FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing) [2023] FCA 100

File number:	VID 146 of 2019
Judgment of:	**LEE J**
Date of judgment:	16 February 2023
Catchwords:	**CORPORATIONS** – the GetSwift saga – spectacular fall of market darling 'tech start-up' – liability judgment 2,618 paragraphs long – declarations of scores of contraventions of ss 180 and 674 of *Corporations Act 2001* (Cth) by company and three directors – company re-domiciled to Canada during currency of regulatory proceeding – company placed into voluntary liquidation despite undertakings given to Court – no appearance by company, ringleader and second in command **CORPORATIONS** – Australian Securities and Investments Commission (**ASIC**) seeking imposition of pecuniary penalties on company and three directors in respect of contraventions of civil penalty provisions – ASIC seeking disqualification orders against three directors – survey of principles of penalty and disqualification – contraventions serious and materially prejudicial to the market – contrition non-existent for two contraveners – general and specific deterrence warrant disqualification and penalty orders
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) s 12DA *Corporations Act 2001* (Cth) ss 180(1), 206C(1), 206E(1), 674, 674(2A), 600K, 1041H, 1317E, 1317DA, 1317G(1A), 1317G(1B), 1317G(1), 1657, Sch 2 (Insolvency Practice Schedule (Corporations)) ss 90-10, 90-15, 90-20 *Fair Work Act 2009* (Cth) s 546 *Federal Court of Australia Act 1976* (Cth) s 37P *Federal Court Rules 2011* (Cth) r 10.24 *Corporate Law Reform Bill 1992* (Cth)
Cases cited:	*Adler v Australian Securities and Investments Commission* [2003] NSWCA 131; (2003) 179 FLR 1 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 96 ALJR 426

Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd [2019] FCA 786; (2019) 370 ALR 637
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25
Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd [2022] FCA 875
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640
Australian Competition and Consumer Commission v Yazaki [2018] FCAFC 73; (2018) 262 FCR 243
Australian Institute of Professional Education Pty Ltd (in liq) [2017] FCA 521
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
Australian Securities and Investments Commission v Adler [2002] NSWSC 483; (2002) 42 ACSR 80
Australian Securities and Investments Commission v Beekink [2007] FCAFC 7; (2007) 238 ALR 595
Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4) [2021] FCA 1578; (2021) 158 ACSR 196
Australian Securities and Investments Commission v Citrofresh International Limited (No 3) [2010] FCA 292; (2010) 268 ALR 303
Australian Securities and Investments Commission v Flugge (No 2) [2017] VSC 117; (2017) 342 ALR 478
Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing) [2021] FCA 1384
Australian Securities and Investments Commission v Healey (No 2) [2011] FCA 1003; (2011) 196 FCR 430
Australian Securities and Investments Commission v Lindberg [2012] VSC 332; (2012) 91 ACSR 640
Australian Securities and Investments Commission v Macdonald (No 12) [2009] NSWSC 714; (2009) 259 ALR 116
Australian Securities and Investments Commission v MobiSuper Pty Limited [2022] FCA 990
Australian Securities and Investments Commission v Newcrest Mining Ltd [2014] FCA 698; (2014) 101 ACSR 46
Australian Securities and Investments Commission v Rio Tinto Limited (No 2) [2022] FCA 184
Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (in liq) [2016] FCA 1488; (2016) 118 ACSR 43
Australian Securities and Investments Commission v Squirrel Superannuation Services Pty Ltd [2022] FCA 702
Australian Securities and Investments Commission v Westpac [2019] FCA 2147

	Australian Securities Commission v Donovan (1998) 28 ACSR 583 *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; (2022) 403 ALR 67 *Djordjevich v Rohrt* [2021] VSC 178 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 *LM Investment Mgmt Ltd v Drake* [2017] QSC 34 *Murrihy v Betezy.com.au Pty Ltd (No 2)* [2013] FCA 1146; (2013) 221 FCR 118 *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 *Trade Practices Commission v CSR Limited* (1991) ATPR 452,135 *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	162
Date of hearing:	30–31 January 2023
Counsel for the Plaintiff:	Mr P Solomon KC, Ms N Moncrief and Ms G Westgarth
Solicitor for the Plaintiff:	Johnson Winter & Slattery
Counsel for the First Defendant:	The First Defendant did not appear
Counsel for the Second Defendant:	The Second Defendant did not appear
Counsel for the Third Defendant:	The Third Defendant did not appear
Counsel for the Fourth Defendant:	Ms B Ng

Solicitor for the Fourth Defendant:	Baker McKenzie

ORDERS

VID 146 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**GETSWIFT LIMITED (ACN 604 611 556)** First Defendant
	BANE HUNTER Second Defendant
	JOEL RICHARD STUART MACDONALD Third Defendant
	BRETT EAGLE Fourth Defendant

ORDER MADE BY: **LEE J**

DATE OF ORDER: **16 FEBRUARY 2023**

THE COURT ORDERS THAT:

GetSwift Limited (in liq)

1. Leave be granted *nunc pro tunc* pursuant to s 500(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to continue this proceeding against GetSwift Limited (in liq).

2. GetSwift Limited (in liq) pay to the Commonwealth of Australia, within 30 days of the date of these Orders, a pecuniary penalty of $15,000,000, pursuant to s 1317G(1A) of the Corporations Act, in respect of the contraventions of s 674(2) of the Corporations Act identified in Orders 1–22 of the Orders dated 26 November 2021.

Mr Hunter

3. Bane Hunter pay to the Commonwealth of Australia, within 30 days of the date of these Orders, a pecuniary penalty of $2,000,000, pursuant to s 1317G(1) and s 1317G(1A) of the Corporations Act in respect of his contraventions of s 180(1) and s 674(2A) of the Corporations Act identified in Orders 23–26 of the Orders dated 26 November 2021.

4. Bane Hunter be disqualified from managing corporations for a period of 15 years pursuant to ss 206C(1) and 206E(1) of the Corporations Act.

Mr Macdonald

5. Joel Richard Stuart Macdonald pay to the Commonwealth of Australia, within 30 days of the date of these Orders, a pecuniary penalty of $1,000,000, pursuant to s 1317G(1) and s 1317G(1A) of the Corporations Act in respect of his contraventions of s 180(1) and s 674(2A) of the Corporations Act identified in Orders 27–30 of the Orders dated 26 November 2021.

6. Joel Richard Stuart Macdonald be disqualified from managing corporations for a period of 12 years pursuant to ss 206C(1) and 206E(1) of the Corporations Act.

Mr Eagle

7. Brett Ronald Eagle pay to the Commonwealth of Australia, within 30 days of the date of these Orders, a pecuniary penalty of $75,000, pursuant to s 1317G(1) and s 1317G(1A) of the Corporations Act in respect of his contraventions of s 180(1) and s 674(2A) of the Corporations Act identified in Orders 31–32 of the Orders dated 26 November 2021.

8. Brett Ronald Eagle be disqualified from managing corporations for a period of two years pursuant to ss 206C(1) and 206E(1) of the Corporations Act.

Costs

9. GetSwift Limited (in liq), Bane Hunter and Joel Richard Stuart Macdonald be jointly and severally liable to pay 92.5% of ASIC's costs of and incidental to the penalty hearing.

10. Brett Ronald Eagle pay 7.5% of ASIC's costs of and incidental to the penalty hearing.

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

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION AND PREVIOUS FINDINGS

1 To adapt the famous remark of Ted Heath, GetSwift Limited (in liq) (**GetSwift**), and those primarily responsible for its wrongful conduct, could be described as representing the unacceptable face of start-up capitalism.

2 GetSwift was a public "early stage technology company" that generated operating losses in every year of its existence. Notwithstanding this, from an issue price of 20 cents in December 2016, within a year, its share price had risen to well over $4, prior to a trading halt announcement. It raised a total of $104,000,000 from investors in two placements. It became a market darling because it adopted an unlawful public-relations-driven approach to corporate disclosure instigated and driven by those wielding power within the company.

3 This eventually became apparent. Three days after the publication of an article in January 2018 in the *Australian Financial Review* entitled "GetSwift: Too Fast For its Own Good" (cogently explaining that GetSwift had failed to update the market about losing materially significant contracts), Get Swift Logistics Pty Ltd (**Get Swift Logistics**) (a wholly owned subsidiary) transferred $72,000,000 to a bank account held by GetSwift, Inc (another wholly owned subsidiary incorporated in the United States). On 22 August 2018, following the commencement of an investigation by the Australian Securities and Investments Commission (**ASIC**) in February 2018, Get Swift Logistics transferred an additional $8,500,000 to an offshore bank account held by GetSwift, Inc., bringing the total funds transferred to $80,500,000. These transactions were unexplained by any evidence before me.

4 More remarkably, well after the balloon had gone up, the share price had plummeted, a class action had been started, and at around the same time the evidence concluded in the liability phase of the ASIC regulatory case before me, GetSwift sought to re-domicile to Canada. GetSwift convinced another judge of this Court to allow it to do so, partly on the basis of an undertaking that GetSwift Technologies Limited (**GetSwift Technologies**) would not take any steps to wind up GetSwift and would indemnify GetSwift in relation to penalties imposed in this case or in relation to an adverse judgment in the class action. ASIC did not pre-emptively

make an application to me to restrain the removal of GetSwift from Australia when the highly unusual course was proposed during the pendency of the regulatory proceeding (although it is fair to record it did oppose the scheme approval in the separate proceeding).

5 The undertaking was not worth the paper it was written on. GetSwift Technologies (as GetSwift's only member) resolved in July 2022 to place GetSwift into voluntary liquidation. The absence of any likely return means the class action brought by shareholders (*Webb v GetSwift Limited & Anor*, NSD 580 of 2018) has now settled with no recovery by those who suffered loss by reason of GetSwift's breaches. In approving settlement of the class action on 2 February 2023, Murphy J observed that GetSwift's "own misconduct has now brought it to its knees" and that its actions represented a "scandalous episode of corporate misconduct". One can only agree with his Honour's observations.

6 What is the response of the people responsible for this dreadful state of affairs?

7 Mr Bane Hunter, the former executive chairman and chief executive officer, and principal instigator of the wrongdoing of GetSwift, has not returned to Australia to defend his position and did not appear at the penalty hearing. His lieutenant, Mr Joel Macdonald, after initially appearing at a case management hearing, has also not turned up to defend himself. He also signed the resolution winding up GetSwift.

8 After putting ASIC to proof in every aspect of its intricate case and requiring expenditure of vast public resources, neither Mr Hunter nor Mr Macdonald have shown the slightest degree of remorse or contrition, nor have they made any acknowledgment they behaved improperly. Additionally, ASIC has been unable to explore where all the money raised from investors went.

9 It is against this singular background that I am required to consider the civil penalty to be paid by the liquidated malefactor, Messrs Hunter and Macdonald and by Mr Brett Eagle (a solicitor who remains in Australia and who has, by contrast, engaged with the penalty case). I am also required to consider whether each of the individuals should be disqualified from managing corporations in the future and, if so, for how long. I have already said enough to make it obvious that this is an unusual civil penalty case, which has no ready analogue.

10 My mercifully unreported liability judgment in this matter (*Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing)* [2021] FCA 1384 (**Liability Judgment**)) was 2,618 paragraphs long. As I then explained, its size was the result of the case advanced by the ASIC being vast in scope, involving the need to wade doggedly through a prodigious documentary case and make innumerable findings. These reasons assume familiarity with the findings relevant to each the contraveners, and adopt the definition of terms in the Liability Judgment.

11 Despite this, it is worth sketching a broad summary of what was found, and the key contours of the saga and its cast.

B GETSWIFT AND THE RELEVANT PLAYERS

B.1 The Cast

12 As noted above, Mr Hunter was chief executive officer and executive chairman of GetSwift. Mr Macdonald was the so-called "President" and managing director; and Mr Eagle a non-executive director, and the principal, sole director and sole solicitor of Eagle Corporate Advisers Pty Ltd (**Eagle Corporate Advisers**). Mr Eagle held the position of "General Counsel and Corporate Affairs" at GetSwift for a period, pursuant to a retainer between Eagle Corporate Advisers and GetSwift.

13 A hierarchy existed among the directors. When it came to directing the affairs of the company, Mr Hunter was the man in charge, Mr Macdonald was his important ally, and Mr Eagle was a significantly less important player: Liability Judgment (at [1914]). There was an apparent promise made by Mr Hunter to Mr Macdonald that he would drive value "north of 1$b" and that he would "know you are taken care of for the future – I made you a promise – do or die on my part": Liability Judgment (at [11], [1953]).

