# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2021] FCA 1630

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| File number(s): | VID 228 of 2020 |
| Judgment of: | **ANDERSON J** |
| Date of judgment: | 22 December 2021 |
| Catchwords: | **CORPORATIONS** – where contraventions of ss 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H of the *Corporations Act 2001* (Cth) relating to false, misleading or deceptive conduct – whether the declarations made in the liability judgment meet the requirements of s 12GBA – imposition of appropriate penalties pursuant to s 12GBA of the ASIC Act for contraventions of s 12DB(1) and s 12DA(1) – assessment of pecuniary penalties – where a significant pecuniary penalty will be ordered in respect of all Defendants |
| Legislation: | *Acts Interpretation Act 1901* (Cth)<br>*Australian Securities and Investments Commission Act 2001* (Cth)<br>*Corporations Act 2001* (Cth)<br>*Federal Court of Australia Act 1976* (Cth)<br>*Federal Court Rules 2011* (Cth)<br>*Treasury Law Amendment (2019 Measures No. 3) Act 2020* (Cth) |
| Cases cited: | *ACCC v Cement Australia Pty Ltd* (2017) 258 FCR 312<br>*ACCC v Coles Supermarkets Australia Pty Ltd* (2015) [2015] FCA 330; 327 ALR 540<br>*ACCC v Optus Mobile Pty Ltd* [2019] FCA 106<br>*ACCC v Telstra Corp Ltd* [2018] FCA 571<br>*ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640<br>*ASIC v Allianz Australia Insurance Limited* [2021] FCA 1062<br>*ASIC v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511, [2020] FCA 1499<br>*ASIC v Australia and New Zealand Banking Group Ltd* [2018] FCA 155<br>*ASIC v BT Funds Management Ltd* [2021] FCA 844 |

*ASIC v Forex Capital Trading Pty Ltd* [2021] FCA 570

*ASIC v GE Capital Finance Australia, Re GE Capital Finance Australia* [2014] FCA 701

*ASIC v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701

*ASIC v Westpac Banking Corporation* [2019] FCA 2147

*ASIC v Theta Asset Management Ltd* [2020] FCA 1894

*ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54

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

*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181

*ASIC v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167

*ASIC v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59; 124 ACSR 351

*Hogben Pty Ltd v Tadros* [2016] NSWSC 1683

*Boyd v Thorn* (2017) 96 NSWLR 390

*Browne v Dunn* (1893) 6 R 67

*Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; (2020) 148 ACSR 247

*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 194 IR 461; 269 ALR 1

*Consumer Affairs Victoria v Vic Solar Pty Ltd (No 4)* [2021] FCA 449

*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 252 CLR 482

*Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467

*Kinsella v Gold Coast City Council* [2015] 1 Qd R 274

*Klees v M101 Holdings Pty Ltd* [2021] NSWSC 182

*Malamit Pty Ltd v WFI Insurance Ltd* [2017] NSWCA 162

*Milfoil Pty Ltd v Commonwealth Bank of Australia* [2017] VSCA 256

*Polyukhovic v Commonwealth* (1991) 172 CLR 501

*Re HIH Insurance Ltd* (2002) 189 ALR 365

*Rural Press Finance Ltd v ACCC* (2003) 216 CLR 53

*Shanton Apparel v Thornton Hall Manufacturing Ltd* (1989) 17 IPR 311

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| | *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249<br>*Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) ATPR 41-076<br>*Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529<br>*Visy Paper Pty Ltd v ACCC* [2005] FCAFC 236; 224 ALR 390<br>*Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 |
| Division: | General Division |
| Registry: | Victoria |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Regulator and Consumer Protection |
| Number of paragraphs: | 271 |
| Counsel for the Plaintiff: | Jonathon Moore QC appearing with Caryn van Proctor and Premala Thiagarajan |
| Solicitor for the Plaintiff: | Australian Securities and Investments Commission |
| Counsel for the Defendants: | Michael Pearce SC appearing with Aaron Weinstock, Angel Aleksov and Campbell Thompson |
| Solicitor for the Defendants: | Roberts Gray Lawyers |

# ORDERS

**VID 228 of 2020**

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| **BETWEEN:** | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** |
| | Plaintiff |
| **AND:** | **MAYFAIR WEALTH PARTNERS PTY LTD** and others named in the schedule |
| | Defendants |
| **ORDER MADE BY:** | **ANDERSON J** |
| **DATE OF ORDER:** | **22 DECEMBER 2021** |

**THE COURT ORDERS THAT:**

1. I direct the parties to confer and submit to my chambers a proposed form of orders to give effect to these Reasons for Judgment. In the event that a form of orders cannot be agreed between the parties, then each party should submit the form of order for which they contend.

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

# REASONS FOR JUDGMENT

## ANDERSON J:

## INTRODUCTION

1 On 23 March 2021, I delivered judgment on liability in this proceeding in *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247 (**Liability Judgment**). In the Liability Judgment, I upheld the Australian Securities and Investments Commission's (**ASIC**) claims that the Defendants, between 3 July 2019 and 16 April 2020 (**Relevant Period**), engaged in conduct that was:

(1) misleading or deceptive, or likely to mislead or deceive, in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***) and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***);

(2) made false or misleading representations in contravention of ss 12DB(1)(a) and (e) of the *ASIC Act*, by representing that: two financial products promoted and issued by the Defendants, namely the unsecured promissory notes called "M+ Fixed Income Notes" (**M+ Notes**) and the secured promissory notes called "M Core Fixed Income Notes" (**Core Notes**) (together, the **Mayfair Products**):

(a) were comparable to, and of similar risk profile to, bank term deposits (**Bank Term Deposits Representations**), when the Mayfair Products exposed investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products lacked the prudential regulations that apply to bank term deposits;

(b) on maturity of the Mayfair Products, the principal would be repaid in full (**Repayment Representations**), when in fact, investors in these products might not receive their capital repayments because the Defendants maintained the contractual right to extend the time for repayment indefinitely, even in circumstances where the Defendants did not have sufficient funds to repay their investors;

(c) were specifically designed for investors seeking certainty and confidence in their investments and therefore carried no risk of default (**No Risk of Default**

**Representations**), when there was a risk that investors could lose some or all of their principal investment; and

(d) in respect of the First and Third Defendants, that the Core Notes were fully secured financial products (**Security Representation**), when they were not,

(collectively, the **Representations**).

2 ASIC now seeks the following further relief:

(a) orders that the Defendants pay a pecuniary penalty in respect of their contraventions of ss 12DB(1)(a) and (e) of the *ASIC Act*, pursuant to ss 12GBA and 12GBCA of the *ASIC Act*;

(b) orders permanently restraining the Defendants from publishing the Representations and certain other representations, pursuant to s 12GD(1) of the *ASIC Act* and/or s 1101B and/or s 1324 of the *Corporations Act*;

(c) adverse publicity orders, pursuant to s 12GLB(1) of the *ASIC Act*; and

(d) an order that the Defendants pay ASIC's lump sum costs of, and incidental to, the proceeding on a joint and several basis fixed at $276,441.

3 In respect of the pecuniary penalties sought under ss 12GBA and 12GBCA of the *ASIC Act*, ASIC submits that the appropriate penalty for each Defendant is as follows:

(a) First Defendant (Mayfair Wealth Partners Pty Ltd) – $4 million;

(b) Second Defendant (M101 Holdings Pty Ltd) – $3 million;

(c) Third Defendant (M101 Nominees Pty Ltd) – $3 million; and

(d) Fourth Defendant (Online Investments Pty Ltd) – $2 million.

4 The First, Second and Fourth Defendants oppose the further relief sought by ASIC. The Third Defendant, M101 Nominees Pty Ltd, is in liquidation and did not appear or participate in the Penalty Hearing. By way of summary, the First, Second and Fourth Defendants (which, for the purpose of this Judgment, I will define as the **Defendants**) submit that no pecuniary penalty should be ordered because:

(a) no penalty can be assessed under s 12GBCA(2) of the *ASIC Act* because the legislation at the relevant time did not specify a maximum penalty applicable to this proceeding within s 12GBCA(2)(a), and further, ASIC has not proven the benefit derived and

detriment avoided because of the contraventions within s 12GBCA(2)(b), and has not sought to prove a penalty amount under s 12GBCA(2)(c);

(b) the declarations of contravention made on 23 March 2021 in the Liability Judgment do not comply with s 12GBA of the *ASIC Act* as they fail to identify with sufficient specificity the contraveners and the contravening conduct;

(c) even if the declarations comply with s 12GBA, relief under s 12GBB should be refused on discretionary grounds; and

(d) the contraventions declared were not serious and do not merit the imposition of pecuniary penalties.

5 Alternatively, the Defendants submit that, having regard to the nature of the contraventions and the evidence in mitigation, only minor penalties should be ordered.

6 The Defendants submit that the interim injunctions made on 16 April 2020 should be discharged and no permanent injunctions should be made.

7 The Defendants submit that no adverse publicity orders should be made.

8 The Defendants submit that costs should be reserved pending the outcome of the Penalty Hearing.

**SUMMARY**

9 For the reasons that follow, I will order the following pecuniary penalties be paid to the Commonwealth of Australia:

(1) The First Defendant pay - $10 million;

(2) The Second Defendant pay - $8 million;

(3) Third Defendant pay - $8 million; and

(4) The Fourth Defendant pay - $4 million.

10 I will also make the adverse publicity orders and injunctions sought by ASIC and will reserve the costs of the proceeding pending further argument from the parties in light of these Reasons given on the Penalty Hearing.

## RELEVANT FINDINGS

11 The liability trial proceeded before me undefended. As a consequence, there was no challenge to the evidence tendered by ASIC. There was no evidence tendered by the Defendants.

12 I set out below the background facts and the findings in the Liability Judgment that are relevant for the purposes of this penalty judgment.

13 The Defendants are part of a broader group of companies (**Mayfair 101 Group**) with a common director, Mr James Mawhinney. Mr Mawhinney is the sole director of each of the Defendants. The Mayfair 101 Group raised money from members of the public through various investment products and used that money to acquire real estate and invest in private equity ventures, often indirectly through loans to related entities: Liability Judgment [20].

14 The First Defendant, Mayfair Wealth Partners Pty Ltd, trading at the time as Mayfair Platinum (**Mayfair Wealth**), promoted the Mayfair Products to investors in Australia by a number of means including brochures, emails and websites: Liability Judgment [4].

15 The Second Defendant, M101 Holdings Pty Ltd (**M101 Holdings**) was the issuer of the M+ Notes: Liability Judgment [5].

16 The Third Defendant, M101 Nominees Pty Ltd (**M101 Nominees**) was the issuer of the Core Notes. On 13 August 2020, in proceeding VID 524 of 2020, the Court made *ex parte* interim orders appointing Said Jahani and Philip Campbell-Wilson as joint and several provisional liquidators of M101 Nominees. On 29 January 2021, M101 Nominees was wound up by the Court on just and equitable grounds with Messrs Jahani and Campbell-Wilson appointed as liquidators: Liability Judgment [6].

17 The Fourth Defendant, Online Investments Pty Ltd trading as Mayfair 101 (**Online Investments**) participated in the marketing of the Mayfair Products. Online Investments is the holding company of Mayfair Wealth and operated a website (www.termdepositguide.com) which promoted and marketed the Mayfair Products: Liability Judgment [7].

18 During the Relevant Period, the Mayfair Products were marketed and promoted by the Defendants in a number of ways, including via Mayfair Wealth's websites and in newspaper advertisements: Liability Judgment [79], [82]-[89], [91]-[95], [100]-[103], [106], [148], [152]-[154], [156], [[159], [161], [165], [167]-[168] and [175].

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

19 The statements set out in Annexure A to the Reasons in the Liability Judgment were made by the Defendants in the marketing and promotional material. The Mayfair Products conveyed, separately and together, an impression that the Mayfair Products were comparative to, and of similar risk profile to, bank term deposits: Liability Judgment [148].

20 The Bank Term Deposits Representation was made to investors in circumstances where the Mayfair Products exposed investors to significantly higher risk than bank term deposits: Liability Judgment [150].

21 I accepted the matters referred to in Mr Tracy's First Expert Report dated 12 June 2020 (**First Expert Report**) and Provisional Liquidators' Report dated 24 September 2020 (**Provisional Liquidators' Report**) including that the issuer of the Core Notes, M101 Nominees, "has been insolvent since inception and remains insolvent": Liability Judgment [150(a)].

22 I accepted the Mayfair Products lacked the prudential regulations that apply to bank term deposits: Liability Judgment [150(b)].

23 The Bank Term Deposits Representation was made in relation to financial products (being the Mayfair Products), which concerned the future performance of the Mayfair Products and was a representation as to a future matter: Liability Judgment [151] and [152].

24 The Defendants had no reasonable grounds for making the Bank Term Deposits Representation. In the absence of such reasonable grounds, the conduct in respect of the Bank Term Deposits Representation was deemed, pursuant to s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, to be misleading: Liability Judgment [153] and [154].

25 The evidence establishes that the Bank Term Deposits Representation in relation to the Mayfair Products was misleading or deceptive and created a false and misleading impression that the Mayfair Products were comparable, and of similar risk profile to, bank term deposits. The Mayfair Products exposed investors to significantly higher risk than bank term deposits, including by reason of the fact that the Mayfair Products are debentures, and lack the prudential regulations that apply to bank term deposits. The Mayfair Products are not comparable to, or a proper alternative to, bank term deposits: Liability Judgment [155].

**Findings in respect of Repayment Representation**

26 The statements set out in Annexure A to the Reasons in the Liability Judgment were made by the Defendants in the relevant promotional material and conveyed, separately and together, an impression that, on maturity of the Mayfair Products, the principal invested would be repaid in full: Liability Judgment [156].

27 The Repayment Representation was made in circumstances where investors in the Mayfair Products might not receive capital repayments at maturity because the Defendants had the contractual right to elect to extend the time for repayment to investors for an indefinite period of time including where the Defendants did not have sufficient funds to repay investments at maturity: Liability Judgment [157].

28 The Repayment Representation was misleading or deceptive. It created the false and misleading impression that, on maturity of the Mayfair Products, the principal would be repaid in full: Liability Judgment [158].

29 The Repayment Representation was a representation which concerned future performance of the Mayfair Products and was therefore a representation as to a future matter. The Defendants adduced no evidence that they had reasonable grounds for the Repayment Representation. Pursuant to the deeming provisions of s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, there were no such reasonable grounds and, as a result, the Repayment Representation was deemed to be misleading: Liability Judgment [159].

30 The evidence established that the Repayment Representation was misleading or deceptive or a false and misleading representation that the Mayfair Products were of a particular standard, quality or value, or had particular performance characteristics or benefits. The evidence established that investors in the Mayfair Products might not receive capital repayments at maturity: Liability Judgment [160].

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

31 The statements set out in Annexure A to the Reasons in the Liability Judgment were made and conveyed, separately and together, an impression that the Mayfair Products carried no risk of default. The No Risk of Default Representation were statements made in the marketing material: Liability Judgment [161].

32 The use of the words "certainty" and "confidence" by the Defendants in the marketing material for the Mayfair Products was likely to have conveyed to at least some consumers that their principal investment would definitely be repaid in full at maturity and that the investments carried no risk of default: Liability Judgment [162].

33 The Defendants had a contractual right to suspend redemptions of investments at maturity for an indefinite period of time if the Defendants did not have sufficient funds to repay investors. The Defendants had exercised that right to suspend redemptions: Liability Judgment [163].

34 The uncertainty of the financial position of the Defendants exposed investors to a real risk that investors could lose some or all of their principal investment. The Mayfair Products cannot be described as giving investors "certainty". The Mayfair Products have been, in fact, designed by the Defendants to produce a result which is uncertain for investors and could not on any reasonable view be described as an investment with no risk of default: Liability Judgment [164].

35 The No Risk of Default Representation was made in relation to the Mayfair Products which relates to the future performance and was therefore a representation as to a future matter. The Defendants did not adduce any evidence to establish that they had reasonable grounds for making the No Risk of Default Representation. There were no such reasonable grounds. Pursuant to the deeming provisions of s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, the No Risk of Default Representation was deemed misleading and deceptive: Liability Judgment [165].

36 On the evidence, ASIC established that the No Risk of Default Representation was misleading or deceptive or was a false and misleading representation that Mayfair Products carried no risk of default: Liability Judgment [166].

**Findings in respect of the Security Representation**

37 The statements relied upon by ASIC and set out in Annexure A to the Reasons of the Liability Judgment were made by the First and Third Defendants. Those statements conveyed, separately and together, any impression that the Core Notes were fully secured financial products: Liability Judgment [167].

