FEDERAL COURT OF AUSTRALIA

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

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:	**JAGOT, O'BRYAN AND CHEESEMAN JJ**
Date of judgment:	15 September 2022
Catchwords:	**APPEAL AND NEW TRIAL** — appeal against findings of contraventions of Corporations Act and ASIC Act in proceeding for permanent injunctions — where ASIC conducted case on basis that no findings of contraventions necessary for injunctions under s 1324 of Corporations Act — where appellant denied procedural fairness — exceptional case in which proceeding must be remitted for hearing in different basis from original case — where other appeal grounds alleging incompetence of counsel and lawyers spurious and unnecessary — appeal allowed
Legislation:	*Australian Securities and Investments Act 2001* (Cth) ss 8, 11, 12A, 12DA(1), 12DB(1)(a), 12DB(1)(e), 12GB(1)(d), 12GBCL *Corporations Act 1989* (Cth) s 82 *Corporations Act 2001* (Cth) ss 79, 79(c), 180–184, 206E, 461(1)(k), 474A, 530A, 530B, 597(12), 597(12A), 911A(1), 1041H, 1101B(1), 1101B(4), 1324(1) *Evidence Act 1995* (Cth) ss 76, 79, 80, 135, 140 *Federal Court of Australia Act 1976* (Cth) s 23 *Securities Industry (Amendment) Act 1971* (NSW) *Securities Industry (Amendment) Act 1970* (Vic) *Securities Industry Act 1980* (Cth) s 14 *Securities Industry Act 1970* (NSW) s 5F *Securities Industry Act 1975* (NSW) s 12 *Securities Industry Act 1971* (Qld) s 10 *Securities Industry Act 1975* (Qld) s 12 *Securities Industry Act 1970* (Vic) s 5B *Securities Industry Act 1975* (Vic) s 12 *Securities Industry Act 1970* (WA) s 32 *Securities Industry Act 1975* (WA) s 12

Cases cited:

Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia [1932] HCA 9; (1932) 47 CLR 1

Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd [1997] FCA 871; (1997) 78 FCR 197

Australian Securities and Investments Commission v McDougall [2006] FCA 427; (2006) 229 ALR 158

Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liq) [2017] FCA 497; (2017) 348 ALR 525

Australian Securities and Investments Commission v Carey (No 3) [2006] FCA 433; (2006) 232 ALR 577

Australian Securities and Investments Commission v Cassimatis (No 9) [2018] FCA 385

Australian Securities and Investments Commission v Fuelbanc Australia Limited [2007] FCA 960; (2007) 162 FCR 174

Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd [2019] FCA 1514; (2019) 138 ACSR 395

Australian Securities and Investments Commission v Linchpin Capital Group Ltd [2018] FCA 1104

Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd [2016] FCA 292; (2016) 111 ACSR 638

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2020] FCA 494

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

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387; (2014) 103 ACSR 453

Australian Securities and Investments Commission v One Tech Media Ltd (No 6) [2020] FCA 842

Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2) [2020] FCA 1463; (2020) 148 ACSR 154

Bajramovic v Calubaquib [2015] NSWCA 139; (2015) 1 MVR 15

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

Construction Forestry Mining & Energy Union of Australia v Inspector Alfred [2004] FCAFC 36; (2004) 135 FCR 459

Devon v Capital Finance Australia Ltd [2014] VSCA 73

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503
Gore v Australian Securities and Investments Commission [2017] FCAFC 13; (2017) 249 FCR 167
ICI Australia Operations Pty Ltd v Trade Practices Commission [1992] FCA 707; (1992) 38 FCR 248
In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs [2013] NSWSC 106; (2013) 93 ACSR 421
Klees v M101 Holdings Pty Ltd [2021] NSWSC 182; (2021) 150 ACSR 513
Meneses v Directed Electronics OE Pty Ltd [2019] FCAFC 190; (2019) 273 FCR 638
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom [2006] HCA 50; (2006) 228 CLR 566
Nobarani v Mariconte [2018] HCA 36; (2018) 265 CLR 236
Nudd v The Queen [2006] HCA 9; (2006) 225 ALR 161
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
R v Birks (1990) 19 NSWLR 677
Re IPO Wealth Holdings No 2 Pty Ltd (No 2) [2020] VSC 733
Re Vault Market Pty Ltd [2014] NSWSC 1641
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129
Smits v Roach [2006] HCA 36; (2006) 227 CLR 423
Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362
University of Wollongong v Metwally [No 2] [1985] HCA 28; (1985) 60 ALR 68
WA Country Health Service v Wright [No 2] [2010] WASCA 120
Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491
Whisprun Pty Ltd v Dixon [2003] HCA 48; (2003) 200 ALR 447
Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661

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

Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	170
Date of hearing:	22–26 August 2022
Counsel for the Appellant:	Mr A Myers AC QC, Mr M Pearce SC, Mr A Weinstock, Mr A Aleksov and Mr C P Thompson
Solicitor for the Appellant:	Roberts Gray Lawyers
Counsel for the First Respondent:	Mr T Sullivan QC, Mr D Barnett, Ms S Robb 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):	Mr R Kruse
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:	**JAGOT, O'BRYAN AND CHEESEMAN JJ**
DATE OF ORDER:	**15 SEPTEMBER 2022**

THE COURT ORDERS THAT:

1. The appellant be granted leave to rely on the amended notice of appeal.
2. The amended notice of appeal be filed within 7 days of the making of these orders.
3. The appellant be granted leave to rely on the affidavit of James Mawhinney filed 8 April 2022 in support of the appeal.
4. The appeal be allowed.
5. Orders 1, 2 and 4 made by the primary judge on 19 April 2021 be set aside.
6. In lieu thereof it be ordered that:
   (1) The matter be remitted for hearing and determination by a judge other than the primary judge on the basis of:
      a. such further evidence and submissions the parties wish to adduce and put respectively; and
      b. such further case management orders as the judge to whom the matter is remitted thinks fit.

(2) The plaintiff pay the second defendant'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.

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.

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

REASONS FOR JUDGMENT

THE COURT:

1 The appellant, Mr Mawhinney, appeals against an order made by the primary judge on 19 April 2021 restraining him, for a period of 20 years, from:

(1) 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**);

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

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

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

2 In these reasons, we refer to this order as the **restraining order**.

3 On the first day of the appeal, Mr Mawhinney provided the Court with an amended notice of appeal which made a small number of amendments to the notice of appeal that had been filed. The amendments had been foreshadowed in Mr Mawhinney's written submissions and the first respondent, the Australian Securities and Investments Commission (**ASIC**), did not oppose the amendments. The appeal proceeded on the basis of the amended notice.

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 in circumstances where:

(1) ASIC had not alleged or sought any findings of either:

(a) contraventions of ss 911A(1) and 1041H of the Corporations Act and/or ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act 2001* (Cth) (the **ASIC Act**); or

(b) Mr Mawhinney being involved in any such contraventions within the meaning of s 79(c) of the Corporations Act and/or s 12GB(1)(d) of the ASIC Act,

but,

(2) the primary judge made and relied on such findings in making the restraining order.

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.

1. The procedural fairness issue

1.1 Background

8 The denial of procedural fairness results from the findings of contravention and involvement the primary judge made in his reasons for judgment, *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3)* [2021] FCA 354; (2021) 153 ACSR 230. However, the circumstances leading to that denial go back to the commencement of this proceeding.

9 A little (but not too much) of the overall background is helpful.

10 On 22 May 2020 **Vasco** Trustees Limited as trustee of the IPO Wealth Fund appointed receivers to companies controlled by Mr Mawhinney, principally **IPO Wealth** Holdings Pty Ltd, and related entities.

11 On 3 April 2020 ASIC commenced proceeding VID 228 of 2020 against three companies associated with Mr Mawhinney, Mayfair Wealth Partners Pty Ltd (subsequently renamed Australian Income Solutions Pty Ltd) trading as **Mayfair Platinum**, **M101 Holdings** Pty Ltd, **M101 Nominees** Pty Ltd and Online Investments Pty Ltd (trading as Mayfair 101), alleging misleading and deceptive conduct in contravention of various provisions of the Corporations Act and the ASIC Act. ASIC sought declarations, injunctions, and pecuniary penalties. This proceeding is referred to as the **Mayfair proceeding**. On 16 April 2020 the primary judge made interlocutory orders in the Mayfair proceeding: *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494.

12 On 10 August 2020 ASIC filed the originating application in this matter seeking the winding up of M101 Nominees and an order that Mr Mawhinney, pursuant to ss 1101B(1) and 1324(1) of the Corporations Act and/or s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), by himself, his servants, agents, employees and any company of which he is an officer or member, be restrained from, in effect, advertising, promoting or marketing any financial product, and/or soliciting or receiving funds in connection with any financial product in perpetuity. ASIC also sought the same relief on an interlocutory basis against Mr Mawhinney. The originating application was not accompanied by a statement of claim or a concise statement. This proceeding is referred to as the **Mawhinney proceeding**.

13 On 13 August 2020 the primary judge made *ex parte* orders in the Mawhinney proceeding appointing provisional liquidators to M101 Nominees and granting the interlocutory injunctions against Mr Mawhinney. In September 2020 Mr Mawhinney (while unrepresented) sought to set those interlocutory orders aside but failed. Mr Mawhinney and M101 Nominees retained the law firm, Ashurst Australia (**Ashurst**) to act for them in the Mawhinney proceeding on 22 September 2020. It is apparent that Ashurst also represented the third defendant, **Sunseeker** Holdings Pty Ltd (which was not subject to the appointment of the provisional liquidators), although it filed no formal notice of acting.

14 It is sufficient then to record that, along the way:

(1) ASIC filed evidence in the Mawhinney proceeding and the Mayfair proceeding, but never filed a statement of claim or concise statement in the Mawhinney proceeding;

(2) by orders made on 26 October 2020, the primary judge fixed a timetable in the Mawhinney proceeding and it was given a hearing date of 1–2 February 2021;

(3) Ashurst was "without funds or instructions" from Mr Mawhinney and Sunseeker to file evidence in the Mawhinney proceeding as required by 12 November 2020, but obtained a variation of those orders to enable such evidence and submissions to be filed by 11 December 2020 and 25 January 2021 respectively;

(4) the Mayfair proceeding was listed for a two to three day hearing on 15 February 2021;

(5) Mr Mawhinney and Sunseeker did not file evidence by 11 December 2020 or submissions by 25 January 2021 in the Mawhinney proceeding as Mr Mawhinney was focusing instead on a company restructuring proposal;

(6) on 25 January 2021 Ashurst wrote to ASIC seeking an adjournment of the hearing of the Mawhinney proceeding on the basis of consent to the winding up of M101

Nominees, but further time being given to enable Mr Mawhinney to obtain independent legal representation to defend the claims for permanent injunctions against him as Ashurst perceived it had a conflict of interest in acting for Mr Mawhinney in that regard;

(7) upon the recommendation of Ashurst on 26 January 2021, Mr Mawhinney retained counsel below in the Mawhinney proceeding on 27 January 2021;

(8) on 27 January 2021 ASIC proposed in response to Ashurst that the hearing of the Mawhinney proceeding be deferred to the period of 15–17 February 2021, when the Mayfair proceeding had been listed for hearing on the basis that the defendants in the Mayfair proceeding were unrepresented and would not require the three days allocated for that hearing, with Mr Mawhinney to file evidence in the Mawhinney proceeding by 8 February 2021;

(9) on 27 January 2021 Ashurst ceased to act for Mr Mawhinney and Mr Mawhinney retained Scanlan Carroll to act for him in the Mawhinney proceeding;

(10) on 28 January 2021 Scanlan Carroll agreed to ASIC's proposal to use 15, 16 or 17 February 2021 for the hearing of the Mawhinney proceeding;

(11) also on 28 January 2021 ASIC responded that it proposed that the Mayfair proceeding should be heard first and evidence in the Mayfair proceeding be evidence in the Mawhinney proceeding;

(12) on 29 January 2021 the primary judge made consent orders winding up M101 Nominees; and

(13) on 2 February 2021 the primary judge made orders vacating the then hearing dates of 3–4 February 2021 in the Mawhinney proceeding and listing the Mawhinney proceeding for hearing on 15 February 2021 with associated orders, amongst other things, that:

(a) Mr Mawhinney file any affidavits by 8 February 2021;

(b) ASIC file any affidavits by 11 February 2021; and

(c) evidence filed in the Mayfair proceeding is evidence in the Mawhinney proceeding in relation to ASIC's application for injunctions against Mr Mawhinney.

1.2 The pre-hearing position before the primary judge

15 ASIC filed submissions in chief in the Mawhinney proceeding on 18 January 2021.

16 In these submissions ASIC said that the grant of an injunction pursuant to s 1324 of the Corporations Act does not require an applicant to establish a contravention of the Act, citing *Australian Securities and Investments Commission v* ***Macro Realty*** *Developments Pty Ltd* [2016] FCA 292; (2016) 111 ACSR 638 at [23]. ASIC also said that s 1101B of the Corporations Act empowers the Court to make orders (including injunctions) in respect of contraventions of Ch 7 of the Corporations Act if, in the opinion of the Court, it is desirable to do so, citing *Macro Realty* at [55].

17 Section 1324 of the Corporations Act provides that:

> (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act; or
>
> (b) attempting to contravene this Act; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
>
> (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
>
> (f) conspiring with others to contravene this Act;
>
> the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
>
> …
>
> (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
>
> (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
>
> (b) whether or not the person has previously engaged in conduct of that kind; and
>
> (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

18 *Macro Realty* at [23] reflects the uncontroversial proposition that s 1324 empowers a court to grant an injunction where a person has not in fact contravened the Corporations Act, but is proposing to engage in conduct that would contravene the Corporations Act.

