FEDERAL COURT OF AUSTRALIA

Mawhinney v Australian Securities and Investments Commission (No 2)

[2022] FCAFC 205

Appeal from:	*Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3)* [2021] FCA 354
File number:	VID 244 of 2021
Judgment of:	**ALLSOP CJ, O'BRYAN AND CHEESEMAN JJ**
Date of judgment:	22 December 2022
Catchwords:	**COSTS** – costs of the appeal – application by interested persons for indemnity costs – application by appellant for indemnity costs and Bullock order – applicable principles in the context of a successful appeal but where the proceeding is to be remitted for retrial **PRACTICE AND PROCEDURE** – where no application for a special costs order is made at the time orders pronounced – application to vary costs order after the order is entered – power of the Court to vary a costs order pronounced and entered
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 14(3), 37M(2), 43 *Federal Court Rules 2011* (Cth) rr 39.05, 40.01, 40.02
Cases cited:	*Australian Trade Commission v Disktravel* [2000] FCA 62 *Bullock v London General Omnibus Co* [1907] 1 KB 264 *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 *CGU Insurance Ltd v AAI Ltd* [2016] NSWCA 335 *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 *Commonwealth v McCormack* (1984) 155 CLR 273 *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* [2015] HCA 53; 327 ALR 192 *Flint v Richard Busuttil & Co Pty Ltd* (2013) 216 FCR 375 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 *Fritz v Hobson* (1880) 14 Ch D 542

Gould v Vaggelas (1985) 157 CLR 215

Johnston v Cameron [2002] FCAFC 301

Kazar v Kargarian (2011) 197 FCR 113

L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2) (1982) 151 CLR 590

Latoudis v Casey (1990) 170 CLR 534

Life Therapeutics Ltd v Bell IXL Investments Ltd (No 2) (2008) 170 FCR 595

Mawhinney v Australian Securities and Investments Commission [2022] FCAFC 159

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

McCracken v Phoenix Constructions (Queensland) Pty Ltd [2013] FCAFC 87

Metwally v University of Wollongong [1985] HCA 28; 60 ALR 68

Notaras v Barcelona Pty Ltd (No 2) [2019] FCA 617

O'Keeffe Nominees Pty Ltd v BP Australia Ltd (No 2) (1995) 55 FCR 591

Oshlack v Richmond River Council (1998) 193 CLR 72

Owston Nominees No 2 Pty Ltd v Branir Pty Ltd (2003) 129 FCR 558

Queensland North Australia Pty Ltd v Takeovers Panel (No 2) (2015) 236 FCR 370

Ramsay Health Care Australia Pty Ltd v Compton (2016) 247 FCR 387

Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [1988] HCA 2; 77 ALR 190

Ruddock v Vadarlis (2001) 115 FCR 229

Siminton v Australian Prudential Regulation Authority (No 2) [2008] FCAFC 113

Smith v NSW Bar Association (1992) 176 CLR 256

State of Victoria v Sportsbet Pty Ltd (No 2) [2012] FCAFC 174

Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2) (2007) 159 FCR 274

Water Board v Moustakas [1988] HCA 12; 180 CLR 491

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations

Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	77
Date of hearing:	14 December 2022
Counsel for the Appellant:	Mr A Myers AC KC, Mr M Pearce SC and Mr A Weinstock
Solicitor for the Appellant:	Roberts Gray Lawyers
Counsel for the First Respondent:	Mr T Sullivan KC, Mr D Barnett and Mr N Congram
Solicitor for the First Respondent:	Australian Securities and Investments Commission
Counsel for the Second and Third Respondents:	The Second and Third Respondents did not appear
Counsel for Mr William Newland (Interested Person):	Mr J McComish
Solicitor for Mr William Newland (Interested Person):	Colin Biggers & Paisley
Counsel for Scanlan Carroll (Interested Person):	Mr J Styring
Solicitor for Scanlan Carroll (Interested Person):	Scanlan Carroll
Counsel for Ashurst Australia (Interested Person):	Ms M Agnoletti
Solicitor for Ashurst Australia (Interested Person):	Allens

ORDERS

VID 244 of 2021

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

ORDER MADE BY:	**ALLSOP CJ, O'BRYAN AND CHEESEMAN JJ**
DATE OF ORDER:	**22 DECEMBER 2022**

THE COURT ORDERS THAT:

1. Order 7 of the orders of the Court made on 15 September 2022 be set aside and, in its place, the following order be made:

   The appellant pay the costs of the Interested Persons, Ashurst Australia, Scanlan Carroll and William Newland, of and in connection with the appeal (including their application as to costs) on an indemnity basis.

2. Order 8 of the orders of the Court made on 15 September 2022 be set aside and, in its place, the following order be made:

   The first respondent pay 50% of the appellant's costs of the appeal (excluding any costs in respect of ground 29) on an indemnity basis.

3. The application by the appellant to vary order 8 of the orders of the Court made on 15 September 2022 (the **appellant's costs application**) be otherwise dismissed.

4. Each of the appellant and the first respondent bear their own costs arising out of the appellant's costs application.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1 My participation in this costs appeal was necessitated by the resignation of the presiding judge in the substantive appeal, Justice Jagot, which was brought about by her Honour's appointment to the High Court of Australia.

2 I have read the reasons of O'Bryan and Cheeseman JJ, with most of which, subject to the following, I agree. I agree with the orders concerning the Intervenors and with the refusal of the Bullock order. I would make a different order, but perhaps similar in practical effect, in favour of Mr Mawhinney against ASIC.

3 The making of orders, their finality when called for, and the fairness to parties in the disposition of costs and costs orders are all matters of both practical and juridical importance.

4 At the time of making orders and publishing reasons, parties should be ready to alert the Court to likely applications such as costs orders that may arise from offers of compromise so that orders can be fashioned to accommodate such possible applications. However, it is not always easy to interrupt a judge or a Court in making orders and delivering judgment. Also it may not be until reading the reasons that it is apparent that a supplementary costs order might be appropriate. That is why r 40.02 of the *Federal Court Rules 2011* (Cth) is there. The introductory phrase "a party or a person who is entitled to costs…" is apt to include a party or person who has in their favour an order for costs, which order means costs as between party and party (see r 40.01). Costs are discretionary: s 43 of the *Federal Court of Australia Act 1976* (Cth). It is less than precise (though depending on context, it may be appropriate) to speak of an entitlement to costs unless there is an order in existence. Such a costs order may be part of final orders or part of interlocutory orders. Here the costs order in relation to the interested parties was part of final orders, though orders which contained the possible variation of another order.

