FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Dunjey [2023] FCA 361

File number:	WAD 276 of 2021
Judgment of:	**FEUTRILL J**
Date of judgment:	21 April 2023
Catchwords:	**CORPORATIONS** – winding up – unregistered managed investment scheme – scheme – interest in scheme – unlicensed financial services business – financial products – dealing in financial products – business where the second defendant executed 'loan agreements' with investors and pooled loan funds in bank accounts – where second defendant represented loan funds would be used for 'investments' – liquidator of company and scheme appointed – winding up corporate trustee – receivers and managers of trust assets appointed **PRACTICE AND PROCEDURE** – implied undertaking – purpose of freezing order disclosure affidavit – release from implied undertaking refused **PRACTICE AND PROCEDURE** – declaratory relief – potential criminal prosecution – proper contradictor – Court's disapproval of contravening conduct – declaratory relief granted
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 33, 76(1), 76(2), 77(b), 78 *Corporations Act 2001* (Cth) ss 9, 1101B(1)(a)(i), 601EB, 601ED, 601EE(1), 601EE(2), 761E, 763A(1)(a), 763B, 766A, 911A, 911A(1), 1311, 1317E *Evidence Act 1995* (Cth) ss 59, 60-64, 66A-75, 81-84, 87, 88, 135, 136 *Federal Court of Australia Act 1976* (Cth) ss 23, 57 *Federal Court Rules 2011* (Cth) rr 7.32, 7.33
Cases cited:	*Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 *Allstate Life Insurance Co v Australian & New Zealand Banking Group Ltd* (1995) 57 FCR 360

Aussie Airlines Pty Ltd v Australian Airlines (1996) 68 FCR 406

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

Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378

Australian Competition and Consumer Commission v Renegade Gas Pty Ltd [2014] FCA 1135

Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504

Australian Securities and Investments Commission v Chase Capital Management Pty Ltd [2001] WASC 27

Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd [2004] WASC 241; (2004) 187 FLR 270

Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd [2007] FCA 1868; (2007) 164 FCR 487

Australian Securities and Investments Commission v Hutchings [2001] NSWSC 522; (2001) 38 ACSR 387

Australian Securities and Investments Commission v Kreicichwost [2007] NSWSC 948; (2007) 64 ACSR 411

Australian Securities and Investments Commission v Marco (No 6) [2020] FCA 1781

Australian Securities and Investments Commission v Marco (No 13) [2023] FCA 83

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

Australian Securities and Investments Commission v Munro [2016] QSC 9

Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3) [2020] FCA 1035; (2020) 146 ACSR 270

Australian Securities and Investments Commission v Ostrava Equities Pty Ltd [2016] FCA 1064

Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd [2002] NSWSC 310; (2002) 41 ACSR 561

Australian Securities and Investments Commission v Secure Investments Pty Ltd [2020] FCA 639

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

	Australian Securities and Investments Commission v Takaran Pty Ltd (2002) 170 FLR 388; [2002] NSWSC 834 *Australian Softwood Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission)* [1981] HCA 49; (1981) 148 CLR 121 *Bell Group Ltd (in liq) v Westpac Banking Corporation* [2001] WASC 315 *BMI Ltd v Federated Clerks Union of Australia* (1983) 76 FLR 141 *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167; (2004) 207 ALR 452 *Briginshaw v Briginshaw* (1938) 60 CLR 336 *Corporate Affairs Commission (NSW) v Transphere Pty Ltd* (1988) 15 NSWLR 596 *Deputy Commissioner of Taxation v Shi* [2021] HCA 22; (2021) 392 ALR 1 *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421 *Frigger v Trenfield (No 3)* [2023] FCAFC 49 *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 *IMF (Australia) Ltd v Sons Of Gwalia Ltd (Administrator Appointed)* [2004] FCA 1390; (2004) 211 ALR 231 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3; (2005) 218 ALR 283 *Mann v Medical Defence Union Ltd* [1997] FCA 45 *McLennan v Taylor* (1967) 85 WN(PT1) (NSW) 525 *Oil Basins Ltd v Commonwealth* [1993] HCA 60; (1993) 178 CLR 643 *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 *Sybron Corporation v Barclays Bank Plc* [1985] 1 Ch 299
Division:	General Division
Registry:	Western Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	174
Date of last submissions:	4 April 2023 (plaintiff) 13 April 2023 (first defendant)

Date of hearing:	29 to 30 June 2022
Counsel for the Plaintiff:	Mr JP Moore QC with Ms CE Klemis
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendants:	The Defendants did not appear
Counsel for Westpac Banking Corporation:	Mr JG Abberton (29 June 2022 only)
Solicitor for Westpac Banking Corporation:	Lavan
Counsel for the Provisional Liquidators of the Second Defendant:	Mr RM Johnson
Solicitor for the Provisional Liquidators of the Second Defendant:	HWL Ebsworth
Counsel for Trustee in Bankruptcy of First Defendant:	Mr JP Cook
Solicitor for Trustee in Bankruptcy of First Defendant:	Thynne & Macartney

ORDERS

WAD 276 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**MICHAEL JEFFERSON DUNJEY** First Defendant
	ASCENT INVESTMENT AND COACHING PTY LTD ACN 127 668 553 Second Defendant
	WESTPAC BANKING CORPORATION ACN 007 457 141 Intervener
	GD PROJECT LIVING PTY LTD ACN 624 182 083 Interested Person
	SEAFLOWER PTY LTD Interested Person
	JOHN GERVASE SHANAHAN Interested Person

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **21 APRIL 2023**

THE COURT NOTES THAT:

For the purposes of these orders, the **Scheme** means the managed investment scheme, with at least the following features, operated by the second defendant between, at least, 1 July 2012 and 13 December 2021:

A. The second defendant (through the first defendant or others) made representations to potential contributors to the effect that funds advanced to the second defendant would be used as part of an 'investment fund' under the management of the second defendant (through the first defendant). That the profits derived from that 'investment fund' would be used to pay a return to contributors in the form of interest at a high rate on funds advanced. That the second defendant was able to offer high rates of interest because the

first defendant had particular skill in investment and generating sufficient returns to pay the high rate of interest as well as a return for the second defendant.

B. The description of the fund as a 'hedge fund' or 'investment fund' or funds under management and the like, if not expressly, then implicitly, represented that the funds advanced would be pooled with other funds advanced and used for the purposes of the investment activities of the second defendant. Similarly, the apparently lucrative investment activities of the second defendant inferred that 'funds' would be aggregated and used for the second defendant's investment activities.

C. Many contributors to whom representations of the kind referred to in paragraphs A and B were made entered into loan agreements with the second defendant and made advances or deposits into bank accounts of the second defendant.

D. The advances deposited into the bank accounts were mixed with advances and deposits made by other contributors into those bank accounts.

E. Contributors made the advances and deposits on the understanding and in the expectation that the second defendant would use the funds advanced for carrying out investment activities and that the contributors would be paid a return (interest) out of the profits of that investment activity.

F. A considerable proportion of the funds the second defendant received from contributors were used to make payments to other contributors and were not used for conducting investment activities.

G. A proportion of the funds the second defendant received from contributors was used to pay for individual expenses of the second defendant and personal expenses of the first defendant or people or entities related to him.

H. A proportion of the funds the second defendant received from contributors was used to acquire assets that were 'investment' activities of the second defendant.

I. The contributors who provided funds to the second defendant did not have day to day control over the use of those funds.

THE COURT DECLARES THAT:

1. The second defendant, Ascent Investment and Coaching Pty Ltd (Provisional Liquidator Appointed) (ACN 127 668 553), operated the Scheme as an unregistered

managed investment scheme in contravention of s 601ED(5) of the ***Corporations Act 2001*** (Cth) in circumstance in which the Scheme was required to be registered under s 601EB of the *Corporations Act* in the period between, at least, 1 July 2012 and 13 December 2021.

2. By operating the Scheme, the second defendant contravened s 911A of the *Corporations Act* in that it carried on a financial services business without holding an Australian Financial Services Licence in the period between, at least, 1 July 2012 and 13 December 2021.

THE COURT ORDERS THAT:

1. The second defendant's interlocutory application dated 25 May 2022 for an order that the second defendant be wound up pursuant to s 461(1)(a) of the *Corporations Act* is dismissed with no order as to the costs of that application.
2. Pursuant to s 461(1)(k) of the *Corporations Act*, the second defendant is wound up on just and equitable grounds.
3. Pursuant to s 472(1) of the *Corporations Act,* **Mr** Matthew James **Donnelly** and **Mr** Sean **Holmes** of **Deloitte** Financial Advisory Pty Ltd, are appointed joint and several liquidators to the second defendant (**Liquidators**).
4. Pursuant to s 601EE(2) of the *Corporations Act*, the Scheme is to be wound up.
5. The Liquidators are to be responsible for the winding up of the Scheme.
6. The second defendant is to pay the plaintiff's cost of the proceedings and such costs as taxed or agreed be reimbursed out of the property of the second defendant, in accordance with s 466(2) of the *Corporations Act*.
7. Paragraph 5 of the orders made on 13 December 2021 is varied by inserting the following paragraph before existing sub-paragraph 5(a):

   (aa) Mr John Gervase Shanahan (**Trustee**), in his capacity as the Trustee in Bankruptcy of the estate of the first defendant, from preserving any property (as defined in the *Corporations Act*) of the first defendant and:

      (i) realising any such property in accordance with the applicable powers under the *Bankruptcy Act 1966* (Cth); and

      (ii) paying from the proceeds of sale of any such property:

(A) any valid and subsisting secured claims against such property; and

(B) the Trustee's reasonable remuneration, costs and expenses relating to the preservation and realisation of such property,

with any remaining proceeds of sale, following the payments referred to above at paragraphs 5(a)(ii)(A) and 5(a)(ii)(B), to be paid into an interest bearing bank account held jointly by the Liquidators and the Trustee requiring the dual authorisation of the Trustee and any one of the Liquidators to effect a withdrawal of any funds,

(iii) exercising the rights attached to any share held by the first defendant for the purpose of appointing Mr Donnelly and Mr Holmes of Deloitte as liquidators of the company in which that share is held.

8. Pursuant to s 57 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth), Mr Donnelly and Mr Holmes are appointed, jointly and severally, as receivers and managers (**Receivers**) over the property, assets and undertakings of the Ascent Trust (formerly the Dunjey Family Trust) (**Trust**).

9. The need for the Receivers to file a guarantee under rr 14.21 and 14.22 of the *Federal Court Rules 2011* (Cth) is dispensed with.

10. The Receivers are authorised to take possession of, preserve, maintain and sell all property, assets and undertakings of the Trust (**Trust Assets**).

11. The Receivers are to have the power:

(a) to do all things (including, but not limited to, the signing of any documents) for the realisation of the Trust Assets;

(b) provided by s 420 of the *Corporations Act* as if the reference therein to 'the corporation' were to 'the Trust' together with the powers that a liquidator has in respect of property of a company (in its role as legal owner and trustee) pursuant to s 477(2) of the *Corporations Act*;

(c) without limiting the powers granted pursuant to paragraphs 11(a) and (b), necessary to attend to the following identified tasks:

(i) the identification of the Trust Assets and the trust liabilities;

(ii) the identification of Trust creditors and distinguishing them from non-Trust creditors (if any);

(iii) the ascertaining of the state of the accounts between the beneficiaries and the trustee;

(iv) the recovering of, or attempting to recover, the Trust Assets, including debts due to the Trust;

(v) the taking of possession of, collecting and protecting the Trust Assets;

(vi) the carrying on of any business of the Trust;

(vii) the realisation, or attempted realisation, of the Trust Assets;

(viii) the distribution of any proceeds of realisation to meet the claims of the creditors or persons whose debts were incurred in relation of the Trust; and

(ix) any matter in the administration of the Trust which is ancillary to the above to the extent to which it had to be undertaken for the purposes of the identified tasks.

12. The Receivers are justified and would be acting properly in not distributing any Trust Assets, or any part of them, to or for the benefit of any of the beneficiaries of the Trust until further direction or order of the Court.

13. The question of payment of the remuneration, costs and expenses of the Liquidators and Receivers and of the Trustee for assisting them in the discharge if their duties is reserved and is to be the subject of further order of the Court and, in the meantime:

(a) the remuneration, costs and expenses incurred by the Receivers are to be paid from the Trust Assets;

(b) the remuneration, costs and expenses of the Liquidators as liquidators of the Scheme are to be paid out of the assets of the Scheme; and

(c) the remuneration, costs and expenses of the Liquidators as liquidators of the second defendant are to be paid out of the assets of the second defendant.

14. Pursuant to section 37AI of the *Federal Court Act*, until 4:15pm on the date fixed for the hearing referred to in paragraph 19 of these orders or any other date to which that hearing may be adjourned, or further or other order, paragraphs A – I of the notes to these orders, paragraphs 1 and 2 of the declarations made under these orders and the

reasons for decision in respect of these orders are not to be published to anyone other than to the Court, the parties to these proceedings and the Liquidators and Receivers, the Trustee, Westpac Banking Corporation, Seaflower Pty Ltd and GD Project Living Pty Ltd (collectively, **interested non-parties**) and the parties' and interested non-parties' legal representatives

15. By 5 May 2023, the first defendant is to file and serve on the other parties to the proceedings and the interested non-parties an outline of submissions in support of his application for a suppression and non-publication order together with a minute of the proposed order and any affidavit(s) in support of that application.

16. By 12 May 2023, any interested news publisher which wishes to appear and be heard on the first defendant's application is to file a notice to that effect and serve that notice on each party and each interested non-party.

17. By 19 May 2023, the plaintiff, second defendant, interested non-parties and any interested news publisher are to file and serve on each party, each interested non-party and any interested news publisher any submissions and any affidavit(s) in support of those submissions.

18. By 19 May 2023, the parties and the interested non-parties are to file and serve on each party and each interested non-party any minute of agreed proposed orders, or competing minute of proposed orders, addressing the matters the subject of paragraphs 167 to 171 of the reasons for decision together with any submissions and affidavit(s) in support of the relevant minute of proposed orders.

19. The question of the Receivers' and Liquidators' costs and the first defendant's application for a suppression and non-publication order is listed for hearing on a date to be fixed.

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

REASONS FOR JUDGMENT

FEUTRILL:

Introduction

1 By an amended originating process filed on 17 March 2022 (**Application**), the plaintiff (**ASIC**) seeks certain orders against the second defendant, Ascent Investment and Coaching Pty Ltd (ACN 127 668 553) (referred to in these reasons as **Ascent** or the **second defendant**) to address asserted contraventions of:

(a) section 601ED(5) of the ***Corporations Act*** *2001* (Cth), which prohibits a person from operating a managed investment scheme that s 601ED(1) requires to be registered under s 601EB unless the scheme is so registered; and

(b) section 911A of the *Corporations Act*, which requires a person who carries on a financial services business to hold an **A**ustralian **F**inancial **S**ervices **L**icense covering the provision of the financial services.

