such an influence. It can be personal or general advice: s 766B(2).

18 A financial product is a facility through which, or through the acquisition of which, a person, relevantly, makes a financial investment: s 763A(1)(a). Section 763B provides that a person makes a financial investment if:

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

19 Section 764A(1)(ba) specifically includes in the meaning of 'financial product' an interest in an unregistered managed investment scheme.

20 Section 764A(1)(g) also specifically includes a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)* as a financial product. A superannuation interest is a beneficial interest in a superannuation entity: s 10 *SIS Act*. A superannuation entity means, relevantly, a 'regulated superannuation fund' which has the meaning given by s 19: s 10 *SIS Act*.

21 A person deals in a financial product, amongst other things, if they issue a financial product: *Corporations Act* s 766C, s 761E.

22 The statement of agreed facts establishes that Ms Kaur advised hundreds of people to establish SMSFs and that nearly 300 people acted on that advice. It can be inferred that those SMSFs were regulated superannuation funds within the meaning of the *SIS Act*, so that what Ms Kaur was doing was recommending that people acquire a financial product, namely an interest in a superannuation entity. She was thereby carrying on a financial services business, without an AFSL. She also advised investors to acquire financial products comprised of interests in the Scheme.

23 Further, MKS carried on a financial services business because it dealt in financial products. It issued interests in the Scheme, which were facilities through which persons made financial

investments as defined above, and were also financial products by reason of the specific inclusion of interests in unregistered managed investment schemes in the definitions of that term. As MKS's controlling mind, Ms Kaur carried on a financial services business in the same way.

24 The declarations sought by ASIC as to contraventions of s 911A of the *Corporations Act* are appropriate to be made. For reasons similar to those given in relation to s 601ED, the declarations sought by the parties will be modified slightly so that it is contraventions of s 911A(1) and s 911A(5B), the latter being the civil penalty provision, that are declared.

### **Should the Scheme be wound up?**

25 Section 601EE of the *Corporations Act* provides that if a person operates a managed investment scheme in contravention of s 601ED(5), ASIC (among others) may apply to the Court to have the scheme wound up. ASIC has so applied here. On such an application, the Court may make any orders it considers appropriate for the winding up of the scheme.

26 It is appropriate to wind the Scheme up here. The statement of agreed facts establishes that:

- (a) the Scheme has been operating unlawfully because it was not registered;
- (b) the solvency of the Scheme is doubtful - MKS still owes investors over \$6 million, where its only assets are approximately \$220,000 in cash and any directors' loans owed by Ms Kaur and Sadu Singh which are undocumented and unquantified. Ms Kaur's and Sadu Singh's realisable assets may amount to about \$1.3 million net of debts;
- (c) Ms Kaur employed investor funds contributed to the Scheme for her own personal benefit and for the benefit of Sadu Singh, Melvin Singh and Ms Lee, and so (to put it mildly) she cannot be trusted to account properly for the remaining investor funds and property acquired with those funds;
- (d) Ms Kaur and MKS did not keep adequate financial records; and
- (e) ASIC seeks to wind up MKS, which (adopting a charitable approach to assessing the regularity of the legal underpinnings of the Scheme) can be called the 'responsible entity' of the Scheme.

27 In *ASIC v Marco (No 6)* [2020] FCA 1781 at [135], McKerracher J considered it was appropriate to make orders for the orderly cessation of a scheme and an associated company because of the persistence and seriousness of the contraventions; an evident shortfall in investor funds; the absence of any reasonably foreseeable prospect of a significant return to investors;

evidence of related party and personal expenditure from investor funds; and deficiencies in record keeping as to investor entitlements. All of these matters are also evident in the Scheme here.

28 Largely for the reasons just given, it can readily be inferred that there is no prospect that the Scheme could be regularised and then carried on lawfully and profitably. The best prospect for any return to investors is to wind it up and so place it in the hands of the same persons who are to act as liquidators of MKS and receivers and managers of relevant property of the defendants. Orders to wind up the Scheme are appropriate and will be made.

### **Should MKS be wound up?**

29 In circumstances in which ASIC is investigating, or has investigated the affairs of a company, under Division 1 of Part 3 of the *Australian Securities and Investments Commission Act 2001* (Cth), ASIC may apply to the Court for the winding up of the company: s 464 *Corporations Act*. The precondition of an ASIC investigation is satisfied here. ASIC seeks the winding up of MKS pursuant to s 459B and s 461(1)(k). MKS consents to the making of such an order.

30 Section 459B provides that where, on application under s 464, the Court is satisfied that the company is insolvent, the Court may order that the company be wound up in insolvency. Section 461(1)(k) is the just and equitable ground.

31 In my view it is not necessary to reach any conclusions about whether MKS should be wound up in insolvency, as there is ample basis to wind it up on the just and equitable ground. The categories of circumstances that will justify such an order are not closed but it is well established that one such circumstance is where there is a justifiable lack of confidence in the conduct and management of the company's affairs and so a risk to the public interest that warrants protection. This can include a lack of confidence in the propensity of the controllers of the company to comply with obligations such as keeping proper books and records: see *ASIC v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234 at [19]-[21] (Gordon J).

32 The facts set out in the statement of agreed facts lead inexorably to the conclusions that the Court lacks confidence in those who managed, or should have managed, MKS, namely Ms Kaur and Sadu Singh, and that the protection of the public interest requires that MKS be wound up. Subject to one further comment, I accept the parties' joint submission that this is because (para 74):

- (a) MKS has been operating unlawfully, by conducting an unregistered managed investment scheme;
- (b) MKS is more probably than not insolvent;
- (c) its sole director, [Sadu] Singh, accepts he is not a fit and proper person to manage corporations (having effectively abdicated his role as director during the Period, while MKS contravened various statutory provisions);
- (d) MKS' controlling mind, Kaur, and the only person genuinely familiar with its affairs, also accepts she is not a fit and proper person to manage corporations (given the various wrongful conduct outlined in the SOAF);
- (e) if the Court is minded to make the orders otherwise contemplated by the proposed minute of order, MKS will be without a director, or any viable replacement director, upon [Sadu] Singh and Kaur's disqualification from managing corporations indefinitely;
- (f) it is appropriate to have the affairs and true financial position of MKS investigated by an independent professional acting in the best interests of MKS' creditors, including the Investors;
- (g) the liquidation of MKS may allow Investors (whose funds MKS might otherwise not be obliged to repay for a significant period of time) to secure the return of those Investor Funds which remain at the earliest opportunity by seeking to prove in MKS' liquidation.

33 The further comment is that the disqualification of the directors for any significant period of time will provide at least part of the basis for a just and equitable winding up where, as here, there are no candidates to replace them, and certainly no appropriate ones. The disqualification need not be 'indefinite'. Whether it is appropriate to order indefinite disqualification is addressed immediately below.

34 It will obviously be convenient to appoint as liquidators of MKS the same persons who are to be liquidators of the Scheme and receivers and managers of relevant property.

**For what periods should Ms Kaur and Sadu Singh be disqualified?**

35 ASIC applies for orders disqualifying Ms Kaur and Sadu Singh from managing corporations 'for an indefinite period'. Ms Kaur and Sadu Singh consent to this.

36 Section 206C of the *Corporations Act* provides that on application by ASIC, 'the Court may disqualify a person from managing corporations for a period that the Court considers appropriate' if, relevantly, a declaration is made under s 1317E that the person has contravened a corporations/scheme civil penalty provision, and the Court is satisfied that the disqualification is justified: s 206C.

37 Under s 1317E(3) of the *Corporations Act*, s 601ED(8) is a corporations/scheme civil penalty provision. Ms Kaur's contravention of s 601ED(8) means that the Court has power to disqualify her if it is satisfied that the disqualification is justified.