5 I would not read r 40.02 as overridden by r 39.05 and not available when final orders have been entered. Whether this is because the two should be read together or because the order in r 40.02 does not truly vary the order (notwithstanding r 40.01) may not matter (though I prefer the former). The need for orders in paras 40.02(b) and (c) often will not be appreciated until well after the delivery of judgment and the likely entry of orders. Such must be taken to have been understood at the time the rule was made. It would be odd if orders under those paragraphs

could be made after entry of judgment, but not under para (a). Convenience, orderly practice and good order would see matters in r 40.02, and especially, but not limited to, the matters in r 40.02(b) and (c) being able to be raised after the entry of final orders. This conforms with the predecessor rules, as O'Bryan and Cheeseman JJ point out at [44] below.

6 As to the variation to order 8, I would make a different, albeit probably similar order in practical effect. The order originally made reflected the view of the Full Court of the lack of merit (to understate the matter) of much of what had been argued by the appellant on appeal, other than the powerful and determinative procedural fairness issue. I do not intend to qualify those views of the Full Court at all. Those views were also expressed in the context of deciding whether the most exceptional circumstances existed to relieve ASIC of the "elementary" proposition that it should be bound by the conduct of its case below: *Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 at 71; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 at 498. The consequences of so being bound would have had the proceedings below dismissed, leaving ASIC to face a *res judicata* or *Anshun* argument consequential upon dismissal.

7 The price of having the proceedings remitted for a full re-pleading and the running of a new case should be that Mr Mawhinney, within reason, be held harmless and made whole from the consequences of the first failed attempt by ASIC. There are limits, however, to that discretionary evaluation and judgement. ASIC should not have to pay anything for the unjustified, and unjustifiable, attack on the members of the profession in ground 29 who acted for Mr Mawhinney and displayed no lack of competence in the execution of their retainers. Also, the grounds of appeal (other than the procedural fairness issue) lacked merit in the way trenchantly expressed by the Full Court. Ordinarily, it would be open to a Court (as the Full Court did) to deny costs to even a winning party for such unnecessary arguments. But the circumstances here are not ordinary. They are exceptional, most exceptional. Mr Mawhinney is now faced with the repetition and development of the case in any amendment by way of re-pleading. Part of the price of that advantage for ASIC (in the public interest) should be that all or as much prejudice as possible to Mr Mawhinney that can reasonably be able to be eliminated should be eliminated. In my view, that should involve ASIC paying Mr Mawhinney's costs other than ground 29. Certainly the costs in relation to the procedural fairness issue should be paid on an indemnity basis. Given the Full Court's views as to the lack of merit of the other grounds of appeal up to and including ground 28, I would reduce those costs to party and party costs. This would involve not an expression of view that the Court was in error in the original order, but rather would reflect my view that, given the most exceptional circumstance of the

remitter for a re-pleading and running of another case, that even the costs of these grounds of appeal should be paid, although with some allowance made for their lack of apparent merit. I would make that allowance a reduction from indemnity costs that would indemnify and hold harmless Mr Mawhinney from the consequences of that part of the case to party and party costs. Justices O'Bryan and Cheeseman have resolved these issues in a simpler way, and one which may be less costly to assess and which may have similar practical effect.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.

Associate: 

Dated: 22 December 2022

REASONS FOR JUDGMENT

O'BRYAN AND CHEESEMAN JJ:

Introduction

8 These reasons relate to the costs orders arising from one of two appeals, which were heard concurrently over five days on 22 to 26 August 2022. The Court (constituted by Jagot, O'Bryan and Cheeseman JJ) delivered separate judgments in respect of each appeal: *Mawhinney v Australian Securities and Investments Commission* [2022] FCAFC 159 (which we will refer to as the **First Appeal**) and *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 (which we will refer to as the **Second Appeal**).

9 The appeals concerned two different proceedings brought by the Australian Securities and Investments Commission (**ASIC**) against Mr Mawhinney and a number of companies controlled by him, and the separate judgments made by the primary judge in each proceeding. The two proceedings largely concerned the same substratum of facts. As a consequence, there was considerable overlap in the grounds of appeal. The appellants in each of the appeals, Mr Mawhinney in the First Appeal, and Mayfair Wealth Partners Pty Ltd, M101 Holdings Pty Ltd and Online Investments Pty Ltd in the Second Appeal, were represented by the same counsel and solicitors. ASIC was the respondent in both appeals and was represented by the same counsel and solicitors in each appeal. In respect of the grounds of appeal that overlapped in each appeal, the written and oral submissions of the appellants and the respondents were generally made in both appeals.

10 In the Second Appeal, the appeal by the appellants (Mayfair Wealth Partners Pty Ltd, M101 Holdings Pty Ltd and Online Investments Pty Ltd) was dismissed and the appellants were ordered to pay ASIC's costs as agreed or taxed.

11 The costs orders that are the subject of these reasons arise in relation to the First Appeal in respect of which Mr Mawhinney is the appellant.

12 In the First Appeal, Mr Mawhinney appealed against an order made by the primary judge on 19 April 2021 restraining him, for a period of 20 years, from:

(a) soliciting funds in connection with any financial product (as defined in Div 3 of Ch 7 and s 9 of the *Corporations Act 2001* (Cth) (the **Corporations Act**);

(b) receiving funds in connection with any financial product;

(c) advertising, promoting or marketing any financial product; and

(d) without a Court order, removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with any financial product.

13 On 15 September 2022, the Court made orders allowing the appeal and remitting the matter for hearing and determination by a judge other than the primary judge: see *Mawhinney v Australian Securities and Investments Commission* [2022] FCAFC 159 (**Appeal Judgment** or **AJ**).

14 The amended notice of appeal contained 29 grounds of appeal in total. The appeal was allowed on one principal basis reflected in appeal grounds 2 and 3(e): that the appellant was denied procedural fairness by the primary judge making findings of contraventions by the appellant and certain corporate entities of ss 911A(1) and 1041H of the Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act 2001* (Cth) (**ASIC Act**), although the first respondent, ASIC, did not allege that any such contraventions had been committed.

15 As referred to below, many of the other grounds of appeal were rejected by the Court. Other grounds of appeal, to the effect that the primary judge erred in his findings of contraventions of the Corporations Act and the ASIC Act by the appellant, were effectively overtaken by the Court's conclusion that the appellant had been denied procedural fairness. In the result, none of the grounds of appeal, other than grounds 2 and 3(e), were upheld by the Court.