19 Section 1101B of the Corporations Act provides that:

> (1) The Court may make such order, or orders, as it thinks fit if:
>
> (a) on the application of ASIC, it appears to the Court that a person:
>
> (i) has contravened a provision of [Chapter 7], or any other law relating to dealing in financial products or providing financial services;
>
> …
>
> However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.
>
> …
>
> *Examples of orders the Court may make*
>
> (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
>
> (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
>
> (i) a provision or provisions of [Chapter 7]; or
>
> (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or
>
> …
>
> (e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and
>
> (f) an order restraining a person from providing any financial services that are specified in the order; …

20 ASIC submitted that it sought the permanent injunctions against Mr Mawhinney as:

> 48. The evidence establishes that the Mayfair 101 Group owes over $211 million to investors in various financial products launched since 2016.
>
> 49. The Report of the provisional liquidators supports a finding that Mawhinney has engaged in a number of contraventions of the Act, as does the IPO Judgment [*Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733].
>
> 50. The evidence filed by ASIC and outlined above establishes that Mawhinney (the director of the entities in the Mayfair 101 Group) intended to restructure the group, create a new company and transfer investors from current companies to the new company and, if not prevented from doing so by the Court, would have continued to seek to raise funds from investors on the basis of misleading or deceptive representations, as part of a scheme that was unlikely to result in any returns for investors.
>
> 51. The evidence, particularly the IPO Judgment, also establishes that Mawhinney has previously transferred assets acquired with investor funds overseas, to the

detriment of those investors.

52. The Injunction will have utility and serve a purpose manifested by the Act by preventing Mawhinney from continuing to engage in the conduct that has put Australian investors' superannuation funds and investments at risk.

53. For these reasons, ASIC submits that it is appropriate that Mawhinney be permanently restrained from promoting financial products and from raising funds through financial products, including through investments in the Core Notes, M+ Notes and Australian Property Bonds, and from transferring any assets acquired through funds raised by those financial products overseas to the detriment of investors.

21 Mr Mawhinney's submissions prepared by counsel and filed on 8 February 2021 included that:

(1) the documents concerning the M Core Fixed Income Notes that M101 Nominees issued from October 2019 disclosed all key features of those products;

(2) all of the powers relied upon by ASIC required the Court to satisfy itself that the orders sought were appropriate in the circumstances;

(3) ASIC's expert, Mr Tracy, had misunderstood the security, in part because he had been incorrectly instructed that investors were told that the "assets are otherwise unencumbered, and are made up of Australian real estate assets held by Mayfair 101 Group entities, and cash from investors" which omitted a comma after "real estate" as, in fact, investors were told that the "assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors";

(4) the Mayfair Group investment products were not a Ponzi scheme as they involved actual assets with "real value, and real potential" subject to actual security as disclosed – "[a]t worst, the business acquired assets faster than it grew its income, a fact which, when combined with the economic slow down brought on by Covid-19, the chilling effect on investor confidence of being under investigation by ASIC and subsequent capital raising injunctions, led to liquidity problems"; and

(5) the application was premature as the extent of any loss that would flow to investors would not be known until the liquidation process reaches its conclusion and "[r]elevant matters are still undetermined and working their way through courts and other processes. Mr Mawhinney is entitled to make his case in those proceedings, or see the result of those processes, before he is subject to the extremely severe measures sought to be imposed by ASIC".

22 ASIC filed submissions in reply on 11 February 2021 which included that:

(1) the missing comma in the instructions to Mr Tracy had been confirmed by him to be immaterial to his conclusions;

(2) the problem with the M Core Fixed Income Notes was that the value of the security over the units in the unit trust which owned real estate was subject to any security over the real estate which could be granted at any time and could not accurately be described as a "pool of assets in respect of which first-ranking, registered security interests have been granted" and in which the "assets are otherwise unencumbered" without being grossly misleading;

(3) Mr Tracy's report also referred to:

(a) a loan agreement between M101 Nominees and a related entity called Eleuthera Group Pty Ltd which was unsecured; and

(b) the related party loan to Jarrah Lodge Holdings Pty Ltd as trustee for the Jarrah Lodge Unit Trust No 1,

both of which remained unexplained by Mr Mawhinney;

(4) it seemed that Mr Mawhinney was using the same assets supposedly already providing (albeit in an indirect and thus imperfect form) security for the M Core Fixed Income Notes as security for new investors in another investment scheme he was promoting involving a product called Australian Property Bonds, and there had been no response by Mr Mawhinney to ASIC's concern;

(5) Mr Mawhinney's companies may have created their own market at Mission Beach with an associated risk that the value of each property recorded by M101 Nominees was above market value, exposing investors to serious risk of loss, and falsifying the "dollar-for-dollar" representation that M101 Nominees was continuing to make to investors, and there had been no response by Mr Mawhinney to ASIC's concerns;

(6) almost $6 million of investors' money appeared to have been used to pay deposits on land purchase contracts that had since gone into default, and there had been no response by Mr Mawhinney to ASIC's concern;

(7) Mr Mawhinney had continued to seek to raise funds from investors after the "decision to implement the Liquidity Prudency Plan" was issued, and there had been no response by Mr Mawhinney to ASIC's concern;

(8) ASIC's concern is, as set out in its primary submissions, that Mr Mawhinney would seek to use different corporate vehicles to raise funds from investors using the same or a similarly flawed scheme;

(9) ASIC sought the injunctive relief pursuant to ss 1101B and 1324 of the Corporations Act or s 23 of the FCA Act and noted that in *Australian Securities and Investments Commission v* ***Cassimatis*** *(No 9)* [2018] FCA 385 at [117]–[124], Dowsett J expressed doubt as to whether s 1324(1) empowered the Court only to restrain unlawful conduct. However, in that case no relief was sought under s 1101B or s 23, which are not so constrained;

(10) there are a number of cases in which the Court has granted injunctive relief restraining otherwise lawful dealings in financial products under ss 1101B and 1324 (citing *In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v* ***Hobbs*** [2013] NSWSC 106; (2013) 93 ACSR 421 at [88]–[90]; *Australian Securities and Investments Commission v* ***Avestra*** *Asset Management Limited (In Liq)* [2017] FCA 497; (2017) 348 ALR 525 at [234]–[235]; *Australian Securities and Investments Commission v* ***Monarch*** *FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453 at [96]; *Australian Securities and Investments Commission v* ***McDougall*** [2006] FCA 427; (2006) 229 ALR 158 at [64]);

(11) the investment schemes were like a Ponzi scheme as they were highly speculative investments made with investor funds (the profits of which, if realised at all, would largely go to Mr Mawhinney's companies) that produced almost no actual returns with which to pay investors' interest and redemptions; and

(12) the orders sought by ASIC were not premature. The events established to date, including the facts to be found in this proceeding and on the basis of the evidence adduced in the Mayfair proceeding warranted the injunctions sought.

23 Contrary to ASIC's submissions, in *Cassimatis* Dowsett J said:

(1) his Honour could see no basis for construing s 1324 as "authorizing the grant of an injunction which restrains conduct beyond that identified in s 1324(1), particularly when the relevant conduct is lawful": [118]; and

(2) "s 1324(1) authorizes the injunctive restraint of unlawful conduct, particularly that described in subparas 1324(1)(a)–(f). If such an order is made, then the Court may also order that the relevant person do certain things. Section 1324(2) authorizes an

> injunction compelling the performance of acts required under the Act. In my view, s 1324 as a whole empowers the Court to restrain unlawful conduct, to make supplementary orders in support of any such restraint and to compel the discharge of statutory obligations. It does not provide a general power to restrain lawful action, or to compel conduct where there is no lawful obligation to perform such conduct": [124].

24 The other cases to which ASIC referred also do not support ASIC's apparent proposition that an injunction under s 1324 or an order under s 1101B of the Corporations Act might be granted without proof of an actual or proposed contravention of the Act. In *Hobbs* at [90], Ward JA's point was that s 1101B was not a code exclusively regulating the power of the courts to grant injunctive relief having similar effect to a financial services disqualification order. In *Avestra*, the defendants did not contest the injunctions sought under s 1324 and had been found to be involved in contraventions of the Corporations Act: [234]–[235]. In *Monarch* at [97], Gordon J said:

> [w]here a person has contravened Ch 7 of the Corporations Act, the Court has power to restrain a person from carrying on a business: subs 1101B(1)(a) and (4)(a). However, under s 1101B, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person. Under s 1324 of the Corporations Act, the Court has power to restrain the contravener and a person involved in the contravention: *Re Idylic Solutions* at [72]–[91].

25 *McDougall* at [64]–[72] concerned the words in s 1324 "on such terms as the Court thinks appropriate" and the associated capacity to grant an injunction restraining both contravening conduct and non-contravening conduct having a sufficient nexus with the contravening conduct.

26 The seeds of a problem had been sown – ASIC appeared to be maintaining that it could obtain an injunction under s 1324 and/or an order under s 1101B of the Corporations Act without establishing an actual or prospective contravention of the Act at all.

27 To the contrary, however, s 1324(1) permitted the grant of an injunction restraining *the* person who had engaged in or was proposing to engage in conduct that constituted, constitutes or would constitute a contravention of the Corporations Act or the proscribed conduct described in paragraphs (b) to (f) which depend upon a contravention or a prospective contravention. Section 1101B permitted the making of an order restraining *a* person if it appeared to the Court that a person has contravened a provision of Ch 7 of the Corporations Act or any other law relating to dealing in financial products or providing financial services, but only if satisfied that the order would not unfairly prejudice any person.

1.3 The hearing before the primary judge

28 At the hearing on 16 February 2021, the primary judge queried the breadth of the injunction sought against Mr Mawhinney, but said he accepted that he could restrain more than unlawful conduct. It is apparent from the context that the primary judge considered that if the power to grant an injunction existed, the terms of the injunction could extend beyond a restraint on the conduct found to be in contravention of the Corporations Act (a proposition not material to the appeal other than by way of background). The primary judge also referred to "proven conduct… as established before me, which I'm yet to determine". In response ASIC's counsel said in opening:

> … it's not necessary, in my submission, for your Honour to find – to make a finding of any contravening conduct. It's sufficient that the – there's a prima facie case or apparent to your Honour that there is contravening or would be contravening conduct, and the decision of *ASIC v Linchpin Capital Group* [2018] FCA 1104 addresses that topic…

29 *Australian Securities and Investments Commission v* ***Linchpin*** *Capital Group Ltd* [2018] FCA 1104 concerns the appointment of a receiver under s 1323 of the Corporations Act, a power which is available where, relevantly, an investigation is being carried out by ASIC in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of the Corporations Act, and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person to whom the person the subject of the investigation by ASIC is liable, or may be or become liable, to pay money. In this context, established authority referred to by Derrington J in *Linchpin* at [61] is that "there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person's assets have been or are about to be dissipated", citing *Australian Securities and Investments Commission v Carey (No 3)* [2006] FCA 433; (2006) 232 ALR 577 at [26]. Before the primary judge, ASIC's counsel referred to *Linchpin* at [80] where Derrington J said:

> …ASIC has established a *prima facie* case that Endeavour has breached its obligations as a financial licencee and has contravened the Act in numerous respects. Similarly, it has shown more than a *prima facie* case that Linchpin has contravened the Act in significant respects and engaged in, what might transpire to be, significant breaches of trust and fiduciary duties. The breaches gives rise to a risk that the fund assets remaining in the hands of those companies, being mainly the rights to recover the loans which have been made, may be lost. It would follow there are solid grounds for the imposition of injunctions restraining the defendants from further engaging in the operation of the schemes or engaging in the provision of financial services save, in the case of Endeavour, to the extent necessary to allow it to carry on its other existing business interests.

30 The point Derrington J was making was that in respect of ASIC's application to appoint a receiver under s 1323 of the Corporations Act, ASIC did not need to establish a prima facie case of contraventions of the Corporations Act but had done so and more, which caused his Honour to be satisfied that he should appoint a receiver.

31 Accordingly, *Linchpin* said nothing about ss 1324 or 1101B of the Corporations Act in support of ASIC's position. Whatever the reason, ASIC put to the primary judge that his Honour's powers under ss 1324 and 1101B of the Corporations Act did not depend on any finding of contravention of the Act and were enlivened by a prima facie case only of contravention.

32 In this appeal ASIC did not seek to support this proposition. It accepted that ss 1324 and 1101B operate as described in [27] above. In particular, it accepted that the words "it appears to the Court" in s 1101B(1) did not mean that the Court could grant a permanent restraint on the basis of a mere prima facie case of contravention of the Corporations Act by a person. Rather, ASIC (implicitly) accepted that it would appear to the Court that a person had contravened the Corporations Act if the Court was satisfied, on the civil standard of proof, that a person had contravened that Act.