No final relief is sought on the Application against the first defendant, Mr Michael Jefferson Dunjey (referred to in these reasons as **Mr Dunjey** or the **first defendant**).

2 Before the final hearing of the Application, orders were made appointing **Mr** Matthew James **Donnelly** and **Mr** Sean **Holmes** of Deloitte Financial Advisory Pty Ltd **provisional liquidators** of the second defendant. The second defendant appeared at the final hearing of the Application through the provisional liquidators. Mr Dunjey made limited written submissions, but did not appear at the final hearing of the Application. **Westpac** Banking Corporation sought and was granted leave to appear and intervene at the final hearing of the Application as a person interested in the outcome of that application. **Mr** John Gervase **Shanahan**, Mr Dunjey's trustee in bankruptcy, sought and was granted leave to appear and make submissions on the final hearing of the Application. **Seaflower** Pty Ltd and **GD Project Living** Pty Ltd, which had sought and been granted leave to appear at interlocutory hearings and which had filed appearances, did not seek leave and were not granted leave to intervene at the final hearing. No party or interested non-party contested the liability of Ascent. No party or interested non-party contested the appropriate relief, except for Mr Dunjey, who ultimately made submissions to the effect that the requested declarations should not be made.

3 At the final hearing of the Application ASIC tendered and relied upon a very substantial body of documentary evidence. No witness with direct knowledge of any of the matters the subject of the Application gave direct evidence of those matters. However, certain hearsay evidence of witnesses with direct knowledge was tendered and admitted into evidence.

4 In the end, notwithstanding that the evidence upon which ASIC relies is documentary and (or) hearsay, I am satisfied to the degree required for the serious nature of the allegations made against Ascent, that it has contravened ss 601ED(5) and 911A of the *Corporations Act*. I am also satisfied that Ascent and the unregistered managed investment scheme it operated should be wound up and the provisional liquidators appointed as liquidators for that purpose. As there may be some complexity identifying and getting in property of each of the scheme and the company, I will hear the parties further on an appropriate mechanism for so doing including, if appropriate, the appointment of the receivers to get in all property of the scheme and the company in respect of which the liquidators may then request directions as to the division and distribution of that property at some later point in time. Although I am also satisfied that the Court should grant the declaratory relief requested as a mark of the Court's disapproval of the contravening conduct, I will hear the parties on the extent to which it would be appropriate to make a non-publication order regarding those declarations, parts of the orders made and these reasons. In the meantime, there will be an interim non-publication order pending the hearing and determination of that issue.

Background

5 On 13 December 2021, ASIC commenced proceedings against Ascent and Mr Dunjey (collectively referred to in these reasons as **the defendants**). At the time of commencement, the proceedings were originally made under s 1323 of the *Corporations Act* and s 23 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth). Interim relief was sought for asset preservation orders against the defendants, for orders restraining the first defendant from leaving Australia and for other orders (**freezing orders**).

6 On 13 December 2021, freezing orders were made against the defendants after an *ex-parte* hearing that day. These orders restrained the defendants from removing any property of the defendants from Australia and prevented Mr Dunjey from leaving Australia. Disclosure orders were also made against Mr Dunjey in his own capacity, and on behalf of Ascent. These orders required Mr Dunjey to disclose details about bank accounts, debts, assets and liabilities, as well

as property and income of the defendants. The initial freezing orders were varied, by consent, on 15 December 2021, 20 December 2021 and 4 March 2022. There was not an *inter-partes* hearing and, subject to further variations made by orders of 2 June 2022 and 9 December 2022, the freezing orders remain in place.

7 On 20 January 2022, Seaflower was ordered to file a notice of appearance on the basis that it remained necessary for it to seek leave to be heard. Seaflower was granted leave to appear, by its director, from time-to-time at various case management hearings. Seaflower had an interest as a person which had provided funds to Ascent and, therefore, may have been affected by the freezing order and the final relief ASIC requested in the Application.

8 On 21 February 2022, GD Project Living filed an interlocutory application in the proceedings requesting an order to vary the terms of the freezing order and, in effect, requesting the Court to make an interim mandatory injunction ordering Ascent to refund $500,000 to GD Project Living said to have been transferred to Ascent on 16 December 2021. On 16 and 25 March 2022, the Court made orders granting GD Project Living leave to file and serve that application without becoming a party to the proceedings and ordering it to file a notice of appearance. On 2 June 2022, its application was dismissed. GD Project Living was also granted leave to appear from time to time at various case management hearings.

9 On 1 March 2022, ASIC made an interlocutory application for an order appointing a provisional liquidator to Ascent and for other orders.

10 On 16 March 2022, ASIC was granted leave to amend its originating process and on 17 March 2022, it filed the Application (the amended originating process). The Application is made under ss 461(1)(k), 464, 601ED(5), 601EE, 911A, 1101B(1), 1317E, 1323 and 1324 of the *Corporations Act*, as well as ss 21, 23 and 43 of the *Federal Court Act.*

11 On 25 May 2022, Mr Dunjey as the sole member of Ascent passed a special resolution that it be wound up by the Court pursuant to s 461(1)(a) of the *Corporations Act*. On the same day, Ascent filed an interlocutory application seeking an order that the company be wound up by the Court pursuant to the member's special resolution.

12 On 2 June 2022, the Court made orders pursuant to s 472(2) of the *Corporations Act* appointing Mr Donnelly and Mr Holmes as the provisional liquidators of Ascent together with other orders to facilitate the final hearing of the Application.

13 On 24 June 2022, Westpac filed an interlocutory application in which it sought leave to intervene and be heard in the proceedings as a party whose interests may be directly affected by a decision in the proceedings. Westpac requested leave to intervene due to certain security interests it asserted in property of Mr Dunjey. On the same day, the Court made an order granting Westpac that leave.

14 The Application was heard on 29 and 30 June 2022. ASIC appeared and made submissions at the final hearing. Ascent appeared through the provisional liquidators. Ascent made no submissions and tendered no evidence in opposition to the allegations ASIC made or the relief ASIC sought against Ascent in the proceedings. Although Mr Dunjey was also named as a defendant he did not appear at the hearing and made no submissions, other than certain submissions relating to admissibility of evidence referred to later in these reasons, and tendered no evidence on the Application.

15 Westpac appeared, but made no submissions at the hearing. Its principal interest was to secure a variation to the freezing orders which was ultimately made by an order of the Court of 9 December 2022.

16 Mr Shanahan was granted leave to appear as an interested non-party. Mr Shanahan made no submissions and tendered no evidence on the Application.

17 Neither Seaflower nor GF Project Living appeared or sought leave to appear and make submissions or tender evidence at the final hearing of the Application.

18 No party or interested non-party who (which) appeared at the final hearing opposed the relief ASIC sought in the Application. However, as the provisional liquidators, Mr Shanahan and Westpac had or may have had different or conflicting interests in the precise terms of any orders made on the Application, at the end of the hearing on 30 June 2022, I ordered the parties and interested non-parties to file an agreed minute of proposed final orders to be made on the Application, or failing agreement, separate minutes, and to file and serve any written submissions in support of such orders.

19 On 21 July 2022, a **minute** of proposed orders was filed. In written submissions of the provisional liquidator and Mr Shanahan filed the same day, it was submitted that the proposed orders comprised an agreed position of ASIC, the provisional liquidators and Mr Shanahan with respect to certain parts of the proposed orders. The provisional liquidators and Mr

Shanahan requested certain other orders to which ASIC had no objection. In substance, by the agreed position the provisional liquidators agree with all the relief ASIC has sought against Ascent in the proceedings including declaratory relief to the effect that Ascent has contravened s 601AE(5) and s 911A of the *Corporations Act*.

20 On 27 March 2023, the parties and interested non-parties were invited to make further written submissions on three questions arising from ASIC's request that the Court make declaratory relief against Ascent. On 4 April 2023, ASIC filed written submissions in response to that invitation. On 5 April 2023, the Court received email correspondence from the director of Seaflower in which submissions or comments were made with respect to ASIC's submissions regarding declaratory relief. On 6 April 2023, the Court invited all interested non-parties who (which) had participated in the proceedings at any time to make any further submissions on the question of declaratory relief. On 11 April 2023, the Court received further correspondence from Seaflower in which further submissions were made in response to the Court's letter of 27 March 2023. On 13 April 2023, Mr Dunjey filed submissions in response to the Court's request in which he made submissions, for the first time, opposing the declaratory relief requested against Ascent. On 14 April 2023, the Court received email correspondence from ASIC in which it made submissions, in effect, in response to Mr Dunjey's submissions. No further submissions were received from any of the other parties or interested non-parties.

Evidence

21 ASIC read and relied on the following affidavits.

(a) Paragraphs [1]-[6], [12], [13], [16]-[18], [21(d)], [21(e)], [23]-[25], [28]-[43], [50]-[55], [61]-[73], [77]-[90], [92]-[95] of the affidavit of **Mr** Jamie **Macchiusi** affirmed 10 December 2021 and exhibit JM-1 to that affidavit. The affidavit was received on the hearing of the originating application as Ex 1.1.

(b) Paragraphs [1]-[7], [10]-[12], [17], [17(a)-(c)], [18], [22], [23], [25(d)], [27]-[29], [42], [46], [48], [50] and [54] of the affidavit of Mr Macchiusi affirmed 1 March 2022 and exhibit JM-2 to that affidavit. The affidavit was received in the hearing as Ex 1.2, but the documents at tabs 4, 5 and 6 of JM-2 were provisionally received in the hearing as part of the exhibit and subject to rulings on Mr Dunjey's objections to the receipt of those documents.

(c) Paragraphs [1]-[6], [11]-[15] and [18] of the affidavit of Mr Macchiusi affirmed 12 April 2022 and exhibit JM-3 to that affidavit. The affidavit was received as Ex 1.3 in the hearing.

(d) Paragraphs [1]-[7], [9]-[15], [16]-[21], [22], [24]-[26], [28]-[52] of the affidavit of **Ms** Hollie **Ponton** affirmed 1 March 2022 and exhibit HEPP-1 to that affidavit. The affidavit was received as Ex 2.1 in the hearing.

(e) The affidavit of Ms Ponton affirmed 9 March 2022 and annexures HEPP-1 to HEPP-5 of that affidavit. The affidavit was received as Ex 2.2 in the hearing.

(f) Paragraphs [1] and [5] of an affidavit of Mr Dunjey sworn 23 May 2023. The affidavit was received as Ex 3 in the hearing.

(g) Paragraphs [2]-[14] and [15(a)] of the affidavit or Mr Donnelly affirmed 22 June 2022 and annexures MD1 to MD11 to that affidavit. The affidavit was received as Ex 4 in the hearing. MD10 of that affidavit was report of the provisional liquidators (**Provisional Liquidators' Report**).

(h) Paragraphs [1]-[3] of the affidavit of Mr Sean Holmes affirmed 22 June 2022. The affidavit was received as Ex 5 in the hearing.

22 ASIC also tendered a number of documents. Exhibit 6.1 was a letter from ASIC to Mr Dunjey dated 22 December 2021 with a notice requiring him to appear for an examination. Exhibit 6.2 was a letter from ASIC to **Ms** Mali **Eva** dated 20 December 2021 with a notice requiring her to appear for an examination. Exhibit AIC.0083.0134.6212 and Ex 7 comprised various loan agreements, correspondence involving Mr Dunjey and (or) representatives of Ascent and financial records of Ascent. These were unredacted copies of document of which redacted copies were contained in one or more of JM-1, JM-2 or JM-3.

23 The documentary evidence ASIC tendered at the hearing ran to more than 6000 pages. The allegations made against Ascent are serious and conclusion of contraventions of s 601AE(5) and s 911A should not be made lightly. As explained later, the Court should be satisfied of the facts to the standard identified in ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336 per Dixon J (at 361-362). Due to the high public importance of proceedings of this nature and the impact dismissal for want of proof may have on the many contributors of funds to Ascent, together with the necessity to reach a state of satisfaction that has not been the product of 'inexact proofs,

indefinite testimony, or indirect inferences,' the Court has given consideration to the whole record in order to make the findings of fact referred to later in these reasons.

Hearsay

24 ASIC's evidence insofar as it concerned the allegations of contraventions of the *Corporations Act* was founded to a significant extent on hearsay or, in the language of s 59 of the ***Evidence Act*** *1995* (Cth), previous representations. In general, previous representations are not admissible unless they fall within one or more of the exceptions set out in ss 60-64, 66A-75, 81-84, 87 and 88 of the *Evidence Act*. Even if admissible under an exception, the Court retains a discretion to exclude or limit the use of it under ss 135 and 136 of the *Evidence Act*.

25 A document containing a previous representation may be admitted into evidence notwithstanding that it is not otherwise admissible under an exception to the hearsay rule by agreement between the parties or it may be tendered and admitted without objection from any other party in the proceedings. In these circumstances, the previous representation is in evidence and may be given such probative weight as the trial judge may consider appropriate on all relevant issues: see, e.g., *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 214, 219-220; *McLennan v Taylor* (1967) 85 WN(PT1) (NSW) 525 at 528-529, 537-538, 540; *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [393].

26 No objection was taken to ASIC reading and relying on Mr Dunjey's affidavit of 23 May 2022. Therefore, the facts deposed in that affidavit are received in the hearing.

27 No objection was taken to ASIC relying on the statements made in the section 19 examinations of Mr Dunjey, Ms Eva and Mr Jenkin. At the hearing, I ruled that these statements were admissible. Subject to the qualification below concerning Mr Dunjey's disclosure affidavits, the facts stated in those transcripts are received in the hearing. My reasons for admitting these statements into evidence may be briefly stated as follows.

28 The evidence reveals that the relevant statements were contained in records of examinations of Mr Dunjey, Ms Eva and Mr Jenkin undertaken in accordance with Part 3 Division 2 of the ***A****ustralian* ***S****ecurities and* ***I****nvestments* ***C****ommission* ***Act*** *2001* (Cth). Section 76(1) of the *ASIC Act* provides that a statement a person makes at an examination of the person is admissible against that person in proceedings. Therefore, statements of Mr Dunjey are admissible against

him in the proceedings. Section 76(2) provides that the statement is admissible even if it is heard together with proceedings against another person (here, Ascent).