38 As for Sadu Singh, the joint submissions submit that he contravened s 180(1), which is also a corporations/scheme civil penalty provision. That provision obliged him, as a director and later as sole director of MKS, to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise in the circumstances. The statement of agreed facts establishes that Sadu Singh took no part in the management of MKS despite his role as director. He did not monitor or supervise Ms Kaur. Reliance on another to perform tasks is only reasonable where there are sufficient monitoring systems in place so as to be aware of possible internal irregularities: *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 at 500-501 (Clarke and Sheller JJA). It is never acceptable to blindly delegate responsibility: see *Sheahan v Verco* [2001] SASC 91; (2001) 79 SASR 109 at [101], [105] (Mullighan J). I am satisfied that Sadu Singh contravened s 180(1) of the *Corporations Act*. Under s 1317E, a declaration of that contravention must be made. The first precondition for disqualification of Sadu Singh under s 206C is satisfied; as in the case of Ms Kaur, the Court must consider whether the disqualification is justified.

39 The seriousness of Ms Kaur's and Sadu Singh's respective contraventions of the *Corporations Act* mean that some period of disqualification is justified. But I do not consider that it is appropriate to disqualify them for 'an indefinite period', that being the wording of the order sought. That is vague and ambiguous. There are several cases, however, in which persons have been disqualified permanently or for life, so I proceed on the basis that an order to that effect can be made: see *ASIC v White* [2006] VSC 239 at [17], [29]-[43]; *ASIC v Maxwell* [2006] NSWSC 1052; *ASIC v Managed Investments Ltd (No 10)* [2017] QSC 96; *ASIC v Elm Financial Services Pty Ltd* [2005] NSWSC 1065. Such an order would always be subject to the ability of the disqualified person to apply to the Court for leave to manage corporations or corporations of a particular class or particular corporations: s 206G.

40 The main factors that a court will take into account in determining the appropriate period of disqualification are itemised in Santow J's well-known judgment in *ASIC v Adler* [2002] NSWSC 483 at [56], and there is no need to set them out here. I will refer to them below to the extent that they are relevant when assessing the appropriate periods of disqualification. However two general observations of principle are worth making at the outset.

41 First, although it is often said that the purpose of the power to disqualify persons from managing corporations is to protect the public, that cannot be the only purpose behind it, in view of the way the courts have approached the power. If the purpose were purely protective, it would be difficult to explain why in most cases disqualification orders are made for fixed periods, not permanently: see *Rich v ASIC* [2004] HCA 42; (2004) 220 CLR 129 at [41]-[42] (McHugh J). If the public needs to be protected against the way that a person manages corporations now, it is difficult to see how that need, or the person, will change after 5, 10 or 15 years, say. In most cases of this kind, prospects of reform or rehabilitation are not considered. As Windeyer J observed in *Hutchings* at [20], while there remained a risk that the defendants in that case may use the corporate veil to engage in activities bringing harm to members of the public, there was no logical reason to think a disqualification period of say 5 or 10 years would be appropriate.

42 The second observation is that, when a law enforcement agency such as ASIC and defendants present agreed disqualification orders, the first function of the Court is not to decide what period is appropriate. It is to decide whether the periods proposed by the parties are within a range of appropriate outcomes. Only if the Court decides that they are not will it be necessary for it to decide what period is appropriate. In that sense, the approach to agreed disqualification orders is the same as the approach to agreed penalty orders as laid down in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [46]; see also *ASIC v Woolridge* [2019] FCAFC 172 at [18]-[22].

43 With those principles in mind, I am satisfied that the proposed period of disqualification of Ms Kaur, for an 'indefinite period' which I take to be equivalent to disqualification for life, is within the range of appropriate periods. Her conduct was very serious and very damaging to many members of the public. She advised hundreds of people, supposedly about what was in their best financial interests, but in fact she induced them to provide money to a venture she controlled and from which she benefitted. The benefit she gained was partly by reason of her unauthorised use of some of the money obtained, not for the venture but for her own personal benefit and that of members of her family. That fell well short of generally accepted standards of honesty and financial probity. All of this was done in complete disregard of important laws as to the licensing of persons giving financial advice and the registration of managed investment schemes. This disregard continued even after ASIC warned Ms Kaur in correspondence, twice, that she may have been breaching the law.



44 The venture into which Ms Kaur directed investor funds was risky and speculative as is shown by the likelihood that most if not all of the funds of many of the investors have been lost. Inadequate record keeping and a lack of controls over what was done with the funds are likely to exacerbate the losses and the difficulty of making any recovery on behalf of investors. The losses are going to be in the millions of dollars and are likely to impact on the retirement savings of many individuals. Ms Kaur's activities were thus activities undertaken in a field in which there was potential to do great financial damage. It is not clear whether Ms Kaur shows any contrition or remorse for all of this, although I do take into account the fact that she appears to have cooperated with ASIC at least since this proceeding was commenced. I also take into account that there is no evidence of any financial or corporate misfeasance on her part before she started to operate the Scheme.

45 These matters taken together show that disqualification of Ms Kaur for life from managing corporations is within the range of appropriate disqualification orders, and an order to that effect will be made.

46 Despite the agreed position of the parties that Sadu Singh should also be disqualified 'for an indefinite period', in my view his case is different. To be sure, his conduct, or the lack of any conduct, in leaving the management of MKS to Ms Kaur was a serious default of his duties of care and diligence as a director. His failure to prevent Ms Kaur from doing what she did has contributed to the serious damage to the retirement savings of many individuals which is mentioned above. A significant period of disqualification is appropriate. But there is a real difference between his neglect, as lamentable as it was, and the active misfeasance of Ms Kaur. The parties submit that she was the controlling mind of MKS at all times and the individual through whom it engaged in all wrongdoing. She is the one who dealt with all the investors and potential investors. There is no evidence of what Sadu Singh knew about what she was doing or evidence of the opportunity he had to prevent it. There is no evidence that Sadu Singh was knowingly involved in Ms Kaur's misfeasance. There is no evidence that he acted dishonestly.

47 Having regard to the objectives of general and specific deterrence in disqualification orders (see *Adler* at [56]) it is appropriate to mark the lesser seriousness of Sadu Singh's conduct when compared to that of Ms Kaur with a lesser period of disqualification. I do not consider that disqualification for life is within the range of appropriate penalties for Sadu Singh's breach of duties of care and diligence.

48 It is necessary, then, to decide what period of disqualification is justified. I take account of all the matters just mentioned, as well as the fact that, no doubt as a result of negotiation, the parties do not seek any pecuniary penalty against Sadu Singh, and the lack of any evidence that Sadu Singh will suffer hardship as a result of the disqualification. On the other hand, I also take account of his cooperation with ASIC since the proceeding was commenced, albeit in the absence of evidence of contrition or remorse. In my view, a period of disqualification of 15 years is justified. I have taken into account that, despite some contradictory evidence, it appears that Sadu Singh was born in 1961 and is almost 62 years old. A period of disqualification of 15 years means that he will be almost 77 years old when the disqualification order lifts. So while the disqualification is not for life, I have taken into account the fact that Sadu Singh may be of relatively advanced age by the time the disqualification expires.

### **Injunction against Ms Kaur**

49 ASIC also seeks an order under s 1324 of the *Corporations Act* that Ms Kaur be permanently restrained from carrying on a financial services business in Australia, and from operating an unregistered managed investment scheme in contravention of s 601ED(5). In view of the seriousness of her misconduct it is appropriate to protect the public by making these orders on a permanent basis. While the latter part of the order will prohibit conduct that is already unlawful, it is appropriate to add the possible sanction of contempt of court. McKerracher J made similar orders in *Marco (No 6)*: see at [122].

50 However there is one point of difference between the injunction in *Marco (No 6)* and the one in this case. The order McKerracher J made prohibited the carrying on of a financial services business in Australia without holding an AFSL - conduct that would be unlawful anyway - whereas here ASIC seeks an order restraining Ms Kaur from carrying on a financial services business in Australia in any circumstances. An order of that kind can be characterised as a financial services disqualification order; there is power to make it under s 1324 and the principles that apply to disqualification orders under s 206C can also be applied to orders of this kind: see *Re Idylic Solutions Pty Ltd; ASIC v Hobbs* [2013] NSWSC 106 at [91], [103] (Ward JA, as she then was).

