Federal Court of Australia

Australian Securities and Investments Commission v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd [2020] FCA 1166

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| File number(s): | VID 524 of 2020 |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 13 August 2020 |
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| Catchwords: | **CORPORATIONS** – investigation by ASIC – ex parte application – ASIC seeks appointment of provisional liquidator, asset preservation orders, restraining orders and travel restriction orders – whether orders should be made on ex parte basis – whether orders necessary and appropriate in the particular circumstances – risk of potential fraudulent dissipation of assets – risk conduct has characteristics of a “Ponzi scheme” **Held**: orders sought are necessary and appropriate on the basis of evidence presented  |
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| Legislation: | *Corporations Act 2001* (Cth), ss 472(2), 1101B(1), 1101B(5), 1323(1), 1323(3), 1324(1) and 1324(4) *Federal Court of Australia Act 1976* (Cth), s 23  |
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| Cases cited: |  *Australian Securities and Investments Commission v Adler* (2001) 38 ACSR 266*Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd* [2001] NSWSC 1180*Australian Securities and Investments Commission, In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 3)* [2006] FCA 433*Australian Securities & Investments Commission; in the Matter of Richstar Enterprises Pty Ltd ACN (099 071 968) v Carey (No 19)* [2008] FCA 38 *Australian Securities and Investments Commission v CME Capital Australia Pty Ltd, in the matter of CME Capital Australia Pty Ltd (No 3)* [2016] FCA 545*Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2*Australian Securities and Investments Commission v Goldenberg* [2020] FCA 809*Australian Securities & Investments Commission v Hawley* [2008] FCA 1423*Australian Securities and Investments Commission v Koops* [2010] FCA 20*Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104*Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 684*Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741*Australian Securities & Investments Commission, in the matter of Money for Living (Aust) Pty Ltd (Administrators Appointed) v Money for Living (Aust) Pty Ltd (Administrators Appointed)* [2005] FCA 1621*Australian Securities and Investments Commission v Secure Investments Pty Ltd* [2020] FCA 639*Australian Securities and Investments Commission v Troy* (1999) 33 ACSR 121*Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd* [2017] FCA 477*Carr v Darren Berry International Marine Pty Ltd (No. 1)* [2013] FCA 1150*Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1)* (1986) 11 ACLR 566*Deputy Commissioner v Ausmart Services Pty Ltd* [2018] FCA 1912*Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd* [2017] FCA 437  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 75 |
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| Date of hearing: | 13 August 2020  |
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| Counsel for the Plaintiff: | J P Moore QC and C van Proctor |
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| Solicitor for the Plaintiff: | Australian Securities and Investments Commission |

ORDERS

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|  | VID 524 of 2020 |
| IN THE MATTER OF M101 NOMINEES PTY LTD (ACN 636 908 159) |
| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONPlaintiff |
| AND: | M101 NOMINEES PTY LTD (ACN 636 908 159)First DefendantJAMES PETER MAWHINNEYSecond DefendantSUNSEEKER HOLDINGS PTY LTD (ACN 632 076 469)Third Defendant |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 13 AUGUST 2020 |

THE COURT ORDERS THAT:

1. Pursuant to section 472(2) of the *Corporations Act 2001* (**Act**), Said Jahani and Philip Campbell-Wilson of Grant Thornton (**the** **Provisional Liquidators**) be appointed as joint and several provisional liquidators of the First Defendant.
2. The Provisional Liquidators shall, within 42 days of this Order, provide to the Court and to the parties, a report as to the provisional liquidation of the First Defendant (**Report**), including:
	1. the identification of the assets and liabilities of the First Defendant;
	2. an opinion as to the solvency of the First Defendant;
	3. an opinion as to the value of the assets of the First Defendant;
	4. an opinion as to the likely return to creditors, if the First Defendant is wound up;
	5. an opinion as to whether the First Defendant has proper financial records;
	6. any other information necessary to enable the financial position of the First Defendant to be assessed;
	7. any suspected contraventions of the Act by the First Defendant; and
	8. any suspected contraventions of the Act by the director of the First Defendant.
3. The Plaintiff is to provide to the Provisional Liquidators copies of:
	1. all books and records in the Plaintiff’s possession that the Plaintiff considers relevant to the Provisional Liquidators’ Report; and
	2. the affidavit of Dayle Buckley affirmed 5 August 2020 and filed in this proceeding.
4. The First Defendant and Second Defendant are to cooperate and provide all reasonable assistance required of them by the Provisional Liquidators, including making available to the Provisional Liquidators all books and records of the First Defendant.
5. Pursuant to sections 1101B(5) and 1324(4) of the Act and/or section 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), until further order, the Second Defendant, by himself, his servants, agents, employees and any company of which he is an officer or member, is restrained from:
	1. receiving or soliciting funds in connection with any financial product (as defined in Division 3 of Chapter 7 and section 9 of the Act (**Financial Product**)), including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds;
	2. advertising, promoting or marketing any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds; and
	3. removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds.
6. Pursuant to sections 1323(1) and 1323(3) of the Act and/or section 23 of the FCA Act, until further order, the Third Defendant, by itself and its servants, agents and employees, is restrained from:
	1. selling, charging, mortgaging or otherwise dealing with, disposing of and/or diminishing the value of the units in the following trusts (**Units**):
		1. Mayfair Island Trust
		2. Mission Beach Property Trust
		3. Mission Beach Property Trust No 2
		4. Mission Beach Property Trust No 3
		5. Mission Beach Property Trust No 4
		6. Mission Beach Property Trust No 5
		7. Mission Beach Property Trust No 6
		8. Mission Beach Property Trust No 7
		9. Mission Beach Property Trust No 8
		10. Mission Beach Property Trust No 9
		11. Mission Beach Property Trust No 10
		12. Mission Beach Property Trust No 11
		13. Mission Beach Property Trust No 12
		14. Jarrah Lodge Unit Trust No 1; and
	2. causing or permitting the Units to be sold, charged, mortgaged or otherwise dealt with, disposed of, or diminished in value.
7. Pursuant to sections 1323(1)(k) and 1323(3) of the Act, until further order, the Second Defendant is restrained from leaving or attempting to leave Australia.
8. Service of the Originating Process and supporting affidavit is dispensed with.
9. Service of:
	1. this Order; and
	2. the Originating Process; and
	3. the affidavit of Ms Dayle Buckley affirmed 5 August 2020, and the exhibits/annexures to it; and
	4. the Plaintiff’s submissions dated 11 August 2020,

be effected on the Defendants as soon as possible.

1. The Plaintiff has leave to give to:
	1. the relevant authorities that record, control and regulate the ownership of real property;
	2. the relevant authorities that record, control and regulate the ownership of motor vehicles;
	3. the relevant authorities that record, control and regulate the ownership of maritime vessels and craft;
	4. any bank, building society or other financial institution through which, to the best of the Plaintiff’s belief, any of the Defendants operates any account;
	5. any other person or entity, holding or controlling property, which, to the best of the Plaintiff’s belief, belongs to any of the Defendants; and
	6. the relevant authorities that issue and control of passports,

notice of these orders, by delivering a copy of this Order to a person apparently in the employ of that entity or person.

1. The matter be listed for case management before Anderson J at 10am on 20 August 2020.
2. Liberty to apply.
3. Costs reserved.