33 While ASIC's counsel below referred to Mr Tracy's opinions about apparent contraventions of the Corporations Act and the provisional liquidators' report having "uncovered" contraventions of the Corporations Act by Mr Mawhinney and his companies, ASIC's counsel below also said in opening:

> And it is ASIC's submission – which I will come to in closing – that it's not necessary for your Honour to make findings of actual contravention by Mr Mawhinney – or in fact anyone – but apparent contravention and – are sufficient for your Honour to make the injunction relief that's sought, and ASIC does rely upon - -
>
> HIS HONOUR: And that was the injunction in your submissions directed to protecting the public from an apprehended future risk.
>
> ASIC's Counsel: Absolutely, and that's why section 1101(b) is framed in that way, that it just requires the appearance of a contravention by any person and any other person can then be restrained in order to promote – to further the purposes of the Act, and that's what's necessary to protect the public from this ongoing conduct.
>
> …
>
> And so, ASIC relies upon – and as I said, this is admissible, your Honour can make findings based upon the contents of it that Mr Mawhinney – that he is of the opinion that Mr Mawhinney may have been in breach of section 180 in relation to the offering of Core Note holders, and ..... unsophisticated investors, and also for a number of reasons in relation to the ..... security that was obtained, including failing to ensure that the appropriate security was taken out to protect the company's interest in the line to Eleuthera, and in paying redemptions to ..... holders from other investments – and I

> will come to some specific evidence about that in a moment – in paragraph 120, the provisional liquidators are of the opinion that Mr Mawhinney may have breached section 181, largely for similar reasons or at least for entering into a loan with Eleuthera with no security or ability to enforce in the event of non-payment to the detriment of the company, and continuing to advance further funds to Eleuthera when it would have been apparent to any reasonable person that the ability to recover advances would be limited.
>
> And based on those same matters, at paragraph 122, the provisional liquidator considers there to be – may have been a breach of section 182. In paragraph 126 on page 3050, he considered that there may have been a breach of section 184. At paragraph 141, which is on page 3051, the provisional liquidator says it's his view that the director has been in breach of section 474A… At paragraph 142 to 145, Mr – the provision[al] liquidator expresses the view that Mr Mawhinney has contravened section 588G of the Corporations Act, that is insolvent trading…
>
> … And then, at paragraph 158, the provisional liquidator opines that the – the view that the director is in breach of section 104(1)(h)… it is the case that he was the guiding mind and will of ..... companies and the person it is the case that he was the guiding mind and will of ..... companies and the person responsible for all of the decisions that resulted in the conduct engaged in by the company…

34 ASIC's counsel continued in opening before the primary judge as follows:

> … I will take your Honour to examples of a wide variety of what is inappropriate and likely unlawful conduct, without requiring your Honour to make findings of contraventions specifically in respect of each of them. But your Honour can take all of that evidence to form the view that it is necessary to protect the public from future unlawful – unspecified unlawful conduct – largely, it's anticipated in the nature of schemes such as these – but necessarily unlawful conduct that the injunctions need to be this broad to protect the public, and also, that this evidence, although not in support of any specifically pleaded contravention itself, is conduct which your Honour should take into account as sufficiently inappropriate, if not unlawful, to support the breadth of the orders that are sought.

35 ASIC's counsel also said in opening before the primary judge:

> It's simply the nature and fact of the circumstances that are explained, described by his Honour [in *Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733] and described by the provisional liquidators in M101 Nominees that means that the protection of the public requires the injunction that is sought, and that's the test, and that's the language of the statute.

36 *Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733 concerned a winding up order under s 461(1)(k) of the Corporations Act (the just and equitable basis for winding up) and the appointment of receivers. The power of the Court did not depend on contraventions of the Corporations Act.

37 The provisional liquidators' report dated 24 September 2020 does say that the investigations had "uncovered a number of contraventions of the Corporations Act 2001 by both the Company

and the Director primarily in relation to Section 180 and 1041H of the Act". The details of the report included that:

(1) the provisional liquidator was required to report on "suspected" contraventions of the Corporations Act;

(2) the "table below sets out possible contraventions of the Act ...", followed by a table of possible contraventions, eg, of director's duties;

(3) "I have also considered other potential contraventions of the Act by the Director and/or the Company…";

(4) "[b]ased upon the information available to me at the date of this report, it is my opinion that the Director may have been in breach of Section 180 of the Act…";

(5) "[b]ased upon the information available to me at the date of this report, it is my opinion that the Director may have been in breach of Section 181 of the Act…";

(6) "[b]ased upon the information available to me at the date of this report, it is my opinion that the Director may have been in breach of Section 182 of the Act…";

(7) "[b]ased upon the information available to me at the date of this report, I am not aware of the Director being in breach of Section 183 of the Act…";

(8) "[b]ased upon the information available to me at the date of this report, it is my opinion that the Director may have been in breach of Section 184 of the Act…";

(9) "[a]s I am not in possession of all records of the Company, I am unable to determine whether the Director has failed to maintain adequate financial records";

(10) "[i]t is my view that the Director has been in breach of Section 474A of the Act…";

(11) "[i]t is my opinion the Company has been trading insolvent since incorporation on the basis that it did not have a sustainable business model… However, I note that pursuant to various Federal Government relief packages to support businesses during the current Covid 19 health crises, the Corporations Act has been amended to provide directors a moratorium for liability for trading whilst insolvent from 25 March 2020 to 31 December 2020";

(12) "there is sufficient evidence available to show the Director failed to deliver the Company's property and records";

(13) "it is my view that the Director was in breach of Section 1041H of the Act"; and

(14) "it is my finding that the Company did not act honestly and fairly".

38 The conclusion of the provisional liquidators' report said this:

> 162. This report contains my preliminary findings. Given I have not had access to the entirety of the records of the Company or those of related entities, it is likely with further time and greater access to information, additional matters may come to my attention that would be relevant for the Court's consideration.
>
> 163. Taking into account the above and as detailed in this report, I conclude at this point in time:
>
> a. The realisable value of the Company's assets is negligible and insufficient to pay M Core noteholders back their investment. This is largely due to the financial viability of Eleuthera and its potential inability to repay the outstanding loan of c.$63.5 million to the Company;
>
> b. The security provided to PAG on behalf of the M Core noteholders holds little value as it specifically excludes real estate assets which is the only tangible asset held by the Mayfair 101 Group entities/trust. In any event, I note that the entities that provided security to the Company are subject to current insolvency proceedings in which their assets are being sold for the benefit of their first ranking mortgagees (Naplend and Family Island Trust);
>
> c. The Company has been trading insolvent since inception by virtue of its unsustainable business model (taking funds from investors on a short-term basis and on-lending to a related party entity on a 10 year term) and it is my opinion that it is unlikely to ever return to a position of solvency;
>
> d. In a winding up scenario, it is my opinion that M Core noteholders would not receive a dividend from the Company; and
>
> e. The director and the Company have continuously been in breach of numbers sections of the Act since the Company was incorporated.

39 It is apparent that the provisional liquidators' report was preliminary, based on limited information, was intended to identify "suspected" contraventions of the Corporations Act, identified numerous possible or potential contraventions of the Corporations Act, and identified the opinion of the provisional liquidator that there had been other contraventions of the Corporations Act. Given ASIC's position before the primary judge that it did not have to prove a contravention of the Corporations Act at all, but had to prove only an apparent or prima facie contravention of that Act, ASIC did not distinguish between the provisional liquidator's opinion about any suspected, possible, potential or actual contravention.

40 In referring to an associated entity of IPO Wealth, **IPO Capital** Pty Ltd in opening before the primary judge ASIC's counsel said:

> IPO Capital didn't hold an AFSL and was not authorised to get hold of an AFSL. Mr Mawhinney is the sole director of that company… That is a contravention of 911A. It's not, again, specifically pleaded in this proceeding but your Honour will be able to

> form – will be able to conclude that the conduct is in contravention of 911A, which is an offence.

41 ASIC's counsel below also referred to an investment in the IPO Wealth scheme, saying:

> So again, a contravention, your Honour could find it was conduct that was – did not comply with section 911A of the Act, and it was after the – after Mr Mawhinney was on notice of that issue as well, and after the IPO Wealth Fund had been established ..... raised by these entities. Your Honour will see ..... transferred to the Eleuthera Group Proprietary Limited – Eleuthera not holding an [AFSL] or being an authorised representative…

42 In his opening in response, Mr Mawhinney's counsel below said:

(1) the orders sought against Mr Mawhinney were severe and would require a high level of culpability to be found;

(2) ASIC was relying on a provisional liquidators' report and other preliminary evidence, thereby exposing the prematurity of the application, particularly given that interlocutory injunctions to the same effect as the permanent injunctions sought were already in place;

(3) the Court:

> …can't possibly be expected to form the view that there has been breaches of director's duties and other statutory provisions based on a provisional liquidators report; but then [ASIC] says, "Well, your Honour can be satisfied that it's – they're apparent breaches."
>
> They're apparent breaches. Well, that's a very flimsy basis on which to make the type of orders that are sought against a person, for life.

(4) it was not clear that the investors would receive no return, but the Court was being asked to make very serious orders when it did not know the ultimate outcome of the liquidation process;

(5) it could not be ASIC's case that there was represented to be dollar for dollar security over real estate as that was not what was said in the relevant documents (referring to the so-called missing comma issue);

(6) it was clear from the face of the relevant documents that the products were not term deposits;

(7) there were sound commercial reasons for the security being over units in the unit trusts and not over the underlying real estate assets; and

(8) "the ASIC case as I understand it is that there was something inherently toxic in these products".

43 It is clear that counsel for Mr Mawhinney below considered that ASIC's case depended only on proof of apparent contraventions of the Corporations Act, which counsel rightly identified as a flimsy basis for the making of orders of the kind ASIC sought (and, as noted, not a basis on which ASIC now seeks to defend the orders made below).

44 Counsel for Mr Mawhinney below briefly cross-examined Mr Tracy. The focus of the cross-examination was that: (a) Mr Tracy did not have valuation reports for the assets of the unit trusts and did not have profit and loss or balance sheet statements for the companies, and (b) he could not determine with absolute certainty that there would be a shortfall of funds, but had significant concerns about certain matters.

45 The matter below was then adjourned for the provision of closing submissions in writing and orally.

46 ASIC filed closing written submissions on 24 February 2021.

47 In these submissions ASIC referred to ***Re Vault*** *Market Pty Ltd* [2014] NSWSC 1641 in which Brereton J said:

> 70. … [T]he broadly expressed power in s 1101B(1) may authorise an order against a person other than the contravener. While satisfaction that a person has contravened a provision of Chapter 7 is a jurisdictional prerequisite, the only limitation on the order that can be made, once that requirement is satisfied, is that "the Court is satisfied that the order would not unfairly prejudice any person". …
>
> 83. … The context and content of s 1101B indicates that its purpose is protective and remedial, rather than deterrent in nature. … [W]hat was contemplated was an injunction to restrain misconduct that was ongoing, or to remove the risk of future misconduct when such a risk was suggested by a history of persistent past misconduct.

48 ASIC submitted that the permanent injunctions were not premature as there was "ample evidence from which the Court can readily conclude that Mr Mawhinney's continued fundraising and marketing of financial products and services to Australian investors presents a real and significant risk to those investors".

49 In answer to the case put for Mr Mawhinney, ASIC submitted that:

(1) the marketing of the products was misleading because it created the false impression the products were similar to bank term deposits;

(2) the lack of security over the real estate assets owned by the unit trusts means that there was not "dollar-for-dollar" security as had been represented to investors and the security had little or no value;

(3) there was no explanation of why Mr Mawhinney permitted the Naplend loan to be entered into; and

(4) the investment schemes relied on new investments to make payments due to existing investors, characteristic of a Ponzi scheme.

50 As noted, ASIC said its "primary concern is that Mr Mawhinney will seek to use different corporate vehicles to raise funds from investors using the same or a similarly flawed scheme". ASIC concluded that:

> The evidence overwhelmingly establishes that, if not restrained, Mr Mawhinney will continue to raise funds from unsuspecting Australian investors at great risk that those funds will not be repaid. The risk is not ameliorated by ASIC's powers to take action after future contravening conduct is detected. If Mr Mawhinney is allowed to set up further investment schemes, it is likely that investors will lose money before ASIC can take action. The very significant risk amply justifies the relief sought by ASIC.

51 ASIC's closing submissions did not, in terms, identify any specific contravention or prospective contravention of the Corporations Act sufficient to enliven the powers in ss 1324 or 1101B of the Act.

52 Mr Mawhinney filed closing written submissions on 4 March 2021.

53 The closing written submissions for Mr Mawhinney said that there was "insufficient evidence for the Court to be satisfied that Mr Mawhinney will engage in conduct proscribed by law in the future". The submissions pointed out that, in respect of the other cases where permanent injunctions had been ordered, as relied on by ASIC, the court had found or declared contraventions. For example, the submissions said that:

> … Because ASIC sought declarations in that case [*Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd* [2006] VSC 192; (2006) 57 ACSR 553], the Court had determined the issue of statutory breaches when the question of injunctions arose, unlike this case where the Court is being asked to make the injunctions based on what it submits are "*apparent*" breaches only.

54 The submissions pointed out that, similarly, in *Australian Securities and Investments Commission v Fuelbanc Australia Limited* [2007] FCA 960; (2007) 162 FCR 174 the orders had been tailored to the contravening conduct found to have been committed and did not extend beyond that conduct. Further, *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154 was "yet another case…

[where] the findings in relation to the contraventions… "*enlivened*" the jurisdiction to make the injunctions". Further, in *Australian Securities and Investments Commission v One Tech Media Ltd (No 6)* [2020] FCA 842 the power of disqualification under s 206E of the Corporations Act was engaged only because the defendant had twice contravened the Act. Finally, in *Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd* [2019] FCA 1514; (2019) 138 ACSR 395, "the Court found that the relevant natural person defendant had contravened (by aiding and abetting a corporate defendant) the *Corporations Act* or the *ASIC Act*".

55 The submissions said that none of these cases were analogous to the present in which, amongst other things, Mr Mawhinney had not "been the subject of any declarations of statutory contravention in this proceeding".

56 The submissions also said that no "declarations against Mr Mawhinney personally, in relation to any misleading and deceptive conduct, are sought in proceeding VID228 [the Mayfair proceeding], or this proceeding", and that if "Mr Mawhinney is to be the subject of orders based on investors incurring losses, then the Court should make factual determinations about what actual loss has been incurred and what has caused those losses".