51 The matters considered in relation to the disqualification of Ms Kaur from managing corporations apply equally in relation to the effective disqualification from carrying on a financial services business which ASIC seeks against her. The egregious nature of her conduct,

the need to protect the public from such conduct and the other matters canvassed above justify a permanent restraint. An injunction in the terms proposed by the parties will be made.

### **Receivers**

52 It is appropriate to appoint receivers to the property of Ms Kaur, Sadu Singh and the Scheme and to make ancillary delivery up orders against Melvin Singh and Ms Lee. The Court has power to appoint receivers under s 1101B of the *Corporations Act*, which provides that the Court may make such orders as it thinks fit if, among other things, on the application of ASIC it appears to the Court that a person has contravened a provision of Chapter 7 or any other law relating to dealing in financial products or providing financial services: s 1101B(1)(a)(i). The power to appoint receivers extends, at least, to the property of Ms Kaur and the Scheme since Ms Kaur has breached s 911A, which is in Chapter 7, and MKS, as the only possible other person operating the Scheme, has also breached that provision.

53 However, Sadu Singh has not been found to have breached any provision of Chapter 7, nor has there been any submission that the provision he has breached, s 180, is a law relating to dealing in financial products or providing financial services. It is not immediately apparent that s 1101B authorises the appointment of receivers over the property of a person who has not breached a provision or law of that kind. I have not received any submissions as to the application of s 1101B in relation to Sadu Singh, and in the absence of full submissions, I am not prepared to rely on it for the appointment of receivers over his property.

54 Nevertheless, s 1323(1)(h) empowers the Court to appoint receivers over Sadu Singh's property, he being a person against whom a civil proceeding has been commenced by ASIC: s 1323(1)(c). Section 1323 authorises the appointment of receivers (among other orders) to the property of such a person where the Court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person, to whom the first person is liable or may be or may become liable to pay money, including by way of damages or compensation. MKS is such an aggrieved person in relation to Sadu Singh. His breach of s 180 has exposed the company to possible liabilities to investors and other persons, and therefore MKS may have a claim against him for compensation orders: s 1317H(1) and s 1317J(2). It is in the interests of MKS to preserve Sadu Singh's property by the appointment of receivers over it. As such, I will make orders for the appointment of receivers over Sadu Singh's property pursuant to s 1323(1)(h) of the *Corporations Act*.

55 It will be open to the receivers, consistently with the purpose of their appointment over Sadu Singh's property, to preserve and administer that property harmoniously with the duties and objectives attendant on the other appointments that will be effected by the orders to be made. But if, for any reason, the fact that the appointment is made under s 1323 rather than s 1101B prejudices the receivers' performance of their duties or, ultimately, the interests of the investors, it will be open to ASIC or the receivers to revisit the statutory basis of the appointment under the liberty to apply that will be conferred by the orders.

56 As mentioned above, the statement of agreed facts establishes a high degree of likelihood that the property to be covered by the receivership orders was acquired through the use of investor funds. It will be convenient and helpful in the overall task of dismantling the Scheme and attempting to recover investor funds to give the people who are to be appointed liquidators of MKS and the Scheme suitable powers over that property as well: see *Marco (No 6)* at [132].

#### **Asset preservation orders**

57 ASIC also seeks asset preservation orders under s 1323 of the *Corporations Act* in respect of property of Paradise Property Pty Ltd, Melvin Singh and Ms Lee. There is evidence that they may have received some investor funds. The asset preservation orders sought are less restrictive than those currently in place and the relevant defendants have consented to them. It is appropriate to make them in order to give the liquidators and receivers time to investigate what may have become of investor funds and whether recovery action should be taken.

#### **Conclusion**

58 Orders as set out at the beginning of this judgment will be made.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate:



Dated: 7 June 2023

## Annexure



Federal Court of Australia  
District Registry: Western Australia  
Division: General

No. WAD 293 of 2020

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

**MONICA KAUR** and others named in the schedule

Defendants

### STATEMENT OF AGREED FACTS

Pursuant to section 191 of the *Evidence Act 1995* (Cth), each of the parties agree the following facts for the purposes of this proceeding.

#### A. PARTIES

1. The plaintiff (**ASIC**) is a body corporate:
  - (a) established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth);
  - (b) continued by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
  - (c) able to sue in its corporate name by reason of s 8 of the ASIC Act.
2. The first defendant (**Kaur**):
  - (a) was a director of the second defendant (**MKS**) between:
    - i. 13 June 2006 and 11 August 2009;
    - ii. 15 September 2011 and 16 January 2017; and
    - iii. 3 April 2018 and 5 February 2020;<sup>1</sup>

<sup>1</sup> Affidavit of Lauren Creary affirmed 4 August 2021 (**Creary Affidavit**), [14(a)] KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2 to the Creary Affidavit ("**LJC-2**")).

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission		
Prepared by (name of person/lawyer)	Ingrid McCormick		
Tel	[redacted]	Fax	N/A
Email	[redacted]		
<b>Address for service</b>	Level 1, 11 Mounts Bay Road PERTH WA 6000		

- (b) holds and at all material times held 50% of the shares on issue in MKS;<sup>2</sup>
- (c) is and was at all material times the controlling mind of MKS;<sup>3</sup>
- (d) was a director of the third defendant (**Paradise Property**) between 28 April 2011 and 18 July 2019;<sup>4</sup>
- (e) held 60% of the shares on issue in Paradise Property until 18 July 2019<sup>5</sup>;
- (f) is the wife of the fourth defendant (**Singh**);<sup>6</sup>
- (g) is the mother of the fifth defendant (**Melvin Singh**)<sup>7</sup> and the sixth defendant (**Lee**);<sup>8</sup>
- (h) is the aunt of Jaswinderjit Kaur, who was a director of MKS between:<sup>9</sup>
  - i. 15 September 2015 and 27 June 2016;
  - ii. 18 July 2016 and 16 January 2017;
- (i) resides with Singh and Melvin Singh;<sup>10</sup> and
- (j) does not hold and has never held an Australian financial services (**AFS**) licence, nor been appointed as an authorised representative under an AFS licence.<sup>11</sup>

3. MKS:

- (a) stands for Monica Kaur Sadu;<sup>12</sup>
- (b) was incorporated on 13 June 2006;<sup>13</sup>
- (c) has and at all material times had two shareholders, Kaur and Singh, who each hold 50% of the shares on issue in MKS;<sup>14</sup>
- (d) has since 5 February 2020 had as its sole director Singh;<sup>15</sup>
- (e) carries and at all material times carried on business in property investment and development;<sup>16</sup>
- (f) manages properties located at 69 and 77 Vaucluse Circuit, Belmont WA;<sup>17</sup> and

<sup>2</sup> Creary Affidavit, [15]; KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>3</sup> Creary Affidavit, [45].

<sup>4</sup> Creary Affidavit, [20]; KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2).

<sup>5</sup> Creary Affidavit, KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2) 60,000 of 100,000 shares on issue.

<sup>6</sup> Creary Affidavit, [13]; KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2)

<sup>7</sup> Creary Affidavit, [43].

<sup>8</sup> Creary Affidavit, [22].

<sup>9</sup> Creary Affidavit, [14(b)]; KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>10</sup> Creary Affidavit, [43].

<sup>11</sup> Creary Affidavit, [46].

<sup>12</sup> Creary Affidavit, [45(e)].