38 The Security Representation was made expressly by statements of the First and Third Defendants in the relevant marketing and promotional material for the Core Notes: Liability Judgment [168].

39 I accepted the expert opinion of Mr Tracy at [2.11]-[2.14] and the conclusion at [2.24] of the First Expert Report to the effect that Core Note investor funds were not generally supported by first-ranking unencumbered asset security at 31 December 2019 and 20 March 2020: Liability Judgment [170].

40 I accepted Mr Tracy's expert opinion that, to the extent that there was security over units in various trusts (the trustees of which owned properties), such security was of little moment when, as stated by Mr Tracy, the relevant properties (with the exception of one property) had been mortgaged to a third party. The unchallenged evidence was that those third parties held first registered mortgages: Liability Judgment [171].

41 I accepted Mr Tracy's expert opinion in respect of concerns regarding the asset security value, as set out at [2.25] and [2.26] of the Expert Report. Mr Tracy's First Expert Report raised considerable doubt about the asset security values and the recovery of funds for Core Note investors: Liability Judgment [172].

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

43 I was satisfied on the evidence that the Security Representation was made in relation to financial products, being the Core Notes, which were promissory notes. I was satisfied that the Security Representation was made by Mayfair in promoting the Mayfair Products and by M101 Nominees in the application form for the Core Notes: Liability Judgment [174].

44 I was satisfied that the Security Representation was made in relation to future performance of the Core Notes and was therefore a representation as to a future matter. The Defendants have

adduced no evidence to establish that they had reasonable grounds for making the Security Representation. I found that there were no such reasonable grounds. Pursuant to s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*, I found that the Security Representation was misleading: Liability Judgment [175].

45 I was satisfied on the evidence that ASIC had established that the making of the Security Representation was misleading or deceptive or was a false or misleading representation that the Core Notes were of a particular standard, quality, value or grade, or had performance characteristics or benefits, that they did not possess: Liability Judgment [176].

46 At the Liability Hearing, ASIC sought to rely upon the Court's powers to issue declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***), s 1101D(1)(a) of the *Corporations Act* and/or s 12GBA of the *ASIC Act*. ASIC sought at the Liability Hearing that the Court make various declarations pursuant to these statutory provisions in respect to the conduct of the Defendants which the Court found contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act*: Liability Judgment [178].

47 At the Liability Hearing, ASIC applied pursuant to s 12GBA(1) of the *ASIC Act* for a declaration that a person has contravened a civil penalty provision. Section 12GBA(6) provides that "a provision of Subdivision D (other than section 12DA) is a civil penalty provision". ASIC, at the Liability Hearing, sought declarations in respect of ss 12DB(1)(a) and (e) of the *ASIC Act*, which appear in Subdivision D of Division 2 of Part 2 of that legislation: Liability Judgment [182].

**Findings relevant to declarations made in the Liability Judgment**

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

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision; and

(d) the conduct that constituted the contravention.

49 In the Liability Judgment I made the following findings at [186] and [187], in relation to the declarations sought by ASIC:

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

(a) the proposed declarations sought by ASIC identify with precision the conduct that contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*;

(b) those declarations are directed to the determination of an extant controversy rather than any abstract or hypothetical question;

(c) ASIC has a real interest in seeking the declarations and the declarations being made. ASIC is also given the power to apply to the Court under s 1101B(1)(a)(i) of the *Corporations Act* and s 12GBA(1) of the *ASIC Act*;

(d) the Defendants are each a proper contradictor because they are the subject of the declarations.

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

## Evidence tendered at Penalty Hearing

### *ASIC's Evidence*

50 ASIC, at the Penalty Hearing, tendered a substantial number of documents in the Court Book which were identified in a list of material relied upon which was submitted to chambers during the first day of the hearing on 29 September 2021 and marked P-1. These documents were collectively tendered as a single exhibit. ASIC also read [1]-[5], [9] and [10] of the Third Affidavit of Mr Tracy sworn 22 September 2021 as well as Annexure "JMT8", being a copy of the Second Supplementary Report dated 14 September 2020 of Mr Tracy (**Tracy Second Supplementary Report**).

51 Mr Tracy's Second Supplementary Report provided comments on, and set out his opinions with respect to six issues:

(1) a typographical omission, relating to a missing comma;

(2) the "compliant third class of asset" for the M Core Fixed Income Notes as described by Mr Mawhinney in his affidavit dated 8 September 2020;

(3) the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that the units in the unit trust are a valid security;

(4) the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy's First Expert Report contained certain errors;

(5) the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy's First Expert Report incorrectly asserted that there were instances where Core Notes did not maintain first-ranking security over assets; and

(6) the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy was misinformed as to the security structure of the Mayfair Products.

52 As to the typographical omission, Mr Tracy deposed that he did omit to include a comma and that this should be corrected. Mr Tracy however did not waiver with respect to the substance of his findings, in particular, that PAG Holdings (Australia) Pty Ltd (**PAG**), as security trustee (with one exception) did not hold direct first-ranking asset security over the Australian real property assets which were the primary assets of each trust.

53 As to the "compliant third class of asset" described by Mr Mawhinney in his affidavit dated 8 September 2020, Mr Tracy deposed that the security was appropriately described by him in his First Expert Report as well as his First Supplementary Report dated 12 August 2020 (**First Supplementary Report)**. Mr Tracy deposed that the observations made by Mr Mawhinney, in his 8 September 2020 Affidavit did not change his opinion, as expressed in his First Report and First Supplementary Report, in particular, that PAG, as security trustee did not hold direct first-ranking asset security over:

(i) the Australian real property assets which are the primary assets of a number of the trusts (with one exception); or

(ii) loans advanced which are the primary assets of Jarrah Lodge Unit Trust No 1 (**JLUT**).

54 Mr Tracy maintained that it was unclear if PAG, as security trustee, had security over deposits paid for Australian real property assets.

55 As to Mr Mawhinney's assertion that the units in the unit trust were a valid security, Mr Tracy noted that, as it appeared to him, there were many instances where the security was put in place after the relevant dates, and sometime after each relevant property was acquired, deposits paid, or the loans were advanced. Mr Tracy deposed that the implication of this delayed securitisation is that, in many instances at the time when the Core Note investor funds were used to acquire and make deposits on Australian real property, Sunseeker Holdings Pty Ltd (**Sunseeker Holdings**) had not yet entered into a Specific Security Deed (**SSD**) or registered

its security over the units in the majority of trusts on the Personal Property Securities Register (**PPSR**). Mr Tracy deposed that this meant that its interests were likely to be unsecured at the relevant dates and that all other dates leading up to the registration of the relevant property on the PPSR. Mr Tracy maintained that his opinion did not change with respect to the nature of the security over the Australian real Property assets and the loans advanced which are the primary assets of JLUT. Mr Tracy maintained that, based on the information made available to him, it was unclear if PAG, as security trustee had security over deposits paid for Australian real property assets.

56 As to the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy's First Expert Report contained certain errors, Mr Tracy noted that, while the missing comma should be corrected, the observations made in the Mawhinney Affidavit did not change the opinions as expressed in his First Expert Report and First Supplementary Report, in particular, that PAG, as security trustee (with one exception) does not hold direct first-ranking asset security over the Australian real property, whether acquired or deposits have been paid, nor loans advanced, which are the primary assets of each trust. Mr Tracy described the existence of other securities, including the security over the units in the trusts held by Sunseeker Holdings and granted in favour of the security trustee, PAG at 4.12 to 4.46 of his First Expert Report and 3.10 to 3.21 and 3.24 of his First Supplementary Report, and maintained this was correct.

57 As to the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy's First Expert Report incorrectly asserts that there were instances where Core Notes did not maintain first-ranking security over assets, Mr Tracy maintained that these assertions did not change his opinion with respect to his views on the nature of the security over the real Australian real Property assets and the loans advanced which are the primary assets of JLUT. Mr Tracy maintained that, based on the information made available to him, it was unclear if PAG, as security trustee has security over deposits paid for Australian real property assets.

58 As to the assertion by Mr Mawhinney in his affidavit dated 8 September 2020 that Mr Tracy was misinformed as to the security structure of the Mayfair Products, Mr Tracy maintained that the value of the units in each trust is directly referable to the value of the underlying real property less and any prior ranking security interest registered over the relevant property, deposits paid on real property assets, the recoverable value of loans advanced and other liabilities in the trust. Mr Tracy noted that a further relevant consideration is whether the security that exists, is valid and enforceable at the dates when Core Note investor funds were

used to acquire the real property and make deposits on Australian real property assets, or loans were advanced. Mr Tracy maintained that the previous findings that he made in his First Expert Report, with respect to the timing of when the security documents appeared to be entered into and registered on the PPSR, compared to the time when Core Note investor funds were used to acquire real property and make real property deposits and loans advanced.

59 Mr Tracy was required by the Defendants to attend for cross-examination. Mr Tracy maintained what he previously stated in his expert reports and did not waiver in the views that he previously expressed. In summary, Mr Tracy confirmed the expert opinion that he gave in his Expert Reports. Mr Tracy gave the following evidence:

(a) Mr Tracy said that his role, as an independent expert witness, was to describe the existence of the security arrangements, and to independently confirm, by reference back to various registers, what security existed at the relevant dates.

(b) Mr Tracy said that his expert reports described the registration of securities and also expressed opinions on enforceability and validity.

(c) Mr Tracy said that the opinions which he expressed in his expert reports were based on his review of the documents that were made available to him in his review, and that he was confident in the opinions that he made in respect of those documents.

(d) Mr Tracy gave evidence that the Core Notes were not generally supported by first-ranking unencumbered asset security.

(e) Mr Tracy said that he expressed significant concerns around the existence of the security, over which the Core Notes were held. Mr Tracy stated that there was a risk that prior registered security holders may be able to escalate their facilities, and that this could lead, potentially, to the appointment of receivers, which ultimately did occur after he had prepared his First Expert Report.

(f) Mr Tracy also said that he expressed concerns in relation to the properties which were acquired in the Mission Beach region, which occurred in a relatively short period of time. Mr Tracy stated that the acquisition of properties in this manner led to a commensurate increase in the value of the properties at that time.

(g) Mr Tracy said that he was concerned about the financial capacity of some of the parties to be able to repay their loans and, in particular, Eleuthera which, based

on his review of its balance sheet, showed a negative net asset position indicating a potential issue around the repayment of that loan.

(h) Mr Tracy noted that, in his First Expert Report, he raised concerns about the basis of the four per cent uplift in values that was applied by M101 Nominees in its report to the security trustees, and Mr Tracy also stated that he subsequently expressed concern around the basis of the uplift that was applied to the Dunk Island assets. Mr Tracy stated that these initial concerns had been proven correct given the appointment of the receivers, and then consequently the default interest rate of 48 per cent which is now being charged by Naplend Pty Ltd (**Naplend**).

(i) Mr Tracy noted that the security which was put in place with respect to a number of the assets, was only done so after the date that the asset was acquired, or it was not registered at the time the assets were acquired. Mr Tracy noted that he raised concerns about the fact that property was acquired using investor funds, and that he did raise this concern with ASIC.

(j) As to the investment scheme and the purchase of property in Dunk Island, it was put to Mr Tracy that the COVID-19 pandemic had a negative impact on tourism to that region and, as a result there was a commensurate negative impact on the ability for property in that area to generate income and capital growth. Mr Tracy considered that it was too far a stretch to conclude that the presence of the pandemic would significantly impact the value of these assets. Mr Tracy pointed to the fact that property prices in many markets, including in many regional markets, significantly increased throughout the pandemic. Mr Tracy considered that it was clear that regional tourism experienced a strong growth during the pandemic, particularly in Queensland. Mr Tracy said that Dunk Island was significantly impacted by Cyclone Yasi and was not a tourist destination at that time, and he was not aware of any significant operations at Dunk Island at that time.

(k) Mr Tracy was asked to assume certain facts and was posed questions in relation to the operations of Eleuthera and the flow of funds between that entity and other entities in the Mayfair Group as well as the ownership structure of these entities.

(l) Mr Tracy said that if Eleuthera was acting as the treasury entity in the Mayfair Group, the transfer of moneys from the noteholders to the various trusts within that group should have been secured, and that any entity in a corporate group that acts as a treasury entity should have such security in place.

(m) As to the value of any security over the debts that were owed to Core Notes investors, pursuant to 2.2(b)(iii) and 2.2(d)(iii) of the First Expert Report, Mr Tracy stated that the form of security was described at 4.8 of this report.

(n) Mr Tracy was asked a series of questions in relation to the security arrangements and the nature of the assets that were secured by the charges in the unit trust. Mr Tracy stated that the real estate was not directly secured and that the investor money which was used to acquire the real estate was ultimately mortgaged to Naplend. Mr Tracy maintained that this is what was described in the reports of the security trustee and what he relied upon when forming conclusions which ultimately made up his reports. Mr Tracy identified that any value which could be ascribed to the units would be an amount which would include the property, less any liabilities against that property. Mr Tracy maintained that the properties that were held by the unit trust had some value based on the representations that were made in the reports of the security trustee, but maintained that he was unable to confirm the value of the properties.

(o) It was put to Mr Tracy that paragraph 16 of his First Expert Report, which had a missing comma misled him into believing that there were two classes of assets, being Australian real estate and cash. Mr Tracy disagreed with that assertion. Mr Tracy said that he filed a further affidavit with respect to that specific question where he acknowledged that there appeared to be a typographical error, but, in any case, it did not impact the analysis that he undertook and what he represented in respect to the security that related to the trusts.

(p) Mr Tracy said that what had been represented to him was that the investor funds had been used to acquire real estate, pay deposits, and make loans, but that the principal asset, was the real estate. Mr Tracy stated that his concern was that the real estate was left in a position where it was able to be mortgaged to a third party, and the lack of security back to the investors over that property created a significant security risk for those investors.

60 The Defendants' senior counsel, Mr Pearce SC, submitted in final address, that I should not accept the evidence of Mr Tracy nor the opinions which he expressed in his expert reports. I do not accept that submission. I found Mr Tracy to be a considered and careful witness. Mr Tracy did not resile from the opinions which he expressed in his First Expert Report dated 12 June 2020, First Supplementary Report dated 12 August 2020, Second Supplementary Report dated 14 September 2020, Third Supplementary Report dated 10 December 2020 and Fourth Supplementary Report dated 20 September 2021 (collectively, **Expert Reports**) under cross-examination.

61 I accept the evidence Mr Tracy gave and the expert opinions expressed by Mr Tracy in his Expert Reports.

***Defendants' Evidence***

62 The Defendants tendered documents in the Court Book that were identified in a List of Documents dated 30 August 2021 which was marked MFI-1. The Defendants subsequently submitted to my chambers an updated list of documents on 4 October 2021. The documents were tendered as a single exhibit marked as D-1.

63 ASIC required Mr Mawhinney to attend for cross-examination. In summary, Mr Mawhinney gave the following evidence in cross-examination:

(a) Mr Mawhinney was taken to an email which he sent on 7 June 2019, to his solicitors at the time, KHQ Lawyers, in which Mr Mawhinney identified that ASIC's regulatory guide (**RG**) RG156 would be reviewed in detail prior to the promotion of Core Notes. Mr Mawhinney said that "retail investors" were not accepted as investors. Mr Mawhinney said that all of their clients were "wholesale clients" in alignment with s 708 of the *Corporations Act*. It was put to Mr Mawhinney that a "wholesale client" could be a "retail investor". Mr Mawhinney said that this was the first time that had been put to him.

(b) Mr Mawhinney was asked whether he sought legal advice that a "retail investor" was the same as a "retail client". Mr Mawhinney said that he did not. It was put to Mr Mawhinney that he would have regarded RG156 as irrelevant because

it used the term "retail investors", which he said he did not accept as clients. Mr Mawhinney disagreed with this assertion.

(c) It was put to Mr Mawhinney that RG156 provides that "*Advertisement for notes should state that the product is not a bank deposit. Further, they should not suggest that the note is or compares favourably to a bank deposit.*" And when asked whether he considered the advertising for the Core Notes was compliant with RG156, Mr Mawhinney said that he received advice that it was compliant. Mr Mawhinney could not provide formal written evidence of this advice.

(d) Mr Mawhinney was asked about the advertisements that were published to promote the Core Notes. Mr Mawhinney was referred to RG156 and was shown how the guide states that advertisements should not state that there is little to no risk of investors losing their principal or note being paid interest, and that advertisements should not state that the products have "no fees". It was put to Mr Mawhinney that his advertisements were contrary to what the RG156 pronounced. Mr Mawhinney said that he could not recall whether the advertisements that he published said this.