57 The position is clear. Mr Mawhinney's counsel below, now alleged to have so incompetently represented Mr Mawhinney that the hearing below miscarried, was not meeting a case that Mr Mawhinney or anyone else had in fact contravened the Corporations Act. He was meeting a case that it was sufficient for there to have been apparent contraventions of the Corporations Act. He was (correctly) pointing out that there was no authority supporting ASIC's position that mere apparent contraventions were sufficient to empower the Court to make the orders sought under ss 1324 or 1101B of the Corporations Act.

58 ASIC filed closing written submissions in response on 8 March 2021. ASIC said that "Mr Mawhinney has had ample opportunity to give evidence and to address the concerns raised by ASIC and the provisional liquidators and has declined to do so". It said that while "ASIC does not allege that Mr Mawhinney was consciously dishonest, his conduct was indicative of serious irresponsibility and disregard for his legal obligations".

59 The oral closing submissions below were made on 9 March 2021. ASIC identified that the unanswered vice of all of the investment schemes was the use of new investments to pay out required redemptions of existing investors, which was an inherently flawed business model.

Further, that unless permanently restrained, Mr Mawhinney would continue to operate such schemes resulting in significant risks and losses.

60 ASIC said below that it was of no importance that it had not sought declarations of contraventions as there were "numerous instances of unlawful conduct that have not been answered" and:

> simply because ASIC hasn't sought to seek declaratory relief in respect of each of them is no bar to your Honour being satisfied on all of the material that there is a risk of future unlawful conduct, a risk of future contraventions of the Act, and a risk of future loss to investors by conduct that is unlawful.

61 Further, that the:

> risk is such that Mr Mawhinney must be prevented from engaging in any business, not simply from engaging in unlawful business, because it's obvious that at each step of the way, he has, in fact, engaged in unlawful conduct. And because of the inherently problematic nature of the schemes, does so each time from the outset.

62 ASIC's counsel continued:

> Then, your Honour – so it's no distinction, in my submission, that ASIC has not sought a declaration in respect of each – what could be – your Honour, could readily find is unlawful conduct in this case. It's the – what's important is for your Honour to be satisfied, in all that's required by the statutory test, is for, your Honour, to be satisfied that the injunction is appropriate to address the purpose of the Act which is to protect investors from unlawful conduct.
>
> There is no requirement to establish any one or number of contraventions in this case. Your Honour - - - could readily do so but that's not the way ASIC has put it's case and it's not the way it needs to and it's no distinction… we said in our reply submissions what has occurred and I think what Justice Robson has found as well is that his conduct is indicative of serious irresponsibility and disregard for his legal obligations and ASIC puts it no higher than that and accepts that it does not allege conscious dishonesty.

63 ASIC's counsel below also said:

> I've submitted to your Honour, there is not a reason to distinguish any of the cases. It's not a pre-conditioned – it's not the language of the Act 1101B and 1324, the Corporations Act did not require ASIC to establish or seek declaration to the contravention. That's the – the entire point is that all of the conduct is required to convince your Honour that it's appropriate to have these restraints imposed to protect the public in the future. That is the statutory language, and your Honour shouldn't take a more narrow or prescriptive approach than that.

64 ASIC's counsel below said that: "…there's no contest that Mr Mawhinney was the controlling mind of all of the relevant companies and, essentially, for that purpose, is the maker of all of the representation".

65 Mr Mawhinney's counsel below said:

> In opening this case I ask the question why this application needed to be brought now when no declarations of statutory contravention have been made or even sought against Mr Mawhinney personally. This question has not been answered. Instead, ASIC has doubled down on making this premature application by shifting the focus of the relief they seek from section 1324 to section 1101B of the Corporations Act and submitting that only apparent breaches are needed in reliance on a provisional liquidator's report and an analysis of the security that did not involve a valuation of the security.
>
> Well, in my submission, the court cannot be satisfied that breaches of statutory provisions have occurred on the strength of that evidence and the court should be very reluctant to make such serious orders under section 1101B on such thin evidence.

66 Mr Mawhinney's counsel below referred to *Klees v M101 Holdings Pty Ltd* [2021] NSWSC 182; (2021) 150 ACSR 513 in which Hammerschlag J (as his Honour then was) considered the same provisional liquidators' report and said at [132]: "[i]n any event, the Report does not establish the value of the Notes (nil or otherwise), either when they were issued or now. On its face, it was prepared on incomplete information".

67 Mr Mawhinney's counsel below urged the primary judge to reach the same conclusion.

68 Mr Mawhinney's counsel below also said:

> …it's the provisional liquidator's report which is relied on to show that there are apparent breaches of statutory conventions. Provisional liquidator's reports routinely contain the possibility, the suggestion, that there are breaches of statutory provisions. Routinely, companies are placed into liquidation and it looks like potentially, maybe, depending on the evidence, a statutory provision was breached, routinely… this proceeding involves an application for very, very serious orders against an individual, and in my submission the fact that those – that application is based on a provisional liquidator's report and not a liquidator's report is based on the suggestion in a provisional liquidator's report that there are potentially statutory breaches instead of an application for declarations that there have been statutory breaches. That is relevant in light of this application, in light of the orders sought.

69 Mr Mawhinney's counsel below asked rhetorically:

> But the real point is why don't we wait for a liquidator's report once a full investigation has occurred? Why doesn't ASIC seek declarations and prove their case against Mr Mawhinney? Why does ASIC come to this court and say, "Do this now. Make these orders." There are interim injunctions in place. There's no reason for this application to be brought now in the way it has been brought, none whatsoever. And no explanation has been given. Those questions which I commenced my opening with are still very much live. And ASIC is seeking to have this court go out on a limb and make these orders in a situation that is very unlike the situation in which these orders are normally sought. I'm talking about the proceeding, not necessarily the facts, although we will get to that. It's very unlike the other cases.

70 Mr Mawhinney's counsel below observed that "it would be very difficult to demonstrate that Mr Mawhinney actually breached any laws, because plainly he has not breached managed investment scheme laws. Plainly, he has not breached laws, be they statutory …".

71 When asked by the primary judge of the relevance of findings his Honour might make in the Mayfair proceeding to the Mawhinney proceeding, Mr Mawhinney's counsel said that no such findings could be used as the order of 2 February 2021 was only that evidence filed in the Mayfair proceeding is evidence in the Mawhinney proceeding. Consequently, ASIC was not entitled to rely on oral evidence or submissions in the Mayfair proceeding as part of the record in the Mawhinney proceeding. In any event, Mr Mawhinney was not a party to the Mayfair proceeding and had no opportunity to be heard in that proceeding so no finding in that proceeding could be used against Mr Mawhinney. Mr Mawhinney's counsel was correct.

72 Mr Mawhinney's counsel below said:

> the court should dismiss the proceedings, noting that nothing would prevent ASIC from seeking declarations against Mr Mawhinney and any other appropriate orders in the future if facts demonstrate that such an order – such an application could be warranted on the evidence.

73 In the course of submissions in reply by ASIC's counsel the primary judge said:

> His Honour: And is your submission because I don't need to be satisfied that there have in fact been contraventions by Mr Mawhinney, and all I have to be satisfied about is the appropriateness or not of granting the relief, that, in one sense, doesn't really matter as long as I'm – to wait to the end if I'm persuaded there's sufficient evidence now to invoke the discretion, which I have, under the Corporations Act.
>
> ASIC's counsel: Yes. Absolutely, your Honour. Yes. And that's not to say that your Honour shouldn't and can't find that there has been unlawful conduct, but in terms of the financial records of the company and the quantum of the loss to investors, your Honour need not and should not wait any longer and can be confident about the real risk to investors to all of the products.

74 ASIC's case in closing submissions (written and oral) had moved even further away from the statutory provisions. Its case was that the central (perhaps the only) issue was the appropriateness of the relief which did not depend on ASIC proving any contravention or prospective contravention of the Corporations Act. The evidence was such that the primary judge "could" find unlawful conduct, but that was not what ASIC sought and was not the way ASIC had put its case because it did not need to do so. Rather, it was "appropriate to have these restraints imposed to protect the public in the future. That is the statutory language, and your Honour shouldn't take a more narrow or prescriptive approach than that".

1.4 The primary judge's reasoning

75 Insofar as relevant to the procedural fairness issue in the appeal, the primary judge reasoned as follows.

76 At [392] the primary judge said:

> …Mr Mawhinney was at all relevant times:
>
> (a) the sole director of Mayfair Wealth Partners Pty Ltd, which, on 15 June 2020, changed its name to Australian Income Solutions Pty Ltd;
>
> (b) the sole director of M101 Holdings, which was the issuer of the M+ Notes;
>
> (c) the sole director and shareholder of Online Investments Pty Ltd, which at all relevant times was the sole shareholder of Mayfair Wealth Partners Pty Ltd and M101 Holdings; and
>
> (d) the sole director of M101 Nominees, which was the issuer of the Core Notes. Mr Mawhinney was a director of Mayfair Group Pty Ltd, which at all relevant times was the sole shareholder of M101 Nominees. Mr Mawhinney was a director and sole shareholder of Sunseeker Holdings Pty Ltd, which was the sole shareholder in Mayfair Group Pty Ltd;
>
> (e) the sole director of IPO Wealth and the IPO Wealth Subsidiaries. The sole shareholder of IPO Wealth was Online Investments Pty Ltd, and Mr Mawhinney was the sole director and shareholder of Online Investments Pty Ltd. The sole shareholder of the IPO Wealth Subsidiaries was IPO Wealth;
>
> (f) the sole director of Eleuthera;
>
> (g) the sole director of IPO Capital. The sole shareholder of IPO Capital was Online Investments Pty Ltd and, as stated above, Mr Mawhinney was the sole director and shareholder of Online Investments Pty Ltd.

77 At [396] the primary judge said:

> In light of Mr Mawhinney's roles (as set out above) and the evidence referred to earlier in these reasons, I am satisfied that Mr Mawhinney was the controlling or directing mind and will of each of the corporate Defendants and of M101 Holdings, IPO Capital, IPO Wealth and Mayfair Wealth Partners Pty Ltd. In truth, on the evidence, Mr Mawhinney is the only person that could have been the relevant entities' directing mind and will. (In other words, this is one of those cases where finding the "directing mind and will" of an entity "presents no difficulty": see *Kojic* [*Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; (2016) 249 FCR 421] at [96].) I am satisfied on the evidence that these entities were at all relevant times the corporate alter egos of Mr Mawhinney. I am satisfied that Mr Mawhinney was a person "involved" in the conduct (which is the subject of the findings above) of the relevant entities within the meaning of s 79(c) of the *Corporations Act* and s 12GBCL(b) of the *ASIC Act*.

78 The primary judge returned to the "findings above" subsequently.

79 Section 79 of the Corporations Act provides that:

> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly

concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

80 Section 12GBCL of the ASIC Act provides that:

A person who:

(a) attempts to contravene a civil penalty provision; or

(b) is involved in a contravention of a civil penalty provision;

is taken to have contravened the provision.

81 The primary judge then asked at [397] if there was "jurisdiction to make the injunctions which ASIC seeks", by which it must be understood that the primary judge was asking if the power to do so under the statutory provisions was engaged. After identifying the relevant statutory provisions, the primary judge referred at [401] to *Re Vault* at [69]–[72] and, in quoting from those paragraphs, emphasised Brereton J's statement that the power under s 1101B:

> does not depend on establishing that the person against whom the order was made was "involved", within the meaning of s 79, in the contravention, although the degree and nature of the relationship between the person and the contravention would no doubt be highly relevant to the exercise of the discretion to make such an order.

82 At [404]–[405] the primary judge said (emphasis in original):

> As to s 1101B, a precondition to making an order under s 1101B(1) is that, "on the application of ASIC, it appears to the Court that a person … has contravened a provision of [Chapter 7], or any other law relating to dealing in financial products or providing financial services" (underlining added). There is no controversy that ASIC has made the relevant application, so that criterion is satisfied. In addition, on the basis of the findings which I have detailed earlier in these reasons, I am satisfied that:
>
> (a) IPO Capital contravened s 911A(1) of the *Corporations Act*, which is a provision of Chapter 7;
>
> (b) M101 Nominees and M101 Holdings have contravened s 1041H of the *Corporations Act* (which is a provision in Chapter 7) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* (which are "law[s] relating to dealing in financial products or providing financial services");
>
> (c) M101 Holdings' dealings with Mr Donald were a contravention of the provisions of Chapter 7 concerning the provision of financial services to "retail clients";
>
> (d) Mayfair Wealth Partners Pty Ltd (which eventually changed its name to Australian Income Solutions Pty Ltd), in its dealings concerning the Australian Property Bonds and Mr Rouse, contravened s 1041H of the *Corporations Act* and and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*;
>
> (e) Mr Mawhinney is a person that "has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention[s]" by IPO Capital, M101 Nominees, M101 Holdings and Mayfair Wealth Partners Pty Ltd: see findings made above and s 79(c) of the

Corporations Act and s 12GBCL(b) of the *ASIC Act*.

> In these circumstances, I am satisfied that the jurisdictional precondition in s 1101B(1) is satisfied and jurisdiction to make orders under s 1101B(1) is enlivened.

83 The primary judge continued at [406]–[407]:

> As to s 1324 of the *Corporations Act*, for the reasons stated in relation to s 1101B and on the basis of the findings made above, I am satisfied that Mr Mawhinney is "a person" who "has engaged … in conduct that constituted … being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of [the Corporations Act]": *Corporations Act*, s 1324(1)(e). I am therefore satisfied that the jurisdictional precondition in s 1324 has been enlivened and, as a result, the Court has power to:
>
> > … grant an injunction, on such terms as the Court thinks appropriate, restraining [Mr Mawhinney] from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
>
> Finally, I should note that I reject Mr Mawhinney's submission that, if Mr Mawhinney is to be the subject of orders based on investors incurring losses, then the Court should make factual determinations about what actual loss has been incurred, and what has caused those losses. That submission should not be accepted because there is no indication in ss 1101B or 1324 to the effect that a court must assess loss as a jurisdictional precondition to making orders under those provisions. The relevant jurisdictional precondition relates to contravention, not the ascertainment of the quantum or cause of actual loss.