29 Further, s 77(b) of the *ASIC Act* provides that where direct evidence by a person (referred to as the absent witness) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination that tends to establish a matter is admissible in the proceeding as evidence of that matter unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness. Section 78 provides the Court with guidance on the weight to be given to a statement admitted under s 77. The statements of Ms Eva and Mr Jenkin fall into this category. Mr Dunjey's statement also falls into this category if it is not admissible under s 76(1).

30 In any event, the statements in the records of the examinations are previous representations and no party to the proceedings objected to the tender of them. Therefore, they may be received in evidence and given such weight as the Court considers appropriate.

Disclosure affidavits

31 Mr Dunjey objected to ASIC reading and relying on his affidavits of 20 and 21 December 2021 (**disclosure affidavits**). To the extent that these affidavits were also made for or on behalf of Ascent, it made no formal objection to ASIC tendering them.

32 Paragraph 10 of the freezing orders made on 13 December 2021 was in the following terms:

> 10. On or before 4:00pm AWST on 20 December 2021, except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, the first defendant must deliver or cause to be delivered to the plaintiff, a full and detailed affidavit on his own behalf and a full and detailed affidavit on behalf of the second defendant, respectively, setting out:
>
> (a) the name and address of any bank, building society or other financial institution at which there is an account in the name of or under the control of the relevant defendant, together with the number of such account, the name of such account and the balance of that account;
>
> (b) the name address and email address of any person or persons indebted to the relevant defendant and the amount of the indebtedness;
>
> (c) an itemised inventory of the relevant defendant's assets and liabilities;
>
> (d) an itemised inventory of any and all property (as defined in the Corporations Act) whether real or personal owned or controlled by the relevant defendant or in which that defendant has any legal or beneficial interest;

(e) in respect of any of the property (as defined in the Corporations Act) of the relevant defendant which has been given as security for any debt, the details of that property and the nature of the security and the debt so incurred; and

(f) the sources and amount of any income, wages, earnings or other payments received by the relevant defendant in the last 12 months and expected to be received by the relevant defendant in the next 12 months.

The second reference to the 'first defendant' in the *chapeau* is evidently an error and should be a reference to the 'second defendant'. The disclosure affidavits were made in compliance with that order.

33 ASIC commenced the proceedings under s 1323 of the *Corporations Act*. A purpose of that provision is to provide a means by which property that may, in due course, represent a source for the vindication of rights of aggrieved persons is preserved for their benefit. Orders on an interim basis may be made under s 1323(3) of the *Corporations Act*: e.g., *Australian Securities and Investments Commission v Secure Investments Pty Ltd* [2020] FCA 639 at [27] (and the cases there cited). It is open to the Court to make freezing orders under s 1323: e.g., *Australian Securities and Investments Commission v Kreicichwost* [2007] NSWSC 948; (2007) 64 ACSR 411 at [33]-[44].

34 Rule 7.32 of the *Federal Court **Rules** 2011* (Cth) provides that the Court may make a freezing order 'for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied'. Rule 7.33 of the *Rules* provides that the Court may make an order ancillary to a freezing order, which includes making an order for the purpose of eliciting information relating to assets relevant to the freezing order. The power in these rules, in turn, is derived from s 23 of the *Federal Court Act*.

35 The interim freezing orders made on 13 December 2021 were plainly made for the purpose of preserving property for the benefit of aggrieved persons and to prevent the frustration or inhibition of the Court's process. Paragraph 10 of the freezing orders made in this case was an ancillary order of the kind referred to in r 7.33 of the *Rules*.

36 In *Deputy Commissioner of Taxation v **Shi*** [2021] HCA 22; (2021) 392 ALR 1 (at [22]) Gordon J described the purpose of freezing orders and ancillary orders in the following terms:

> [22] A freezing order, and an asset disclosure order, have the same fundamental

> purpose: "to prevent the abuse or frustration of [a court's] process in relation to matters coming within its jurisdiction"… Freezing orders may be made, and may continue to operate, after final judgment to protect the efficacy of the execution … And for freezing orders to be effective there needs to be timely disclosure of assets … The utility in both orders lies in ensuring that the court's processes for enforcement of a judgment are not frustrated by assets being spirited away between the time of commencement of the proceedings and eventual enforcement.
>
> (footnotes and citations omitted).

37 The nature of Mr Dunjey's objection was that the disclosure affidavits were subject to an implied undertaking that ASIC had made to the Court to the effect that the disclosure affidavits made in compliance with para 10 of the freezing orders may only be used for the purpose for which those orders were made. Mr Dunjey submitted that ASIC was not permitted to tender the disclosure affidavits in evidence in support of the final relief sought on the Application because use of the affidavits in that manner and 'publication' of the information contained in them by reading the affidavits in open court is foreign to the purpose for which the Court ordered Mr Dunjey to make the affidavits.

38 The plurality in ***Hearne*** *v Street* [2008] HCA 36; (2008) 235 CLR 125 described the 'implied undertaking' in the following terms (citations and footnotes omitted):

> 96 Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits. The appellants did not dispute the existence of this principle, and in particular did not dispute its potential application to the affidavit of Mrs Hesse and the witness statement of Dr Tonin.

Further, it is a substantive obligation that arises by virtue of the circumstances in which one party to the proceedings obtains documents or information from another party to the proceedings: *Hearne* at [105]-[108].

39 In general, where a party to litigation is compelled to disclose documents or information through processes such as discovery, interrogatories, subpoena, exchange of witness statements or affidavits the basis for compelling that disclosure relates to obtaining evidence for the purposes of the substantive dispute in the proceedings. In that context, a party to whom the

documents or information have been disclosed are permitted to use the documents or information for the purposes of the proceedings in which disclosure was compelled. Those purposes can extend to amendments to pleadings and adding causes of action as these are steps that fall within the scope of the purposes for which disclosure was ordered: *Allstate Life Insurance Co v Australian & New Zealand Banking Group Ltd* (1995) 57 FCR 360 at 378-379; *Mann v Medical Defence Union Ltd* [1997] FCA 45 at 52-53; *Sybron Corporation v Barclays Bank Plc* [1985] 1 Ch 299 at 328; *Bell Group Ltd (in liq) v Westpac Banking Corporation* [2001] WASC 315 at [291].

40 The position is different in circumstances in which disclosure is ordered for a specific or more limited purpose. It is important to appreciate that disclosure of documents or information is not ordered as a right but where necessary for the proper administration of justice. In *Hearne* (at [107]) the plurality emphasised that the existence of the implied undertaking itself arises from a necessity to balance the burden of disclosure against the interests of justice:

> 107 The expression "implied undertaking" is thus merely a formula through which the law ensures that there is not placed upon litigants, who in giving discovery are suffering "a very serious invasion of the privacy and confidentiality of [their] affairs", any burden which is "harsher or more oppressive … than is strictly required for the purpose of securing that justice is done." To that statement by Lord Keith of Kinkel of the purpose of the "implied undertaking" may be added others. In *Riddick v Thames Board Mills Ltd* Lord Denning MR said:
>
> > "Compulsion [to disclose on discovery] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."
>
> In *Harman v Secretary of State for the Home Department* Lord Diplock said:
>
> > "The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides … through its rules about abuse of process and contempt of court."
>
> In *Watkins v A J Wright (Electrical) Ltd* Blackburne J said:
>
> > "In my judgment, a serious inroad into [the safeguards referred to by Lord Diplock] and, therefore, into the utility of the discovery process in the just disposal of civil litigation would occur if it were open to a litigant (or his solicitor) to enjoy the fruits of discovery provided by the other side, but avoid the risk of committal for contempt for acting

> in breach of the countervailing implied obligation on the ground that he was unaware of the existence of the undertaking. I take the view that it does not lie in the mouth of a person to plead ignorance of the legal consequences of the discovery process."
>
> To speak in terms of "undertaking" serves:
>
> > "a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court."
>
> Staughton LJ said: "[A]lthough described as an implied undertaking it is a rule which neither party can unilaterally disclaim." The importance with which the courts have viewed the obligation under discussion is indicated by the fact that although it can be released or modified by the court, that dispensing power is not freely exercised, and will only be exercised where special circumstances appear.
>
> > "Circumstances under which that relaxation would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party."
>
> (footnotes omitted)

41 Taking into account that the purpose of freezing orders is to preserve assets or property to prevent the frustration of the Court's process, ultimately of execution after judgment, and that disclosure of information about the existence and location of assets or property is for the purpose of aiding that process, in my view, the ancillary orders were made on the implicit condition that the disclosure affidavits would be used for that purpose. Therefore, ASIC requires release from that condition or 'implied undertaking' to tender and (or) rely on the disclosure affidavits for the purposes of proving facts upon the final hearing of the Application.

42 The principles applicable to whether a person should be released from the implied undertaking were described in the following way in *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3; (2005) 218 ALR 283 at [31]:

> 31 In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show "special circumstances": see, for example, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217; 110 ALR 685. It is unnecessary to examine the authorities in this area in any detail. The parties were not in disagreement as to the legal principles. The notion of "special circumstances" does not require that some extraordinary factors must bear on the question before the discretion will be

> exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined. In *Springfield Nominees*, Wilcox J identified a number of considerations which may, depending upon the circumstances, be relevant to the exercise of the discretion. These were:
>
> - the nature of the document;
> - the circumstances under which the document came into existence;
> - the attitude of the author of the document and any prejudice the author may sustain;
> - whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
> - the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);
> - the circumstances in which the document came in to the hands of the applicant; and
> - most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.

43 I am not persuaded that I should release ASIC from the implied undertaking. The principal reason for refusing the requested release is that I do not consider the statements in the disclosure affidavit to be particularly relevant to the factual questions that I must decide on the Application. Also, the statements of Mr Dunjey in the affidavits are hearsay and objection has been taken to the admissibility of the affidavits. In short, I do not consider that it is necessary, in the interests of justice, to release ASIC from the undertaking.

44 ASIC submitted that the disclosure affidavits were relevant to questions of fact related to the financial position of Ascent, its management and whether it should be wound up on just and equitable grounds. I fail to see the relevance of the affidavits to those questions. Further, the financial position of Ascent is addressed directly in other obviously relevant evidence.

45 Part of the section 19 examination of Mr Dunjey was undertaken using the disclosure affidavits. I make no comment on the propriety of that use of the disclosure affidavits as no party has made submissions on that subject. Nonetheless, these parts of the examination appear to have been directed to eliciting admissions from Mr Dunjey that certain statements made in the disclosure affidavits were not accurate. I also do not consider these parts of Mr Dunjey's examination relevant to the final relief on the Application. Accordingly, I have not relied upon

or given any weight to the statements of Mr Dunjey made in those parts of his section 19 examination.

Findings of fact

46 Mr Dunjey was the sole director and member of Ascent. Mr Dunjey was made a bankrupt on 21 June 2022. Mr Shanahan was appointed as his trustee in bankruptcy on the same day.

47 Ascent is a company incorporated in accordance with the *Corporations Act*. It was registered in Western Australia on 21 September 2007. It has issued 100 fully paid ordinary shares for $100 in total. Mr Dunjey does not, evidently, hold the shares beneficially. As noted above, Mr Donnelly and Mr Holmes were appointed joint and several provisional liquidators of Ascent on 2 June 2022.

48 Ascent is trustee of the Ascent Trust. The Ascent Trust has an **A**ustralian **B**usiness **N**umber (ABN 32 828 649 986). The original trust deed is dated 21 May 2010. Mr Dunjey and **Mrs** Aimee Elizabeth **Dunjey** were the trustees of the trust and it was then named the 'Dunjey Family Trust'. The original trust deed was amended by a deed of resignation and appointment of trustee and variation of trust dated 1 July 2019. Mr and Mrs Dunjey retired and Ascent was appointed trustee. Also, the trust name was changed to 'Ascent Trust'.

49 The Ascent Trust is a discretionary trust. The trust deed (as amended) follows the form of a typical discretionary family trading trust deed. The 'general beneficiaries' are Mr Dunjey, Mrs Dunjey and other legal persons who are described in clause 3 of the trust deed. By that provision, a related company may become a 'general beneficiary'. It appears that Ascent was or became such a general beneficiary. The 'specified beneficiaries' are the children of Mr and Mrs Dunjey. While described as 'beneficiaries', until the vesting date of the trust property, the beneficiaries are, in point of detail, objects of the trust powers described in the trust deed and not the beneficial owner of any specific trust property unless and until such property is appointed on a beneficiary in the exercise of a trust power.

50 The 2020 financial statements and tax return for the Ascent Trust describe the trust as a 'Discretionary trust – investment activities'. Net income from business activities is recorded as $8,804,919 and Ascent Trust is recorded as having assets of $117,518,439. The majority of those assets ($115,789,224) are recorded as 'IB Trading Account (Open Positions)'. It has liabilities of $117,518,419. The majority of those liabilities ($107,072,635) are recorded as

'Client Loan Agreements' and ($4,217,749) 'Client Loan Interest Accrual'. In the tax return, Ascent is recorded as the beneficiary of the trust estate to which the whole of the trust income was distributed.

51 Between 2010 and December 2021, Ascent (as borrower) made a number of loan agreements with legal persons (as lenders). The lenders were individuals and companies in their own right or as trustees of trusts including superannuation funds. All the loan agreements followed a common form.

52 The *pro-forma* of the loan agreements appears to have been prepared by Minter Ellison Lawyers. The agreements are described as 'Loan agreements'. They name Ascent as 'Borrower' and the counterparty as 'Lender'. For some of the agreements Mr Dunjey is named as 'Borrower' and is the party to the agreement, not Ascent.

53 Clause 2.1 of the loan agreement provides that 'the Lender agrees to provide the Advance to the Borrower in a principal amount not exceeding $[the amount of the applicable advance]'. Clause 2.3 provides that the 'Borrower may use the Advance for any purpose whatsoever'. Clause 4(a) provides for repayment of the 'Outstanding Amount' on the 'Termination Date'. The 'Outstanding Amount' is the balance of the Advance and the 'Termination Date' is a date fixed in the agreement subject to earlier termination in accordance with the terms of the agreement. Clause 6 provides for interest. It accrues at the 'Interest Rate' (in most cases 15% per annum subject to agreement of another rate) and is payable annually on the last business day of each year and on the Termination Date.

54 The financial records of Ascent in evidence include interest accrual schedules for the financial years of 30 June 2010 to 30 June 2020. As of 30 June 2010, Ascent had accrued interest in respect of one loan to one lender. As of 30 June 2011, Ascent had accrued interest in respect of 20 loans to 20 lenders. As of 30 June 2012 and in each financial year thereafter to 30 June 2020, Ascent had accrued interest in respect of more than 20 loans to more than 20 lenders. Based on the loan agreements in evidence, I infer that there were written loan agreements in the same or substantially the same terms for each loan recorded in Ascent's financial records.

