FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (No 2) [2019] FCA 24

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judge: | **REEVES J** |
|  |  |
| Date of judgment: | 18 January 2019 |
|  |  |
| Catchwords: | **CORPORATIONS** – application by the Australian Securities and Investments Commission (ASIC) to wind up the three respondent companies on the just and equitable ground under s 461(1)(k) of the *Corporations Act 2001* (Cth) (the Act) – the relevant principles for such winding up orders – where one of those companies is deregistered, whether it should first be reinstated under s 601AH(2) of the Act – whether ASIC is an aggrieved person for the purposes of s 601AH(2) of the Act**CORPORATIONS** – application by ASIC to permanently restrain the fourth respondent from providing financial services under s 1324(1)(e) of the Act and to disqualify him from managing corporations under s 206E(1) of the Act – where the fourth respondent was a financial advisor engaged in the investment of his clients’ superannuation savings – where ASIC’s investigations determined that the fourth respondent frequently misappropriated investor funds for personal purposes over a number of years – where the fourth respondent, as the director of the first respondent, failed to ensure that the first respondent lodged its annual financial statements on time or at all – the principles relevant to disqualification and restraint orders – the appropriate restraint and disqualification periods to be imposed |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 201A, 206E, 461, 462, 464, 601AA, 601AB and 601AC, 601AD, 601AH, 989B, 989D, 912A, 1101B, 1323, 1324*Corporations Regulations 2001* (Cth)*Federal Court Rules 2011* (Cth) r 30.21  |
|  |  |
| Cases cited: | *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189; [2013] FCA 234*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* (2015) 106 ACSR 302; [2015] FCA 527*Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483*Australian Securities and Investments Commission v Avestra Asset Management Limited (ACN 119 227 440) (in liq) and Others* (2017) 120 ACSR 247; [2017] FCA 497*Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371*Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (ACN 151 584 885) and Others* (2018) 129 ACSR 171; [2018] FCA 1070*Australian Securities and Investments Commission v International Unity Insurance Pty Ltd ACN 085 026 348* [2004] FCA 1059*Australian Securities and Investments Commission v Letten (No 10)* [2011] FCA 498*Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064*Bell Group Ltd (ACN 008 666 993) (in liq) and Others v Australian Securities and Investments Commission and Another* (2018) 128 ACSR 247; [2018] FCA 884*Story v National Companies and Securities Commission* (1988) 13 NSWLR 661*The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 |
|  |  |
| Date of hearing: | 18 July 2018 |
|  |  |
| Date of last submissions: | 13 December 2018 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 75 |
|  |  |
| Counsel for the Applicant: | Ms K Slack |
|  |  |
| Solicitor for the Applicant: | Australian Securities and Investments Commission |
|  |  |
| Counsel for the First Respondent: | The First Respondent did not participate in the proceeding |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent did not participate in the proceeding |
|  |  |
| Counsel for the Third Respondent: | The Third Respondent did not participate in the proceeding |
|  |  |
| Counsel for the Fourth Respondent: | The Fourth Respondent did not participate in the proceeding |

ORDERS

|  |  |
| --- | --- |
|  | QUD 255 of 2018 |
|  |
| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONApplicant |
| AND: | CFS PRIVATE WEALTH PTY LTD ACN 141 584 885First RespondentBDM ASIA PACIFIC PTY LTD ACN 127 643 529 (DEREGISTERED)Second RespondentCOMBINED FINANCIAL SOLUTIONS PTY LTD ACN 003 152 378 (and another named in the Schedule)Third Respondent  |

|  |  |
| --- | --- |
| JUDGE: | REEVES J |
| DATE OF ORDER: | 18 January 2019 |

THE COURT ORDERS THAT:

1. The First Respondent be wound up under section 461(1)(k) of the *Corporations Act 2001* (Cth) (the Act).
2. William James Harris and Anthony Norman Connelly be appointed as joint and several liquidators of the First Respondent.
3. The Third Respondent be wound up under section 461(1)(k) of the Act.
4. William James Harris and Anthony Norman Connelly be appointed as joint and several liquidators of the Third Respondent.
5. Pursuant to s 1324(1)(e) of the Act, the Fourth Respondent be restrained from providing financial services for a period of 25 years.
6. Pursuant to section 206E(1) of the Act, the Fourth Respondent be disqualified from managing corporations for a period of 3 years.

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

REASONS FOR JUDGMENT

REEVES J:

# INTRODUCTION

1. Over the past decade, approximately, Mr Graeme Miller, the fourth respondent, misappropriated the superannuation and other savings of a group of clients to whom he purported to provide investment advice. He did that through the three companies that make up the other three respondents in this proceeding.
2. In late 2016, certain of Mr Miller’s activities came to the attention of the Australian Financial Services regulator, the Australian Securities and Investments Commission (ASIC). ASIC’s investigations of those activities eventually uncovered the misappropriations mentioned above. As a consequence, it commenced this proceeding in which it has sought a wide range of relief against Mr Miller and his three companies.
3. First, it has sought orders under s 461(1)(k) of the *Corporations Act 2001* (Cth) (the Act) for the winding up of the three respondent companies on just and equitable grounds and for the appointment of liquidators. Those companies are:
4. CFS Private Wealth Pty Ltd (the first respondent);
5. BDM Asia Pacific Pty Ltd (the second respondent); and
6. Combined Financial Solutions Pty Ltd (the third respondent).
7. At this point, it is convenient to interpose to note two things about BDM Asia Pacific. First, the original name of that company was similar to the other two respondents above, namely CFS Corporation Pty Ltd. Secondly, that company was deregistered as a company on 13 February 2017 as a result of action taken by ASIC under s 601AB(1A) of the Act. It must therefore be reinstated before it can be wound up. Accordingly, ASIC has applied for a reinstatement order under s 601AH(2) of the Act. I will return to this issue later in these reasons.
8. Initially, ASIC also sought orders under ss 1101B and/or 1324(1) of the Act to permanently restrain Mr Miller from providing financial services and orders pursuant to s 206E(1) of the Act disqualifying him from managing corporations for such period as the Court considers appropriate. However, in its supplementary submissions it abandoned its reliance on s 1101B. ASIC also initially sought declarations that CFS Private Wealth had contravened s 912A of the Act, however at the hearing it did not seek to pursue that relief provided that the injunction orders it sought were made.

