FEDERAL COURT OF AUSTRALIA

Provide Nominees Pty Ltd v Australian Securities and Investments Commission [2024] FCA 303

File number:	VID 1063 of 2023
Judgment of:	**ROFE J**
Date of judgment:	27 March 2024
Catchwords:	**PRACTICE AND PROCEDURE** – interlocutory application for summary judgment under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) and r 26.01(1)(a) of the *Federal Court Rules 2011* (Cth) – whether pleadings disclose a reasonable cause of action – allegation that ASIC did not have "reason to suspect" that the plaintiff "may have … committed" a contravention of the corporations legislation pursuant to s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) because it did not hold the separate and distinct state of mind in s 16 of the Act – whether necessary to decide application to set aside notice to produce – application for summary judgment allowed.
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Australian Securities Commission Act 1989* (Cth) *Corporations Act 1989* (Cth) *Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *Trade Practices Act 1974* (Cth) *Federal Court Rules 2011* (Cth)
Cases cited:	*Australian Broadcasting Corporation v Kane* [2019] FCA 1312 *Australian Securities and Investments Commission v Cassimatis* (2013) 220 FCR 256 *Australian Securities and Investments Commission v GetSwift Ltd* (2023) 167 ACSR 178 *Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd* (2020) 148 ACSR 123 *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2021] FCA 1630

	Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2) [2021] FCA 247 *Australian Securities and Investments Commission v Provide Nominees Pty Ltd* [2023] FCA 1137 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 *Australian Securities Commission v Lucas* (1992) 36 FCR 165 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1994) 54 FCR 284 *Gloucester Shire Council v Fitch Ratings, Inc* [2016] FCA 587 *Little River Goldfields NL v Moulds* (1991) 32 FCR 456 *Prior v South West Aboriginal Land and Sea Council Aboriginal Corporation* [2020] FCA 808 *Provide Nominees Pty Ltd v Australian Securities and Investments Commission* [2024] FCAFC 25 *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 *Spencer v Commonwealth* (2010) 241 CLR 118 *Unions NSW v New South Wales* (2023) 407 ALR 277 *Vines v Australian Securities and Investments Commission* (2007) 63 ACSR 505 *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	88
Date of hearing:	18 March 2024
Counsel for the plaintiff:	Mr M D Wyles KC with Mr B K Holmes
Solicitor for the plaintiff:	Strongman & Crouch
Counsel for the defendant:	Mr P W Collinson KC with Mr L Hogan
Solicitor for the defendant:	Australian Government Solicitor

ORDERS

VID 1063 of 2023

BETWEEN:	**PROVIDE NOMINEES PTY LTD (ACN 644 657 161)** Plaintiff
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Defendant

ORDER MADE BY: **ROFE J**

DATE OF ORDER: **27 MARCH 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) and rule 26.01(1) of the *Federal Court Rules 2011* (Cth), summary judgment dismissing the proceeding be given in favour of the Defendant against the Plaintiff on the basis that the Plaintiff has no reasonable prospect of successfully prosecuting the proceeding, or no reasonable cause of action is disclosed.
2. The Plaintiff pay the Defendant's costs of and incidental to the proceeding.

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

REASONS FOR JUDGMENT

ROFE J:

1 On 29 March 2022, the defendant (**ASIC**) commenced a formal investigation pursuant to s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***), in relation to suspected contraventions by the plaintiff (**Provide**) of s 911A of the ***Corporations Act** 2001* (Cth).

2 On 5 August 2022, ASIC formally amended the scope of the investigation to include, in addition to s 911A, suspected contraventions of ss 12DA, 12DB and 12DF of the *ASIC Act*, and ss 1041E, 1041F and 1041H of the *Corporations Act* (**Relevant Provisions**). The additional contraventions all relate to false or misleading representations, or misleading or deceptive conduct.

3 Between May 2022 and January 2023, ASIC issued three notices to Provide to produce documents pursuant to s 33 of the *ASIC Act*. Provide subsequently produced a total of 328 documents to ASIC in response.

4 By originating process and **Concise Statement** filed on 13 December 2023, Provide seeks a declaration that by 2 November 2023 ASIC did not have the power under s 13 of the *ASIC Act* to conduct an investigation of its conduct, and an injunction permanently restraining further such investigation.

5 On 31 January 2023, ASIC filed an interlocutory application seeking summary judgment against Provide pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) and r 26.01(1) of the *Federal Court **Rules** 2011* (Cth) on the basis that Provide has no reasonable prospect of success (**Summary Judgment Application**).

6 ASIC filed an affidavit from its lawyer, Mr James Docherty, dated 31 January 2024 in support of its application. Paragraph [5] of his affidavit annexed several documents, including a copy of an affidavit of Mr Shannon McGuire, an ASIC investigator, dated 2 December 2022 which was filed in the proceeding before O'Bryan J (referred to below at [21]). Provide objected to ASIC reading para [5] of Mr Docherty's affidavit and admitting the documents annexed to his affidavit into evidence in this proceeding. I ruled during the hearing that the affidavit and annexed documents were admissible as they were only adduced because Provide referred to Mr Docherty's affidavit in its Concise Statement. Provide further objected that Mr McGuire's

affidavit could not be accepted as the truth of the fact in issue in this proceeding. I do not need to rule on that objection because nothing in Mr McGuire's affidavit bears on whether I should grant ASIC's Summary Judgment Application.

