FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v M101 Nominees Pty Ltd (in liq) (No 7) [2024] FCA 381

File number(s):	VID 524 of 2020
Judgment of:	**O'CALLAGHAN J**
Date of judgment:	19 April 2024
Catchwords:	**PRACTICE AND PROCEDURE** – application by second defendant for evidentiary rulings – where a number of rulings agreed by the parties and other rulings held over – application by second defendant to strike out certain paragraphs of statement of claim – where Full Court in *Mawhinney v Australian Securities and Investments Commission* (2022) 294 FCR 375 held that an order may be made under s 1101B(1) of the *Corporations Act 2001* (Cth) based on the contravention of another person – whether plaintiff's statement of claim gave clear notice and proper particulars of each contravention alleged and of the connection between the second defendant and each such contravention, either by way of his involvement in the contravention in the sense described in *Yorke v Lucas* (1985) 158 CLR 661 or otherwise – where plaintiff did not allege that the second defendant was accessorily liable for companies' alleged contraventions of the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (Cth) – where the issue to be decided at trial will be whether each of the factual matters pleaded in relation to the second defendant's involvement is sufficient to establish the requisite nexus between the relevant contravention and the orders sought against him under s 1101B(1), such that the Court should in the exercise of its discretion grant the injunctive relief sought by the plaintiff – whether pleading of implied representations "embarrassing" within the meaning of rule 16.21(1) of the *Federal Court Rules 2011* (Cth) – whether in other respects claims were sufficiently particularised – strike out application dismissed
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Corporations Act 2001* (Cth) ss 79, 1101B, 1101B(1), 1101B(4)(c)(ii), 1324(1)(e) *Federal Court Rules 2011* (Cth) rr 16.21, 16.21(1)

Cases cited:	*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd* [2024] FCA 344 *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 2)* (2019) 140 ACSR 635; [2019] FCA 2151 *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (in liq) (No 6)* [2023] FCA 1276 *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502 *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533 *KTC v David* [2022] FCAFC 60 *Mawhinney v Australian Securities and Investments Commission* (2022) 294 FCR 375 *Re Vault Market Pty Ltd* (2014) 32 ACLC 14-069; [2014] NSWSC 1641 *Yorke v Lucas* (1985) 158 CLR 661
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	55
Date of hearing:	8 April 2024
Counsel for the Plaintiff:	M Borsky KC with N I Congram and J Nikolic
Solicitor for the Plaintiff:	MinterEllison
Counsel for the Second Defendant:	M R Pearce SC with A Aleksov and P Donovan
Solicitor for the Second Defendant:	Roberts Gray Lawyers

ORDERS

VID 524 of 2020

IN THE MATTER OF M101 NOMINEES PTY LTD (ACN 636 908 159)

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**M101 NOMINEES PTY LTD (ACN 636 908 159) (IN LIQ)** First Defendant
	JAMES PETER MAWHINNEY Second Defendant
	SUNSEEKER HOLDINGS PTY LTD (ACN 632 076 469) Third Defendant

ORDER MADE BY: **O'CALLAGHAN J**

DATE OF ORDER: **19 APRIL 2024**

THE COURT ORDERS THAT:

The interlocutory application

1. The second defendant's interlocutory application filed on 2 April 2024 seeking orders striking out certain paragraphs of the plaintiff's statement of claim filed on 20 December 2023 be dismissed.

2. The second defendant pay the plaintiff's costs of the application.

Evidence in proceeding VID 228 of 2020

3. Paragraph 5 of the orders made by Anderson J on 2 February 2021 is vacated and evidence filed and/or tendered in proceeding VID 228 of 2020 is:

   (a) not to be taken to be evidence in this proceeding; and

   (b) excluded to the extent already evidence in this proceeding,

   without prejudice to the plaintiff's right to seek to tender such evidence at the further hearing of the trial of this proceeding.

Liquidator of M101 Nominees

4. The second defendant has leave to cross-examine Mr Said Jahani at the further hearing of the trial of this proceeding.

IPO Wealth Reports

5. The reports of the receivers and managers and later provisional liquidators and liquidators of IPO Wealth Holdings Pty Ltd be excluded from evidence in this proceeding.

Cross-examination of witnesses

6. Insofar as the plaintiff seeks to rely on the affidavit of Mr Kieran Michael Egan sworn 25 November 2020, the affidavit of Mr Peter Ping Yuen Hui affirmed 15 January 2021 and/or the affidavit of Mr Jordan Robert Thomas Hicks affirmed 15 January 2021 at the further hearing of the trial of this proceeding, the second defendant has leave to cross examine those deponents.