# FACTUAL CONTEXT

1. Much of the factual context to this proceeding has already been considered in the interlocutory application I heard and decided in May 2018. At that time, I made interim restraining orders against Mr Miller under ss 1101B(5) and 1324(4) of the Act, as well as preservation orders under ss 1323(1) and (3): see *Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (ACN 151 584 885) and Others* (2018) 129 ACSR 171; [2018] FCA 1070. Consequently, the most convenient way to outline the factual context to this proceeding is to set out the apposite parts of the reasons mentioned above. They are as follows (at [7]–[12]):

7 In September 2016, ASIC began investigating suspected contraventions of the Act, the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), the Crimes Act 1900 (NSW) (Crimes Act) and the Queensland Criminal Code (Criminal Code) in relation to the preparation and submission of personal insurance policy applications by Mr Miller and Mr Ian Dale through CFS Private Wealth Pty Ltd, the first respondent, during the period 27 July 2015 to 19 January 2016.

8 CFS Private Wealth is an Australian Financial Services Licence holder under the Act. Mr Miller is one of the responsible managers of CFS Private Wealth and he is currently its sole director and shareholder.

9 Combined Financial Solutions Pty Ltd, the third respondent, is an authorised representative of CFS Private Wealth. Mr Miller is also currently the sole director and shareholder of Combined Financial Solutions.

10 In April 2017, ASIC expanded its investigation to include suspected contraventions of the Act, the Crimes Act and the Criminal Code in relation to the transfer of funds from CFS Private Wealth clients’ self-managed superannuation funds to CFS Corporation Pty Ltd (CFS Corporation).

11 CFS Corporation is the original name of a company which was later renamed Go to Super Pty Ltd and then BDM Asia Pacific Pty Ltd, the second respondent. As has been mentioned already, this company was deregistered on 13 February 2017. Mr Miller was formerly a director of CFS Corporation.

12 On 1 September 2017, ASIC’s investigation was further expanded to encompass the period commencing from 1 November 2008 and to include the distribution of funds from CFS Corporation to other persons and entities.

1. Because it affects one of the issues that are to be considered later in these reasons, it is also important to add that Mr Miller resigned as the sole director of CFS Corporation (or BDM Asia Pacific as it was named at the time) on 22 July 2015 and, at the time of its deregistration, that company had no directors. This was contrary to the requirements of s 201A of the Act.

# THE RESULTS OF ASIC’S INVESTIGATIONS

1. The results of ASIC’s investigations are detailed in a number of affidavits that ASIC filed in this proceeding. They included the following:
2. affidavits by Ms Jennifer Atkinson, an ASIC investigator who, with others, led ASIC’s investigations into the affairs of the four respondents;
3. an affidavit by Ms Georgina Barraclough, an ASIC investigator and a member of ASIC’s Forensic Accounting Services team, who assisted Ms Atkinson with her investigations; and
4. affidavits by Mr Gavin Crosbie and Mrs Robyn Crosbie, two self-funded retirees who invested their superannuation savings on Mr Miller’s advice.
5. It is convenient to begin with the activities that first brought Mr Miller to ASIC’s attention. Mr Miller made various admissions about those activities during an interview that was conducted in the course of ASIC’s investigations. That interview took place on 10 April 2017 and was conducted by Ms Atkinson and Ms Caroline Lewis (an ASIC officer). Mr Miller was legally represented during the interview. A transcript of that interview was annexed to the affidavit of Ms Atkinson. In that interview, Mr Miller admitted that he had made applications for life insurance in his name, or in the name of his former business partner, Mr Dale, to OnePath Life Limited, TAL Life and Asteron Life, each of which applications contained false information. He also admitted that he received commissions as a result of those applications; that he had written other insurance policies for family members and for close friends without their knowledge or consent; and that he had received commissions from those applications as well.
6. As mentioned above, ASIC extended its investigations into Mr Miller’s activities in April and September 2017 to include various transfers he had made to and from CFS Private Wealth and CFS Corporation. The background to, and details of, those transfers, as disclosed by ASIC’s investigations, are set out below.
7. First, from in or about 2008, Mr Miller provided financial services, including investment, superannuation and insurance advice, to various clients through CFS Corporation. In the course of providing those services, he arranged a series of transfers of significant sums of money from those clients’ self-managed superannuation funds to CFS Corporation ostensibly for investment purposes.
8. ASIC established that, over a nine year period, Mr Miller caused more than $4.7 million to be transferred to CFS Corporation in this manner. By tracing the transfers of monies into and out of CFS Corporation’s two Suncorp bank accounts, ASIC’s investigations revealed that Mr Miller did not, in fact, invest those monies as he had represented he would do, but rather he used them for his own personal purposes and to make interest payments to other clients.
9. ASIC’s investigations and Mr Crosbie’s affidavit revealed that, between November 2013 and April 2015, Mr and Mrs Crosbie invested $950,000 of their superannuation savings on Mr Miller’s advice. Mr Miller returned $100,000 of that sum in October 2015, however the Crosbies lost the remaining $850,000.
10. Ms Barraclough’s affidavit described the following details of the six deposits that comprised the $950,000 which the Crosbies made into CFS Corporation’s bank accounts:

|  |  |  |  |
| --- | --- | --- | --- |
| **Deposit number** | **Date** | **Bank account statement description** | **Amount** |
| 1 | 27 Nov 2013 | BRANCH DEPOSIT Ballina | $150,000.00 |
| 2 | 4 Feb 2014 | BRANCH DEPOSIT Hornsby | $150,000.00 |
| 3 | 15 Apr 2014 | BRANCH DEPOSIT Ballina | $200,000.00 |
| 4 | 26 Sept 2014 | DIRECT CREDIT CROSBIE FAMILY S | $100,000.00 |
| 5 | 29 Dec 2014 | BRANCH DEPOSIT Ballina | $100,000.00 |
| 6 | 9 Apr 2015 | BRANCH DEPOSIT Ballina | $250,000.00 |