84 The primary judge made the restraining order for a period of 20 years after further consideration of the circumstances, including observing at [423] that "the jurisdictional precondition to orders under ss 1101B and 1324 relates to the existence of a relevant contravention…".

1.5 ASIC's position in the appeal

85 In the appeal ASIC:

(1) abandoned any reliance on s 1324 of the Corporations Act, saying that "ASIC accepts that s 1324 did not supply power to make the" injunctions. Presumably this is because s 1324 required the Court to have found that Mr Mawhinney himself had engaged in or was proposing to engage in conduct that constituted, constitutes or would constitute a contravention of the Corporations Act or, relevantly, had been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the Corporations Act, when ASIC had sought no such finding;

(2) abandoned the whole of the case it put below about the proper construction of s 1101B of the Corporations Act, saying that the "jurisdictional basis for orders under s 1101B in the circumstances of this case is a finding that there has been at least a contravention

by someone (made at J [405]) and a finding that the orders will not unfairly prejudice any person (made at J [471])"; and

(3) accepted that it had never sought any finding that Mr Mawhinney was involved in contraventions within the meaning of s 79(c) of the Corporations Act (which must also include the equivalent s 12GBCL(b) of the ASIC Act).

86 ASIC nevertheless maintained that the primary judge's orders did not involve a denial of procedural fairness.

87 First, ASIC said that Mr Mawhinney had notice of the originating application seeking the permanent injunctions and "never sought any orders for pleadings or points of claim identifying the basis upon which the injunctive relief was sought". Rather, the "basis upon which the injunctive relief was sought was apparent from the evidence served in the proceeding".

88 Secondly, ASIC said that given the evidence relied on by ASIC in the Mawhinney proceeding "it was obvious that the conduct, and the legality of the conduct, of M101 Nominees, M101 Holdings, Mayfair Wealth, IPO Wealth and IPO Capital would be in issue".

89 Thirdly, ASIC said that as to:

> Mr Mawhinney himself, a finding that he was involved in contraventions within the meaning of s 79(c) of the Corporations Act (J [396], [405(e)]) was not required to found jurisdiction to make the orders. However, Mr Mawhinney's role as sole directing mind of the bodies corporate (J [380]–[396]) was, and was obviously, squarely in issue given that the Restraint was sought against Mr Mawhinney. Plainly, there had to be a sufficient link between contravening conduct and Mr Mawhinney to justify orders restraining him.

90 Fourthly, ASIC said that the:

> …fact that ASIC (mistakenly) advanced a position at trial that in the circumstances of this case satisfaction of contravention was not required to enliven s 1101B of the Corporations Act does not alter the analysis. The primary judge obviously, and correctly, decided not to proceed on the basis of that submission and instead to make findings of contravention that enliven the jurisdiction in s 1101B at J [404], [405]. As indicated above, given any one or more of the findings of contravention at J [404(a)] to [404(d)] enliven the jurisdiction, the finding that Mr Mawhinney was knowingly concerned at J [404(e)] was not required for jurisdiction.

91 Fifthly, when asked during the appeal how the primary judge's orders could stand given that ASIC itself now accepted that a number of bases upon which the primary judge had made those orders either were not available (that is, s 1324) or had never been proposed by ASIC (that is, s 12GBCL(b) of the ASIC Act) or had never been sought by ASIC (all of the findings of contravention), ASIC responded that there was sufficient support in the primary judge's

reasoning, particularly the key factual findings, which remained unaffected by these considerations. As ASIC's counsel put it in the appeal, adopting the structural analogy used in the course of debate, the "underlying findings are the pillar, and so if we assume the cladding was combustible cladding, it has been removed but the pillar remains intact and the building remains intact…".

1.6 Consideration

92 It is not necessary to identify the other findings in the primary judge's reasons which mainly appear at [415]–[472] or the various sources of evidence arguably capable of supporting those findings and the references to that evidence somewhere in the submissions of ASIC's counsel below, other than to note the fact that ASIC acknowledged that it was unable to identify any reference to the position of Mr Donald (an investor in M101 Holdings who the primary judge found to be a "retail client") in those submissions as referred to by the primary judge at [404(c)].

93 ASIC's position in the appeal is untenable. It does not matter that ASIC is able to trawl through the evidence and find something arguably capable of supporting the finding of contravention the primary judge made. It does not matter that ASIC is able to trawl through the submissions of ASIC below and find a reference to that evidence, other than in respect of the finding at [404(c)]. The idea that the primary judge's orders, based on findings of contraventions and Mr Mawhinney's involvement in contraventions that ASIC never sought, can stand because the primary judge also referred to the conduct underlying the findings of contraventions must be rejected.

94 The primary judge rightly rejected ASIC's case that it did not have to prove a contravention of the Corporations Act to engage s 1101B. But the case Mr Mawhinney's counsel came to meet was the case ASIC put. Mr Mawhinney's counsel below rightly did not consider ASIC's case to be consistent with any authority, but nothing disclosed that the case that had to be met was the specific contraventions and Mr Mawhinney's involvement in them as identified in [392] of the primary judge's reasons. ASIC repeatedly said that was not its case. Mr Mawhinney's counsel was entitled to and did act on that basis. The fact that Mr Mawhinney's counsel below also said that the evidence (such as the provisional liquidators' report which was preliminary and based on incomplete information) could not possibly establish contraventions of the Corporations Act confirms this to be so. The point Mr Mawhinney's counsel below was making was that ASIC had effectively been forced to put a flimsy case about apparent contraventions

because the seeking of permanent injunctions was premature, being based on preliminary and incomplete information.

95 The primary judge and Mr Mawhinney's counsel below were confronted by an undifferentiated mass of evidentiary material. On the case that Mr Mawhinney's counsel below was meeting, this did not matter. On the case as found by the primary judge, the undifferentiated mass of evidentiary material mattered a great deal. It is inconceivable that, had Mr Mawhinney's counsel been confronted by the case as found by the primary judge, Mr Mawhinney's counsel below would have adopted the same forensic strategy. In any event, there is no need to go so far. It is obvious that had ASIC put the case as found by the primary judge, even during the course of the hearing, Mr Mawhinney's counsel would have had an entirely different suite of forensic opportunities open for consideration. So much is obvious from the fact that, as it was, Mr Mawhinney's counsel said during closing submissions that the primary judge should dismiss this premature application and "that nothing would prevent ASIC from seeking declarations against Mr Mawhinney and any other appropriate orders in the future if facts demonstrate that such an order – such an application could be warranted on the evidence".

96 Contrary to ASIC's submissions in the appeal:

(1) the fact that Mr Mawhinney did not seek pleadings or points of claim identifying the basis upon which the injunctive relief was sought is immaterial. It was for ASIC to disclose the case it was bringing by some effective means;

(2) the basis upon which the injunctive relief was sought was not apparent from the evidence. The evidence referred to vast amounts of conduct, alleged, possible, potential, likely and otherwise. The idea that from that vast mass Mr Mawhinney's counsel was meant to appreciate that the case he was meeting as was found by the primary judge at [392] is absurd;

(3) while it was obvious that the conduct of M101 Nominees, M101 Holdings, Mayfair Wealth, IPO Wealth and IPO Capital would be in issue, ASIC repeatedly disavowed any reliance on the illegality of that conduct. There is an unbridgeable forensic gap between a case based on apparent or prima facie illegality and a case based on actual illegality;

(4) there is an unbridgeable legal gap between a conclusion that a person is the directing mind of a company and a conclusion that a person has been involved in a contravention by a company within the meaning of s 79(c) of the Corporations Act and/or

s 12GBCL(b) of the ASIC Act. The former conclusion may permit attribution of the knowledge of the directing mind to the company. The latter requires intentional participation in the sense described in ***Yorke v Lucas*** [1985] HCA 65; (1985) 158 CLR 661 at 666–670 of knowledge of, and intention to, do the essential matters constituting the contravention. Accordingly, putting a case that Mr Mawhinney was the directing mind of the companies bears no resemblance to a case that Mr Mawhinney was involved (in the requisite legal sense) in the specific contraventions which the primary judge found at [404];

(5) the fact that ASIC has now abandoned reliance on s 1324 and accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions cannot be simply put to one side or described as mere "cladding", even if "combustible cladding". The primary judge relied on s 1324, the findings of contraventions, and the finding of Mr Mawhinney's involvement in the contraventions as the foundation for the particular orders he made. It is impossible to know what the primary judge might have done if any one or other of those findings had not been made. In dealing with the terms of the orders he should make the primary judge said:

(a) at [415], "having regard to the matters I have set out above, I am satisfied that an injunction of the breadth which is sought by ASIC is justified and appropriate for the following reasons", when the matters set out above include the reliance on s 1324, the findings of contraventions, and the involvement of Mr Mawhinney in the contraventions;

(b) at [418], "on the findings I have made, and the evidence I have accepted, Mr Mawhinney is such a cavalier financial services provider… Mr Mawhinney has been involved in multiple contraventions spanning a number of years", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(c) at [419(a)], "I am satisfied that the contraventions and findings outlined in this judgment "are a particularly egregious example of the kind of conduct that the statutory provisions are designed not merely to prevent, but to dissuade and sanction in the strongest terms": *ASIC v Financial Circle* [*Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; (2018) 131 ACSR 484] at [169]", when ASIC accepts that it never sought

findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(d) at [420], "I am not satisfied that it is appropriate to tailor the orders to reduce the scope of the orders ASIC has sought. This is because Mr Mawhinney has demonstrated a high propensity to circumvent or simply ignore financial services regulation (see the various findings and contraventions referred to above)", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(e) at [421], "[h]aving regard to the high risk posed by Mr Mawhinney to the public as evidenced by the findings which I have made in this proceeding, I am satisfied that the scope of the orders sought by ASIC is appropriate", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(f) at [440], "Mr Mawhinney caused the relevant corporate entities to engage in contravening conduct in circumstances where he knew or ought reasonably to have known that it was very likely not compliant with financial services laws", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(g) at [451], "[i]n light of the evidence and findings I have made in this proceeding, it can be stated that Mr Mawhinney has a total disregard for the law and compliance with financial regulation. It is unnecessary to set out all of the findings again. It is sufficient to say that, on the basis of those findings, I am satisfied that Mr Mawhinney has a complete lack of regard for, or appreciation of, the very important purposes served by financial services laws. In addition, I note that, beyond financial services laws, the evidence in this proceeding also demonstrates Mr Mawhinney's total disregard for corporations law and governance generally. By way of example, the evidence shows that Mr Mawhinney has had no regard for laws concerning insolvent trading and directors' duties", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions;

(h) at [461], "[i]n these circumstances, and having regard to all of the evidence and findings outlined above, I have reached the conclusion that an appropriate period of restraint in all the circumstances is a period of 20 years…", when the

matters set out above include the reliance on s 1324, the findings of contraventions, and the involvement of Mr Mawhinney in the contraventions;

(i) at [462], "as the assessment of the evidence earlier in these reasons should show, I have found that Mr Mawhinney's involvement in contraventions of the *Corporations Act* and the *ASIC Act* are of a very serious kind and warrant a very substantial period of restraint", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions; and

(j) at [465], "Mr Mawhinney has shown a total disregard for the *Corporations Act* and the *ASIC Act*", when ASIC accepts that it never sought findings of contraventions or of the involvement of Mr Mawhinney in the contraventions.

97 No citation of authority is required. Having run one case (it needed to prove only apparent contraventions), ASIC could not succeed on a case that it had repeatedly disavowed (that it had proved contraventions by a person and that Mr Mawhinney was involved in those contraventions). The making of the restraining order based on that other case, never put and disavowed, involves a fundamental denial of procedural fairness to Mr Mawhinney. The primary judge's orders cannot stand.

1.7 What should happen now?

98 Mr Mawhinney submitted that having failed in the case it put below, ASIC could not now seek an order that the matter be remitted for a hearing on the basis it had repeatedly disavowed. In support, Mr Myers QC referred to *Water Board v* ***Moustakas*** [1988] HCA 12; (1988) 180 CLR 491 at 498, *University of Wollongong v* ***Metwally*** *[No 2]* [1985] HCA 28; (1985) 60 ALR 68 at 71, ***Whisprun*** *Pty Ltd v Dixon* [2003] HCA 48; (2003) 200 ALR 447 at [51], ***Devon*** *v Capital Finance Australia Ltd* [2014] VSCA 73 at [77]–[82], and *WA Country Health Service v* ***Wright*** *[No 2]* [2010] WASCA 120 at [83].

99 The issue of potential remittal was alive in the appeal and was addressed by both ASIC and Mr Mawhinney (see appeal transcript day 1 pp 61–63, day 2 p 96, day 4 p 235, day 5 pp 311, 356–358). In particular, Mr Mawhinney made plain that he put all submissions he wished to put against remittal as being contrary to the interests of justice in circumstances where ASIC had made (and should be held) to its forensic decisions below (see, in particular, appeal transcript at pp 356–358).

100 The matter miscarried below for two reasons. ASIC put a legally incorrect case and the primary judge made orders based on a legally correct case not put (and, indeed, disavowed by ASIC). The making of the orders denied Mr Mawhinney procedural fairness. In *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145 the High Court made the point that an appellate court will not order a new trial in response to a denial of procedural fairness where the inevitable result will be the same order as that would be futile. See also *Nobarani v Mariconte* [2018] HCA 36; (2018) 265 CLR 236 at [39].