7. After the plaintiff has filed and served any further lay or expert evidence upon which it intends to rely at the further hearing of the trial, and at least 4 weeks before the commencement of that hearing, the second defendant may make any application for leave to cross-examine:

   (a) Mr Jason Mark Tracy;

   (b) Ms Dayle Buckley; and

   (c) Mr Hugh Daniel Copley.

Evidence of Mr Rouse

8. The affidavit of Mr Richard Francis Leslie Rouse affirmed 19 November 2020 is excluded from evidence at the further hearing of the trial of this proceeding without prejudice to the plaintiff's right to give notice of its intention to tender that affidavit pursuant to ss 63 and 67 of the *Evidence Act 1995* (Cth).

Costs of evidentiary rulings application

9. The costs of the second defendant’s application in relation to evidentiary rulings be reserved.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J

INTRODUCTION

1 This proceeding has a long history. There is no need to repeat it here, including because it is outlined in my reasons in *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (in liq) (No 6)* [2023] FCA 1276 at [10]–[44].

2 These reasons assume familiarity with that history.

3 The proceeding is set down for trial on 28 October 2024, on an estimate of two weeks.

4 I have before me two interlocutory applications brought by Mr Mawhinney, the second defendant.

5 The first application concerns evidentiary rulings sought by Mr Mawhinney. Seven rulings were sought, the reasons in support of which were detailed in a document entitled "Evidentiary rulings and submissions in support" filed on 8 March 2024.

6 By the time of the hearing, and after senior counsel appearing in the proceeding had conferred, the parties reached an agreed position about four rulings. That agreement is reflected in orders 3, 4, 5, 6 and 8 above.

7 Having heard submissions about the three remaining disputed rulings, I suggested that they be held over pending the filing of ASIC's evidence, because the evidentiary position will be clearer by then. The parties agreed. That agreement is reflected in order 7 above.

8 So, for present purposes, I need say no more about evidentiary rulings.

9 That leaves the second application, being Mr Mawhinney's interlocutory application filed on 2 April 2024 seeking orders pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) striking out parts of ASIC's statement of claim filed 20 December 2023.

APPLICABLE PRINCIPLES

10 Rule 16.21(1) of the Federal Court Rules provides that a party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading contains scandalous material; contains frivolous or vexatious material; is evasive or ambiguous; is likely to cause prejudice, embarrassment or delay in the proceeding; fails to disclose a reasonable

cause of action or defence or other case appropriate to the nature of the pleading; or is otherwise an abuse of the process of the Court.

11 As Wigney J said in *KTC v David* [2022] FCAFC 60 at [119]–[121]:

> The word "vexatious" in the context of rules such as r 16.21 is an "omnibus expression" that includes material which is scandalous, discloses no reasonable cause of action, is oppressive or embarrassing, or the inclusion of which is otherwise an abuse of the processes of the Court. Material in a pleading would also be considered to be vexatious or frivolous if it was included in the pleading with the intention of annoying or embarrassing, or for a collateral purpose, or if it raises matters that are "obviously untenable or manifestly groundless".
>
> A pleading is likely to cause prejudice or embarrassment, for the purposes of r 16.21(1)(d) of the Rules, if it is susceptible to various meanings, contains inconsistent allegations, includes various alternatives which are confusingly intermixed, contains irrelevant allegations or includes defects which result in it being unintelligible, ambiguous, vague or too general. Such a pleading could equally be characterised as evasive or ambiguous for the purposes of r 16.21(1)(c) of the Rules.
>
> A pleading may be considered to be embarrassing if it suffers from narrative prolixity or irrelevancies to the point that it is not a pleading to which the other party can reasonably be expected to plead to. A party cannot be expected to respond to mere context, commentary, "history, narrative material or material of a general evidentiary nature".
>
> A pleading may also be struck out as embarrassing if it is plain that the pleading party cannot lawfully call any evidence at the hearing to substantiate the pleading.
>
> A "reasonable cause of action", for the purposes of r 16.21(1)(e) of the Rules, is a cause of action that has some chance of success having regard to the allegations pleaded. A cause of action cannot be struck out merely on the basis that it appears to be weak.
>
> (Internal citations omitted)

12 The cases also make clear that the discretion to strike out should be exercised sparingly and only in plain and obvious cases, where no reasonable amendment could cure the alleged defect or deficiency.