7 On 7 February 2024, shortly after ASIC filed its Summary Judgment Application, Provide issued a notice to produce to ASIC seeking broad categories of investigative documents spanning several years.

8 On 9 February 2024, ASIC filed a further interlocutory application seeking orders to set aside Provide's notice to produce (**Notice to Produce Application**).

9 The Summary Judgment Application and Notice to Produce Application were heard together on 18 March 2024.

10 For the reasons given below, I will grant ASIC's Summary Judgment Application. Accordingly, it is unnecessary to decide ASIC's Notice to Produce Application.

BACKGROUND

11 Aside from the penultimate paragraph of this section, the following background matters are taken from the "Important Facts" section of Provide's Concise Statement.

12 Provide was registered on 26 September 2020 and conducts business under the business name "Provide Capital".

13 Provide says that its business enables individuals, companies, self-managed superannuation funds and trusts the opportunity to lend to Provide, earning fixed interest returns. Provide uses borrowings from third parties to increase its operational and investment capabilities.

14 On 29 March 2022, ASIC commenced the formal investigation into Provide under s 13 of the *ASIC Act* in relation to suspected contraventions of s 911A of the *Corporations Act* with respect to offering investment opportunities by Provide since 28 September 2020.

15 On 4 April 2022, ASIC issued a notice to produce pursuant to s 33 of the *ASIC Act* as part of the investigation. The notice sought two categories of documents and, on 6 May 2022, Provide produced documents pursuant to that notice.

16 On 16 June 2022, ASIC issued a second notice to produce, which sought 10 categories of documents.

17 On 5 August 2022, ASIC formally amended the scope of its investigation as described above.

18 On 19 September 2022, ASIC withdrew the second notice.

19 On 28 September 2022, ASIC issued a third notice to produce, which sought 15 categories of documents (**Third Notice**).

20 Between 25 November 2022 and 27 January 2023, Provide produced a total of 314 documents to ASIC pursuant to the Third Notice.

21 On 2 December 2022, ASIC commenced proceeding VID 712 of 2022 against Provide in this Court seeking an inquiry pursuant to s 70(3) of the *ASIC Act* into the compliance of Provide with the Third Notice. Provide denied that it had failed to comply with the Third Notice. However, at trial, Provide contested ASIC's application only on the basis that the Court did not have jurisdiction to hear and determine the application by reason of ASIC's alleged failure to satisfy the requirements contained in s 70(2) of the *ASIC Act*.

22 On 25 September 2023, O'Bryan J ordered that Provide produce documents in accordance with categories 1, 2, 3 and 12 of the schedule to the Third Notice.

23 The primary judge's decision dismissing Provide's argument as to the Court's jurisdiction (*Australian Securities and Investments Commission v* ***Provide*** *Nominees Pty Ltd* [2023] FCA 1137) was upheld on appeal in *Provide Nominees Pty Ltd v Australian Securities and Investments Commission* [2024] FCAFC 25 with the Full Court providing ex tempore reasons for its decision on 22 February 2024.

24 On 2 November 2023, in response to an inquiry from Provide's solicitors, ASIC stated that it had not prepared an interim report pursuant to s 16(1)(a) of the *ASIC Act* in respect of the investigation.

SUMMARY JUDGMENT

Legislation and principles

25 ASIC seeks summary judgment under s 31A(2) of the *FCA Act* and r 26.01(1) of the Rules on the basis that Provide's application has no reasonable prospect of success.

26 Section 31A of the *FCA Act* provides:

> **31A Summary judgment**
>
> (1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is prosecuting the proceeding or that part of the proceeding;

and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

(5) This section does not apply to criminal proceedings.

27 Rule 26.01(1) of the Rules provides:

26.01 Summary judgment

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

(b) the proceeding is frivolous or vexatious; or

(c) no reasonable cause of action is disclosed; or

(d) the proceeding is an abuse of the process of the Court; or

(e) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.

28 French CJ and Gummow J in ***Spencer*** *v Commonwealth* (2010) 241 CLR 118 at [22] described s 31A as follows:

> The section authorises summary disposition of proceedings on a variety of bases under its general rubric. It will apply to the case in which the pleadings disclose no reasonable cause of action and their deficiency is incurable. It will include the case in which there is unanswerable or unanswered evidence of a fact fatal to the pleaded case and any case which might be propounded by permissible amendment. It will include the class of case in the longstanding category of cases which are "frivolous or vexatious or an abuse of process". The application of s 31A is not, in terms, limited to those categories.

29 The principles regarding summary judgment are well-settled and were not in dispute.

30 McKerracher J set out the principles in ***Prior*** *v South West Aboriginal Land and Sea Council Aboriginal Corporation* [2020] FCA 808 at [27]-[29]:

27 Section 31A was inserted into the *Federal Court Act* to give the Court greater flexibility in granting summary judgment. Its terms are reflected in r 26.01 of the *Federal Court Rules*. Save that s 31A(3) is not contained in r 26.01(1), the section and the rule otherwise contain identical tests. Accordingly, the authorities on s 31A are useful in considering r 26.01.