101 In the present case, an order for remittal would be futile if ASIC is bound by the case it ran before the primary judge. An order for remittal would not be futile if this is an exceptional case in which ASIC is not bound by the case it ran below.

102 In *Moustakas* at 498 the majority of the High Court (Mason CJ, Wilson, Brennan and Dawson JJ) said:

> It is true that in *Maloney* [*Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 294; (1978) 18 ALR 147 at 152.] it was recognized that in "very exceptional cases" a plaintiff's omission to put at trial a case formulated on appeal may not be conclusive against him. But it was pointed out that the opportunity to assert the new case at another trial should only be granted where the interests of justice require it and such a course can be taken without prejudice to the defendant. No exceptional circumstances arise in this case where the parties adopted the course which they took of their own choice. Moreover, it could hardly be said that a new trial could be held now, more than ten years after the accident, without prejudice to the defendant.

103 In *Metwally* at 71 the High Court said:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

104 In *Whisprun* at [51] the majority of the High Court (Gleeson CJ, McHugh and Gummow JJ) said:

> It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action. Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs.

105 In *Devon* at [77]–[82] the Victorian Court of Appeal said:

> There are very exceptional circumstances where a new trial might be ordered on an issue of fact not litigated at trial. The interests of justice must require the determination of the new issue, and there must be no prejudice to the other party.
>
> …
>
> One express application of this exception was by this Court in *Macarthur Cook Real Estate Funds Ltd v APN Funds Management Ltd* [[2013] VSCA 240; (2013) 9 ASTLR 409]. But in that case all the evidence which appeared to be relevant had been called, all the submissions on the point had been made and the trial judge had seemingly decided the case on the issue without characterising it as such. The Court held that any improper prejudice to the respondent could be removed in that case by confining the judge's further consideration of the issue to the evidence previously adduced.
>
> Another possibility was suggested by Gaudron J in *Moustakas* where the plaintiff seeks to make an alternative case based upon facts established by evidence called by the defendant. She said [at [507]]:
>
> > [T]he denial of a verdict to a plaintiff where the evidence called by a defendant results in a finding of fact disclosing a breach of duty not expressly relied upon by the plaintiff makes the case a ''very exceptional [case] where the interests of justice … require a new trial'' as contemplated by Jacobs J in *Maloney v Commissioner of Railways (NSW)*.
>
> On the other hand, the Full Court of the West Australian Supreme Court refused to apply this exception in *WA Country Health Service v Wright [No 2]* where the party seeking a new trial had at trial deliberately eschewed the issue. In the circumstances the Court held that allowing a new trial would be unfair to the other party.
>
> One reason why cases of this kind are very exceptional is because there will almost inevitably be prejudice to the other party. Costs are one obvious source of prejudice, but there is also prejudice in the unrecoverable expenses, worry, uncertainty, and inconvenience of a further trial.

106 In *Wright* at [83] the Court of Appeal (WA) said:

> Where a party raises on appeal a case that it did not put at trial, a new trial to allow that case to be litigated will be ordered only in exceptional circumstances: *Maloney* (152); *Moustakas* (497–498). In the present case there are no grounds which would justify an order for a new trial. The respondent's case at trial was advanced, for the reasons explained by the respondent''s counsel, quite deliberately on the basis that the respondent's injury was caused by the failure of the appellant to diagnose and treat the respondent for pneumonia on 3 July. The primary judge, correctly in my respectful opinion, concluded that on the evidence he was unable to find that the respondent had pneumonia. The respondent's case was not put on the basis found by the primary judge because counsel for the respondent considered that on such a case causation could not be established. It would be quite unfair to the appellant for the respondent now to be allowed a new trial to put the case on a basis that he had deliberately eschewed at the original trial.

107 We consider that the present case is "very exceptional", and that the interests of justice overall require that the proceeding be remitted for another hearing.

108 First, when the High Court referred to "no prejudice" being a condition of permitting a party to assert a new case on remittal in *Moustakas* at 498, it must be understood to have meant no prejudice incapable of effective (even if imperfect) amelioration. This must follow from the fact that no order can ameliorate the effect of the worry, inconvenience and interference with personal and business affairs which all litigation involves, yet the interests of justice may still dictate that a hearing on a different basis from that put below is required in an exceptional case.

109 Secondly, while no order can ameliorate the worry, inconvenience and interference with personal and business affairs which all litigation involves, that kind of impact on Mr Mawhinney must be considered along with all other relevant circumstances. Mr Mawhinney's position in the appeal was that any order for remittal would be futile, not that he would suffer some prejudice not able to be ameliorated by costs orders, different from the general effect of the worry, inconvenience and interference with personal and business affairs which all litigation involves. If Mr Mawhinney wished to raise any such matter, he should have done so as part of the case he put in the appeal (given that the order he sought was dismissal of the proceeding below). As discussed, the remittal would be futile if ASIC was held to the legal case it put below. The discretion to permit ASIC not to be held to the legal (or evidentiary) case it put below exists in exceptional circumstances. Further, and as explained in the fifth point below, the worry, inconvenience and interference with personal and business affairs which all litigation involves will be no different for Mr Mawhinney now than it would have been had he been given procedural fairness below.

110 Thirdly, ASIC is not a private individual or entity seeking to vindicate some private right. It is a public body (s 8 of the ASIC Act) having the functions conferred on it by statute (ss 11–12A of the ASIC Act). The legislation under which ASIC performs functions regulates corporate and financial activity in Australia. The present proceeding was brought by ASIC in the public interest and with the objective of protection of the public. The character of ASIC, the functions it performs, and the nature of this litigation are relevant to the issues of the exceptional circumstances and the interests of justice. This matter involves issues concerning the need for protection of the public from potentially serious harm.

111 Fourthly, this is not a case in which ASIC was bound to fail below if the primary judge had rejected ASIC's case as put. Had the primary judge notified the parties that he was going to reject ASIC's case that it had to prove only apparent contraventions of the Corporations Act, the primary judge would have had a discretion available to him. The primary judge could have

dismissed the case as counsel for Mr Mawhinney had proposed, but on the basis the case was premature and ASIC could later seek declarations of contraventions and such other orders as warranted by the evidence then existing. This proposition involved a realistic and reasonable appreciation by Mr Mawhinney's counsel below that this was the best outcome which Mr Mawhinney could obtain, and that once the liquidations were complete or sufficiently advanced, ASIC would be able to make a case for permanent injunctions against Mr Mawhinney. The primary judge could have adjourned the matter for subsequent hearing enabling ASIC and Mr Mawhinney to adduce further evidence once the liquidations were further advanced or completed. The primary judge could have invited ASIC to discontinue the proceeding. The primary judge could have dismissed the proceeding on a summary basis. Had Mr Mawhinney been given procedural fairness, what was unlikely in the extreme was an outcome in which ASIC was somehow prevented from seeking permanent injunctions against Mr Mawhinney based on a proper legal and evidentiary foundation.

112 Fifthly, if Mr Mawhinney had been afforded procedural fairness below, then whatever the path the primary judge might have taken, Mr Mawhinney would have remained subject to the interlocutory injunctions made by the primary judge on 13 August 2020. This is the fact on which Mr Mawhinney's counsel (sensibly) relied in support of his argument that ASIC pressing for permanent injunctions was premature in the circumstances and that the public interest was and would be effectively protected by the continuation of the interlocutory injunctions. Accordingly, the best realistic outcome Mr Mawhinney could have hoped for below (as his counsel below rightly recognised) was that Mr Mawhinney would continue to be subject to the interlocutory injunctions until the liquidations were sufficiently advanced for ASIC to determine if it could prove contraventions of the Corporations Act by some person sufficiently relevantly connected to Mr Mawhinney (or, relevantly, involving Mr Mawhinney), to the requisite civil standard of proof as provided by s 140 of the *Evidence Act 1995* (Cth) (the **Evidence Act**). That is the same position as Mr Mawhinney would now be in, if orders are made remitting the matter for hearing on the proper legal and evidentiary basis. In this regard, in order 2 of the orders made on 19 April 2021 the primary judge vacated paragraphs 5, 6 and 7 of the orders dated 13 August 2020. These are the interlocutory injunctions. But for the making of the restraining order, the primary judge would not have vacated the interlocutory injunctions. It follows that the primary judge's order vacating the interlocutory injunctions must also be set aside.

113 Sixthly, there can be no suggestion that ASIC's position below was in any way intended to secure some kind of forensic advantage. ASIC was acting under what it now accepts to be a mistaken view as to the law. While ASIC was represented at the hearing below by junior counsel, we do not overlook the fact that it is apparent that senior counsel was otherwise involved in ASIC's case. Indeed, ASIC's written opening and closing submissions disclose that they were prepared by junior and senior counsel. With hindsight, it is easy to see where things went wrong and the different course which should have been taken. But what is relevant now is that it is clear ASIC did not act to obtain a forensic advantage and no such forensic advantage is apparent.

114 Seventhly, 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.

115 Eighthly, we consider it clear that the remitted matter should not be heard by the primary judge. The primary judge has already made findings of contraventions which cannot stand given the denial of procedural fairness. The primary judge has also made adverse credit findings against Mr Mawhinney in *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630 at [64]. The principle that justice must not only be done but must be seen to be done requires the matter to be remitted to a judge other than the primary judge.

116 Finally, despite it being clear from what we have said above, we should record our view that this is a very exceptional case in which ASIC should be permitted to depart from the legal and evidentiary position it adopted below. In order to ensure procedural fairness, and given the nature of the permanent injunctions which ASIC seeks, the case requires ASIC to give clear

notice and proper particulars of each contravention it alleges and of the connection between Mr Mawhinney and each such contravention, either by way of his involvement in the contravention (in the sense described in *Yorke v Lucas*) or otherwise. Beyond saying this, the proper case management of the remitted matter is for the relevant judge to decide.

2. Why the other appeal grounds should not have been raised

117 We have said above that the other grounds of appeal ought not to have been raised.

118 To understand our concern, it is necessary to refer to the most regrettable ground, ground 29, which alleges that the proceeding miscarried by reason of the incompetence of the solicitors and counsel who acted for Mr Mawhinney in the matter below. As discussed above, 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 Even leaving aside the obvious facts that: (a) Mr Mawhinney decided that Ashurst should be funded and focused on his restructuring proposals and not this proceeding, (b) counsel below and Scanlan Carroll were not retained by Mr Mawhinney until 27 January 2021, when Mr

Mawhinney was already in breach of orders for the filing of evidence and submissions and the hearing was listed for 3–4 February 2021, the allegations of incompetence in ground 29 do not come close to conduct incapable of rational explanation on forensic grounds.

121 Ground 29(a) is that the lawyers failed to assert on behalf of Mr Mawhinney his privilege against self-exposure to a penalty and to resist various procedural steps and the reception of evidence in reliance on the privilege. However:

(1) there are real and complex questions of principle (including difficult issues of statutory construction relating to ss 530A and 530B of the Corporations Act), which we need not resolve, as to whether any such privilege existed in respect of the books of the company in liquidation and in circumstances where ASIC was seeking only injunctions under s 1324 or restraining orders under s 1101B: for example, *Construction Forestry Mining & Energy Union of Australia v Inspector Alfred* [2004] FCAFC 36; (2004) 135 FCR 459 at [13], [19], [32] and [51] and *Gore v Australian Securities and Investments Commission* [2017] FCAFC 13; (2017) 249 FCR 167 at [277]–[294], *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [35];

(2) ASIC was not asserting any contravention of any law by Mr Mawhinney as the basis for the injunctions or restraining orders;

(3) even if the privilege against penalty applied in favour of Mr Mawhinney, it did not apply to the companies and the same information was obtainable under compulsion from the companies: *Meneses v Directed Electronics OE Pty Ltd* [2019] FCAFC 190; (2019) 273 FCR 638 at [95]–[96];

(4) even if the privilege against penalty applied in favour of Mr Mawhinney, there was a sound forensic basis for not asserting the privilege, given that Mr Mawhinney's co-operation with ASIC was in issue before the primary judge: for example, at [321(d)] and [333];

(5) counsel has a wide and independent discretion as to the manner in which proceedings are conducted: *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423 at [46]; and

(6) in the circumstances described above, the fact that no such privilege was asserted in the proceeding below on behalf of Mr Mawhinney is manifestly capable of rational explanation. The conduct is far removed from the required standard for appellate intervention for legal incompetence.

122 Ground 29(c) is that the lawyers failed to object to the order which made evidence at the trial in the Mayfair proceeding evidence at the trial of this proceeding. However:

(1) Mr Mawhinney had to obtain an adjournment of the hearing on 3–4 February 2021 to be able to make any case against the orders at all – a consequence of the decisions of Mr Mawhinney alone;

(2) ASIC was willing to contemplate the adjournment of the hearing on 3–4 February 2021 to one of the dates for the hearing of the Mayfair proceeding which Mr Mawhinney had decided not to defend but also proposed an order that evidence in the Mayfair proceeding be evidence in the Mawhinney proceeding;

(3) in the circumstances of Mr Mawhinney's need to obtain the adjournment of the hearing, the decision to agree to ASIC's proposal, albeit confined to the proposal that evidence filed in the Mayfair proceeding be evidence in the Mawhinney proceeding, was well within the wide and independent discretion of counsel and the bounds of reasonable legal representation;

(4) the ground upon which Mr Mawhinney might have objected to the admission of that evidence in the Mawhinney proceeding, leaving aside the proposed privilege in ground 29(a) as to perhaps a minor part of that evidence, is not apparent. Mr Mawhinney could not have expected to be able to object to the admission of the evidence on the basis that he did not have sufficient time to meet it, as Mr Mawhinney had chosen to retain counsel at the last moment; and

(5) in the circumstances described above, the fact that no such objection to that order was asserted in the proceeding below on behalf of Mr Mawhinney is manifestly capable of rational explanation. The conduct is far removed from the required standard for appellate intervention for legal incompetence.