THE STRIKE OUT APPLICATION

13 The impugned paragraphs of the statement of claim fall into four categories.

Accessorial liability

14 The first category is about the pleas in relation to accessorial liability, in paragraphs 33–38, 131–135, 144–148, 156–160, 169–173, 195–201, 236–243, 265–271, 292–296 and 297.

15 ASIC's case in this (remitted) proceeding is for relief under s 1101B(1) of the *Corporations Act 2001* (Cth) against Mr Mawhinney in respect of alleged contraventions of the Corporations

Act and the *Australian Securities and Investments Commission Act 2001* (Cth) committed by certain companies.

16 Before the Full Court, Mr Mawhinney argued that an order could not be made against him under s 1101B(1) based on the contravention of another person. See *Mawhinney v Australian Securities and Investments Commission* (2022) 294 FCR 375 (Jagot, O'Bryan and Cheeseman JJ) (**J**).

17 The Full Court rejected that argument, and Mr Mawhinney accepts that the trial of the proceeding must be conducted on the basis that the Full Court's decision on that point is correct (although he reserves the position to argue otherwise, should the matter end up in the High Court).

18 Section 1101B(1) relevantly provides that the Court "may make such order, or orders, as it thinks fit if: (a) on the application of ASIC, it appears to the Court that a person: (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services …"

19 The Full Court relevantly said this about the connection between the contravener and the contravention, and the person in respect of whom an order under s 1101B(1) may be made, at J [116] and [158]:

> Finally, despite it being clear from what we have said above, we should record our view that this is a very exceptional case in which ASIC should be permitted to depart from the legal and evidentiary position it adopted below. In order to ensure procedural fairness, and given the nature of the permanent injunctions which ASIC seeks, **the case requires ASIC to give clear notice and proper particulars of each contravention it alleges and of the connection between Mr Mawhinney and each such contravention, either by way of his involvement in the contravention (in the sense described in *Yorke v Lucas*) or otherwise.** Beyond saying this, the proper case management of the remitted matter is for the relevant judge to decide.
>
> …
>
> … In its terms, s 1101B contains no express limitation on the categories of persons in respect of whom an order may be made. The only express limitation is that the Court must be satisfied that the order would not unfairly prejudice any person. **It may be accepted that there is an implicit limitation that the power to make an order under the section is confined by the scope and purpose of the power, which includes an implication that there is a sufficient nexus between the relevant contravention and the order made**: cf, *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 258 per Lockhart J and at 267 per Gummow J and *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197 at 202 per Merkel J.

20 It will suffice to set out one example, because the same pattern repeats itself in the impugned paragraphs. Paragraphs 33–38 of the statement of claim are as follows:

> **B.2 Mr Mawhinney**
>
> 33. Mr Mawhinney participated in the operations or management of IPO Capital.
>
> **Particulars**
>
> (a) Mr Mawhinney interacted with staff about IPO Capital's dealings.
>
> (b) Mr Mawhinney interacted with investors and potential investors on behalf of IPO Capital.
>
> (c) Mr Mawhinney could access, and execute, transactions on IPO Capital's bank accounts.
>
> (d) In July 2016, Mr Mawhinney sought advice on whether IPO Capital required an AFSL.
>
> (e) Between September 2016 and March 2017, Mr Mawhinney (personally or through Don Christie of Astuto Lawyers) corresponded with ASIC about IPO Capital's non-compliance with s 911A of the Corporations Act.
>
> (f) Mr Mawhinney was the sole director and secretary of IPO Capital.
>
> (g) Further particulars may be provided prior to trial.
>
> 34. Mr Mawhinney held himself out as participating in the operations or management of IPO Capital.
>
> **Particulars**
>
> (a) Mr Mawhinney used the james@ipocapital.com.au email address and IPO Capital signature block.
>
> (b) Mr Mawhinney was listed on page 11, entitled "Experienced & Professional Team", of a PowerPoint presentation about IPO Capital.
>
> (c) Mr Mawhinney provided quotes for a media publication that associated him with IPO Capital.
>
> 35. At all material times, by reason of the matters alleged in paragraphs 27 to 34 above, Mr Mawhinney was involved in IPO Capital carrying on a financial services business in this jurisdiction without an AFSL.
>
> 36. From 2016 to at least December 2017, Mr Mawhinney knew that:
>
> a. IPO Capital was carrying on a financial services business in this jurisdiction.
>
> b. IPO Capital did not hold an AFSL.
>
> **Particulars**
>
> Mr Mawhinney's knowledge is to be inferred from the following:
>
> (a) Mr Mawhinney was the sole director and secretary of IPO Capital.