1. Ms Barraclough went on, in her affidavit, to describe how a significant portion of each of these deposits was subsequently transferred to Mr Miller’s personal bank account, to his wife’s bank account, to their personal credit cards, and to a bank account in the name of Mr Miller’s son. As well, she described how some transfers were made to effect interest repayments to Mr Miller’s other clients. Since there were almost 100 transactions associated with these six deposits, I will, for convenience, use the first and fifth deposits above as examples.
2. “Deposit 1”: Ms Barraclough established that, after receiving this $150,000 deposit, Mr Miller used it to make a number of transfers totalling approximately $148,000, including the following:
3. $50,000 to a bank account in the name of “Graeme Walter Miller and Wendy Anne Miller”;
4. $13,460 to a bank account in the name of “Mr Alan James Pride & Mrs Lynette Joan Pride” (the Prides were identified in Ms Atkinson’s affidavit as other clients of Mr Miller);
5. $12,400 to a bank account in the name of “Mr G W Miller”;
6. $10,000 to a credit card account in the name of “Mr G W Miller”;
7. $5,000 to a credit card account in the name of “Mr Graeme Walter Miller”;
8. $2,000 to a credit card account in the name of “Graeme W Miller”;
9. $2,000 to a bank account in the name of “Mr Stephen James Miller”;
10. $2,000 to a credit card account in the name of “Mrs Wendy A Miller”; and
11. $1,000 to a bank account in the name of “Mrs Wendy Anne Miller”.
12. “Deposit 5”: Ms Barraclough established that, after receiving this $100,000 deposit, Mr Miller used it (along with funds contributed by other investors that were already in the same account) to make a number of transfers totalling approximately $179,000, including the following:
13. $37,000 to a bank account in the name of “Mr Graeme Miller”;
14. $20,884 to a bank account in the name of “Mr Graeme W Miller”;
15. $15,000 to a bank account in the name of “Graeme Walter Miller and Wendy Anne Miller”;
16. $13,000 described as “international transfer to Sri Lanka”;
17. $11,519 to a bank account in the name of “Mr Alan James Pride & Mrs Lynette Joan Pride”;
18. $7,000 to a credit card account in the name of “Graeme W Miller”;
19. $7,000 to a credit card account in the name of “Mr G W Miller”;
20. $6,000 to a credit card account in the name of “Mr Graeme Walter Miller”;
21. $5,000 described as “cash withdrawal”;
22. $5,000 to a bank account in the name of “Mr G W Miller”; and
23. $4,000 to a credit card account in the name of “Mrs Wendy A Miller”.
24. In her affidavit, Ms Atkinson also described another deposit of $225,000 that two of Mr Miller’s clients, Mr Jeffrey Cayzer and Mrs Margaret Cayzer, made to one of CFS Corporation’s bank accounts on 26 August 2016. Of that amount, Ms Atkinson’s investigations established that $200,000 was subsequently transferred into a bank account in the name of “Mr Graeme Miller and Mrs Wendy Miller”. Ms Atkinson said in her affidavit that she believed this bank account to be Mr and Mrs Millers’ home loan account.
25. During his interview with Ms Atkinson and Ms Lewis on 10 April 2017 mentioned above, Mr Miller claimed that the transfers described above were “loans”. The falsity of this claim is demonstrated, in part, by Mr Miller’s conduct in the days immediately following that interview.
26. On 13 April 2017, three days after the interview, ASIC sent a letter to Suncorp-Metway Ltd instructing it to immediately close the bank accounts held by BDM Asia Pacific (previously CFS Corporation (see at [6(10)] above)) and to transfer any funds in those accounts to ASIC. During her investigations, Ms Atkinson discovered that, on the same day, Mr Miller caused $40,000 to be transferred from BDM Asia Pacific’s bank account at Suncorp into his personal bank account. After that transfer, a balance of $194,756.69 remained in that bank account. Approximately two weeks later, on 26 April 2017, Mr Miller contacted Suncorp by telephone and requested the transfer of that remaining balance to his personal bank account. During her investigations, Ms Atkinson was also able to obtain a transcript of a recording of that telephone conversation from Suncorp. Ultimately, that transfer could not be completed because Suncorp had closed the account on ASIC’s instructions earlier that day and sent those funds to ASIC.
27. Three other matters pertinent to the relief sought in this proceeding were revealed by Ms Atkinson’s investigations. First, they revealed that, as the director of CFS Private Wealth, Mr Miller had not kept adequate books and records documenting his clients’ investments. Specifically, he had not recorded their names; the amounts they invested; which of the three respondent companies they supposedly invested in; and the amounts, if any, that were repaid to them.
28. Secondly, her investigations revealed that CFS Private Wealth had failed to lodge its profit and loss statements and balance sheets for the financial years ending 30 June 2016 and 2017, as required by s 989B of the Act. Furthermore, for the financial years ending 30 June 2010, 2011, 2013, 2014 and 2015, it had lodged those documents after the date stipulated in the Act (s 989D).
29. Thirdly and finally, her investigations revealed that CFS Private Wealth and Combined Financial Solutions had not complied with ASIC Regulatory Guide 166 entitled “Licensing: Financial requirements”, which required Australian Financial Services Licence holders holding client money or property in excess of $100,000 to maintain at least $50,000 in surplus liquid funds. As at 1 February 2018, CFS Private Wealth held only $537.06 in assets, and as at 29 January 2018, Combined Financial Solutions held only $0.08.

# SOME PROCEDURAL MATTERS

1. Before turning to consider ASIC’s claims for relief, it is convenient to record some procedural matters. First, none of the four respondents has filed a notice of address for service in this proceeding. Secondly, none of them appeared at the first case management hearing on 10 May 2018. Nor did any of them appear at the hearing of the interlocutory application on 21 May 2018. Finally, there was no appearance by any of them at the final hearing of this matter on 18 July 2018.
2. Nonetheless, having regard to various affidavits filed by ASIC, I was satisfied: that CFS Private Wealth, Combined Financial Solutions and Mr Miller were all served with the originating process on 4 May 2018; that ASIC had, prior to the final hearing in July 2018, provided all respondents with copies of the orders made on 21 May 2018; and, finally, that three weeks prior to that final hearing, ASIC sent a copy of its written submissions to Mr Miller’s most recent known email address. Accordingly, I was satisfied that all respondents had been given adequate notice of the final hearing and I therefore proceeded with that hearing in their absence pursuant to r 30.21(1)(b)(i) of the *Federal Court Rules 2011* (Cth).

# THE WINDING UP APPLICATIONS

## The relevant legislative provision

1. Section 461(1)(k) of the Act provides:

The Court may order the winding up of a company if:

…

(k) the Court is of the opinion that it is just and equitable that the company be wound up.