14 Mr Hunter was protective in approaching the task of drafting announcements and insisted that he draft the ASX announcements because it involved a very "specific skill set" (Liability Judgment at [1369]) to get "results" (Liability Judgment at [1919(7)]), being to influence the market perceptions of the value of GetSwift's shares: Liability Judgment (at [1144]). Though less dominant, Mr Macdonald was not a mere follower of Mr Hunter. I found that he was acutely

aware of the forces at play and was *ad idem* with Mr Hunter about the importance of imparting good news to the market at opportune times and the significance of marking ASX announcements as price sensitive: Liability Judgment (at [1931]–[1932]).

15 Mr Eagle was somewhat on the outer: Liability Judgment (at [1915]–[1922], [1941]). He was a melancholy figure, often harried by Messrs Hunter and Macdonald. Many of his actions seemed directed to gaining their approval: Liability Judgment (at [1859], [1941]). Indeed, I accept Mr Eagle's evidence he was the subject of bullying at the hands of Mr Hunter. To his superiors in the hierarchy, he was a box to tick when it was convenient, and one to put to one side when it was not.

B.2 The Contraventions

16 I found that *first*, GetSwift engaged in 22 contraventions of s 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**), 40 contraventions of both s 1041H of the Corporations Act and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); *secondly*, that Mr Hunter was knowingly involved in 16 of GetSwift's 22 contraventions (and thereby contravened s 674(2A) of the Corporations Act), engaged in 29 contraventions of both s 1041H of the Corporations Act and s 12DA of the ASIC Act, and failed to exercise his powers and discharge his duties as a director with the degree of care and diligence required (and thereby contravened s 180(1) of the Corporations Act); *thirdly*, that Mr Macdonald was knowingly involved in 20 of GetSwift's 22 contraventions, engaged in 33 contraventions of both s 1041H of the Corporations Act and s 12DA of the ASIC Act, and failed to exercise his powers and discharge his duties as a director with the degree of care and diligence required; and *fourthly*, that Mr Eagle was knowingly involved in three of GetSwift's 22 contraventions of s 674; and failed to exercise and discharge his duties as a director with the degree of care and diligence required.

17 Not all these contraventions were of civil penalty provisions. Indeed, why ASIC sought repetitive declarations of contravention was a source of frustration and represented a considerable waste of time. Be that as it may, annexed to these reasons as **Annexure A** is a summary table of the declarations made as to contraventions to which a pecuniary penalty can apply.

C GETSWIFT'S PRESENT POSITION

18 Before proceeding, it is well to outline evidence that was not relevant to the Liability Hearing or has come to light since, including as to GetSwift's present financial position.

19 As noted above, ASIC opposed the "top hat" scheme of arrangement proposed to effect the re-domiciliation of GetSwift to Canada. One of the key concerns raised by ASIC during the course of the separate scheme proceeding was that following implementation of the scheme, GetSwift would have no assets within Australia to meet any adverse judgment: Affidavit of Anthony Vardy affirmed 12 August 2022 (at [33]) (**August Vardy Affidavit**). As part of the proceeding, ASIC requested information from GetSwift including: what assets, including any cash in bank accounts, were held by GetSwift within Australia; and what assets held within Australia at that time (if any) would remain within Australia following implementation of the scheme: August Vardy Affidavit at [34]).

20 The solicitors for GetSwift informed ASIC that the principal assets of GetSwift were its shareholdings in subsidiaries which comprise the GetSwift Group (August Vardy Affidavit at [35]):

> Those subsidiaries own various assets located both within Australia and throughout the world … In the event a money judgment were to be entered against GetSwift following the implementation of the Scheme and that judgment was not satisfied, a liquidator could be appointed by the court to liquidate the assets of GetSwift for the benefit of its creditors. Any such liquidator would, through GetSwift's ownership of its subsidiaries, control all of the companies comprising the GetSwift Group and the assets owned by those subsidiaries, regardless of the geographic location of those assets … following implementation of the Scheme, Holdco intends not to redeploy or transfer any of GetSwift's assets, other than the movement of cash amongst subsidiaries in the ordinary course of business for purposes such as working capital and projects.

21 On 13 January 2021, the scheme of arrangement was implemented. From that date, the common shares of GetSwift Technologies were listed on the NEO Exchange (**NEO**), a Canadian stock exchange based in Toronto.

22 On 15 January 2021, GetSwift was removed from the official list of the Australian Securities Exchange (**ASX**). On the same day, GetSwift Technologies started trading on the NEO at $2.05 Canadian Dollars.

23 But the end was relatively near. Management Reports from GetSwift Technologies circulated in February and May 2022 indicated that there was doubt as to whether GetSwift Technologies would "continue as a going concern" and "reali[s]e its assets and extinguish its liabilities in the normal course of business and at the amounts stated in the financial report".

24 As I have already mentioned, GetSwift was placed into voluntary liquidation on 29 July 2022. Ms Catherine Conneely and Mr Rahul Goyal of KordaMentha were appointed as liquidators: August Vardy Affidavit (at [56]).

25 On 6 October 2022, GetSwift Technologies released to the NEO a media release entitled "GetSwift Sale Process and Auction Completed, Sale of Company's SaaS assets Approved". Around a month later, GetSwift, Inc filed a document entitled "Declaration of Joel Macdonald in support of motion for approval of third amended to asset purchase agreement and supplemental sale order" in Case No 22-11057-MEW in the United States Bankruptcy Court in the Southern District of New York (**US Bankruptcy Proceeding**). In that Declaration, Mr Macdonald sets out further progress of the proposed assets sale by GetSwift Technologies.

26 On 28 October 2022, the liquidators of GetSwift issued to GetSwift's creditors a Statutory Report, which states that it is expected that the liquidation will be completed within six to twelve months of the date of the report.

27 On 26 November 2022, GetSwift, Inc and GetSwift Technologies each filed in the US Bankruptcy Proceeding documents entitled "Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy", which itemised payments or transfers made to officers, directors and anyone in control of GetSwift, Inc or GetSwift Technologies in the period 1 August 2021 to 31 July 2022: Affidavit of Anthony Vardy affirmed 25 January 2023 (at [11]–[12]) (**January Vardy Affidavit**). These documents reveal that between these dates, GetSwift, Inc paid $135,525.87 to Mr Hunter and $240,563.43 to Mr Macdonald respectively for "salary and employment benefits": January Vardy Affidavit (at [13]).

D ORDERS SOUGHT

28 As a consequence of my findings in the Liability Judgment, ASIC seeks the following final orders:

(1) in respect of GetSwift, an order pursuant to s 1317G(1A) of the Corporations Act that GetSwift pay to the Commonwealth a pecuniary penalty in the amount of $15,000,000 in respect of the declared contraventions of s 674(2);

(2) in respect of Mr Hunter:

(a) orders pursuant to s 206C(1) and/or s 206E(1) of the Corporations Act disqualifying Mr Hunter from managing corporations for a period of 12 years;

(b) orders pursuant to ss 1317G(1A) and 1317G(1) of the Corporations Act that Mr Hunter pay a pecuniary penalty in the amount of $1,000,000 in respect of the declared contraventions of s 180(1) and s 674(2A);

(3) in respect of Mr Macdonald:

(a) orders pursuant to s 206C(1) and/or s 206E(1) of the Corporations Act disqualifying Mr Macdonald from managing corporations for a period of 12 years; and

(b) orders pursuant to ss 1317G(1A) and 1317G(1) of the Corporations Act that Mr Macdonald pay a pecuniary penalty in the amount of $1,000,000 in respect of the declared contraventions of s 180(1) and s 674(2A);

(4) in respect of Mr Eagle:

(a) orders pursuant to s 206C(1) and/or s 206E(1) of the Corporations Act disqualifying Mr Eagle from managing corporations for a period of four years; and

(b) orders pursuant to ss 1317G(1A) and 1317G(1) of the Corporations Act that Mr Eagle pay a pecuniary penalty in the amount of $150,000 in respect of the declared contraventions of s 180(1) and s 674(2A); and

(5) an order that the defendants be jointly and severally liable for, and pay, ASIC's costs.

29 For the reasons that follow, I have determined to make a pecuniary penalty order against each of the four defendants and disqualification orders against Messrs Hunter, Macdonald and Eagle.

E THE CONDUCT OF THE HEARING

30 As noted above, when the matter was called on the first day of hearing, there were no appearances entered for GetSwift, Mr Hunter or Mr Macdonald. This came as no surprise, as the only parties to put on material were ASIC and Mr Eagle, and ASIC had faced issues contacting Mr Hunter and Mr Macdonald.

31 The timetabling orders I made in July 2022 included orders for substituted service pursuant to s 37P of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and r 10.24 of the *Federal Court Rules 2011* (Cth) at new email addresses (and, in the case of Mr Hunter, via the social media platform LinkedIn). Indeed, the Affidavit of Karl James Barnett affirmed 25 January 2023 (at [4]–[37]) (**Barnett Affidavit**) traces ASIC's attempts to reach Messrs Hunter and Macdonald, and the eventual need for ASIC to send documents to an alternate email address for Mr Macdonald in order to bring them to his attention, following a slew of "Delivery Failure Notifications" upon sending documentation to Mr Macdonald. Two emails sent by my Associate in order to confirm listing arrangements in the days preceding the hearing also resulted in bounce-back "Delivery Failure Notifications": Barnett Affidavit (at [30]). Despite this, I am amply satisfied that each of Mr Hunter and Mr Macdonald were fully aware of the hearing.

32 When the matter was called on, another notable absence from the court room was Mr Eagle, who had sworn no affidavit evidence and intended to give no evidence *viva voce.* Counsel for Mr Eagle informed the Court she had, however, been instructed to provide a statement on behalf of Mr Eagle. I informed counsel that I would not be receiving what appeared to be a regulatory proceeding equivalent of a "dock statement", and noted if Mr Eagle wished to put material before the Court, including evidence concerning contrition and any other relevant evidence, then he should step into the witness box and give evidence on his oath. After an adjournment to allow counsel to obtain instructions, Mr Eagle decided to give evidence.

33 ASIC relies upon my findings of fact in the Liability Judgment, the evidence relied upon at the Liability Hearing, and six further affidavits. Mr Eagle also relies on the findings made in the Liability Judgment, the documents tendered in the Liability Hearing, and affidavits from two

"character witnesses", Messrs Benjamin Chilstrom (affirmed 21 September 2022) (**Chilstrom Affidavit**) and Marc Skjellerup (sworn 23 September 2022) (**Skjellerup Affidavit**).

F LEGAL FRAMEWORK

F.1 Penalties

General Principles

34 Once a declaration of contravention of a civil penalty provision has been made under s 1317E, the Court may order a person to pay a pecuniary penalty under s 1317G. The word "may", of course, allows a discretion: *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131; (2003) 179 FLR 1 (at 165 [748] per Giles JA).

35 The precise statutory test for the imposition of a pecuniary penalty turns on the type of civil penalty provision in respect of which the Court has made a declaration. The contraventions in this case relate to: ss 674(2) and 674(2A) of the Corporations Act, "financial services civil penalty provisions" (as defined in s 1317DA); and s 180(1), a "corporation/scheme penalty provision" (as defined in s 1317E). I will return to the applicable tests in due course, but before doing so, it is appropriate to canvass the foundational principles.

36 Those principles were recently distilled by the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 96 ALJR 426. Although that case concerned s 546 of the *Fair Work Act 2009* (Cth), the observations of the plurality have since been applied to analogous civil penalty regimes (see, for example, *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 (at [129]–[131] per Yates, Abraham and Cheeseman JJ)), relevantly including the Corporations Act and the ASIC Act: *Australian Securities and Investments Commission v Squirrel Superannuation Services Pty Ltd* [2022] FCA 702 (at [60] per Burley J); *Australian Securities and Investments Commission v MobiSuper Pty Limited* [2022] FCA 990 (at [112] per Charlesworth J).

37 *First,* subject to the statutory scheme in question, the primary (if not sole) purpose of a civil penalty is the promotion of the public interest in compliance with the provisions of the Act in question by the deterrence of further contraventions of that Act: *ABCC v Pattinson* (at 431 [9] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). Importantly for the purposes

of this case, retribution, denunciation and rehabilitation have no part to play: *ABCC v Pattinson* (at 433 [16]).

38 *Secondly*, the power to order a person to pay a pecuniary penalty under s 1317G of the Corporations Act is a discretionary one, which must be exercised judicially, congruently with the aims and purposes of the Act: *ABCC v Pattinson* (at 437 [40]).