(b) Mr Mawhinney's business experience.

(c) Mr Mawhinney was involved in the day-to-day operations of IPO Capital as alleged at paragraphs 33 and 34.

(d) In July 2016, Mr Mawhinney sought advice on whether IPO Capital required an AFSL.

(e) Between September 2016 and March 2017, Mr Mawhinney (personally or through Don Christie of Astuto Lawyers) corresponded with ASIC about IPO Capital's non-compliance with s 911A of the Corporations Act.

37. By reason of the matters alleged in paragraphs 33 to 36 above, Mr Mawhinney was directly or indirectly, knowingly concerned in, or party to, IPO Capital's contraventions of s 911A of the Corporations Act.

38. Further or alternatively, by reason of any combination of the matters alleged in paragraphs 33 to 36 above, Mr Mawhinney was associated with IPO Capital's contraventions of s 911A of the Corporations Act.

21 ASIC pleads at paragraph 297 of its statement of claim that:

In the premises of …

b. Mr Mawhinney's involvement in [the companies' contraventions] as alleged in paragraphs:

i. paragraph 37 in respect of the contraventions by IPO Capital;

ii. paragraphs 134, 147, 159, 172, 200, 242, 270 and 295 in respect of the contraventions by Australian Income Solutions;

iii. paragraphs 134, 147, 159, 172, 200 and 295 in respect of the contraventions by M101 Nominees;

iv. paragraphs 134, 147, 159 and 200 in respect of the contraventions by M101 Holdings;

v. paragraphs 134 and 159 in respect of the contraventions by Online Investments;

vi. paragraph 270 in respect of the contraventions by Mainland Property Holdings;

c. in the alternative to paragraph 297.b above, Mr Mawhinney's association with [the companies' contraventions] as alleged in paragraphs:

i. paragraph 38 in respect of the contraventions by IPO Capital;

ii. paragraphs 135, 148, 160, 173, 201, 243, 271 and 296 in respect of the contraventions by Australian Income Solutions;

iii. paragraphs 135, 148, 160, 173, 201 and 296 in respect of the contraventions by M101 Nominees;

iv. paragraphs 135, 148, 160 and 201 in respect of the contraventions by M101 Holdings;

v. paragraphs 136 and 161 in respect of the contraventions by Online Investments;

vi. paragraph 271 in respect of the contraventions by Mainland Property Holdings;

d. Mr Mawhinney's involvement in launching Australian Property Bonds after Anderson J made orders on 16 April 2020 in relation to M+ Fixed Income Notes and M Core Fixed Income Notes;

Particulars

(a) On 16 April 2020, Anderson J made orders which:

(i) restrained Australian Income Solutions (then trading as Mayfair Wealth Partners Pty Ltd), M101 Holdings, M101 Nominees and Online Investments from:

(A) using the phrases "bank deposit", "capital growth", "certainty", "fixed term", "term deposit" and "term investment" in any advertising, promotion or marketing; and

(B) advertising, promoting or marketing the M+ Fixed Income Notes and the M Core Fixed Income Notes.

(ii) required those entities to publish a notice on the websites www.mayfair101.com and www.mayfairplatinum.com.au and to provide a copy of the notice to each prospective new investor in either the M+ Fixed Income product or the M Core Fixed Income product.

(b) Australian Property Bonds were launched on 20 April 2020.

(c) Mr Mawhinney's involvement in the launch of Australian Property Bonds is to be inferred from the following:

(i) Mr Mawhinney was the managing director of the M101 Group of companies;

(ii) Mr Mawhinney was the sole director of Australian Income Solutions;

(iii) Mr Mawhinney was the sole director and shareholder of Online Investments, which was the sole shareholder in Australian Income Solutions;

(iv) Mr Mawhinney's final sign off was needed on marketing materials;

(v) Mr Mawhinney was actively involved in the business affairs of Australian Income Solutions; and

(vi) Mr Mawhinney sent the email announcing the launch of Australian Property Bonds and other emails about this product.

e [sic]. any loss or risk of loss to investors with IPO Capital and investors in

M Core Fixed Income Notes, M+ Fixed Income Notes and/or Australian Property Bonds; and

f [sic]. the absence of any unfair prejudice to any person affected by the relief sought by ASIC,

ASIC is entitled to the injunctive relief under s 1101B(1) of the Corporations Act sought in the Amended Originating Application filed on 15 November 2023.