55 The loan agreements and financial records viewed in isolation appear to establish a relatively orthodox debtor – creditor relationship between Ascent (or Mr Dunjey) as borrower and the legal persons who advanced the funds as lenders. However, the loan agreements must be viewed within the wider context in which the legal persons were encouraged to advance the

funds to Ascent (or Mr Dunjey). In these reasons, I refer to the notional lenders more neutrally as 'contributors'.

56 ASIC tendered numerous examples of communications between Mr Dunjey and potential contributors between 22 November 2010 and 14 October 2021. In these communications Mr Dunjey described the contributions as 'investments' in a 'hedge fund' or an 'investment fund'. Mr Dunjey also guaranteed contributors the 'investor's capital' along with an assured 15% return. Mr Dunjey also described the concept of the scheme as contributors 'investing' by lending their capital to his trading company. He also referred to having funds 'under investment' and numerous clients. For example, in an email from Mr Dunjey to a potential contributor dated 8 July 2015 he said (emphasis added):

> *... I do have numerous investors in the US.*
>
> ***I essentially own – for want of a better term – a Hedge Fund.***
>
> ***People invest their money with me and I do two things:***
>
> 1. *Firstly,* ***I 'insure' the underlying capital that is invested. This is done through numerous methods****. The primary method being through the use of Put Options.*
> 2. *I provide a regular annual return of 15%. As you will appreciate, this is a rather high figure and can make some people slightly uncomfortable with just how high the figure is. However because I am a private trader ... returns of this nature are the norm ...*
>
> *I have operated this way for 13 years now without any hitches. All clients are protected by legal documents which include details of the two things mentioned above ... The best way I have found for US investors to jump on board is to essentially "loan" their capital to* ***my trading company*** *for an agreed period of time at the agreed interest rate of 15% pa. for US invetors* [sic] *this then becomes a loan contract ie you are becoming the bank and lending your capital to* ***my private trading company*** *...*
>
> *There are plenty of reasons why you would want to invest. And certainly a few why you would not ... Another reason not to invest is that I am not licensed in the US. Therefore you are relying on an Australian loan contract to secure your investment.*
>
> *So yes, any investment would come down to trust – which would not be enough for most ... ive* [sic] *been doing it successfully now for 13 years,* ***have US100 mill under investment and have 150 clients*** *...*

57 During Mr Dunjey's section 19 examination he said that potential contributors were provided with a document entitled 'Loan Agreement Overview'. The document provides an explanation for clause 2.3 of the loan agreement that provides that the funds may be used for any purpose whatsoever. In the Loan Overview Agreement it is said (emphasis added):

> The background to this clause is that when Michael set up the Ascent company and structure, they were considering unit trusts. Each contract was close to 700 pages long,

> with 695 of those pages dedicated to defining **how the money would be invested**. You see, you can't just say **the funds will be used for trading**. You have to define whether it is stocks, derivatives, ETFs and then define what markets you will be using. The scope is huge and provided no flexibility if Michael was thinking about **moving to a new market**.

58 During the section 19 examination of Ms Eva, she described the usual process by which funds were obtained from contributors. In brief, it was consistent with a system by which contributors received the 'Loan Agreement Overview' document and draft loan agreements before the contributors' instructions were obtained and implemented. Contributors signed (electronically) loan agreements and made deposits into an Ascent bank account at the direction of Ascent. Ms Eva also said that it was common for contributors to roll over, at least, the capital amount deposited at the end of the loan agreement period.

59 In the communications with potential contributors, Ascent was described as an 'investment company' or as a 'trading company' with millions of dollars 'under investment' or which Ascent and Mr Dunjey 'manage'. These communications also promoted Mr Dunjey as a skilful investor who would use funds contributed (or invested) to carry out investment activities from which the interest on contributor loans would be paid. For example, in an email from Mr Dunjey to a potential contributor dated 7 October 2011 he said (emphasis added):

> *... As promised, here is some initial information about **my Hedge Fund – Ascent** ...*
>
> *Apart from the attached PDF, here are some other basics re the fund and what I do:*
>
> - ***"Ascent Investment and Coaching PTY LTD" is my investment company and is essentially structured as a hedge fund**.*
> - ***People invest their cash, or their cash from say their SMSF's or other retirement policies with me**;*
> - ***The first thing I do is insure the value of their investment … It is insured 100% by long term put options**.*
> - *The second thing I do (only after the money has been insured) is to then make an annual 15% return on the investment. This 15% is not aimed for. This 15% is guaranteed. At the end of each 12 month period, your 15% return can either be reinvested in the fund, or can be withdrawn for whatever purpose you need it for*
>
> *...*
> - *… **all legal contracts are set up to 100% protect the client** …*
>
> ***From a legal perspective you need to know that the legal contract is set up as a Loan Contract. This is typical and standard for many hedge funds both in Australia and in the US**. In this way you essentially become the bank and you lend your money to Ascent. **Ascent invests the money and returns you 15% per annum and returns you***

> ***all of the capital at a time we both decide upon. So you need to understand from the start that this is structured legally as an unsecured loan. This puts some people off. But for the majority its perceived the way it should be, and that is it's a more secure investment than if you were with a standard mutual fund or superannuation policy. This method also allows you to easily invest from a Self Managed Super Fund*** ...

In other communications Mr Dunjey represented, in substance, that he invested 'for other people'.

60 Mr Macchiusi's affidavit of 10 December 2021 included JM-1. JM-1 contained bank statements from a number of financial institutions and statements of a company, **Interactive Brokers** Australia Pty Ltd. Mr Macchiusi analysed the statements in the period from 1 May 2021 to 24 September 2021 and deposed to the conclusions or opinions he formed based on that analysis. I consider these conclusions or opinions to be, in substance, submissions founded on an analysis of the underlying supporting materials. In the absence of any submissions to the contrary, I accept these statements as an accurate summary of the supporting materials based on the assumptions recorded in Mr Macchiusi's affidavit.

61 Mr Macchiusi analysed three bank accounts of Ascent held with the Bank of Queensland:

(a) Ascent Account BSB: [redacted] – Account Number: [redacted] (**Ascent Deposit Account**);

(b) Ascent Account BSB: [redacted] – Account Number: [redacted] (**Ascent Payment Account**); and

(c) Ascent Account BSB: [redacted] – Account Number: [redacted] (**Ascent Transaction Account**).

62 Mr Macchiusi deposed and I accept that the three accounts were structured and operated in the following manner:

> 53. …Mr Dunjey's scheme is structured, such that:
>
> (a) Investors transfer their funds into the Ascent Deposit Account;
>
> (b) Mr Dunjey / Ascent transfers the majority of Investor Funds from the Ascent Deposit Account to the Ascent Payment Account; and
>
> (c) money is transferred out of the Ascent Payment Account to pay 'returns' to Investors (as well as being transferred to other accounts …).

63 Mr Macchiusi deposed and I accept that:

> 54. From my review of the Selected Accounts, it appears that there are a large volume

of transactions that can be attributed to Investors (both receiving funds from Investors, and paying money out to Investors). I have come to this conclusion by reviewing the transaction descriptions in the relevant bank records. Where the descriptions for deposits into the Ascent Deposit Account, or payments out of the Ascent Payment Account, include a name that is not related to the Defendants, or include a reference to a SMSF, I have presumed them to be Investor Funds. I have also had regard to repeated monthly, or apparently quarterly payments made to Investors from the Ascent Payment Account.

64 The matters deposed to in the above paragraphs of Mr Macchiusi's affidavit are also consistent with the manner in which Ms Eva described the operation of these accounts during her section 19 examination.

65 Mr Macchiusi deposed and I accept the following:

78. Analysis of statements during the Analysed Period show that:

(a) $15,449,162.42 was received from Investors into the Ascent Deposit Account;

(b) a total of $2,600,000.00 was received from Interactive Brokers Pty Ltd into the Ascent Deposit Account;

(c) $6,972,995.72 was paid out to Investors from the Ascent Payment Account;

(d) a total of $1,695,000.00 was paid to a HSBC Bank account attributed to 'Interactive Brokers LLC' with a reference to '(Ascent)' from the Ascent Payment Account.

79. From the above, only $1,695,000.00 was invested into the Interactive Brokers Account of $15,449,162.42 received from Investors.

80. Analysis of the Interactive Brokers Accounts for the period of 1 May 2021 to 5 November 2021 indicate that:

(a) the net position of the of the trading accounts Ascent, or controlled by Mr Dunjey at 9 November 2021 was $1,963,528.42; and

(b) of the 20 accounts open in the name of Ascent, only 4 appear to be active.

Given the small percentage of Investor funds in the Interactive Brokers Accounts, it appears highly unlikely that Mr Dunjey and Ascent could be generating the 15% returns promised to Investors, let alone the 40% returns that Mr Dunjey has represented that he is able to generate on investment.

81. In addition to the detailed analysis of the Selected Accounts, I have conducted a review of the other account statements that have been provided to ASIC, which appear to show that Investor funds (that flowed through the Ascent Deposit Account and Ascent Payment Account) have been utilised to make payments for Mr Dunjey's own private purposes.

82. In particular:

(a) Ascent Payment Account and the Bank of Queensland account ending 3582, shows 35 transactions during the Analysed Period that include references to 'Trfr To BOQ Visa Card - Platinu...' and 'Direct Debit Platinum Visa'; and

(b) bank statements obtained from CitiGroup that relate to the 'Bank of Queensland Platinum Visa' account ending 3512 (bearing the ASIC barcodes AIC.0012.0001.0256, AIC.0012.0001.0274, AIC.0012.0001.0286, AIC.0012.0001.0300, AIC.0012.0001.0320) behind **Tab 24** in the name of Mr Dunjey,

83. My analysis indicates that:

(a) the Visa cards ending 3512 and 0071 are used for personal expenses, including payments for groceries, UberEats, dining and school expenses; and

(b) in the period of Analysed Period, $282,224.98 was paid from the Ascent Payment Account and the Bank of Queensland account ending 3582 to the 'Bank of Queensland Platinum Visa' account ending 3512.

84. Analysis of the Ascent Payment Account and the Ascent Deposit Account during the Analysed Period show that there are 52 transactions totalling $1,338,286.82 using the description 'Tfr To Account XXX3522' (my redaction).

85. I have analysed:

(a) the statements for the Bank of Queensland account in the name of Mr Dunjey trading as Michael Jefferson Dunjey ending 3522 (bearing the ASIC barcodes AIC.0010.0002.0904, AIC.0010.0002.0900, AIC.0010.0002.0894, AIC.0010.0002.0880 and AIC.0010.0002.0911) behind **Tab 23**;

(b) statements for the ANZ 'Access Advantage' account in the name of Mr Dunjey numbered XXX3374 (my redaction), bearing ASIC barcodes AIC.0017.0001.1591, AIC.0017.0001.1592 and AIC.0017.0001.1592, which are behind Tab 26; and

(c) statements for the ANZ 'Residential Investment Loans' in the name of Dunjey numbered XXX3427, XXX0374, XX3825, XXX9478 (my redaction) (collectively **ANZ Loans**), bearing ASIC barcodes AIC.0017.0001.1594, AIC.0017.0001.1598, AIC.0017.0001.1600 and AIC.0017.0001.1602, which are behind **Tab 26**.

86. My analysis indicates that:

(a) $92,500 was paid from the account ending 3522 to the ANZ 'Access Advantage, account ending 3374; and then:

(b) from the ANZ 'Access Advantage' account ending 3374 to the ANZ Loans accounts; and then

(c) the account statements for the ANZ Loan accounts show transactions that correspond with the amounts debited from the ANZ 'Access Advantage' account ending 3374.

87. I have also reviewed of the documents of Westpac for loans in the name of

Mr Dunjey numbered XXX5283, XXX0251, XXX4394, XXX4984, XXX3869, XXX4079, XXX4167, XXX4191, XXX4239, and XXX7072 (my redaction) (collectively **Westpac Loans**), bearing ASIC barcodes AIC.0014.0001.0672, AIC.0014.0001.0652, AIC.0014.0001.1299, AIC.0014.0001.1030, AIC.0014.0001.1216, AIC.0014.0001.0506, AIC.0014.0001.0527, AIC.0014.0001.0545, AIC.0014.0001.0631 and AIC.0014.0001.0348, which are **behind Tab 25**. That review indicates that $119,537.54 from the account ending 3522 was paid towards the Westpac Loans.

88. In summary, from the analysis of the materials referred in paragraph [84], I understand that the account ending 3522 received a total of $1,338,286.82 from the Ascent Payment Account and the Ascent Deposit Account during the Analysed Period, from which:

(a) $92,500 was paid to the ANZ Loans

(b) $119,537.54 was paid towards the Westpac Loans; and

(c) $16,940.53 was paid for property related expenses,

(d) $433,926.12 was paid to the Australian Taxation Office.

89. I have also conducted an analysis of the following bank statements for the Bank of Queensland accounts:

(a) Dunjey Property Pty Ltd as trustee for Dunjey Property Trust, numbered 23067435, bearing ASIC barcodes AIC.0010.0002.0560 AIC.0010.0002.0556, AIC.0010.0002.0554, AIC.0010.0002.0544, AIC.0010.0002.0568 and AIC.0010.0002.0574, which are behind Tab 23;

(b) Dunjey Property Pty Ltd as trustee for Dunjey Property Trust No. 2, numbered 23067702, bearing ASIC barcodes AIC.0010.0002.0525, AIC.0010.0002.0521, AIC.0010.0002.0519, AIC.0010.0002.0509, AIC.0010.0002.0533 and AIC.0010.0002.0539, which are behind Tab 23;

(c) Dunjey Property Pty Ltd as trustee for Dunjey Property Trust No. 3, numbered 23067772 bearing ASIC barcodes AIC.0010.0002.0490, AIC.0010.0002.0486, AIC.0010.0002.0484, AIC.0010.0002.0474, AIC.0010.0002.0498 and AIC.0010.0002.0504, which are behind Tab 23;

(d) Dunjey Property Pty Ltd as trustee for Dunjey Property Trust No. 4, numbered 23067821 bearing ASIC barcodes AIC.0010.0002.0455, AIC.0010.0002.0451, AIC.0010.0002.0449, AIC.0010.0002.0439, AIC.0010.0002.0463 and AIC.0010.0002.0469, which are behind Tab 23,

collectively, the **Dunjey Property Accounts**; and

(e) Trust Deeds for the Dunjey Property Accounts, bearing ASIC barcodes AIC.0010.0002.0065, Ale.0010.0002.0095, AIC.0010.0002.0121 and AIC.0010.0002.0147, which appear behind **Tab 23**,

> 90. My analysis indicates that the Dunjey Property Accounts received funds from the Ascent Deposit Account, Ascent Payment Account and the account ending 3522. Over the Analysed Period a total of $582,065.59 was paid from Dunjey Property Accounts for what appears to be Mr Dunjey's private purposes.