(e) Mr Mawhinney was asked about the status of the security over the real property, and it was put to Mr Mawhinney that not having first-ranking security over real property exposed the investors to the risk, which eventuated, that the real property could be used to secure directly third-party loans which is what occurred with Naplend. It was put to Mr Mawhinney that he did not make disclosures to investors in relation to the kind of security which existed over the relevant property in support of the investors' notes. Mr Mawhinney said that he did make disclosures to some investors, but not all. When asked how this was so, Mr Mawhinney identified that some investors requested a copy of the security statements, specific to the secured notes.

(f) It was put to Mr Mawhinney that such disclosures and warnings, pursuant to RG156.20, must be prominent to ensure investors have a balanced impression of the note offering. Mr Mawhinney said that he did not recall reading this prior to the publication of the advertisements.

(g) When asked whether the advertisements provided prominent warnings to potential investors as to the risks involved with losing some or all of their money

(per RG156.10), Mr Mawhinney stated that the offer documents contained a "risks section" in the "FAQ section", and that was done so pursuant to advice given to him by KHQ Lawyers. It was put to Mr Mawhinney that his advertisements stated the interest rates that were being offered, and contrary to RG156.21, prominent warnings were not stated on the advertisements that investors could lose some, or all of their money. Mr Mawhinney said that there was a risk statement in the product offering which was recommended to him by his legal team.

(h) When it was put to Mr Mawhinney that the risk statement was in a brochure, and did not appear in any of the advertisements. Mr Mawhinney stated that RG applied to financial services companies offering retail products, and that Mayfair 101 and the Core Note products were not retail products. Mr Mawhinney said that they were not licensed to provide retail products and while they took into account some factors from the RG, based on the advice that they received, this did not apply to the products.

(i) When Mr Mawhinney was asked whether the advice he received was that the RG did not apply to his products, Mr Mawhinney said that the advice he received in this regard was oral advice some time ago, but noted that the RG was something that was taken into consideration, but that they were not required to follow.

(j) When it was put to Mr Mawhinney that there no evidence, besides his statement that he was provided with oral advice, supporting the proposition that his lawyers said that the RG did not apply to his products, Mr Mawhinney said that he had a conversation with his lawyers in which they advised him that because he offered wholesale products the RG did not apply.

(k) When asked why his lawyers were not called to give evidence, Mr Mawhinney said that he did not ask them, or did not think to ask them to do so.

(l) It was put to Mr Mawhinney that not having first-ranking security directly over real property exposed the investors to the risk, which eventuated, that the real property could be used to secure direct third-party loans. Mr Mawhinney disagreed with this assertion.

(m) When asked if this is what occurred with the loan from Naplend, Mr Mawhinney said the underlying assets were mortgaged as a result of the loan being accelerated due to the inability to pay that loan out.

(n) Mr Mawhinney was asked if he thought that there was a prospect that the Mayfair Group of companies could grant direct security over the real estate, and thereby diminish the value of security the investors had over the units, Mr Mawhinney disagreed.

(o) When asked whether Mr Mawhinney notified investors that direct security was given to Naplend over the real estate, thereby devaluing the value of the security of the units, Mr Mawhinney said that he did not because there was no requirement to, and because there was adequate security in place securing the Naplend facility. Mr Mawhinney further stated that the product documents provided all the required disclosures. However, Mr Mawhinney did not believe it was necessary for investors to be informed that the security was not over real estate, but rather over units in a trust that owned real estate which was the subject of first-ranking security to another entity. Mr Mawhinney said that he told investors he would secure their investment by "cash, real estate, and other assets".

(p) Mr Mawhinney said that there was security over the bank account, one property in compliance with the alpha document, and multiple PPSR-registered charges that were all first-ranking security over the unit trust, 14 of which held the entire Mission Beach and Dunk Island real estate portfolio. Mr Mawhinney said that this is what was offered to investors and was compliant.

(q) When asked whether Mr Mawhinney considered it relevant to tell investors that, insofar as they had security over real property, it was just one property and what the value of that property was, Mr Mawhinney said that he did not know, because it was not required, and because his legal advisors did not advise him that he had any legal obligation to do so.

(r) It was put to Mr Mawhinney that the security trustee was asked to provide reports to ASIC, and when that occurred, there was a "mad scramble" by Mr Mawhinney and the security trustee to create new security and to include it in the reports that were provided to ASIC. Mr Mawhinney disagreed with that

assertion and said that it was the role of the security trustee to respond to ASIC's questions.

(s) Mr Mawhinney was asked if he had an explanation as to why it was necessary for his security trustee to restate the report and bring in new security that did not previously exist. Mr Mawhinney said that the security trustee was comfortable with the information that was provided, and only after they had a further look at the information, did they decide that they would report on it differently. Mr Mawhinney said that the reports the security trustee provided still confirmed that there was adequate security.

(t) It was put to Mr Mawhinney that the security trustee raised concerns about the uplift that would apply to the property, by virtue of the fact that Mr Mawhinney and the Mayfair Group had created their own market by purchasing a large amount of homes in the relevant area which had the effect of inflating property prices. Mr Mawhinney disagreed with this point, and said that he took a conservative approach to the valuation of the properties and the unit trusts. Mr Mawhinney said that there was significant value in the unit trusts well beyond just the individual purchase price of each individual property.

(u) Mr Mawhinney was asked, given Mr Mawhinney's view, if there was significant value in the unit trusts, why the Naplend loan required a 24 per cent interest rate and a 48 per cent default rate, and why such a high interest rate was required for financing. Mr Mawhinney said that interest rates of this kind were not uncommon for bridging finance for regional projects.

(v) It was put to Mr Mawhinney that in fact, he was desperate for finance and was forced to pay what could be described as "extortionate interest rates" for such a loan. Mr Mawhinney described the financing as a "very sound commercial decision". Mr Mawhinney said that taking a bridging facility on a short-term basis was a commercial tool that was used at the time.

(w) Mr Mawhinney was asked whether the ability to finance such a high interest rate required continual promotion of the Core Notes and for investors to be drawn in, and if this was not done, he would be unable to pay the interest, and would be at risk of default. Mr Mawhinney said that he was entitled to assume that, because they had had a history of new investors joining the group month-

in month-out, it was not reasonably foreseeable that COVID-19 would hit, nor was it reasonably foreseeable that ASIC would make an application to stop their fundraising.

(x) Mr Mawhinney was taken to a Mayfair 101 document where ASIC's action that was taken was described as "misguided", and Mr Mawhinney was asked whether he still agreed with that view. Mr Mawhinney said he did agree with it.

(y) Mr Mawhinney was taken to his open letter to ASIC dated 16 March 2021, in which he described ASIC's prosecution as "prosecution for a crime that was never committed", and Mr Mawhinney was asked whether he still agreed with that view. Mr Mawhinney said he maintained that view.

(z) Mr Mawhinney was taken to his open letter to ASIC dated 16 March 2021, in which he told ASIC that they constructed their case with "fictitious evidence", and Mr Mawhinney was asked whether he still agreed with that view. Mr Mawhinney said he maintained that view.

(aa) Mr Mawhinney was taken to his open letter to ASIC dated 16 March 2021, in which he described ASIC as having "no regard for the law", and Mr Mawhinney was asked whether he still agreed with that view. Mr Mawhinney said that he did stand by his view.

(bb) Mr Mawhinney was asked whether he moved property that was paid for by investor funds, or with investor funds, to the British Virgin Islands. Mr Mawhinney said that the British Virgin Islands entity formed part of the Mayfair Group and the shares that were transferred there had not disappeared.

(cc) Mr Mawhinney was asked whether the shares that were transferred to the company in the British Virgin Islands, were the subject of any security held. Mr Mawhinney said they never were.

(dd) Mr Mawhinney was asked whether he accepted that someone who might satisfy the definition of "sophisticated investor", because they had sold their house and had $500,000 to invest, might not be a sophisticated person. Mr Mawhinney disagreed with that assertion.

(ee) It was put to Mr Mawhinney that he had expressed no remorse for his actions. Mr Mawhinney disagreed with that assertion.

64 I did not find Mr Mawhinney to be a credible witness. Mr Mawhinney refused to make even the most obvious concessions to the failures of the Mayfair Group of companies to make disclosure to investors of the risks faced by them in investing in the Mayfair Products. Mr Mawhinney sought to rely upon legal advice obtained by the Mayfair Group of companies to justify the failure of the promotional material to explain adequately the risks that investors faced in investing in the Mayfair Products. The impression I obtained from Mr Mawhinney's demeanour in giving evidence was that Mr Mawhinney was determined to allocate blame for the substantial losses incurred by investors to ASIC for taking enforcement action against Mr Mawhinney and the Mayfair Group of companies. Mr Mawhinney refused to accept that investors did not have first-ranking security over real property assets. Mr Mawhinney refused to accept any responsibility for the substantial losses sustained by investors as a consequence of his and the Mayfair Group of companies investment decisions. Mr Mawhinney was determined to inform the Court why he and the Mayfair Group of companies were not at fault. Mr Mawhinney refused to accept that the investments made by the Mayfair Group of companies were highly speculative and that this fact had not been disclosed in the promotional and marketing material to investors. Mr Mawhinney's evidence was not honest and truthful.

**Liability Judgment – Issue Estoppel**

65 The Defendants, in cross-examination of Mr Tracy, and in the documents which they tendered in the Penalty Hearing, sought to challenge the findings made in the Liability Hearing. The Defendants submit that the Court should make additional findings, the consequence of which, the Defendants submit, is that the Court should find that:

(a) the security concerns raised by the security trustee were addressed to the security trustee's satisfaction;

(b) the misrepresentations found in the Liability Judgment were not serious contraventions;

(c) the Defendants had a culture of obtaining and acting on legal advice in respect to their statutory obligations as providers and issuers of financial products;

(d) the Defendants obtained legal advice from solicitors and counsel as to their disclosure obligations to investors and followed that advice;

(e) insofar as the Provisional Liquidators' Report found that the Third Defendant's business model (M101 Nominees Pty Ltd) was not sustainable, that was wrong;

(f) insofar as the provisional liquidators found that M101 Nominees was insolvent from inception, that was wrong;

(g) insofar as the Provisional Liquidators' Report found that M101 Nominees did not hold any security in respect of its loan to Eleuthera, that was wrong;

(h) the expert opinion of Mr Tracy should not be accepted as it was out of date, qualified and wrong insofar as Mr Tracy expressed the opinion that Core Note investor funds were not generally supported by first-ranking unencumbered asset security as at 31 December 2019 and 20 March 2020;

(i) Insofar as Mr Tracy's evidence supports a conclusion that the investors have suffered losses, that was wrong;

(j) Mr Tracy's expert opinion that, to the extent that there was security over units in various trusts (the trustees of which own properties), such security was of little moment when, the relevant properties (with the exception of one property) had been mortgaged to a third party which was, in the Defendants' submission, wrong; and

(k) insofar as Mr Tracy's Expert Reports raised considerable doubt about the asset security values and recovery of funds for Core Note investors, Mr Tracy was wrong.

66 The Defendants submit correctly, that the Court has given final judgment on liability and is *functus officio* in respect of all questions concerning liability. However, the Defendants contend that, because in their view "the Court's judgment on liability is the four declarations of contravention", it is open to the Defendants to contest all facts already found by the Court in this proceeding, other than the findings of fact which are the basis for the declared contraventions which, in the Defendants' submission, are to be determined in accordance with the principles of issue estoppel. See *Spencer Bower and Handley, The Doctrine of Res Judicata* (5th edition, 2019) at 5.28; *711 Hogben Pty Ltd v Tadros* [2016] NSWSC 1683, [62]-[68]; *Boyd v Thorn* (2017) 96 NSWLR 390 at [147]; *Kinsella v Gold Coast City Council* [2015] 1 Qd R 274, [72]-[76]; *Malamit Pty Ltd v WFI Insurance Ltd* [2017] NSWCA 162, [43]; *Shanton Apparel v Thornton Hall Manufacturing Ltd* (1989) 17 IPR 311.

67 ASIC submits that the Defendants are bound by all findings of fact in the Liability Judgment, including the findings of fact which were the basis for the declarations. ASIC submits that the authorities relied upon by the Defendants on issue estoppel do not involve a single proceeding with separate hearings on liability and relief, but rather concern general principles about issue

estoppel, relevant where courts are considering "what was at issue in a previous proceeding": *Milfoil Pty Ltd v Commonwealth Bank of Australia* [2017] VSCA 256 at [89] per Santamaria JA, Tate and Whelan JJA agreeing.

68 ASIC submits that the authorities relied upon by the Defendants have limited relevance to the present situation where the Court is considering the penalty to be ordered in relation to a determination about certain issues as part of the same proceeding (rather than past proceedings).

69 ASIC submits that the only case involving liability and penalty cited by the Defendants is *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467 (***FSU***) where Merkel J rejected an attempt by the respondents in that case to re-litigate facts already found in relation to liability as part of the same proceeding. In *FSU*, Merkel J held at [6] that it was "not appropriate" to raise "matters relating to liability that had not been raised at the liability hearing". The consequential ruling in that case was that the "evidence filed by the respondents for the purpose of [the penalty] hearing which was also capable of being relevant to liability, was to be received only in relation to the quantum of any penalty" – does not permit a party, at the penalty phase of a proceeding, to submit that a fact already found by the court should be re-determined. In *FSU*, Merkel J held that if a matter raised at a penalty hearing does not contradict a finding of fact made at the liability hearing, but is relevant nonetheless to both liability and penalty, it will be received only on the latter basis: *FSU* at [11] and [28].

70 ASIC submits, that Merkel J in *FSU* did not allow the respondent, the Commonwealth Bank of Australia (**CBA**), to advance an argument "which if accepted, would result in different findings on liability to those made in the reasons for judgment": *FSU* at [49]. ASIC submits that Merkel J held at [55] that there was a:

> … fundamental difficulty with CBA being permitted to raise its argument for the first time during the penalty hearing. It is self evident that, if the argument had been pleaded, or had it been raised in the submissions presented prior to, or in the course of, the hearing in relation to liability, its determination would have been affected by evidence. In the circumstances, it would be unfair to now permit CBA to rely on the argument for the first time at the penalty hearing

71 ASIC submits that there is nothing in the authorities cited by the Defendants that enables them to revisit the facts already found in the Liability Judgment. ASIC submits that, insofar as evidence that may be relevant to both liability and relief may be sought to be adduced for the

purposes of the Penalty Hearing, such evidence can only be adduced if it is not inconsistent with findings made on liability.

72 ASIC submits that the Defendants' attempt to challenge the evidence already led by ASIC at the Liability Hearing, ought not be permitted as it represents a breach of the rule in *Browne v Dunn* (1893) 6 R 67 (***Browne v Dunn***). The evidence of ASIC's witnesses at the Liability Hearing was uncontested because the Defendants advised the Court that they would make no appearance nor tender any evidence at the Liability Hearing: Liability Judgment [13] and [79].

73 ASIC submits that the rule in *Browne v Dunn* prevents the Defendants from now advancing matters in contradiction to evidence already led. ASIC submits that if the Defendants wished to contradict the evidence of ASIC's witnesses then fairness required that the Defendants put their case to ASIC's witnesses in order that ASIC's witnesses be given the chance to squarely confront any criticism of their evidence.

74 I accept ASIC's submissions that the Defendants are bound by the findings of fact which I made in the Liability Judgment. It is not permissible for the Defendants in the penalty phase of the proceeding to seek to challenge the findings of fact already made in the liability phase of the proceeding. It is also not permissible for the Defendants in the penalty phase of the proceeding to seek to have the Court make findings of fact which contradicts findings of fact made at the Liability Hearing. I reject the Defendants' attempt in the penalty phase of the proceeding to advance submissions which, if accepted, would result in different findings on liability to those I made in the Liability Judgment. There is nothing in the authorities relied upon by the Defendants and referred to in [66] above, which would enable the Defendants to have re-determined facts already found in the Liability Judgment. For these reasons, I reject the Defendants' attempt to seek to revisit facts already found in the Liability Judgment and to submit in the penalty phase of the proceeding that the findings made were wrongly determined. If the Defendants wish to challenge the correctness of the findings made in the Liability Judgment then the proper forum for that to take place is an appeal from the Liability Judgment. Subject to the Defendants' right of appeal, the Defendants are bound at the Penalty Hearing by my previous findings in the Liability Judgment. The consequence is that I reject the Defendants' attempt to have me re-determine or make findings which are inconsistent with the findings made in the Liability Judgment.