28 The effect of s 31A was to lower the bar for a successful application for summary judgment or summary dismissal from the common law principles stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 (at 91) and by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 (at 129-130). In ***Spencer*** *v Commonwealth* (2010) 241 CLR 118 per Hayne, Crennan, Kiefel and Bell JJ (at [53] and [60]), the High Court recognised the radical departure of s 31A from the common law by the introduction of the standard of 'no reasonable prospects of success'. The majority said, amongst other things, that (at [50]-[53], [58]-[60]):

(a) consideration of the operation and application of s 31A must begin from consideration of its text. The central idea about which the provisions pivot is 'no reasonable prospect'. The choice of the word 'reasonable' is important;

(b) effect must be given to the negative admonition in subs (3) that a defence, a proceeding, or a part of a proceeding may be found to have no reasonable prospect of successful prosecution even if it cannot be said that it is 'hopeless' or 'bound to fail'. It is important to recognise that the combined effect of subs (2) and subs (3) is that the inquiry required is whether there is a 'reasonable' prospect of prosecuting the proceeding, not an inquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail;

(c) in this respect, s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered. Those earlier provisions were understood as requiring formation of a certain and concluded determination that a proceeding would necessarily fail;

(d) with respect to how the expression 'no reasonable prospect' should be understood, no paraphrase of the expression would provide a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is 'no reasonable prospect'. The creation of a lexicon of words or phrases to capture the operation of the statutory phrase should be avoided;

(e) in many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described as 'frivolous', 'untenable', 'groundless' or 'faulty'. But none of those expressions should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A;

(f) rather, full weight must be given to the expression as a whole. The Court may exercise power under s 31A if, and only if, satisfied that there is 'no reasonable prospect' of success; and

(g) the power to dismiss an action summarily is not to be exercised lightly.

29 Other principles that have been identified in relation to s 31A include that:

(a) a reasonable prospect of success is one which is real, not fanciful or merely arguable: *Rogers v Assets Loan Co Pty Ltd* (2008) 250 ALR 82 per Logan J (at [41]), cited in ***Buurabalayji*** *Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 2)* [2018] FCA 978 per McKerracher J (at [3]), though this must now be read with *Spencer* (at [58]-[60]);

(b) there will be no prospect of success in circumstances where there is a defect in the pleadings which cannot be cured: *"Sam Hawk" v Reiter Petroleum Inc* (2016) 246 FCR 337 per Kenny and Besanko JJ (at [269]), cited in *Buurabalayji* (at [3]);

(c) an application for summary dismissal is likely to succeed where the applicant's success in the principal proceedings relies upon a question of fact that can truly be described as fanciful, trifling, implausible, improbable, tenuous or one that is contradicted by all the available documents or other materials. Conversely, as a general principle, an application for summary dismissal is unlikely to succeed where, on a critical examination of all the available materials, the Court is satisfied that there appears to be a real question of fact to be determined between the parties: *Australian Securities and Investments Commission v* ***Cassimatis*** (2013) 220 FCR 256 per Reeves J (at [47]);

(d) similarly, as a general principle, the moving party on an application for summary dismissal is likely to succeed if it is able to demonstrate to the Court that the applicant's success in the principal proceedings relies upon a question of law that is straightforward and confined, or is trite in the sense that it is well settled on authority, such that the question can be resolved summarily without the necessity for a full trial. On the other hand, the moving party would be unlikely to succeed if the Court is satisfied that the applicant's success in the proceedings relies upon a question of law that is serious or important, or is difficult and therefore likely to require lengthy argument for its resolution, or involves conflicting authority: *Cassimatis* (at [48]); see also: *Luck v University of Southern Queensland* [2008] FCA 1582 per Logan J (at [14]- [15]): s 31A is amenable to resolving straightforward questions of law; *SK Foods LP v SK Foods Australia (in liq) (No 3)* (2013) 214 FCR 543 per Flick J (at [115]): summary judgment may still be appropriate if a question raised is of some complexity; *McAleer v University of Western Australia (No 3)* (2008) 171 FCR 499 per Siopis J (at [39] and the cases therein cited): s 31A permits dismissal of a proceeding where an inquiry into the merits of the issues of law demonstrates the arguments are insufficiently strong to warrant the matter going to trial;

(e) a Court should be particularly cautious about ordering summary determination where proceedings involve questions of fact and law, or mixed questions of fact and law, as these combinations usually give rise to some complexity that would require a full hearing. In such circumstances the moving party, as a general principle, would need to show a substantial absence of merit on either of the question of fact or law concerned, or on the mixed question: *Cassimatis* (at [49]); and

(f) if a *prima facie* case in support of summary judgment is established,

> the onus shifts to the opposing party to point to some factual or evidentiary issues making a trial necessary: *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372 per Gordon J (at [127]), cited in *Buurabalayji* (at [3]). See also *Dandaven v Harbeth Holdings Pty Ltd* [2008] FCA 955 per Gilmour J (at [6]).