66 The facts deposed to in paragraphs [78]-[90] of Mr Macchiusi's affidavit of 10 December 2021 are also supported by the preliminary opinions expressed in the Provisional Liquidators' Report.

67 Mr Macchiusi deposed facts to the effect and I accept that for the period 1 May 2021 to 24 September 2021:

(a) The majority of contributors' funds were not used for investments made with Interactive Brokers or otherwise, but were used to make payments to other contributors and to make payments to Mr Dunjey or entities related to him that were used for Mr Dunjey's personal expenses including the acquisition of real property.

(b) Ascent received deposits of approximately $15.6 million from 88 contributors into the Ascent Deposit Account. Of those, 78 made payments that were less than $500,000, including ten contributors who were trustees of self-managed superannuation funds (**SMSFs**).

(c) Approximately $10.9 million was transferred from the Ascent Deposit Account to the Ascent Payment Account. From there:

    (i) $1,695,000 was paid to a HSBC Bank account attributed to Interactive Brokers with a reference to Ascent;

    (ii) $6,958,510 was paid out to approximately 147 contributors; and

    (iii) at least $1,955,116.82 was transferred to accounts with the Bank of Queensland that appears to be in the name of and controlled by Mr Dunjey.

68 Mr Macchiusi deposed facts to the effect and I also accept that the bank statements record that in the period 25 September 2020 to 24 September 2021, about 160 contributors deposited approximately $23 million into the Ascent Deposit Account. Of those contributors, 149 deposited a total of approximately $13.8 million in amounts that, when aggregated with other payments from that contributor in that period, were less than $500,000, including deposits of 15 SMSFs.

69 While Mr Macchiusi only made a detailed analysis of the bank account statements for the period from 1 May 2021 to 24 September 2021, I infer from the similarity in the overall activity of Ascent and Mr Dunjey that the bank accounts were operated in the same or substantially the same manner from the inception of the activities in 2010. That is, I draw the inference from the established facts that a considerable portion of funds Ascent or Mr Dunjey received as advances from contributors has been used, at least, to make payments to other contributors.

70 During the course of the hearing on 29 June 2022, ASIC was requested, in substance, to identify evidence with respect to a specific contributor or contributors of:

(a) representations Mr Dunjey made to that contributor;

(b) that contributor's loan agreement; and

(c) that contributor's advance made into a bank account operated by or under the control of Ascent (or Mr Dunjey) in which it was mixed with advances of other contributors.

71 ASIC tendered a number of documents that formed part of Exhibit 7. These documents included documents of the character described above with respect to three groups of contributors.

72 The first group of contributors were partners (spouses) who provided funds to Ascent in 2010 through a SMSF. They were provided with a document that described the investment activities of Ascent. The document refers to 'Ascent Investments' and is entitled 'buy, write, protect'. It describes an investment strategy utilising options and 'covered calls'. It represented that Mr Dunjey had focussed on investments in property and derivatives. That document was sent to the contributors with a draft of a loan agreement substantially in the terms described above at paragraphs [52]-[53].

73 The second contributors were also spouses. They provided funds to Ascent personally in August 2021. Before providing the funds, the contributors were sent an email with a table of interest rates for various loan amounts and loan terms. The documents record that there was at least one meeting between one of the contributors and Mr Dunjey. Further, Mr Dunjey also answered written questions the contributors had 'regarding investing in Ascent'. On one occasion, in answer to a contributor's question, Mr Dunjey included the following response in email correspondence:

…

3. The main advice (or concern) I've had has been on the security of this money, this is from my brother in law (business owner and accountant) and his brother who is a chartered accountant in the big smoke. I realise you have security in your systems and approach to trading but is there any more assurance around security you can offer outside of longevity in the market? Do you yourself build in security with loaned money from various sources?

Richard this is a very reasoned response from your bro and bro in law. As we have already discussed, this is an unsecured commercial loan contract.

Ascent of course does not need the money. We predominately trade our own money. However for close friends and family I can accept loans to help improve their own financial situation. So in the most part, I only do his within my close circle. Ben has put your name forward because of his relationship with you and your previous interest.

So in your case, where we have no pre existing relationship, I can completely understand that the lack of security in this agreement may prevent you from going ahead.

That being said, as Ben and myself have already alluded to, there are a number of financial services organisations both in Australia and around the world that use my investment and trading expertise. These will absolutely provide the security you are looking for.

One such example is 12 Stones here in Perth. This has literally just begun and is ready to take on investments. I have an ownership in 12 Stones and am the Chief Investment Officer. Our web page should be up and running next week. Like I said, its [sic] only just launched. There are two other licensed products in Australia and one in London that I trade for. However I think 12 Stones would be the best path for you if you choose not to go ahead with Ascent.

12 Stones is a licensed Managed Investment Scheme and therefore provides the security you might be wanting. However, like any MIS, it will not work like a loan and therefore you wont [sic] have access to the fixed returns of Ascent through the loan model there.

So the choice is yours.

I realise I haven't really answered your question here. Ascent is a world class product and has been running for 15 years. The trading systems I have there are used the world over. But I can not offer you any security here other than track record.

If you need the security, then 12 Stones might be more to your liking.

Ps if your bro or bro in law would like the Information Memorandum (IM) for 12 Stones, I would be more than happy to pass it on.

…

74 The contributors were evidently provided information about Ascent, the Ascent Foundation and Everyday Leader. In the example above, the contributor decided to lend $190,000 to Ascent and was provided with a confirmation email for the amount to be lent, the term and the interest rate. The confirmation email included a copy of the Ascent company overview, loan agreement overview referred to earlier in these reasons and a draft loan agreement in the same terms as

the other loan agreements. The documents indicate that the contributor made a deposit of $190,000 into an Ascent bank account on 24 August 2021 and signed a loan agreement, loan request and request for loan advance in the same terms as the documents referred to earlier in these reasons on that day.

75 The third contributors were also partners (spouses) who provided funds to Ascent in December 2021. In email communications with representatives of Ascent one of the contributors said that he was 'looking to book another time with Michael [Dunjey] to further discuss investing with Ascent'. The documents record that, again, there was at least one meeting between one of the contributors and Mr Dunjey. After that meeting, the contributors were sent an email suggesting that the contributors had agreed to advance at least $400,000 and attaching a copy of the loan agreement overview referred to earlier in these reasons and a draft loan agreement in the same terms as the other loan agreements. These contributors deposited $200,000 into an Ascent bank account on 13 December 2021 and signed a loan agreement, loan request and request for loan advance in the same terms as the documents referred to earlier in these reasons on that day.

76 Within the mass of documents ASIC tendered there was a series of other documents associated a deposit of $750,000 from another contributor, through that contributor's company, made on 26 August 2021. Mr Dunjey sent the individual an email on 24 August 2021 in which he said:

> …
>
> **Short Term Investment Terms**
>
> | *Minimum Capital* | *Six week total return* |
> |---|---|
> | $300,000.00 | 6.3% |
> | $400,000.00 | 8.1% |
> | $500,000.00 | 9.2% |
> | $750,000.00 | 10.5% |
> | $1,000,000.00 | 12.0% |
>
> Obviously I know you said 500k is properly your upper limit for this deal.
>
> The higher figures I am offering are just in case you want to pool family or friends money for a higher rate of return.
>
> …

77 ASIC tendered a loan agreement between Ascent, as trustee of the Ascent Trust, as the borrower and the individual's company, as the lender. The loan agreement appears to have been executed electronically by Mr Dunjey for Ascent and the individual for the company. There were also documents entitled 'Loan request' and 'Request for loan advance'. The loan agreement, loan request and request for loan advance are all in respect of $750,000 and dated 26 August 2021. The bank account records for Ascent, as trustee of the Ascent Trust, record a deposit from the company on 26 August 2021 in the sum of $750,000. Curiously, the same day there is a withdrawal of $750,000 to 'Clark Settlements Trust Account' suggesting a payment in the same amount was made on the same day in respect of the purchase of real property.

78 There was specific evidence concerning deposits made by a further four groups of contributors. These contributors, or another person on their behalf, had made complaints to ASIC about Mr Dunjey or Ascent in 2013, 2017 and 2021. The complaints and circumstances in which the contributors provided funds to Ascent are described in the affidavits of Mr Macchiusi of 10 December 2021 and 1 March 2022. The communications between Mr Dunjey, or other agents of Ascent, and the contributors as well as loan agreements were tendered as part of JM-1 and JM-2.

79 In June 2013, ASIC received a complaint from a person who appears to have been the accountant of a contributor. ASIC tendered a record of a conversation between an employee of ASIC and the accountant. The information the accountant provided is hearsay on hearsay. I place no weight on that information.

80 Mr Macchiusi deposed that the accountant provided ASIC with a number of documents. One document is an unsigned loan agreement dated 2 March 2012. That document is missing every second page. It appears to have been redacted to remove the name of the contributor. I place no weight on the document. Another document appears to be an unsigned draft loan agreement. It is in the same form as the other loan agreements that were tendered. It is for an advance of $519,839.78 and has clause 2.3 in the same terms as the other loan agreements. It also appears to have been redacted to remove the name of the contributor.

81 ASIC tendered a series of email communications between the accountant and Mr Dunjey. In 2010, the accountant sought clarification of a number of matters relating to an amount of $350,000 the accountant said had been 'invested' with Mr Dunjey. In Mr Dunjey's response, he represented that he had been 'running an investment fund for 12 years' and described two

structures for investment purposes of 'the two differing groups of people I invest for'. The first structure was described as a unit trust. The second is described, in substance, as loans to Mr Dunjey that he uses to trade on his own account. Mr Dunjey also said the following:

> …
>
> On a personal note, I never consider this to be a loan arrangement at all. It's simply that many accountants I know have recognised that from a taxation perspective and a legal perspective, when the investor provides capital and receives interest repayments, this can legally be presented from a tax perspective as a loan to the Director which is then honoured with interest repayments. Please feel free to contact me if you need clarification about this point.
>
> I as the sole trader take the risk of the investment. So the 350k is transferred into my trading account. Then I purchase shares and/or derivative products under my name. At the end of the 'investing period' the capital is simply returned to the 'investors'.
>
> …

The balance of the email continued to use language consistent with characterisation of the amount deposited as an 'investment' rather than a loan.

82 The accounting firm communicated with Mr Dunjey again in 2012. In these communications, in response to an enquiry by an accountant, Mr Dunjey said 'I confirm that the investment is capital protected'.

83 The accounting firm was sent copies of emails between a potential contributor and Mr Dunjey from May 2013. In these communications, Mr Dunjey sent the potential contributor a copy of the 'buy, write, protect' document referred to earlier in these reasons. In an email to the potential contributor, Mr Dunjey said:

> …
>
> So here is some basic information about where things stand:
>
> 1. The name of the Company I direct is Ascent Investment and Coaching PTY LTD
>
> 2. My wife and I retired (financially) five years ago. So our goal is certainly not to expand this particular company. Our goal simply is to help our immediate circle to reach financial freedom. Or if our clients have already reached financial freedom, the goal is to protect the money they already have and to provide an ongoing - well above market average returns - ongoing passive cash flow.
>
> 3. Ascent simply does two things for our clients:
>
>   a. We insure the value of a persons [sic] portfolio through the use of long term put options; and

b. We provide a 15% annual return on investment. This is not aimed for, This is guaranteed through a legal contract signed by all parties.

4. I normally only help people who are personally known to me or have been directly referred to me, So if you end up being interested in what Ascent is and would like more information, could I please request that you try and recall where you found my name. We are not chasing new business and we don't do ANY marketing whatsoever. We are merely trying to help people known to us.

…

84 ASIC tendered an Ascent document entitled 'Investors Interim Update'. It referred to 'Principal Invested' of $350,000, 'Investment Commenced' on 2 September 2008. It described the sectors in which the 'Trust' had invested.

85 In August 2017, ASIC received a complaint from a contributor who had expressed a concern that Ascent and (or) Mr Dunjey were operating a Ponzi scheme or a scam. Mr Macchiusi spoke with the contributor in November 2021. The substance of the contributor's statements to Mr Macchiusi were to the effect that Mr Dunjey promised a 15% return, that the potential contributor would lend money to him and that he would use that money for investment purposes. Further, the contributor alleged that Mr Dunjey said he was making returns of 40% on his investments. He said he was Australia's largest unlicensed hedge fund. The contributor had provided funds to Mr Dunjey, but after becoming concerned about the nature of the investment she withdrew her funds and was repaid.

86 ASIC tendered a series of communications between Mr Dunjey and Ms Eva, as representatives of Ascent, and the contributor. These documents indicate that the contributor deposited $1,250,000 into an Ascent bank account in August 2017. These were the subject of two separate loan agreements for $500,000 and $750,000 respectively. The loan agreements were in the same terms as the other loan agreements referred to earlier in these reasons. In Facebook communications between Mr Dunjey and the contributor's son he said 'As you are no doubt aware, I have closed the investment contract with your Mum and Alex and returned their capital and interest to them'.

87 In June 2021, ASIC received a complaint from another accountant. ASIC tendered a record of a conversation between Mr Macchiusi and the accountant. Again to the extent it purports to record statements of events involving Mr Dunjey and contributors it is hearsay on hearsay and

I afford it no weight. ASIC also tendered documents that the accountant provided concerning contributors who were clients of the accountant.

88 ASIC tendered Ascent documents that are described as 'tax statements' for a contributor for the financial years ended 30 June 2020 and 30 June 2021. The documents purport to record loan balances and interest income during those financial years.

89 ASIC tendered the details and signing pages of a loan agreement dated 3 May 2011 and a loan agreement, a loan request, a request for loan advance and documents entitled 'Deed of variation and termination of loan agreement' all dated 8 May 2019 for another contributor. The loan agreement, loan request and request for loan advance were all in the same terms as the documents described earlier in these reasons. ASIC also tendered Ascent 'tax statements' for that contributor (the trustee of a SMSF) for the 2014 to 2021 financial years. ASIC tendered bank statements for the contributor recording payments of apparent interest from Ascent on 8 May 2016 and 9 May 2017. ASIC tendered an email from Mr Dunjey to the contributor in which Mr Dunjey represented that he was part of a team that was launching a licensed managed investment scheme known as 12 Stones Global EFT Momentum Fund. The email said:

> …
>
> Whilst Ascent is still able to legally and ethically take care of any SMSF monies you may have with us, we have found the compliance framework for SMSF's to become increasingly onerous. And as such, as SMSF contracts naturally come to an end, in many cases we will offer you the opportunity to roll out of Ascent, and into the 12 Stones product.
>
> The very nature and existing skill set of the 12 Stones team will be far more conducive to the SMSF landscape. It will also allow me to concentrate on what I do best -Trade.
>
> …

90 In January 2022, ASIC received a complaint from a financial advisor. The financial advisor indicated that a complaint had previously been made to ASIC in August 2017 and the complainant had said that ASIC had been informed of the possibility that Mr Dunjey was operating a Ponzi scheme.