<sup>13</sup> Creary Affidavit, [11] KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>14</sup> Creary Affidavit, [15] KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>15</sup> Creary Affidavit, [13], KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>16</sup> Creary Affidavit, [47], [64(b)]. KAU.0003.0001.0007 (Tab 14 of exhibit LJC-2); KAU.0003.0001.1719 (Tab 15 of exhibit LJC-2)

- (g) does not hold and has never held an AFS licence, nor been appointed as an authorised representative under an AFS licence.<sup>18</sup>
4. Paradise Property:
- (a) was incorporated on 28 April 2011;<sup>19</sup>
  - (b) until 18 July 2019 had two shareholders, Kaur and Singh, who held 60 and 40 per cent of the shares on issue in Paradise Property respectively;<sup>20</sup>
  - (c) since 18 July 2019 has had a single shareholder, MPS (WA) Pty Ltd (ACN 627 110 892) (MPS), of which Melvin Singh is the sole director and shareholder;<sup>21</sup>
  - (d) has since 18 July 2019 had as its sole director Melvin Singh;<sup>22</sup>
  - (e) carries and at all material times carried on a real estate business, involving the sale and leasing of real property and property management;<sup>23</sup> and
  - (f) was the vehicle used to sell property developed as part of the "Scheme" (as that term is defined in paragraph 19 below).<sup>24</sup>
5. Singh:
- (a) has since 5 February 2020 been the sole director of MKS, and was at all material times a director of MKS;<sup>25</sup>
  - (b) holds and at all material times held 50% of the shares on issue in MKS;<sup>26</sup>
  - (c) is the husband of Kaur;<sup>27</sup>
  - (d) is the stepfather of Melvin Singh;<sup>28</sup> and
  - (e) resides with Kaur and Melvin Singh.<sup>29</sup>
6. Melvin Singh:
- (a) is the sole director and shareholder of MPS;<sup>30</sup>
  - (b) is and has since 18 July 2019 been:

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<sup>17</sup> Creary Affidavit, [64(k)].

<sup>18</sup> Creary Affidavit, [46].

<sup>19</sup> Creary Affidavit, [16] KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2).

<sup>20</sup> Creary Affidavit, [21] KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2).

<sup>21</sup> Creary Affidavit, [18], [21] KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2).

<sup>22</sup> Creary Affidavit, [19] KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2)

<sup>23</sup> Creary Affidavit, [65], [69], [70(a)]; KAU.0003.0001.0417 (Tab 20 of exhibit LJC-2)

<sup>24</sup> Creary Affidavit, [99].

<sup>25</sup> Creary Affidavit, [13]; KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>26</sup> Creary Affidavit, [15] KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>27</sup> Creary Affidavit, [13] KAU.0003.0005.0107 (Tab 1 of exhibit LJC-2).

<sup>28</sup> Creary Affidavit, [18].

<sup>29</sup> Creary Affidavit, [43].

<sup>30</sup> Creary Affidavit, [18].





- i. the sole director of Paradise Property;<sup>31</sup> and
    - ii. via MPS, the sole shareholder of Paradise Property;<sup>32</sup>
  - (c) is the son of Kaur and stepson of Singh;<sup>33</sup>
  - (d) resides with Kaur and Singh;<sup>34</sup> and
  - (e) holds a bank account with the Commonwealth Bank of Australia the account number of which ends in #1240.<sup>35</sup>
7. Lee:
- (a) is the daughter of Kaur;<sup>36</sup>
  - (b) received a gift from Kaur during the Relevant Period (as that term is defined in paragraph 18 below);<sup>37</sup> and
  - (c) holds a bank account with the Commonwealth Bank of Australia the account number of which ends in #4312.<sup>38</sup>

#### B. FACTUAL BACKGROUND

8. On 8 February 2017, ASIC wrote to MKS noting:<sup>39</sup>
- (a) its concern that MKS may be operating an unregistered managed investment scheme (**MIS**) and carrying on a financial services business without an AFS licence, by promoting that investors set up or use an existing self-managed superannuation fund (**SMSF**) to invest in real property; and
  - (b) the requirements of section 601ED of the *Corporations Act 2001* (Cth) (**Corporations Act**) regarding when a MIS must be registered, including if the MIS has more than 20 members.
9. On 28 February 2017, Kaur, on behalf of MKS, responded to ASIC asserting that MKS did not provide financial services, it did not have any investors but that it did have lenders, it did not provide recommendations or advice to lenders and that it did not operate any scheme.<sup>40</sup>

<sup>31</sup> Creary Affidavit, [19]; KAU.0003.0005.0113 (Tab 2 of exhibit LJC-2).

<sup>32</sup> Creary Affidavit, [18].

<sup>33</sup> Creary Affidavit, [43].

<sup>34</sup> Creary Affidavit, [43].

<sup>35</sup> Affidavit of Laura Davis affirmed 4 August 2021 (**Davis Affidavit**), [80].

<sup>36</sup> Creary Affidavit, [22].

<sup>37</sup> Creary Affidavit, [106(d)]; Davis Affidavit, [24].

<sup>38</sup> Davis Affidavit [39(a)].

<sup>39</sup> Creary Affidavit, [30]; KAU.0003.0004.0087 (Tab 10 of exhibit LCJ-2).

<sup>40</sup> Creary Affidavit, [31]; KAU.0003.0004.0004 (Tab 11 of exhibit LCJ-2).

10. On 5 March 2017, Kaur gave an interview which was recorded and published on the website of 'District 32'. That website was accessible to the general public.<sup>41</sup>
11. In the interview, Kaur stated:
- (a) words to the effect that she was representing MKS in the interview;<sup>42</sup>
  - (b) that she "help[ed] everyday Australians to create wealth for retirement";<sup>43</sup>
  - (c) that what she "basically" did was "pool in funds from investors, either cash or from their self-managed superannuation funds. I then use the money to do property developments. I do all the work and my investors just collect a guaranteed returns [sic] of 12 per cent per annum";<sup>44</sup>
  - (d) that "most of my investors are people working in the mines because they are very cash poor and very rich in their super...and they have super that's not working for them, like earning much less interest on them, so they would like to come on board and have more profits";<sup>45</sup> and
  - (e) that "we've got a friend in Busselton...he has referred a lot of clients to me... his property only value went up by 20 per cent in the last eight years... whereas if you had come on board with us, your super could have doubled".<sup>46</sup>
12. Until at least 29 April 2019, the following information was published on the website of District 32 in relation to MKS:<sup>47</sup>
- (a) under Business Description, "We generate high returns on capital, savings and Super through property investment & development."; and
  - (b) under Testimonials, "As a retiree, my Super is my most important source of income. MKS has taken care of my retirement for me by helping me to take control of my Super through a Self Managed Super Fund (SMSF). MKS has also provided me with income by generating high returns from my SMSF through property investment. I am grateful to MKS for taking care of my retirement for me - Lefy Pappas".
13. On 24 July 2019, ASIC wrote to Kaur in her capacity as a director of MKS, again noting its concern that MKS may be carrying on a financial services business without an AFS

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<sup>41</sup> Creary Affidavit, [59].

<sup>42</sup> Creary Affidavit, [61].

<sup>43</sup> Creary Affidavit, [62(a)] KAU.0003.0006.0001 (Tab 17 of exhibit LJC-2).

<sup>44</sup> Creary Affidavit, [62(a)] KAU.0003.0006.0001 (Tab 17 of exhibit LJC-2).

<sup>45</sup> Creary Affidavit, [62(b)] KAU.0003.0006.0001 (Tab 17 of exhibit LJC-2).

<sup>46</sup> Creary Affidavit, [62(i)(j)] KAU.0003.0006.0001 (Tab 17 of exhibit LJC-2).