31 ASIC has the onus of establishing that Provide's application has no reasonable prospect of success and should be summarily dismissed: *Australian Securities and Investments Commission v* ***Cassimatis*** (2013) 220 FCR 256 at [45] (per Reeves J).

The relationship between s 13 and s 16 of the *ASIC Act*

32 Provide's application is based on the following premises which are set out in its Concise Statement:

> 8. By reason of the contravention consequences referred to in [4] and [7] above [relating to, among other things, maximum penalties], a contravention of ss 911A, 1041E, 1041F, and 1041H of the *Corporations Act* and ss 12DA, 12DB and 12DF of the *ASIC Act* is a serious contravention within the meaning of that expression as found in s 16(1)(a) of the ASIC Act (**s 16 serious contravention**).
>
> 9. It follows that, as at 29 March 2022 and 5 August 2022 respectively, ASIC must have commenced and amended the investigation on the basis that it had reason to suspect that Provide may have committed s 16 serious contraventions of the *Corporations Act* or the *ASIC Act*, which s 16 serious contraventions are denied.
>
> 10. By email dated 2 November 2023, the Australian Government Solicitor, acting for and on behalf of ASIC, stated *"we are instructed that ASIC has not prepared an interim report pursuant to section 16(1)(a) of the ASIC Act in respect of its investigation of Provide Nominees"*.
>
> 11. Pursuant to s 16 of the *ASIC Act*, where, in the course of an investigation under Division 2 of Part 3 of the *ASIC Act*, ASIC forms the opinion that a serious contravention of the *Corporations Act* or the *ASIC Act* has been committed, ASIC must prepare an interim report that relates to the investigation and set outs its findings about the contraventions and the evidence and other material on which those findings are based.
>
> 12. It follows that, in the period 29 March 2022 to 2 November 2023, ASIC, in consequence of its conduct of the Investigation, was not able to and did not form an opinion that Provide has committed a s 16 serious contravention of either the *Corporations Act* or the *ASIC Act*.
>
> 13. By reason of the matters set out in [12], by no later than 2 November 2023 and at all material times thereafter, ASIC did not have reason to suspect, as is required by s 13 of the *ASIC Act*, that Provide may have committed a contravention of ss 911A, 1041E, 1041F, and 1041H of the *Corporation Act*, nor a contravention of ss 12DA, 12DB and 12DF of the *ASIC Act*.
>
> 14. Further or alternatively, by no later than 2 November 2023, ASIC did not have reason to suspect that Provide may have committed a contravention of the *Corporations Act* or the *ASIC Act*.

33 Provide's primary cause of action is disclosed at [13]. The basis for its claim is that because ASIC had not prepared an interim report (required by s 16(1)(a) of the *ASIC Act* if, in the course of an investigation, ASIC "forms the opinion that a serious contravention of a law … has been committed"), then it follows that from at least that time ASIC did not have "reason to suspect that there may have been committed a contravention of the corporations legislation" as required by s 13(1)(a).

34 Provide also contends that an alternative cause of action, not based on the bare fact that no s 16 interim report has been prepared, is pleaded at [14] which relies upon the pleaded facts in the Concise Statement. This will be addressed below.

35 Sections 13 and 16 sit within Div 1 ("Investigations") of Pt 3 of the *ASIC Act*.

36 Section 13 empowers ASIC to investigate suspected contraventions of the *ASIC Act* and *Corporations Act*. Section 13 relevantly provides:

> **13 General powers of investigation**
>
> (1) ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has *reason to suspect that there may have been committed*:
>
> (a) *a contravention* of the corporations legislation (other than the excluded provisions); or
>
> …
>
> (6) If ASIC has *reason to suspect that a contravention* of a provision of Division 2 of Part 2 *may have been committed*, ASIC may make such investigation as it thinks appropriate.
>
> (Emphasis added.)

37 Section 16 is "directed to ensuring that discovered violations of legal rules and prohibitions are drawn to the attention of appropriate authorities": *Deloitte Touche Tohmatsu v Australian Securities Commission* (1994) 54 FCR 284 at 291 (per Lindgren J) which was approved by the Full Court in *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 106 (per Beaumont, Drummond and Sundberg JJ).

38 Section 16 relevantly states:

> **16 Interim report on investigation**
>
> (1) Where, in the course of an investigation under this Division, ASIC *forms the opinion* that:
>
> (a) *a serious contravention* of a law of the Commonwealth, or of a State

> or Territory in this jurisdiction, *has been committed*;
>
> …
>
> it must prepare an interim report that relates to the investigation …
>
> (Emphasis added.)

39 Drummond J set out the well-established principle in *Australian Securities Commission v* ***Lucas*** (1992) 36 FCR 165 at 178 that:

> Far from there being a principle that, once there is an assertion that a statutory power has been used for an improper purpose, there is a burden on the authority exercising the power to prove propriety, the cases I have referred to show that there is a well-established principle applicable in a variety of situations that it is the person asserting impropriety in the exercise of a statutory power who has the burden of making out that challenge, difficult though that task will generally be.