22 Senior counsel for Mr Mawhinney, Mr M R Pearce SC, who appeared with Mr A Aleksov and Mr P Donovan of counsel, submitted that a line of authorities to which he took me stands for the proposition that it is not open to ASIC to plead "conventional accessorial liability" under consideration in *Yorke v Lucas* (1985) 158 CLR 661 as the connection between Mr Mawhinney and the contraventions alleged against the various companies. To do so, it was contended, would be contrary to the cases that say that accessorial liability under provisions like s 79 of the Corporations Act is available only where express provision is made for it, such as in s 1101B(4)(c)(ii) and s 1324(1)(e). See *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 at [104], [110] (Brereton J); *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502 at [444] (Beach J); *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 2)* (2019) 140 ACSR 635; [2019] FCA 2151 at [18] (O'Bryan J); and *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533 at [179]–[180] (Greenwood J), [235] (Rares J).

23 But, in this proceeding, ASIC does not seek any finding that Mr Mawhinney was accessorily liable for the companies' alleged contraventions of the Corporations Act or the ASIC Act.

24 And ASIC agrees that if it did seek such relief, it would run afoul of the cases referred to above at [22].

25 ASIC says that in pleading the case on accessorial liability the way that it has, it is doing precisely what the Full Court effectively directed it to do in its reasons, in order to accord procedural fairness to Mr Mawhinney.

26 Mr M Borsky KC appeared for ASIC, with Mr N I Congram and Ms J Nikolic of counsel. He put the submission on those points this way in his oral submissions:

> [W]e don't seek any finding in this proceeding that Mr Mawhinney was accessorily liable for contraventions of the misleading or deceptive conduct provisions in the Corporations Act or the ASIC Act. We don't seek a declaration or orders that he was an accessory within the *Yorke v Lucas* sense to contraventions of [sections] 1041H or 12DA of the ASIC Act and cognate provisions.

> If we were seeking such … relief, then our friend's submissions and our friend's references to various decisions [listed at [22] above] would be on point, but they're not. Rather, what we are doing is precisely what the Full Court directed us to do … [O]ur learned friend quite properly took your Honour to the passages in the Full Court's judgment which set the scene for this argument. Your Honour may not need to go back to it, but paragraph 116 in the Full Court's judgment records that a price ASIC was required to pay, amongst others, … for the remitter in this very exceptional case was that, contrary to the position as it had been before Anderson J, and to that point in the Full Court, where there was no statement of claim, no clear statement of the case at all, their Honours made plain that ASIC was required to give clear notice and proper particulars of each contravention and of the connection between Mr Mawhinney and each contravention. That's what [paragraph] 116 [of the Full Court's reasons] says. And their Honours went on to say either in the sense described in *Yorke v Lucas* or otherwise … We read that carefully. And then the pleading, which ASIC delivered for the first time in this matter, that's what ASIC has done.
>
> …
>
> [T]heir Honours accept [at paragraph 158 of their reasons] that there is an implicit limitation that the power to make an order under the section [1101B] is confined by the scope and purpose of the power, which includes an implication that there is a sufficient nexus between the relevant contravention and the order made. So that is to say – and their Honours … make the same point in subtly different terms in paragraph 116 – it's incumbent on ASIC to establish a contravention by a person, not Mr Mawhinney – and we plead our case in relation to that in quite some detail – and to establish that there was a connection between each contravention and Mr Mawhinney.

27 Once so much is accepted, as it must be, then Mr Mawhinney's contention that the accessorial liability pleas should be struck out because they are bound to fail must be rejected, because ASIC does not, contrary to Mr Mawhinney's contention "plead conventional accessorial liability as the connection between the contraventions alleged and Mr Mawhinney so as to justify an order against him under s 1101B(1)". It only seeks relief under that provision, and not s 79 (for example).

28 At trial, the issue to be decided will be whether each of the factual matters pleaded in relation to Mr Mawhinney's involvement is sufficient to establish, whether in the "*Yorke v Lucas* sense" or otherwise, the requisite nexus between the relevant contravention and the orders sought against him under s 1101B(1), such that the Court should in the exercise of its discretion grant the injunctive relief ASIC seeks.