91 Mr Macchiusi had a conversation with the financial advisor and made a file note of it. ASIC tendered the file note. It is redacted to remove personal information. ASIC issued a notice to the complainant under s 33 of the *ASIC Act*. ASIC tendered documents produced in response to that notice. One of the documents was an investment strategy document apparently for the trustee of a SMSF. It records, amongst other things:

…

Investment Objectives Outline

1. ***Moderate to high returns****: Average rate of return on investments in the SMSF to equal or exceed 10% per annum:*

2. ***Sufficient Liquidity****: The SMSF should be in a position to pay benefits to members as they fall due;*

3. ***Returns Paid Annually and Consistently****: Annual returns are paid once throughout the calender* [sic] *year and fall on the anniversary date of the investment;*

4. ***Flexibility of Re-Investinent*** [sic] ***Choice****. The investments within the SMSF have the flexibility to re-invest returns within the same investment vehicle, or have the returns placed in another asset class within the SMSF;*

5. ***Low Risk****: It is the objective of the SMSF to invest in low risk investment vehicles;*

6. ***Insurance****: The value of assets within the SMSF should be insured where possible against a fall in value;*

92 The section titled 'Specific Investment Strategy' records the following passage:

There are three primary objectives to the strategy:

1. *The fund wishes to be exposed to shares in the ASX50;*

2. *The fund wishes to gain a cash flow from the shares by way of dividend payments and the selling of call options;*

3. *The fund seeks low risk and high security and achieves this by the purchase of long term put options attached to the purchase of shares. These options guarantee the future sale price of an invested share is at least equal to the purchase price of that share.*

It was decided by the Trustees of the fund that the investment company Ascent Investments and Coaching PTY LTD achieves all the above objectives.

…

93 ASIC also tendered an Ascent client history report for the relevant SMSF. That document records initial loans, interest and interest re-invested from 21 July 2011 to 10 December 2017. It also records initial loans, interest and interest re-invested personally for two individuals who I infer were the trustees and members of the relevant SMSF.

94 I am satisfied based on the evidence ASIC tendered in support of the Application that, in the period between, at least, 1 July 2012 and 13 December 2021, Ascent carried on a business with the following features:

(a) Mr Dunjey made representations to potential contributors to the effect that funds advanced to Ascent (or Mr Dunjey) would be used as part of an 'investment fund' under the management of Mr Dunjey. That the profits derived from that 'investment fund' would be used to pay a return to contributors in the form of interest at a relatively high rate. That Ascent was able to offer high rates of interest because Mr Dunjey had particular skill in investment and generating sufficient returns to pay the high rate of interest as well as a return for Ascent.

(b) Further, the description of the fund as a 'hedge fund' or 'investment fund' or funds under management and the like, if not expressly, then implicitly, represented that the funds advanced would be pooled with other funds advanced and used for the purposes of the investment activities of Ascent. Similarly, the apparently lucrative investment activities of Ascent inferred that 'funds' would be aggregated and used for Ascent's investment activities.

(c) Many contributors to whom Mr Dunjey made representations of the kind referred to in the preceding sub-paragraph made loan agreements with Ascent or Mr Dunjey and made advances or deposits into bank accounts of Ascent or Mr Dunjey.

(d) The advances deposited into the bank accounts were mixed with advances and deposits made by other contributors into those bank accounts.

(e) Contributors made the advances and deposits on the understanding and in the expectation that Ascent or Mr Dunjey would use the funds advanced for carrying out investment activities and that the contributors would be paid a return (interest) out of the profits of that investment activity.

(f) A considerable proportion of the funds Ascent or Mr Dunjey received from contributors were used to make payments to other contributors and were not used for conducting investment activities.

(g) A proportion of the funds Ascent or Mr Dunjey received from contributors was used to pay for personal expenses of Mr Dunjey or persons or entities related to him.

(h) A proportion of the funds Ascent or Mr Dunjey received from contributors was used to acquire assets that were 'investment' activities of Ascent.

95 I also find, based on the facts deposed to in the affidavits of Ms Ponton and the opinions she expresses therein, the facts deposed to in Mr Dunjey's affidavit of 25 May 2022, the facts

deposed to and opinions expressed in the affidavit of Mr Donnelly and Mr Holmes and the Provisional Liquidators' Report, that as of, at least, 25 May 2022, if not before, Ascent was not able to pay its debts as and when they became due and payable. I reach that conclusion without having regard to those parts of Ms Ponton's affidavits and the Provisional Liquidators' Report that rely on the information contained in the disclosure affidavits. I also find, based on that evidence, that the financial statements of Ascent do not accurately reflect its financial position.

96 Based on the evidence concerning the flow of funds through Ascent's bank accounts, it is likely that Ascent used the deposits of later contributors to pay 'interest' and 'capital' to earlier contributors. That is, it very likely that Mr Dunjey and Ascent operated a 'Ponzi' scheme. See, e.g., *Australian Securities and Investments Commission v Marco (No 13)* [2023] FCA 83 at [84], [85]. Indeed, Mr Dunjey described the scheme as a 'Ponzi' scheme himself in communications with **Messrs** Ben **Vance** and Arron **Forrester**. For example, in an email of 10 June 2010 Mr Dunjey said to Messrs Vance and Forrester:

> …
>
> I have spoken to you both today. It is a great day. It is the day when we are completely free to contact people about our ~~Ponzi scheme~~ hedge fund. The legal contract is set up, the bank accounts are ready to go. And now all we need is some investors.
>
> Lets [sic] maybe throw around some mes [sic] of when w e [sic] can have a celebratory dinner and catch up.
>
> I will bring condoms in case things get out of hand.
>
> (Strike-through in the original.)

97 It is also likely that the vast majority of the funds that contributors deposited into an Ascent bank account have not been used for genuine investment activities of the kind represented to contributors. It is likely that a significant proportion of the funds have been used by Mr Dunjey or entities related to him to acquire personal and real property for the benefit of Mr Dunjey and (or) those entities. Further, that any returns from that property has not been used to finance payments of 'interest' or 'capital' to contributors.

98 While I consider the above matters likely, the present state of the evidence is not such that I am able to make a positive finding in regard to those matters. However, I consider the likelihood of those matters to be a relevant consideration for the purposes of determining what orders the Court should make on the Application.

Unregistered managed investment scheme – s 601EE

99 Section 601EE(1) of the *Corporations Act* relevantly provides that if a person operates a managed investment scheme in contravention of s 601ED(5), ASIC may apply to have the scheme wound up. Section 601EE(2) gives the Court the power to make any orders it considers appropriate for the winding up of the Scheme. Section 601ED(5) of the *Corporations Act* provides that '[a] person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under s 601EB unless the scheme is so registered'. It is not in dispute that the scheme alleged to have been operated by Ascent was not registered under s 601EB and Mr Macchiusi's evidence confirms that fact.

100 A '*managed investment scheme*' is defined in s 9 of the *Corporations Act*. The definition relevantly has three elements and a number of exclusions at sub-ss (c)-(n) that are not applicable in this case. The three elements of the definition are as follows:

> ***managed investment scheme means***:
>
> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day to day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or
>
> …

101 Section 601ED(1) of the *Corporations Act*, which imposes a registration requirement in respect of certain managed investment schemes that meet the above definition, provides relevantly that a managed investment scheme must be registered under s 601EB when it has more than 20 members. Section 601ED(4) of the *Corporations Act* sets out rules for working out how many members a scheme has for the purposes of the section. By reason of the findings I have made in paragraphs [54] and [94], it is not necessary to consider these rules as it is quite clear that there were more than 20 contributors to the alleged scheme from, at least, 1 July 2013.

102 The definition of '*managed investment scheme*' in s 9 of the *Corporations Act* requires the identification of a '[a] scheme'. In ***Australian Softwood*** *Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission)* [1981] HCA 49; (1981) 148 CLR 121, Mason J (with whom Gibbs CJ and Stephen J agreed) observed (at 129) by reference to *Clowes v Commissioner of Taxation* (Cth) (1954) 91 CLR 209 (at 225) that 'all that the word "scheme" requires is that there should be "some programme, or plan of action"'. In *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388; [2002] NSWSC 834, Barrett J discussed the nature of a 'scheme':

> 15 The essence of a "scheme" is a coherent and defined purpose, in the form of a "programme" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan. … Profit-making will almost invariably be a feature or objective of the kind of scheme with which the s 9 definition of "managed investment scheme" is concerned, given the definition's references in several places to "benefits". Whatever is incidental and necessary to the pursuit of the profit (or "benefits") will therefore be comprehended by the scheme, including, it seems to me, steps sensible to counter risk of loss (or detriment). …

The evidence and findings earlier in these reasons establishes that such a program or plan of action existed.

103 The first element of the '*managed investment scheme*' definition contained in s 9(a)(i) of the *Corporations Act* requires that people contribute money or money's worth. The evidence and the findings referred to earlier in these reasons establish that contributors have contributed, in aggregate, a substantial sum of money to the scheme operated by the defendants for the period analysed in Mr Macchiusi's affidavit of 10 December 2021. The documents tendered in evidence also establish that Ascent recorded loans in its financial statements in respect of contributors for the 2010 to 2020 financial years in substantial amounts.

104 The first element of the '*managed investment scheme*' definition also requires that money or money's worth be contributed as consideration to acquire rights (interests) to benefits produced by the scheme. The word '*interest*' in this context is also defined in s 9 as follows:

> ***interest*** in a managed investment scheme (including a notified foreign passport fund) means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

105 Schemes involving the contribution of money for a fixed interest return are capable of engaging this aspect of s 9(a)(i) of the '*managed investment scheme*' definition. In this regard the following observations of Davies AJ in *Australian Securities and Investments Commission v*

Pegasus *Leveraged Options Group Pty Ltd* [2002] NSWSC 310; (2002) 41 ACSR 561 are pertinent:

> 27. In the present case, the investors invested in a scheme. They did not merely make individual loans to Pegasus at interest. In each case, the investors understood that the moneys would be used with other moneys in some money-making programme or plan of action…
>
> 28. … In each case, the investor was informed and understood that the ability of Pegasus to pay the specified rate of interest would result from a dealing with the moneys in the manner which was represented to the investor. It was obvious to each investor that the rate of interest offered was not a normal rate of interest. That rate of interest was understood to be achievable only by the carrying out by Pegasus of its represented programme or plan of action.

(see also the authorities cited in *Pegasus* at [31], *Australian Securities and Investments Commission v Hutchings* [2001] NSWSC 522; (2001) 38 ACSR 387 at [13] and *Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd* [2004] WASC 241; (2004) 187 FLR 270 at [90]-[96].) Additionally, in *Pegasus*, that was so even where 'there was no describable activity which was likely to produce a return …' in the amount promised (at [19]).

106 The evidence and findings referred to earlier in these reasons demonstrate that contributors contributed money as consideration to acquire rights (interests) to benefits produced by the scheme. The contributors executed the loan agreements and deposited funds into bank accounts controlled or held by Ascent and Mr Dunjey on the understanding that they were acquiring rights to benefit from what was represented to them as a lucrative investment scheme managed by Mr Dunjey who was a particularly skilful investor.

107 The second element of the '*managed investment scheme*' definition, contained in s 9(a)(ii) of the *Corporations Act*, requires that '*any*' of the contributions are to be pooled or used in a common enterprise, to produce financial benefits or benefits consisting of rights or interests in property for the people who hold interests in the scheme. As set out earlier in these reasons, contributors understood from the nature of the representations made to them or, otherwise, it was the only reasonable inference from those representations, that funds advanced to Ascent or Mr Dunjey were to be pooled with other funds under management and used for the purposes of Ascent's or Mr Dunjey's supposedly lucrative investment activities.

108 The final element of the '*managed investment scheme*' definition, contained in s 9(a)(iii) of the *Corporations Act*, requires that 'the members do not have day-to-day control over the operation

of the scheme (whether or not they have the right to be consulted or to give directions)'. It is plain that contributor's had no such control in this case. Ascent or Mr Dunjey had control of the funds after they were deposited into a bank account.

109 It follows that the evidence and findings referred to earlier in these reasons establish that a managed investment scheme existed and that scheme was required to be registered, but was not so registered. Neither Ascent nor Mr Dunjey contested such a finding or conclusion.

110 In *Pegasus*, Davies AJ observed (at [55]) that:

> 55 The word "operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. **The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme**. The Oxford English Dictionary gives these relevant meanings:
>
> > "5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work.
> >
> > 6. To cause or actuate the working of; to work (a machine, etc.). Chiefly *U.S.*
> >
> > 7. To direct the working of; to manage, conduct, work (a railway, business, etc.); to carry out or through, direct to an end (a principle, an undertaking, etc.). orig. *U.S.*"
>
> (Emphasis added.)

111 Drawing on this reasoning, Derrington J in *Australian Securities and Investments Commission v **MyWealth** Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035; (2020) 146 ACSR 270 said (at [85]):

> The word "operate" in s 601ED(1) does not refer to the identity of the person who owned the scheme, rather it refers to those acts which constitute the management or carrying out of the activities of the scheme as a matter of ordinary parlance: [*Pegasus*]. However, the section does not only apply to people who, by themselves, perform all of the activities which constitute the carrying out of the scheme. **A person will operate a managed investment scheme if they perform an act or some of the acts which constitute its carrying on, so long as the act or acts are directed to that end**. In this case, the scheme was carried on by the defendants acting together, even though each had different, albeit sometimes overlapping, roles to perform.
>
> (Emphasis added.)

112 The evidence and findings referred to earlier in these reasons establish, based on the meaning of 'operate' in the context of s 601ED(5) as explained in *MyWealth*, that Ascent, through the

agency of Mr Dunjey, operated the scheme that was required to be registered under s 601EB in contravention of s 601ED(5).

Unlicensed financial services business – s 911A

113 Section 1101B(1)(a)(i) of the *Corporations Act* relevantly provides that the Court may make such order, or orders, as it thinks fit if, on the application of ASIC, it appears to the Court that a person has contravened a provision of Ch 7 (Financial services or markets).