75 ASIC's reliance on the rule in *Browne v Dunn* in this proceeding is misplaced. The correct principle which prevents the Defendants from now advancing an issue which is contrary to findings which have been made in the Liability Judgment would be pursuant to principles of *res judicata* and issue estoppel, which, as I have found above, are enlivened.

## RELEVANT STATUTORY AND LEGAL PRINCIPLES

### Maximum penalty – s 12DB *ASIC Act*

76 Prior to 13 March 2019, the maximum penalty for a contravention of s 12DB of the *ASIC Act* was 10,000 penalty units: s 12GBA(3) of the *ASIC Act* as at 5 October 2017.

77 Between 13 March 2019 and 23 June 2020, and thus when ASIC commenced these proceedings on 3 April 2020, s 12GBCA(2) of the *ASIC Act* provided that the maximum pecuniary penalty for each contravention of ss 12DB(1)(a) and 12DB(1)(e) was as follows:

> (2) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:
>
> (a) the penalty specified for the civil penalty provision, multiplied by 10; and
>
> (b) if the Court can determine the benefit derived and detriment avoided because of the contravention- that amount multiplied by 3; and
>
> (c) either:
>
> (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
>
> (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units- 2.5 million penalty units.

### Penalty specified for the civil penalty provision

78 At the time this proceeding was commenced on 3 April 2020, there was no penalty specified due to a drafting error in the *ASIC Act*. That rendered s 12GBCA(2)(a) incapable of operation.

79 On 23 June 2020, subsection 12GBCA(2)(a) was amended to replace the words in (a) above with "50,000 penalty units". Thereafter, s 12GBCA(2) provided:

> *Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate*
>
> (2) The pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12 month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

80 For contraventions between 1 July 2017 and 30 June 2020, a penalty unit was $210.30. Accordingly, the maximum penalty specified in s 12GBCA(2)(a) of the *ASIC Act* for a single contravention of s 12DB committed in that period is $10.5 million.

81 ASIC submits, and the Defendants agree, that the amendment to s 12GBCA(2)(a) operates retrospectively, in the sense that a court must treat its operation as having commenced on 13 March 2019: s 327 of the *ASIC Act*.

82 The relevant conduct in the present case first took place on 3 July 2019.

83 The Defendants submit that legislation which gives retrospective operation to penal legislation, such as the amending legislation in this case, is not within the power of the Commonwealth Parliament. However, the Defendants concede, that the decision of the High Court in *Polyukhovic v Commonwealth* (1991) 172 CLR 501 binds this Court such that it cannot be said that the retrospective operation of s 12GBCA(2)(a) is beyond the power of the Commonwealth Parliament. The Defendants formally make the submission that the amending legislation is beyond the power of the Commonwealth Parliament to preserve their right to press this argument in the High Court of Australia, should the need arise.

84 The only point of contention between the parties in relation to the retrospective operation of s 12GBCA(2)(a) is whether the amendment applies to proceedings commenced prior to the amendment taking effect, as is the case here.

85 The Defendants contend that the amendment affected by s 327 of the *ASIC Act* does not apply to these proceedings which arise from conduct which occurred between 13 March 2019 and 23 June 2020. The Defendants submit that s 327 of the *ASIC Act* is silent with respect to the process pertaining to legal proceedings commenced before 23 June 2020. In the Defendants'

submission, s 327 of the *ASIC Act* should be read subject to s 7(2) of the *Acts Interpretation Act 1901* (Cth) (***AIA***). That section provides that the amendment of an Act or part of an Act does not affect, among other things, any legal proceeding, and such a legal proceeding may be continued or enforced as if the Act or part of the Act had not been repealed or amended. However, s 2(2) of the *AIA* provides that "the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention". The Defendants accept that the Parliament may alter rights in extant litigation with retrospective force if there is such a contrary intention.

86 The Defendants submit that the existence of a contrary intention requires an "explicit provision" which they submit is missing in s 327. I reject that contention for the reasons that follow.

87 I accept ASIC's submission that the express terms of the amending legislation contains a clear contrary intention. The amendment to s 12GBCA(2)(a) was made by Schedule 3, Part 1, Item 3 of the *Treasury Law Amendment (2019 Measures No. 3) Act 2020* (Cth). Item 9 of Schedule 3 also inserted s 327 into the *ASIC Act* in the following terms:

> **327 Application-amounts of pecuniary penalties**
>
> The amendments made by items 2 and 3 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* apply in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurred or occurs wholly on or after the commencement of Schedule 2 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.
>
> Note: Schedule 2 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* commenced on 13 March 2019.

88 The contrary intention required by s 2(2) of the *AIA* is clear in s 327 of the *ASIC Act*. The penalty provision in s 12GBCA(2)(a) of the *ASIC Act* has effect if "the conduct ... occurred … after" 13 March 2019. That was the position here. The relevant conduct which has been held to be in contravention of a civil penalty provision first took place on 3 July 2019. The plain words of s 327 of the *ASIC Act* contain an express contrary intention to the position in s 7(2) of the *AIA*.

89 I also accept ASIC's submission that the alternative construction of these provisions advanced by the Defendants requires a strained reading of the legislation. It would require the Court to read words into the legislation which are not there, not implied and not warranted. The

Defendants' construction requires the Court to read s 327 of the *ASIC Act* as if it stated that the new penalty provision in s 12GBCA(2)(a) of the *ASIC Act* applies to conduct after 13 March 2019 "but not if that conduct is the subject of proceedings commenced after that date and before the Act came into force". Nothing in the legislation suggests these words should be read in.

90 Whilst I accept that the contrary intention of which s 2(2) of the *AIA* speaks, must be found in the legislation itself, regard may be had to extrinsic materials to assist in interpreting the legislation. I accept ASIC's submission that the extrinsic materials confirm that the amendment to s 12GBCA(2)(a) of the *ASIC Act* applies to any conduct from 13 March 2019, irrespective of whether proceedings had been commenced when the amendments came into force. That intention is consistent with the part of the Explanatory Memorandum to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* (Cth) (**Explanatory Memorandum**), which states:

> 3.7 Part 1 also corrects a drafting error in the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019. The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 sought to introduce a stronger penalty framework into the Australian Securities and Investments Commission Act 2001 by increasing civil penalty amounts and expanding the methods by which a civil penalty could be calculated. However due to a drafting error, this outcome was not achieved.
>
> 3.8 The amendments address the drafting error by clarifying that the maximum pecuniary penalty for the contravention of a civil penalty provision is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. These amendments ensure the Government's objectives of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 are achieved. [Schedule 3, items 2 and 3, paragraphs 12GBCA(1)(a) and 12GBCA(2)(a) of the Australian Securities and Investments Commission Act 2001]
>
> 3.9 The amendments to correct the error in the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 apply from the day Schedule 2 to that Act commenced. **The retrospective application** of the amendments is consistent with the Government's **intention to strengthen corporate and financial sector penalties and ensures that a period does not exist where the affected parties could avoid penalties for contravening civil penalty provisions**. [Schedule 3, item 9, section 326 of the Australian Securities and Investments Commission Act 2001].
>
> (Emphasis added.)

91 The Explanatory Memorandum states that the purpose of the retrospective application of the provision was to ensure that a period did not exist where affected parties could avoid penalties for contravening civil penalty provisions. This intention supports a reading which simply

applies the legislation retrospectively as at the date specified in accordance with the plain words of s 327 of the *ASIC Act*, rather than a strained reading that would enable the Defendants to avoid a penalty and therefore take advantage of the very error that the amendment sought to cure. The Explanatory Memorandum does not establish a contrary intention for the purposes of s 2(2) of the *AIA*. It is consistent with the wording of s 327 of the *ASIC Act*, which on its own terms provides for the retrospective operation on proceedings whether or not they were commenced at the time that the amendment was passed.

92 I am satisfied that the clear intention in s 327 of the *ASIC Act* is that the amendment to s 12GBCA(2)(a) was wholly retrospective in respect of all contravening conduct after 13 March 2019. It was not limited to contravening conduct after that date but where proceedings had not yet been commenced in respect of that conduct.

93 It follows, for these reasons, that the maximum penalty fixed by s 12GBCA(2)(a) for each contravention of s 12DB committed by the Defendants is $10.5 million.

**ASIC's Submissions on Penalties under s 12GBCA(2)(b)**

94 ASIC submits that the pecuniary penalty applicable under s 12GBCA(2)(b) of the *ASIC Act* is the sum of all benefits obtained and detriments avoided by one or more persons that are reasonably attributable to the contravention: s 12GBCE of the *ASIC Act*.

95 ASIC submits that the benefit derived by the contravening conduct was the total of the funds raised by the Defendants through the issue of the Mayfair Products, being approximately $140 million raised from 281 investors.

96 ASIC submits that the funds raised by the Defendants were used for the benefit of the Defendants' group of companies in order to try (albeit highly speculatively) to generate profits, and also in some instances for the personal use of Mr Mawhinney and his family and for other entities in the group: Liability Judgment [141(e)], [141(f)] and [141(g)]. ASIC submits that:

(a) the issuers of the Mayfair Products (M101 Holdings and M101 Nominees, the Second and Third Defendants) obtained the funds raised from investors, for the investment by each of the issuers into, *inter alia*, related entities. That is, they invested funds in their own name, and also used funds for the benefit of associated entities and their members. This is consistent with the unchallenged evidence of the provisional liquidators in respect of the assets of M101 Nominees: Liability Judgment [134];

(b) Mayfair Wealth (the First Defendant) had a "beneficial interest in the issue" of the Mayfair Products, as noted in the brochures for the Mayfair Products;

(c) Online Investments (the Fourth Defendant) held 95% of the shares in Eleuthera Group Pty Ltd, the entity which obtained the benefit of investor funds lent to it (more than $60 million lent by M101 Nominees (the Third Defendant) from funds raised from Core Note investors): Liability Judgment [122] and [134].

97 ASIC submits that in respect of the Core Notes, M101 Nominees raised $67 million from 96 investors in an approximate 7-month period. ASIC submits that the Court can be satisfied that the entirety of this amount is the benefit reasonably attributable to the contraventions arising from the Representations. ASIC submits that this is so for the following reasons:

(a) the Court was satisfied that the statements made by Mayfair Wealth and M101 Nominees conveyed, separately and together, an impression that the Core Notes were fully secured financial products: Liability Judgment [66], [167], [168];

(b) the Core Notes were distinguished from the M+ Notes on the basis of the security offered, with the Core Notes being the "secured" offering, as opposed to the "unsecured" M+ Notes;

(c) the "secured" nature of the Core Notes was a fundamental feature of the product, and the entirety of the funds raised for this product represented the benefit derived from the contraventions; and

(d) the funds raised through the Core Notes were used by M101 Nominees as well as for the benefit of associated entities and their members, including Mayfair Wealth and Online Investments.

98 ASIC tendered evidence from six investors. Those six investors invested a total of $2.8 million into the Mayfair Products:

(a) Mr Booth invested a total of $750,000 into the Core Notes;

(b) Mr Wiggill invested a total of $300,000 into the M+ Notes;

(c) Mr Donald invested a total of $300,000 into the M+ Notes;

(d) Ms Campbell invested a total of $400,000 into the M+ Notes;

(e) Ms Asher invested a total of $630,000 into the Core Notes; and

(f) Mr Charadia invested a total of $500,000 into the M+ Notes.

99 ASIC submits that those investors each gave unchallenged evidence that they have not been able to recover the sums invested. The funds were used by the issuers of the Mayfair Products and in the case of investments in the Core Notes, were used in the manner described by the provisional liquidators and Mr Tracy, as set out in the Liability Judgment at [127] and [136]. In ASIC's submission, these funds represent the benefit to the issuers of the Mayfair Products and were also used for the benefit of associated entities and their members, including Mayfair Wealth and Online Investments: Liability Judgment [141(e)], [141(f)] and [141(g)].

100 ASIC submits that it is not essential to identify the precise quantum of the benefit obtained individually by each Defendant, given the terms of s 12GBCE of the *ASIC Act*. Nevertheless, ASIC submits, that the Court may readily conclude that the benefit to each Defendant was substantial, given the Mayfair Products raised approximately $140 million from 281 investors.

101 ASIC submits that the overwhelming evidence at the liability trial was that investors were led into the "marketing web" by the impugned representations conveyed by the advertisements and marketing material published by the Defendants. All investors completed application forms which contained misleading representations. All of the funds were raised in circumstances where misleading representations had been made and on the basis of misleading marketing and advertising. In ASIC's submission, all investments can therefore be considered to be reasonably attributable to the contravening conduct of the Defendants.

102 ASIC submits that it is not possible to identify the individual number of contraventions as a separate contravention occurred each time a consumer accessed the Defendants' websites. ASIC is not able to identify the number of times the websites were accessed or the advertisements published. It is known that at least 281 investors filled in forms that contained misleading representations. ASIC submits that the number of representations is at least 281 and most likely much higher.

103 ASIC submits, in the present circumstances, it is permissible for the Court to act on the basis that the total maximum penalty for all of the contraventions was three times the total benefit derived from all of the contraventions. That, in ASIC's submission, obviates the need to determine the number of individual contraventions. On that basis, the total maximum penalty under s 12GBCA(2)(b) from all contraventions is $420 million (3 x $140 million).

**Defendants' Submissions on Penalties under s 12GBCA(2)(b) of the *ASIC Act***

104 The Defendants submit that proving the applicable penalty under s 12GBCA(2)(b) of the *ASIC Act* requires that ASIC prove "the benefit derived and detriment avoided because of the contravention". The Defendants submit that this requires ASIC to comply with the requirements of s 12GBCE of the *ASIC Act*, which provides:

> The ***benefit derived and detriment avoided*** because of a contravention of a civil penalty provision is the sum of:
>
> (a) the total value of all benefits obtained by one or more persons that are reasonably attributable to the contravention; and
>
> (b) the total value of all detriments avoided by one or more persons that are reasonably attributable the contravention.

105 The Defendants submit the terms of ss 12GBCA(2)(b) and 12GBCE of the *ASIC Act* make clear that the following criteria must be satisfied:

(a) Benefits obtained must be identified.

(b) Detriments avoided must be identified.

(c) The total value of those benefits and detriments must be quantified.

(d) Causal connections must be established between, on the one hand, the benefits obtained and detriments avoided and, on the other, the contravening conduct.

106 The Defendants submit that ASIC has failed to satisfy the abovementioned criteria.

107 The Defendants submit that the benefits obtained cannot be the amounts invested in the M+ Notes and the Core Notes of $140 million. The Defendants submit that that cannot be correct in light of the evidence led by ASIC that the amounts raised by the notes were, for the most part, invested in real estate and other assets. The Defendants submit that the deployment of the funds in this fashion cannot be regarded as benefits to the Defendants. This, in the Defendants' submission, would be inconsistent with the dicta of Middleton J in *ASIC v Forex Capital Trading Pty Ltd* [2021] FCA 570 (***Forex***) at [120] and [121] where his Honour found that the evidence established that the contravening conduct had a direct and significant benefit to the foreign exchange trader, because it had induced clients to make loss-making trades from which, as a counterparty, the trader had profited: *Forex* at [147], [152] and [153]. Further, the Defendants submit, that Middleton J concluded that, because of certain inter-company arrangements, the benefit obtained by the trader was broader than its financial profit. However,

Middleton J did not attempt to quantify the benefit and did not use this criterion in assessing the maximum penalty: *Forex* at [153].

108 The Defendants submit that ASIC must point to some profit made by the Defendants, or some return actually realised, from the investment of the funds in the M+ Notes and the Core Notes. Alternatively, in the Defendants' submission, ASIC must establish some diversion of the funds to the personal use of the Defendants or a related party. The Defendants submit that ASIC has established neither.

109 The Defendants further submit that ASIC has not sought to establish any detriment avoided. As a consequence, in the Defendants' submission, the case under s 12GBCA(2)(b) of the *ASIC Act* falls at this first hurdle.

110 The Defendants submit that ASIC has not sought to establish any causal connections between the contravening conduct and the benefit it, mistakenly in the Defendants' submission, identifies. The Defendants submit that there is no evidence that any significant number of investors in the Mayfair Products were induced to make an investment by any contravening conduct.

111 The Defendants submit that none of the evidence given by ASIC's witnesses namely John Booth, Theo Wiggill, John Donald, Kerrie Campbell, Robert Charadia and Jaime Asher establishes that they were induced to make the investments as a consequence of the contravening conduct.