29 I should make brief mention of the decision of Brereton J in *Re Vault Market Pty Ltd* (2014) 32 ACLC 14-069; [2014] NSWSC 1641, because both parties claimed that the decision supported their opposing positions. In my view, the following passage from his Honour's reasons, which the Full Court adopted (J at [163]), is entirely consistent with the approach described by the Full Court and adopted by ASIC in this case, as follows (at [70]):

> … However, there are other indications that the broadly expressed power in **s 1101B(1) may authorise an order against a person other than the contravener**. While satisfaction that a person has contravened a provision of Chapter 7 is a jurisdictional prerequisite, the only limitation on the order that can be made, once that requirement is satisfied, is that "the Court is satisfied that the order would not unfairly prejudice any person". While the example in s 1101B(4)(a) refers to an order restraining a person from carrying on a business ... if *the* person has persistently contravened a provision or provisions of Chapter 7, it is an example only. More significantly, the example in s 1101B(4)(b) includes an order to the directors of a body corporate, where the body corporate was the contravener, and the examples in s 1101B(4)(c) and (d) expressly refer to a person who was involved in a contravention; these examples demonstrate that the general power in s 1101B(1), of which they are but illustrations, extends to authorise an order against a person other than the contravener - provided that the order would not unfairly prejudice any person. **That power does not depend on establishing that the person against whom the order was made was "involved", within the meaning of s 79, in the contravention, although the degree and nature of the relationship between the person and the contravention would no doubt be highly relevant to the exercise of the discretion to make such an order.**
>
> (Emphasis added).

30 I should also note that the question of the nature of the knowledge necessary for someone to incur liability as an accessory is currently the subject of a judgment reserved in the High Court. As Jackman J explained in *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd* [2024] FCA 344 at [40], the question involves an issue that is one of longstanding controversy:

> It is well established that in order for a person to be "knowingly concerned" in a contravention within the meaning of s 75B of the *Competition and Consumer Act 2010* (Cth), the person must have actual (not imputed or constructive) knowledge of the essential facts constituting the contravention, although it is not necessary for the person to know that those facts constitute a contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 667 and 670 (Mason ACJ, Wilson, Deane and Dawson JJ); *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ). In *Anchorage Capital Master Offshore Limited v Sparkes* [2023] NSWCA 88; (2023) 111 NSWLR 304 at [329], the New South Wales Court of Appeal (comprising Ward P, Brereton JA and Griffiths AJA) referred to a longstanding controversy as to whether, in order to incur liability as an accessory, knowledge that the representation is false is required (the narrow view), or knowledge of facts which would have falsified the representation if they had been adverted to suffices (the wider view). Their Honours referred to a large number of authorities supportive of the two views, but held that the narrow view was the correct one on the basis that "Where the contravention is the prohibition on engaging in misleading or deceptive conduct, one can be 'knowingly concerned' in it only if one knows that the conduct is misleading or deceptive": [330] and [342]. However, a month before that judgment was given, the Full Court of the Federal Court gave judgment in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2023] FCAFC 54; (2023) 297 FCR 180, in which the reasons of Wigney and O'Bryan JJ at [297]–[314] appear to accept the wider view. An appeal to the High Court in that case was heard in February 2024, and judgment is reserved. The New South Wales Court of Appeal recently noted that a live debate remains about the wider view: *Care A2 Plus Pty Ltd v Pichardo* [2024] NSWCA 35 at [120]–[122] (Bell CJ, with whom

Stern JA and Basten AJA agreed).

31 In any event, paragraphs 38, 135, 148, 160, 173, 201, 243, 271 and 296 plead in the alternative to the relevant paragraphs that precede them, that Mr Mawhinney was "associated with" the primary contraventions, and that the requisite nexus was thus established. Those paragraphs do not rely on the concept of involvement in contraventions in the sense described in *Yorke v Lucas*.

32 It follows that the application to strike out paragraphs 33–38, 131–135, 144–148, 156–160, 169–173, 195–201, 236–243, 265–271, 292–296 and 297 is refused.

Implied representations

33 Next, Mr Mawhinney seeks to strike out pleas of implied representations in paragraphs 124, 136, 149 and 190 because they are embarrassing within the meaning of the Rules, essentially, it was contended, because they are unintelligible.

34 Each of those paragraphs allege that, by reason of matters pleaded in earlier parts of the statement of claim, one or more relevant companies made specified representations. Each of the earlier parts of the statement of claim identifies marketing materials associated with relevant companies, such as websites, brochures, newspaper and email advertisements and search engine advertising, and statements made in those marketing materials, from which ASIC alleges the specified representations are to be implied.