114 Section 911A(1) of the *Corporations Act*, which appears in Ch 7 (Financial services or markets), provides that 'subject to this section a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services'. Sub-section 911A(2) provides for a number of exceptions to the requirement in s 911A(1) that are not applicable to this case. The phrase 'financial services business' is defined by s 761A to mean '*a business of providing financial services*'.

115 Section 766A of the *Corporations Act* identifies the circumstances in which a person provides a financial service. Relevantly, a person provides a financial service under s 766A(1)(b) if they '*deal in a financial product*'.

116 Division 3 of Ch 7 defines the phrase 'financial product' in a number of different respects, including specific inclusions and exclusions, as well as a general definition. The general definition and one of the specific inclusions are relevant to this case. In light of the evidence and findings referred to earlier in these reasons, the interests that contributors received from the scheme satisfy the general definition and applicable specific inclusion of 'financial product'. Both avenues for satisfying the definition of financial product are alternatives and do not give rise to material differences in subsequent analysis.

117 As to the specific inclusion, s 764A relevantly provides:

> **764A Specific things that are financial products (subject to Subdivision D)**
>
> (1) Subject to Subdivision D, the following are ***financial products*** for the purposes of this Chapter:
>
> …
>
> (ba) any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied:

(i) an interest in the scheme;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

…

118 It will be recalled from the above analysis that the scheme operated by Ascent satisfied s 601ED(1)(a) by having more than 20 members. None of the specific exclusions in Subdivision D are applicable. Thus, the interests of contributors in the managed investment scheme Ascent operated was a 'financial product'.

119 Section 763A(1)(a) of the *Corporations Act* contains the general definition of '*financial product*', and relevantly provides that for the purposes of Ch 7 a '*financial product*' is a facility through which, or through the acquisition of which, a person makes a financial investment. Section 763B(a) of the *Corporations Act* relevantly provides that a person makes a financial investment if the investor gives money or money's worth to another person and:

(i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); …

120 It is also a requirement that 'the investor has no day-to-day control over the use of the contribution to generate the return or benefit': s 763B(b).

121 With respect to a similar scheme involving loan agreements, in *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; (2020) 148 ACSR 154, Derrington J said (at [52]-[53]):

52 The major issue is whether it is possible to extract from the evidence which ASIC adduced sufficient facts to be able to conclude that the investors intended that Secure Investments would use the contributions to generate a financial return for them. In this respect it is inappropriate to rely solely upon the loan agreements as encapsulating an arrangement which amounted to a "financial product". A mere loan agreement between a borrower and lender by which money is lent in return for its repayment together with interest is unlikely to satisfy the requirement that it was intended that the contribution would be used by the Borrower to generate a financial return for the lender. In the ordinary course, a borrower uses borrowed funds for their own purposes to generate a benefit for themselves and the interest rate is the price paid for the use of the

funds.

> 53 However, the circumstances of this case show that the answer to the question of what was the intended use of the funds is not to be limited to a consideration of the terms of the loan agreements. It is to be answered in the context of all of the relevant circumstances, including what the investors were told about the transaction. That seems to be somewhat axiomatic. If reliance is to be placed upon the intention of the borrowers, evidence of the cause of their alleged beliefs would naturally be centrally relevant. In that respect it is somewhat strange that there is little, if any, evidence from the investors of the circumstances in which they entered into the relevant transactions insofar as those circumstances may elucidate what they were told of the nature of the investment. That is even true in relation to those investors who provided affidavit evidence. As it is, the matter needs to be approached by way of inference from the surrounding circumstances. Nevertheless, and despite the absence of direct evidence, it is possible to conclude that the investors did intend that Secure Investments would use their funds to generate a financial return for them.

122 Based on the findings of fact set out earlier in these reasons, it could not be seriously contended that contributors had not given money to Ascent and, at least, the contributors had intended that Ascent would use the money to generate a financial return, or other benefit, for the contributor.

123 The concept of 'dealing' in a financial product under s 766A(1)(b) is given its meaning by s 766C which relevantly provides that:

> (1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:
>
> (a) applying for or acquiring a financial product;
>
> (b) issuing a financial product;
>
> (c) in relation to securities and interests in managed investment schemes – underwriting the securities or interests;
>
> (d) varying a financial product;
>
> (e) disposing of a financial product;
>
> …

124 With respect to the concept of 'issuing' further guidance is given by s 761E(4) which relevantly provides that: 'the ***issuer***, in relation to a financial product issued to a person (the ***client***), is the person responsible for the obligations owed, under the terms of the facility that is the product … to … the client'. Again, based on the findings set out earlier in these reasons, Ascent issued a financial product to the contributors. Ascent was the person responsible for the obligations owed under the loan agreements and it was the person responsible, in effect, for investing the

contributors' collective funds in an investment activity from which the profits would be derived to pay the interest stipulated in the loan agreements.

125 The concept of '*carrying on business*' implies an element of continuity or a repetition of acts: *Hope v Bathurst City* Council (1980) 144 CLR 1 at 9. It is to be contrasted with an isolated transaction which is not repeated: *Smith v Anderson* (1880) 15 Ch D 247 at 277–8; *Edgelow v MacElwee* [1918] 1 KB 205 at 206. However, in determining if a person is 'carrying on a business' the emphasis on continuity may not be heavy and a single venture, depending on its scope, may amount to the carrying on of a business: *United Dominions Corp Ltd v Brian Pty* Ltd (1985) 157 CLR 1 at 15; cf *Ballantyne v Raphael* (1889) 15 VLR 538 at 541, 557.

126 The evidence referred to earlier in these reasons demonstrates that Ascent was carrying on a business. There was repetitive and systematic conduct involving discussions and representations to contributors, the provision of promotional material to contributors and making loan agreements with contributors.

127 Ascent, through the agency of Mr Dunjey, provided financial services by dealing in financial products. Ascent issued financial products to contributors based upon the evidence and findings of:

(a) the provision and execution of the loan agreements;

(b) the receipt of funds from contributors bank accounts held in Ascent's name; and

(c) the circumstances in which funds were provided to Ascent.

128 As a result of these activities Ascent made available a facility through which, or through the acquisition of which, contributors made a financial investment. In particular:

(a) contributors gave money to Ascent for the purposes of s 763B(a)(i) of the *Corporations Act*;

(b) Ascent used the contributions of investors to generate a financial return or other benefit for investors for the purposes of s 763B(a)(ii) of the *Corporations Act* in the limited sense that contributors' funds were used to finance withdrawals and some small returns were derived from investment activities undertaken by Ascent; and

(c) I infer from the loan agreements and the circumstances of a large number of deposits having been made by contributors, that contributors intended that Ascent would use the

funds advanced for the benefit of contributors even if no return or benefit was in fact generated for the purposes of s 763B(a)(iii) of the *Corporations Act*.

129 I also infer from the same unchallenged material, and for the purposes of s 763B(b) of the *Corporations Act*, that contributors did not have day-to-day control over the use of the contributions to generate the return or benefit.

130 It is alternatively also the case, for the reasons expressed in relation to s 601ED, that contributors were entitled to interests in the scheme such that Ascent was dealing in a financial product pursuant to s 764A(i)(ba) of the *Corporations Act*.

131 Based upon evidence as to quantum, number and frequency of deposits and withdrawals, I find that the systematic issuing of financial products amounted to the carrying on of a business.

132 The defendants did not hold an AFSL at any relevant time.

133 It follows that Ascent contravened s 911A of the *Corporations Act* as alleged.

Relief

134 After the hearing on 29 and 30 June 2022, ASIC, the provisional liquidators and Mr Shanahan filed the minute dated 21 July 2022. The minute comprised two parts. In the first part, ASIC requested the Court to make declarations as to contraventions of s 601ED(5) and s 911A of the *Corporations Act*. The second part of the minute concerned proposed orders consequent upon the declarations sought in the first part. As to the second part, ASIC consented to orders in terms of paragraphs [1] to [13] of that part of the minute and neither consented nor opposed orders in terms of paragraphs [14] to [18] of that part of the minute. Each of the provisional liquidators and Mr Shanahan made written submissions in support of paragraphs [14] to [18] of the minute.

Declaratory relief

135 The Court has a broad discretionary power to make declarations of right under s 21 of the *Federal Court Act*: *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421 at 437-438; ***Ainsworth*** *v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 581-582; *Australian Competition and Consumer Commission v* ***MSY*** *Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378 at [8]-[21]. As observed in *Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114 (at [30]), it is 'beyond contest' that a

superior court of record has plenary jurisdiction to make a declaratory order concerning contravention of the *Corporations Act* (citing *Australian Softwood* per Gibbs CJ (at 125 and *Corporate Affairs Commission (NSW) v Transphere Pty Ltd* (1988) 15 NSWLR 596 per Young J at 209).

136 In circumstances where contraventions have been established and declarations would have utility, including by identifying contravening conduct and recording the Court's disapproval of that contravening conduct, the Court ought to grant declaratory relief: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [93] (***ABCC v CFMEU***); ***Rural Press*** *Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [93], [95]; *Australian Securities and Investments Commission v* ***Ostrava Equities*** *Pty Ltd* [2016] FCA 1064 per Davies J at [51].

137 Nonetheless, generally, there must be a proper contradictor to the declarations sought: *Aussie Airlines Pty Ltd v Australian Airlines* (1996) 68 FCR 406 at 414 (citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 and *Ainsworth* at 596). A proper contradictor is a party that has an interest in opposing the declarations sought. The concept of a proper contradictor is not confined to a party that actively opposes the declarations sought. The concept extends to a party with an interest in opposing the declarations who refuses or does not indicate if it is opposed. In other words, such a party may be said to be one which, notwithstanding its silence, has an interest in opposing the proposed conduct: ***IMF*** *(Australia) Ltd v Sons Of Gwalia Ltd (Administrator Appointed)* [2004] FCA 1390; (2004) 211 ALR 231 per French J (as his Honour then was) at [47]. The concept also extends to parties who ultimately consent or do not oppose the declarations: *Oil Basins Ltd v Commonwealth* [1993] HCA 60; (1993) 178 CLR 643 at 648-649; *IMF* at [47]; *MSY* at [17], [30].

138 In addition, before a court makes declarations relating to breaches of provisions of the *Corporations Act* it should be satisfied of the following matters:

(a) That there is sufficient supportive evidence to satisfy the Court that it should make the declarations sought in regard to breaches of the C*orporations Act* to the standard identified in *Briginshaw* per Dixon J (at 361-362); see also *BMI Ltd v Federated Clerks Union of Australia* (1983) 76 FLR 141 at 152-153; *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103

ACSR 453 per Gordon J at [64] and *Australian Securities and Investments Commission v Munro* [2016] QSC 9 at [47] (and the cases there cited).

(b) That the declarations are specifically informative as to the basis upon which the court declares that a contravention of the *Corporations Act* has occurred. There should be appropriate and adequate particulars of how and why the impugned conduct is a contravention of the *Corporations Act*: *Rural Press* at [90]; *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd* [2014] FCA 1135 per Gordon J at [66]; and *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167; (2004) 207 ALR 452 at [35].

139 A failure to comply with s 601ED(5) is presently an offence by virtue of s 1311 of the *Corporations Act*. A failure to comply with s 911A is also an offence under s 1311. The maximum penalty for a contravention of each of s 601ED(5) and s 911A is 5 years by virtue of ss 1311A, 1311B and Schedule 3 of the *Corporations Act*. Civil courts should be wary of making declarations against a party for contraventions of the *Corporations Act* in circumstances where a criminal prosecution in respect of the same subject matter as the declarations is a real possibility: *Australian Securities and Investments Commission v* ***HLP*** *Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487 at [58]; *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* [2016] FCAFC 97; (2016) 242 FCR 153 at [46].

ASIC's submissions

140 ASIC has submitted that it does not intend to refer a criminal brief to the **C**ommonwealth **D**irector of **P**ublic **P**rosecutions in respect of Ascent. It has also submitted that it does not intend to refer a criminal brief to the CDPP in respect of Mr Dunjey for contraventions of s 601ED(5) or s 911A of the *Corporations Act.*

141 ASIC submitted that Mr Dunjey and Ascent were proper contradictors in this case. Each were parties to the proceedings and had a genuine interest in opposing the relief sought. Further, that neither sought to oppose the relief did not mean that they were not proper contradictors. ASIC also submitted that Seaflower and GD Project Living, as well as other former clients of Ascent, were provided with copies of the originating process and affidavits of Mr Macchiusi and had the opportunity to seek leave to intervene, but had elected not to do so.

Seaflower's submissions

142 Seaflower made two submissions by way of email correspondence, the first on 5 April 2023 and the second on 11 April 2023. By an email to the Court of 5 April 2023, Seaflower made a submission to the effect that ASIC's characterisation of Seaflower's role in the proceedings was misleading. Seaflower also indicated that the Court had not requested submissions from Seaflower on the question of declaratory relief, which was correct. Thereafter, on 7 April 2023, the Court requested all interested non-parties which had appeared at any hearing before the Court to make any submissions they may have wanted to make on the question of declaratory relief.

143 Seaflower made further submissions, by way of an email to the Court on 11 April 2023. In these submissions, Seaflower sought to address the substance of the grant of declaratory relief against Ascent. The submissions contained a mixture of purported evidence and submission. To the extent the submissions are based on purported evidence I have taken not account of them. As to the substantive question, as Seaflower neither sought nor was granted leave to intervene on the final hearing of the Application, I consider that its right to make submissions on the question of relief is limited to what, if any, effect declaratory relief may have on its interests. None has been identified in its submissions. Otherwise, the submissions are to similar effect to those made in the email of 5 April 2023 which are addressed below.

144 The grounds upon which Seaflower contended that ASIC's submissions concerning Seaflower's role in the proceedings were misleading is not clear from Seaflower's submissions. In any event, nothing turns on it, as I accept that Seaflower was not a true contradictor in the proceedings. The grounds upon which Seaflower had or could have had an interest in opposing the relief sought and being granted leave to intervene have not been established. Therefore, ASIC's submission to the effect that Seaflower could have applied to intervene, but elected not to do so, is not to the point. Otherwise, I do not consider ASIC's submissions to have been misleading; I reject that contention of Seaflower.

145 While I accept that Seaflower was not a true contradictor, I also do not accept certain assertions Seaflower made in apparent support of that proposition. Lest it be thought that the Court has accepted those assertions in reaching the conclusions that Seaflower was not a true contradictor, it is necessary to briefly record my reasons for not accepting those assertions.