39 *Thirdly*, the process of fixing the quantum of a penalty is one of "instinctive synthesis": *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (at 37–38 [44] per Jagot, Yates and Bromwich JJ). The Court is not unanchored, however, as there must be some reasonable relationship between the theoretical maximum and the final penalty imposed: *ABCC v Pattinson* (at 440 [53], citing *ACCC v Reckitt Benckiser* at 63 [156]). The following factors have emerged as possible relevant considerations, but not a "rigid catalogue" (*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (at 580 [91] per Buchanan J); *ABCC v Pattinson* (at 433 [18])), and were summarised by French J in *Trade Practices Commission v CSR Limited* (1991) ATPR ¶41-076 (at 52,152–53) as follows:

> (1) The nature and extent of the contravening conduct.
>
> (2) The amount of loss or damage caused.
>
> (3) The circumstances in which the conduct took place.
>
> (4) The size of the contravening company.
>
> (5) The degree of power it has, as evidenced by its market share and ease of entry into the market.
>
> (6) The deliberateness of the contraventions and the period over which it extended.
>
> (7) Whether the contravention arose out of the conduct of senior management or at a lower level.
>
> (8) Whether the company has a corporate culture conducive to compliance with the [Act in question], as evidenced by educational program[me]s or other corrective measures in response to an acknowledged contravention.
>
> (9) Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the [Act in question] in relation to the contravention.

40 I pause here to note that the need to avoid adopting a checklist approach has been brought into even sharper focus following *ABCC v Pattinson*. The overriding need to focus on what is necessary for specific and general deterrence is the key, and the above matters are important insofar as they inform the remedial response necessary to secure the objects of deterrence.

41 *Fourthly*, the Court must arrive at a figure with a view to ensuring that the penalty is not such as to be regarded as "an acceptable cost of doing business": *ABCC v Pattinson* (at 433 [17]); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (at 659 [66] per French CJ, Crennan, Bell and Keane JJ), citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 (at 265 [63] per Keane CJ, Finn and Gilmour JJ). Persons engaged in trade and commerce must be deterred from the "cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention": *Singtel Optus v ACCC* (at 265 [63]).

42 *Fifthly*, careful attention to the maximum penalty may be required because, balanced with all other relevant factors, it provides a yardstick: *Australian Competition and Consumer Commission v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 (at [43] per Murphy J) citing *ABCC v Pattinson* (at 440 [52]–[54]).

43 *Sixthly*, it has been said that even if a company is in liquidation, it may still be appropriate to order that it pay penalties as a measure of the Court's disapproval of the contraventions, and the seriousness of the contraventions: *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq)* [2017] FCA 521 (at [26] per Bromwich J). But following *ABCC v Pattinson* (at 431 [9]), it is important to note that the justification of any such order is not because of retribution but because a penalty in such circumstances can further the aim of general deterrence.

44 *Seventhly*, three principles commonly utilised in criminal sentencing also inform the Court's arrival at a penalty figure: *ABCC v Pattinson* (at 438–439 [44]–[45]).

45 The *first* is the so-called "course of conduct" or "one transaction" principle. In *Australian Securities and Investments Commission v Westpac* [2019] FCA 2147 (at [264]), Wigney J explained that "where there is an interrelationship between the legal and factual elements of

two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality". Put another way, where conduct engaged in by an offender may technically comprise a number of separate offences, if that conduct can fairly be characterised as a single act or course of conduct, the sentences imposed should be attuned to reflect that fact and avoid double punishment: *Australian Competition and Consumer Commission v Yazaki* [2018] FCAFC 73; (2018) 262 FCR 243 (at 294–295 [227]–[229] per Allsop CJ, Middleton and Robertson JJ); *ASIC v Westpac* (at [264] per Wigney J).

46 The *second* is the "totality" principle, which requires the Court to look at the entirety of the offending and determine the most appropriate sentence for all the offences taken together: *ASIC v Westpac* (at [269] per Wigney J); *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2019] FCA 786; (2019) 370 ALR 637 (at 691 [240]–[241] per Perram J).

47 *Thirdly* and finally, parity and equal justice are relevant factors in determining the appropriate penalty: *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714; (2009) 259 ALR 116 (at 173 [319]–[322] per Gzell J); *Australian Securities and Investments Commission v Flugge (No 2)* [2017] VSC 117; (2017) 342 ALR 478 (at 491 [69]–[72] per Robson J). Ultimately, however, each case turns on its facts, so a review of penalties imposed in past cases is of limited utility.

48 I hasten to add, as emphasised by the plurality in *ABCC v Pattinson* (at 432 [14]), that there are, of course, limits to the "transplantation" of principles governing criminal sentencing to civil penalty regimes. Again, the focus must be on the promotion of the public interest in compliance with the relevant statutory norms by specific and general deterrence. The only "proportionality" which falls for consideration is the need to strike a "reasonable balance between deterrence and oppressive severity": *ABCC v Pattinson* (at 437–438 [41]).

The Pecuniary Penalty Regime under the Corporations Act

49 As is already evident, the contraventions in this case relate to: ss 674(2) and 674(2A) of the Corporations Act, "financial services civil penalty provisions" (as defined in s 1317DA); and s 180(1), a "corporation/scheme penalty provision" (as defined in s 1317E).

50 The relevant tests to be applied to contraventions of financial services civil penalty provisions and corporate/scheme penalty provisions differ slightly. Both are furnished in s 1317G, which, at the times material to this case, provided as follows:

> **1317G Pecuniary penalty orders**
>
> *Corporation/scheme civil penalty provisions*
>
> (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
>
> (aa) the contravention is of a corporation/scheme civil penalty provision; and
>
> (b) the contravention:
>
> (i) materially prejudices the interests of the corporation, scheme or fund, or its members; or
>
> (ii) materially prejudices the corporation's ability to pay its creditors; or
>
> (iii) is serious.
>
> *Financial services civil penalty provisions*
>
> (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
>
> (aa) the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G); and
>
> (b) the contravention:
>
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
>
> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation, scheme or fund, the

members of that corporation, scheme or fund; or

(iii) is serious.

(1B) For the purposes of subsection (1A), the relevant maximum amount is:

(a) $200,000 for an individual; or

(b) $1 million for a body corporate.

51 As can be seen, the requisite satisfaction in respect of each type of provision rests on "material prejudice" to relevant parties, or the "seriousness" of the relevant contraventions.

52 There do not appear to be settled principles as to what is required for "material prejudice": *LM Investment Mgmt Ltd v Drake* [2017] QSC 34 (at [47] per Jackson J). Notwithstanding this, a number of indicators may be drawn out from the authorities, including:

(1) in *ASIC v Macdonald (No 12)*, Gzell J observed (at 181 [401]) (in the context of continuous disclosure and share price fluctuations) that "material prejudice" for the purposes of s 1317G(1) necessitates the question of whether a reasonable person "would expect the information to have a material effect on the market price"; and

(2) in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 (at 117 [134]), Santow J considered that material prejudice within the meaning of s 1317G(1) flowed from a concatenation of nine transactions which involved, among other things, the payment of funds to a company controlled by Mr Adler, and in turn, the purchase of various technology and communication stocks, in respect of which significant loss was suffered.

53 Whatever the precise ambit of the notion of "material prejudice", it plainly exists where a company was at a very real risk of being materially worse off because of the contraventions.

54 There is greater clarity around what constitutes a "serious" contravention. Perhaps unsurprisingly, it seems that the vast majority of the authorities rely on the seriousness of a contravention to enliven s 1317G, rather than any material prejudice caused. While "serious" is not defined in the Corporations Act, the authorities indicate that a contravention is serious for the purposes of s 1317G if it is grave or significant (*Australian Securities Commission v Donovan* (1998) 28 ACSR 583 (at 608 per Cooper J); *Australian Securities and Investments*

Commission v Citrofresh International Limited (No 3) [2010] FCA 292; (2010) 268 ALR 303 (at 313 [34] per Goldberg J)) or weighty, important, grave and considerable (*Australian Securities and Investments Commission v Lindberg* [2012] VSC 332; (2012) 91 ACSR 640 (at 669 [133] per Robson J)). Conduct leading to market distortion, or inaccurate information in the market, has been recognised in other cases as "serious": *ASIC v Citrofresh* (at 313 [34] per Goldberg J); *ASIC v McDonald (No 12)* (at 171–172 [310] per Gzell J); *Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 698; (2014) 101 ACSR 46 (at 55 [58] per Middleton J). Whether a contravention is "serious" is, again, ultimately a question of fact: *Australian Securities and Investments Commission v Rio Tinto Limited (No 2)* [2022] FCA 184 (at [36] per Yates J).

55 Finally, the maximum penalty for each contravention of s 674(2) is $1,000,000, while the maximum applicable penalty for each contravention of ss 674(2A) and 180(1) of the Act is $200,000: s 1317G(1B). While the maximum penalties were increased on 13 March 2019, those new maximum penalties do not apply to the contraventions established in this matter by operation of s 1657. The value of the penalty unit is that at the time of the contravention: *Murrihy v Betezy.com.au Pty Ltd (No 2)* [2013] FCA 1146; (2013) 221 FCR 118 (at 127 [28] per Jessup J).

F.2 Disqualification

56 Part 2D.6 of the Corporations Act concerns, as suggested by its title, "Disqualification from managing corporations". Relevantly, s 206C provides as follows:

> **206C Court power of disqualification - contravention of civil penalty provision**
>
> (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) a declaration is made under:
>
> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
>
> (ii) section 386-1 (civil penalty provision) of *the Corporations (Aboriginal and Torres Strait Islander) Act 2006* that the person has contravened a civil penalty provision (within the meaning of that Act); and
>
> (b) the Court is satisfied that the disqualification is justified.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

57 As can be seen, the person's conduct and "any other matters that the Court considers appropriate" may be considered by the Court under s 206C(2).

58 Section 206C has been referred to as the "centrepiece" of the disqualification provisions under the Corporations Act: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 (at 320 [56] per Finn, Stone and Perram JJ). ASIC also raises s 206C's close companion, s 206E. Section 206E(1) provides that on application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(i) has at least twice been an officer of a body corporate that has contravened this Act … while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

(ii) has at least twice contravened this Act … while they were an officer of a body corporate; or

(iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and

(b) the Court is satisfied that the disqualification is justified.

59 In determining whether the disqualification is justified, s 206E(2) provides that the Court may have regard to: (a) the person's conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate. The criteria relevant to the exercise of the Court's discretion under this section are the same as those surveyed above in relation to s 206C. Hence, as may be evident on the face of the provisions, and in the light of the facts of this case, nothing turns on whether any disqualification order I make is made under s 206C or s 206E.

60 In *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 (at 152 [48]), McHugh J described the judgment of Santow J in *ASIC v Adler* as the leading authority on the Court's disqualification power. I do not propose to reconvey these oft-cited principles here, other than to highlight the following, which summary also draws upon the principles set out by Middleton J in *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 (at 445–449 [104]–[110]).

61 Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards: *ASIC v Adler* (at 97–99 [56] per Santow J). An order also seeks both general and personal deterrence, though it is not punitive: *ASIC v Adler* (at 97–99 [56] per Santow J); *ASC v Donovan* (at 603–607 per Cooper J). Protection of the public also envisages protection of individuals who deal with companies, including consumers, creditors, shareholders and investors: *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 (at [220] per Gordon J).

62 The Court is required to be satisfied not only that an order for disqualification should be made, but that the period of disqualification is justified: *Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4)* [2021] FCA 1578; (2021) 158 ACSR 196 (at 214 [75] per Banks-Smith J). The length of the period of disqualification and the seriousness of the contraventions in question are correlative. The following factual circumstances fall to be considered:

(1) the character of the offenders (including honesty and competence);

(2) the nature of the breaches;

(3) the extent of the losses incurred;

(4) the structure of the companies and nature of their business; and

(5) the propensity for offenders to reform or reoffend, as well as any lack of contrition or remorse.

63 Ultimately, however, these principles and the earlier cases from which they are derived provide guidance only: *Australian Securities and Investments Commission v Beekink* [2007] FCAFC 7; (2007) 238 ALR 595 (at 607 [112] per Mansfield, Jacobson and Siopis JJ).

64 Finally, in an appropriate case, the Court may make both a pecuniary penalty order and a disqualification order. The cases suggest, however, that the purposive bases for such orders differ somewhat. In *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; (2022) 403 ALR 67 (at 103 [144]), Allsop CJ, Jackson and Anderson JJ noted that disqualification orders have been said to have elements of retribution, deterrence, reformation and mitigation as well as the objective of protection of the public: see also *Rich v ASIC* (at 152 [52] per McHugh J). The Full Court (at 103 [144]) relied upon an explanatory paper accompanying the first draft of the *Corporate Law Reform Bill 1992* (Cth), which stated (at [178]) that the question is whether the defendant's conduct, while not attracting criminal liability, "was so reprehensible and had such serious consequences as to warrant an order prohibiting the person from managing a corporation".