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

REASONS FOR JUDGMENT

ANDERSON J:

# Introduction

1. The Plaintiff (**ASIC**) has filed an originating process seeking urgent, ex parte, interlocutory relief under ss 472(2), 1101B(1), 1101B(5), 1323(1), 1323(3), 1324(1) and 1324(4) of the *Corporations Act 2001* (Cth) (***Corporations******Act***) and s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), for the appointment of provisional liquidators to the First Defendant, travel restraint orders against the Second Defendant, injunctions and ancillary orders.
2. The Plaintiff relies on an affidavit of Ms Dayle Buckley affirmed 5 August 2020 (**Buckley**).
3. As this application was commenced on an urgent basis, I made the orders set out above shortly after hearing ASIC’s application on 13 August 2020. These are my reasons for making those orders which I endeavoured to publish on an expedited basis so that the reasons for the orders were available to the parties as soon as possible.
4. The reasons were ready for publication on the Federal Court’s website on 13 August 2020. However, in the afternoon of 13 August 2020, ASIC informed my Associate that it had not yet formally served an authenticated copy of the Orders made on 13 August 2020 on the Defendants. ASIC requested that the publication of reasons be delayed until ASIC was in a position to confirm that service on the Defendants had occurred. In addition, referred to below are certain Orders of Robson J of the Supreme Court of Victoria dated 12 August 2020, which appear to have been sought and obtained by ASIC and were provided to my Chambers on 13 August 2020. Among other things, those Orders preserved confidentiality in the matters referred to in those Orders for a limited temporal period. As a result, it appeared that this judgement could properly refer to Robson J’s Orders after ASIC had served Robson J’s Order on certain parties or after 4pm on 14 August 2020. It was appropriate that the timing of the publication of these reasons accommodated those matters.

# Factual matters presented

1. ASIC alleges that the First Defendant, M101 Nominees Pty Ltd (**M101 Nominees**), has received significant funds (approximately $67 million) from investors in debentures called M Core Fixed Income Notes (**Core Notes**), based on representations that, amongst other things, there would be security for the full amount invested, when in reality those funds are not secured to that extent or at all (Buckley, [6.1]). ASIC alleges that it appears very unlikely that Core Note investors will be able to recover the full amount of their principal investment (Buckley, [6.6]).

## ASIC’s investigation

1. On 29 January 2020, ASIC commenced an investigation pursuant to s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). That investigation concerned suspected contraventions of s 12DA of the ASIC Act and/or s 1041H of the *Corporations Act* by Mayfair Wealth Partners Pty Ltd (**Mayfair Wealth**) in relation to the promotion and marketing of what are referred to as the M+ Fixed Income Notes (**M+ Notes**) and the Core Notes, both of which are types of debentures.
2. On 27 March 2020, that investigation expanded to include suspected contraventions of s 12DB of the ASIC Act, and to include as subjects of the investigation three other entities (Buckley, [22]). Those entities were Online Investments Pty Ltd trading as Mayfair 101 (**Mayfair 101**), M101 Holdings Pty Ltd (**M101 Holdings**) (the issuer of the M+ Notes) and the First Defendant, M101 Nominees (the issuer of the Core Notes) (Buckley, [22]).
3. On 2 June 2020, ASIC commenced an investigation pursuant to s 13 of the ASIC Act in relation to suspected contraventions of ss 180, 181, 182 and 184 of the *Corporations Act* by the Second Defendant, Mr Mawhinney, during the period 1 January 2019 and continuing (Buckley, [40]).
4. Ms Buckley has deposed that there is a possibility that criminal proceedings may be commenced against Mr Mawhinney at some time in the future as a result of ASIC's investigation (Buckley, [182.8]).

## Other events

1. Since 11 March 2020, the repayment of principal funds invested in the Core Notes issued by M101 Nominees has been suspended (Buckley, [6.2.], [29]-[31]). The payment of interest to Core Note investors has also been delayed (Buckley, [96]).
2. On 16 April 2020, I made Orders in proceeding VID 228 of 2020 which, by way of summary, restrained certain entities (namely, Mayfair Wealth Partners, M101 Holdings, M101 Nominees and Online Investments Pty Ltd) from using certain phrases in relation to advertisements related to those entities’ marketing. Those orders required those entities to add certain notices on those entities’ websites and provide those notices to prospective investors. That notice was in the following terms:

The Mayfair 101 Group of companies reminds investors prior to investing in the products offered by the Mayfair 101 Group that:

1. Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government’s Financial Claims Scheme (colloquially known as the ‘Government Bank Guarantee’ which covers deposits up to A$250,000 per depositor, per bank).

2. As with all investment products, there are risks in investing in the Mayfair 101 Group’s products.

3. Investing in the products offered by the Mayfair 101 Group is not the same as depositing money in a term deposit offered by a bank. Investing in Mayfair 101 Group products has a higher level of risk compared to investing in a bank term deposit.

4. In certain circumstances, the Mayfair 101 Group can exercise the right to suspend some or all redemptions at the end of the fixed term. The Mayfair 101 Group exercised this right on 11 March 2020. As such, all redemptions are currently suspended until such time as management agrees to lift the suspension and process redemptions. Your investment in the products offered by the Mayfair 101 Group may also be subject to suspension of some or all redemptions at the end of the fixed term. This is a risk that you should take into account.

1. On 6 June 2020, the accountants for the Mayfair 101 Group terminated their retainer (Buckley, [144]-[150]).
2. On 29 June 2020, a Senior Manager at ASIC received a letter from Hall & Wilcox, who are the solicitors for PAG Holdings (Australia) Pty Ltd (**PAG**) in its role as security trustee for the Core Notes (**Security Trustee**) (Buckley, [75]). That letter stated the following (among other things):

We confirm that we act for PAG Holdings (Australia) Pty Ltd (**Security Trustee**) in its capacity as trustee of the Mayfair Platinum Secured Notes Security Trust (**Trust**).

On 24 October 2019, M101 Nominees Pty Ltd (**Company**) and the Security Trustee entered into a Security Trust Deed regarding Mayfair 101 Nominees Pty Ltd - Secured Promissory Notes (**Security Trust Deed**). The primary purpose of the Trust is for our client to hold security in relation to redeemable promissory notes issued by the Company to noteholders (**Noteholder**s).

…

We confirm that the Security Trustee attempted to appoint Craig Shepard of KordaMentha as a Controller (receiver and manager) over the security that the Security Trustee holds under clause 12.2(a) of the General Security Deed Poll in order to protect the interests of Noteholders, including having regard to the enclosed incomplete and unsatisfactory responses received from Mr Mawhinney (and his lawyers) to various enquiries made by our firm and our client …

Unfortunately, Mr [Craig] Shepard [of KordaMentha] informed us on 26 June 2020 that he and his partners are not prepared to accept the appointment as Controller. This is because, after having recently undertaken further enquiries (including PPSR searches and property searches of the underlying Dunk Island and Mission Beach properties), Mr Shepard and his partners are concerned about the significantly reduced value of properties in Northern Queensland and the fact that NAPLA [(being a third-party lender (see Buckley, [105] and Annexure “DB15” to the Buckley affidavit))] holds mortgages on all bar one of the underlying properties and holds a second ranking [all present and after-acquired property (**ALLPAAP**)] to the Security Trustee (such that his appointment as a receiver and manager may trigger NAPLA to exercise its rights in relation to the security it holds leaving no net equity in the security held by our client’s under the Security Trust Deed).