40 The principle that a person impugning the exercise of statutory power has the burden of establishing impropriety extends to where the power is exercisable upon the existence of reasons for a specified belief, such as s 13 of the *ASIC Act*: see *Little River Goldfields NL v Moulds* (1991) 32 FCR 456 at 466 (per Davies J).

41 ASIC says that Provide has failed to discharge its onus to establish that ASIC did not, as at 2 November 2023, hold a suspicion that Provide may have contravened the corporations legislation such as to justify continuing its investigation pursuant s 13 of the *ASIC Act*.

42 Provide's argument that ASIC's failure to form the state of mind required by s 16 means that ASIC did not form, and could not have formed from 2 November 2023, a different state of mind pursuant to s 13 is illogical and therefore Provide's application has no reasonable prospect of success.

43 Sections 13 and 16 of the *ASIC Act* contemplate distinct states of mind and serve different purposes. The phrase "forms the opinion" in s 16 contemplates a belief or conclusion that a contravention has been committed. A "reason to suspect" in s 13 is a state of mind that falls well short of a belief or a conclusion. ASIC may have "reason to suspect" that a contravention "may have been committed" (s 13(1)(a) and s 13(6)) without ever having "form[ed] the opinion" that a contravention "has been committed" (s 16(1)(a)). It does not follow as a matter of logic that if ASIC has not formed an opinion that a serious contravention of a law has been committed, then ASIC could not have, and does not continue to have, a reason to suspect that a contravention may have been committed. That is to say nothing at this stage about the distinction between "contravention" and "serious contravention" which is discussed below.

44 Further, that an investigation is occurring and continues is a predicate of s 16. That must include a s 13 investigation. Whether or not ASIC formed the opinion set out in s 16 in the course of an investigation cannot establish that ASIC did not hold and could not hold, or was without basis for holding, another prior state of mind required by s 13 to make an investigation. ASIC not forming the s 16 opinion in the course of an investigation cannot have the result that it no longer has the power to conduct the investigation at all.

45 Provide did not seek to rebut, either in its written or oral submissions, the illogicality of its argument that the lack of a s 16 opinion equals a lack of s 13 state of mind. As Provide's cause of action disclosed in the pleadings fails as a matter of logic, the defect cannot be cured by any amendment to the pleading or the production of evidence. Therefore, Provide has "no reasonable prospect of successfully prosecuting the proceeding" within the meaning of s 31A(2) of the *FCA Act* and r 26.01(1)(a) of the Rules based on its primary cause of action.

46 That is sufficient to deal with the Summary Dismissal Application. However, as ASIC put an additional case for summary dismissal based on the distinction between "contravention" in s 13 and "serious contravention" in s 16, I will also deal with that in the next section.

Serious Contravention

47 ASIC says that a further reason why Provide's cause of action based on the relationship between s 13 and s 16 has no reasonable prospect of success is because s 13 only requires suspicion that a "contravention" may have been committed whereas s 16 refers to a "serious contravention". Whether or not ASIC forms the opinion that a "serious contravention … has been committed" says nothing about whether ASIC held or continues to hold a suspicion that "a contravention …. may have been committed" in respect of the same provision or other provisions.

48 The parties disagreed about the meaning of "serious contravention" in s 16 of the *ASIC Act*. ASIC contends that whether a contravention is a "serious contravention" is a question of fact based on the conduct in question. A contravention of a particular provision may be a mere "contravention" or a "serious contravention" depending on a range of factors. Provide submits that any mere contravention of the Relevant Provisions is necessarily serious in light of the maximum potential penalties for contravening those provisions and, on Provide's construction, the implied requirement in all of the Relevant Provisions that the conduct be deliberate.

49 "Serious contravention" is not defined in the *ASIC Act* or the *Corporations Act* (or the relevant predecessor acts – the *Australian Securities Commission Act 1989* (Cth) and *Corporations Act 1989* (Cth)). The composite phrase is only used in s 16 and s 18 of the *ASIC Act*. The explanatory materials to the *ASIC Act* and *Corporations Act* do not shed any light on its meaning. The meaning of the expression "serious contravention" in s 16 does not appear to have been expressly considered by any Court.

50 Ipp JA in ***Vines*** *v Australian Securities and Investments Commission* (2007) 63 ACSR 505 at [229] said that whether "the contravention is a serious one" for the purposes of s 1317EA(5) of the *Corporations Act* is determined by reference to:

> (a) the degree by which the officer of the corporation concerned has departed from the requisite standard of care and diligence …; and
>
> (b) the consequences, potential or actual, of the contraventions.

51 Ipp JA's formulation is consistent with a recent summary by Lee J in *Australian Securities and Investments Commission v* ***GetSwift*** *Ltd* (2023) 167 ACSR 178 as to the meaning of "serious" in s 1317G(1)(b)(iii) of the *Corporations Act*. That provision provides that a Court may order a person to pay a pecuniary penalty in relation to the contravention of a civil penalty provision if, among other things, the contravention is "serious". His Honour stated at [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 (*ASC v Donovan*) at 608 (per Cooper J); *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* (2010) 268 ALR 303; 77 ACSR 392; [2010] FCA 292 (*ASIC v Citrofresh*) at [34] (per Goldberg J)) or weighty, important, grave and considerable (*Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640; [2012] VSC 332 at [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 [34] per Goldberg J); *ASIC v McDonald (No 12)* (at [310] per Gzell J); *Australian Securities and Investments Commission v Newcrest Mining Ltd* (2014) 101 ACSR 46; [2014] FCA 698 (at [58] per Middleton J). Whether a contravention is "serious" is, again, ultimately a question of fact: *Australian Securities and Investments Commission v Rio Tinto Ltd (No 2)* [2022] FCA 184 (*ASIC v Rio Tinto (No 2)*) at [36] (per Yates J).