65 The corollary is, as explained by the Full Court (at 102 [143]–[144]), that the long-standing practice of considering the question of disqualification prior to the question of a pecuniary penalty is sound because the primary aim of disqualification orders is the protection of the public, while the purpose of a pecuniary penalty is to act as a specific and general deterrent to the public against repetition of like conduct. I have adopted this course in Sections H–J which follow.

F.3 The Court's Approach to the Present Case

66 Having canvassed the guiding principles, I now turn to the appropriate orders to be made against the four defendants. In determining the appropriate penal response, I have had regard to all of the above principles. As will be seen, given that the task before the Court is instinctive, I have fastened upon several aspects in each conclusion ultimately reached, focussed on deterrence as the touchstone and, in the end, having appropriate regard to totality. To my mind, this approach is apposite in the light of *Pattinson*, and is more faithful to that decision than a "checklist-like" analysis.

G PENALTY AGAINST GETSWIFT

67 I agree it is appropriate for GetSwift to pay a penalty of $15,000,000 (as against the total available maximum of $22,000,000). I generally accept ASIC's oral and written submissions in this regard but set out below the matters I consider to be of particular importance.

G.1 Consideration

68 *First*, although GetSwift will not be able to contravene to like effect in the future, this does not mean that deterrence does not remain critical. General deterrence in a serious case such as the present, is of very real importance. GetSwift's size and financial position, the extent of the contraventions and the leading roles of executive directors are facts which support the need for a penalty which reflects the Court's disapproval of conduct of this kind.

69 *Secondly*, the proposed penalty takes account of the seriousness of the various contraventions: s 1317G(1A). ASIC's characterised the objective seriousness of the various contraventions as follows:

	DECLARED CONTRAVENTION	**OBJECTIVE SERIOUSNESS**
1.	Did not notify the ASX of the Fruit Box Agreement Information	Mid to upper
2.	Did not notify the ASX of the Fruit Box Termination Information	Upper
3.	Did not notify the ASX of the CBA Projection Information	Upper
4.	Did not notify the ASX of the Pizza Pan Agreement Information	Mid
5.	Did not notify the ASX of the APT Agreement Information	Mid
6.	Did not notify the ASX of the APT No Financial Benefit Information	Mid to upper
7.	Did not notify the ASX of the CITO Agreement Information	Mid
8.	Did not notify the ASX of the CITO No Financial Benefit Information	Mid to upper
9.	Did not notify the ASX of the Hungry Harvest Agreement Information	Mid
10.	Did not notify the ASX of the Fantastic Furniture Agreement Information	Mid

11.	Did not notify the ASX of the Fantastic Furniture Termination Information	Mid to upper
12.	Did not notify the ASX of the Betta Homes Agreement Information	Mid
13.	Did not notify the ASX of the Betta Homes No Financial Benefit Information	Mid to upper
14.	Did not notify the ASX of the Bareburger Agreement Information	Mid
15.	Did not notify the ASX of the NAW Agreement Execution Information	Upper
16.	Did not notify the ASX of the NAW Projection Information	Upper
17.	Did not notify the ASX of the Johnny Rockets Agreement Information	Mid to upper
18.	Did not notify the ASX of the Johnny Rockets Termination Information	Mid to upper
19.	Did not notify the ASX of the Yum MSA Information	Upper
20.	Did not notify the ASX of the Yum Projection Information	Upper
21.	Did not notify the ASX of the Amazon MSA Information	Upper
22.	Did not notify the ASX of the Second Placement Information	Upper

70 It is difficult to be precise about such evaluative matters, but as is evident from my reasoning in the Liability Judgment, this characterisation is broadly correct and the contravening conduct is certainly no less objectively serious than has been submitted by ASIC.

71 *Thirdly,* the period over which the contravening conduct took place is significant. It spanned an extended period with the longest contravention occurring over a period of approximately 22 months (the CBA Projection Information) and the shortest occurring over a period of seven hours (the Amazon MSA Information). Each contravention was a continuing contravention and it would be risible to suggest it was an isolated event, or a momentary lapse in judgment.

72 *Fourthly*, the wrongdoing was insidious. Moreover, it was tricky. As I found in the Liability Judgment, the omitted information (as defined at [1108]) would not have been discoverable upon enquiry by a third party.

73 *Fifthly*, the contravening conduct had real life consequences for the investing public, and materially prejudiced the interests of GetSwift's members: s 1317G(1A). I found each of the announcements caused an increase in GetSwift's share price (although the increases were of different magnitudes) and each produced an increase in the volume of shares traded: Liability Judgment (at [1248]). Further, the contravening conduct had the effect of misleading the market. The ASX announcements played a pivotal role in engendering the expectations of investors as to how GetSwift's business was performing: Liability Judgment (at [1260]). It clearly contributed to GetSwift attracting $99,000,000 from investors in two share placements between July and December 2017: August Vardy Affidavit (at [45]–[47]). The creation of a false market has caused significant loss for many people who purchased securities. These third party losses are now apparently irrecoverable.

74 *Sixthly*, and critically, the contraventions were the result of a plan and constituted deliberate conduct by the company, as part of a public-relations-driven approach to corporate disclosure executed by the company's most senior officers: Liability Judgment (at [1808]–[1894]). Those senior officers ignored the company's continuous disclosure policy and, obviously enough, the company took no remedial or disciplinary steps against them.

75 *Seventhly*, GetSwift did not cooperate with ASIC, putting ASIC to proof on virtually all matters (however obvious), at great expense to the public: *NW Frozen Foods v ACCC* (at 291); *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369; (2003) 130 FCR 406 (at 421 [47] per Lindgren J).

76 *Eighthly* and finally, there is no evidence of contrition or remorse by the two of the company's senior officers primarily responsible. Indeed, such evidence as there is points in the opposite direction. So much is demonstrated by announcements made in respect of this proceeding and a series of Twitter posts published by Mr Macdonald following the delivery of the Liability Judgment. The following tweet, posted on 11 November 2021, is an example:

> Very disappointed with yesterday's outcome.
>
> The court acknowledged we were a small Aussie startup doing a lot on the world stage. Growing a startup can be chaotic & messy. Not everything is perfect & people will attack you from all directions when you are disrupting an industry
>
> What gives up (sic) a level of peace is the narrative shifted dramatically over the past two years. From being falsely accused of making material new (sic) up, to what was judged as a measured new client PR campaign. A very different determination from the original allegations.
>
> Nonetheless the company maintains the position that it made its best efforts to alert shareholders of material updates as they came in.
>
> We will now digest the full judgment, assess our options and also look to learn from it (where we can). Our last 3-4 years as a company are proof of that.
>
> In the meantime, I probably need a beer or two to dust this all off. We will be back.

77 That Mr Macdonald feels a "level of peace" is not only cold comfort to those that have suffered loss, but also reflects a troubling and defiant lack of insight into the scale and seriousness of the wrongdoing set out in excruciating detail in the Liability Judgment.

78 Furthermore, this insouciance as to the findings in the Liability Judgment is reflected in the fact that there were no changes to the composition of the board even at this late stage. Messrs Hunter and Macdonald remained in their positions and were well remunerated with Mr Hunter earning a total of $1,791,328 of which 46% was "performance related" and Mr Macdonald earning a total of $1,616,019 with 51% of his remuneration being "performance related".

79 The final penalty figure reached is the result of a synthesis arrived at after considering a large number of contraventions. As such, in the end, it is necessary to stand back and ensure that the total figure reflects the totality of wrongdoing: *Garuda* (at [240] per Perram J). I am amply satisfied that the offending conduct, and the steps taken (and not taken) by the company in the wake of that conduct, justify a total penalty of $15,000,000. This figure (approximately 68% of the total available maximum of $22,000,000) may seem conservative to some, particularly in the light of the statutory maximum and the penalties ordered against offenders in a number of cases helpfully summarised by ASIC in oral and written submissions: see, for example, *ASIC v Rio Tinto (No 2)* (75% of statutory maximum for one contravention of s 674(2)); *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (in liq)* [2016] FCA 1488; (2016) 118 ACSR 43 (80% of statutory maximum in respect of one contravention of s

674(2)). Of course, the appropriate range for penalty should not be assessed by reference to the maximum potential penalty alone, not least where the contraventions relied upon may be considered to amount to an ongoing course of conduct: *ACCC v Yazaki* (at 291 [231], 296 [234] per Allsop CJ, Middleton and Robertson JJ). I simply refer to these (to a limited extent) roughly comparable cases to demonstrate why the figure arrived at seems to me to be appropriate in all the circumstances. The contraventions were serious, serial and at the heart of GetSwift's culture.

G.2 GetSwift's s 1317S Defence

80 For completeness, I should note that I have addressed GetSwift's pleading, at [278] of its defence to the second further amended statement of claim, that:

> if it is liable by reason of the claims against it based on alleged contraventions of s 674 of the Corporations Act (which is denied), then it acted honestly and having regard to all the circumstances of the case, ought fairly to be excused from any such liability (in whole, or in the alternative, in part) pursuant to s 1317S of the Corporations Act.

81 Matters relevant to relief under this section include: (1) whether the defendant acted honestly; (2) whether, having regard to all the circumstances of the case, the defendant ought fairly to be excused for the contravention; and (3) whether, as a matter of discretion, the Court should exercise its power to relieve the defendant in whole or part from any liability and, if in part, to what extent.

82 There is no evidence whatsoever before the Court to enliven any genuine consideration of this or any other defence. Accordingly, there is no cause to excuse liability, either in whole or in part.

H DISQUALIFICATION AND PENALTY AGAINST MR HUNTER

83 Turning to Mr Hunter, it is logical to start at the end: orders must be made disqualifying Mr Hunter, and, further, requiring him to pay to the Commonwealth a pecuniary penalty in respect of his wrongdoing. The protection of the public requires not only that Mr Hunter be deterred from further misconduct, but also that a pecuniary penalty order is made demonstrating that such conduct is deemed by the Court to be wholly unacceptable. Accordingly, while understanding the differences between the remedial responses of fine and disqualification

explained above, the following sections deal with disqualification and penalty together, traversing factors relevant to both enquiries. This course was also taken by ASIC in oral and written submissions.

H.1 ASIC's Case

84 ASIC's submissions emphasise that Mr Hunter's contravening conduct was the most serious (reflecting my findings in Liability Judgment [1914]–[1922]), but, as I raised at the hearing, somewhat curiously, ASIC proposed the same penalty and period of disqualification for Messrs Hunter and Macdonald (namely a penalty of $1,000,000 and a disqualification period of 12 years). As will become evident, although I consider ASIC's submissions as to the terms of the penalty and disqualification orders to be made against Mr Macdonald to be cogent and appropriate, Mr Hunter's more egregious conduct and parity demand a period of disqualification and penalty for Mr Hunter somewhat higher than contended for by ASIC.

85 ASIC relies on the following factors as being relevant to disqualification and penalty in Mr Hunter's case.

86 The *first* is Mr Hunter's position and personal knowledge. Mr Hunter was the ringleader: he was the main draftsman behind the ASX announcements, and he acted with knowledge and awareness of GetSwift's continuous disclosure obligations and material company information (see, for example, the "Hunter Omitted Information", as defined at [1977] of the Liability Judgment).

87 *Secondly*, ASIC relies on my findings that Mr Hunter acted deliberately (see, for example, Liability Judgment (at [1817]) ("Bit by bit until we get a $7.50 share price :)").

88 *Thirdly,* ASIC points to my conclusion in the Liability Judgment that Mr Hunter was motivated by his own financial gain. Mr Hunter's remuneration for his role at GetSwift included not only a salary but shares and performance-based bonuses: August Vardy Affidavit (at [21] and [82]–[83]). He also received performance rights, to the value of $268,820 in FY 2017, $1,738,605 in FY 2018, [83(b)]), $212,295 in FY 2019 and $327,077 in FY 2020: August Vardy Affidavit (at [81(a)], [83(b)], [84(a)], [85(a)]).

89 *Fourthly,* ASIC points to the fact that Mr Hunter has not demonstrated any contrition, nor has he cooperated with ASIC. He made no admissions to any of the contraventions or elements of the contraventions.