1. ASIC has standing to bring these winding up applications under ss 462(2)(e) and 464(1) of the Act.
2. Without setting them out in full, I am satisfied that ASIC has met all the formal requirements in the Act and in the *Corporations Regulations 2001* (Cth) for each winding up application.

## Key principles

1. The key principles relating to a winding up application under s 461(1)(k) were helpfully summarised by Lander J in *Australian Securities and Investments Commission v International Unity Insurance Pty Ltd ACN 085 026 348* [2004] FCA 1059 as follows (at [135]–[139]):

135 **The plaintiff is authorised to make an application for winding up on the just and equitable grounds where it is in the public interest to do so**: *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 at 532.

136 There are a number of separate grounds which justify the making of a winding up order under this head. **If mismanagement, misconduct or lack of confidence in the conduct and management of the affairs of a company is established, it may be appropriate to wind up the company under this head**: *Australian Securities Commission v AS Nominees Limited* at 532-533; *Australian Securities & Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at 469.

137 **If the plaintiff can establish that there have been breaches of the provisions of the Act, including, but not limited to, breaches of directors’ duties, inadequacy of accounts and inadequacy of record keeping, it may be appropriate to make an order under this head**: *Australian Securities Commission v AS Nominees Limited* at 532-533; *Australian Securities & Investments Commission v ABC Fund Managers* at 469.

138 **If there is a need to ensure investor protection, a winding up order may be made under this head**: *Australian Securities Commission v AS Nominees Limited and Others* at 532-533; *Australian Securities & Investments Commission v ABC Fund Managers and Others* at 469.

139 **An order may be made if a company has not carried on its business candidly and in a straightforward manner with the public**: *Australian Securities & Investments Commission v Austimber Pty Ltd* [1999] FCA 566; (1999) 17 ACLC 893. Such an order would also be appropriate where the corporation has acted fraudulently or entered into sham transactions.

(Emphasis added)

1. See also the similar summaries of these principles in *Australian Securities and Investments Commission v Letten (No 10)* [2011] FCA 498 at [12]–[14] per Gordon J; in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189; [2013] FCA 234 at [20]–[24] per Gordon J; and, more recently, in *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [55]–[57] per Beach J.

### CFS Private Wealth

1. ASIC contended that it is just and equitable to wind up CFS Private Wealth on the following grounds:
2. that the company had committed, and continued to commit, contraventions of ss 912A(1)(a) and (c) of the Act;
3. that the company had misused investor funds in a way that warranted investor protection;
4. that Mr Miller, as the company’s sole director: had demonstrated an inability to adequately document matters relating to the affairs of the company; had failed to apply appropriate directorial rigour in the administration of the company which had resulted in a justifiable lack of confidence in the conduct and management of the company’s affairs; and had failed to ensure that the company complied with its obligations under the Act, resulting in repeated and ongoing breaches over a lengthy period of time;
5. that the company did not have sufficient assets to meet the conditions of its Australian Financial Services Licence; and
6. that ASIC had lost confidence in the conduct and management of the company.
7. From the existence of this application, ground (e) above is both self-evident and self-serving. However, ASIC’s other grounds above require closer consideration.

#### Ground (a)

1. Section 912A of the Act relevantly provides:

(1) A financial services licensee must:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

…

(c) comply with the financial services laws; and

…

1. In *Australian Securities and Investments Commission v Avestra Asset Management Limited (ACN 119 227 440) (in liq) and Others* (2017) 120 ACSR 247; [2017] FCA 497, Beach J summarised the principles relating to the expression “efficiently, honestly and fairly” in s 912A(1)(a) above as follows (at [191]):

**The “efficiently, honestly and fairly” standard is applied as a single, composite concept, rather than three discrete behavioural norms.** The following principles are not in doubt (see *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206; [2012] FCA 414 at [69] and [70] per Foster J). First, the words “efficiently, honestly and fairly” entail that **a person must go about their duties efficiently having regard to the dictates of honesty and fairness**, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty. Second, the phrase connotes **a requirement of competency in providing advice and in complying with relevant statutory obligations. Third, the word “efficient” entails that the person is adequate in performance and is competent**. Fourth, the concept of honesty is looked at through the lens of commercial morality rather than through the lens of the criminal law.

(Emphasis added)

1. The words “honestly” and “fairly”, when used together, have also been said “to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound”: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672 per Young J.
2. Having considered the evidence adduced by ASIC in support of this application, particularly the conduct summarised at [8]–[23] above, I am satisfied that CFS Private Wealth has not provided financial services efficiently, honestly and fairly in contravention of s 912A(1)(a). Specifically, the company, through the actions of its sole director, Mr Miller, has not had regard to the dictates of honesty and fairness, nor conducted itself in an ethically sound way and it has not provided advice to its clients competently.
3. With respect to s 912A(1)(c), ASIC submitted that CFS Private Wealth had breached ss 989B and 989D of the Act. Together, these provisions require that, by three months after the end of each financial year, a licensee must lodge with ASIC a “true and fair profit and loss statement and balance sheet” for each financial year unless an extension of time is granted.
4. Based on the matters outlined at [22] above, I am satisfied that the company has contravened s 912A(1)(c) and, accordingly, it has not complied with its statutory obligations.

#### Grounds (b) to (d)

1. In relation to ground (b), the blatant misuse of investor funds described at [11]–[20] above satisfies me that investor protection warrants the winding up of CFS Private Wealth.
2. In relation to ground (c), the matters summarised at [21] above satisfy me that Mr Miller, as the sole director of CFS Private Wealth, has demonstrated an inability to adequately document matters relating to the affairs of the company. I am also satisfied that his actions, as summarised at [11]–[23] above, give rise to a justifiable lack of confidence in the conduct and management of the company and therefore warrant its winding up. Additionally, because of the breaches of ss 912A(1)(a) and (c) which I have already mentioned above, I am satisfied that Mr Miller has failed to ensure that CFS Private Wealth complies with its legal obligations and that has resulted in repeated and ongoing breaches of the provisions of the Act.
3. Finally, in relation to ground (d), having regard to the matters outlined at [23] above, I am satisfied that the company does not have sufficient assets to meet the conditions of its Australian Financial Services Licence.