112 The Defendants rely upon affidavits from seven investors in the Mayfair Products namely Linda Roberts, Annette Barnett, Bruce Golightly, Clive Hitchen, Doug Schirripa, George Stenning and Judith Foley to establish that all investors were aware:

(1) that the investment product they acquired was not provided by a bank;

(2) that the product was not a term deposit; and

(3) that it carried a greater risk than a term deposit with a bank.

113 Further, the Defendants rely upon the affidavit of Mr Golightly, an investor in Core Notes, where he attested that he received, read and understood the brochure for the product, and is of the view that he was not misled or deceived about it.

114 The Defendants submit that the totality of the evidence does not support an inference that any significant number of investors were, in fact, induced to invest by any contravening conduct, still less, that there was any resulting benefit derived by the Defendants.

115 The Defendants submit that even if ASIC's case was accepted that the benefits obtained were the total amounts invested in the Mayfair Products, it could not prove that these benefits were "reasonably attributable to" any of the contraventions found against the Defendants: see *Klees v M101 Holdings Pty Ltd* [2021] NSWSC 182 at [105]-[115].

116 The Defendants submit that the result is that the Court cannot assess a penalty under s 12GBCA(2)(b) of the *ASIC Act*.

117 The Defendants submit that since no penalty is assessable under s 12GBCA(2)(a) and since the Court cannot assess, in the Defendants' submission, a penalty under s 12GBCA(2)(b); and since ASIC has not made a case for assessment under s 12GBCA(2)(c), no penalty is assessable under s 12GBCA and therefore no penalty may be imposed under s 12GBB.

**Consideration of pecuniary penalties under s 12GBCA(2)(b) of the *ASIC Act***

118 I reject ASIC's submissions on the maximum pecuniary penalty applicable under s 12GBCA(2)(b) of the *ASIC Act*. I do not accept that the benefit derived by the Defendants from the contravening conduct was the total of the funds raised by the Defendants through the issue of the Mayfair Products being approximately $140 million raised from 281 investors. The evidence is that a substantial proportion of the amounts raised by the M+ Notes and the Core Notes were invested in real estate in and around Mission Beach as well as entering into a contract to acquire Dunk Island. I am not satisfied on the evidence that ASIC has quantified the benefit derived by the contravening conduct of the Defendants through the issue of the Mayfair Products. It follows, that the Court cannot assess a pecuniary penalty under s 12GBCA(2)(b) of the *ASIC Act*.

119 ASIC has not sought to make a case for the assessment of the maximum pecuniary penalty under s 12GBCA(2)(c) of the *ASIC Act*.

120 For the reasons given, the maximum pecuniary penalty must be determined by reference to s 12GBCA(2)(a), and is $10.5 million for each contravention committed by the Defendants.

## OTHER REASONS THE DEFENDANTS SUBMIT NO PENALTY SHOULD BE ORDERED UNDER S 12GBB

### Validity of Declarations

121 The Defendants submit that if, contrary to their primary submission, it is possible to assess penalties under s 12GBCA(2) of the *ASIC Act*, then there are a number of reasons why no penalties should be ordered, namely:

(1) the declarations were not made under s 12GBA;

(2) even if the declarations were made under s 12GBA they do not supply a proper foundation for penalties under s 12GBB; and

(3) the contraventions were not serious and do not merit the imposition of pecuniary penalties.

### Declarations not made under s 12GBA of the *ASIC Act*

122 The Defendants submit that the declarations in the Liability Judgment were not made, or not made validly, under s 12GBA of the *ASIC Act*.

123 The Defendants submit that a penalty can only be ordered under s 12GBB of the *ASIC Act* if a declaration is first made under s 12GBA. The Defendants submit that none of the four declarations made in the Liability Judgment expressly purports to have been made under s 12GBA of the *ASIC Act*. The Defendants submit that ASIC's Originating Motion asserted that the declarations it sought could be made under s 12GBA and/or s 21 of the *FCA Act* and/or s 1101B of the *Corporations Act*. The Liability Judgment at [186] stated that the declarations sought by ASIC identify with precision the contravening conduct and that ASIC had power under s 12GBA(1) of the *ASIC Act* to apply to the Court for the declarations. The Defendants submit, however, that there is no direct statement in the Liability Judgment that the declarations would be made under s 12GBA of the *ASIC Act*. In any event, the Defendants submit that while they are bound to accept at the Penalty Hearing that the declarations were validly made, they may challenge the power pursuant to which the declarations were made. They submit that the declarations may be regarded as having been validly made under s 21 of the *FCA Act* or s 1101B of the *Corporations Act*; however, the Defendants submit that they were not validly made under s 12GBA of the *ASIC Act*.

124 The Defendants submit that under s 12GBA(4) of the *ASIC Act*, there are four requirements for a declaration of contravention under s 12GBA. These include that the declaration specifies the

person who committed the contravention and that it specifies the conduct that constituted the contravention. In addition, in the Defendants' submission, the Courts have laid down certain principles for declarations under provisions like s 12GBA of the *ASIC Act* and s 1317E of the *Corporations Act*. In *Re HIH Insurance Ltd* (2002) 189 ALR 365 at 367, Santow J held that declarations under s 1317E must be "self-contained and intelligible", must avoid attributing legal consequences to events "without specific delineation" and require "a reasonable degree of specification of the relevant conduct, based upon facts found and conclusions reached.": See also in *Rural Press Finance Ltd v ACCC* (2003) 216 CLR 53 at 91 per Gummow, Hayne and Heydon JJ at [89] and [90].

125 The Defendants submit that none of the four declarations complied with s 12GBA of the *ASIC Act* because none of them sufficiently identified the person who committed the contravention and none of them sufficiently identified the conduct which constituted the contravention.

126 The Defendants submit that each of the four declarations is to the effect that the Defendants, collectively or jointly, committed the contravention. None of the declarations attributed any several liability for the contraventions to any of the Defendants individually. The Defendants submit that ASIC's written submissions on penalty disclose at [7]-[11], [33], [34], [79], [80] and [84], that the Defendants did not act wholly jointly or collectively in committing the conduct which has been held to contravene s 12DB of the *ASIC Act*. In the Defendants' submission, they had their separate spheres of operation but this cannot be discerned from the terms of the declarations.

127 The Defendants submit that the terms of the declarations comprising the Court's order can only be understood as attributing joint liability to all the Defendants for all the contraventions except the Second Defendant for the Security Representations. The Defendants submit that the Full Court in *ACCC v Cement Australia Pty Ltd* (2017) 258 FCR 312 at 376-392 held that joint liability is not a proper basis for assessing penalties for regulatory contraventions. To do that would be to penalise one Defendant for the contraventions of another.

128 The Defendants submit that ASIC, at the Penalty Hearing, seeks to amend the form of the declarations which it drafted for consideration of the Court at the Liability Hearing to have several liability attributed to the individual Defendants as part of the penalty phase of the proceeding. That, in the Defendants' submission, should not be permitted because it would, in effect, involve re-opening the liability case. The Defendants submit that the Court is now

*functus officio* on all questions concerning liability and it is now too late for ASIC to repair the deficiency in the declarations. Accordingly, by failing to attribute several liability for the contraventions to the individual Defendants, the declarations fail to comply with s 12GBA(4)(c) of the *ASIC Act*.

129 The Defendants further submit that the declarations also failed to comply with s 12GBA(4)(d) of the *ASIC Act* because they did not adequately identify the conduct that constituted the contravention. In particular, they failed to identify the actual number of contraventions.

130 The Defendants submit that ASIC's claim that there has been at least 281 contraventions is not plausible. The Defendants submit that ASIC's case is based on the proposition that, each time a consumer accessed the Mayfair websites, there was a contravention and thus this must have happened at least 281 times because there were 281 investors. The Defendants submit that the following obvious flaws exist in ASIC's reasoning:

(1) the fact that there were 281 investors does not mean that the websites must have been accessed at least 281 times. The Defendants submit that ASIC's own evidence demonstrated that an investment could be made in the Mayfair Products without going to the websites;

(2) even if an investor accessed a website containing the misrepresentations, it does not follow that the investor read the misrepresentations. The Defendants submit that ASIC's own evidence made that clear. Mr Booth said in evidence that he looked at the website but did not garner much information from it. Mr Donald said in evidence that he looked at the website, but did not see any of the misrepresentations. Ms Campbell gave evidence that she only looked at the Trustpilot page of the website; and

(3) the authorities cited by ASIC in its submissions do not support the proposition that there was a separate contravention each time a consumer accessed the website.

131 The Defendants submit that since the declarations do not comply with s 12GBA no penalty may be imposed under s 12GBB of the *ASIC Act*.

## DEFENDANTS' SUBMISSIONS THAT PECUNIARY PENALTIES SHOULD BE REJECTED ON DISCRETIONARY GROUNDS

132 The Defendants submit that even if the declarations are held to have been validly made under s 12GBA, the imposition of a penalty under s 12GBB is discretionary and there are strong discretionary grounds for declining to impose penalties.

133 The Defendants submit that the imposition of pecuniary penalties should be refused on discretionary grounds because the number of contraventions is indeterminable. This, in the Defendants' submission, makes the assessment of proper penalties impossible. The Defendants submit that the starting point for assessing pecuniary penalties is to look at each contravention and ascertain whether a penalty should be separately assessed for that contravention, before moving to consider such factors as course of conduct and totality. The Defendants submit that the failure of the Liability Judgment to identify each contravention makes it impossible to begin the process of assessment of penalty. It further makes it impossible to move to the secondary stage of considering course of conduct and totality because the total number of contraventions is not known.

134 The Defendants submit that another discretionary ground for declining to order pecuniary penalties is that the contraventions, when considered fairly and objectively, were not serious. The Defendants submit that the misrepresentations were directed to wholesale clients and sophisticated investors. Furthermore, the material promoting the Mayfair Products made clear, in the Defendants' submission, that the investments were only to wholesale investors and contained warnings about the risk of investment. The Defendants submit that in light of the clear warnings in the materials promoting the Mayfair Products , and the fact that the investors called to give evidence by ASIC should, in the Defendants' view be characterised as "sophisticated", the Bank Term Deposit Representation cannot be regarded as a serious contravention. The Defendants submit that on a fair and objective review of all the evidence it should be concluded that it is unlikely that anyone was seriously misled by this representation.

135 The Defendants submit that the Repayment Representation, on its face, is unlikely to have seriously misled anyone. This is because, in the Defendants' submission, it is hardly surprising that a financier seeking investment funds would represent that they would be repaid in full on maturity. The Defendants submit that it should be concluded that the Repayment Representation, though a contravention of ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act*

and s 1041H(1) of the *Corporations Act*, was not a serious contravention and that, taking account of these matters under s 12GBB(5)(a) and (c), no penalty should be imposed for this contravention.

136 The Defendants submit that the No Risk of Default Representation is a similar category and that it should be concluded that it was not a serious contravention and not one which merits the imposition of a pecuniary penalty.

137 The Defendants submit in respect of the Security Representation that this contravention too was a minor or technical one and does not merit the imposition of a pecuniary penalty.

## ASIC'S SUBMISSIONS IN REPLY

### Validity of Declarations

138 ASIC submits that the Defendants' submission that the declarations in the Liability Judgment were not made, or not made validly, under s 12GBA of the *ASIC Act* should be rejected. The Liability Judgment at [186(c)] makes clear that the declarations were made pursuant to the power under s 12GBA(1) of the *ASIC Act*. In ASIC's submission, it was not necessary that the declarations themselves state the specific provision pursuant to which they were made in order to be valid.

139 ASIC submits, to the extent that the Defendants wish to challenge the form or the legal basis of the declarations, those are matters which should be raised on appeal and not in the Penalty Hearing.

140 ASIC submits that there is no substance to the Defendants' submission that the declarations in the Liability Judgment were not validly made under s 12GBA of the *ASIC Act*. The Defendants do not dispute that the Court has jurisdiction to grant relief in relation to the Defendants. Rather, the Defendants suggest that the form of the declarations should have been different under s 12GBA before relief is granted at the Penalty Hearing.

### Requirements of s 12GBA of the *ASIC Act*

141 ASIC submits that contrary to the submissions of the Defendants, the declarations made in the Liability Judgment, meet the requirements of s 12GBA. The declarations state who was the subject of the contraventions and the conduct that constituted the contraventions. That satisfies the legislative requirements of s 12GBA(4)(c) and (d).

142 ASIC submits that each of the declarations states that all four Defendants contravened the *ASIC Act* and the *Corporations Act* in relation to the relevant representations, except for the declaration in relation to the Security Representation for which only the First, Third and Fourth Defendants were in contravention.

143 ASIC submits, with one exception, to the extent that the Defendants suggest that the declarations identified the incorrect subject or subjects, this is a matter for appeal. The exception relates to the Fourth Defendant (Online Investments). That entity did not make the Repayment Representation or the Security Representation. By mistake, two of the declarations did not reflect this fact. ASIC submits that pursuant to the slip rule, under 39.05(e) of the *Federal Court Rules 2011* (Cth), the Court should amend the declarations made to account for this. Accordingly, ASIC has submitted a form of amended declarations which it asks the Court to make.

144 ASIC submits that contrary to the submissions of the Defendants, there is no requirement under s 12GBA(4)(c) that where there are multiple contraveners, the form of the declarations must delineate the exact liability of each of the subjects of the declarations in the words of the declaration itself. Rather, it is proper that such declarations record that multiple subjects have engaged in contravening conduct.

145 ASIC submits that it is entirely appropriate that it now makes submissions as to the correct penalty to be imposed in respect of each of the Defendants, taking into account, amongst other things, the relevant conduct of those parties. This is consistent with the approach taken in *ASIC v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59; 124 ACSR 351 where Moshinsky J made a number of declarations as to contraventions that multiple subjects engaged in contravening conduct. There is no requirement, in ASIC's submission, for the declarations to delineate the way in which each of those Defendants was said to have contributed to the relevant contravention. It is sufficient for the declaration to simply state that each of the Defendants had engaged in the relevant contravention.

146 ASIC submits that the Defendants' submission that the declarations can only be understood as "attributing joint liability to all the Defendants", which is "not a proper basis for assessing penalties" is misconceived. Declarations reflecting contravening conduct by multiple defendants are commonplace. ASIC submits that the Full Court in *ACCC v Cement* emphasised that the central concern must be that each contravener is separately responsible for its own

course of conduct and subject to an "appropriate remedy" at [381]. ASIC submits that consistent with *ACCC v Cement*, ASIC proposes penalties which are specifically tailored to the different Defendants based on their conduct and what would be appropriate in all the circumstances.

147 ASIC submits that the declarations each detail the nature of the representations which the Court held had been made out in the Liability Judgment and which were in contravention of the *ASIC Act* and the *Corporations Act*. ASIC submits that the declarations were made with requisite specificity, such that they were self-sufficient and intelligible in their own right. Whilst the declarations were self-contained and intelligible, it was not necessary that they list every detail which provided their underlying basis. That is the role of the reasons for the Liability Judgment.

148 In *Rural Press Finance Ltd v ACCC* (2003) 216 CLR 53, Gummow, Hayne and Heydon JJ at [89]-[90] said that that the declarations must state the "gist" of the findings of the contravening actions. ASIC submits that each of the four declarations in the Liability Judgment meet that criteria.

149 Contrary to the Defendants' submission, ASIC submits that it was not necessary for the declarations to specify how many contraventions occurred. In ASIC's submission, the courts have adopted a common sense approach in which declarations identify the nature of the contraventions and a period of time in which the contraventions occurred, without attempting to specify the number of contraventions which happened in that period. This is sufficient at the liability stage for the purpose of the declarations. At the penalty stage, the courts will make a rough estimate of the number of contraventions involved. However, there are many cases, when even this is not considered necessary. For instance in *ASIC v Allianz Australia Insurance Limited* [2021] FCA 1062, Allsop CJ at [123] and [124] held that "in light of ASIC's submissions that each time a person viewed the websites containing the … statements … it constituted a separate contravention" it was "not appropriate to quantify a theoretical maximum". The Chief Justice made no attempt to estimate the number of contraventions, instead, finding that it was "appropriate to roll up the various contraventions in a single assessment". The various contraventions were taken into account by the Chief Justice in that assessment while themselves remaining unquantifiable.