146 By paragraph 8 of orders of the Court made on 20 January 2022, Seaflower was permitted to file an affidavit in respect of the final hearing of ASIC's originating application. On 16 March 2022, orders were made, amongst other things, permitting ASIC to amend its originating application and vacating all orders for filing affidavit evidence by the parties and Seaflower that had been made on 20 January 2022. As the transcript of the case management hearing of 16 March 2022 records, it was contemplated that further orders would be made for the exchange of affidavit evidence with respect to the amended originating application after conferral between the parties and interested non-parties and the preparation of agreed or competing minutes dealing with the exchange of evidence and other matters. Seaflower was granted leave to appear at that case management hearing by its director. Therefore, I do not accept an assertion that Seaflower made in its submissions to the effect that the orders of 20 January 2022 were varied without notice to Seaflower. Thereafter, Seaflower made no application or submission to the Court requesting an opportunity to intervene at the final hearing or adduce evidence for the purposes of that final hearing. Its reasons for not so doing are not in evidence before the Court. Therefore, I do not accept any of the assertions of fact Seaflower has made concerning the reasons for its action or inaction in the proceedings. In any event, its subjective state of mind is not relevant. The objective fact is that, although Seaflower filed a notice of appearance, it neither applied for nor was not granted leave to intervene at the final hearing. Moreover, there was nothing before the Court from which to consider or determine if Seaflower had a proper basis for being granted leave to intervene at the final hearing of the Application.

First defendant's submissions

147 On 13 April 2023, Mr Dunjey filed further submissions. Mr Dunjey's submissions were directed towards the issue of the potential for a criminal prosecution to be brought against him and the possible impact declarations could have on that prosecution. He submitted that the Court should take into account, in the exercise of its discretion, the potential for there to be criminal prosecutions of Mr Dunjey for offences other than contraventions of s 601ED(5) and s 911A of the *Corporations Act*. These include a potential prosecution for alleged false or misleading statements in contravention of s 1041E of the *Corporations Act*. Mr Dunjey submitted that there is significant overlap in the factual questions upon which the declarations are founded and a potential prosecution for contravention of s 1041E. In substance, Mr Dunjey opposes the grant of the declarations requested on those grounds. Alternatively, he submits that the Court should make a suppression or non-publication order under s 37AF of the *Federal*

Court Act to have effect until the question of what, if any, criminal charges may be brought against Mr Dunjey has been resolved.

Declaratory relief is appropriate

148 I am satisfied that the declaratory relief ASIC has requested should be made.

149 Although the evidence before the Court is largely documentary and (or) hearsay, the findings of fact referred to earlier in these reasons are based upon 'actual persuasion of its occurrence or existence' to the standard referred to in *Briginshaw*. That state of satisfaction has not been reached on 'inexact proofs, indefinite testimony, or indirect inferences'. I am satisfied that Ascent contravened s 601ED(5) and s 911A of the *Corporations Act* and, even though Ascent will be wound up and will cease to exist, the Court should mark its disapproval of that corporate misconduct. It is also appropriate to do so to vindicate the regulator's claims, to deter other corporations and those who control them from engaging in similar conduct, to inform contributors of the unlawful nature of the scheme and the financial services business and to describe the nature of the scheme for the benefit of those charged with the responsibility of winding up the scheme, the company and the personal affairs of Mr Dunjey.

150 I accept that Ascent and Mr Dunjey, as parties to the proceedings, were proper contradictors even though neither actively opposed the relief ASIC sought on the Application during the final hearing of that application. In any case, Mr Dunjey has, belatedly, made submissions, as a contradictor, in opposition to the declarations sought against Ascent.

151 I also accept ASIC's submissions, at face value, that there is no intention to refer briefs to the CDPP concerning the contraventions of Ascent. As for Mr Dunjey, I accept ASIC's submission that there is no intention to refer briefs to the CDPP concerning contraventions of s 601ED(5) and s 911A of the *Corporations Act*. I take it from that submission, that there is no intention, in effect, to prosecute Mr Dunjey for alleged criminal offences as a primary contravener or as an accessory to Ascent's contraventions of those provisions of the *Corporations Act*.

152 A significant reason for inviting further submissions on the question of declaratory relief was the potential for a criminal prosecution of Mr Dunjey as an accessory to Ascent's contraventions of the *Corporations Act*. If such a prosecution were in contemplation, then there would be a risk of a jury learning of the findings in the civil proceedings to which Mr Dunjey was a party regarding the contraventions of Ascent and those findings would or may be made,

in part, on evidence that would not be available in criminal proceedings. That is, there would be a risk of civil proceedings interfering with potential criminal proceedings. It was a risk of that nature that resulted in Finkelstein J in *HLP* declining to entertain, on a final basis, in that case declaratory and injunctive relief against Mr Berlowitz. Nonetheless, Finkelstein J granted declaratory and injunctive relief against the corporate defendants because there was no risk of prosecution of them.

153 In this case, Mr Dunjey did not appear on the final hearing of the Application and made no submissions in opposition to the relief sought until after the Court invited submissions on that question. Further, Mr Dunjey has not actively contested in these proceedings the findings of fact that would support the relief ASIC has sought against Ascent. Mr Dunjey made no submissions before or during the final hearing of the Application to the effect that the Court should not entertain the Application at all due to the potential for the proceedings to interfere with criminal prosecutions of Ascent and (or) Mr Dunjey. Given that the declarations are requested against Ascent and there is no realistic prospect of a prosecution of Ascent or Mr Dunjey for contraventions of ss 601ED(5) and 911A of the *Corporations Act*, I do not consider that the possibility of criminal prosecution of Mr Dunjey for some other unspecified and unknown offence provides a proper ground for refusing to grant the declarations requested against Ascent.

154 As to suppression or non-publication orders, in these circumstances, I am not satisfied that the declarations sought against Ascent have the potential to interfere with any criminal prosecution of Mr Dunjey that may be being contemplated. Nonetheless, I accept that the findings upon which the declarations are founded and the form of the orders are substantially based on conduct of Mr Dunjey and that there is potential for the declarations, orders and reasons in these civil proceedings to come to the attention members of a jury empanelled for any criminal prosecution of Mr Dunjey. While I am not satisfied, on the information available, that any of the grounds for making a suppression or non-publication order under ss 37AF and 37AG of the *Federal Court Act* have been met, there is a serious question to be considered in that regard. Accordingly, I am satisfied that I should make an interim non-publication order under s 37AI of the *Federal Court Act* with respect to the declarations, orders and reasons and make orders to facilitate interested persons making further submissions and putting on further evidence on the question of whether there are grounds for making a suppression or non-publication order under s 37AF of the *Federal Court Act*.

Winding up of the scheme and Ascent

155 Paragraphs [1] to [6] of the second part of the minute seek orders in accordance with s 461(1)(k) and s 601EE(1) of the *Corporations Act* for orders that Ascent and the unregistered managed investment scheme be wound up (respectively).

156 On 25 May 2022, Ascent made an interlocutory application that it be wound up under s 461(1)(a) of the *Corporations Act*. In that case, the Court may order that the company be wound up because it has, by special resolution resolved that it be so wound up. As mentioned earlier in these reasons, the Court ordered the appointment of the provisional liquidators because ASIC had made an application for appointment of provisional liquidators pending determination of whether the company should be wound up under s 461(1)(k) and the company had applied for it to be wound up under s 461(1)(a). Paragraph [1] of the second part of the minute seeks an order that Ascent's interlocutory application be dismissed with no order as to the costs of that application. That order will be made because I am satisfied that an orders should be made that Ascent be wound up on just and equitable grounds under s 461(1)(k).

157 Section 601EE(1) of the *Corporations Act* provides that, if a person operates a managed investment scheme in contravention of s 601ED(5), ASIC may apply to have the scheme wound up. Section 601EE(2) provides that the Court may make any orders it considers appropriate for the winding up of the scheme.

158 Section 461(1)(k) of the *Corporations Act* provides that the Court may order the winding up of a company if the Court is of opinion that it is just and equitable that Ascent be wound up. In this respect, s 462(2)(e) and s 464 of the *Corporations Act* make clear that ASIC has standing to seek such an order if it is investigating, or has investigated, under Part 3, Division 1 of the *ASIC Act* matters being, or connected with the affairs of a company.

159 It is well established that ASIC may apply for the winding up of a company on the 'just and equitable ground' on the basis of public interest considerations: see, for example, *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 per Finn J (at 530-531). *Pegasus* provides a good analogy to this case. In *Pegasus*, Davies AJ granted a winding up on application by ASIC, having referred (at [91]) to observations of Owen J in *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* [2001] WASC 27 (at [75]) to the effect that '[t]he public interest justifies intervention where, among other

things, it is required for investor protection and where there has been regular or repeated breaches of the law'.

160 I am satisfied that the evidence establishes that similar considerations are applicable in the present proceedings such that both the scheme and Ascent ought to be wound up. I am also satisfied that Ascent is insolvent and, therefore, in any event, it is not in the public interest that it should be permitted to continue to trade.

161 Orders will be made appointing the provisional liquidators as liquidators of Ascent and the scheme in terms of paragraphs [2] - [6] of the second part of the minute.

Appointment of receivers

162 Paragraphs [9] to [13] of the second part of the minute seek orders for the appointment of Mr Donnelly and Mr Holmes (**Receivers**) as joint and several receivers and managers over the property, assets and undertakings of the Ascent Trust and for ancillary orders. I take the intended effect of the proposed order to be that the Receivers be appointed as receivers and managers over the property, assets undertakings of Ascent that it held on trust immediately before they were appointed as the provisional liquidators.

163 Clause 7.6(2) of the Ascent Trust deed (as amended) provides that if the trustee is a company and it enters into liquidation, whether compulsory or voluntary the office of trustee 'will be determined and vacated'. The applicable date of vacation of the office of trustee is 25 May 2022, at the earliest, when a special resolution was passed and the application was made to have the company wound up under s 461(1)(a) of the *Corporations Act* and at the date of appointment of the Liquidators, at the latest.

164 The order for the appointment of a receiver over the property, assets and undertaking that Ascent held (or holds) as trustee of the Ascent Trust is sought under s 57 of the *Federal Court Act*. That provision confers a broad power on the Court to appoint a receiver by interlocutory order in any case in which it appears to the Court to be just and convenient so to do.

165 I am satisfied that it is appropriate to appoint Mr Donnelly and Mr Holmes as receivers and managers of the Ascent Trust property, assets and undertaking. There are at least two reasons for considering it just and convenient to do so. First, as I have mentioned, the appointment of the Liquidators, if not the provisional liquidators, will terminate Ascent's office as trustee of the Ascent Trust. Second, based on the facts and opinions expressed in the Provisional

Liquidators' Report, it appears likely that it will be necessary to investigate and determine what property, assets and undertaking Ascent holds in its own right, as operator of the scheme and held as trustee of the Ascent Trust. Further, questions may arise as to whether the contributors to the scheme have proprietary interests in or claims against Ascent in its own right or the trustee of the Ascent Trust. Therefore, it is necessary to identify and preserve the property, assets and undertaking that Ascent holds (or held) as trustee of the Ascent Trust.

Variation to the freezing orders

166 Paragraphs [7] and [8] of the second part of the minute request further variations to the freezing orders made on 13 December 2021. The order requested in para [7(a)] will be made by consent. The order requested in para [7(b)] was made on 9 December 2022. The order requested in para [8] is unnecessary because the freezing orders already make provision for the parties to have liberty to apply.

Remuneration, costs and expenses

167 Paragraphs [14] to [17] of the second part of the minute request the Court to make orders that would, in effect, permit the remuneration, costs and expenses incurred by Mr Donnelly and Mr Holmes as liquidators of Ascent, as liquidators of the scheme and as receivers and managers of the Ascent Trust to be paid out of the assets of the Ascent Trust, the assets of the scheme and the assets of the company as if all these assets were a single combined pool of assets for the purposes of the costs and expenses of the receivership and liquidations of Ascent and the scheme.

168 I am not prepared to make orders of the requested nature without a further hearing. In short, I would need to be persuaded that it is appropriate to make such an order in the circumstances of this case. For example, it seems to me that the beneficiaries of the Ascent Trust, the creditors of Ascent and the contributors of the scheme may have different or conflicting interests in an order of the kind that is requested.

169 Nonetheless, I consider that Mr Donnelly and Mr Holmes should not be hindered in the task of identifying, getting in and realising the property, assets and undertaking of the Ascent Trust, scheme and Ascent in the most efficient and cost effective manner and should be able to do so knowing that their costs and expenses will be paid out of such property, assets and undertaking. It seems to me that a possible solution is to appoint Mr Donnelly and Mr Holmes as joint and several receivers and managers of all property, assets and undertaking of Ascent, Ascent as

trustee and the scheme (**Property**) and make provision for them to identify what part of the Property is trust property of the Ascent Trust, property of Ascent in its own right, and property of the scheme and for them to deliver those parts of the Property, in due course, to the trustee of the Ascent Trust, the liquidators of Ascent and the liquidators of the scheme. It would be appropriate for their costs and expenses of undertaking the work of that receivership to be paid out of the Property, as a whole. Orders of a similar nature were made in *Australian Securities and Investments Commission v Marco (No 6)* [2020] FCA 1781. I will hear the parties as to whether it would be appropriate to make orders of a similar nature in this case.

170 In the meantime, orders will be made for payment of remuneration, costs and expenses out of the assets of the Ascent Trust for the Receivers, out of the assets of the scheme, for the Liquidators as liquidators of the scheme and out of the assets of Ascent for the Liquidators as liquidators of Ascent.

171 Paragraph [18] of the second part of the minute requests the Court to make orders to the effect that Mr Shanahan is entitled to reasonable remuneration, costs and expenses for assistance in the identification, care, preservation of assets of the scheme and to be paid for such remuneration, costs and expenses out of the assets of the scheme. On the basis of the information available, I am not prepared to make an order in such terms. This is not to say that an order to the effect that the Liquidators, as liquidators of the scheme, would be acting properly and would be justified in paying of such reasonable remuneration, costs and expenses of Mr Shanahan out of the assets of the scheme would not be appropriate if the Liquidators were to request such a direction and provide proper and sufficient justification for such a direction to be made in due course.

Conclusion

172 Orders will be made substantially in terms of the minute of proposed orders dated 21 July 2022.

173 I will hear the parties on the final form of the orders to be made with respect to the remuneration, costs and expenses of Mr Donnelly and Mr Holmes as Receivers and Liquidators and of Mr Shanahan for assisting Mr Donnelly and Mr Holmes in the performance of their duties.

174 There will be an interim non-publication order made in respect of the declarations, part of the orders and these reasons. Provision will be made for the parties and interested non-parties to

make further submissions as to whether there should be any continuation of that non-publication order.

I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Feutrill.

Associate:

Dated: 21 April 2023