Absent the directors of the Security Trustee providing personal indemnities and/or providing the Controller with funding (which they are not in a position to do), Mr Shepard and his partners have decided it is too commercially risky an appointment for KordaMentha to accept. Fundamentally, their concern is that there is insufficient equity in the properties to take the job ‘on spec’. Mr Shepard also stated that he doubted whether any other competent insolvency practitioner would be happy to accept an appointment as a receiver (assuming they undertake [a] similar amount of research) in the current circumstances due to the commercial risks and uncertainty referred to above. We have confirmed Mr Shepard’s view with Stephen Longley at PwC.

Accordingly, our client is concerned by its inability to appoint a receiver/manager for the reasons noted above and its limitations to take further concrete action to protect the interests of Noteholders having regard to the developments and issues raised in the documents and correspondence enclosed with this letter. Given the urgency of these matters, and to ensure that the Noteholders’ interests are protected (and the general public, particularly having regard to what is stated in Mr Mawhinney’s enclosed email to Mr van Wegen dated 21 June 2020) our client requests that ASIC gives immediate consideration to:

* the utility of ASIC funding the appointment of a receiver and manager over the security held by our client (including having regard to the commercial considerations identified in this letter). By way of completeness, you will observe that Mr Mawhinney has represented in the enclosed document titled ‘Statement of Noteholder Secured Monies’ dated 12 June 2020 that the net equity of the Security held by our client is $81,417,935 (as referred to in this document as “Total Value of Security Granted”). Further, a potential benefit of appointing a receiver/manager is that the receiver and manager would be able to compel documents and information that have been requested in our enclosed correspondence to Mr Mawhinney and his lawyers which have not been provided (or, in our view, have not been adequately provided) including in relation to the value of the security held by our client; and/or
* ASIC otherwise exercising its statutory powers,

in the circumstances as disclosed in this letter …

1. Recently, in relation to another related scheme, the Second Defendant, Mr Mawhinney, caused a substantial investment, made by a company he controls with investor funds, to be transferred to a related company in the British Virgin Islands (Buckley, [112.1], [125]). That led to the appointment by the Supreme Court of Victoria of receivers over a series of Mawhinney-controlled related companies (**IPO Wealth Entities**), and the subsequent appointment of receivers as provisional liquidators of the IPO Wealth Entities (Buckley, [109], [110], [122]). The receivers (now provisional liquidators) have identified a number of concerns in relation to the investments and poor record keeping of the IPO Wealth Entities (Buckley, [6.10]-[6.12], [112], [120]), including the transfer of funds from M101 Nominees (the First Defendant) to one of those companies (IPO Wealth Holdings Pty Ltd) (Buckley, [120.6]).
2. On 12 August 2020, Robson J of the Supreme Court of Victoria made Orders in proceeding S ECI 2020 02990 and ASIC provided those Orders to my Chambers on 13 August 2020. Order 4 of those Orders granted leave to ASIC to disclose to the Federal Court of Australia in this proceeding the affidavit of Mr Mawhinney sworn 5 August 2020 and filed in in proceeding S ECI 2020 02990 (**Mawhinney Affidavit**). That affidavit was provided to my Chambers on 13 August 2020. The Mawhinney Affidavit indicates the following:
3. the personal income tax returns exhibited to the Mawhinney Affidavit do not disclose any substantial personal income (see Mawhinney Affidavit, [2]-[5], Exhibit “JPM-1” and “JPM-2”);
4. an ANZ bank account in Mr Mawhinney’s name at 4 June 2020 had a closing balance of approximately $420,000 (see Mawhinney Affidavit, [7] and Exhibit “JPM-3”);
5. Mr Mawhinney holds a bank account in Monaco (Mawhinney Affidavit, [6]). The Mawhinney Affidavit records (at [9]-[10]) that Mr Mawhinney established this account when he was considering relocating to Monaco, but, to the best of Mr Mawhinney’s knowledge and belief, this Monaco account was never used;
6. Mr Mawhinney does not hold any real property in his personal capacity (Mawhinney Affidavit, [12]);
7. Mr Mawhinney does not hold any credit cards in his own name or have any mortgages or other loans in his own name (Mawhinney Affidavit, [24]).

## ASIC’s concerns

1. Mr Mawhinney is continuing to seek to raise funds from investors through another product, the Australian Property Bonds (Buckley, [6.8]). Those funds appear to be secured by properties at Mission Beach – that is, the same assets that are owned by various trusts that the Security Trustee, PAG, holds security over for the benefit of Core Note investors (Buckley, [6.8]).
2. ASIC is concerned that Mr Mawhinney’s efforts to raise funds in order to make relevant payments to investors have been somewhat frustrated by the Court orders referred to at paragraphs [10] and [13] above. ASIC is concerned that the Australian Property Bonds product is a third product developed by Mr Mawhinney designed to circumvent that frustration, and raise funds from investors by way of the Australian Property Bonds product, in order to make relevant payments to investors in different products. ASIC has submitted that such conduct has characteristics which are typically associated with a “Ponzi scheme”. The *Oxford Dictionary of Economics* (5th edition, 2017) defines a “Ponzi scheme” as follows:

[A “Ponzi scheme” is a] fraudulent investment scheme that pays a return to current investors using their own investment or funds from subsequent investors. A Ponzi scheme attracts investors by promising returns that are high relative to alternative investments. The promised returns can only be paid if the flow of new investment is sufficiently great. Since this cannot be sustained in the long run a Ponzi scheme must inevitably collapse …

1. Mr Mawhinney has recently expressed an intention to restructure the Mayfair 101 Group, create a new company and transfer investors from current companies to the new company. Mr Mawhinney has also stated that one of the objectives of the restructure process will be to “[p]rotect our assets from recourse from receivers where practical” (Buckley, [6.7], [116], [133]-[143]).
2. ASIC believes that it is unlikely that investors in the M+ Notes will in fact recover funds invested (Buckley, [6.6], [64]-[68], [105]-[106]). ASIC is concerned that the Defendants may transfer overseas, or otherwise improperly deal with, investor funds or assets to the detriment of the investors. ASIC’s concern is heightened by the fact that the repayment of principal funds invested in the Core Notes has been frozen since 11 March 2020 and the payment of interest has been delayed (Buckley, [6.1], [6.2], [6.8], [112.1]).
3. ASIC is further concerned that Mr Mawhinney has expressed an intention to restructure the Mayfair 101 Group by “transferring the Security Trustee’s … collateral that it manages on behalf of the secured debenture holders to NewCo to preserve investor entitlements (the security is over the units of the unit trusts that hold the Mission Beach assets including Dunk Island)” (Buckley, [6.7], [135]; see also Buckley [133]-[143]).
4. ASIC has a strong suspicion of breaches of the *Corporations Act* by entities controlled by Mr Mawhinney (Buckley, [6.9], [32]-[35]). In particular, ASIC considers that Mayfair Wealth and Mayfair 101 made statements that were false, misleading or deceptive by representing that:
5. the M+ Notes and Core Notes are comparable to bank terms deposits, and have a similar risk profile to bank term deposits, when they are debentures with a significantly higher risk profile;
6. the principal investment will be repaid in full on maturity, when investors may not receive capital repayments on maturity or at all, and because Mayfair could elect to extend the time for repayment for an indefinite period;
7. the M+ Notes and the Core Notes were specifically designed for people seeking “certainty and confidence in their investments”, when investors may not receive interest and/or capital repayments, and could lose some, or all, of their investment; and
8. the M+ Notes and the Core Notes products provide capital growth opportunities, when they do not (Buckley, [34]).
9. ASIC relies upon an expert report prepared by Mr Jason Tracy of Deloitte (the **Expert Report**) which reveals serious concerns:
10. about the asset security values of “secured” assets held by entities in the Mayfair 101 Group; and
11. that the related entities’ financial capacity to repay the loans received from M101 Nominees appears to be unknown (Buckley, [6.6], [64]-[68], [105]-[106]).
12. The Expert Report at 2.11.-2.14 concludes the following as to the securities in place:

2.11 While various security arrangements have been entered into between [the Security Trustee] as security trustee, M101 Nominees and the various trustees, it would appear, with one exception, that [the Security Trustee] does not have [a] direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020.