52 In *Australian Securities and Investments Commission v* ***Mayfair*** *Wealth Partners Pty Ltd* [2021] FCA 1630, Anderson J discussed the meaning of "serious contraventions" in relation to s 12DA and s 12DB of the *ASIC Act* and s 1041H of the *Corporations Act,* all of which Provide is suspected by ASIC of contravening. The question before Anderson J was whether the

defendants ought to pay a pecuniary penalty pursuant to s 12GBA and s 12GBCA of the *ASIC Act* in respect of the contraventions found in the liability judgment in *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247. The defendants argued that they should not be ordered to pay pecuniary penalties because, among other reasons, the contraventions were not "serious contraventions". Section 16 of the *ASIC Act* was not at issue.

53 Anderson J determined that the defendant's misleading and deceptive conduct and false or misleading representations constituted "serious contraventions", rejecting the defendant's argument that the misleading conduct was only a "minor or technical" contravention: see at [137] and [171]. His Honour's comments at [172] and [239]-[245] demonstrate that whether a contravention is a "serious contravention" is "a question of fact" (*GetSwift* at [52]) determined by refence to the evidence and the nature of the conduct, rather than the nature of the relevant provision that has been contravened. Although his Honour did not refer to *Vines,* Anderson J's discussion in *Mayfair* reflects Ipp JA's construction that a "serious" contravention is judged according to the departure from the requisite standard of care and diligence and the consequences of the contravention. Anderson J observed at [239]:

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

54 It is uncontroversial that a broad spectrum of conduct or representations may be misleading and deceptive such as to contravene s 12DA or s 12DB of the *ASIC Act* or s 1041E or s 1041H of the *Corporations Act*. The conduct may be very serious in the way described by Anderson J in *Mayfair* because it is calculated, grossly misleading and leads to devastating losses for those who relied upon the misleading representations or conduct. The conduct that contravenes the

relevant provision may also be inadvertent and lead to very minor consequences such that it cannot be regarded as serious.

55 Provide referred to *Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd* (2020) 148 ACSR 123 at [8] where Wigney J described suspected contraventions of the Relevant Provisions, as well as other provisions of the *ASIC Act* and *Corporations Act*, as "extremely serious". Provide contends that Wigney J's comment demonstrates that a contravention of any of these provisions is necessarily serious. However, when Wigney J's observation at [8] is read in context, it is evident that his Honour is using the word "serious" to describe contraventions in the way proposed by ASIC: as a factual description of the degree of seriousness of the relevant conduct in that case. His Honour is not using the phrase "serious contravention" to designate or classify the contravention of certain provisions as necessarily a "serious contravention".

56 The Relevant Provisions ASIC suspects Provide may have contravened would not necessarily be "serious contraventions" if committed. Therefore, there is no relationship between whether ASIC suspects that Provide may have contravened one of the Relevant Provisions and whether ASIC did or did not form the opinion that Provide had committed a "serious contravention" of one or more of these provisions. It is entirely plausible and consistent with the texts of the *ASIC Act* and *Corporations Act* for ASIC to suspect that Provide may have contravened, for example, s 12DA of the *ASIC Act* and even formed the opinion that Provide had, in fact, contravened s 12DA without ever holding the suspicion, let alone forming the belief, that such conduct amounted to a "serious contravention" for the purposes of s 16.

57 The additional requirement of "seriousness" in s 16 is therefore another reason why it cannot be said rationally that because ASIC has not formed the state of mind under s 16, it did not or could not continue to hold the "reason to suspect" state of mind under s 13.

The length and nature of the investigation

58 Although not expressed clearly in its Concise Statement or written submissions, senior counsel for Provide clarified during the hearing that Provide has an alternative cause of action that is independent of the s 16 point.

59 Provide's written submissions refer to certain paragraphs of the Concise Statement and says it relies on these facts, rather than the s 16 point, in support of the ultimate conclusion that ASIC's investigation is no longer authorised by s 13 of the *ASIC Act*. The facts referred to by Provide

are no more than a description of the investigation so far and cannot, on any view, lead to the inference that ASIC did not have reason to suspect that Provide may have contravened the Relevant Provisions as required by s 13.

60 Senior counsel for Provide, Mr Wyles KC, said during the hearing that the Court should infer from the fact that ASIC had been conducting the investigation for 14 months that ASIC no longer has a reason to suspect that Provide may have committed contraventions of the Relevant Provisions. In that time, ASIC has interviewed people and served requests for documents. Provide says the outstanding documents sought by the Third Notice could not reasonably bear on the question of whether Provide had engaged in the contraventions. As such, ASIC now has all the information it needs to conclude whether Provide has contravened the Relevant Provisions.