H.2 Consideration

90 It is important to recognise at the outset that a number of my findings as to contravening conduct arose out of the same factual substratum. To this end, ASIC has identified Mr Hunter's "distinct" contraventions, in order to avoid double punishment. This course is sensible and principled, and I have adopted it. Accordingly, where, for example, Mr Hunter contravened s 674(2A) in respect of a particular ASX announcement and also contravened s 180(1) by causing or permitting GetSwift to contravene s 674(2) in respect of the same ASX announcement, I have only counted a single contravention, being the primary contravention of s 674(2A).

91 On this approach, there are 32 distinct contraventions by Mr Hunter, comprising the 16 contraventions of s 674(2A) of the Act and an additional 16 distinct contraventions of s 180(1) which are not derivative of, or overlapping with, the contraventions of s 674(2A). These distinct contraventions are bolded and underlined in the table in Annexure A.

92 I am of the view that Mr Hunter must be disqualified for a period of 15 years. Moreover, I am satisfied that his conduct had such serious consequences on the investing public and was so materially prejudicial to the interests of GetSwift and its members that he should also pay a pecuniary penalty of $2,000,000. Anything less would be insufficient. In addition to the factors emphasised by ASIC, which I generally accept, the following factors loom large in my analysis.

93 *First,* notwithstanding that Mr Hunter is no longer a director of GetSwift and GetSwift is in liquidation, there is still a need for specific deterrence and protection of the public to ensure that Mr Hunter does not act in a similar way if he ever had the chance (after his period of disqualification has expired).

94 The contemporaneous communications set out in such detail in the Liability Judgment demonstrate beyond peradventure that Mr Hunter is a man who is presently wholly unsuited to

be in a position of responsibility in a public company. Two incidents are worth recounting as they are representative and revelatory of his, for want of a better term, "leadership" style.

95 The *first* is set out in the Liability Judgment (at [15]–[18]): at a September 2017 board meeting in which she was participating remotely, Ms Jamila Gordon (also a director of GetSwift) was told by Mr Hunter she was on the "hot spot" in relation to her questions as to the materiality of an ASX announcement. Mr Eagle, at the apparent behest of Mr Hunter, then spoke uninterrupted for about 12 minutes, apparently from a document, upbraiding her for "governance issues", including for allegedly causing delays in making announcements. Ms Gordon (an impressive woman who escaped civil war in Somalia in 1991 and studied English at a TAFE college before university) was trying to write down what was being said. She could not keep up, and asked for a copy of the document that Mr Eagle was reading from so she could counter the criticism properly. Mr Hunter insultingly responded by saying words to the effect of, "Let me put it to you in English you can understand" and then repeated the details of her perceived deficiencies at similar length. She eventually responded:

> [A]s a director I'm accountable having these announcements released without my total understanding and having a board meeting where… my objections, if I have objections, are minuted, therefore I have huge exposure and responsibility and that's why I'm raising these issues.

96 To this Mr Hunter responded: "that's why you have director's insurance."

97 This incident illustrates a number of aspects of Mr Hunter's personality that emerged through a close review of the contemporaneous documents set out in such detail in the Liability Judgment. I observed (at [13]) that Mr Hunter displayed a management style that owed little to the influence of the late Dale Carnegie. I further noted that he was demanding, forceful and regularly brusque to the point of rudeness. Upon re-reading the evidence and reflecting on my findings, including after listening to the evidence of Mr Eagle, and in the absence of any explanation by Mr Hunter, I would go further: Mr Hunter was not only a bully, but also someone who had a laser-like focus on making money for himself and Mr Macdonald. If that involved breaking the law regulating financial markets, or exposing GetSwift to third party liability, that was of little concern to him.

98 The only one who comes out of these events with credit is Ms Gordon. It was no doubt difficult to stand up to Mr Hunter, but she had the courage to do so. But consequently, she paid a predictable price. By 24 October 2017, Mr Hunter was writing to Ms Gordon, his fellow director, as follows:

> [D]o NOT reach out to our customers where you do not own the relationship without prior approval -you were explicitly told you are not to get involved with commercial discussions. You only own the CBA relationship that's it. You are NOT authorized to negotiate on behalf of the company with any other entity. This is an instant termination for cause if you do.

99 This unprofessional, hectoring, and minatory tone recurs time and again in Mr Hunter's communications. Ms Gordon was removed from GetSwift shortly after this email.

100 The *second* example occurred on 24 February 2017, when, following the release of the Fruit Box announcement, Mr Hunter sent an email to Ms Gordon in which he stated: "Bit by bit until we get to a $7.50 share price :)". He then sent an email to his fellow directors in which he wrote: (Liability Judgment at [10]):

> To date since IPO listing price I am pleased to inform you that the company [sic] share price is up 140% - the strongest performer on the ASX. **That means that I have driven the market value of the company up by more than $36m in 3 months.** We are now worth more than $63M and heading towards $200m in very short order. **These results are not accidental.**
>
> …
>
> This company if we achieve or our objectives in 2 years [*sic*] be valued well above the $800M + market cap, and **no excuse will stand in our way to reach that goal**. The rewards will be fantastic and amazing especially when you consider the timeline, so let's stay focussed now more than ever.
>
> (Emphasis added).

101 I have little doubt, after reading the whole of the evidence, that in Mr Hunter's mind, allowing "no excuse [to] stand in [the] way" of that "goal" included an insistence by anyone that the company act prudently and comply with the norms regulating disclosure. Mr Hunter directed and engaged in wrongful conduct over a period of more than 22 months.

102 *Secondly*, the penalty and disqualification period is appropriate to further the requirements of general deterrence. Hopefully others will think twice about adopting a strategy to influence the company's share price by the release of strategically placed ASX announcements which omit

material information that the market requires to make informed decisions. It will also reinforce that a director's continuous disclosure obligations are to be taken seriously.

103 Finally, although Mr Hunter is not presently in Australia and holds no directorships here, there is utility in the making of a disqualification order against him because he may return here. It is irrelevant to the relief sought in this case, and will be matter for others, as to whether a "Reciprocal Order" ought be made by the British Columbia Securities Exchange to prevent him from managing corporations in British Columbia, where he has most recently conducted business.

104 In short, there is no basis to conclude other than Mr Hunter is unrepentant and lacks any insight into his conduct. He should not be in charge of the affairs of a company. A long period of disqualification is necessary.

I DISQUALIFICATION AND PENALTY AGAINST MR MACDONALD

105 I accept ASIC's submission that Mr Macdonald ought to be disqualified for a period of 12 years and pay a penalty of $1,000,000. This relative outcome also now reflects differences in the findings made as to the conduct of Mr Macdonald as compared to Mr Hunter.

106 That said, much of what I have already said as to GetSwift and Mr Hunter is relevant to my determination as to Mr Macdonald. It suffices to add the following.

107 The facts underlying Mr Macdonald's declared contraventions are overlapping. Accordingly, I have identified 38 distinct contraventions by Mr Macdonald, comprising the 20 contraventions of s 674(2A) of the Act and an additional 18 distinct contraventions of s 180(1) which are not derivative of, or overlapping with, the contraventions of s 674(2A). These distinct contraventions are shaded in grey in the contraventions table in Annexure A.

108 Although I found that evidence concerning Mr Macdonald's fixation on share price was more limited than the evidence against Mr Hunter, the evidence nevertheless demonstrated that Mr Macdonald was engrossed with GetSwift's share price, including the impacts of any delay on the share price: Liability Judgment (at [1809]). As recorded above at [14], Mr Macdonald was *ad idem* with Mr Hunter in his approach to ASX announcements: Liability Judgment (at [1932]). He proceeded with a disregard for the integrity of the market.

109 Of real significance in Mr Macdonald's case is his lack of insight or contrition. His tweet on 11 November 2021 (set out above at [76]) reveals a lack of self-awareness or any reflection on his part.

110 Although I have real concerns as to Mr Macdonald's involvement in causing GetSwift to be wound up, in apparent breach of the undertaking and without explanation, I will put aside this matter for present purposes. My focus is on specific and general deterrence as informing the remedial response to the contraventions found against Mr Macdonald.

111 Mr Macdonald, although apparently in the thrall of Mr Hunter, was no mere cat's paw. As I have explained, he was an active and eager participant. This conduct, plainly enough, demonstrates that Mr Macdonald has little understanding or regard for his legal obligations as a director, when they get in the way of pursuing a strategy to make money.

112 The nature of his breaches, the extent of the losses incurred, his lack of insight and remorse, and his suggestable character taken together will, in all the circumstances, require a lengthy period of disqualification, but not quite as long as Mr Hunter.

113 Further, given the nature and extent of his contravening conduct; the amount of loss or damage caused; the deliberateness of the contraventions and the period over which it extended; Mr Macdonald's level of seniority as "President"; and his lack of co-operation, specific and general deterrence requires the penal response sought by ASIC.

J DISQUALIFICATION AND PENALTY AGAINST MR EAGLE

114 Finally, there is Mr Eagle.

115 Mr Eagle contravened s 674(2A) of the Corporations Act on three occasions, and contravened s 180(1) of the Corporations Act by causing or permitting GetSwift to contravene s 674(2) on five occasions.

116 As with Mr Hunter and Mr Macdonald, in order to avoid double punishment, it is necessary to identify Mr Eagle's "distinct contraventions". Of the contraventions of s 180(1) of the Corporations Act, three concerned the same conduct in respect of Mr Eagle's contraventions

of s 674(2A) of the Act. Therefore, five distinct contraventions fall to be considered in respect of Mr Eagle.

J.1 Mr Eagle's Submissions

117 As to penalty, Mr Eagle concedes that a pecuniary penalty should be imposed as a source of personal deterrence. He contends, however, that the Court should not be satisfied that Mr Eagle be disqualified for any period.

118 As the only member of the triumvirate to put on any evidence and submissions with respect to penalty and disqualification, it is necessary to address Mr Eagle's contentions, which may be summarised as follows.

119 *First*, Mr Eagle contends that the punitive element imposed by a disqualification order has already been inflicted because of the publicity generated by this proceeding. Mr Eagle points to a vast volume of media material published as to GetSwift's ASX announcements and the subsequent decline in GetSwift's share price and its insolvency. The Court should infer, it is said, that the public interest in Mr Eagle's role within GetSwift has damaged Mr Eagle's reputation as a director in Australia with the consequence that he is unlikely to be a director of a listed company (or a director of any company) in the foreseeable future. Further, Mr Eagle contends that he has suffered the public embarrassment of having the Court find that he engaged in contravening conduct, and that this all likely to have an adverse impact on his reputation as a legal adviser, particularly on corporate governance and compliance issues.

120 *Secondly*, Mr Eagle contends that a disqualification order is inappropriate because the public needs no protection as he is unlikely to engage in similar conduct in the future. The public notoriety surrounding his conduct means that he is unlikely to ever be appointed a director of an ASX listed company, or face the unique circumstances that he did as a non-executive director of GetSwift (see Liability Judgment at [1919(4), (8) and (9)]). Further, as an experienced solicitor who advises clients on compliance and governance issues, Mr Eagle contends that he is cognisant of the Court's findings and reasons, and accordingly, is objectively unlikely to engage in such contravening conduct in the future. The contraventions

were in 2017–2018. There is no suggestion, it is said, in the years passed, that there has been any further failure or misconduct by Mr Eagle.

121 *Thirdly*, Mr Eagle submits that to make a disqualification order is unnecessary, oppressive and out of all proportion to the Court's findings in respect of his contraventions. This is not a case where Mr Eagle's contraventions were part of a larger pattern of reckless or illegal conduct from which the public requires protection. GetSwift was Mr Eagle's first and only directorship of an ASX listed company. Additionally, it is said that the common theme of Mr Eagle's contraventions was Mr Eagle's failure to act to ensure disclosure of material information to the market, in circumstances where Messrs Hunter and Macdonald called the shots. Mr Eagle nonetheless relies on the Court's finding that he attempted to ensure GetSwift complied with its continuous disclosure obligations by seeking (unsuccessfully) to implement some rigour in the process of approving ASX announcements (Liability Judgment at [1942]).

122 *Fourthly*, Mr Eagle notes he was neither a full time non-executive director nor general counsel of GetSwift and during this time continued to practise as a solicitor through Eagle Corporate Advisers (see, for example, Chilstrom Affidavit at [8]). He reasonably expected Messrs Hunter and Macdonald to comply with their obligations in s 3 of the Continuous Disclosure Policy (as defined in the Liability Judgment at [29]). This reliance was not unreasonable given the clear directives from Messrs Hunter and Macdonald that ASX announcements could only be approved and released by them, and the scolding Mr Eagle received from Messrs Hunter and Macdonald when those dictates were not followed (Liability Judgment at [1369], [1919(4), (8) and (9)]).