16 Appeal ground 29 concerned the appellant's legal representatives at or prior to trial, being the law firms Ashurst and Scanlan Carroll and counsel William Newland. Ground 29 was that:

> The proceeding miscarried by reason of the incompetence of the solicitors and counsel who acted for the appellant in failing:
>
> (a) to assert on behalf of the appellant his privilege against self-exposure to a penalty and to resist various procedural steps and the reception of evidence in reliance on the privilege;
>
> (b) [deleted];
>
> (c) to object to the order which made evidence at the trial in proceeding no VID 228 of 2020 evidence at the trial of this proceeding;
>
> (ca) to object to the concurrent trial of liability and penalty;
>
> (d) to object to the admission into evidence at the trial of the Tracy Reports;
>
> (e) to object to the admission into evidence at the trial of the M101 PL Report;
>
> (f) to object to the admission into evidence at the trial of the IPO PL Reports;

(g) to cross-examine at the trial the investors who gave evidence to test whether they were retail clients or unsophisticated investors and whether they were misled by any conduct of the appellant, the second respondent or Australian Income Solutions Pty Ltd;

(ga) to cross-examine the provisional liquidators of M101 Nominees to establish the serious errors in their report referred to in ground 8;

(gb) to cross-examine Mr Tracy about the impact of the materially incorrect instructions on his first two reports referred to in ground 7(c);

(h) to adduce evidence and to make submissions at trial on the true nature of the investment schemes operated by the defendants and their constituent elements, including the Eleuthera loan, the Naplend loan, the security arrangements and the sustainability of the schemes.

17 Each of Ashurst, Scanlan Carroll and Mr Newland were given leave to appear on the hearing of the appeal to contest ground 29 as persons with an interest in the proceeding (**Interested Persons**). Each filed written submissions prior to the hearing of the appeal and each made oral submissions at the hearing, represented by counsel.

18 In the Appeal Judgment, the Court observed (at AJ [4]-[7]):

4 This is an appeal which ought to have been brought on one ground with two particulars. The sole ground of appeal which ought to have been brought is that Mr Mawhinney was denied procedural fairness …

5 This challenge is found in grounds 2 and 3(e) in the notice of appeal and the amended notice of appeal. This ground of appeal must succeed for the reasons given below.

6 Regrettably, however, there were 29 grounds of appeal in total. These other grounds of appeal involve the abandonment and re-formulation of the case which had been put to the primary judge, in part on the basis of spurious allegations that the incompetence of the lawyers who acted for Mr Mawhinney below caused the proceeding to miscarry, and otherwise in disregard of the fundamental principle that a party is bound by the party's conduct of the case below.

7 The allegations of incompetence of the legal representatives below involve a failure to accept the applicable principles and the circumstances of the hearing before the primary judge. To understand the baselessness of the appeal but for the procedural fairness ground, it is necessary to understand the circumstances involving the denial of procedural fairness. In explaining this, it will also become unfortunately apparent that the approach of ASIC below placed the primary judge in a difficult position, effectively causing the denial of procedural fairness.

19 The Court made orders upholding the appeal, setting aside the orders of the primary judge and remitting the matter for hearing and determination by a judge other than the primary judge on the basis of such further evidence and submissions that the parties wish to adduce and put respectively and such further case management orders as the judge to whom the matter is remitted thinks fit. By order 6(2), the Court ordered ASIC to pay Mr Mawhinney's costs of and

in connection with the hearing before the primary judge on 16 February 2021 and 9 March 2021 on an indemnity basis. In respect of the remittal order and the indemnity costs order, the Court observed that:

(a) the costs prejudice to Mr Mawhinney (from the remitter) must be ameliorated by orders that ASIC pay Mr Mawhinney's costs of the trial on an indemnity basis, being the price ASIC must pay for the remittal (AJ [114]); and

(b) this is an exceptional case in which ASIC should be permitted to depart from the legal and evidentiary position it adopted below (AJ [116]).

20 The Court also made the following orders with respect to the costs of the appeal:

> 7. The appellant pay the costs of the interested parties, Ashurst Australia, Scanlan Carroll, and William Newland, of and in connection with the appeal, as agreed or taxed.
>
> 8. Subject to order 9, each of the appellant and the first respondent pay their own costs of the appeal.
>
> 9. Any party wishing to adduce further evidence or make further submissions about order 8 above:
>
> (a) may file and serve such evidence and submissions in support not exceeding 3 pages in length within 5 days of the date of these orders, in which event order 8 is stayed and must also give notice to the Court and other parties whether the party seeks a further oral hearing or is willing for the issue to be determined on the papers;
>
> (b) in that event, any party so served may file and serve evidence and submissions in response not exceeding 3 pages in length within a further 5 days and, in that event, the party must also give notice to the Court and other parties whether the party seeks a further oral hearing or is willing for the issue to be determined on the papers; and
>
> (c) a party who has filed evidence and submissions under order 9(a) may file and serve evidence and submissions in reply not exceeding 2 pages in length within a further 3 days.

21 With respect to those costs orders, the Court summarised its conclusions as follows (AJ at [170]):

> We have framed orders reflecting our conclusions above. These orders include:
>
> (1) …;
>
> (2) …;
>
> (3) that Mr Mawhinney pay the costs of the interested parties, the lawyers traduced by the spurious allegations of incompetent legal representation; and
>
> (4) that Mr Mawhinney and ASIC each pay their own costs of the appeal reflecting

> our views above that, although Mr Mawhinney succeeded in the appeal, his appeal ought to have been confined to the ground of procedural fairness as specified in appeal grounds 2 and 3(e). ASIC and the Court ought not to have been vexed otherwise by so many spurious appeal grounds. We will nevertheless afford Mr Mawhinney and ASIC an opportunity to adduce evidence and make submissions in respect of that costs order.

22 Subsequent to the making of those orders, the following submissions and supporting material were filed and served:

(a) On 19 September 2022, Ashurst filed and served submissions with respect to their costs of the appeal. Ashurst sought an order, in place of order 7 made on 15 September 2022, that the appellant pay the costs of Ashurst of and in connection with the appeal on a party and party basis until 11.00 am on 3 August 2022 and thereafter on an indemnity basis. The submissions were supported by an affidavit of Louise Mary Jenkins, a partner of Allens (the solicitors for Ashurst) sworn 20 September 2022.

(b) On 20 September 2022, Mr Newland filed and served submissions with respect to his costs of the appeal. Mr Newland sought an order, in place of order 7 made on 15 September 2022, that the appellant pay his costs of and in connection with the appeal on an indemnity basis, alternatively on a party and party basis until 5 August 2022 and thereafter on an indemnity basis. The submissions were supported by an affidavit of Patrick Xavier Tuohey, the solicitor for Mr Newland, sworn 20 September 2022.

(c) On 20 September 2022, the appellant filed and served written submissions with respect to his costs of the appeal. The appellant sought an order, in place of order 8 made on 15 September 2022, that ASIC pay the appellant's costs of and in connection with the appeal on an indemnity basis and that ASIC pay the appellant the costs incurred by him pursuant to order 7 of the order made on 15 September 2022 (that is, the costs payable to the Interested Persons).

(d) On 26 September 2022, Scanlon Carroll filed and served submissions with respect to their costs of the appeal. Scanlon Carroll sought an order, in place of order 7 made on 15 September 2022, that the appellant pay the costs of Scanlon Carroll of and in connection with the appeal (including this application) on an indemnity basis. The submissions were supported by an affidavit of Amanda Lee Harrington, a partner of Scanlon Carroll, sworn 26 September 2022.