2.12 It also appears that deposits were paid on properties in instances where there was no security registered on the PPSR in favour of [the Security Trustee] at the time of the deposit being paid, including at 31 December 2019 and 20 March 2020.

2.13 Further, in relation to the two related party loans, one of the loans appears to have had no security registered on the PPSR at 31 December 2019 and 20 March 2020, while the other appears to have a prior registered third party security at 20 March 2020.

2.14 Given the conclusions reached in Sections 2.11 to 2.13, in my opinion, there are a significant number of instances where Core Note investor security was not first ranking and the assets were not otherwise unencumbered at 31 December 2019 and 20 March 2020.

1. ASIC further points to 2.24 of the Expert Report which states the following:

In summary, it would appear that Core Note investor funds were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020.

1. ASIC also relies upon the Expert Report which expresses the following further concerns regarding the asset security value at 2.25 and 2.26:

2.25 In the absence of a funds flow showing the receipt of Core Note investor funds and payment from the M101 Nominees bank account, it is unclear whether all the funds from Core Note investors have flowed to secured assets.

2.26 I have a number of concerns regarding the asset security values for Core Note investors:

(a) There is a risk that prior registered security holders may be able to escalate their facilities and appoint receivers. In the event this happens, asset values and the recovery of funds to Core Note investors could be negatively impacted.

(b) There is a risk [that,] given [Mayfair] was active in acquiring a large number of properties from October 2019 to April 2020[,] … these entities established a market price in an otherwise illiquid and small property market at Mission Beach. Consequently, there is a risk that the contract price in each sale contract is above market price in today’s terms, negatively impacting the asset security values and recovery of funds to Core Note investors.

(c) The deposits paid on the properties not settled totalling $5,852,387 at 20 March 2020 may be at risk of forfeiture due to failure to complete, especially if significant additional funds of $86,483,036 cannot be sourced to settle these transactions. It is unclear to me where these additional funds would come from.

(d) The financial capacity of the related entities to repay the loans received from M101 Nominees is unclear in the absence of financial information outlining their financial position, historical and forecast performance.

(e) The basis of the 4% uplift totalling $2,983,400 at 20 March 2020 applied by M101 Nominees to the carrying value of the 119 real property assets, including Dunk Island[,] is not well supported by the documents made available to me. If this amount is excluded, there would appear to be a deficiency of $2,732,540 to Core Note investors, assuming full recovery of all other secured assets in line with M101 Nominees report to PAG [the Security Trustee] at 20 March 2020.

1. ASIC’s investigations reveal that, as at 30 March 2020, M101 Nominees had received $67,587,852.07 in funds from investors. As at 1 July 2020, the M Core Bank Account has $2,765.08.
2. ASIC’s investigations reveal that investor funds in the Core Notes were used to fund a loan that was not adequately secured for the benefit of investors, which is noted in the Expert Report’s assessment of the security held on behalf of investors (Buckley, [6.1], [63]-[68]).
3. Mr Mawhinney is the director of the entities in the Mayfair 101 Group and has expressed an intention to restructure the group, create a new company and transfer investors from current companies to a new company (Buckley, [6.7]. As noted above, Mr Mawhinney has stated that one of the objectives of the restructure process will be to “[p]rotect our assets from recourse from receivers where practical” (Buckley, [6.7], [135]).
4. ASIC has raised concerns that Mr Mawhinney is seeking to raise funds for his stated purpose of improving “the Group’s liquidity position” (Buckley Affidavit [6.8], [128-132]). ASIC submits thatin reality this situation may have the hallmarks of the Ponzi-like characteristics of raising funds to repay M+ and Core Note investors.

# OVERVIEW of ASIC’s SUBMISSIONS

1. ASIC submitted that the reason for bringing this application on an ex parte basis was that, in order to protect the interests of aggrieved investors, there was a need to ensure that the Defendants were not given notice of the application. This was because ASIC held a genuine concern that, if the Defendants were given notice of the application, they might take steps to either leave the jurisdiction or further remove assets overseas to the detriment of investors.
2. ASIC has submitted that, in light of the concerns set out in the Buckley Affidavit, it is in the public interest and necessary for the protection of the Core Note investors that certain steps now be taken. ASIC has submitted that there is a need for an independent investigation to be conducted into the affairs of M101 Nominees, including an examination of its accounts and transactions, with the assets of M101 Nominees (and certain assets of the Third Defendant, Sunseeker Holdings Pty Ltd) preserved and out of the control of the Second Defendant, Mr Mawhinney, while that investigation occurs.
3. ASIC submits that the point has now been reached where, as a matter of public protection, and as an appropriate risk-minimisation balance, the Court ought restrain Mr Mawhinney from raising any further funds from members of the public until this proceeding is heard and determined.
4. ASIC submits that provisional liquidators have already been appointed within the Mayfair 101 Group of which Mr Mawhinney is the sole director (being the IPO Wealth Entities) and those provisional liquidators have identified issues with respect to how the assets and investments of those entities have been dealt with (Buckley, [6.10], [112], [120], [124]). The commonality of director and accountants across the Mayfair 101 Group gives rise to a heightened risk that the inappropriate classification of investments and poor record keeping identified by the receivers of the IPO Wealth Entities may also arise in respect of the Core Notes and M101 Nominees, as well as any other entity through which Mr Mawhinney may seek to raise funds (Buckley, [6.12], [112], [120], [124], [145]).
5. ASIC is concerned that, if certain relief is not granted, M101 Nominees and Mr Mawhinney may continue to raise funds based on potentially false and misleading representations, and the Defendants may transfer overseas or otherwise improperly deal with investor funds or assets to the detriment of investors.
6. I turn to consider each of the types of orders ASIC has sought.