61 All of the Relevant Provisions that Provide is suspected of contravening are, in Provide's view, "serious contraventions". Therefore, according to Provide, because ASIC had not formed the opinion as at 2 November 2023 that Provide had contravened those provisions, it is reasonable to infer that ASIC also no longer has reasonable grounds to maintain a suspicion that Provide may have contravened those provisions.

62 This "reasonableness" submission goes nowhere once Provide's primary submission on the s 16 point is dismissed, including its construction of "serious contravention". There is no logical basis to infer that because, at 2 November 2023, ASIC had not formed the opinion that a "serious contravention" had been committed means that ASIC cannot have reasonably suspected (and continues to suspect) that a contravention may have been committed for the purposes of s 13.

63 Further, there is no basis to infer from the fact that the investigation has been ongoing for 14 months that ASIC no longer suspects that Provide may have contravened the Relevant Provisions or to conclude that such a suspicion, if held, would now be unreasonable. I do not consider that 14 months is an unreasonable amount of time for a regulator to conduct a complex investigation in the circumstances of this case, which, as set out in the Concise Statement, has involved ASIC issuing three notices (one of which was withdrawn), and the commencement on 2 December 2022 by ASIC of the *Provide* proceeding (VID 712 of 2022) seeking compliance with the third notice.

64 I also note, having already concluded that 14 months is not unreasonable, the observation of O'Bryan J in *Provide* at [134] in relation to the third notice:

> The evidence before the Court demonstrates a history of delay and obfuscation on the part of Provide in complying with the Notice. The most egregious example is the redaction of documents produced to ASIC. After the AGS correctly informed Provide's solicitors, Strongman & Crouch, that the purported basis for redacting the documents lacked justification, Strongman & Crouch merely asserted the contrary position. I have previously described Strongman & Crouch's purported justification for redacting the documents as spurious.

65 Given these observations by O'Bryan J, it ill behoves Provide to suggest that the length of ASIC's investigation is so unreasonable that it would not be reasonable for ASIC to continue to suspect that Provide may have committed a contravention for the purposes of s 13.

66 Accordingly, none of the facts pleaded in Provide's Concise Statement give rise to an arguable case that ASIC lacks the power to conduct the investigation pursuant to s 13.

Further contentions by Provide

67 Provide contends that the pleadings reveal that there are six issues for determination at trial, three issues which are in the nature of statutory construction and three issues which are in the nature of fact. Provide contends that its application cannot be summarily dismissed in circumstances where there are factual and legal disputes that need to be resolved.

68 The three construction issues identified by Provide are:

(1) whether any contravention of ss 911A, 1041E, 1041F and 1041H of the *Corporations Act* and ss 12DB, 12DF, 12DA of the *ASIC Act* is necessarily a "serious contravention" within the meaning of s 16(1)(a) of the *ASIC Act*;

(2) what is a "serious contravention" within the terms of s 16(1)(a); and

(3) the proper construction of s 13 and whether it is an implied condition that the power in s 13 must be exercised reasonably.

69 The three factual issues identified by Provide are whether:

(4) ASIC commenced and amended the investigation on the basis that it had reason to suspect that Provide may have committed "serious contraventions" within the meaning of s 16(1)(a);

(5) at 2 November 2023, ASIC was not able to, and had not formed, an opinion that Provide had committed a "serious contravention" of one or more of the Relevant Provisions; and

(6) from 2 November 2023, ASIC had a reason to suspect that Provide had contravened one of the Relevant Provisions.

70 The precondition to a Court considering the six issues identified by Provide is that there is a "matter" within the meaning of Ch III of the *Constitution*. Where a plaintiff has no reasonable prospect of success, it cannot be said that "'there is some immediate right, duty or liability to be established by the determination of the Court' in the administration of a law" such as to constitute a "matter": see *Unions NSW v New South Wales* (2023) 407 ALR 277 at [15] (per Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ) quoting *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266 (per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

71 Provide has no evidence to support any of its three factual contentions and, for the reasons below, it is not permitted to issue a notice to produce to ASIC to fish for those facts.

72 I have already determined the first two of the three legal issues raised by Provide. However, even if those three legal issues are important questions of construction that need to be determined in a final judgment, none of those questions if resolved in Provide's favour would ultimately assist Provide. That is because, as I have explained above, even if contraventions of all of the Relevant Provisions are necessarily "serious contraventions" within the meaning of s 16(1)(a) of the *ASIC Act*, the states of mind contemplated by s 13 and s 16 are distinct such that an inference cannot be drawn that ASIC did not have (and does not continue to hold) the s 13 "reason to suspect" state of mind because it did not have the s 16(1)(a) "forms the opinion" state of mind. Hence, the questions of law and fact raised by ASIC are not actually "relie[d] upon" by Provide to support its cause of action: see *Cassimatis* at [48] (per Reeves J).