#### Conclusion

1. For all of these reasons, I am satisfied that it is just and equitable to order that CFS Private Wealth be wound up under s 461(1)(k) of the Act.

### Combined Financial Solutions

1. ASIC contended that it is just and equitable to wind up Combined Financial Solutions on the following grounds:
2. that the company is an authorised representative under CFS Private Wealth’s Australian Financial Services Licence;
3. because of the ambiguity with respect to the question whether the client investors concerned invested in Combined Financial Solutions, or CFS Private Wealth, it was appropriate to wind up the company to ensure that all the debt claims of the creditors and investors in both companies are considered concurrently;
4. that Mr Miller as the company’s sole director has failed to apply appropriate directorial rigour in the administration of the affairs of the company which has resulted in a justifiable lack of confidence in the conduct and management of those affairs; and
5. that Mr Miller, as the company’s sole shareholder, has been notified of this application to wind up the company and has not opposed it.
6. In relation to ground (a), I am satisfied from the evidence that has been adduced by ASIC in support of this application that Combined Financial Solutions is an authorised representative under CFS Private Wealth’s Australian Financial Services Licence.
7. In relation to ground (b), based on the parlous state of the records of the company as described at [21] above, I am satisfied that there is ambiguity as to which of the two companies it was that each of the client investors made their investments in and it would therefore be prudent to wind up both Combined Financial Solutions and CFS Private Wealth concurrently.
8. In relation to ground (c), I am satisfied that Mr Miller’s actions as the sole director of the company, as summarised at [11]–[23] above, give rise to a justifiable lack of confidence in the conduct and management of the company and therefore warrant a winding up order.
9. Finally, in relation to ground (d), based on the matters summarised at [24]–[25] above, I am satisfied that Mr Miller was made aware of this proceeding and that he has elected not to take any part in it.

#### Conclusion

1. For all of these reasons, I am satisfied that it is just and equitable to order that Combined Financial Solutions be wound up under s 461(1)(k) of the Act.

### BDM Asia Pacific

1. As has been mentioned earlier in these reasons, BDM Asia Pacific is currently deregistered as a company and it cannot, therefore, be wound up until such time as its registration as a company is reinstated. That is so because under s 601AD(1) of the Act: “[a] company ceases to exist on deregistration”.

#### The reinstatement application

1. In an attempt to resolve this impasse, ASIC sought an order under s 601AH(2) of the Act for the reinstatement of BDM Asia Pacific’s registration as a company. That section relevantly provides:

The Court may make an order that ASIC reinstate the registration of a company if:

(a) an application for reinstatement is made to the Court by:

(i) a person aggrieved by the deregistration; or

(ii) a former liquidator of the company; and

(b) the Court is satisfied that it is just that the company’s registration be reinstated.

1. ASIC contended that it was a “person aggrieved” by the deregistration within the terms of s 601AH(2)(a)(i). It based that contention on the matters described at [20] above, namely that at the time of its deregistration the company held cash assets of $194,756.69 and those funds were paid to, and vested in, it (ASIC) under s 601AD(2) of the Act. Consequently, ASIC claimed that, if the company were not reinstated and those funds remained vested in it, a number of things would follow. First, those funds would not be available to a liquidator for distribution to the creditors of the company. Secondly, it would be involved in the affairs of the company and that would not be commensurate with its role as the Regulator. Thirdly, it will have to bear the burden of having to administer and account for those funds.
2. The principles bearing on whether a person is “aggrieved” for the purposes of a reinstatement application under s 601AH were recently summarised by McKerracher J in *Bell Group Ltd (ACN 008 666 993) (in liq) and Others v Australian Securities and Investments Commission and Another* (2018) 128 ACSR 247; [2018] FCA 884 (*Bell Group*)as follows (at [47]–[50]):

47 **The expression ‘person aggrieved’ in s 601AH should not be construed narrowly**: *Yeo v Australian Securities and Investments Commission* [2017] FCA 1480 at [14]-[16] per Gleeson J and the authorities therein cited). For a person to be aggrieved for the purposes of s 601AH(2)(a)(i), **an applicant for reinstatement must be able to show that the deregistration deprived the applicant of something, or injured or damaged the applicant in a legal sense, or if the applicant became entitled, in a legal sense, to regard the deregistration as a cause of dissatisfaction**: *Danich* at [32] per Barrett J.

…

49 There is no temporal restriction in the description ‘person aggrieved’ as long as there is a causal link between the grievance and the deregistration. A person can become aggrieved after the time of deregistration: see the discussion by Gillard J in *Pilarinos v Australian Securities and Investments Commission* [2006] VSC 301 (*Pilarinos*) at [49] …

50 There needs, however, to be some connection other than simply being a shareholder or a director of a company that is deregistered in order to be a person aggrieved. **An applicant must demonstrate that his or her interests have been, or are likely to be, prejudicially affected by the deregistration of the company. A mere dissatisfaction with an event will not render someone a ‘person aggrieved’; they must be a person who has been damaged or injured in a legal sense**: *Callegher v Australian Securities and Investments Commission* (2007) 218 FCR 81; 239 ALR 749; 98 ALD 1; [2007] FCA 482 (*Callegher*) at [50] per Lander J and the authorities therein cited) …

(Emphasis added)