150 ASIC submits that a similar approach was adopted in *Dover* by O'Bryan J where the Court declared that within a defined relevant period of time, contraventions of the *ASIC Act* and *Corporations Act* occurred for misleading or deceptive conduct, or false or misleading representations, in relation to the supply of financial services. The declarations made by O'Bryan J were not detailed and did not enumerate a specific number of contraventions. Rather, the declarations made by O'Bryan J declared that a contravention occurred "on each occasion that [the First Defendant's] authorised representatives provided clients with a "Client Protection Policy".

151 ASIC submits that Murphy J in *ACCC v Optus Mobile Pty Ltd* [2019] FCA 106 (***Optus***) made a declaration that Optus had made a false and misleading representation under s 12DB(1)(b) of the *ASIC Act* during a defined period of time to an undefined number of customers. In considering the penalty flowing from this declaration, Murphy J referred to the contraventions, but held that it was not appropriate to make a finding about the precise number of contraventions. Instead, his Honour said in *Optus* at [44] that it was appropriate to fix a penalty assisted by understanding the extent to which there was a course or courses of conduct leading to potentially a huge number of contraventions, and to undertake the "instinctive synthesis" by reference to a recognition of the multiplicity of breaches, a broad view of the course or courses of conduct, and an assessment of the overall extent and seriousness of offending, together with all other relevant considerations, but in particular the need for specific and general deterrence: see also *ASIC v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167.

152 ASIC submits that the authorities referred to above, make clear the fact that, in its submissions as to penalty, ASIC's estimates the number of contraventions is in no way intended to "re-open liability and to seek a different judgment to that which was sought and granted" as the Defendants contend.

153 ASIC submits that the Defendants incorrectly suggest that ASIC relies on the figure of "at least 281" victims of the Defendants' misleading conduct because there were 281 investors and those investors must have visited the Mayfair websites: Defendants' submissions [67]. ASIC does not rely on 281 investors having visited the Mayfair websites (although many would have). ASIC relies on the fact that all of those 281 investors filled out a form which itself contained contravening representations.

154 In ASIC's submission, the Court is able to look at the overall circumstances of the contraventions in assessing the appropriate penalty, which may include considering an ascertainable subset of contraventions and considering certain contraventions as part of one continuing contravention: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 (***Reckitt***) at [157].

155 ASIC submits that the same approach was applied by O'Bryan J in *Dover* at [22] where his Honour made clear that where there is a very large number of contraventions, it is entirely permissible for the Court to affix penalty in relation to a minimum number of contraventions identified. Furthermore, O'Bryan J confirmed that the Court is not required to consider each contravention in a siloed fashion, especially where the contraventions arose as part of a single course of conduct: *Dover* at [123].

**ASIC'S REPLY TO THE CONTENTION THAT NO PENALTY SHOULD BE ORDERED ON "DISCRETIONARY GROUNDS"**

156 ASIC submits that the Defendants' contention that a penalty "can only be imposed jointly and to do so would penalise one Defendant for the contraventions of others" is misconceived. ASIC does not seek penalties to be "imposed jointly". Instead, ASIC seeks orders for the imposition of penalties separately in respect of each Defendant's contraventions, regardless of the form of the declarations.

157 ASIC submits that the fact that the number of contraventions is indeterminate cannot possibly be a ground for refusing to impose any penalty at all. In ASIC's submission, the authorities make clear that the impossibility to determine the number of contraventions is not a basis for refusing to impose a penalty at all.

158 ASIC submits that the Defendants' contention that the contraventions were not serious cannot be accepted. ASIC submits that whilst only "wholesale investors" as defined in the *Corporations Act* were eligible to invest in the Mayfair Products, the evidence at the Liability Hearing established that the Mayfair Products were targeted to investors who were not sophisticated or experienced, and many were investing a large proportion of their retirement savings.

159 ASIC submits that the Defendants' submissions at [82]-[84] suggest that the Court's declarations concerning the Bank Term Deposit Representation, the Repayment Representation, and the No Risk of Default Representation should not have been granted, or

that no loss was suffered, thereby the representations were, accordingly, not serious and should be rejected. The Defendants' submissions impermissibly traverse and ignore the findings of fact made by the Court in the Liability Judgment.

**CONSIDERATION – DECLARATIONS UNDER SECTION 12GBA**

160 I do not accept the Defendants' submission that the declarations made in the Liability Judgment were not made, or not made validly, under s 12GBA of the *ASIC Act*. ASIC, by its further amended originating process filed 15 February 2021, sought to rely upon the Court's power to make declarations pursuant to s 21 of the *FCA Act*; s 1101AB(1)(a) of the *Corporations Act* and/or s 12GBA of the *ASIC Act*. ASIC sought that the Court make the various declarations pursuant to these statutory provisions in respect to the Defendants' conduct which the Court found in the Liability Judgment to have contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act*: Liability Judgment [178].

161 The Liability Judgment at [182] expressly referred to ASIC applying under s 12GBA(1) of the *ASIC Act* for a declaration that a person has contravened a civil penalty provision. The Liability Judgment then identified that under s 12GBA(6) "a provision of Subdivision D (other than section 12DA)" is a "civil penalty provision". The Liability Judgment records "ASIC seeks declarations in respect of ss 12DB(1)(a) and (e) of the *ASIC Act*, which appear in Subdivision D of Division 2 of Part 2 of that legislation".

162 The Liability Judgment at [183] records that under s 12GBA(3) of the *ASIC Act* the "Court must make the declaration if it is satisfied that the person has contravened the provision" being a civil penalty provision (ss 12DB(1)(a) and (e)). The Liability Judgment then refers to the requirements of s 12DBA(4) of the *ASIC Act*.

163 The Liability Judgment at [186] records that I was satisfied that the declarations ought be made and that:

(a) the proposed declarations sought by ASIC identify with precision the conduct that contravened s 1041H(1) of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*;

(b) ASIC is given the power to apply to the Court for the declarations under s 1101B(1)(a)(i) of the *Corporations Act* and s 12GBA(1) of the *ASIC Act*.

164 It is apparent that ASIC sought declarations under s 12GBA (amongst other provisions) of the *ASIC Act* for the conduct of the Defendants which contravened ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act* (amongst other provisions) and that the declarations made by the Court in the Liability Judgment reflect the fact that ASIC applied to the Court for the declarations under s 12GBA of the *ASIC Act* (amongst other provisions). I reject the Defendants' submission that there was no direct statement in the Liability Judgment that the declarations were made under s 12GBA of the *ASIC Act*.

165 I also do not accept the Defendants' submission that the declarations were not validly made under s 12GBA of the *ASIC Act*. If the Defendants wish to challenge the form or the legal basis of the declarations, the correct forum in which to raise such matters is on an appeal and not during the penalty phase of the proceeding.

166 At [186] of the Liability Judgment, I was satisfied that the requirements for making the declarations had been satisfied and that the proposed declarations sought by ASIC identified with precision the conduct that contravened s 1041H(a) of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*.

167 I do not accept the Defendants' submission that it is not possible to identify from the declarations the person who committed the contravention and the conduct which constituted the contravention.

168 I do not accept the Defendants' submission that where there are multiple contraveners, as in this case, that it is impermissible for declarations to record that multiple subjects or contraveners have engaged in the contravening conduct. If the facts, as found by the Court, are that multiple defendants engaged in contravening conduct, then there is nothing impermissible in the declarations reflecting contraventions made by multiple subjects engaging in contravening conduct. There is no requirement under s 12GBA(4)(c) that where there are multiple contraveners, the form of the declarations must delineate the exact liability of each of the subjects of the declarations in the text of the declaration. It is permissible for such declarations to record that multiple subjects have engaged in contravening conduct. I accept ASIC's submission that declarations involving contravening conduct by multiple defendants are commonplace. In *ASIC v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59; 124 ACSR 351, Moshinsky J made a number of declarations as to contraventions that multiple subjects engaged in contravening conduct.

169 I also reject the Defendants' submission that the declarations made are invalid because the declarations do not specify how many contraventions occurred. I accept ASIC's submission that the authorities reveal that courts have adopted a common sense approach in which declarations identify the nature of the contraventions and a period of time in which the contraventions occurred, without attempting to specify the number of contraventions which happened in that period if that is not practical. That is all that is required of the declarations at the liability phase of the proceeding. The Court will then, in the penalty phase of the proceeding, make an assessment of the number of contraventions without the need to specify the precise number of contraventions: See *ASIC v Allianz Australia Insurance Limited* [2021] FCA 1062 per Allsop CJ, order 3(d) and order 6(d) and at [123] and [124], and O'Bryan J in *Dover*, order 1 and [24(b)] and [48], and *Optus* per Murphy J at [44].

170 Insofar as ASIC now applies under r 39.05(e), (the slip rule) to correct a mistake in the second and fourth declaratory orders, I decline to do so.

171 I reject the Defendants' submission that the contraventions found in the Liability Judgment were not serious and do not merit the imposition of pecuniary penalties.

172 I am satisfied on the evidence tendered at the Liability Hearing that the conduct of the Defendants, which contravened s 1041H(1) of the *Corporations Act* and ss 12DBA(1), 12DB(1)(a) and 12 DB(1)(e) of the *ASIC Act*, was serious and resulted in a number of investors losing a significant amount of money by investing in the Mayfair Products, which has not been repaid. This included Robert Charadia and Ms Jaime Asher who were called by ASIC as witnesses in the Liability Hearing, and who I accepted were misled by the representations found to have been made by the Defendants in the statements which are Annexure A to the Liability Judgment, used to market and promote the Mayfair Products.

173 I reject the Defendants' submission that pecuniary penalties should be refused on discretionary grounds because the number of contraventions is indeterminate. I accept ASIC's submission that the Court is able to look at the overall circumstances of the contraventions in assessing the appropriate penalty, which may include considering an ascertainable subset of contraventions and considering certain contraventions as part of one continuing contravention: *Reckitt* at [157]. O'Bryan J in *Dover* at [12], a case concerning contraventions under s 12 GBA of the *ASIC Act* held that where there is a very large number of contraventions, it is entirely permissible for the Court to affix a penalty in relation to a minimum number of contraventions identified. O'Bryan

J in *Dover* at [123] also held that the Court is not required to consider each contravention in a siloed fashion, especially where the contraventions arose as part of a single course of conduct. In *Optus*, Murphy J at [39] observed that where there are a very large number of contraventions, which are difficult or impossible to precisely enumerate, then there can be no meaningful overall maximum penalty such that the maximum penalty should not be applied mechanically and should instead be treated as one of a number of relevant factors albeit an important one. In such circumstances, it is appropriate not to make a finding about the precise number of contraventions or whether there is a single course or multiple courses of conduct.

174 I reject the Defendants' submission that the fact that the number of contraventions is indeterminate is a ground for refusing to impose any penalty at all. The recent decision of *ASIC v BT Funds Management Ltd* [2021] FCA 844 is an example of where it was impossible to determine the number of contraventions (at [36]), and also where (as in the present case) there were joint contraveners (at [50]).

**PRINCIPLES FOR ASSESSMENT OF PENALTY**

175 The parties were in substantial agreement as to the relevant principles for an assessment of penalties. Those principles were conveniently summarised in ASIC's submissions and may be stated as follows.

176 Section 12GBB(5) of the *ASIC Act*, as in force during the Relevant Period, requires the Court, in determining the appropriate penalty, to take into account four specific matters and all other relevant matters. The four specific matters are:

(a) the nature and extent of the contravention;

(b) any loss or damage suffered because of the contravention;

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court to have engaged in any similar conduct.

177 In *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) ATPR 41-076, French J, in the context of a contravention of provisions of Part IV of the *Trade Practices Act 1974* (Cth) (***TPA***), listed a number of matters potentially relevant to the assessment of penalty under s 76 of the *TPA*. Those factors have been referred to on many occasions in the assessment of civil penalties including under the *ASIC Act* and are of assistance in applying s 12GBB(5):

*ACCC v Telstra Corp Ltd* [2018] FCA 571 at [21], referring to s12GBA(2) of the *ASIC Act*, being the predecessor to s12GBB(5). They are:

(a) the size of the contravening company;

(b) the deliberateness of the contravention and the period over which it extended;

(c) whether the contravention arose out of the conduct of senior management or at a lower level;

(d) whether the company has a corporate culture conducive to compliance with the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(e) whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention;

(f) whether the contravener has engaged in similar conduct in the past; and

(g) the financial position of the contravener.

178 The list is not exhaustive nor a rigid catalogue or checklist of matters to be considered, however those factors may be taken to be relevant because they directly bear on the assessment of the penalty that is necessary to achieve general and specific deterrence: *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 at [150].

179 The overriding requirement is that the Court should weigh all relevant circumstances that bear on the assessment of an appropriate penalty in the circumstances of the case: *ASIC v GE Capital Finance Australia, Re GE Capital Finance Australia* [2014] FCA 701 at [72].

180 In weighing and balancing the relevant factors, the Court must ensure that the penalty is just, bearing in mind the protective and deterrent purpose of a pecuniary penalty and the factors relevant to the contravention and the contravener: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 252 CLR 482 (***Fair Work***) at [55], [59] and [110].

181 The primary objective of a pecuniary penalty is deterrence: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [65]; see also *ASIC v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701 at [117] (***ASIC v Westpac (No 3)***), directed to act as a specific deterrent to the contravener and as a general deterrent to others who might be tempted to contravene the law: *Fair Work* at 506 [55] per French CJ, Kiefel, Bell, Nettle

and Gordon JJ (Gageler J agreeing at 511 [68], Keane J agreeing at 513 [79]); *ASIC v Australia and New Zealand Banking Group Ltd* [2018] FCA 155 at [22] (***ASIC v ANZ***).

182 The specific and general deterrent effect of pecuniary penalties is achieved by putting a price on a contravention that is "sufficiently high" to deter repetition by both the contravener and would-be contraveners: *Fair Work* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Gageler J agreeing at [68], Keane J agreeing at [79]).

183 In *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [62]-[63], in a passage approved by the High Court in *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [64] and [66], the Full Court explained the need to ensure that the penalty "is not such as to be regarded by that offender or others as an acceptable cost of doing business", but rather is set at an amount that will deter those engaged in trade and commerce "from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention". The penalty must also be proportionate to achieve the objective of specific and general deterrence, because the punishment should reflect what the offender has done: *ASIC v ANZ* at [22].

184 In determining the appropriate penalty for a multiplicity of civil penalty contraventions, the Court may have regard to two common law principles that originate in criminal sentencing: the "course of conduct" principle and the "totality" principle.

**Course of conduct principle**

185 There are some cases which suggest that where a very large number of individual contraventions have been committed, the course of conduct principle is only of "limited utility": *Reckitt* at [157].

186 Despite this, several cases have accepted as established the principle that "where there is an interrelationship between the factual and legal elements of two or more contraventions, consideration may be given to whether it is appropriate to impose a single overall penalty for that course of conduct": *ASIC v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511, [2020] FCA 1499 at [50] (***ASIC v AGM***).

187 This principle recognises that where there is such a relationship between multiple contraventions, "care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality": *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 194 IR 461; 269 ALR 1 at [39].

188 While caution is required in too readily applying such criminal law concepts, the course of conduct principle remains a useful "tool", and it is "therefore of paramount importance to identify whether multiple contraventions constitute a single course of conduct or separate instances of conduct, so as to ensure that an appropriate deterrent effect is achieved by the imposition of the penalty or penalties in respect of that particular conduct": *ACCC v Cement* at [424].

189 In some cases a "notional maximum penalty" has been calculated by multiplying the maximum penalty for a single contravention by the number of separate courses of conduct involved: *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) [2015] FCA 330; 327 ALR 540 at [103].

**Totality principle**

190 In determining the appropriate penalty for a large number of contraventions, the Court may have regard to the totality principle as a final consideration of whether the cumulative total of the penalty is just and appropriate and in proportion to the contravening conduct considered as a whole. The principle will not always or necessarily result in a reduction of the penalty that would otherwise be imposed. It enables the Court to consider whether the final penalty is in proportion to the nature, quality and circumstances of the conduct involved. The Court may apply the principle to "alter the final penalties to ensure that they are just and appropriate": *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; (2020) 148 ACSR 247 at [69] per Beach J.

**Instinctive synthesis**

191 Determining a civil penalty usually involves multi-factorial decision-making, identifying and balancing all the factors relevant to the contravention. While there are differences between the criminal sentencing process and the fixing of a pecuniary penalty: *Fair Work* at [56]-[57], the fixing of a pecuniary penalty may to an extent be likened to the "instinctive synthesis" involved in criminal sentencing: *ASIC v Westpac Banking Corporation* [2019] FCA 2147 at [261]; *Optus* at [44].