<sup>47</sup> Creary Affidavit, [63], KAU.0003.0004.0092 (Tab19 of exhibit LJC-2).

licence, or authorisation as a representative of an AFS licensee, by recommending investments into real property with clients' SMSFs.<sup>48</sup>

14. On 15 August 2019, MKS responded to ASIC asserting it was not required to hold an AFS licence as it only provided general factual information and did not, amongst other things, operate a MIS.<sup>49</sup>
15. Until at least 22 April 2020, an MKS Facebook page continued to display the following post, which had been posted on 10 October 2016:<sup>50</sup>

*Congratulations to our founder & managing director Monica Kaur for being accepted as an Associate Member of the Self-Managed Super Fund (SMSF) Association. The SMSF Associations [sic] the largest and most highly regarded community in Australia.*

16. Kaur applied for SMSF Association membership on 5 October 2016 and renewed her membership each year.<sup>51</sup> At the time Kaur joined, Associate membership to the SMSF Association was open to anyone providing professional advice, products and/or services in the retail and/or wholesale SMSF sector.<sup>52</sup>
17. Until at least 25 November 2020 MKS maintained a website which:<sup>53</sup>
  - (a) stated that Kaur was the Managing Director and CEO of MKS;
  - (b) stated that MKS was established for the purpose of helping "buyers, investors and developers to generate value from their capital through property investment"; and
  - (c) listed various services MKS provided, including subdivision strategies, green title, survey strata, feasibility studies and project management.
18. On 6 May 2020, ASIC commenced an investigation under section 13 of the ASIC Act into suspected contraventions of the Corporations Act and ASIC Act by Kaur, MKS and Paradise Property from 1 March 2017 onwards (**Relevant Period**).<sup>54</sup>
19. The investigation centred on the suspected operation by MKS of a scheme whereby persons (**Investors**) contributed money to the development of real property in consideration of a return on investment in the form of a fixed interest rate (**Scheme**).<sup>55</sup>

<sup>48</sup> Creary Affidavit, [33]; KAU.0003.0002.0002 (Tab 12 of exhibit LCJ-2).

<sup>49</sup> Creary Affidavit, [34]; KAU.0011.0001.0004 (Tab 13 of exhibit LCJ-2).

<sup>50</sup> Creary Affidavit, [53]; KAU.0003.0001.0044 (Tab 16 of exhibit LJC -2).

<sup>51</sup> Creary Affidavit, [56].

<sup>52</sup> Creary Affidavit, [57].

<sup>53</sup> Creary Affidavit, [48]; KAU.0003.0001.0007 (Tab 14 of exhibit LJC-2); KAU.0003.0001.1719 (Tab 15 of exhibit LJC-2).

<sup>54</sup> Creary Affidavit, [22].

<sup>55</sup> Creary Affidavit, [23].

### Advice provided to potential Investors

20. During the Relevant Period, Kaur acting on behalf of MKS, met or spoke with at least 573 potential Investors in person or by telephone, including about establishing a self-managed superannuation fund and investing in MKS.<sup>56</sup>
21. Kaur met with, or spoke to, each potential Investor on at least one occasion and often on several occasions.<sup>57</sup>
22. Singh, Melvin Singh and Lee never met with potential Investors about or in relation to establishing a self-managed superannuation fund or investing in MKS.<sup>58</sup>
23. Singh deferred all matters regarding the affairs of MKS to Kaur.<sup>59</sup>
24. Kaur obtained information from potential Investors concerning aspects of their financial circumstances, including on some occasions, the balance held in their superannuation fund and their investment objectives.<sup>60</sup>
25. Kaur advised potential Investors to set up an SMSF and of the benefits of opening an SMSF, such as paying lower fees or receiving a better return.<sup>61</sup>
26. Kaur advised potential Investors to roll over funds from any existing superannuation accounts into an SMSF.<sup>62</sup>
27. ASIC believes that approximately 293 potential Investors proceeded to establish an SMSF with Kaur<sup>63</sup> and Kaur, MKS and Singh do not contest this estimate.
28. The establishment of SMSFs took place as follows:<sup>64</sup>
  - (a) Kaur obtained template paperwork from one of at least three accountants who had specific SMSF application forms which they provided to her;
  - (b) Kaur pre-filled the paperwork, including liaising with potential Investors to obtain details for the paperwork;
  - (c) the potential Investor signed the paperwork;
  - (d) Kaur sent the paperwork to the relevant accountant;
  - (e) the accountant set up the SMSF name and trust;

<sup>56</sup> Creary Affidavit, [64(e)], [72], [73].

<sup>57</sup> Creary Affidavit, [73].

<sup>58</sup> Creary Affidavit, [64(e)].

<sup>59</sup> Creary Affidavit, [39(d)(i)].

<sup>60</sup> Creary Affidavit, [74].

<sup>61</sup> Creary Affidavit, [75], Affidavit of Philida McKenzie affirmed 25 July 2021 (**McKenzie Affidavit**), [5], Affidavit of Lovely Otoo affirmed 29 July 2021 (**Otoo Affidavit**), [17e][19], Affidavit of Daniel Collins affirmed 9 July 2021 (**Collins Affidavit**), [11(a)]

<sup>62</sup> Creary Affidavit, [76]; Collins Affidavit [11a].

<sup>63</sup> Davis Affidavit, [16].

<sup>64</sup> Creary Affidavit, [81].

- (f) Kaur directed the potential Investor to a bank branch to establish a bank account for their SMSF;
  - (g) the potential Investor received a cheque (representing funds rolled over from their existing superannuation account) from the accountant who set up their SMSF;
  - (h) the potential Investor took the cheque to the bank and opened an SMSF account; and
  - (i) once the cheque was banked, the potential Investor paid a fee to Kaur:
    - i. which during the Relevant Period ranged from \$2,000 to \$8,600; and
    - ii. a portion of which Kaur sent to the relevant accountant.
29. The precise amount is not known but ASIC believes that MKS and/or Kaur have received at least \$1,330,969 in fees for setting up SMSFs for potential Investors some of whom went on to invest in the Scheme.<sup>65</sup> Kaur, MKS and Singh do not contest this figure.
30. Kaur advised potential Investors to invest SMSF or personal money into MKS property developments.<sup>66</sup>
31. In these discussions, Kaur advised potential Investors that:
- (a) other people were also contributing money to MKS property development;<sup>67</sup>
  - (b) money they loaned would be pooled with money loaned by other people and used for property development;<sup>68</sup>
  - (c) they would receive a fixed return on their investment;<sup>69</sup> and
  - (d) they would not have to manage their investment and this would instead be handled by MKS and/or Kaur.<sup>70</sup>
32. Some Investors were told by Kaur that the Investors were required to invest their SMSF funds in the Scheme.<sup>71</sup>

#### Provision and pooling of Investor Funds

<sup>65</sup> Davis Affidavit, [12(b)], [15].

<sup>66</sup> Creary Affidavit, [78]; McKenzie Affidavit, [4][5]; Otoo Affidavit, [13][16]; Collins Affidavit, [15][16]; T.Laidlaw Affidavit, [9].

<sup>67</sup> Creary Affidavit, [79]; McKenzie Affidavit, [4][5]; Otoo Affidavit, [16][17e][19]; Collins Affidavit, [16b] KAU.0004.0024.0001 (annexure DPC-11).

<sup>68</sup> Creary Affidavit, [64(e)], [89].

<sup>69</sup> Creary Affidavit, [64(e)], [79]; McKenzie Affidavit, [4][5]; Otoo Affidavit, [16][17e][19]; Collins Affidavit, KAU.0004.0024.0001 (annexure DPC-11).

<sup>70</sup> Creary Affidavit, [79] McKenzie Affidavit, [4][5]; Otoo Affidavit, [16][17e][19];

<sup>71</sup> Creary Affidavit, [78], [116].

33. Most Investors who invested money with MKS did so from their SMSF.<sup>72</sup> Other Investors invested from their own cash reserves.<sup>73</sup>
34. The precise number of Investors is unknown based on MKS' records.<sup>74</sup>
35. During the Relevant Period, the Scheme received at least \$10,157,639 from at least 160 Investors (**Investor Funds**).<sup>75</sup>
36. At Kaur's direction, Investor Funds were paid into one of the following four bank accounts (collectively, **Scheme Accounts**):<sup>76</sup>
- (a) account [redacted] (**MKS BBL Account**) held with Bendigo and Adelaide Bank Limited in the name of 'MKS', which received at least \$4,603,515 in Investor Funds in the Relevant Period;
  - (b) account [redacted] (**MKS CBA Account**) held with the Commonwealth Bank of Australia in the name of 'MKS', which received at least \$4,472,273 in Investor Funds in the Relevant Period;
  - (c) account [redacted] (**Kaur and Singh BBL Account**) held with Bendigo and Adelaide Bank Limited in the personal names of Kaur and Singh, which received at least \$81,997 in Investor Funds in the Relevant Period; and
  - (d) account [redacted] (**Kaur and Singh CBA Account**) held with the Commonwealth Bank of Australia in the personal names of Kaur and Singh, which account received at least \$999,852 in Investor Funds in the Relevant Period.
37. Most, if not all, Investors signed an agreement which set out the terms of their investment with MKS.<sup>77</sup> Some Investors signed agreements and then transferred money to the Scheme Accounts as directed, while others transferred money first and then completed an agreement.<sup>78</sup>
38. The terms of the agreements varied slightly, however in general the agreements contained the following terms:<sup>79</sup>
- (a) the client is to loan MKS an amount;
  - (b) the amount lent means the amount plus any other amounts previously lent;

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<sup>72</sup> Creary Affidavit, [78].