# Consideration

## Provisional liquidators

1. ASIC has sought an order pursuant to section 472(2) of the *Corporations Act* that certain registered liquidators be appointed as joint and several provisional liquidators of the First Defendant, M101 Nominees. Section 472(2) provides that “[t]he Court may appoint a registered liquidator provisionally *at any time after the filing of a winding up application and before the making of a winding up order* or, if there is an appeal against a winding up order, before a decision in the appeal is made” (emphasis added). ASIC has sought an order that M101 be wound up pursuant to s 461(1)(k) of the *Corporations Act*. That section provides that “[t]he Court may order the winding up of a company if … the Court is of opinion that it is just and equitable that the company be wound up”. In these circumstances, the statutory power to appoint a provisional liquidator is enlivened.
2. The principles to be considered for the appointment of a provisional liquidator are well established and conveniently summarised in *Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd* [2017] FCA 437, where Davies J stated the following at [3]-[4]:

Section 472(2) of the Act empowers the Court to appoint a liquidator to a corporation provisionally “any time after the filing of the winding up application and before the making of a winding up order…”. On 3 April 2017, the [Deputy Commission of Taxation (**DCT**)], who has standing under s 462(2)(b) of the Act as a creditor of each of the corporate defendants in respect of various tax liabilities, filed applications to wind up A & S Services, DNV, Bolton & Swan and AHW Solicitors (“the corporate defendants”) under s 461(1)(k) of the Act on the just and equitable ground.

The principles for the appointment of a provisional liquidator … were recently summarised by this Court in *Australian Securities and Investments Commission v* *Uglii Corporation Ltd* [2016] FCA 1099; (2016) 116 ACSR 389 at [72] as follows:

The Court’s power is wide and the Court may appoint a provisional liquidator on any ground but as the appointment of a provisional liquidator is a drastic intrusion into the affairs of the company, a provisional liquidator will generally not be appointed unless the Court is satisfied that there is a reasonable prospect that a winding up order will be made on the application to wind up and some good reason is shown for placing the affairs of the company under the external control of a provisional liquidator prior to the hearing of the winding up application, such as public interest considerations, to preserve the status quo, or to protect the company’s assets or affairs: *Australian Securities and Investments Commission v Solomon* (1996) 19 ACSR 73, 80 (per Tamberlin J) (“Solomon”); *Australian Securities and Investments Commission v Weerappah (No 2)* [2009] FCA 249 at [8]-[9]; *Australian Securities and Investments Commission v Tax Returns Australia Dot Com Pty Ltd* [2010] FCA 715 at [73]-[77]. Public interest considerations may include, for example, the need for an independent examination of the state of accounts of the corporation by someone other than the directors, or where the affairs of the company have been carried on without due regard to legal requirements so as to leave the Court with no confidence that the company’s affairs are being properly conducted with due regard for the interests of shareholders: *Solomon* at 80.

Thus, whilst the power to appoint a provisional liquidator is not circumscribed, and there is a wide discretion, an applicant for the appointment of a provisional liquidator generally needs to satisfy the Court that there is a reasonable prospect, or it is reasonably likely, that a winding up order will be made on the application (see also *Allstate Explorations NL v Batepro Australia Pty Ltd* [2004] NSWSC 261 (“*Allstate Explorations*”) at [27]) and the applicant can point to some good reason for intervention prior to the final hearing and show that the appointment is needed in the public interest, or to preserve the status quo in relation to the affairs of the company, or to protect the company’s assets (*Allstate Explorations* at [30]). On an ex parte application, there should be cogent evidence that the delay involved in effecting service, or at least in giving notice of the application, or the very fact of notice itself is likely to be such as to defeat the purpose of appointing a provisional liquidator: *South Downs Packers Pty Ltd v Beaver* [1984] 2 Qd R 559; (1984) 8 ACLR 990 at 994 (McPherson J). In *Carr v Darren Berry International Marine Pty Ltd (No 1)* [2013] FCA 1150, Perram J ordered the appointment of provisional liquidators on an ex parte basis. His Honour considered that the potentially fraudulent nature of what was taking place combined with the inherent mobility of the company’s property made it impracticable for the application to be heard on notice in the ordinary way. (Underlining added.)

1. ASIC applies on an urgent basis and seeks the appointment of a provisional liquidator and other relief on an ex parte basis. The appointment of a provisional liquidator on an ex parte application is an extreme measure and, as Perram J observed in *Carr v Darren Berry International Marine Pty Ltd (No. 1)* [2013] FCA 1150 (***Carr***) at [8], should only be countenanced where “no other solution is available”.
2. In *Deputy Commissioner v Ausmart Services Pty Ltd* [2018] FCA 1912, Yates J at [29] concluded the following:

[His Honour] was persuaded that, on balance, interim relief should be granted by the appointment of provisional liquidators to preserve the assets of the defendants and to protect them from *potentially fraudulent dissipation* to the detriment of the Commonwealth and, perhaps, other creditors. I was persuaded that ex parte relief was warranted given the risk, on the evidence provided, that giving notice of the application might well defeat the purpose for which the provisional liquidators were to be appointed (emphasis added).

1. On the basis of the material furnished to the Court by the corporate regulator, ASIC, particularly the matters set out above, I am satisfied that there exists a considerable risk of potentially fraudulent dissipation to the detriment of the relevant note holders. The potential detriment to noteholders would entail adverse financial consequences. I am satisfied that there is a reasonable prospect, or it is reasonably likely, that a winding up order will be made on the application to wind up and that good reason has been shown to put the company into external administration in the public interest. I am satisfied that giving notice of the application might well have defeated the purpose for which the provisional liquidators were to be appointed, namely preserving the assets of the relevant Defendants and protecting those assets from potentially fraudulent dissipation to the detriment of noteholders. In the circumstances of this application, I am satisfied that it was necessary for ASIC to make an ex parte application in order to achieve the protective purpose of the appointment of a provisional liquidator as, in the words of Perram J in *Carr*, I am satisfied that there is “no other solution” currently available which will adequately achieve that protective purpose. I am also satisfied that the balance of convenience favours protecting investors’ funds.
2. I will make the order ASIC has sought in relation to the appointment of a provisional liquidator.

## Asset preservation orders under s 1323

1. ASIC seeks an order pursuant to s 1323 of the *Corporations Act* which would restrain, until further order, the Third Defendant, by itself and its servants, agents and employees, from engaging in certain specified activities.
2. Section 1323(1) is a lengthy provision. It provides as follows:

(1) Where:

(a) an investigation is being carried out under the ASIC Act or this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act; or

(b) a prosecution has been begun against a person for a contravention of this Act; or

(c) a civil proceeding has been begun against a person under this Act;

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called ***an aggrieved person***) to whom the person referred to in paragraph (a), (b) or (c), as the case may be, (in this section called the ***relevant person***), is liable, or may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property, the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:

(d) an order prohibiting a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;

(e) an order prohibiting a person holding money, financial products or other property, on behalf of the relevant person, or on behalf of an associate of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the financial products or other property, to, or to another person at the direction or request of, the person on whose behalf the money, financial products or other property, is or are held;

(f) an order prohibiting the taking or sending out of this jurisdiction, or out of Australia, by a person of money of the relevant person or of an associate of the relevant person;

(g) an order prohibiting the taking, sending or transfer by a person of financial products or other property of the relevant person, or of an associate of the relevant person:

(i) from a place in this jurisdiction to a place outside this jurisdiction (including the transfer of financial products from a register in this jurisdiction to a register outside this jurisdiction); or

(ii) from a place in Australia to a place outside Australia (including the transfer of financial products from a register in Australia to a register outside Australia);

(h) an order appointing:

(i) if the relevant person is a natural person—a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person; or

(ii) if the relevant person is a body corporate—a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person;

(j) if the relevant person is a natural person—an order requiring that person to deliver up to the Court his or her passport and such other documents as the Court thinks fit;

(k) if the relevant person is a natural person—an order prohibiting that person from leaving this jurisdiction, or Australia, without the consent of the Court.