**Penalties imposed in other cases**

192 Assessments in analogous cases may provide guidance to the Court in assessing an appropriate penalty, in that they allow for equal treatment in similar circumstances, thereby meeting the principle of equal justice. Penalties set in other cases can only be a guide, however, because

the facts and circumstances in different cases are rarely the same, it is difficult to apply this principle in a uniform way, and when applied the principle should be used as a guide only: *ACCC v SMS Global Pty Ltd* [2011] FCA 855 at [80], *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2003) 127 FCR 170 at [10]-[17] per Sackville J and [52]-[60] per Merkel J; *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No 2)* [2002] FCA 192; 201 ALR 618 at [17]; *NW Frozen Foods* at 295; and *ACCC v Telstra* at [210].

## ASIC'S SUBMISSIONS ON THE APPROPRIATE PENALTY TO BE IMPOSED ON THE DEFENDANTS

193 ASIC submits that the most significant considerations, with respect to the appropriate penalty that should be provided to the Defendants, are as follows.

194 First, ASIC submits that the contravening conduct was very serious. The Court found in the Liability Judgment that the Defendants made 166 statements (as identified in Annexure A to the Liability Judgment) containing gross misrepresentations, across a period of over nine months, and only stopped once restrained by the Court. The Court found in the Liability Judgment that in making the Representations, the Defendants repeatedly mischaracterised the nature and risk profile of the Mayfair Products as being low risk, safe, certain or secure, and akin to term deposits, when in fact these products exposed investors to significantly higher risk than term deposits: Liability Judgment [155]. The Defendants engaged in a marketing strategy to divert people searching online for something equivalent in risk to a bank term deposit, by using sponsored-link advertising and websites with meta-title tags including the words "best term deposit": Liability Judgment [109]. This included the website operated by Online Investments with the URL www.termdepositguide.com.

195 The Bank Term Deposit Representations lured, for example, Ms Asher who described herself as "an extremely conservative investor": Transcript at [T 28]; and whose objective was to put the proceeds of her recent property sale away for six months in a term deposit: [T 28]. Ms Asher had searched Google for "best term deposit rates in Australia", which returned the Defendants' websites as the top result: [T 28]. Ms Asher also specifically relied on the Repayment Representations and the Security Representations: [T 29], to invest $630,000 in the Core Notes, which comprised almost 100% of her assets: [T 29].

196 Another investor, Mr Charadia, who is an unemployed, widowed single parent to three children for whom he is a full-time carer and is unable to work for health reasons including a brain tumour: [T 22], invested $500,000 in the M+ Notes which has not been repaid: [T24]. Mr Charadia explained to the Defendants that he "didn't want to take a risk with [his] money" and wanted to preserve his capital whilst getting a better interest rate than he was earning on bank term deposits: [T23], in response to which a representative of the Defendants compared the risk of the M+ Notes to a bank: [T23]. Mr Charadia was not aware prior to investing that the Defendants could suspend redemptions: [T 24].

197 In relation to the Repayment Representations, the Court found that it was "highly misleading" to fail to disclose that investors' returns were tied to the relevant issuer's investment performance, and described the underlying investments as "highly speculative": Liability Judgment [156(a)].

198 The Representations in respect of the Core Notes were particularly egregious in light of the evidence of the provisional liquidators that M101 Nominees had been insolvent since inception: Liability Judgment [150], and because of the evidence of Mr Tracy that investor funds were generally not supported by first-ranking unencumbered asset security, and to the extent there was security over units in various trusts (the trustees of which owned properties), such security was of little moment when all but one of the relevant properties had been mortgaged to a third party: Liability Judgment [170]-[171].

199 Secondly, ASIC submits that the very significant harm to individual Australian investors, who invested what was often retirement funds with the Defendants on the basis of misleading representations, were likely to have induced the investors into believing their funds were securely invested, when in reality their funds were now very likely to have been lost. M101 Nominees is in liquidation, with the provisional liquidators estimating a nil return to Core Note investors: Liability Judgment [138]. M101 Holdings has suspended redemptions in the M+ Notes since 11 March 2020: Liability Judgment [116]-[126], with no prospect that they will be fulfilled.

200 Thirdly, ASIC submits that the primary consideration of deterrence, being necessary to dissuade the Defendants and other potential contraveners from engaging in similar conduct, is a significant factor that Court should take into account.

201 Fourthly, ASIC submits that the Court should take into account the fact that the serious and deliberate misconduct took place through the the sole director, and controlling mind of each Defendant. The Court found that Mr Mawhinney was the directing mind and will, and the ultimate beneficiary, of each of the Defendants: Liability Judgment [9]. The Court also accepted the evidence of Mr Tracy of Deloitte that funds raised from investors in at least the Core Notes were loaned to related parties of Mr Mawhinney on an unsecured basis, contrary to the Security Representation, and were used to purchase properties owned by related entities of Mr Mawhinney: Liability Judgment [116]-[127].

202 Fifth, ASIC submits that there has been an absence of any co-operation or remorse by the Defendants. Mr Mawhinney, and the Defendant companies controlled by him, have maintained that they have not committed any contraventions at all, and have not shown remorse for the contraventions which I have found in the Liability Judgment. Rather, Mr Mawhinney and the Defendants have denied any wrongdoing and have shown a complete lack of remorse. This is apparent when viewing Mr Mawhinney and the Defendants' conduct in media releases dated 11 February 2021, 23 March 2021 and 24 April 2021, as well as in an open letter to ASIC from James Mawhinney dated 16 March 2021. The statements made by Mr Mawhinney in the media releases, which included assertions that ASIC's evidence was "fictitious", that ASIC's action against the Mayfair Group was "misguided" and that he has been "Prosecut[ed] for a crime that was never committed".

203 Sixthly, ASIC submits that there were at least two courses of conduct in this case, involving the promotional and marketing activities of two different products. On this basis, the notional maximum penalty is $21 million, representing two times the maximum penalty of $10.5 million for a single contravention of s 12DB of the *ASIC Act*.

204 Seventhly, ASIC submits that an aggravating feature in the present case is that in 2012 – and thus well before the contravening conduct of the Defendants – ASIC published regulatory guides 234 and 156 which relevantly include the following statements:

> a. "Debentures involve significantly higher risk than bank term deposits. It is not good practice for an advertisement for a debenture to make a statement such as 'Is your money earning 6.3% per annum in a bank term deposit?', or to encourage the consumer to 'Invest with us and receive 9.75% per annum instead', as this would not be an appropriate comparison. These two products have very different risks and are not sufficiently similar to allow for such a comparison".

b. "Advertisements for notes should state that the product is not a bank deposit. Further, they should not suggest that:

(a) the note is, or compares favourably to, a bank deposit; or

(b) there is little or no risk of the investor losing their principal or not being paid interest.

This means that the following terms should be avoided in advertisements for notes: 'secure', 'secured', 'guaranteed', 'safe', 'deposit' … 'first ranking' and 'no fees'".

c. "any advertisement for notes that are offered to retail investors should contain prominent disclosure to investors that there is a risk that investors could lose some or all of their money".

d. "Promoters should consider the characteristics of the actual audience that is likely to see the advertisement (e.g. their financial literacy, knowledge, demographics) and whether the advertisement provides adequate information for that audience".

205 ASIC submits that the Defendants did the very things that ASIC had told debenture issuers would be seriously misleading.

206 ASIC submits, in summary, this is a case:

(a) involving grossly misleading conduct;

(b) in a form that ASIC's regulatory guides specifically warned debenture issuers that they should not undertake;

(c) directed towards a potentially vulnerable class of people (such as readers of daily tabloid and standard newspapers who, though with assets above the sophisticated investor level, often were not in fact sophisticated or experienced persons);

(d) that generated a huge amount of investment, all of which is likely to have been lost because it was invested in highly speculative investments, causing very significant financial and psychological harm.

## ASIC'S SUBMISSION ON THE APPROPRIATE PENALTY – MAYFAIR WEALTH (FIRST DEFENDANT)

207 ASIC submits that a penalty of $4 million is appropriate for the contraventions engaged in by Mayfair Wealth, which is the highest penalty sought against the four Defendants. ASIC submits that the higher penalty is appropriate because:

(a) Mayfair Wealth made all four of the Representations;

(b) Mayfair Wealth operated the website to which members of the public were directed by targeted advertising commissioned by it: Liability Judgment [106], and which contained (and responded to) the Representations: Liability Judgment [148], [156], [161], [167] and Annexure A;

(c) the brochures, which contained the application forms, contained a statement that "This document is issued by [Mayfair Wealth]";

(d) Mayfair Wealth was responsible for placing the advertisement for the Core Notes in newspapers: Liability Judgment [100]-[103]; and

(e) Mayfair Wealth engaged in the promotion and advertising of both Mayfair Products and disclosed a beneficial interest in the issue of the Mayfair Products: Liability Judgment [148], [156], [161], [167] and Annexure A.

**ASIC'S SUBMISSIONS ON APPROPRIATE PENALTY – M101 HOLDINGS AND M101 NOMINEES (SECOND AND THIRD DEFENDANTS)**

208 ASIC submits that a penalty of $3 million is appropriate in respect of each of M101 Nominees and M101 Holdings. ASIC submits that the conduct of those entities involved significant culpability for the following reasons:

(a) many of the Representations were contained in the brochures and application forms for the products issued by M101 Nominees and M101 Holdings: Liability Judgment [91]-[99], [151], [161];

(b) the Mayfair Products were issued by M101 Holdings and M101 Nominees. Accordingly, but for their conduct, the contraventions would not have occurred, and no investors would have suffered loss; and

(c) M101 Holdings and M101 Nominees received investors' funds and dealt with them in ways that were contrary to the Representations: Liability Judgment [114]-[145], [157], [163].

209 ASIC submits that pursuant to s 553B(1) of the *Corporations Act*, any pecuniary penalty imposed on M101 Nominees will not be enforceable or admissible to proof, as the company is in liquidation and is insolvent: Liability Judgment [136].

210 ASIC submits that a significant pecuniary penalty is nonetheless necessary in the present case to serve the purpose of general deterrence. This is particularly so where all of the impugned representations concerned M101 Nominees: *ASIC v AGM* at [34]-[35].

## ASIC'S SUBMISSIONS ON APPROPRIATE PENALTY – ONLINE INVESTMENTS (FOURTH DEFENDANT)

211 ASIC submits that a penalty of $2 million is appropriate in respect of Online Investment's contraventions. Online Investments operated the 'www.termdepositguide.com' website which promoted the Mayfair Products and which contained the Bank Term Deposit Representation, with meta-title tags such as "term deposit rates – best term deposit options" and domain names such as "term deposit guide": Liability Judgment [46] and [109], which ASIC submits are particularly egregious examples of the Bank Term Deposit Representations.

212 Online Investments is also the shareholder of the First and Second Defendants. Further, Online Investments held 95% of the shares in Eleuthera Group Pty Ltd, which obtained the benefit of more than $60 million lent to it by M101 Nominees from funds raised from Core Note investors: Liability Judgment [122], [134]. Online Investments therefore obtained, and has retained, significant financial advantages from the funds raised from investors.

## DEFENDANTS' SUBMISSIONS IN MITIGATION OF PENALTY

213 The Defendants made the following submissions on penalty.

### Legal Advice

214 The Defendants submit that they relied heavily on legal advice for every significant aspect of their investment activities. In the period August 2017 to May 2020, they incurred legal costs of $735,214 of which $206,640 was for legal compliance and $93,312 was for advice on promotional material, identified at [87] of the Defendants penalty submissions.

215 The legal advice included advice from counsel on various regulatory aspects of the proposed investments. The advice covered numerous aspects of the structuring of the investments, the security arrangements and the promotional material, identified at [88] of the Defendants penalty submissions.

216 The Defendants submit that the extensive involvement of lawyers in every aspect of the Defendants' investment activities demonstrates a strong compliance culture. This, the

Defendants submit, is a mitigating factor and diminishes the need for specific deterrence in the setting of penalties in this case.

**Losses**

217 The Defendants accepted that the magnitude of any losses caused by contravening conduct is a relevant factor in assessing penalty. However, the Defendants submit, that no losses have been proven in the present case.

218 The Defendants submit that the evidence relied upon by ASIC as to losses arising from the contravening conduct is inadequate and out of date. The Defendants submit that there is no evidence before the Court from which any conclusion can be drawn about losses for the Core Note investors or the holders of the M+ Notes.

219 The Defendants also submit that the enforcement actions taken in this proceeding and in the related proceeding, M101 (VID524/2020), made it difficult for the Defendants to raise funds so as to recapitalise investments which had been made by the Defendants. This, in the Defendants' submission, resulted in the Defendants being unable to recapitalise or source other funds which resulted in the Third Defendant having to obtain bridging finance from Naplend Pty Ltd on onerous commercial terms. The Defendants submit that this confluence of events brought on by the impact of the pandemic and on 11 March 2020, the Second and Third Defendants' freezing redemptions, respectively in the M+ Notes and Core Notes, resulted in the inability of the Defendants to recapitalise the investments made by them.

220 The Defendants submit that the provisional liquidators of the Third Defendant and Mr Tracy, a Chartered Accountant and Partner at Deloitte, misunderstood the nature of the investment scheme which focused on tourism assets and the role of the Eleuthera Group Pty Ltd. The submissions made by the Defendants at [112]-[132] are submissions directed at taking issue with evidence and findings made in the Liability Judgment. The time to challenge that evidence was at the hearing on liability which, it will be recalled, the Defendants did not participate in and did not file any evidence.

## ASIC'S REPLY SUBMISSIONS IN RESPECT OF THE DEFENDANTS' FACTORS IN MITIGATION

221 ASIC advanced the following submissions in reply to the mitigation factors relied upon by the Defendants.

**Legal Advice**

222 ASIC submits that insofar as the Defendants contend that it is a mitigating factor that they "relied heavily on legal advice for every significant aspect of their investment activities", that contention must be rejected for at least two reasons. First, the authorities make clear that legal advice is irrelevant or at best of marginal relevance; and second, the legal advice sought and obtained was inadequate, including for reasons of incomplete instructions.

223 ASIC submits that the authorities make clear, that reliance on legal advice is not a discounting factor of any material weight in respect of penalty*: Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 at [309]-[310] (Wilcox, French and Gyles JJ); *Visy Paper Pty Ltd v ACCC* [2005] FCAFC 236; 224 ALR 390 at [49]; *ACCC v Jetstar (No 2)* [2017] FCA 205 at [31]-[32]. In *Consumer Affairs Victoria v Vic Solar Pty Ltd (No 4)* [2021] FCA 449, O'Bryan J at [39] said that "independent legal advice … is generally considered not to be a mitigating factor of any material weight".

224 ASIC submits that the legal advisers from whom the Defendants sought advice was not instructed as to the actual and proposed use of investor funds and the risks associated with the investments.

**Losses**

225 ASIC submits that although losses are relevant, loss is not a determinative factor in the imposition of a pecuniary penalty. ASIC submits that significant penalties may be imposed even where there is no loss suffered: *ASIC v Theta Asset Management Ltd* [2020] FCA 1894 (***Theta***) at [280].

226 ASIC submits that contrary to the Defendants' submissions at [100], in considering loss in the context of fixing penalties, precise proof is not required. A court may instead estimate, in general terms, what level of loss is likely: *Theta* at [297]. ASIC submits that is precisely the approach the Court adopted in the Liability Judgment. ASIC submits that the Court in the Liability Judgment has already accepted the provisional liquidators' estimation of nil return to creditors from the assets of M101 Nominees: Liability Judgment at [135], [138], [173]. Further, the Court concluded in the Liability Judgment at [172] that there is considerable doubt about the asset security values and the recovery of funds for Core Note investors. The evidence, in ASIC's submission, establishes that it is inherently unlikely that the investors will receive any, or any significant, return of the interest and capital owed to them.

227 ASIC submits that in relation to approximately $65 million owing to investors in the M+ Notes, the liquidator (for the Core Notes) stated that the M+ Notes noteholders are unlikely to receive any return: Provisional Liquidators' Report at [1], [52(d)(iv)], [58] and [75(b)].

228 ASIC relies upon the Provisional Liquidators' Report at [75(b)] where the liquidators state "the M+ [Notes] noteholders who advanced funds to M101 Holdings are unlikely to receive any return". ASIC also relies upon the fact that redemptions in the M+ Notes have been suspended since March 2020: Liability Judgment [133 item h] and [163].

229 ASIC submits that nothing sought to be relied upon by the Defendants in their submissions suggests that the evidence accepted in the Liability Judgment was incorrect or that there is any real prospect of investors receiving the funds owed to them.