73 Accordingly, I do not consider that the six issues raised by Provide disclose a reasonable cause of action.

Notice to Produce Application

74 Provide filed a notice to produce seeking all material evidencing or recording ASIC decisions (or consideration of decisions) to commence, conduct, amend and continue ASIC's investigation (which commenced in 2022, and continues), and documents evidencing, recording or referring to a suspicion of contravention held by ASIC or grounds for it.

75 The notice to produce was filed very shortly after the Summary Dismissal Application was filed and served.

76 Provide submits that the validity of the notice to produce is relevant to the Summary Dismissal Application because, in order to assess whether Provide has a reasonable prospect of success, all of the relevant evidence needs to be considered and all such evidence can only be before the Court if the notice to produce is executed and complied with by ASIC.

77 Provide contends that ***Gloucester Shire Council*** *v Fitch Ratings, Inc* [2016] FCA 587 directly supports its proposition that evidence relevant to an assessment of prospects is not only permitted but required in relation to a summary judgment application, and serving a notice to produce is a legitimate means by which to obtain that evidence. In that case, Wigney J held that the applicants were entitled to issue a notice to produce and subpoena to defend a summary judgment application.

78 *Gloucester Shire Council* did not involve a regulatory body. Further, Wigney J at [24] restated the well-established principle that a notice to produce or subpoena:

> cannot be used for the purposes of "fishing" or conducting a "fishing expedition". A finding of "fishing" amounts to a finding that the subpoena has no legitimate forensic purpose because the documents are sought to discover if the issuing party has a case, not to support a case that has already been articulated …

79 That principle is applied with particular force in the context of respondents seeking to impugn investigatory or regulatory authorities: see, eg, *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 at [21]-[25] (per Bromwich J); *Australian Broadcasting Corporation v Kane* [2019] FCA 1312 at [33]-[37] (per Abraham J).

80 For example, in ***WA Pines*** *Pty Ltd v Bannerman* (1980) 30 ALR 559, the Chairman of the Trade Practices Commission issued a notice pursuant to s 155 of the ***Trade Practices Act*** *1974* (Cth) to the appellant on the basis that the Chairman had, in the words of s 155(1), "reason to believe that [the appellant] is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act". The appellant commenced proceedings to challenge the notice on a number of grounds, including that the "the notice was issued without the Trade Practices Commission, the respondent or the Deputy Chairman having reason (or alternatively any legally sufficient reason) to believe any of the matters set out in s 155(1) of the said Act" (para 6 of the statement of claim).

81 The state of mind required by s 155(1) of the *Trade Practices Act* is not dissimilar to that required by s 13 of the *ASIC Act*, and the appellant's challenges to the Chairman's power is analogous to Provide's challenge in this case to ASIC's power.

82 The Court in *WA Pines* refused the appellant's applications for discovery, interrogatories and further particulars to establish that the Chairman "has no reason to believe" any of the matters set out in s 155(1) of the *Trade Practices Act*. The Full Court held at 566 (per Brennan J, Bowen CJ and Lockhart J agreeing) that:

> In the present case, discovery is sought before there is a tittle of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v Blake's Motors* [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery. This is not such a case. This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing.

83 Brennan J's (as his Honour then was) observations apply to Provide's notice to produce.

84 In *Gloucester Shire Council*, Wigney J held at [35] that the notice to produce issued by the applicants was "reasonably targeted and not expressed in overly broad or ambiguous terms" and "could not fairly be characterised as involving 'fishing'" or "'trawling' for documents for the purpose of … seeking to discover if they have a case". *Gloucester Shire Council* can be distinguished on the basis that, for the reasons given above, Provide has no legal or factual basis for its allegation that ASIC does not have the requisite state of mind pursuant to s 13. Therefore, Provide's notice to produce, which is framed extremely broadly to include all of ASIC's investigative documents, is an attempt to make a case where no case presently exists. That is "mere fishing" and is not a basis to refuse the Summary Judgment Application.

85 Given that I will make orders giving summary judgment against Provide pursuant to s 31A(2) of the *FCA Act*, I do not need to decide on ASIC's Notice to Produce Application or say anything further on that matter. But if I were required to reach a conclusion, I would set the notice aside on the basis that it is fairly characterised as "fishing" or "trawling" for documents.

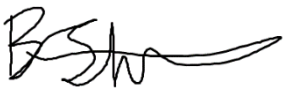
CONCLUSION

86 The power to summarily dismiss a proceeding pursuant to s 31A of the *FCA Act* is not to be exercised lightly: *Spencer* at [60] (per Hayne, Crennan, Kiefel and Bell JJ). This is an appropriate case to exercise that power. The basis of Provide's claim that ASIC lacks the requisite state of mind pursuant to s 13 of the *ASIC Act* to continue the investigation is based on an illogical construction of the relationship between s 13 and s 16. The further facts relied upon by Provide, such as the length of the investigation, go nowhere once the s 16 point is dismissed. Provide's Concise Statement therefore does not disclose a reasonable cause of action and that deficiency cannot be cured by amending those pleadings.

87 Accordingly, I will grant ASIC's application for summary judgment pursuant to s 31A(2) of the *FCA Act* and r 26.01(1)(a) of the Rules.

88 Provide should also be ordered to pay ASIC's costs.

I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rofe.

Associate: 

Dated: 27 March 2024