(e) On 29 September 2022, ASIC filed and served submissions with respect to its costs of the appeal. ASIC did not seek any variation to the orders made on 15 September 2022 and otherwise resisted the variations to the orders sought by the appellant.

23 As noted earlier, this appeal was heard and determined by a Full Court comprising Jagot, O'Bryan and Cheeseman JJ. On 16 October 2022, Jagot J resigned her office as a justice of this Court following her appointment as a justice of the High Court of Australia. Section 14(3) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) provides that:

> Where, after a Full Court (including a Full Court constituted in accordance with this subsection) has commenced the hearing, or further hearing, of a proceeding and before the proceeding has been determined, one of the Judges constituting the Full Court dies, resigns his or her office or otherwise becomes unable to continue as a member of the Full Court for the purposes of the proceeding, then the hearing and determination, or the determination, of the proceeding may be completed by a Full Court constituted by the remaining Judges, if at least 3 Judges remain or, if the remaining Judges are 2 in number and the parties consent, by a Full Court constituted by the remaining Judges.

24 The appellant was unwilling to consent to this residual costs application being determined by O'Bryan and Cheeseman JJ in accordance with s 14(3). Accordingly, on this application the Court is constituted by Allsop CJ, O'Bryan and Cheeseman JJ.

25 For the reasons that follow, the Court will vary order 7 of the orders made on 15 September 2022 to award the Interested Persons indemnity costs. The Court will also vary order 8 and order that ASIC pay 50% of the appellant's costs of the appeal (excluding any costs in respect of ground 29) on an indemnity basis.

26 It is convenient to address the costs of the Interested Persons before considering the position of the appellant and ASIC.

Costs of the Interested Persons

27 As stated above, appeal ground 29 was that the proceeding below miscarried by reason of the incompetence of the solicitors and counsel who acted for the appellant, being Ashurst, Scanlan Carroll and Mr Newland.

28 On 15 February 2022, the Court made orders requiring the appellant to write to, relevantly, Ashurst, Scanlan Carroll and Mr Newland to advise them of the allegations raised against them in appeal ground 29.

29 On 3 March 2022, the Court made orders, amongst others, that:

(a) Ashurst, Scanlan Carroll and Mr Newland be treated as persons with an interest in the proceeding in relation to appeal ground 29;

(b) Ashurst, Scanlan Carroll and Mr Newland file and serve outline of submissions, any affidavit material to be relied on and a chronology in respect of appeal ground 29; and

(c) otherwise timetabling the participation of Ashurst, Scanlan Carroll and Mr Newland in the appeal.

30 Strictly, Ashurst, Scanlan Carroll and Mr Newland were not made parties to the appeal; the appellant did not seek any relief against them. By the orders made on 3 March 2022, they were given leave to participate in the appeal as persons having an interest in the proceeding in relation to ground 29, akin to interveners. Consistently with the leave granted to them, the Interested Persons joined issue with the appellant on ground 29. The Interested Persons were successful on the ground. In the Appeal Judgment, the Court rejected that ground in emphatic terms (see AJ [118]-[131]). The Court concluded that "ground 29 is and ought to have been recognised to be hopeless" (at AJ [131]).

31 Section 43 of the FCA Act confers a broad discretion on the Court to award costs in proceedings, including costs in favour of interveners and other non-parties in appropriate cases: *O'Keeffe Nominees Pty Ltd v BP Australia Ltd (No 2)* (1995) 55 FCR 591 at 596-597 per Spender J; *Life Therapeutics Ltd v Bell IXL Investments Ltd (No 2)* (2008) 170 FCR 595 at [18]-[24]. However, there is no "usual practice" of ordering costs in favour of interveners when the outcome of a proceeding accords with the arguments advanced by them: see *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 (***Ruddock v Vadarlis***) at [53] per Beaumont J, referred to with approval by Branson J in *Johnston v Cameron* [2002] FCAFC 301 at [19].

32 At the time of judgment on 15 September 2022, the Court made order 7 requiring the appellant to pay the costs of the Interested Persons of and in connection with the appeal. No objection to that order has been taken by the appellant. Rather, as discussed below, the appellant has sought a "Bullock" order (after *Bullock v London General Omnibus Co* [1907] 1 KB 264 at 272) that ASIC indemnify the appellant for those costs.

33 Order 7 made by the Court on 15 September 2022 reflected the Court's conclusions that: the interests of the Interested Persons were directly affected by appeal ground 29; with the leave of the Court they participated in the appeal to oppose ground 29; and the Interested Persons were successful in their opposition to ground 29. In the circumstances, the Court determined that it was just for the appellant, which had advanced ground 29, to pay their costs.

Applications without leave

34 Within a short time after the making of order 7 on 15 September 2022, each of the Interested Persons applied to vary that order, seeking an order for indemnity costs. When making order 7, the Court did not reserve liberty to the Interested Persons to apply to vary that order (in contrast to order 8). Nor did any of the Interested Persons seek such liberty at that time.

35 The Court expects parties to deal with issues relating to costs in a timely and efficient way: *Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* (2007) 159 FCR 274 (***Tristar***) at [26] per Buchanan J. Ordinarily, an application for a special costs order, such as indemnity costs, should be made during the hearing: *Tristar* at [26]; *Siminton v Australian Prudential Regulation Authority (No 2)* [2008] FCAFC 113 at [4]; *McCracken v Phoenix Constructions (Queensland) Pty Ltd* [2013] FCAFC 87 at [13]. The usual exception is an application for indemnity costs based on an offer of compromise which cannot be disclosed until the Court has pronounced judgment. In that case, though, the application should be made immediately following the pronouncement of judgment.

36 The appellant opposed the applications made by the Interested Persons on the basis that order 7 had been pronounced and entered and therefore could not be altered other than by way of appeal.

37 Once a judgment or order of a court has been pronounced and entered, the general common law rule is that the court lacks power to make a further order that alters or sets aside that judgment or order: see *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 (***Caboolture Park***) at 234-235. However, there are exceptions to the general rule many of which are set out in r 39.05 of the *Federal Court Rules 2011* (Cth):

> The Court may vary or set aside a judgment or order after it has been entered if:
>
> (a) it was made in the absence of a party; or
>
> (b) it was obtained by fraud; or
>
> (c) it is interlocutory; or
>
> (d) it is an injunction or for the appointment of a receiver; or
>
> (e) it does not reflect the intention of the Court; or
>
> (f) the party in whose favour it was made consents; or
>
> (g) there is a clerical mistake in a judgment or order; or
>
> (h) there is an error arising in a judgment or order from an accidental slip or omission.

38 A further exception is the power to make ancillary or supplemental orders: see the discussion in *Caboolture Park* at 234-236 and in *Owston Nominees No 2 Pty Ltd v Branir Pty Ltd* (2003) 129 FCR 558 at [17]-[27] per Allsop J (as his Honour then was).