123 *Fifthly*, Mr Eagle contends that the Court can be satisfied that his conduct while at GetSwift was unusual or uncharacteristic for him (Liability Judgment at [1940]), especially as a solicitor of many years' experience, advising clients on corporate governance and compliance. Mr Eagle is described as an excellent lawyer and a trusted adviser of clients (Chilstrom Affidavit at [1], [7] and [10]). Mr Eagle also volunteers for Marine Rescue NSW and is the Vessel Master at the Middle Harbour Unit, where he takes full responsibility for the vessel and its crew as they perform rescues and training drills (Skjellerup Affidavit at [11]).

124 *Sixthly*, Mr Eagle submits that he did not personally gain from his contraventions. The amounts received as a non-executive director of GetSwift comprised cash, salary and fees ranging between $21,720 and $71,806 per annum, which are modest amounts in the light of his experience and the nature of the legal and advisory services he provided.

125 *Seventhly*, it is said it would be oppressive and unjust for Mr Eagle to be disqualified from managing or being a director of his private family or service companies, including Eagle Corporate Advisers. Mr Eagle's sole source of income is derived from Eagle Corporate Advisers, and, to date, no allegations have been made against Mr Eagle regarding his management or directorships of the other companies of which he is a director, including Eagle Corporate Advisers. Mr Eagle submits that if he was unable to practise through Eagle Corporate Advisers, it would cause disruption to his clients and impair his practice which will cause him financial hardship.

126 *Eighthly*, Mr Eagle acknowledges that the Court's findings and contraventions against him are serious but at the low end of the scale. The Court did not find that Mr Eagle engaged in a deliberate course of conduct or that Mr Eagle deliberately failed to take the steps the Court found he should have taken. When Mr Eagle filed and served his amended defence following the close of ASIC's case, Mr Eagle did not plead any positive defences or press for relief under the excuse provisions of s 1317S or s 1318 of the Corporations Act. With regards to the appeal filed by Mr Eagle, that appeal relied upon (and was dependent upon) the success or otherwise of GetSwift's grounds of appeal. When GetSwift discontinued its appeal, Mr Eagle also discontinued.

127 *Tenthly*, it is said that prior to his involvement in GetSwift, Mr Eagle has previously had an unblemished record as a director of several Australian companies.

128 Finally, Mr Eagle rejects ASIC's characterisation that he did not cooperate with its investigations. He submits that he did cooperate by attending an examination on 13 June 2018. Further, given the number of contraventions alleged against Mr Eagle when the proceedings commenced, Mr Eagle was entitled to put ASIC to proof and, as the Court found in the Liability Judgment, Mr Eagle was ultimately successful in defending most of the allegations made

against him. Mr Eagle attempted, without success, to avoid a contested penalty hearing by seeking to agree on a penalty with ASIC. As I said in the Liability Judgment (at [2618]):

> … ASIC should provide … a version of a third further amended originating [process] which specifies, with particularity, the penal orders it now seeks against each of the contraveners.

129 Despite these occurrences, Mr Eagle contends that he (and the Court) were only informed of the relief ASIC sought against each of the defendants at a case management hearing on 12 July 2022 almost eight months after the Liability Judgment was handed down (T13.11–14.41).

130 With respect to the penalty of $150,000 sought by ASIC, Mr Eagle contends that the amount is well outside the range for low to mid-level serious misconduct. To ensure parity between the penalties, and taking into account the mitigating factors, Mr Eagle submits that any pecuniary penalty imposed by the Court ought not exceed $30,000.

J.2 Consideration

131 There is some force in aspects of Mr Eagle's submissions. I am satisfied in the light of the relevant principles that Mr Eagle should be disqualified for a period of two years and pay a penalty of $75,000.

132 While I accept Mr Eagle gave his evidence honestly, it had some troubling aspects. Three matters, to my mind, loom large in the evaluative assessment.

133 *First,* it is significant that by June 2017, it would have been blindingly obvious to anybody at GetSwift that there was something rotten going on. I accept, insofar as it goes, that Mr Eagle made at least some attempts to implement (among other things) some discipline in relation to ASX announcements. But that submission cannot overcome the fact that it was clear by that point Messrs Hunter and Macdonald were operating GetSwift in a manner that was liable to expose shareholders (and the public at large) to serious financial harm. In my view, the only rational explanation for Mr Eagle staying the course was the prospect of significant reward. The appropriate response as a director was to insist on fundamental changes to the heart of GetSwift's operations and its corporate governance or, failing those changes being implemented, to resign. Mr Eagle did neither. In part, I suspect that was because of difficulties he perceived in standing up to a bully.

134 *Secondly*, Mr Eagle seems to have an imperfect understanding of contrition and remorse, let alone any need to make amends for wrongdoing. In short, my strong impression after hearing his evidence is that he was trying to be honest but was struggling to demonstrate any real insight into his actions and their seriousness. Indeed, Mr Eagle appeared fixated on the harm that has been inflicted upon himself and his professional standing, but not necessarily the harm that was occasioned on others, including shareholders and the broader public. By way of example, Mr Eagle gave the following answers during cross-examination (at T33.34–47 and T38.27–34):

> The question's very straightforward. What have you done to make amends for the conduct you consider regrettable? **--- Make amends to whom?**
>
> Mr Eagle, could you kindly direct your attention to my question. If it's unclear, tell me what you consider unclear and then, answer it? --- In the broader context of make amends or, you know, how have I reacted, **as a professional, there are certain engagements that I have turned down because I felt it would not be workable to manage a level of integrity and a level of transparency with a particular client**, principally for reasons that are unique to the potential client. So certainly, that has changed in my general practice, the way I go about practicing. So that would be, sort of, make amends in the broader context, I guess. It's – certainly, it has increased my focus on how important these things are and even with some of the clients that I do still currently have, I do certainly raise these issues much more readily and with much more insistence than perhaps previously.
>
> …
>
> You do tell his Honour that you're contrite, don't you? --- Yes
>
> How do you say that manifests itself? --- Certainly in the expression that I've presented today, and I am glad for the opportunity to do that that the response of these matters, as I said, **is extremely regrettable from a professional standpoint**. I also mentioned that it certainly has changed how I focus on matters with the new projects and I do find myself much more front of mind, I guess, if I can describe it that way with respect to ensuring clients are made aware of governance issues.
>
> (Emphasis added).

135 It was a curious feature of Mr Eagle's evidence that he did not understand the first question to be directed not towards the consequences for himself, but the harm suffered by third parties. I am not doing a disservice to Mr Eagle by focussing on simply one question and answer. The impression I formed was based on the whole of his evidence and his manner of giving it.

136 At the end of the day, the disqualification and pecuniary penalty regime under the Act has at its heart the object of protecting the public: *ABCC v Pattinson* (at 437 [40]). Contrition in the relevant sense would involve turning one's mind to the harm suffered by members of the public

who purchased GetSwift securities, rather than the personal and professional embarrassment which flowed from the contravening conduct. Mr Eagle's evidence was immediately focussed upon the latter. It was not exactly lip service being given to contrition and remorse, but it did not demonstrate any real understanding of what these feelings actually are.

137 *Thirdly*, I consider it relevant that Mr Eagle did not speak up about the culture of bullying perpetuated by Messrs Hunter and Macdonald at GetSwift or do anything about it. During the hearing, I raised the incident with Mr Eagle that occurred at the board meeting in September 2017. Mr Eagle recalled the meeting and gave the following answers to the questions I asked of him (T41.46–42.26):

> Did you think that was disgraceful, what occurred at that meeting? --- My recollection on that point was it required a much more significant level of seriousness in light of the release of the annual report filing, and there were delays with the auditor, and we were at serious risk of missing that filing deadline. It was one occasion - - -
>
> Sorry, I don't think you understand the question I put to you. Do you think Mr Hunter saying those words to Ms Gordon was a disgraceful thing for a – one of your fellow directors to say to one of your other fellow directors? --- Yes, I do. Yes.
>
> Right. What did you do about it? --- I - - -
>
> Did you say – did you say to him, "That's a terrible thing to say. It's a disgrace that you say such a thing to a fellow director, and you're behaving like a bully"? --- No, I did not, regrettably.
>
> Right. Why not? --- Yes, regrettably, I suppose it was that same bullying that was impacting me, as well, in standing up to Mr Hunter.
>
> Yes. Well, if you're a director, and you form the view that the person primarily in charge with – dealing with directors and refusing to provide you with announcements and dealing you with as a bully, why, as a solicitor of the Supreme Court of New South Wales, didn't you do anything? --- I don't have an answer for that, your Honour.
>
> Yes, and do you think that that's conduct which falls well short of the conduct that you should have engaged in? --- Yes.
>
> Which is more than a matter of mere regret? --- Yes, I do. Yes.

138 While I accept that Mr Eagle was subjected to bullying, it would not have taken the bravery of Horatius to stand up for a fellow director and condemn Mr Hunter's conduct. Rather, at least at this meeting, Mr Eagle participated in the harassment of Ms Gordon. Ms Gordon was subjected to an even greater degree of bullying than Mr Eagle, but, cognisant of her responsibilities as a director, pushed back. This is not to suggest that Mr Eagle's mere status

as a solicitor exposed him to a more onerous set of responsibilities compared to Ms Gordon. Nonetheless, to my mind, it ought to have afforded Mr Eagle a greater insight into the consequences of his complicity, largely by reason of his passivity. This all says something about how he viewed and performed his role as a director.

139 Several other factors fortify my conclusion that some penalty and disqualification are appropriate in all the circumstances.

140 *First*, Mr Eagle possessed actual knowledge of the matters giving rise to the contraventions. In particular, he knew that investors expected client contracts would be announced once the client had completed a proof of concept or trial period, and after the First Quantifiable Announcement was made, that contracts being announced at a point in time when the financial benefit associated with them was secure, quantifiable and measurable. Mr Eagle knew the content of the relevant agreements and announcements, and knew that the inclusion of information in the client contract announcement (which stated, *inter alia*, that (a) clients had not yet commenced a trial or were still a trial period; (b) the exclusive term of the contracts were subject to completion of the trials and subject to termination; and (c) that there were important qualifications to be placed on the projections as to deliveries and revenue) would influence investors in making a decision whether to acquire or dispose of shares in GetSwift (Liability Judgment at [1912]). Mr Eagle was also aware of (and had approved) GetSwift's Continuous Disclosure Policy which set out the procedures and measures designed to ensure GetSwift complied with its continuous disclosure obligations (Liability Judgment at [1903]–[1906]).

141 *Secondly*, although I considered that the evidence failed to establish that Mr Eagle was operating like Messrs Hunter and Macdonald in respect of ensuring that the ASX announcements were timed and released in a way that would affect GetSwift's share price (Liability Judgment at [1954]), Mr Eagle was a beneficiary of any increase in GetSwift's share price. On 9 December 2016, Instanz Resources Pty Ltd (of which Mr Eagle was the director and shareholder) received 1,646,341 ordinary shares in GetSwift (August Vardy Affidavit at [96(d)] and [111]). In addition, Mr Eagle received 1,646,341 performance rights on 16 December 2016 (August Vardy Affidavit at [20]). The performance rights vested in accordance with a certain number of deliveries per month and the revenue of GetSwift and were achieved

by June 2020 (August Vardy Affidavit at [78]–[79]). The vesting of performance rights granted to Mr Eagle were to the value of $29,869 in 2017 (August Vardy Affidavit at [96(c)]) and $117,720 in 2018 (August Vardy Affidavit at [98(a)]).

142 *Thirdly*, Mr Eagle was specifically involved in the client agreements with Pizza Pan, Yum, and Amazon, and, although there is no evidence that Mr Eagle requested that the relevant ASX announcements be marked as price sensitive, he was copied into communications where Messrs Hunter and Macdonald instructed Mr Banson to mark the relevant announcements as price sensitive. As I recorded in the Liability Judgment, Mr Eagle made no independent evaluation as to whether the announcement should be marked as price sensitive and took a passive role in contrast to Messrs Hunter and Macdonald: Liability Judgment (at [1952]–[1955]).

143 *Fourthly*, the contravening conduct occurred over a long period with one contravention spanning 11 months (in connexion with the YUM MSA Information) and the shortest contravention occurring over 25 days (in respect of the NAW Agreement Execution Information). Mr Eagle's conduct was repeated in respect of five distinct contraventions.

144 *Fifthly*, while Mr Eagle attended an examination at the request of ASIC on 13 June 2018, Mr Eagle did not make any admissions as to the contraventions alleged, nor any elements of any contravention (although he has engaged constructively with the litigation at the penalty phase and instructed counsel who skilfully advanced submissions on his behalf).