35 Mr Mawhinney contends that it is incumbent on ASIC to identify with precision the conduct said to give rise to the representation, including an explanation of how the implication is said to arise, because otherwise, he does not know the case he has to meet at trial.

36 The question whether a representation was conveyed is one of fact, and is a matter for trial. As ASIC submitted:

> There is no doubt that, for the purposes of determining whether a person has made a representation that is false, misleading or deceptive or likely to mislead or deceive, the representation may be implied from words or conduct [citing *Australian Securities and Investments Commission v* ***Select AFSL*** *Pty Ltd (No 2)* (2022) 162 ACSR 1; [2022] FCA 786 at [261] (Abraham J); *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 391 ALR 346; [2021] FCA 367 at [83] (Thawley J)]. As Mr Mawhinney acknowledges … whether an implied representation is to be discerned from particular words or conduct is a question of fact, to be answered objectively by considering how an ordinary reasonable member of the audience to which it was directed would understand or interpret it having regard to what was said and done against the background of all of the surrounding circumstances [citing *Select AFSL* at [262]; *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [74]

(Perram J)]. This is quintessentially a matter for trial based on an evaluation of all of the relevant evidence. It cannot be resolved at this interlocutory stage.

37 In my view, in its pleading AISC has articulated the representations alleged, and the words or conduct it relies upon as forming the basis of those representations, with sufficient precision to enable the defendants to understand the case to be met at trial.

38 ASIC also correctly submitted that the allegation in paragraph 190 ("by the conduct alleged in paragraphs 175 to 181 above, M101 Nominees [and other entities] represented that no decision had been made to freeze redemptions …") is not an implied representation, so it falls outside the scope of the objection.

39 ASIC's submissions under this rubric are therefore to be accepted. Whether the pleaded representations, implied or otherwise, are conveyed is a question of fact to be decided at trial, by considering what was said and done against the background of all surrounding circumstances. See, for example, *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [74] (Perram J).

40 It follows that the application to strike our paragraphs 124, 136, 149 and 190 is refused.

Paragraph 125

41 The next complaint is about paragraph 125 of the statement of claim, which reads:

> 125. M+ Fixed Income Notes and M Core Fixed Income Notes exposed investors to significantly higher risk than bank term deposits.
>
> **Particulars**
>
> The M+ Fixed Income Notes and M Core Fixed Income Notes lacked the prudential regulations that apply to bank term deposits.

42 ASIC has also provided further particulars in correspondence to Mr Mawhinney, identifying the specific prudential regulations upon which it relies in support of the allegation in paragraph 125. That letter relevantly provides:

> ASIC will rely on the following prudential regulations which apply to bank term deposits:
>
> (a) under the *Banking Act 1959* (Cth) (**Banking Act**) only a body corporate that is authorised can carry on a banking business in Australia. A "banking business" includes taking money on deposit. A body corporate that is granted an authority to carry on a banking business in Australia is referred to as an authorised deposit-taking institution or **ADI**. Only ADIs can call themselves "banks", "credit unions" or "building societies";
>
> (b) ADIs are regulated by both the Australian Prudential Regulation Authority

(**APRA**) and ASIC. ASIC administers the licensing, conduct and disclosure obligations of ADIs under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). APRA authorises ADIs in Australia to carry on banking business in Australia under the Banking Act. APRA also makes and enforces prudential standards, which ADIs are required to comply with;

(c) in assessing an application for authorisation to carry on a banking business (referred to as an ADI licence or Restricted ADI licence), APRA will seek to understand the risks the applicant's business will face and its capabilities in addressing those risks. APRA will need to be confident that if the applicant is granted an ADI licence or Restricted ADI licence that it will:

(i) be financially sound;

(ii) manage its risks effectively;

(iii) have sufficient financial and non-financial resources and capabilities;

(iv) have sufficient capital resources to meet capital and liquidity requirements, both at authorisation and ongoing;

(v) meet fit and proper expectations;

(vi) have a sound risk culture;

(vii) satisfy prudential requirements; and

(viii) not pose a risk to the safety of depositors' funds or the stability of the financial system; and

(d) deposits with ADIs are guaranteed by the Australian Government's Financial Claims Scheme up to $250,000 per person per institution; and

(e) the Financial Claims Scheme covers ADIs incorporated in Australia and authorised by APRA.