39 Prior to the hearing of the applications to vary order 7, only Scanlan Carroll addressed the circumstance that order 7 had been pronounced and entered and, subject to an applicable exception, could not be revisited by the Court. In her affidavit in support of Scanlan Carroll's application, Ms Harrington deposed that:

(a) On 7 September 2022, Ms Harrington considered a written communication from counsel for Scanlan Carroll about a special costs order based on the principles in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 (***Colgate-Palmolive***). After consultation with other partners of Scanlan Carroll, it was decided that the firm would seek a special costs order.

(b) On 13 September 2022, the firm received notification of delivery of judgment on 15 September 2022 from Justice Jagot's chambers. The notification stated that appearances were not necessary but provided a Microsoft Teams link should any party wish to appear.

(c) Ms Harrington appeared at the 15 September 2022 hearing by video link. Ms Harrington's intention at the hearing was to inform the Court about Scanlan Carroll's purpose to seek directions about a special costs order. However, Ms Harrington did not seek to interrupt the Court when the costs orders were being pronounced. Mistaken as to her entitlement, Ms Harrington did not raise the issue of costs immediately after the pronouncement of orders.

40 It has long been established that a court may vary an order where there has been an accidental slip or omission by oversight on the part of the party's legal representatives: see *Fritz v Hobson* (1880) 14 Ch D 542 at 561-562 per Fry J; *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590 at 594-595 per Mason ACJ, Wilson and Deane JJ; *Commonwealth v McCormack* (1984) 155 CLR 273 at 277; and *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* [1988] HCA 2; 77 ALR 190 at 191 per Toohey J. The power to vary an order in those circumstances is within the scope of the "slip" rule in r 39.05(h): *Ramsay Health Care Australia Pty Ltd v Compton* (2016) 247 FCR 387 at [21] per Rares, Gleeson and Markovic JJ; *Notaras v Barcelona Pty Ltd (No 2)* [2019] FCA 617 at [34] per Robertson J. As the Full Court observed in *Flint v Richard Busuttil & Co Pty Ltd* (2013) 216 FCR 375 at [26]:

> The purpose of the slip rule is to avoid injustice to litigants (*Gould v Vaggelas* (1985) 157 CLR 215 at 274-5) by ensuring that the court's judgment or order reflects its intention at the time the order was made or the judgment was published, or reflects the intention that the court would have had but for the failure that caused the accidental slip or omission: *Symes v Commonwealth* (1987) 89 FLR 356 at 357. It may be exercised to prevent unintended consequences of the order and in this way give effect to the court's intentions: *Newmont Yandal Operations Pty Ltd v The J Aron Corporation and the Goldman Sachs Group Inc* (2007) 70 NSWLR 411 ("Newmont Yandal") at [116], [185], [194]. It is not confined to errors or omissions of the court; it extends to errors or omissions resulting from the inadvertence of a party's legal representative: *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590 ("Shaddock") at 594-5.

41 On the basis of the evidence given by Ms Harrington, we are satisfied that Scanlan Carroll's failure to seek liberty to apply to vary the costs order at the time of judgment on 15 September 2022 was an error on the part of the firm's representative, Ms Harrington. In those circumstances, the Court has power to vary order 7 in respect of Scanlan Carroll under r 39.05(h).

42 In their written submissions, neither Ashurst nor Mr Newland adverted to the above principles. At the hearing of the costs application, counsel for Ashurst and Mr Newland adopted the position of Scanlan Carroll with respect to r 39.05(h). Counsel for Mr Newland also sought to place reliance on the principles stated in *Smith v NSW Bar Association* (1992) 176 CLR 256 (***Smith***) and *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 (***De L***). Neither case assists. *Smith* concerns the power of a court to re-open reasons for judgment that have been published but before a final order has been pronounced and entered (see at 264-267); *De L* concerns the power of the High Court to re-open a costs order before it has been entered (see at 216). In this Court, that circumstance is addressed by r 39.04, but is inapplicable here (as order 7 was entered shortly after it was pronounced). The broader statements of principle in *De L* at 215 concern the special position of the High Court, as a final court of appeal, to re-open its judgments or orders.

43 None of the parties referred to rr 40.01 and 40.02. Those rules provide as follows:

> **40.01 Party and party costs**
>
> If an order is made that a party or person pay costs or be paid costs, without any further description of the costs, the costs are to be costs as between party and party.
>
> Note: Costs as between party and party is defined in the Dictionary.
>
> **40.02 Other order for costs**
>
> A party or a person who is entitled to costs may apply to the Court for an order that costs:

(a) awarded in their favour be paid other than as between party and party; or

(b) be awarded in a lump sum, instead of, or in addition to, any taxed costs; or

(c) be determined otherwise than by taxation.

Note 1: The Court may order that costs be paid on an indemnity basis.

Note 2: The Court may order that the costs be determined by reference to a cost assessment scheme operating under the law of a State or Territory.

44 Rule 40.02 applies when a party or person is entitled to costs. The language presupposes that a costs judgment or order has been made in favour of a party or other person, as no "entitlement" to costs exists prior to a court judgment or order as to costs. The rule contemplates that, following such a judgment or order, the party or person entitled to costs may apply to the Court for further orders in respect of those costs: that they be awarded other than on a party and party basis; that they be awarded in a lump sum; or that they be determined otherwise than by taxation. The principle underlying the rule would appear to be that such orders in relation to costs are in the nature of ancillary or supplemental orders which may be made notwithstanding that an order for costs has been pronounced and entered. In that respect, the rule is consistent with the previous rules within Order 62 which provided as follows (emphasis added):

3 Time for dealing with costs

(1) The Court may in any proceeding exercise its powers and discretions as to costs at any stage of the proceeding or **after the conclusion of the proceeding**.

…

4 Taxed costs and other provisions

(1) Subject to this Order, where by or under these Rules or any order of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.

(2) Where the Court orders that costs be paid to any person, the Court may further order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that person shall be entitled to:

(a) a proportion specified in the order of the taxed costs; or

(b) the taxed costs from or up to a stage of the proceedings specified in the order; or

(c) a gross sum specified in the order; or

(d) a sum in respect of costs to be ascertained in such manner as the Court may direct.

(3) **The Court may make an order under subrule (2) at any time, whether or not an order that costs be paid to a person has previously been made or entered**.