<sup>73</sup> Creary Affidavit, [64(i)].

<sup>74</sup> Creary Affidavit, [83].

<sup>75</sup> Davis Affidavit, [12(a)].

<sup>76</sup> Davis Affidavit, [12(c)]; Creary Affidavit, [88].

<sup>77</sup> Creary Affidavit, [87]; (Tab 28 of exhibit LJC-2).

<sup>78</sup> Creary Affidavit, [64(f)].

<sup>79</sup> Creary Affidavit, [87]; (Tab 28 of exhibit LJC-2).

- (c) interest rate means a rate that was specified, with rates ranging from 1.85% to 20% paid at maturity;
- (d) the term of the loan was specified, which was usually 20 months, with the maximum being 408 months from the date of the loan;
- (e) a premature termination clause which provides the lender must make a request for premature termination to MKS, which is entitled to 20% of the loan amount for premature termination. Further, in the event of such termination, the lender is not entitled to any interest accrued over the period of the investment; and
- (f) a term which allows the borrower to apply the amount lent in such a manner as it may decide.

39. On ASIC's analysis, Investors have contributed money without supporting documentation.<sup>80</sup>

**Scheme properties**

40. At least the following properties were developed by MKS as part of the Scheme (**Scheme Properties**):<sup>81</sup>

- (a) 8 Mentone Road, Balga WA 6061, which was subdivided into three lots known as
  - i. 8A Mentone Road, Balga WA 6061;
  - ii. 8B Mentone Road, Balga WA 6061;
  - iii. 8C Mentone Road, Balga WA 6061;
- (b) 4 Shelvock Crescent, Koondoola WA 6064, which was subdivided into two lots known as;
  - i. 4 Shelvock Crescent, Koondoola WA 6064;
  - ii. 6 Shelvock Crescent, Koondoola WA 6064;
- (c) 6 Shelvock Crescent, Koondoola WA 6064, which was subdivided into three lots known as;
  - i. 8 Shelvock Crescent, Koondoola WA 6064;
  - ii. 1A Swincer Way, Koondoola WA 6064;
  - iii. 1B Swincer Way, Koondoola WA 6064;
- (d) 14 Heathcroft Road, Balga WA 6061, which was subdivided into four vacant lots known as;

<sup>80</sup> Creary Affidavit, [86], KAU.0003.0011.0001 (Tab 27 of exhibit LJC-2).

<sup>81</sup> Creary Affidavit, [90]-[92]; KAU.0004.0017.0001 (Tab 29 of exhibit LJC-2)

- i. 14 Heathcroft Road, Balga WA 6061;
  - ii. 16 Heathcroft Road, Balga WA 6061;
  - iii. 2A Garrick Way, Balga WA 6061;
  - iv. 2B Garrick Way, Balga WA 6061;
- (e) 105 Oxley Avenue, Padbury WA 6025, which was subdivided into three lots known as:
- i. 105A Oxley Avenue, Padbury WA 6025;
  - ii. 105B Oxley Avenue, Padbury WA 6025;
  - iii. 105C Oxley Avenue, Padbury WA 6025;
- (f) 41 Hunter Way, Padbury WA 6025, which was subdivided into three lots known as:
- i. 41 Hunter Way, Padbury WA 6025;
  - ii. 43 Hunter Way, Padbury WA 6025;
  - iii. 6 Wilson Road, Padbury WA 6025; and
- (g) 4 Karimba Street, Wanneroo WA 6065, which is in development.
41. The properties listed in paragraphs 40(a) to 40(d) above were registered in the personal names of Kaur and Singh.<sup>82</sup>
42. The properties listed in paragraphs 40(e) to 40(g) above were registered in the personal name of Melvin Singh (**Melvin Singh Properties**).<sup>83</sup>
43. Kaur used money from MKS:
- (a) as part of the purchase price and development of the Melvin Singh Properties that were part of the Scheme; and
  - (b) to service loans secured against the Melvin Singh Properties.<sup>84</sup>
44. Melvin Singh has an interest in property located at 3 Nelson Street, Inglewood WA (**3 Nelson Street**) by way of MPS as trustee for the 3 Nelson Unit Trust.<sup>85</sup>
45. Kaur and Singh owned 3 Nelson Street until about 15 April 2020 when it was transferred to MPS as trustee for the 3 Nelson Unit Trust as a gift. ASIC believes (and Kaur, MKS and Singh do not dispute) that contributions to loans secured against 3 Nelson Street

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<sup>82</sup> Creary Affidavit, [91]

<sup>83</sup> Creary Affidavit, [92]

<sup>84</sup> Creary Affidavit, [94(b)]

<sup>85</sup> Creary Affidavit, [93]



were made from the MKS CBA Account during the time in which Kaur and Singh owned 3 Nelson Street (including during the Relevant Period).<sup>86</sup>

#### Use of Investor Funds

46. Investor Funds have been:<sup>87</sup>
- (a) directed towards the development of property by the Scheme, including the Scheme Properties;
  - (b) directed towards personal expenses of Kaur, Singh and/or others;
  - (c) repaid, in part, to Investors (ASIC believes that approximately \$3,824,605 has been repaid to approximately 116 Investors).
47. Investors had no day-to-day control over the development and sale of properties within the Scheme.<sup>88</sup>
48. At all material times, Kaur had control over the movement of funds from the Scheme Accounts and how funds received from Investors into the Scheme Accounts were spent.<sup>89</sup>
49. During the Relevant Period, Kaur controlled approximately 55 bank accounts.<sup>90</sup>
50. Investor Funds paid into the Scheme Accounts were subsequently transferred into at least 32 other accounts controlled by Kaur. Thereafter those funds were intermingled with other funds in those accounts.<sup>91</sup>
51. Kaur treated Investor Funds as her own funds to deal with as she wished. Kaur purported to take undocumented 'director loans' from MKS.<sup>92</sup>
52. Among other things:
- (a) money taken from MKS was used to:<sup>93</sup>
    - i. fund the development of property by the Scheme, including the Scheme Properties;
    - ii. assist funding Paradise Properties' real estate business;
    - iii. fund Kaur and Singh's personal expenses;
  - (b) Kaur used funds from MKS to purchase the Melvin Singh Properties;

<sup>86</sup> Creary Affidavit, [93]

<sup>87</sup> Davis Affidavit, [12(e)], [26]

<sup>88</sup> Creary Affidavit, [100]

<sup>89</sup> Creary Affidavit, [100(a)]

<sup>90</sup> Creary Affidavit [101]; Davis Affidavit, [12(d)]

<sup>91</sup> Creary Affidavit, [101]

<sup>92</sup> Creary Affidavit, [103]; Davis Affidavit [52(b)]

<sup>93</sup> Creary Affidavit, [ [103(c)] Affidavit of Monica Kaur on behalf of MKS affirmed on 17 March 2021 (**MKS Affidavit**),[9-15].