145 Having noted all this, I consider the period sought by ASIC for disqualification to be excessive and the fine to be disproportionate to my findings as to Mr Eagle's conduct, particularly relative to the conduct of those primarily responsible.

146 I accept Mr Eagle's role within GetSwift has damaged his reputation and he is unlikely to be a director of a listed company in the foreseeable future. Relevant to specific deterrence, I further accept he has suffered public embarrassment, which is likely to be salutary and, moreover, it is likely to have an adverse impact on Mr Eagle's reputation as a legal adviser, particularly on corporate governance and compliance issues.

147 It may be accepted that the common theme of Mr Eagle's contraventions was his failure to take steps or to act to ensure disclosure of material information to the market, in circumstances

where Messrs Hunter and Macdonald called the shots and that he did, at least, attempt to unsuccessfully implement some rigour in the process (Liability Judgment at [1942]). Mr Eagle's work as a solicitor, as a trusted adviser of clients and his community work suggests that disregard for his responsibilities is not a dominant aspect of his personality.

148 Although the public notoriety surrounding Mr Eagle's conduct means that he is unlikely to be appointed a director of an ASX listed company in the foreseeable future, this is not determinative as to whether a period of disqualification should be ordered. The contraventions amounted to a serious breach of his duties. Disqualification orders are not punitive but are designed to protect the public by facilitating not only specific, but also general deterrence, including protecting creditors and shareholders of public companies against conduct which has caused the failure of GetSwift. Combined with the fact that I do not consider he has yet achieved insight into his actions sufficient to exhibit real remorse and contrition, a period of disqualification, albeit relatively short, is required.

149 For the foregoing reasons, it is appropriate that Mr Eagle be disqualified from managing corporations for a period of two years. I am satisfied that this period serves to protect the public from the harmful use of the corporate structure and demonstrates to the public the importance of preserving proper commercial standards. Further, it is appropriate that Mr Eagle pay a penalty of $75,000 in respect of his contraventions pursuant to s 1317G of the Corporations Act. The total period of disqualification and penalty are appropriate having regard to all the circumstances of his conduct, after considering the submissions of Mr Eagle, and in the light of the orders made against Messrs Hunter and Macdonald.

150 Finally, Mr Eagle foreshadowed that if a disqualification order is made against him, he intends to seek leave pursuant to s 206G of the Corporations Act to manage his personal companies, which include the trustee of his self-managed superannuation fund and Eagle Corporate Advisers.

151 I would be disposed to make such an order upon application. Allowing Mr Eagle to manage the trustee of his self-managed superannuation fund and Eagle Corporate Advisers (which is essentially a corporate vehicle through which Mr Eagle practises as a solicitor) is not inconsistent with the period of disqualification ordered. The evidence suggests he is a solicitor

of competence. To disqualify Mr Eagle from managing these corporations would, in my view, serve no public purpose and would simply punish him for misconduct in a different context. The prevailing aim of discouraging the repetition of *like* conduct would not be diminished by my making an order under s 206G.

K COSTS

152 As to costs, ASIC seeks an order that all defendants be jointly and severally liable for and pay ASIC's costs of and incidental to the hearing as to penalty and other relief.

153 Mr Eagle contends that to make him jointly and severally liable for ASIC's costs punishes him rather than compensating ASIC for the costs it has incurred in relation to the relief it seeks against Mr Eagle. This is because most of the costs incurred are unconnected with Mr Eagle. Accordingly, it is said that given Mr Eagle's limited role and his five "distinct" contraventions, Mr Eagle should only be responsible for the costs incurred by ASIC in responding to Mr Eagle's evidence and submissions. If an order for costs is made against Mr Eagle, he submits that it should be no more than what was ordered in respect of the Liability Hearing, being 7.5% of ASIC's costs of and incidental to the penalty hearing.

154 I agree. The only reason why the bulk of the hearing time was taken up with Mr Eagle was because he was the only one of the defendants that engaged with the process. It is appropriate to resolve the question of Mr Eagle's costs in line with what was ordered in respect of the Liability Hearing, namely that Mr Eagle be required to pay 7.5% of ASIC's costs of and incidental to the penalty hearing. GetSwift and Messrs Hunter and Macdonald should be jointly and severally responsible for 92.5% of ASIC's costs.

L GETSWIFT'S VOLUNTARY LIQUIDATION

155 In closing, I will say something further of GetSwift's entry into voluntary liquidation despite the undertakings given to this Court.

156 Following reflection, I have determined that it is a matter for the Judge in the separate proceeding (and who received and acted upon the undertaking) to determine what, if anything, should happen next, including whether the matter should be referred to the Principal Registrar of the Court for contempt proceedings to be instigated. In any event, given my findings as to

the conduct of the persons concerned, it would be inappropriate for me to hear any such proceeding.

157 It became apparent that at the time of appointment, the liquidators were not aware of the undertaking given to the Court. But the liquidators did become aware of the undertaking on 8 August 2022. The Court was not informed of any breach of the undertaking until ASIC filed its submissions on penalty and other relief. Although I express no conclusion, this silence causes me some pause. Without the benefit of detailed submissions, I am not presently convinced it was appropriate for this information not to have been communicated to the Court to further the interests of the proper administration of the company. The solicitor for the liquidators (who was given leave to appear) informed me that "there was really nothing that the liquidators could do to reverse what had happened" (T44.35–36) and, implicitly, that the liquidators did not consider they had any legal obligation to disclose to the Court the fact that the foundation of their appointment was based upon a resolution passed in defiance of a solemn promise made to this Court, potentially punishable by contempt. This may all be correct, but, in the absence of argument, it is, at least to my mind, intuitively surprising.

158 The Court has supervisory jurisdiction over external administrators and external administrations pursuant to the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 of the Corporations Act (**IPS**), which has effect pursuant to s 600K of the Corporations Act. The purpose of ss 90-10, 90-15 and 90-20 of the IPS is to "serve the public interest by advancing and promoting the regulation, supervision, discipline and correction of liquidators in the interests of honest and efficient administration of the estates of companies subject to the winding up" (*Djordjevich v Rohrt* [2021] VSC 178 (at [189] per Delany J); see also *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 (at 121–122 [63]–[64] per Spigelman CJ, Hodgson JA and Austin J)). Section 90-5 provides that the Court may, on its own initiative during proceedings before the Court, inquire into the external administration of a company. For the purposes of such an inquiry, the Court may require a person who is or has at any time been the external administrator of the company to give information; or provide a report; or produce a document to the Court in relation to the external administration of the company.

159 Despite having power to do so, I do not think it is appropriate for me to investigate this issue further in this proceeding. It is linked to what appears to me to be a clear breach of the undertaking and, if it is thought appropriate to enquire further into the circumstances of the Court only finding out about it at the heel of the hunt, that further issue can be addressed in the context of any broader examination of what happened by another Judge and following procedural fairness being provided to all concerned.

M CONCLUSION AND ORDERS

160 GetSwift and Messrs Hunter, Macdonald and Eagle are all liable to pay to the Commonwealth of Australia, within 30 days of the date of these Orders, pecuniary penalties pursuant to s 1317G of the Corporations Act in respect of their contraventions of civil penalty provisions identified in the Orders dated 26 November 2021. Messrs Hunter, Macdonald, and Eagle should also be disqualified from managing corporations pursuant to ss 206C and 206E of the Corporations Act.

161 The defendants should also pay ASIC's costs as outlined above in Section K.

162 It is to ASIC's credit that regulatory action has been taken, but it is a pity that what was happening at GetSwift was not stopped sufficiently quickly, and assets were not preserved, so as to minimise the loss now visited upon the hapless investors.

I certify that the preceding one hundred and sixty-two (162) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate:

Dated: 16 February 2023

ANNEXURE A

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
GetSwift			
Declared s 674(2) contraventions against GetSwift			
1.	Did not notify the ASX of the Fruit Box Agreement Information	On and from 9:20am on 24 February 2017 until 25 January 2018	[1]
2.	Did not notify the ASX of the Fruit Box Termination Information	Between 20 March 2017 and 25 January 2018	[2]
3.	Did not notify the ASX of the CBA Projection Information	On and from 8:26am on 4 April 2017 until 22 February 2019	[3]
4.	Did not notify the ASX of the Pizza Pan Agreement Information	On and from 1:28pm on 28 April 2017 until 22 February 2019	[4]
5.	Did not notify the ASX of the APT Agreement Information	On and from 11:08am on 8 May 2017 until 22 February 2019	[5]
6.	Did not notify the ASX of the APT No Financial Benefit Information	On and from 17 July 2017 until 22 February 2019	[6]
7.	Did not notify the ASX of the CITO Agreement Information	On and from 9:58am on 22 May 2017 until 22 February 2019	[7]
8.	Did not notify the ASX of the CITO No Financial Benefit Information	On and from 1 July 2017 until 22 February 2019	[8]
9.	Did not notify the ASX of the Hungry Harvest Agreement Information	On and from 9:28am on 1 June 2017 until	[9]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
		22 February 2019	
10.	Did not notify the ASX of the Fantastic Furniture Agreement Information	On and from 10:20am on 23 August 2017 until 22 February 2019	[10]
11.	Did not notify the ASX of the Fantastic Furniture Termination Information	On and from 22 September 2017 until 22 February 2019	[11]
12.	Did not notify the ASX of the Betta Homes Agreement Information	On and from 10:20am on 23 August 2017 until 22 February 2019	[12]
13.	Did not notify the ASX of the Betta Homes No Financial Benefit Information	On and from 24 January 2018 until 22 February 2019	[13]
14.	Did not notify the ASX of the Bareburger Agreement Information	On and from 9:36am on 30 August 2017 until 22 February 2019	[14]
15.	Did not notify the ASX of the NAW Agreement Execution Information	Between 18 August 2017 and 9:00am on 12 September 2017	[15]
16.	Did not notify the ASX of the NAW Projection Information	On and from 10:31am on 12 September 2017 until 22 February 2019	[16]
17.	Did not notify the ASX of the Johnny Rockets Agreement Information	On and from 11:48am on 25 October 2017 until 22 February 2019	[17]
18.	Did not notify the ASX of the Johnny Rockets Termination Information	On and from 9 January 2018 until	[18]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
		22 February 2019	
19.	Did not notify the ASX of the Yum MSA Information	On and from 9:56am on 1 December 2017 until 22 February 2019	[19]
20.	Did not notify the ASX of the Yum Projection Information	On and from 9:56am on 1 December 2017 until 22 February 2019	[20]
21.	Did not notify the ASX of the Amazon MSA Information	Between 10:01am and 6:15pm on 1 December 2017	[21]
22.	Did not notify the ASX of the Second Placement Information	On and from 8:36am on 7 December 2017 until 22 February 2019	[22]
Hunter			
Declared s 674(2A) contraventions against Hunter which may attract penalties			
1.	Hunter was involved in the Fruit Box Agreement Information contravention	On and from 9:20am on 24 February 2017 until 25 January 2018	[23]
2.	Hunter was involved in the Fruit Box Termination Information contravention	Between 20 March 2017 and 25 January 2018	[23]
3.	Hunter was involved in the CBA Projection Information contravention	On and from 8:26am on 4 April 2017 until 22 February 2019	[23]
4.	Hunter was involved in the Pizza Pan Agreement Information contravention	On and from 1:28pm on 28 April 2017 until 22 February 2019	[23]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
5.	Hunter was involved in the APT No Financial Benefit Information contravention	On and from 17 July 2017 until 22 February 2019	[23]
6.	Hunter was involved in the CITO Agreement Information contravention	On and from 9:58am on 22 May 2017 until 22 February 2019	[23]
7.	Hunter was involved in the Fantastic Furniture Agreement Information contsravention	On and from 10:20am on 23 August 2017 until 22 February 2019	[23]
8.	Hunter was involved in the Betta Homes Agreement Information contravention	On and from 10:20am on 23 August 2017 until 22 February 2019	[23]
9.	Hunter was involved in the Bareburger Agreement Information contravention	On and from 9:36am on 30 August 2017 until 22 February 2019	[23]
10.	Hunter was involved in the NAW Agreement Execution Information contravention	Between 18 August 2017 and 9:00am on 12 September 2017	[23]
11.	Hunter was involved in the Johnny Rockets Agreement Information contravention	On and from 11:48am on 25 October 2017 until 22 February 2019	[23]
12.	Hunter was involved in the Johnny Rockets Termination Information contravention	On and from 9 January 2018 until 22 February 2019	[23]
13.	Hunter was involved in the Yum MSA Information contravention	On and from 9:56am on 1 December 2017 until 22 February 2019	[23]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
14.	Hunter was involved in the Yum Projection Information contravention	On and from 9:56am on 1 December 2017 until 22 February 2019	[23]
15.	Hunter was involved in the Amazon MSA Information contravention	Between 10:01am and 6:15pm on 1 December 2017	[23]
16.	Hunter was involved in the Second Placement Information contravention	On and from 8:36am on 7 December 2017 until 22 February 2019	[23]
Declared s 180 contraventions against Hunter which may attract penalties			
17.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Agreement Information	-	[24]
18.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Fruit Box Agreement Representations	-	[25], Annexure A at [1]
19.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Termination Information	-	[24]
20.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the CBA Projection Information	-	[24]
21.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the CBA Agreement Representations	-	[25], Annexure A at [2]
22.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the Pizza Pan Agreement	-	[24]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	Information		
23.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Pizza Pan Agreement Representations	-	[25], Annexure A at [3]
24.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Pizza Pan Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [4]**
25.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the APT No Financial Benefit Information	-	[24]
26.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the CITO Agreement Information	-	[24]
27.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the CITO Agreement Representations	-	[25], Annexure A at [7]
28.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the CITO Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [8]**