45 On its terms, r 40.02 would appear to empower the Court to exercise its discretion to permit the applications that have been made by the Interested Persons notwithstanding that order 7 was pronounced and entered. In the circumstances of the present case, however, it is unnecessary to express a concluded view about the operation of r 40.02. We are satisfied that the notification of delivery of judgment, and the terms of orders 7 to 9, resulted in some confusion for the legal representatives of Ashurst and Mr Newland and that the failure to seek liberty to apply to vary order 7 was an oversight on the part of their legal representatives. The evidence filed on behalf of each showed that offers of compromise had been made to the appellant prior to the hearing of the appeal. The offers of compromise afford each of Ashurst and Mr Newland a clear basis on which to seek an order for indemnity costs. In the circumstances, and despite an absence of direct evidence, we are willing to infer that the failure by Ashurst and Mr Newland to seek liberty to apply to vary order 7 at the time of judgment on 15 September 2022 was an accidental omission on the part of their legal representatives who appeared to receive judgment. In those circumstances, the Court has power to vary order 7 in respect of Ashurst and Mr Newland under r 39.05(h).

46 We reiterate, though, the Court's expectation that parties will deal with issues relating to costs in a timely and efficient way, consistently with the objectives stated in s 37M(2) of the FCA Act (including the efficient use of judicial resources, the efficient disposal of the Court's overall caseload and the disposal of all proceedings in a timely manner). If a special costs order is sought, that should ordinarily be foreshadowed or addressed prior to judgment, or immediately after pronouncement of judgment.

Bases on which indemnity costs sought

47 By their written submissions, the Interested Persons sought an order for indemnity costs on different bases:

(a) Ashurst sought an order on the basis of, and from the time of, an offer of compromise made to the appellant, which Ashurst submitted was unreasonably rejected.

(b) Scanlan Carroll sought an order on the basis that ground 29 was hopeless and the contentions advanced by ground 29 ought never to have been advanced.

(c) Mr Newland sought an order on both bases: ie, on the basis that ground 29 was hopeless and the contentions advanced by ground 29 ought never to have been advanced and, in the alternative, on the basis of, and from the time of, an offer of compromise made to the appellant, which Mr Newland submitted was unreasonably rejected.

48 At the hearing of the costs application, Ashurst adopted the submissions of Scanlan Carroll and Mr Newland and also sought an order on the basis that ground 29 was hopeless and the contentions advanced by ground 29 ought never to have been advanced.

49 In our view, this is an appropriate case for an order for indemnity costs in favour of the Interested Persons. Neither the appellant nor ASIC formally opposed the making of such an order.

50 As noted earlier, the Court has a broad discretion under s 43 of the FCA Act to award costs in a proceeding, including costs in favour of a person who participates in the proceeding as an interested person by leave of the Court. Under s 43, the Court may award costs on an indemnity basis: *Colgate-Palmolive* at 228. Accepted bases for the award of indemnity costs include the fact that the proceeding was commenced or continued in wilful disregard of known facts or clearly established law, the making of allegations which ought never to have been made, the undue prolongation of a case by groundless contentions and an imprudent refusal of an offer of compromise: *Colgate-Palmolive* at 232-234.

51 The allegations made against the Interested Persons by appeal ground 29 were hopeless and ought never to have been made. As the Court explained in dismissing ground 29 (AJ [118]-[120]):

> 118 … the principle of finality of litigation means that a party must be bound by the case the party put below. A rare exception to this principle, most apparent in the criminal law, is that a party cannot be bound by the case the party put below if the incompetence of legal representation is such that it has caused an actual miscarriage of justice. The narrow confines within which this exception to the principle of finality may operate have been repeatedly identified. Even in the criminal law, the incompetence of legal representation must be such as to amount to "conduct incapable of rational explanation on forensic grounds" and resulting in an actual miscarriage of justice: *Nudd v The Queen* [2006] HCA 9; (2006) 225 ALR 161 at [16]. Mere negligence will not suffice; flagrant incompetence is required: *R v Birks* (1990) 19 NSWLR 677 at 685. In *Bajramovic v Calubaquib* [2015] NSWCA 139; (2015) 1 MVR 15 at [38] Emmett JA (with whom Leeming JA and Adamson J agreed) said:
>
> > It is axiomatic that a party is normally bound by the way in which his or her counsel conducts a trial on behalf of the party. That is necessary for the efficient administration of justice, and an adversary system of trial could not work effectively with a different rule. In a criminal trial, inadvertence on the part of an advocate, or clear incompetence, can, in some circumstances, require the intervention of the court in order to avoid the risk of a miscarriage of justice. However, even in the conduct of a criminal trial, where liberty and reputation are at stake, such jurisdiction must be exercised cautiously, and the mere fact of a mistake or unwise decision made by an advocate will not, without

> considerably more, justify the setting aside of a conviction to avoid a miscarriage of justice. A fortiori, the jurisdiction must be exercised very sparingly in civil proceedings.
>
> 119 Appeal ground 29 pays no heed to these principles.
>
> 120 … the allegations of incompetence in ground 29 do not come close to conduct incapable of rational explanation on forensic grounds.

52 At the hearing of the costs application, the appellant sought to defend ground 29 as a ground of appeal that was put in the alternative to his primary ground, a denial of procedural fairness. In simple terms, the appellant argued that either there had been a denial of procedural fairness (because the appellant and his legal representatives had not been put on notice that the case would be determined on the basis of findings of contraventions of the Corporations Act and the ASIC Act) or his legal representatives had been incompetent (having been put on notice that the case would be determined on the basis of findings of contraventions of the Corporations Act and the ASIC Act, his legal representatives failed to contest such a case). The ground was not expressly formulated as an alternative ground, although it can be accepted that, at the hearing of the appeal, the appellant made clear that the ground was advanced in the alternative.

53 For the reasons explained by the Court in the Appeal Judgment, however, the ground was hopeless even when considered in the alternative to the appellant's primary ground. The circumstances in which an appeal will be allowed on the basis of incompetence of legal representation are narrow and generally arise in the context of criminal, not civil, proceedings. The conduct complained of must amount to "conduct incapable of rational explanation on forensic grounds" and must result in an actual miscarriage of justice. For the reasons explained by the Court at AJ [121]-[131], that threshold could never have been reached in respect of the complaints alleged against the appellant's legal representatives in ground 29. The appellant submitted that the Court rejected ground 29 on the premise on which ground 2 was upheld: that is, the appellant and his legal representatives had not been put on notice that the case would be determined on the basis of findings of contraventions of the Corporations Act and the ASIC Act. We reject that submission. For the most part, the Court rejected ground 29 because the complaints of incompetence did not withstand scrutiny even when the ground was considered in the alternative (see in particular AJ [121], [122], [123], [124(1)(a) and (c)], [125(1)], [126(1)], [127(2)], [128(1)], [129] and [130]).

54 Having regard to the findings of the Court with respect to ground 29 at AJ [117]-[131], we consider that the Interested Persons should be awarded indemnity costs. They ought not to have been traduced by the spurious allegations of incompetent representation (see AJ [170(3)]. Their

costs should include the costs of the applications addressed by these reasons for indemnity costs. The applications to vary the costs order were properly brought and were successful.