230 ASIC submits that the evidence from the provisional liquidators supported a conclusion that M101 Nominees was insolvent from the outset. Eight reasons for the provisional liquidators' views are summarised at [101] of the Provisional Liquidators' Report. ASIC submits that none of those reasons concerned the impact of the COVID-19 pandemic or the effect of orders made by this Court.

231 ASIC submits that the provisional liquidators' findings in respect of the solvency of M101 Nominees and the business and funding model summarised at [101] of their report were set out in the Liability Judgment at [136] and accepted by this Court. The Defendants did not file any evidence in response: Liability Judgment [146].

232 ASIC submits that the Defendants having not contested the evidence filed by ASIC at the Liability Hearing cannot now seek to take issue in the Penalty Hearing with the evidence accepted by the Court and the findings made in the Liability Judgment.

**Seriousness of misconduct**

233 ASIC submits that there is no basis for the Court to find that the Defendants' misleading conduct was "only a technical or minor contravention": Defendants' submissions at [129]. The first-ranking security was not over any readily realisable assets of substantive value. All of the underlying properties except one were mortgaged to third parties. There is no point having security over units in a trust that owns real property if the property has been mortgaged to third parties for the full value of the property.

**Other factors advanced by the Defendants in mitigation**

234 ASIC submits that the Defendants did not appear at the hearing on liability or adduce any evidence for the purpose of that hearing and did not admit to any contravening conduct, nor did they consent to any orders or declarations being made against them. ASIC submits that the Defendants have not co-operated with ASIC since publication of the Liability Judgment for the purpose of agreeing a penalty. Instead, the Defendants have elected to contest all of the relief sought by ASIC in the Penalty Hearing. ASIC accepts that the Defendants are entitled to contest all the relief sought by ASIC, but in doing so, in ASIC's submission, they cannot say that they have acted in a way that promotes the early settlement of litigation, reduction of resources and costs involved in contesting the proceeding. ASIC submits that the Defendants' conduct has not had any public benefit in the administration of justice and ASIC's role as financial services regulator: *Forex* at [156]. ASIC submits that the Defendants have not co-operated in any way that supports a reduction in penalty that would otherwise be imposed in respect of the contravening conduct.

235 ASIC submits that in circumstances, such as the present case, where the Defendants have not co-operated in a way designed to avoid the costs of a trial, have not accepted that their conduct was serious and have not apologised to the Court, they cannot rely upon any of the mitigating factors referred to in the Defendants' submissions: *ASIC v Westpac* at [141].

236 ASIC submits that none of the matters advanced by the Defendants mitigate against the penalty sought by ASIC as necessary to achieve the primary consideration of general and specific deterrence. ASIC submits that none of the so-called mitigation factors referred to by the Defendants support a reduction in the penalty that the Court would otherwise consider appropriate in the circumstances.

237 ASIC submits that on no view is it tenable in the circumstances for the Court exercising its discretion in determining an appropriate penalty to conclude that the appropriate penalty should be small or that no penalty should be imposed. To the contrary, ASIC submits that there is a glaring absence of:

(1) any understanding or acceptance of the serious and significant nature of the Defendants' wrongdoing;

(2) any evidence of contrition or remorse;

(3) any apology; and

(4) any acceptance of responsibility for, and recognition of, the consequences of the wrongdoing, being the loss of very significant amounts of money by many elderly, inexperienced investors who have lost significant portions of their life and retirement savings.

238 ASIC submits that all of the above factors point to the need for a very significant pecuniary penalty as sought by ASIC to achieve the necessary specific deterrent effect.

**CONSIDERATION OF PECUNIARY PENALTY**

239 I am satisfied on the evidence tendered in the Liability Hearing and in the Penalty Hearing that the nature and extent of the Defendants' contravening conduct is very serious and has exposed investors in the Mayfair Products to very substantial losses from which many investors will never financially recover. The Representations which I found were made in the Liability Judgment were grossly misleading and calculated to mislead investors as to the nature and extent of the risk of the Mayfair Products so as to represent them as being low risk, safe, certain or secure and akin to term deposits when in fact the Mayfair Products exposed investors to significantly higher risk than term deposits. The Defendants engaged in a marketing strategy to divert people searching online for something equivalent in risk to a bank term deposit, by using sponsored-link advertising and websites with meta-title tags including the words "best term deposit". I have found that the Representations in respect of the Core Notes were particularly egregious in light of the evidence of the provisional liquidators (which I accept) that M101 Nominees had been insolvent since inception and the evidence of Mr Tracy from Deloitte (which I accept) that investor funds were generally not supported by first-ranking unencumbered assets security.

240 The contravening conduct of the Defendants has caused very significant harm to individual investors who in some cases were investing all their retirement funds with the Defendants on the basis that their funds were securely invested when in reality their funds were being invested in highly speculative ventures and now are very likely to have been lost. M101 Nominees is in liquidation with the provisional liquidators estimating a nil return to Core Note investors. M101 Holdings has suspended redemptions in the M+ Notes since 11 March 2020. ASIC submits that the Mayfair Products raised approximately $140 million from 281 investors. This is based upon the total numbers of investors, and the quantum of funds that investors have invested into the M Core Notes and the M+ Notes, which has been deposed to in the affidavit

of Lisa Saunders dated 15 April 2020. These figures were provided by Quattro Capital Group Pty Ltd, a corporate authorised representative of Mayfair Platinum (as was the trading name of the First Defendant, Mayfair Wealth Partners Pty Ltd at the relevant time). I find the number of investors and the amount of funds invested into the Mayfair Products to be accurate.

241 The Provisional Liquidators' Report identifies that the M Core Note and the M+ Note holders should expect a nil return or should not expect any recoveries from the assets of M101 Nominees. The evidence of Mr Tracy, in his Expert Reports, also identifies that the investors were at a real risk that they could lose some or all of their principal investment. The evidence of Mr Tracy was that investor funds were generally not supported by first-ranking unencumbered asset security, and to the extent there was security over units in various trusts the noteholders did not hold direct first-ranking asset security over the Australian real property assets, which were the primary assets of each trust. I find that based on the evidence of Mr Tracy, the Provisional Liquidators' Report and the evidence of the six investors tendered by ASIC, that the investors' funds are lost and will not be recovered, or are very likely to be lost.

242 I also find that the Defendants deliberately mislead investors into investing in the Mayfair Products under the belief that they would be of low risk when in fact the Mayfair Products were highly speculative and carried very substantial risk.

243 I reject, in their entirety, the Defendants' submissions that no pecuniary penalty should be imposed on the discretionary grounds submitted by the Defendants. That is because, contrary to the Defendants' submissions, I have found the Defendants' contravening conduct to be very serious and has caused very substantial loss and harm to investors in the Mayfair Products.

244 I reject the evidence of Mr Mawhinney to the effect that the Defendants had a culture of compliance. The fact that the Defendants, from time to time, sought legal advice from solicitors and counsel does not establish a legally compliant culture.

245 I reject entirely the Defendants' submissions which attack the opinions expressed by Mr Tracy in his Expert Reports. I accept the expert opinions expressed by Mr Tracy in his reports to the effect that Core Note investor funds were not generally supported by first-ranking unencumbered assets security. I also accept the expert opinion of Mr Tracy concerning the doubt about the security values and the likely recovery of funds for Core Note investors. I reject the Defendants' challenge to the evidence of Mr Tracy who was a careful and honest witness whose evidence I accept entirely.

246 I find that the number of contraventions is not able to be ascertained with any certainty.

247 I find that the number of contraventions is likely to be a large but indeterminate number because of manner in which the Mayfair Products were marketed, with the misleading representations published in various media publications such as brochures, emails and online through websites.

248 I find Mr Mawhinney to be the sole director of each of the Defendants and the controlling mind of each of the Defendants.

249 I find that Mr Mawhinney has shown no remorse for the contravening conduct of the Defendants nor for the loss and harm caused to investors in the Mayfair Products. Mr Mawhinney has not sought to cooperate with ASIC. The grossly misleading conduct of the Defendants requires that the Court impose a substantial pecuniary penalty to deter the Defendants and other potential contraveners from engaging in similar conduct.

250 When assessing the principles in arriving at an appropriate penalty, the starting point is s 12GBA of the *ASIC Act*, including the mandatory considerations in s 12GBA(2). The primary, if not the only object of a pecuniary penalty is deterrence, both general and specific: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762; 13 ATPR 41-076 at 52,152 (French J).

251 An appropriate penalty should place a price on contravention that is sufficiently high to deter repetition by the contraveners, and by others. Further, the cost of complying with a penalty cannot be regarded as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [64], citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [68]. No single factor will be decisive. Instead, "[t]he fixing of a penalty involves the identification and balancing of all the factors relevant to the contravention[s] and the circumstances of the defendant[s], and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty": A*ustralian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [100] (Dowsett, Greenwood and Wigney JJ), as affirmed in *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; 299 IR 404 at [115] (Allsop CJ, White and Wigney JJ, Besanko and Bromwich JJ agreeing).

252 During the relevant period, the maximum pecuniary penalties for a contravention of s 12DB(1) by a corporation were as follows:

(a) from 1 April 2017 to 30 June 2017, $1.8 million;

(b) from 1 July 2017 to 12 March 2019, $2.1 million;

(c) from 13 March 2019 to 30 June 2020, $10.5 million; and

(d) from 1 July 2020 to 20 August 2020, $11.1 million

253 As the contravening conduct in this proceeding occurred during the period outlined in (c) above, the maximum penalty that can be provided to the Defendants is $10.5 million per contravention.

254 There are 281 investors (less those investors who the Defendants tendered affidavits from) that have been likely affected by the contravening conduct of the Defendants and the likely number of contraventions is very high, but cannot be conclusively established.

255 I approach the question of penalty, taking account the deliberate misleading and deceptive conduct, the lack of co-operation in this proceeding, the significant effect that the Defendants' conduct has had on a number of investors and the Defendants' complete lack of remorse, wrongdoing and regret. These features of the Defendants' conduct bear upon the level of deterrence required. I have also taken into account the specific matters which must be considered under s 12GBB(5) of the *ASIC Act*. Taking account of these matters, the main consideration to which I have had regard to in arriving at an appropriate penalty is to fix a figure which puts a price on the seriousness of the Defendants' deliberate conduct and the nature of contraventions which caused severe loss to the individual investors. In viewing the matter in this way, I have sought to give attention to the underlying causes of the conduct that is to be deterred, and to take a global view of the contraventions in line with the totality principle.

256 I am of the view that the penalties sought by ASIC are insufficient and do not fully recognise the serious nature and the extent of the loss and harm caused by the contravening conduct. The penalties sought by ASIC are not, in my view, sufficiently high to deter repetition of the contravening conduct by the Defendants and any would-be contraveners, I therefore intend to impose the following pecuniary penalties.

257 First Defendant, Mayfair Wealth - $10 million. I accept ASIC's submissions that Mayfair Wealth should receive the highest penalty because of its involvement in all four of the Representations; its involvement in operating the websites to which members of the public were directed to targeted advertising commissioned by Mayfair Wealth; its involvement in the promotion and advertising of the Mayfair Products and placing advertisements for those products in the media.

258 A pecuniary penalty of $8 million in respect of the Second and Third Defendants, M101 Holdings and M101 Nominees for their involvement in making many of the Representations contained in the brochures and application forms for the Mayfair Products issued by M101 Nominees and M101 Holdings. I observe that the pecuniary penalty imposed on M101 Nominees, which is in liquidation, will not be enforceable or admissible to proof due to the company being in liquidation and its insolvency. A significant pecuniary penalty is nonetheless necessary to be imposed on M101 Nominees to serve the purpose of general deterrence: *ASIC v AGM* (2020) 148 ACSR 511, [2020] FCA 1499 per Beach J at [34]-[35].

259 A pecuniary penalty of $4 million for the Fourth Defendant, Online, is appropriate in respect of Online's contraventions. Online operated the www.termdepositguide.com" website which promoted the Mayfair Products and which contained the Bank Term Deposit Representation.

## INJUNCTIONS

### ASIC's Submissions

260 ASIC submits that pursuant to s 12GD(1) of the *ASIC Act* and s 1101B and/or s 1324 of the *Corporations Act*, the Court may grant an injunction in such terms as the Court considers appropriate if it is satisfied that a person has engaged, or proposes to engage, in conduct that constitutes or would constitute a breach of, relevantly, ss 12DA(1) and 12DB(1)(a) and (e) of the *ASIC Act*, and s 1041H of the *Corporations Act*.

261 On 16 April 2020, the Court made orders on an interim basis restraining the Defendants from using certain phrases in relation to advertisements related to the Defendants' marketing of the Mayfair Products, and also required those entities to add certain notices on their websites and provide the notices to prospective investors: *ASIC v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494. ASIC submits that the injunctions should now be granted on a final and permanent basis (other than in respect of the Core Notes issued by the Third Defendant, which is now in liquidation).

262 ASIC also submits that permanent injunctions should be made prohibiting the First, Second and Fourth Defendants from making the Representations.

263 ASIC submits that the permanent injunctions sought restraining the First, Second and Fourth Defendants from using certain phrases in advertisements and publishing the Representations are appropriate to remedy the contraventions, and to prevent the First, Second and Fourth Defendants from engaging in similar conduct in the future. In this way, ASIC submits that the permanent injunctions will serve the purposes of the *ASIC Act* and the *Corporations Act* to protect the public.

**DEFENDANTS' SUBMISSIONS ON INJUNCTIONS**

264 The Defendants oppose the permanent injunctions which are sought against the First, Second and Fourth Defendants prohibiting them from making the Representations. The Defendants submit that permanent injunctions would unfairly prejudice the First, Second and Fourth Defendants because the order would operate as punishment for each of them for the contravening conduct of others.

265 The First, Second and Fourth Defendants further submit that injunctions ought not be made permanent as the advertising, marketing and promotion of the M+ Notes is not inherently unlawful nor has (in the Defendants' submission) ASIC proved that there is a high risk that the First, Second and Fourth Defendants would engage in the future in the contravening conduct.

**CONSIDERATION – INJUNCTIONS**

**266** I am satisfied on the evidence filed in this proceeding, both in the liability phase and in the penalty phase, that there is a utility and purpose in restraining the First, Second and Fourth Defendants from using the prohibited phrases in advertising, promotion or marketing undertaken by the First, Second and Fourth Defendants including on their website or through any online search platform advertisements. I am satisfied that such injunctions are necessary to protect the public from the First, Second and Fourth Defendants engaging in future contravening conduct.

**ADVERSE PUBLICITY ORDERS**

267 ASIC submits that the Court should make an adverse publicity order under s 12GLB(1)(a) of the *ASIC Act*. ASIC submits that adverse publicity orders are warranted in this case as Mr Mawhinney, the sole director of the Defendants, has published extensive material seeking to

challenge, contradict and/or undermine the Liability Judgment and may similarly seek to undermine the findings in this Penalty Judgment. ASIC further submits that adverse publicity orders would warn consumers visiting the Mayfair 101 website or considering investing in funds with the Mayfair 101 group of the contravening conduct found in the Liability Judgment and this Penalty Judgment.

268 The Defendants oppose the making of any adverse publicity orders on the basis that, as a result of this proceeding, and proceeding VID 524 of 2020 (**M101 Nominees Proceeding**), Mr Mawhinney and the Mayfair Group of companies, including the Defendants in this proceeding, have attracted significant adverse publicity. The Defendants submit that any further adverse publicity orders would be superfluous.

## CONSIDERATION – ADVERSE PUBLICITY ORDERS

269 I reject the Defendants' submissions that adverse publicity orders should not be made on the basis that Mr Mawhinney and the Mayfair Group of companies have already been subjected to adverse publicity as a consequence of this proceeding and the related M101 Nominees Proceedings. I am of the view that adverse publicity orders in the form proposed by ASIC are appropriate to protect the public and inform the public of the Defendants' contravening conduct as found in the Liability Judgment and in this Penalty Judgment. The adverse publicity orders are, in my view, necessary in order to better inform the public of the Defendants' contravening conduct which Mr Mawhinney and the Defendants have sought to downplay in public statements and on the Mayfair 101 website.

## COSTS

270 I will hear the parties on the appropriate form of order for costs.

## DISPOSITION

271 I direct that the parties confer and then submit to my chambers a proposed form of orders to give effect to these Reasons for Judgment. In the event that a form of orders cannot be agreed between the parties then each party should submit the form of order for which they contend.

I certify that the preceding two hundred and seventy-one (271) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate: 

Dated: 22 December 2021