1. There are two reasons why I do not consider ASIC meets the “aggrieved person” criterion in s 601AH(2)(a)(i) above. First, to adopt the words of McKerracher J in *Bell Group*, I do not consider it has been “deprived … of something, or injured or damaged” by virtue of the fact that it currently holds BDM Asia Pacific’s former assets. That state of affairs and all of the consequences of it outlined by ASIC above arise from an obligation which has been imposed on it by statute. That being so, I do not consider those consequences can be characterised as a source of aggrievement. ASIC may be dissatisfied that it has to perform that obligation in the circumstances prevailing in this matter, but that does not, in my view, constitute any relevant prejudice to its interests.
2. Secondly, I consider it is within ASIC’s power to reinstate BDM Asia Pacific of its own initiative without a court order under s 601AH(1). That section provides that “ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered”. During the hearing, ASIC claimed it could not exercise this power because it had deregistered the company for not paying its review fees and, since those fees remained unpaid, it could not be satisfied that “the company should not have been deregistered”, as required by s 601AH(1). Furthermore, it claimed that, at the time of deregistration, the company had no directors and s 201A(1) of the Act required that it have at least one director. Finally, it claimed that, if the company were reinstated, under s 601AH(5), the property of the company which is presently vested in ASIC re-vests in the company and that may provide Mr Miller with the opportunity to access those funds before the company can be wound up.
3. In my view, none of these claims provides a valid reason for ASIC not exercising its discretionary power under s 601AH(1) if it wishes to. In the first place, I do not consider the satisfaction required by that section is necessarily confined to the realisation or existence of error with respect to the original deregistration decision. In my view, that section gives ASIC a broad discretionary power to review and reverse a deregistration decision it has made at any time in the future provided that, on the information available to it at that time, it is satisfied that it should not have exercised its discretion to deregister the company. The present matter provides a good example of the way in which that discretionary power may be exercised. Based on what ASIC now knows about the conduct of the affairs of the company and the desirability now of having a winding up order made with respect to the company, there is ample reason for it to be satisfied that the company should not have been deregistered in 2017 and, therefore, that it should now be re-registered.
4. ASIC’s reliance upon s 201A(1) is curious. If that section provides a barrier to ASIC now reinstating the company under s 601AH(1), logic suggests it would apply equally to its application to have the Court make such a reinstatement order under s 601AH(2). That curiosity aside, I do not consider that section creates a barrier in either situation. There is nothing in s 201A(1) to indicate that a failure to comply with its provisions affects the continuing existence of a company. Under s 119 of the Act, a company comes into existence on the day on which it is registered. And, as the note to s 119 indicates, it remains in that state of existence until it is deregistered under Chapter 5A of the Act. That note is consistent with s 601AD(1) which, as has already been mentioned above, provides that a company ceases to exist on deregistration. This conclusion is further reinforced by the fact that a failure to comply with s 201A(1) is not expressed to be a ground for deregistration of a company under the apposite provisions of Chapter 5A (see ss 601AA, 601AB and 601AC).
5. As for ASIC’s third reason concerning the operation of s 601AH(5), it provides:

**If a company is reinstated**, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. **Any property of the company that is still vested in the Commonwealth or ASIC revests in the company**. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

(Emphasis added)

1. This subsection does not, in my view, have any relevant bearing on the exercise of ASIC’s discretion under s 601AH(1). That discretion is founded on ASIC being satisfied, as discussed above. It is not affected by the consequences of re-registration to which ASIC has pointed. In any event, even if it were, I do not consider any of those concerns are valid. First, the re-vesting of the company’s property will only occur once it is re-registered as a company and ASIC has complete control over the timing of that step. One would assume that ASIC will liaise with the liquidators of the other two respondent companies to ensure that the re-registration of BDM Asia Pacific is timed to advance the interests of the creditors of all three respondents. Secondly, and relatedly, the re-vesting of the property of the company in the company once it is re-registered does not mean that the monies that ASIC holds have to be re-transferred to the Suncorp bank account from whence they came even if that bank account still exists, which seems highly unlikely. In the interim period, if any, the practicalities of the situation would dictate that ASIC would continue to hold those monies on behalf of the company.
2. Thirdly, and perhaps most tellingly, as has already been pointed out by ASIC in relation to the second reason above, the company currently has no directors. It follows that Mr Miller will possess no authority as a director of the company to deal with the company’s assets once it is reinstated. If he purported to do so, he would have to deal with ASIC. The proposition that he would, in the present circumstances, be able to persuade ASIC to transfer the funds to him is, in my view, fanciful.
3. Before leaving this issue, I should note that ASIC submitted, in the alternative, that if I did not find it to be an aggrieved person, I should adjourn its application with respect to the reinstatement of BDM Asia Pacific under s 601AH(2) to allow the liquidators appointed to CFS Private Wealth and Combined Financial Solutions (assuming I decided to order the winding up of those companies) to apply for the reinstatement of that company as an aggrieved person. I do not consider that such an adjournment would be appropriate in the circumstances. First, if the liquidators that are to be appointed to the other two respondent companies believe they meet the criterion of aggrieved persons, they can make an application under s 601AH(2) without this proceeding having to be unnecessarily prolonged. Secondly, and in any event, the re-registration of this company could be achieved more expeditiously and at less cost to the creditors of all three respondents if ASIC were to exercise its discretion under s 601AH(1) which, for the reasons expressed above, I consider it presently possesses.
4. For these reasons, I dismiss ASIC’s application to reinstate BDM Asia Pacific under s 601AH(2). Since that application has been dismissed and the company does not therefore currently exist, I also dismiss ASIC’s application to wind up BDM Asia Pacific under s 461(1)(k) of the Act.

# THE PERMANENT RESTRAINT APPLICATION

1. Pursuant to s 1324(1)(e) of the Act, ASIC has sought an order to permanently restrain Mr Miller from providing financial services. Chapter 9 of the Act contains various miscellaneous provisions. Section 1324 is located in Part 9.5. It describes the powers of courts. Section 1324(1)(e) relevantly provides:
2. Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

…

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

…

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.

…

1. ASIC submitted that Mr Miller was personally liable because he was knowingly concerned in the following contraventions of s 912A(1) of the Act by CFS Private Wealth:

(a) [contraventions] of s 912A(1)(c) by failing to comply with the financial services laws by failing to lodge financial reports (as CFS Private [Wealth] was required to by ss 989B and 989D of the Act) for the financial years ending 30 June 2010, 2014 and 2015 by the due date and, failing to lodge the financial statements for the financial years ending 30 June 2016 and 2017, at all;

(b) [contraventions] of s 912A(1)(a) by virtue of Mr Miller, as the director and authorised representative of CFS Private [Wealth], engaging in improper conduct by transferring investor funds to himself and members of his family without the investors’ authorisation;

(c) [contraventions] of s 912A(1)(a) by failing to keep adequate books and records documenting client investments with the [respondent companies] including the names of all investors, the amounts invested by each, the entity in which each client invested and any amounts repaid to investors; and

(d) [contraventions] of s 912A(1)(a) by lodging illegitimate insurance policy applications without the knowledge of the insureds which contained false information, in order to obtain commissions from insurers.