Costs of the appellant and ASIC

55 As stated earlier, at the time of giving judgment, the Court ordered each of the appellant and the first respondent to pay their own costs of the appeal (order 8).The Court explained that order 8 reflected the view of the Court that, although Mr Mawhinney succeeded in the appeal, his appeal ought to have been confined to the ground of procedural fairness as specified in appeal grounds 2 and 3(e) and ASIC and the Court ought not to have been vexed otherwise by so many spurious appeal grounds (AJ [170(4)]). However, that view was formed without receiving submissions from the appellant and ASIC addressing the question of costs, and hence the Court gave those parties liberty to apply to vary that cost order (order 9).

56 By his submission filed on 20 September 2022, the appellant sought the following orders in place of order 8:

(a) first, that ASIC pay the appellant's costs of and in connection with the appeal on an indemnity basis; and

(b) second, a "Bullock" order that ASIC pay the appellant the costs incurred by him pursuant to order 7 (that is, the costs payable to the Interested Persons).

57 By its submission filed on 29 September 2022, ASIC did not seek any variation to order 8 and otherwise resisted the variations to order 8 sought by the appellant.

58 It is convenient to consider each of the orders sought by the appellant in turn.

Order for indemnity costs

59 In support of an order for indemnity costs, the appellant submitted that, by ordering ASIC to pay the appellant his costs of the trial on an indemnity basis (order 6(2) of the orders made on 15 September 2022), the Court recognised that it was the conduct of ASIC below which caused the trial to miscarry and that the appellant should not be out of pocket for his costs incurred because of that miscarriage. For the same reason, the appellant should not be out of pocket for his costs of the appeal, as the appeal was necessary to overcome the miscarriage of justice below caused by ASIC.

60 The appellant acknowledged that order 8 was made because the Court found that the appeal was not properly focussed on the real issue of denial of procedural fairness (ground 2) and the

other grounds of appeal were either unnecessary or bound to fail (referring to AJ [114], [119], [131], [133]-[149]). The appellant submitted that those findings should be reconsidered by the Court.

61 In giving the appellant liberty to apply to seek a variation to the costs order, the Court did not give the appellant liberty to apply to have the Court "reconsider" its findings with respect to the merits of the grounds of appeal. The liberty to apply is confined to the exercise of the Court's discretion with respect to the costs of the appeal having regard to the Court's findings with respect to the merits of the grounds of appeal. We refuse the appellant's application to "reconsider" the Court's earlier findings.

62 The real question that arises is whether, in circumstances where:

(a) the appellant was successful on the appeal on the ground of a denial of procedural fairness;

(b) the denial of procedural fairness arose from the manner in which ASIC conducted the trial below; and

(c) the Court has determined that it is in the interests of justice for the proceeding to be remitted for retrial,

ASIC should be required to pay the appellant's costs of the appeal and should do so on an indemnity basis, notwithstanding the Court's view that the appeal was not properly confined to the issue of procedural fairness and raised many spurious grounds of appeal.

63 In respect of that question, the appellant submitted that no aspect of his conduct of the appeal should disentitle him to an award of costs on an indemnity basis. In respect of the grounds of appeal which were determined adversely to him, the appellant submitted that there is no certainty in litigation and the appellant cannot have been expected to put all his eggs in the basket of ground 2. This was especially so after receipt of ASIC's written submissions challenging ground 2 and contending that there had been notice at trial of ASIC's allegations of contraventions of the Corporations Act and the ASIC Act. The appellant further submitted that, had the alternative grounds succeeded, they could have obviated a remitter.

64 In response, ASIC supported the Court's evaluation of the competing considerations as reflected in its reasons at AJ [114] where the Court explained:

> … the ameliorative effect of costs orders the Court can make should not be underestimated. We acknowledge that ASIC ran one case and now will have to run

> another. We recognise that ASIC having done so caused the hearing below to miscarry and caused this appeal to be necessary (albeit that the appeal could and should have been confined to the ground of procedural fairness). We recognise that ASIC positively disavowed the legal position it now accepts applies, and that this may well mean that further evidence is required to be adduced at the further hearing by both parties. We consider that the costs prejudice to Mr Mawhinney must be ameliorated by orders that ASIC pay Mr Mawhinney's costs below on an indemnity basis. This is the price ASIC must pay for the remittal. Given that Mr Mawhinney's appeal was not properly focused on the real issue of denial of procedural fairness, we consider that each of Mr Mawhinney and ASIC should bear their own costs of the appeal, but will hear the parties further in this regard if necessary.

65 ASIC submitted that an order that each party pay their own costs of the appeal is an appropriate exercise of the Court's discretion with respect to costs having regard to the extent of unnecessary and spurious grounds of appeal raised by the appellant.

66 As stated earlier, the Court's discretion to award costs under s 43 of the FCA Act is broad. The discretion must be exercised judicially, consistently with the purpose of the power and taking account of relevant facts and circumstances of the litigation: *Kazar v Kargarian* (2011) 197 FCR 113 at [4] per Greenwood and Rares JJ. The purpose of an order is to compensate the successful party, not to punish the unsuccessful: *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ, 563 per Toohey J and 567 per McHugh J. Usually the discretion to award costs is exercised in favour of a successful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [35] per Gaudron and Gummow JJ, [66]-[67] per McHugh J and [134] per Kirby J; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at [25] per Gleeson CJ, Gummow, Hayne and Crennan JJ. Nevertheless, a successful party may be deprived of a proportion of its costs, or even required to pay costs to the other party, if the successful party succeeded only upon a portion of its claim, or failed on issues that were not reasonably pursued, or where the result of the litigation might be described as mixed: *Ruddock v Vadarlis* at [11] per Black CJ and French J; *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 at [11] per Dowsett, Middleton and Gilmour JJ. The mere fact that a court does not accept all of a successful party's arguments, however, does not make it appropriate to apportion costs on an issue by issue basis: *Australian Trade Commission v Disktravel* [2000] FCA 62 at [3]-[4] per French, Kiefel and Mansfield JJ; *State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174 at [8] per Emmett, Kenny and Middleton JJ; *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* [2015] HCA 53; 327 ALR 192 at [6] per French CJ, Kiefel, Nettle and Gordon JJ.

67 The Court's findings with respect to the appellant's grounds of appeal can be categorised in the following ways:

(a) Grounds 2 and 3(e) were upheld by the Court, resulting in the Court allowing the appeal.

(b) Grounds 1, 3 (other than paragraph (e)), 4 to 10, 21, 25 and 27 to 29 were rejected by the Court. Many of those grounds involved the re-formulation of the case which had been conducted at trial before the primary judge and in disregard of the principle that a party is bound by the party's conduct of the case below. The fact that some of those grounds were put in the alternative did not obviate the need for ASIC to respond to the grounds.

(c) It was both unnecessary and inappropriate to determine grounds 11, 12 to 16, 18 to 20 and 22 to 24 in circumstances where the Court found that the appellant had been denied procedural fairness at trial by reason that ASIC had not sought findings of contravention.