43 Mr Mawhinney contends that paragraph 125 pleads a conclusion without material facts, and should be struck out.

44 I disagree. As ASIC submitted, its case on this issue, as pleaded and further rparticularised in the letter set out at [42] above, is that the M+ Fixed Income Notes and M Core Fixed Income Notes were a higher risk than bank term deposits because they were not offered by an authorised deposit-taking institution, were not subject to the detailed regulatory regime applicable to such institutions, and were not protected by the Australian Government's Financial Claims Scheme. Mr Mawhinney says that such matters were in fact disclosed, but, again, that is a factual matter for trial.

45 It follows that the application to strike out paragraph 125 is refused.

Paragraphs 92 and 278

46 The next and final complaint about the pleading concerns paragraphs 92 and 278, which are in these terms:

> 92. On dates presently unknown to ASIC, the Mayfair 101 Group corporate brochure made the following statements:
>
> a. "Mayfair 101 provides a selection of investment banking-style services that build value for shareholders and investors … providing consistent, reliable investor returns";
>
> b. "we aim to deliver consistent, reliable returns to our investors and clients";
>
> c. "Mayfair 101's model has proven itself as a reliable alternative to the banks in generating returns for investors against this sustained backdrop of low interest rates in Australia and the UK";
>
> d. "Mayfair 101's strength lies in our investment banking-style ecosystem, commitment to consistent, reliable returns for investors"; and
>
> e. "Mayfair 101's investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments. By investing with Mayfair Platinum, Mayfair 101's investor-facing division, qualified investors can gain access to:
>
> - income-generating investment opportunities;
>
> - a trusted partner with proven track record;
>
> - intensive credit-analysis and risk management approach;
>
> - advisory board breadth and expertise;
>
> - financial strength; and
>
> - a global presence."
>
> …
>
> 278. Between 28 October 2019 and 8 May 2020, on a date or dates presently unknown to ASIC and via a transfer or series of transfers presently unknown to ASIC:
>
> a. BLP Investment Trust received $290,200.00 traceable to funds invested in the M Core Fixed Income Notes;
>
> b. Panetta Investment Trust received $288,225.00 traceable to funds invested in the M Core Fixed Income Notes; and
>
> c. Tamminga Family Trust received $20,250.00 traceable to funds invested in the M Core Fixed Income Notes.

47 Mr Mawhinney submits that:

> These paragraphs only need to be read to see the deficiency. This proceeding has now

> been on foot for over 3½ years. It has been the subject of a trial, an appeal and an application for special leave to appeal to the High Court. By ASIC's compulsory processes it has received tens of thousands of pages of documentary evidence from the defendants and from other persons. It has had a liquidator appointed to the first defendant, with full access to all its records. In these circumstances it is highly unsatisfactory for ASIC to be pleading such vague and unverifiable allegations. Mr Mawhinney cannot be expected to answer them. It is clear too that ASIC will not be able to improve on them. Accordingly, these paragraphs should be struck out without leave to replead.

48 I do not accept the submission that the paragraphs should be struck because ASIC cannot say when the events that are relied on occurred (other than between stipulated dates in the case of paragraph 278).

49 ASIC submitted that in order to prove its case it does not need to prove the dates on which these events occurred.

50 As to paragraph 92, ASIC says that it will tender a copy of the relevant brochure at trial, and if the Court finds it is the brochure alleged, then ASIC will have proved that there was in existence an item of marketing material containing certain statements about the Notes.

51 It says that whether and when the brochure was in fact used as marketing material are matters for trial, but there is no deficiency in the pleaded case in circumstances where Mr Mawhinney has a copy of the brochure that ASIC intends to tender.

52 As to paragraph 278, ASIC submits that what matters to the pleaded case is that the transfers occurred or were planned to occur contemporaneously with the conduct alleged in paragraphs 279 to 291 of the statement of claim, not the precise date on which the transfers were made. ASIC's pleaded case in that regard is that in the same period of time that the Mawhinney companies were promoting their investment products they did not disclose that the funds invested in the product or the Notes could or would be transferred to entities associated with Mr Mawhinney's family.

53 In my view, in light of those explanations from ASIC about how it intends to prove its case in respect of paragraphs 92 and 278, Mr Mawhinney has sufficient notice of those claims.

54 It follows that the application to strike out paragraphs 92 and 278 is refused.

DISPOSITION

55 Mr Mawhinney's interlocutory application will be dismissed, with costs.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate: 

Dated: 19 April 2024