(Footnotes omitted)

1. ASIC also submitted that Mr Miller was knowingly concerned in the above contraventions because he:

(a) was the directing mind and will of CFS Private [Wealth, relying on] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [at] 170 [and in] *Hamilton v Whitehead* (1988) 166 CLR 121, [at] 127);

(b) was the sole director of CFS Private [Wealth] at the time that it failed to lodge its financial statements for the financial years ending 30 June 2014, 2015, 2016, 2017 and he was one of two directors at the time that CFS Private [Wealth] failed to lodge its financial statements for the financial year ending 30 June 2010, and he failed to take reasonable steps to ensure the contravention did not continue (from the date of his appointment as a director until they were lodged with ASIC on 12 December 2016);

(c) provided the advice to clients, as their financial adviser, to establish a self-managed superannuation fund (**SMSF**) and invest those funds in or with CFS Private [Wealth];

(d) made the representations to clients about how their funds would be used;

(e) was responsible for the documentation of clients’ investments in or with CFS Private [Wealth];

(f) performed the dishonest transfers of funds from CFS Corporation to the personal bank accounts held by himself and his wife;

(g) received the benefit of funds he dishonestly transferred to himself and his wife which were used to pay personal expenses and debts; and

(h) prepared and submitted the illegitimate insurance applications.

(Footnotes omitted)

1. Finally, ASIC submitted that “[w]hile Mr Miller stated in his record of interview with ASIC that the transfer of monies into his personal accounts were loans and, while loans/credit facilities are not financial products, because the funds invested with Mr Miller were interests in SMSF’s which are financial products (see s 764A(1)(g) of the Act), any advice about how to invest SMSF funds and any dealings with SMSF funds are financial services” (footnotes omitted).
2. All of these submissions are sound and should be accepted. Specifically, for the reasons set out at [36]–[38] above, I am satisfied that Mr Miller was knowingly concerned in CFS Private Wealth’s contraventions of ss 912A(1)(a) and (c) of the Act and I am therefore satisfied that he should be restrained from engaging in similar conduct in the future, in particular from providing financial services to members of the public. The remaining issue to be determined is, therefore, the appropriate length of that restraint.
3. In *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 (*Adler*), in proceedings concerning the disqualification of a person from managing corporations, Santow J summarised (at [56]) the principles to be taken into account by a Court when exercising such a power of disqualification. These principles have since been applied to the grant of an injunction under s 1324 to restrain a person from providing financial services: see, for example, *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064 at [52]–[53] per Davies J and *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* (2015) 106 ACSR 302; [2015] FCA 527 at [29]–[30] per White J. While they are lengthy, it is convenient to set those principles out in full. They are as follows:

**The cases on disqualification gave orders ranging from life disqualification to 3 years. The propositions that may be derived from these cases include:**

(i) **Disqualification orders are designed to protect the public** from the harmful use of the corporate structure or from use that is contrary to proper commercial standards: *Australian Securities and Investments Commission v Hutchings* (2001) 38 ACSR 387 at 395; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561; *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd* (1999) 30 ACSR 339 at 349–350; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583 at 602; *Australian Securities Commission v Roussi* (1999) 32 ACSR 568 at 570–1; *Re Strikers Management Pty Ltd; Australian Securities Commission v Dimitri* (unreported, Fed C of A, Burchett J, No NG 3789 of 1996, 7 May 1997, BC9702133); *Re Tasmanian Spastics Association; Australian Securities Commission v Nandan* (1997) 23 ACSR 743 at 751.

(ii) **The banning order is designed to protect the public** by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office: *Australian Securities Commission v Roussi*, above, at 570; *Re Gold Coast Holdings Pty Ltd; Australian Securities and Investments Commission v Papatto* (2000) 35 ACSR 107 at 112.

(iii) **Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors**: *Australian Securities Commission v Roussi* at 570; *Re Gold Coast Holdings Pty Ltd*, above, at 112; *Re Tasmanian Spastics Association*, above, at 751.

(iv) The banning order is protective against present and future misuse of the corporate structure: *Australian Securities Commission v Donovan*, above, at 603.

(v) The order has a motive of personal deterrence, though it is not punitive: *Re Magna Alloys & Research Pty Ltd* (1975) ACLR 203 at 205; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty* Ltd, above; *Australian Securities Commission v Donovan* at 607; *Re Tasmanian Spastics Association* at 751.

(vi) The objects of general deterrence are also sought to be achieved: *Australian Securities Commission v Donovan* at 602.

(vii) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company: *Australian Securities Commission v Donovan* at 607.

(viii) **Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty**: *Australian Securities Commission v Donovan* at 605–7.

(ix) **In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public**: *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd*; *Australian Securities and Investments Commission v Parkes* (2001) 38 ACSR 355 at 386; *Australian Securities Commission v Forem-Freeway Enterprises*; *Australian Securities Commission v Roussi* at 570–1.

(x) **It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct**: *Australian Securities Commission v Donovan* at 607; *Australian Securities and Investments Commission v Parkes*, above, at 386.

(xi) **A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming**: *Australian Securities Commission v Forem-Freeway Enterprises* at 351.

(xii) The eight criteria to govern the exercise of the court’s powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:

* character of the offenders;
* nature of the breaches;
* structure of the companies and the nature of their business;
* interests of shareholders, creditors and employees;
* risks to others from the continuation of offenders as company directors;
* honesty and competence of offenders;
* hardship to offenders and their personal and commercial interests; and
* offenders’ appreciation that future breaches could result in future proceedings.

*Australian Securities Commission v Roussi* at 570–1; *Re Gold Coast Holdings Pty Ltd* at 111.

(xiii) **Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications of 25 years or more) were**:

* large financial losses;
* high propensity that defendants may engage in similar activities or conduct;
* activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;
* lack of contrition or remorse;
* disregard for law and compliance with corporate regulations;
* dishonesty and intent to defraud;
* previous convictions and contraventions for similar activities.

*Australian Securities and Investments Commission v Hutchings*; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd*; *Australian Securities Commission v Parkes*;

(xiv) **In cases in which the period of disqualification ranged from 7–12 years, the factors evident and which lead to the conclusion that these cases were serious though not “worst cases”, included**:

* serious incompetence and irresponsibility;
* substantial loss;
* defendants had engaged in deliberate courses of conduct to enrich themselves at others’ expense, but with lesser degrees of dishonesty;
* continued, knowing and wilful contraventions of the law and disregard for legal obligations;
* lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform;

*Australian Securities Commission v Forem-Freeway Enterprises*; *Australian Securities Commission v Donovan*; *Australian Securities Commission v Roussi*; *Re Strikers Management Pty Ltd*; *Re Gold Coast Holdings Pty Ltd*.