- (c) Kaur or MKS used money from MKS to service loans secured against the Melvin Singh Properties.<sup>94</sup>
- (d) Kaur could not recall whether the account used to pay off her credit card had received funds from MKS,<sup>95</sup>
- (e) the loan secured against Kaur's primary place of residence (at which she resided with Singh and Melvin Singh) was paid for from an MKS account,<sup>96</sup> and
- (f) Kaur made a gift to Lee during the Relevant Period.<sup>97</sup>

#### **Inadequate and incomplete books and records**

53. MKS and Kaur did not keep adequate company books and records, including with respect to:<sup>98</sup>
- (a) details of Investors, such as the names of Investors, the amounts they invested in the Scheme, the interest rates agreed, or the dates on which payments on investments are due;
  - (b) the flow of investor funds insofar as those funds were received into the Scheme Accounts and subsequently transferred to several external accounts, with no records kept regarding the reason(s) why funds were transferred between accounts under Kaur's control; or
  - (c) Kaur's personal takings from MKS' money.
54. There are no reliable records of amounts still owing to Investors and whether the Scheme can repay those amounts when they fall due.<sup>99</sup>
55. At all material times, MKS had no software or data management systems, and instead kept all documents in hard copy in plastic folders (save that Kaur did begin to type out records in the later months of 2020).<sup>100</sup>
56. Despite the Scheme receiving at least \$10,157,639 from at least 160 Investors during the Relevant Period, as at 7 April 2021 Kaur was only able to identify, based on her memory and hard copy documents <sup>101</sup>:
- (a) 135 current Investors in the Scheme, from whom she contended \$5,801,800 had been received; and

<sup>94</sup> Creary Affidavit, [104(b)]; MKS Affidavit, [14].

<sup>95</sup> Creary Affidavit, [106(a)].

<sup>96</sup> Creary Affidavit, [106(c)].

<sup>97</sup> Creary Affidavit, [106(d)].

<sup>98</sup> Creary Affidavit, [108].

<sup>99</sup> Creary Affidavit, [108], [130], [132].

<sup>100</sup> Creary Affidavit, [64(j)].

<sup>101</sup> Creary Affidavit, [84], [85], KAU.0088.00001.0030 (Tab 26 of exhibit LJC-2)

(b) an additional 34 Investors whom she contended have since been paid back in full a total of \$2,566,500.

57. Neither MKS nor Kaur have completed their tax returns for the previous four or five years.<sup>102</sup> Kaur has not met with her accountant to discuss MKS' accounts and tax obligations in over 14 months.<sup>103</sup>
58. Referring to funds in accounts she controls, including the Scheme Accounts, Kaur said in an interview with ASIC on 1 June 2021, "everything is just floating everywhere".<sup>104</sup>

#### Financial position of MKS, Kaur and Singh

##### MKS

59. ASIC investigations indicate that:
- (a) MKS holds total assets of at least \$220,592<sup>105</sup> but this figure does not include the value of the unquantified debt owed to MKS by Kaur and/or Singh (the recoverability of the entirety of the debt is doubtful);
  - (b) MKS has total liabilities of at least \$6,333,033, being amounts still owed to Investors, although some of those debts may not yet have matured;<sup>106</sup>
  - (c) there is an asset deficiency of at least \$6 million<sup>107</sup> but this figure does not include the value of the unquantified debt owed to MKS by Kaur and/or Singh.
60. ASIC believes (and Kaur, MKS and Singh do not dispute) the Deputy Commissioner of Taxation is also a creditor of MKS, MKS having not complied with its tax obligations since the end of 2016.<sup>108</sup>
61. MKS' assets include:<sup>109</sup>
- (a) the following three bank accounts held in its name, which as at 15 July 2021 had a collective balance of \$220,592.53; and

Financial institution	BSB and account no.	Balance
Commonwealth Bank of Australia	[redacted]	\$100,523.78
Commonwealth Bank of Australia	[redacted]	\$0.80*
Bendigo and Adelaide Bank Ltd	[redacted]	\$120,067.95

<sup>102</sup> Creary Affidavit, [131].

<sup>103</sup> Creary Affidavit, [109(b)].

<sup>104</sup> Creary Affidavit, [109(b)].

<sup>105</sup> Davis Affidavit, [47].

<sup>106</sup> Davis Affidavit, [12(f)], [27], [48].

<sup>107</sup> Davis Affidavit, [49].

<sup>108</sup> Davis Affidavit, [56].

<sup>109</sup> Davis Affidavit, [50]-[52].

Total	<b>\$220,592.53</b>
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\* balance as at 11 January 2021

(b) any directors' loans owed to MKS by Kaur and Singh, which are undocumented and presently unquantified.

62. MKS' liabilities are difficult to determine due to the lack of business or accounting records, and the business practices of MKS, but are at least \$6,333,033, comprising sums still owed to Investors.<sup>110</sup>

*Kaur and Singh*

63. ASIC investigations indicate that:

(a) Kaur and Singh's assets are approximately \$4,819,521;<sup>111</sup>

(b) Kaur and Singh's known liabilities are approximately \$2,090,759<sup>112</sup> (which does not include any amounts owed by Kaur and Singh to MKS, or amounts that might be owed to the Investors); and

(c) once the sums Kaur and Singh owe to MKS pursuant to amounts they have taken from MKS are quantified, there is likely to be a net asset deficiency.<sup>113</sup>

64. Kaur and Singh's assets include:

(a) the following five properties of which they are registered proprietors, either solely or jointly:<sup>114</sup>

No	Address	Approx. value per realestate.com.au*
1	9 Vaucluse Circuit, Belmont WA	\$835,000 (\$720,000 to \$950,000)
2	69 Vaucluse Circuit, Belmont WA	\$770,000 (\$680,000 to \$860,000)
3	77 Vaucluse Circuit, Belmont WA	\$865,000 (\$750,000 to \$980,000)
4	952A Beaufort Street, Inglewood WA	\$790,000 (\$670,000 to \$910,000)
5	14 Heathcroft Road, Balga WA	\$165,000**
Total		<b>\$3,425,000</b>

\* as at 29 June 2021 (midpoint of range selected)

\*\* this property was the subject of a contract of sale (which was terminated) and its value is taken from that contract

<sup>110</sup> Davis Affidavit [53].

<sup>111</sup> Davis Affidavit, [68].

<sup>112</sup> Davis Affidavit, [69].

<sup>113</sup> Davis Affidavit, [70].

<sup>114</sup> Davis Affidavit, [72].

(b) the following 16 bank accounts in their sole or joint names,<sup>115</sup> and

No	Financial institution	BSB and account no.	Balance as at 15 July 2021
1	Commonwealth Bank of Australia	[redacted]	\$17,604.79
2	Commonwealth Bank of Australia	[redacted]	\$434,050.59
3	Commonwealth Bank of Australia	[redacted]	\$329,120.79
4	Commonwealth Bank of Australia	[redacted]	\$0
5	Commonwealth Bank of Australia	[redacted]	\$389,017.07
6	Commonwealth Bank of Australia	[redacted]	\$183,534.34
7	Commonwealth Bank of Australia	[redacted]	\$0
8	Commonwealth Bank of Australia	[redacted]	\$0
9	Commonwealth Bank of Australia	[redacted]	\$0
10	National Australia Bank Ltd	[redacted]	\$0
11	National Australia Bank Ltd	[redacted]	(\$157.35)
12	National Australia Bank Ltd	[redacted]	(\$1,501.93)
13	National Australia Bank Ltd	[redacted]	\$0
14	National Australia Bank Ltd	[redacted]	\$0
15	Australia and New Zealand Banking Group Ltd	[redacted]	\$51.09

<sup>115</sup> Davis Affidavit, [71]

No	Financial institution	BSB and account no.	Balance as at 15 July 2021
16	Bendigo and Adelaide Bank Limited	[redacted]	\$42,802.42
Total			<b>\$1,394,521.81</b>

(c) in the case of Kaur:<sup>116</sup>

- i. a property in Singapore which she and her former husband, Jeswinder Singh, own;
- ii. loans owed to her by Paradise Property, Budget Accommodation Perth Pty Ltd and others, which loans attract no interest and are to be repaid when each borrower can afford to do so; and
- iii. jewellery valued at \$15,000.