(d) Ground 26 became moot when ASIC abandoned any reliance on s 1324 of the Corporations Act as a source of power for the orders of the primary judge.

68 In making an award of costs on this appeal, the Court must weigh the facts that the appellant had success on the ultimate outcome of the appeal and has been burdened with a retrial of the proceeding by reason of the manner in which ASIC conducted the case below, together with the facts that the Court found that the appellant failed on numerous grounds of appeal, for many others it was unnecessary and inappropriate to determine the grounds, and the Court's overall assessment is that the appellant ought to have conducted the appeal on the ground that was successful.

69 Contrary to the appellant's submissions, we do not consider it just that ASIC be ordered to pay the whole of the appellant's costs of the appeal on an indemnity basis. However, we consider it just that the appellant receive his costs of the appeal other than in respect of ground 29, and that the costs in respect of grounds 2 and 3(e) be awarded on an indemnity basis. For the reasons expressed in the Appeal Judgment, we consider that a large number of the appeal grounds had no prospect of being upheld and should not have been pursued. For that reason, while it is just that the appellant receive his costs of those grounds (for the reason that he succeeded overall on the appeal), he should not be awarded those costs on an indemnity basis. In respect of ground 29, we consider that the appellant should not receive his costs of pursuing that ground for the reasons explained in the context of the costs of the Interested Persons.

70 We will return to the appropriate form of cost order to be made after consideration of the appellant's application for a Bullock order.

The Bullock order

71 The appellant submitted that it would not be fair to burden the appellant with the costs of the Interested Persons. The appellant argued that ground 29 was necessitated by ASIC's opposition to his key grounds of appeal (a denial of procedural fairness). The appellant therefore acted reasonably, and in response to what ASIC did, in pressing ground 29 on the narrow premise explained at the hearing of the appeal (that is, the ground was put on the alternative premise, contrary to the appellant's principal case that he and his lawyers had not been put on notice that findings of contravention were sought from the Court, that his lawyers had been put on notice that such findings were sought). In those circumstances, the appellant argued that an order in the nature of a Bullock order should be made requiring ASIC to reimburse the appellant for the costs of the Interested Persons which he has been ordered to pay.

72 In response, ASIC submitted that the circumstances which warrant a Bullock order do not arise in this case. ASIC argued that two conditions must ordinarily be satisfied before a court makes a Bullock order against a party (typically an order that an unsuccessful defendant reimburse the plaintiff for the costs payable by the plaintiff to a successful defendant): first, that it was reasonable for the plaintiff to have sued the successful defendant; second, that the conduct of the unsuccessful defendant had induced the plaintiff to sue the successful defendant or otherwise made it fair to impose some liability on it for the costs of the successful defendant (referring to *Gould v Vaggelas* (1985) 157 CLR 215 at 229-230 per Gibbs CJ (***Gould***) and *CGU Insurance Ltd v AAI Ltd* [2016] NSWCA 335 at [37] per Emmett AJA (with whom McColl and Gleeson JJA agreed). ASIC submitted that neither condition is satisfied in respect of the contentions advanced against the Interested Persons by ground 29, in respect of which the appellant has been ordered to pay the costs of the Interested Persons. The Court found that the ground was hopeless. Further, the ground was included in the appellant's notice of appeal from the outset and no conduct of ASIC induced the appellant to advance the ground.

73 We accept the submissions of ASIC. Neither condition for the making of a Bullock order is satisfied. As to the first condition, for the reasons expressed earlier, ground 29 failed, and was bound to fail, because it paid no heed to the applicable legal principles as summarised by the Court at AJ [118]. Further, for the reasons explained by the Court at AJ [121]-[130], none of the particulars of alleged incompetence withstand scrutiny. We do not consider that advancing ground 29 was a reasonable step to have been taken by the appellant in the conduct of the appeal. As to the second condition, ASIC's defence of the appellant's principal ground of appeal cannot be characterised as an inducement to the appellant to advance allegations of

incompetence against his legal representatives at trial, or otherwise make it fair to impose liability on ASIC for the costs of the Interested Persons. In our view, nothing said or done by ASIC led the appellant to advance ground 29, and there is no reason why ASIC should be required to pay for the appellant's "error or overcaution" in advancing ground 29 (as per *Gould* at 229 per Gibbs CJ). The fact that the appellant advanced ground 29 in the alternative to his principal ground of appeal (which was made clear at the hearing of the appeal) does not alter the analysis. The appellant is solely responsible for advancing the ground and causing the Interested Persons to intervene to defend themselves from the contentions advanced by the ground, which were found by the Court to have been flawed.

Appropriate form of costs order

74 As noted at the commencement of these reasons, this appeal (which we have referred to as the First Appeal) was heard concurrently with the Second Appeal. There was considerable overlap in the grounds of appeal, the appellants in each appeal were represented by the same counsel and solicitors and, in respect of overlapping grounds of appeal, the written and oral submissions of the appellants and the respondents were generally made in both appeals. In the Second Appeal, the appeal was dismissed and the appellants (Mayfair Wealth Partners Pty Ltd, M101 Holdings Pty Ltd and Online Investments Pty Ltd) were ordered to pay ASIC's costs as agreed or taxed.

75 Taking into account those matters, we are conscious that any dispute in relation to the costs orders made in the two appeals risks generating substantial costs in and of itself. A just result taking into account the circumstances giving rise to the First Appeal, the manner in which it was conducted and its outcome is that the appellant should receive some of his costs on an indemnity basis, some on a party/party basis and he should bear some of the costs himself. However, we are concerned to avoid making costs orders that will give rise to arid and expensive debate at a granular level by requiring that the assessment of costs proceed on a ground by ground basis. For this reason, and consistently with the overarching purpose of proceedings in this Court, we consider that a just order, that appropriately reflects the tension between the fact that the appeal was necessitated by ASIC's conduct of the proceedings below but was also prolonged by reason of the appellant pursuing a slew of grounds that failed or were unnecessary, is to order that the appellant receive 50% (only) of his costs of the First Appeal (excluding any costs in respect of ground 29) on an indemnity basis.

76 For the avoidance of doubt, as we have determined that it is appropriate to award costs in favour of Mr Mawhinney in the First Appeal but in favour of ASIC in the Second Appeal, at the time of assessing the costs in the First Appeal there will need to be a fair and proper allocation of the costs incurred by Mr Mawhinney in the First Appeal and the costs incurred by Mayfair Wealth Partners Pty Ltd, M101 Holdings Pty Ltd and Online Investments Pty Ltd in the Second Appeal.

77 The application by the appellant to vary order 8 should otherwise be dismissed. We consider that the appellant and ASIC had a measure of success on this costs application and it is appropriate that each of the appellant and ASIC bear their own costs arising out of the costs application.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O'Bryan and Cheeseman.

Associate: 

Dated: 22 December 2022