	Declared contravention	**Date range**	**Declarations (in Orders dated 26 November 2021)**
29.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Tranche 1 Cleansing Notice Representation**	-	**[25],** **Annexure A at [11]**
30.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Tranche 2 Cleansing Notice Representation**	-	**[25],** **Annexure A at [12]**
31.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Fantastic Furniture Agreement Information	-	[24]
32.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Fantastic Furniture Agreement Representations	-	[25], Annexure A at [13]
33.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Fantastic Furniture Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [14]**
34.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Betta Homes Agreement Information	-	[24]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
35.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Betta Homes Agreement Representations	-	[25], Annexure A at [15]
36.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Betta Homes Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [16]**
37.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Bareburger Agreement Information	-	[24]
38.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Bareburger Agreement Representations	-	[25], Annexure A at [17]
39.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Bareburger Price Sensitivity Representation**	-	**[25],** **Annexure A at [18]**
40.	**Hunter caused or permitted GetSwift to contravene:**	-	**[25],** **Annexure A at**

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	(a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Bareburger Quantifiable Benefit Representation**		**[19]**
41.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the NAW Agreement Execution Information	-	[24]
42.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the First NAW Agreement Representations	-	[25], Annexure A at [20]
43.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the NAW Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [21]**
44.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Second NAW Agreement Representations	-	[25], Annexure A at [22]
45.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Johnny Rockets Agreement Information	-	[24]
46.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act;	-	[25], Annexure A at [23]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	(b) s 12DA of the ASIC Act, in relation to the Johnny Rockets Agreement Representations		
47.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Johnny Rockets Price Sensitivity Representation**	-	**[25],** **Annexure A at [24]**
48.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Johnny Rockets Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [25]**
49.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the Johnny Rockets Termination Information	-	[24]
50.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Second Quantifiable Announcements Representation**	-	**[25],** **Annexure A at [26]**
51.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Third Quantifiable**	-	**[25],** **Annexure A at [27]**

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	Announcements Representation		
52.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Yum MSA Information	-	[24]
53.	Hunter caused or permitted GetSwift to contravene s 674(2) in respect of the Yum Projection Information	-	[24]
54.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Yum MSA Representations	-	[25], Annexure A at [28]
55.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Yum Price Sensitivity Representation**	-	**[25],** **Annexure A at [29]**
56.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Yum Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [30]**
57.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Amazon MSA Information	-	[24]
58.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Amazon MSA Representations	-	[25], Annexure A at [31]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
59.	**Hunter caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Amazon Quantifiable Benefit Representation**	-	**[25],** **Annexure A at [32]**
60.	Hunter caused or permitted GetSwift to contravene s 674(2)in respect of the Second Placement Information	-	[24]
61.	Hunter caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Second Placement Cleansing Notice Representation	-	[25], Annexure A at [33]
Macdonald			
Declared s 674(2A) contraventions against Macdonald which may attract penalties			
1.	Macdonald was involved in the Fruit Box Agreement Information contravention	On and from 9:20am on 24 February 2017 until 25 January 2018	[27]
2.	Macdonald was involved in the Fruit Box Termination Information contravention	Between 20 March 2017 and 25 January 2018	[27]
3.	Macdonald was involved in the CBA Projection Information contravention	On and from 8:26am on 4 April 2017 until 22 February 2019	[27]
4.	Macdonald was involved in the Pizza Pan Agreement Information contravention	On and from 1:28pm on 28 April 2017 until 22	[27]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
		February 2019	
5.	Macdonald was involved in the APT Agreement Information contravention	On and from 11:08am on 8 May 2017 until 22 February 2019	[27]
6.	Macdonald was involved in the APT No Financial Benefit Information contravention	On and from 17 July 2017 until 22 February 2019	[27]
7.	Macdonald was involved in the CITO Agreement Information contravention	On and from 9:58am on 22 May 2017 until 22 February 2019	[27]
8.	Macdonald was involved in the CITO No Financial Benefit Information contravention	On and from 1 July 2017 until 22 February 2019	[27]
9.	Macdonald was involved in the Hungry Harvest Agreement Information contravention	On and from 9:28am on 1 June 2017 until 22 February 2019	[27]
10.	Macdonald was involved in the Fantastic Furniture Agreement Information contravention	On and from 10:20am on 23 August 2017 until 22 February 2019	[27]
11.	Macdonald was involved in the Fantastic Furniture Termination Information contravention	On and from 22 September 2017 until 22 February 2019	[27]
12.	Macdonald was involved in the Betta Homes Agreement Information contravention	On and from 10:20am on 23 August 2017 until 22 February 2019	[27]
13.	Macdonald was involved in the Bareburger Agreement Information contravention	On and from 9:36am on 30 August 2017 until 22 February 2019	[27]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
14.	Macdonald was involved in the NAW Agreement Execution Information contravention	Between 18 August 2017 and 9:00am on 12 September 2017	[27]
15.	Macdonald was involved in the Johnny Rockets Agreement Information contravention	On and from 11:48am on 25 October 2017 until 22 February 2019	[27]
16.	Macdonald was involved in the Johnny Rockets Termination Information contravention	On and from 9 January 2018 until 22 February 2019	[27]
17.	Macdonald was involved in the Yum MSA Information contravention	On and from 9:56am on 1 December 2017 until 22 February 2019	[27]
18.	Macdonald was involved in the Yum Projection Information contravention	On and from 9:56am on 1 December 2017 until 22 February 2019	[27]
19.	Macdonald was involved in the Amazon MSA Information contravention	Between 10:01am and 6:15pm on 1 December 2017	[27]
20.	Macdonald was involved in the Second Placement Information contravention	On and from 8:36am on 7 December 2017 until 22 February 2019	[27]
Declared s 180 contraventions against Macdonald which may attract penalties			
21.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Agreement Information	-	[28]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
22.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Fruit Box Agreement Representations	-	[29], Annexure A at [1]
23.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Termination Information	-	[28]
24.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the CBA Projection Information	-	[28]
25.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the CBA Agreement Representations	-	[29], Annexure A at [2]
26.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Pizza Pan Agreement Information	-	[28]
27.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Pizza Pan Agreement Representations	-	[29], Annexure A at [3]
28.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Pizza Pan Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [4]**

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
29.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the APT Agreement Information	-	[375]
30.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the APT Agreement Representations	-	[29], Annexure A at [5]
31.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the APT Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [6]**
32.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the APT No Financial Benefit Information	-	[28]
33.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the CITO Agreement Information	-	[28]
34.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the CITO Agreement Representations	-	[29], Annexure A at [7]
35.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the CITO Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [8]**

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
36.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the CITO No Financial Benefit Information	-	[28]
37.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Hungry Harvest Agreement Information	-	[28]
38.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Hungry Harvest Agreement Representations	-	[29], Annexure A at [9]
39.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Hungry Harvest Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [10]**
40.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Tranche 1 Cleansing Notice Representation**	-	**[29],** **Annexure A at [11]**
41.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Tranche 2 Cleansing Notice Representation**	-	**[29],** **Annexure A at [12]**
42.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Fantastic	-	[28]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	Furniture Agreement Information		
43.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Fantastic Furniture Agreement Representations	-	[29], Annexure A at [13]
44.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Fantastic Furniture Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [14]**
45.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Fantastic Furniture Termination Information	-	[28]
46.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Betta Homes Agreement Information	-	[28]
47.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Betta Homes Agreement Representations	-	[29], Annexure A at [15]
48.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Betta Homes Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [16]**
49.	Macdonald caused or permitted GetSwift to	-	[28]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	contravene s 674(2) in respect of the Bareburger Agreement Information		
50.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Bareburger Agreement Representation	-	[29], Annexure A at [17]
51.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Bareburger Price Sensitivity Representation**	-	**[29],** **Annexure A at [18]**
52.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Bareburger Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [19]**
53.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the NAW Agreement Execution Information	-	[28]
54.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the First NAW Agreement Representations	-	[29], Annexure A at [20]
55.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act;	-	[29], Annexure A at [21]

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	(b) s 12DA of the ASIC Act, in relation to the NAW Quantifiable Benefit Representation		
56.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Second NAW Agreement Representations	-	[29], Annexure A at [22]
57.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Johnny Rockets Agreement Information	-	[28]
58.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Johnny Rockets Agreement Representations	-	[29], Annexure A at [23]
59.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Johnny Rockets Price Sensitivity Representation**	-	**[29],** **Annexure A at [24]**
60.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Johnny Rockets Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [25]**
61.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Johnny Rockets	-	[28]

	Declared contravention	**Date range**	**Declarations (in Orders dated 26 November 2021)**
	Termination Information		
62.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Second Quantifiable Announcements Representation**	-	**[29],** **Annexure A at [26]**
63.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Third Quantifiable Announcements Representation**	-	**[29],** **Annexure A at [27]**
64.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Yum MSA Information	-	[28]
65.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Yum Projection Information	-	[28]
66.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Yum MSA Representations	-	[29], Annexure A at [28]
67.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Yum Price Sensitivity Representation	-	[29], Annexure A at [29]
68.	Macdonald caused or permitted GetSwift to	-	[29],

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
	contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Yum Quantifiable Benefit Representation		Annexure A at [30]
69.	Macdonald caused or permitted GetSwift to contravene s 674(2) in respect of the Amazon MSA Information	-	[28]
70.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Amazon MSA Representations	-	[29], Annexure A at [31]
71.	**Macdonald caused or permitted GetSwift to contravene:** (a) **s 1041H of the Corporations Act;** (b) **s 12DA of the ASIC Act,** **in relation to the Amazon Quantifiable Benefit Representation**	-	**[29],** **Annexure A at [32]**
72.	Macdonald caused or permitted GetSwift to contravene s 674(2)in respect of the Second Placement Information	-	[28]
73.	Macdonald caused or permitted GetSwift to contravene: (a) s 1041H of the Corporations Act; (b) s 12DA of the ASIC Act, in relation to the Second Placement Cleansing Notice Representation	-	[29], Annexure A at [33]
Eagle			
Declared s 674(2A) contraventions against Eagle which may attract penalties			

	Declared contravention	Date range	Declarations (in Orders dated 26 November 2021)
1.	Eagle was involved in the Fruit Box Agreement Information contravention	On and from 27 March 2017 until 25 January 2018	[31]
2.	Eagle was involved in the Fruit Box Termination Information contravention	On and from 27 March 2017 until 25 January 2018	[31]
3.	Eagle was involved in the NAW Agreement Execution Information contravention	Between 18 August 2017 and 9:00am on 12 September 2017	[31]
Declared s 180 contraventions against Eagle which may attract penalties			
4.	Eagle caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Agreement Information	On and from 27 March 2017 until 25 January 2018	[32]
5.	Eagle caused or permitted GetSwift to contravene s 674(2) in respect of the Fruit Box Termination Information	On and from 27 March 2017 until 25 January 2018	[32]
6.	Eagle caused or permitted GetSwift to contravene s 674(2) in respect of the Betta Homes Agreement Information	On and from 23 August 2017 until 28 November 2018	[32]
7.	Eagle caused or permitted GetSwift to contravene s 674(2) in respect of the NAW Agreement Execution Information	Between 18 August 2017 and 9:00am on 12 September 2017	[32]
8.	Eagle caused or permitted GetSwift to contravene s 674(2) in respect of the Yum MSA Information	On and from 1 December 2017 until 28 November 2018	[32]