65. Kaur and Singh's liabilities include:

(a) the following loans secured over the properties identified in paragraph 64(a) above, which are owed either solely or jointly,<sup>117</sup> and

No	Financial institution	Account no.	Property	Balance as at 15 Jul 2021
1	Commonwealth Bank of Australia	[redacted]	77 Vaucluse Circuit, Belmont, WA 6104	\$374,955.07
2	Commonwealth Bank of Australia	[redacted]	9 Vaucluse Circuit, Belmont, WA 6104	\$174,698.34
3	Commonwealth Bank of Australia	[redacted]	9 Vaucluse Circuit, Belmont, WA 6104	\$309,797.79
4	Bank of Western Australia	[redacted]	925A Beaufort Street, Inglewood, WA 6052	\$260,940.86
5	Bank of Western Australia	[redacted]	925A Beaufort Street, Inglewood, WA 6052	\$374,628.36
6	National Australia Bank Ltd	[redacted]	69 Vaucluse Circuit, Belmont, WA 6104	\$595,738.76
Total				<b>\$2,090,759.18</b>

(b) the presently unquantified 'directors' loans' which Kaur and Singh owes to MKS.<sup>118</sup>

<sup>116</sup> Davis Affidavit, [73].

<sup>117</sup> Davis Affidavit, [75].

<sup>118</sup> Davis Affidavit, [76].

**C. THE SCHEME WAS A MANAGED INVESTMENT SCHEME REQUIRING REGISTRATION**

66. The Scheme is a MIS within the meaning of section 9 of the Corporations Act.
67. The Scheme was required to be registered by virtue of section 601ED of the Corporations Act. It was not registered.
68. The following features comprised the 'scheme':<sup>119</sup>
- (a) MKS pooled funds from Investors;
  - (b) MKS then used the money to develop property; and
  - (c) the Investors collected a guaranteed return, for example 20% paid at maturity.
69. The Investors constitute 'members' of the Scheme.<sup>120</sup> In the Relevant Period, there were at least 160 Investors who invested in the Scheme.<sup>121</sup>
70. The Investors 'contributed money' to acquire interests in the Scheme, being rights to a return on investment, by investing either or both of their personal funds and SMSF funds.<sup>122</sup>
71. The Scheme was promoted on the basis that funds from Investors would be pooled.<sup>123</sup>
72. There was an intent on the part of MKS, through its controlling mind Kaur, to pool Investors' contributions.<sup>124</sup>
73. Pooling in fact occurred. Investor Funds were used in a common enterprise, namely, to develop and sell properties for profit.<sup>125</sup>
74. The purpose of the Investors' contributions to the Scheme was to produce financial benefits which were used to pay Investors returns from the use of the funds in various development projects.<sup>126</sup>
75. The Investors did not have day to day control over the operations of the Scheme. MKS, through its controlling mind Kaur, made the overriding investment decisions.<sup>127</sup>
76. In the period between at least 1 March 2017 and 16 December 2020, MKS operated an unregistered MIS which was required to be registered under the Corporations Act, namely the Scheme.<sup>128</sup>

<sup>119</sup> Creary Affidavit, [111].

<sup>120</sup> Creary Affidavit, [112].

<sup>121</sup> Davis Affidavit, [12(a)].

<sup>122</sup> Creary Affidavit, [23], [113].

<sup>123</sup> Creary Affidavit, [117].

<sup>124</sup> Creary Affidavit, [118].

<sup>125</sup> Creary Affidavit, [119].

<sup>126</sup> Creary Affidavit, [120].

<sup>127</sup> Creary Affidavit, [121], [122].

77. MKS took no action to register the Scheme, or to otherwise bring the Scheme into compliance with applicable provisions of the Corporations Act despite the directors of MKS and, in particular, Kaur:<sup>129</sup>
- (a) being made aware of the provisions in the Corporations Act concerning the registration of MISs and, in particular, the requirement to register a scheme with more than 20 members, by no later than 8 February 2017 by reason of ASIC's letter of that date (the subject of paragraph 8 above);<sup>130</sup> and
  - (b) having no reasonable basis at any material time to believe that the number and nature of investors in the Scheme meant that the Scheme did not need to be registered under the Corporations Act.

**Conduct in the management of the Scheme**

78. During the Relevant Period, the directors of MKS and, in particular, Kaur, have:<sup>131</sup>
- (a) intermingled monies received from Investors in the Scheme Accounts with funds in non-Scheme Accounts, including by requiring Investor deposits to be made to personal bank accounts at first instance and otherwise making multiple transfers of Investor Funds out of Scheme Accounts into at least 32 accounts held by the directors and others;
  - (b) treated Scheme funds as their own;
  - (c) used Investor Funds for purposes other than investment in the Scheme;
  - (d) failed to cause MKS to keep, or not kept, adequate books and records; and
  - (e) failed to cause MKS to lodge, or not lodged, tax returns for the past four to five years.

**Doubt as to solvency of Scheme**

79. Assets of the Scheme are held in the personal names Kaur, Singh and Melvin Singh. The extent of the Scheme's liabilities is unconfirmed due to the lack of adequate business records, including undocumented 'director loans' and what ASIC believes (and Kaur, MKS and Singh do not dispute) are incomplete investor agreements.<sup>132</sup>
80. The Scheme may not hold sufficient assets to pay its debts when they fall due.<sup>133</sup>

**Directors not fit and proper**

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<sup>128</sup> Creary Affidavit, [125].

<sup>129</sup> Creary Affidavit, [126].

<sup>130</sup> Creary Affidavit, [123].

<sup>131</sup> Creary Affidavit, [128]-[131].

<sup>132</sup> Davis Affidavit, [67].

<sup>133</sup> Creary Affidavit, [133]



81. Kaur and Singh are not fit and proper persons to be company directors.
82. Despite being the sole director of MKS since 5 February 2020 and a director since its incorporation, Singh deferred all matters regarding the affairs of MKS to Kaur.<sup>134</sup>
83. At all material times, Kaur was the controlling mind of MKS.<sup>135</sup>

**D. CARRYING ON A FINANCIAL SERVICES BUSINESS WITHOUT AN AFS LICENCE**

84. In the period between at least 1 March 2017 and 16 December 2020 both Kaur and MKS, through Kaur as its controlling mind, carried on a financial services business:<sup>136</sup>
- (a) within the meaning of sections 911A and 766A(1)(a) of the Corporations Act;
  - (b) for which MKS and/or Kaur were paid fees; and
  - (c) without an AFS licence,
- insofar as Kaur and MKS:
- (d) provided financial product advice, within the meaning of section 766B of the Corporations Act, to consumers about a superannuation interest, namely SMSFs. In particular Kaur and/or MKS (through Kaur), advised consumers, including those who ultimately invested in the Scheme to:
    - 1. establish an SMSF;
    - 2. roll over funds from existing superannuation funds into that SMSF; and
    - 3. transfer part or all of those SMSF funds to MKS for the purposes of investment in the Scheme.
  - (e) dealt in a financial product by arranging for consumers, or an accountant on behalf of consumers, to apply for or acquire an SMSF; and
  - (f) dealt in a financial product by issuing to consumers interests to financial benefits produced by the Scheme, in the nature of an investment return.

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<sup>134</sup> Creary Affidavit, [39(d)].

<sup>135</sup> Creary Affidavit, [45].

<sup>136</sup> Creary Affidavit, [137].

85. That activity by Kaur and MKS required an AFS licence, which neither had.<sup>137</sup>

Date: 1 October 2021



.....  
Signed by Ingrid McCormick  
Lawyer for the Plaintiff

*Hall & Wilcox*

.....  
Signed by HALL & WILCOX  
Lawyer for the Defendants

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<sup>137</sup> Creary Affidavit, [41], [46],

Federal Court of Australia  
District Registry: Western Australia  
Division: General

No. WAD 293 of 2020

**SCHEDULE OF PARTIES**

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**MONICA KAUR**

First Defendant

**MKS PROPERTY INVESTMENTS/DEVELOPMENTS PTY LTD (ACN 120 157 002)**

Second Defendant

**PARADISE PROPERTY GROUP PTY LTD (ACN 150 632 303)**

Third Defendant

**SADU SINGH**

Fourth Defendant

**MELVIN PAUL SINGH**

Fifth Defendant

**STEPHANIE POH KIM LEE**

Sixth Defendant