1. Section 1323(3) provides the following:

Where an application is made to the Court for an order under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

1. Section 1323(4) provides that, “[o]n an application under [s 1323(1)], the Court must not require the applicant or any other person, as a condition of granting an interim order under [s 1323(3)], to give an undertaking as to damages”.
2. I am satisfied that the statutory pre-condition in s 1323(1)(a) is satisfied. The question becomes whether the remaining pre-conditions in that provision are also established in this case.
3. In this respect, the purpose of s 1323 of the *Corporations Act* is to provide a means by which property that may, in due course, represent a source for the vindication of the rights of aggrieved persons, be preserved for those persons’ benefit: *ASIC v Secure Investments Pty Ltd* [2020] FCA 639 at [27(a)]. In *Australian Securities and Investments Commission, In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 3)* [2006] FCA 433; 232 ALR 577 at [25]-[27], French J (as his Honour then was) stated the following:

The orders that can be made under the section are directed, inter alia, to the preservation of assets against which recovery may be sought in the event that liability to an ‘aggrieved person’ is established on the part of a ‘relevant person’. The orders are made in circumstances where ‘an investigation is being carried out’, ‘a prosecution has been begun’ or ‘a civil proceeding has been begun’. That is to say the orders can be made before liability is established and indeed before the evidence necessary to establish liability has been collected. While an application under the section is not interlocutory in an existing criminal or civil proceeding, it is interlocutory in a wider sense. It preserves the status quo and the assets of the relevant person pending the outcome of the investigation, prosecution or civil proceedings which are on foot – *CAC v Lone Star Exploration NL*( No 2) (1988) 14 ACLR 499 at 504. At the stage an order is sought the Court may not be in a position to identify with precision any particular liability owed by the person the subject of the proposed order. This consideration applies to final orders made under the section as well as to interim orders for which it expressly provides in s 1323(3). The final orders made under the section are necessarily of a temporary or holding character rather than finally disposing of the rights and liabilities of the relevant persons affected by them.

The circumstances in which the Court may make orders under s 1323(1) are wide as indicated by the words ‘necessary or desirable … for the purpose of protecting the interests of a person …’. There is an element of risk assessment and risk management in the judgment the Court is called on to make. It follows, and has been accepted, that there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person’s assets have been or are about to be dissipated – *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 7 ACLC 467 at 476 (Powell J); *Australian Securities and Investment Commission v Adler* (2001) 38 ACSR 266 at [7] (Santow J).

… The interests of aggrieved persons may be protected not only by orders designed to protect dissipation of assets, but also by orders which create an opportunity for the assets of the person under investigation to be ascertained. (Underlining added.)

1. In *Australian Securities and Investments Commission v Adler* (2001) 38 ACSR 266 at [7], Santow J stated the following:

By way of background …, I explain what I consider to be the proper approach to the exercise of the discretion to make asset preservation orders under s1323 of the Corporations Law:

 (a) A distinction needs to be drawn between the power or jurisdiction to make asset preservation orders and when, as a matter of discretion, that power is ordinarily to be exercised. The Court has power to make such orders under s1323 of the Corporations Law , once there is as here a corporate investigation, a prosecution under the Corporations Law or, also as here, a civil proceeding under the Corporations Law; see s1323(1)(a), (b) and (c). That suffices to enliven the jurisdiction to make such orders. That jurisdiction therefore arises even absent strong evidence of dissipation of assets and even absent a prima facie or at least reasonably persuasive case against the individual concerned.

(b) Nonetheless, both evidence of dissipation of assets and at least a reasonably persuasive case are powerful discretionary considerations affecting the Court’s willingness to make an order at all and, if willing, affecting the scope of the orders justified in the circumstances. In that regard, the most intrusive order that could be made is the appointment of a receiver. Appointment of a receiver over a person’s assets is in any circumstances an extraordinary step for the Court to take, though it may be justified when associated with the allegation of misappropriation of property, particularly, though not necessarily exclusively, fraudulent. Austin J said in *ASIC v Burke* ([2000] NSWSC 694, Austin J, 10 July 2000, unreported), “The fundamental issue is not the character of the alleged wrongdoing of the Defendants, but the overriding concern to protect assets for the benefit of those entitled to them …” (para [6]). Similarly, in relation to the making of orders to surrender a passport (s1323(1)(j) and (k)), “The Court is required to engage in a balancing exercise which includes a balancing of public and private rights”; *Isic v Ivey* (1998) 29 ACSR 391 at 394 per Nicholson J.

(c) In the case certainly of a private litigant, absence of appreciable risk of dissipation of assets and of an at least reasonably persuasive case against the individual concerned, should ordinarily lead to the denial of such asset preservation orders as a matter of discretion. Indeed the absence of either one of such factors would ordinarily be fatal. But here there is an ongoing investigation and ASIC as investigator seeks asset preservation orders in pursuit of its public interest role with responsibility to “promote the confident and informed participation of investors and consumers in the financial system”. … That wider public interest embraces both creditors and those affected by a corporate failure. In appropriate circumstances, speaking generally, such orders may be justified even absent evidence of a significant risk of dissipation of assets, though the potentiality may be there.

(d) It would be unwise to attempt to delineate in advance the future exercise of discretion in such applications by ASIC beyond emphasising that the Court, in giving a reasonable margin of appreciation to ASIC in its public interest role, does not abdicate from its responsibility to make sure that the orders that it makes operate in a matter that is proportionate and not more intrusive than is necessary in the circumstances, recognising that it is inevitable that such orders will intrude upon private rights.

(e) The foregoing principles in turn affect the Court’s approach when an urgent ex parte application is made by ASIC. In that circumstance, justification for ex parte relief would ordinarily centre around there being a significant risk of dissipation of assets. There may be exceptional circumstances where the evidence for this may still be in the process of collection and very brief ex parte orders to maintain the status quo may still be justified …

(f) However, when such an application returns on a contested basis, as a matter of principle where ASIC is the moving party there may, based on the principles earlier stated, be a basis for persuading the Court that asset preservation orders proportionate to the circumstances should be made. This is so, though the risk of dissipation of assets remains insignificant. Again, this is because of the requirement that the Commission must act in the public interest rather than self interest. As was said in the decision of ASC v A S Nominees Limited (1995) 13 ACLC 1,822 by Finn J at 1,843: “As a matter of obligation in our system of government the ASC, like all other agents of government, is required to act in the public interest within its spheres of responsibility.”

(g) In making such asset preservation orders, or in granting an injunction pursuant to s1324, balance of convenience considerations do enter into the matter. ASIC, unlike the typical litigant, does not give an undertaking as to damages. This will bear upon the appropriateness of the orders made, though that fact need not necessarily override public interest considerations centred round the interests of creditors, contributories and the wider public (Underlining added.)