The difficulty with *Roussi’s* case is that disqualification for 10 years was ordered, as this was the period of disqualification that the ASC had sought. Had a longer period been applied for, Einfeld J may have considered giving a longer period: *Australian Securities Commission v Roussi* at 571;

(xv) **The factors leading to the shortest disqualifications, that is disqualifications for up to 3 years were**:

* although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated;
* the defendants had no immediate or discernible future intention to hold a position as manager of a company;
* in *Donovan’s* case, the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings;

*Australian Securities Commission v Donovan*; *Re Tasmanian Spastics Association*.

(Emphasis added)

1. Having regard to these principles, I am satisfied that Mr Miller’s misconduct is so serious that it warrants a 25 year restraint. In reaching this conclusion, I have had particular regard to Mr Miller’s frequent and ongoing misuse of his clients’ superannuation savings for personal purposes over a number of years, in a long series of transactions which displayed what I consider to be a serious degree of personal dishonesty. The seriousness of this conduct is compounded, in my view, by the fact that, shortly after he became aware of ASIC’s investigations, Mr Miller withdrew $40,000 from BDM Asia Pacific’s accounts and deposited that sum into his personal bank account. Furthermore, his subsequent attempt to transfer the remaining balance in that account ($194,756.69) to his personal bank account was only thwarted by Suncorp having closed that account, at the request of ASIC, on the day he made that attempt. I have also had particular regard to the area of activity in which Mr Miller engaged in this dishonest conduct, namely the investment of his clients’ superannuation savings, where significant financial and personal damage was likely to be caused to his victims. The Crosbies, who lost $850,000 of the $950,000 they invested between November 2013 and April 2015 on Mr Miller’s advice and are now “left with very little money for their retirement”, provide a striking example.
2. It is also of significance that there is no evidence that Mr Miller has demonstrated any remorse for, or shown any appreciation of, the disastrous effects of his wrongdoing on his erstwhile clients. He did not seek to participate in the hearing so he did not raise any mitigating circumstances. While ASIC quite properly raised his daughter’s death in July 2014 as a potential mitigating factor, given that ASIC’s investigations (as summarised at [8]–[23] above) reveal that Mr Miller began to engage in his dishonest conduct well prior to July 2014, I am not satisfied that this factor could justify any mitigation of the restraint period. There is also no evidence that Mr Miller has any prospects of reforming his behaviour.
3. For these reasons, and in light of the importance of protecting that significant section of the public using financial advisors such as Mr Miller to invest their superannuation savings, and of deterring others who may be tempted to engage in similar misconduct, I propose to order that Mr Miller be restrained from providing financial services for a period of 25 years.

# THE DISQUALIFICATION APPLICATION

1. Finally, ASIC has sought an order under s 206E(1) of the Act disqualifying Mr Miller from managing corporations for such period as the Court considers appropriate. Section 206E relevantly provides:

(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

(ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or

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

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

…

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

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

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

…

1. In making this disqualification application, ASIC relied only on Mr Miller’s conduct in failing to ensure, as the director of CFS Private Wealth, that the company lodged its financial statements for the financial years ending 30 June 2010, 2014 and 2015 by the due date, and failed to lodge its financial statements for the financial years ending 30 June 2016 and 2017 at all. I interpose to note that ASIC did not seek to rely on CFS Private Wealth’s failure to lodge financial statements for the financial years ending 30 June 2011 and 2013 because Mr Miller did not become a director of that company until 10 December 2013 and these statements were eventually lodged prior to that date. However, ASIC did seek to rely on the company’s failure to lodge financial statements for the financial year ending 30 June 2010 as those statements were not lodged until 2016. I have already found above that these five failures to lodge financial statements by the due date, or at all, amounted to contraventions of ss 989B, 989D and, consequently, s 912A(1)(c) of the Act (see [37]–[38] above). Accordingly, I am satisfied that s 206E(1)(a) has been enlivened, and I am further satisfied that disqualification is justified under s 206E(1)(b). The remaining issue to be determined is, therefore, the appropriate length of that disqualification.
2. ASIC submitted that in the context of civil penalty provisions, it was open to the Court to receive submissions as to an appropriate penalty: *The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46. Accordingly, having regard to the principles in *Adler* outlined at [67] above, ASIC submitted that a 3 year disqualification would be appropriate on the basis that:

(a) the annual lodgement of audited accounts is an important part of an Australian financial services licence (**AFSL**) holder demonstrating it has adequate financial resources to provide the services covered by its licence and to conduct the business lawfully;

(b) compliance with the abovementioned obligation is important as it enables ASIC to perform its regulatory functions;

(c) no reasons have ever been proffered to ASIC for the delays and failures to lodge the financial statements;

(d) Mr Miller has failed to express remorse or contrition for those delays and failures;

(e) at least for the past two financial years, Mr Miller appears to have simply ignored the obligations of CFS Private [Wealth] to lodge financial statements (despite being reminded of them by ASIC on two separate occasions); and

(f) the Court cannot be satisfied that Mr Miller has no immediate or discernible future intention to manage the affairs of CFS Private [Wealth] because he has not engaged in these proceedings at all.

(Footnotes omitted)

1. Having considered these submissions and the principles in *Adler*, I am satisfied that it would be appropriate to disqualify Mr Miller from managing corporations for a period of 3 years.

# conclusion

1. To sum up, I am satisfied that CFS Private Wealth and Combined Financial Solutions should be wound up under s 461(1)(k) of the Act and that liquidators should be appointed to those companies. Concerning BDM Asia Pacific, I am not satisfied that ASIC is an aggrieved person such that it has standing to apply to reinstate that company’s registration under s 601AH(2) of the Act. In that event, the winding up order sought by ASIC with respect to that company is redundant. In relation to Mr Miller, I am satisfied that he should be restrained from providing financial services under s 1324(1)(e) of the Act for a period of 25 years. I am also satisfied that he should be disqualified from managing corporations under s 206E(1) of the Act for a period of 3 years. I will make orders accordingly.

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

Associate:

Dated: 18 January 2019

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | GRAEME WALTER MILLER |