123 Ground 29(ca) is that the lawyers failed to object to the concurrent trial of liability and penalty. However, this contention makes no sense as ASIC was seeking only permanent injunctions – the notion of separating "liability" from "penalty" in that context is nonsensical. There is no rational basis upon which it might be supposed that ASIC and the primary judge would not have perceived this proposition as the nonsense which it is.

124 Ground 29(d) is that the lawyers failed to object to the admission into evidence at the trial of Mr Tracy's expert reports (the **Tracy reports**). However:

(1) the decision whether or not to object to those reports involved competing forensic considerations including:

(a) the probable weakness of any objection to admissibility on the spurious asserted bases of the ultimate issue rule abolished by s 80 of the Evidence Act, the preliminary nature of the opinions in circumstances of incomplete information which was most likely relevant to the issue of weight only and the difficulty in succeeding in obtaining a discretionary exclusion under s 135 of the Evidence Act given that the hearing was before a judge alone;

(b) the capacity to use the preliminary nature of the opinions in circumstances of incomplete information as the foundation for the reasonable and sensible argument that ASIC's application was premature; and

(c) the desirability of Mr Mawhinney being able to assert his co-operation with ASIC as a consideration relevant to the terms of any order to be made by the primary judge; and

(2) in the circumstances described above, the fact that no such objection to the Tracy reports was made in the proceeding below on behalf of Mr Mawhinney is manifestly capable of rational explanation. The conduct is far removed from the required standard for appellate intervention for legal incompetence.

125 Ground 29(e) is that the lawyers failed to object to the admission into evidence at the trial of the M101 provisional liquidators' report. However:

(1) all of the same considerations identified for the admission of the Tracy reports apply to admission of the M101 provisional liquidators' report; and

(2) in the circumstances described above, the fact that no such objection to the M101 provisional liquidators' report was asserted in the proceeding below on behalf of Mr Mawhinney is manifestly capable of rational explanation. The conduct is far removed from the required standard for appellate intervention for legal incompetence.

126 Ground 29(f) is that the lawyers failed to object to the admission into evidence at the trial of the IPO provisional liquidators' reports. However:

(1) all of the same considerations identified for the admission of the Tracy reports apply to admission of the IPO provisional liquidators' reports; and

(2) in the circumstances described above, the fact that no such objection to the IPO provisional liquidators' reports was asserted in the proceeding below on behalf of Mr Mawhinney is manifestly capable of rational explanation. The conduct is far removed from the required standard for appellate intervention for legal incompetence.

127 Ground 29(g) is that the lawyers failed 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. However:

(1) the case that ASIC was putting of apparent contraventions did not call for cross-examination of the investors;

(2) in any event, there would have been obvious risks in the cross-examination of the investors, a number of whom presented as apparently vulnerable to exploitation, including the risk that their evidence would have proved their lack of financial sophistication, the extent to which they were in fact misled by the marketing of the products, and the serious harm which they had suffered as a result; and

(3) even with the benefit of hindsight, it is not apparent that counsel's decision not to cross-examine the investors was other than sound, let alone incapable of rational explanation. Again, the conduct is far removed from the required standard for appellate intervention for legal incompetence.

128 Ground 29(ga) is that the lawyers failed to cross-examine the provisional liquidators of M101 Nominees to establish the "serious errors in their report", said to be that: (a) it contained opinions on questions of ultimate fact and of law, (b) it was based on incomplete information, (c) insofar as it contained admissible opinions, those opinions were provisional only and of little probative value, and (d) it was based in part on information which the appellant was compelled to supply in abrogation of his privilege against self-exposure to penalty. However:

(1) all of the same considerations identified for the admission of the Tracy reports apply to cross-examination about the M101 provisional liquidators' report;

(2) in any event, there would have been obvious risks in the cross-examination of the provisional liquidators including that their opinions would be further supported in any oral evidence they might have given; and

(3) even with the benefit of hindsight, it is not apparent that counsel's decision not to cross-examine the provisional liquidators was other than sound, let alone incapable of rational explanation. Again, the conduct is far removed from the required standard for appellate intervention for legal incompetence.

129 Ground 29(gb) is that the lawyers failed to cross-examine Mr Tracy about the impact of the materially incorrect instructions on his first two reports (the so-called missing comma point). However:

(1) all of the same considerations identified for the admission of the Tracy reports apply to cross-examination about the Tracy reports;

(2) Mr Tracy had already explained that irrelevance of the missing comma to his conclusions, making any forensic advantage from cross-examination unlikely;

(3) in any event, there would have been obvious risks in the cross-examination of Mr Tracy that his opinions would be further supported in any oral evidence he might have given; and

(4) even with the benefit of hindsight, it is not apparent that counsel's decision not to cross-examine Mr Tracy was other than sound, let alone incapable of rational explanation. Again, the conduct is far removed from the required standard for appellate intervention for legal incompetence.

130 Ground 29(h) is that the lawyers failed 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. However:

(1) the only person who could have given direct evidence about these matters was Mr Mawhinney himself, yet ground 29(a) asserts incompetence for failure to assert a privilege against exposure to penalty – Mr Mawhinney cannot both assert incompetence in failing to assert that privilege and incompetence in failing to call him (and thereby exposing him to cross-examination) about these matters;

(2) calling Mr Mawhinney would have been fraught with the risk that any evidence he might give would have assisted ASIC in persuading the primary judge that more extensive relief was required;

(3) counsel did make submissions about the true nature of the investment schemes including the security and the loans; and

(4) even with the benefit of hindsight it is not apparent that counsel's forensic decisions about the case were other than sound, constrained as they were by the circumstances of lack of preparation time for which Mr Mawhinney alone was responsible. Again, the conduct is far removed from the required standard for appellate intervention for legal incompetence.

131 For these reasons, ground 29 is and ought to have been recognised to be hopeless. It follows that Mr Mawhinney remains bound by the conduct of his case below. Once that is accepted, all of the other grounds of appeal are exposed as spurious assertions which also ought not to have been made.

132 Ground 1 asserts that Mr Mawhinney was denied procedural fairness by the abrogation of his privilege against self-exposure to penalty by various actions either: (a) pre-dating the retainer of lawyers, or at least counsel and Scanlan Carroll, or (b) capable of rational forensic decisions not to assert any such privilege, and (c) in circumstances where the existence of the privilege, as explained, involves real and complex questions of principle (including difficult issues of statutory construction relating to ss 530A and 530B of the Corporations Act), which we need not resolve.

133 The further evidence on which Mr Mawhinney seeks to rely in the appeal includes the kind of self-serving reconstruction with the benefit of hindsight with which judges are familiar. Mr Mawhinney says that the relevant lawyers never told him about the existence of the privilege against penalty and had he been "told" about it he would have asserted the privilege and provided ASIC with no assistance. In this crucial part of his affidavit at [14], Mr Mawhinney does not say that he did not know that he could assert any such privilege. This is despite the fact that the premise underlying one of his complaints is that some of the evidence which should not have been admitted involved answers he gave in a compulsory examination where he had asserted the privilege against self-incrimination or against penalty under ss 597(12) and (12A) of the Corporations Act. Mr Mawhinney also makes no allowance for the fact that his evidence explains that counsel's recommended strategy was to seek that the Court defer ASIC's case until there was a final report from the liquidators of M101 Nominees. That strategy (which was reasonable and sensible in the circumstances) necessarily required Mr Mawhinney to co-operate with ASIC and the liquidators. Accordingly, Mr Mawhinney's co-operation was relied

on as a factor in his favour below: [321(e)]. Mr Mawhinney cannot turn around now and complain that he was denied procedural fairness when the events about which he complains after counsel had been retained were well within the wide and independent discretion of counsel. Otherwise, it is unnecessary to resolve the question whether Mr Mawhinney has effectively waived the privilege by reason of the fact that he never asserted the privilege. The point is moot in this appeal.

134 Ground 3 asserts that Mr Mawhinney was denied procedural fairness by ASIC's failure to give notice before the hearing of various matters. However, all of the matters involve actual contraventions of the Corporations Act and/or the ASIC Act. As explained, this was not ASIC's case below. As a result, the denial of procedural fairness arises by reason of the primary judge's (correct) rejection of the way in which ASIC put its case below, but decision to grant the relief sought on the basis of a case that was not put. These circumstances leave no room for the denial of procedural fairness that is posited in ground 3.

135 Ground 4 asserts that Mr Mawhinney was denied procedural fairness by the concurrent trial of issues of liability and penalty and by being denied a separate opportunity to adduce evidence and make submissions on penalty after findings were made on liability. As discussed, this conception of the case as involving "liability" and "penalty" is a nonsense once it is accepted that ASIC's case below was that it did not have to prove any contraventions.

136 Ground 5 asserts that the primary judge erred by admitting into evidence at the trial the Tracy reports. But as we have said, counsel below did not object to the admission into evidence of the Tracy reports for sound reasons, so the primary judge could not have erred in admitting those reports into evidence.

137 Ground 6 asserts that the primary judge should have ruled the Tracy reports inadmissible under s 76 of the Evidence Act because they contained opinions on issues of ultimate fact in the proceeding and did not contain opinions admissible within s 79 of the Evidence Act. But as we have said, counsel below did not object to the admission into evidence of the Tracy reports for sound reasons, so the primary judge could not have erred in admitting those reports into evidence.

138 Ground 7 asserts that the primary judge should have ruled the Tracy reports inadmissible under s 135 of the Evidence Act given the provisional nature of Mr Tracy's opinions and that the opinions were based on incomplete information, but counsel below did not object to the

admission into evidence of the Tracy reports for sound reasons, so the primary judge could not have erred in admitting those reports into evidence.

139 Ground 8 asserts that the primary judge should have ruled the M101 provisional liquidators' report inadmissible under s 135 of the Evidence Act given the preliminary nature of the provisional liquidators' opinions and that the opinions were based on incomplete information, but counsel below did not object to the admission into evidence of the M101 provisional liquidators' report for sound reasons, so the primary judge could not have erred in admitting that report into evidence.

140 Ground 9 asserts that the primary judge should have ruled the IPO provisional liquidators' reports inadmissible under s 135 of the Evidence Act for various reasons, but counsel below did not object to the admission into evidence of the IPO provisional liquidators' reports for sound reasons, so the primary judge could not have erred in admitting those reports into evidence.

141 Ground 10 asserts that the primary judge erred by adopting conclusions of ultimate fact and of law from the Tracy reports, the M101 provisional liquidators' report and the IPO provisional liquidators' reports and by failing to reach his own conclusions of ultimate fact and of law. But the problem is not that the primary judge simply adopted these reports. As explained, the problem is that the primary judge used these reports to make findings not sought by ASIC. The use the primary judge made of the reports is not separable from the single real issue in the appeal and on the basis of which the appeal must be allowed. ASIC had evidence which it said proved the case of apparent contraventions that it was running and said that while the primary judge could use the evidence to find actual contraventions, that was not ASIC's case. It is the use of the reports to find a case not put that is the problem, not the primary judge simply adopting the opinions in the reports.

142 Ground 11 asserts a lengthy series of errors in (a) to (q) that the primary judge erred in making these findings of fact and in not finding in respect of each such fact that ASIC had failed to prove it to the requisite standard under s 140 of the Evidence Act. This ground is irreconcilable with the single real issue in the appeal and on the basis of which the appeal must be allowed. ASIC's case was that it did not need to prove anything to the requisite standard under s 140 of the Evidence Act and the problem was that the primary judge rightly rejected this case but made findings not sought by ASIC.

143 Grounds 12 to 16 and 18 to 20 can be addressed collectively:

(1) ground 12 asserts that the primary judge erred in holding that IPO Capital, which was not a party to the proceeding, contravened s 911A(1) of the Corporations Act by providing financial products or financial services without holding an Australian financial services licence;

(2) grounds 13 and 14 assert that the primary judge erred in holding that Mr Mawhinney contravened s 1041H of the Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the ASIC Act by representing to investors that the Core Notes: (a) would be supported by "first ranking, registered security" and that "the assets are otherwise encumbered", and (b) were similar to, or comparable to, a term deposit;

(3) ground 15 asserts that the primary judge erred in holding that Mr Mawhinney contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act by failing to disclose that Core Notes investors' funds would be used to lend money to the Jarrah Lodge Unit Trust No 1 and would then be on-lent to the BLP Investment Trust, the Panetta Investment Trust and the Tamminga Family Trust;

(4) ground 16 asserts that the primary judge erred in holding that M101 Holdings contravened s 1041H of the Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the ASIC Act by taking an investment in M+ Notes from Peter Hui without disclosing that it had implemented a "Liquidity Prudency Policy" which suspended redemptions in respect of the M+ Notes;

(5) ground 18 asserts that the primary judge erred in holding that M101 Holdings contravened s 1041H of the Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the ASIC Act by representing to investors that the M+ Notes were comparable, or entailed similar risk, to a term deposit;

(6) ground 19 asserts that the primary judge erred in holding that M101 Holdings did not comply with the regime in Ch 7 of the Corporations Act in relation to "retail clients" by providing financial services to Mr Donald; and

(7) ground 20 asserts that the primary judge erred in holding that M101 Holdings contravened s 1041H of the Corporations Act and s 12DA(1) of the ASIC Act by failing to disclose to M+ Notes investors that their investments could or would be used to fulfil obligations to investors in the Core Notes product.

144 In respect of each of those grounds, the reason the primary judge erred was because ASIC did not seek those findings. This error subsumes any argument that the primary judge could not have made those findings on the evidence. This again takes us back to the single real issue in the appeal.