1. The ASIC material discloses that there are 14 companies which hold various properties (at Mission Beach and Dunk Island) on trust, and all of the units in those trusts were issued to the Third Defendant, Sunseeker Holdings Pty Ltd (**Sunseeker**). PAG Holdings (Australia) Pty Ltd (**PAG**), as Security Trustee, holds a security interest over Sunseeker's units in those trusts for the benefit of Core Note investors (Buckley Affidavit [54.1], [54.4]). ASIC seeks to restrain Sunseeker from transferring or otherwise dealing with the units in those trusts, so that the security position is preserved (for any liquidator of M101 Nominees (if appointed)) and can be enforced on behalf of the aggrieved persons, being the Core Note investors.
2. In the present case, based on the material provided to the Court by ASIC, I am satisfied that:
3. an investigation is being carried out under the ASIC Act in relation to potential contraventions of the *Corporations Act* and the ASIC Act as described above;
4. the Third Defendant is a “relevant person” who is, or may become, liable to pay money whether in respect of a debt, by way of damages or compensation or otherwise;
5. the Core Note investors are “aggrieved persons”, at least for the purpose of s 1323; and
6. particularly by reason of the material provided to the Court (which provides prima facie evidence that there is a risk of a potential for fraudulent dissipation to the detriment of noteholders), it is necessary or desirable for the Court to make an order under s 1323(1) for the purpose of protecting the interests of the aggrieved persons.
7. I will make the asset preservation orders ASIC has sought.

## Restraining orders

1. ASIC seeks an order, pursuant to ss 1101B(5) and 1324(4) of the *Corporations Act*, that, until further order, Mr Mawhinney (by himself, his servants, agents, employees and any company of which he is an officer or member) be restrained from:
2. receiving or soliciting funds in connection with any financial product (as defined in Division 3 of Chapter 7 and section 9 of the *Corporations Act* (**Financial Product**)), including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds;
3. advertising, promoting or marketing any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds; and
4. removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds.
5. Section 1101B of the *Corporations Act* relevantly provides as follows:

**Power of Court to make certain orders**

*Court’s power to make orders in relation to certain contraventions*

(1) The Court may make such order, or orders, as it thinks fit if:

(a) on the application of ASIC, it appears to the Court that a person:

(i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or

…

(vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; …

…

*Interim orders*

(5) Before considering an application to the Court under subsection (1), the Court may make an interim order of the kind applied for to apply pending the determination of the application, if in the opinion of the Court it is desirable to do so. …

1. Section 1324 of the *Corporations Act* in relevant context provides as follows:

**Injunctions**

(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

(a) a contravention of this Act; or

(b) attempting to contravene this Act; or

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

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

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

(f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

…

(4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

1. Section 1324(8) provides that, “[w]here ASIC applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages”.
2. Sections 1101B(5), 1323 and 1324(4) of the *Corporations Act* “confer a wide power on the Court to grant interim injunctions and freezing orders on an application from ASIC in circumstances where it is desirable to do so” (*ASIC v Goldenberg* [2020] FCA 809 at [3] per Mckerracher J).
3. In *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; 42 ACSR 605; 20 ACLC 1637 (***Mauer-Swisse***), ASIC applied for an interim injunction under s 1324(4) of the *Corporations Act*. Palmer J summarised the relevant principles in relation to s 1324(4) as follows at [36]:

At the risk of some repetition, I summarise the principles which I draw from the presently applicable authorities:

• the jurisdiction which the court exercises under … s 1324 is a statutory jurisdiction, not the court’s traditional equity jurisdiction;

• Parliament has made it increasingly clear by successive statutory enactments that the court, in exercising its statutory jurisdiction under s 1324, is not to be confined by the considerations which would be applicable if it were exercising its traditional equity jurisdiction;

• among the considerations which the court must take into account in an application for an injunction under … s 1324 [of the *Corporations Act*] are the wider issues referred to by Austin J in [*Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114]and [*Australian Securities and Investments Commission v Parkes* ([2001] NSWSC 377; 38 ACSR 355], and by Davies AJ in [*Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; 41 ACSR 561]; they may be gathered under the broad question whether the injunction would have some utility or would serve some purpose within the contemplation of the Corporations Act;

• these considerations are to be taken into account regardless of whether the application is for a permanent injunction under s 1324(1) or for an interim injunction under s 1324(4);

• where an application under s 1324(4) is made by ASIC rather than a private litigant the court is more likely to give greater weight to the broad question whether the injunction would serve a purpose within the contemplation of the Corporations Act;

• where there is an appreciable—that is, not fanciful—risk of particular future contraventions of the Corporations Act by a defendant, it would serve a purpose within the contemplation of the Corporations Act that the court grant not only a permanent injunction but, in an appropriate case, an interim injunction restraining such conduct. Section 1324 evinces an intention that the possibly severe consequences and the relative promptness of proceedings for contempt of court be added to criminal prosecutions as a deterrent to contraventions of the Corporations Act;

• although the questions whether there is a serious question to be tried and where the balance of convenience lies will not circumscribe the court’s consideration in an application for an interim injunction under s 1324(4), the interests of justice will always require that those questions be examined carefully when restrictions are sought to be imposed before the case has been properly examined by the court, even where the protection of the public is said to be involved: see per Young J (as his Honour then was), in *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566 [(***Lombard Nash***)] at 570–1;

• the balance of convenience will be viewed differently according to whether the applicant under s 1324(4) is ASIC or a private litigant. Where ASIC is acting to protect the public interest, the absence of an undertaking as to damages, exempted by s 1324(8), will usually be of little consequence. However, where the proceedings are brought to advance a plaintiff’s private interests, then if such an undertaking is not proffered even though it is likewise exempted by subs (8), the court may take that circumstance into account as a matter of practicality, common sense and fairness in determining where the interests of justice lie and whether “it is desirable” to grant the injunction: see per Young J in *Lombard Nash* at 571. (Underlining added.)

1. The principles summarised by Palmer J in *Mauer-Swisse* and extracted above are “applicable, not only to s 1324(4), but also to an application for an injunction pursuant to s 1101B(5)” (*ASIC v Wealth & Risk Management Pty Ltd* [2017] FCA 477 at [15], Moshinsky J; see also *ASIC v Financial Circle Pty Ltd* [2018] FCA 2 (***Financial Circle***) at [12] per Moshinsky J; *ASIC v Linchpin Capital Group Ltd* [2018] FCA 1104 (***Linchpin***) at [78] per Derrington J). In *Linchpin*, Derrington J noted (at [79]) that “the further the Court strays from the guidance provided by the equitable rules governing the granting of injunctions, the less principled any exercise of power is likely to be”. Although ASIC seeks orders which have a statutory basis, there is a need for attention to considerations traditionally familiar in equity, namely assessing whether there is a serious question to be tried and, if so, identifying where the balance of convenience lies: *Mauer-Suisse* at 614, citing *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1)* (1986) 11 ACLR 566 at 570–571; (1987) 5 ACLC 269 at 272–273 (***Lombard Nash***) per Young J.
2. In this respect, the material provided to the Court by ASIC discloses a number of relevant matters. In particular, the following matters are of serious concern.
3. ***First***, as at 30 March 2020, M101 Nominees had received $67,587,852.07 in funds from investors. As at 1 July 2020, the M Core Bank Account has $2,765.08.
4. ***Second***, It appears that investor funds in the Core Notes were used to fund a loan that was not adequately secured for the benefit of investors, as explained in the Expert Report’s assessment of the security held on behalf of investors (Buckley Affidavit [6.1], [63]-[68]).
5. ***Third***,reference has been made above to Mr Mawhinney’s statement concerning initiating a restructuring process with the stated objective of “[p]rotect[ing] our assets from recourse from receivers where practical” (Buckley Affidavit [6.7], [135]).
6. ***Fourth*,** Mr Mawhinney is continuing to seek to raise funds from investors by way of the Australian Property Bonds product. The evidence indicates these funds are secured by properties at Mission Beach. ASIC holds concerns that Mr Mawhinney is seeking to raise funds for the stated purpose of improving the “Group’s liquidity position” (Buckley Affidavit [6.8], [128-132]). I have referred above to ASIC’s fears regarding certain matters which ASIC is concerned are akin to arrangements colloquially referred to as a “Ponzi scheme”.
7. ***Fifth*,** the commonality of director and accountants across the Mayfair 101 Group raises a heightened risk of inappropriate coordination towards Mr Mawhinney’s stated objectives, as disclosed in the evidence presented.
8. In the circumstances set out in the evidence furnished to the Court by ASIC, particularly the considerations set out above, I accept ASIC’s submission that, as an appropriate risk-minimisation balance, the Court ought restrain Mr Mawhinney from raising any further funds from members of the public, or transferring relevant funds, until the proceeding is heard and determined.