145 Ground 21 asserts that the primary judge erred in holding that Australian Income Solutions Pty Ltd (formerly Mayfair Wealth Partners Pty Ltd), which was not a party to the proceeding, "circumvented" the order made on 16 April 2020 in the Mayfair proceeding by the marketing and issuing of Australian Property Bonds. ASIC had made a case to the primary judge that Mr Mawhinney had sought to circumvent the Court's orders of 16 April 2020 in the Mayfair proceeding (accompanying reasons published as *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494). In this proceeding, the primary judge accepted that case: [379]. Mr Mawhinney's assertions of error in that regard are untenable. Mr Mawhinney submitted that the evidence disclosed:

> a clear intention to ensure that the issues raised by ASIC in the Mayfair proceeding in respect of the marketing of the Core Notes (however misguided), and the interlocutory orders of the primary judge in that proceeding, were fully addressed and complied with in the marketing of the Australian Property Bonds.

146 However:

(1) the finding of "circumvention" of the orders did not imply a contravention of the orders – it implied a working around of the orders;

(2) the evidence included that at least one investor in the Australian Property Bonds could not be granted a first-ranking mortgage unless the existing registered mortgage in favour of Naplend was first discharged: [375];

(3) the evidence included an email from Mr Mawhinney which stated that "eliminat[ing] the current ASIC proceedings", "[d]iminish[ing] ASIC's attention on the Group" and "[e]nabl[ing] our new initiatives to be launched without scrutiny" were Mr Mawhinney's objectives: [378]; and

(4) Mr Mawhinney did not give evidence.

147 Accordingly, it could never be said that the impugned finding of fact in ground 21 is wrong.

148 Grounds 22 to 24 can also be addressed collectively:

(1) ground 22 asserts that the primary judge erred in holding that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, contravened s 1041H of the

Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the ASIC Act by making unspecified representations to the investors in Australian Property Bonds;

(2) ground 23 asserts that the primary judge erred in holding that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, contravened s 1041H of the Corporations Act and s 12DA(1) of the ASIC Act by receiving $100,000 from Richard Rouse and by failing to issue Australian Property Bonds to him; and

(3) ground 24 asserts that the primary judge erred in holding that Mr Mawhinney was involved in the contraventions by M101 Holdings, IPO Capital Pty, and Australian Income Solutions Pty Ltd of ss 911A(1) and 1041H of the Corporations Act and ss 12DA(1), 12DB(1)(a) and (1)(e) of the ASIC Act within the meaning of s 79(c) of the Corporations Act and s 12GBCL of the ASIC Act.

149 In respect of each of those grounds, and in common with grounds 12 to 20, the reason the primary judge erred was because ASIC did not seek those findings. This error subsumes any argument that the primary judge could not have made those findings on the evidence. This again takes us back to the single real issue in the appeal.

150 Ground 25 concerns the Court's power to make orders under s 1101B of the Corporations Act. It is appropriate to address this ground at greater length because the issue raised will affect the further hearing of the proceeding on remitter.

151 By ground 25, Mr Mawhinney contends that, insofar as the restraining order was made pursuant to s 1101B(4)(a) of the Corporations Act, the order was beyond power as it was not proved that Mr Mawhinney had persistently contravened, or was continuing to contravene, provisions of Ch 7 of the Corporations Act. The ground as stated in the notice of appeal is misconceived because s 1101B(4) is not, in itself, a source of power for the Court to make orders. The relevant source of power is s 1101B(1). As stated in its chapeau, s 1101B(4) merely gives examples of orders the Court may make under s 1101B(1). Accordingly, the detail which we now provide about s 1101B should not be understood as suggesting that ground 25 has any greater merit than the other grounds we reject.

152 In his reply submissions on the appeal, Mr Mawhinney effectively rephrased ground 25 to contend that the Court did not have power to make the restraining order under s 1101B(1)(a)(i) in circumstances where it was not proved that Mr Mawhinney had persistently contravened, or was continuing to contravene, provisions of Ch 7 of the Corporations Act. Mr Mawhinney

argued that for such an order to be valid, the power in s 1101B(1)(a)(i) must be read (down) in light of s 1101B(4)(a). In support, Mr Mawhinney submitted that:

(1) s 1101B(4)(a) specifically empowers an order to be made restraining a person from carrying on a business, but only when *that* person (not some other person) has persistently contravened or is continuing to contravene the corporations legislation;

(2) although s 1101B(4) is expressed not to limit s 1101B(1)(a)(i), the highly specific terms of s 1101B(4)(a) strongly suggest that the paragraph exhaustively states the power to make an order of the kind set out in it. In that respect, Mr Mawhinney relied on the maxim ***Expressum facit*** *cessare tacitum*, referring to ***Anthony Hordern*** *and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1 at 7;

(3) for the restraining order to be made under s 1101B(1)(a)(i) alone, without reliance on the power in s 1101B(4)(a), the power in s 1101B(1)(a)(i) would have to be read very expansively. There are numerous provisions in the corporations legislation in which the Court is granted express power to make orders against persons involved in a contravention. Mr Mawhinney referred to the maxim *Inclusio unius est exclusio alterius* (but presumably meant the maxim ***Expressio unius*** *est exclusio alterius* – an express reference to one matter indicates that other matters are excluded) to contend that s 1101B(1)(a)(i) did not comprehend orders being made against a person involved in a contravention committed by another; and

(4) insofar as Brereton J concluded in *Re Vault* that the power in s 1101B(1) authorises an order against a person other than a contravener, the conclusion is incorrect and should not be followed.

153 The task of statutory construction begins with the text of the provision in question, understood in its context (including legislative history and extrinsic materials) and with regard to its purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ and at [37]–[39] per Gageler J; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408; and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]–[71].

154 Mr Mawhinney's submissions find no support in the legislative text or context and should be rejected for that reason.

155 Section 1101B is within Div 3 of Pt 7.12 of Ch 7 of the Corporations Act which regulates financial services and markets. The legislative history of s 1101B can be traced back to the *Securities Industry Acts* enacted in similar form in Victoria, New South Wales and Western Australia in 1970 and in Queensland in 1971. The original form of s 1101B was s 5B of the Victorian Act (inserted by the *Securities Industry (Amendment) Act 1970* (Vic)), s 5F of the New South Wales Act (inserted by the *Securities Industry (Amendment) Act 1971* (NSW)), s 32 of the Western Australia Act and s 10 of the Queensland Act. Those provisions became s 12 of the *Securities Industry Acts* which were enacted uniformly in Victoria, New South Wales, Queensland and Western Australia in 1975 (pursuant to the Interstate Corporate Affairs Agreement ratified by the Parliaments of those States). The provision then became s 14 of the *Securities Industry Act 1980* (Cth) which was applied in each State and Territory as the *Securities Industry Code* and then s 1114 of the *Corporations Law* (as set out in s 82 of the *Corporations Act 1989* (Cth)) which was applied in each State and Territory.

156 Section 1101B and its predecessors have a distinctive form. The section is headed "Power of Court to make certain orders". Three aspects of the section should be noted:

(1) the power of the Court to make an order under s 1101B is enlivened if "it appears to the Court" that a person has contravened a provision of Ch 7 of the Corporations Act or any other law relating to dealing in financial products or providing financial services (s 1101B(1)(a)(i)) or various other rules or conditions regulating the supply of financial services or the operation of financial markets (s 1101B(1)(a)(ii) to (v) and (1)(b) to (d)). ASIC accepted that the phrase "it appears to the Court" is equivalent to the statutory phrase "the Court is satisfied", which means that the Court is satisfied on the balance of probabilities;

(2) the power of the Court to make an order is not expressly confined to an order binding or affecting the person who has contravened. The chapeau to s 1101B(1) empowers the Court to "make such order, or orders, as it thinks fit", subject only to the statutory condition that "the Court is satisfied that the order would not unfairly prejudice any person";

(3) ss 1101B(10) and (11) stipulate as follows:

Duty to comply with order

(10) A person must not, without reasonable excuse, contravene:

(a) an order under this section; or

(b) a requirement imposed under paragraph (8)(a) or (8)(d) by a receiver appointed by order of the Court under subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Power to rescind or vary order

(11) The Court may rescind or vary an order made by it under this section or suspend the operation of such an order.

157 In contrast to s 1101B, s 1324 is headed "Injunctions". It has a different form and field of operation from s 1101B:

(1) the power of the Court to grant an injunction under s 1324 is enlivened if a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

(a) a contravention of the Corporations Act; or

(b) attempting to contravene the Act; or

(c) aiding, abetting, counselling or procuring a person to contravene the Act; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene the Act; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the Act; or

(f) conspiring with others to contravene the Act;

(2) the Court is empowered by s 1324 to grant an injunction, on such terms as the Court thinks appropriate, restraining the person who has engaged in the prescribed conduct from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing; and

(3) a failure to comply with an order under s 1324 is not a statutory offence. Rather, as with any prohibitory or mandatory injunction granted by the Court, non-compliance is punishable as a contempt of court.

158 Mr Mawhinney's reliance on the *Expressio unius* maxim, in an attempt to read down the scope of s 1101B by reference to other provisions such as s 1324, is misconceived. Each of ss 1101B and 1324 operates in accordance with its terms. The fact that there is express power in s 1324 to grant an injunction against a person involved in a contravention within the meaning of

ss 1324(1)(c) or (e) cannot support an implication that s 1101B excludes the power to make an order affecting such a person. In its terms, s 1101B contains no express limitation on the categories of persons in respect of whom an order may be made. The only express limitation is that the Court must be satisfied that the order would not unfairly prejudice any person. It may be accepted that there is an implicit limitation that the power to make an order under the section is confined by the scope and purpose of the power, which includes an implication that there is a sufficient nexus between the relevant contravention and the order made: cf, *ICI Australia Operations Pty Ltd v Trade Practices Commission* [1992] FCA 707; (1992) 38 FCR 248 at 258 per Lockhart J and at 267 per Gummow J and *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* [1997] FCA 871; (1997) 78 FCR 197 at 202 per Merkel J.

159 Likewise, Mr Mawhinney's reliance on the *Expressum facit* maxim is entirely misconceived. The maxim was explained by Gavan Duffy CJ and Dixon J in *Anthony Hordern* as follows (at 7):

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

160 In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566, Gummow and Hayne JJ observed at [59]:

> … what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power.

161 As noted earlier, ss 1101B(1) and 1101B(4) do not confer separate powers on the Court. Section 1101B(4) might be described as definitional, in that it defines (inclusively) or elaborates upon the scope of the power conferred by s 1101B(1). The chapeau to s 1101B(4) states two things: first, the subsection does not limit the power conferred by s 1101B(1); secondly, the subsection provides examples of orders the Court may make under s 1101B(1). Given the form in which s 1101B(4) is expressed, there is no scope for the operation of the *Expressum facit* maxim.

162 Contrary to Mr Mawhinney's arguments, the express terms of s 1101B(4) confirm the breadth of the power conferred on the Court by s 1101B(1). Paragraph (e) of s 1101B(4) provides that the Court may make an order restraining a person from acquiring, disposing of or otherwise

dealing with any financial products that are specified in the order, and paragraph (f) provides that the Court may make an order restraining a person from providing any financial services that are specified in the order. There is no reason to read down the reference to "a person" in those paragraphs such that the power is limited to the person who has contravened a relevant provision as referred to in s 1101B(1).

163 As noted above (albeit in summary form), in *Re Vault*, Brereton J expressed the following views with respect to the power conferred by s 1101B (at [70]):

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

164 For the reasons given above, we agree with those views. The primary judge's reliance upon those principles (at [399]–[401] and [404]–[405]) was correct.

165 Ground 26 asserts that insofar as paragraph 1 of the final order made on 19 April 2021 was made pursuant to s 1324 of the Corporations Act, the order was beyond power as it does not enjoin the appellant from engaging in conduct that would constitute a contravention or attempted contravention of the Act or make him liable as an accessory for such a contravention. ASIC abandoned s 1324 as a relevant source of power for the orders. From that moment onwards, ground 26 became moot.

166 Ground 27 asserts that the primary judge took account of erroneous or irrelevant considerations in assessing the period for which Mr Mawhinney was restrained from carrying on a financial services business, being: (a) there were large financial losses, (b) Mr Mawhinney has a high propensity to engage in similar activity or conduct, (c) if not restrained, Mr Mawhinney is likely to inflict harm on persons who are not sophisticated investors and who are likely to invest

a large proportion of their life savings in high risk products, (d) Mr Mawhinney failed to express remorse or contrition, and (e) Mr Mawhinney has a total disregard for the law and compliance with financial regulation.

167 How any of these considerations could be irrelevant to the exercise of the power to grant a permanent injunction is unclear.

168 Ground 28 is that the restraint in paragraph 1 of the final order made on 19 April 2021 is manifestly excessive. Unless some other ground of appeal succeeded, this ground involves appellate review of a discretionary decision, without apparent regard to the strict confines within which such appellate review might be undertaken.

169 These are the reasons we consider that this appeal was properly brought on the single ground of procedural fairness.

3. Orders

170 We have framed orders reflecting our conclusions above. These orders include:

(1) setting aside orders 1, 2 and 4 made by the primary judge on 19 April 2021 (which has the effect of setting aside the restraining order and the costs order below, while reinstating the interlocutory injunctions and restraints which are the subject of paragraphs 5, 6 and 7 of the orders made by the primary judge on 13 August 2020) and also ordering 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;

(2) remitting the proceeding for hearing and determination by a judge other than the primary judge;

(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.

I certify that the preceding one hundred and seventy (170) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, O'Bryan and Cheeseman .

Associate:

Dated: 15 September 2022