## Travel restraints

1. ASIC seeks an order that, pursuant to sections 1323(1)(k) and 1323(3) of the *Corporations Act*, until further order, Mr Mawhinney be restrained from leaving or attempting to leave Australia.
2. I have set out sections 1323(1)(k) and 1323(3) of the *Corporations Act* above. Section 1323(1)(k) in short empowers the Court in certain circumstances to make an order prohibiting a relevant person from leaving Australia without the consent of the Court.
3. As stated above, I am satisfied that the application of those provisions to the evidence presented to the Court by ASIC provided a proper basis for the asset preservation orders sought by ASIC and referred to above. The question becomes whether the application of those provisions afford a proper basis for making the travel restriction orders ASIC has sought.
4. In this respect, imposing “restrictions upon a person’s freedom of movement is a serious step not lightly to be undertaken”: *Australian Securities and Investments Commission; in the matter of Richstar Enterprises Pty Ltd v Carey (No. 19)* [2008] FCA 38; 65 ACSR 421 at [32] (per French J).
5. That said, Courts have, on a number of occasions, restrained overseas travel by defendants being investigated by ASIC (see eg *ASIC v Troy* (1999) 33 ACSR 121; *ASIC v Australian Investors Forum Pty Ltd* [2001] NSWSC 1180; *ASIC v Mauer-Swisse Securities Ltd* [2002] NSWSC 684; *ASIC, in the matter of Money for Living (Aust) Pty Ltd v Money for Living (Aust) Pty Ltd* [2005] FCA 1621; *ASIC v Hawley* [2008] FCA 1423;250 ALR 57; *ASIC v Koops* [2010] FCA 20).
6. The relevant question, which mirrors the statutory language, has been stated in this way: is it “necessary or desirable to make … the [relevant] travel restriction orders for the purpose of protecting the interests of a person (referred to as an ‘aggrieved person’ in the provision) to whom” the Defendants “may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property” (*ASIC v CME Capital Australia Pty Ltd, in the matter of CME Capital Australia Pty Ltd (No 3)* [2016] FCA 545 at [9] (per Moshinsky J)).
7. In light of that guidance, the material provided to this Court relevantly evidences the following:
8. ASIC has made enquiries of the Australian Border Force (**ABF**) concerning the travel movements of Mr Mawhinney. The ABF has advised ASIC that, between 1 January 2019 and 5 June 2020, Mr Mawhinney travelled internationally 8 times. Mr Mawhinney last departed from Australia on 7 December 2019 and arrived back in Australia on 15 December 2019 from the United Kingdom (Buckley, [159]).
9. On 2 July 2020, ASIC received a letter from Thomson Geer, the lawyers for the provisional liquidators of the IPO Wealth Entities (that is, the entities which are the subject of the Supreme Court of Victoria proceeding referred to earlier in these reasons) (Buckley, [162]). That letter attaches an extract of a report prepared on 14 August 2019 by Pinnacle Advisory Group, the former legal and accounting advisers to Mr Mawhinney and the Mayfair 101 Group (Buckley, [163]). Under the heading “Our detailed understanding of your current structure and objectives”, the report states the following:

… you and your de facto partner currently live in Australia, and you are a tax resident of Australia for Australian tax purposes; however, you and your de facto partner are planning on leaving Australia in the next year or so [ie in the “year or so” from August 2019], at which time you will cease to be Australian tax residents …

1. While there are travel restrictions currently imposed by the Australian Government due to the COVID-19 pandemic, ASIC’s enquiries indicate there are international flights available, private charter flights are able to depart from Australia during the COVID-19 outbreak and last minute private charter flights can be arranged on four hours’ notice (Buckley, [176]-[177]).
2. ASIC has stated that Mr Mawhinney’s presence in Australia is critical to ASIC’s investigations, particularly in light of the centrality of Mr Mawhinney’s role in the relevant group of companies and the comparative complexity of the relevant group’s arrangements (Buckley, [178]-[179]).
3. Mr Mawhinney holds a bank account in Monaco (Mawhinney Affidavit, [6]). Mr Mawhinney established this account when he was considering relocating to Monaco, but, to the best of Mr Mawhinney’s knowledge and belief, this Monaco account was never used (Mawhinney Affidavit records at [9]-[10]).
4. Ms Buckley has formed the view that Mr Mawhinney is a flight risk for the following reasons (see Buckley, [182]):
	1. Mr Mawhinney is the head of a group of companies that are headquartered in London;
	2. Mr Mawhinney has travelled overseas on 8 occasion in the approximately 18 months to 5 June 2020;
	3. Mr Mawhinney is associated with a British Virgin Island Company, 101 Investments Ltd, and has transferred assets to that company;
	4. Mr Mawhinney has substantial cash funds available to him and, as a result, has the means to travel;
	5. as stated above, ASIC has correspondence which indicates Mr Mawhinney has previously expressed an intention to cease residing in Australia from approximately August 2020;
	6. Mr Mawhinney is potentially facing legal action by the provisional liquidators in the IPO Wealth Proceedings;
	7. Ms Buckley deposed that a potential flight risk also arose by reason of the scope and seriousness of ASIC's investigations and the possibility that criminal proceedings may be commenced against Mr Mawhinney at some time in the future as a result of ASIC's investigation.
5. On the hearing of this application, Counsel for ASIC, Mr Jonathon Moore QC, appropriately made submissions which accorded with ASIC’s disclosure obligations on an ex parte application. Mr Moore QC submitted that, if the Defendants were present at the hearing of this application, the Defendants might submit that Mr Marwhinney is currently involved in a number of curial proceedings and is defending those proceedings. Mr Moore QC noted that Mr Marwhinney may in those circumstances submit that any travel restriction orders were unnecessary given Mr Marwhinney’s continuing defence of those proceedings indicates an intention to remain in the jurisdiction.
6. On balance, given the material ASIC has provided to this Court, particularly the matters I have set out above, I am satisfied that the relevant statutory jurisdiction is enlivened and that it is appropriate to make the travel restraint orders ASIC has sought. I am satisfied that is necessary or desirable to make the relevant travel restriction orders, particularly for the purpose of protecting the relevant noteholders, whom the Defendants may be or become liable to pay money on a relevant basis.

# Disposition

1. It follows from the matters deposed to in the Buckley Affidavit and the reasons given above that the Court will make the orders sought by ASIC.

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| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 13 August 2020