NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/06/2021 4:03:40 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged**:**	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	VID244/2021
File Title:	JAMES PETER MAWHINNEY v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised

Dated**:** 11/06/2021 4:41:05 PM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Notice of appeal

No. VID244 of 2021

Federal Court of Australia

District Registry: Victoria

Division: General

On appeal from the Federal Court of Australia

JAMES PETER MAWHINNEY

Appellant

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION and others named in the Schedule

Respondents

To the Respondents

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.

2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

Date:

Signed by an officer acting with the authority of the District Registrar

Filed on behalf of (name & role of party) James Peter Mawhinney (the Applicant)
Prepared by (name of person/lawyer) Rhys Roberts
Law firm (if applicable) Roberts Gray Lawyers
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Address for service (include state and postcode) Collins Place, Level 30, 35 Collins Street, Melbourne VIC 3000

The Appellant appeals from the whole of the judgment and paragraphs 1 and 4 of the order of the Federal Court given on 19 April 2021 at Melbourne.

Grounds of appeal

1. The appellant was denied procedural fairness by the abrogation of his privilege against self-exposure to penalty by:

   (a) the order made on 13 August 2020 compelling the appellant to cooperate with the provisional liquidators appointed to the second respondent and the reliance placed by the learned judge in his reasons for judgment ([2021] FCA 354) on the report of the provisional liquidators;

   (b) the admission into evidence at an *ex parte* hearing on 13 August 2020 of an affidavit sworn by the appellant in proceeding no S ECI 2020 02990 in the Supreme Court of Victoria and the reliance placed by the learned judge on that affidavit in making interlocutory orders on 13 August 2020;

   (c) the admission into evidence at the trial of five affidavits sworn by the appellant in proceeding no S ECI 2020 02284 in the Supreme Court of Victoria and the reliance placed by the learned judge on those affidavits in his reasons for judgment;

   (d) the order made on 2 February 2021 requiring the appellant to file evidence in advance of the close of the first respondent's case;

   (e) the order made on 2 February 2021 requiring the appellant to file an outline of opening in advance of the close of the first respondent's case;

   (f) the admission into evidence, contrary to s 597(12A) of the *Corporations Act* 2001, of statements made by the appellant at his liquidator's examination in the Supreme Court of Victoria in respect of which he had claimed privilege and the reliance by the learned judge in his reasons for judgment on those statements;

   (g) the drawing by the learned judge in his reasons for judgment of inferences adverse to the appellant from his failure to give evidence.

2. The appellant was denied procedural fairness by the learned judge making findings of contraventions of ss 911A(1) and 1041H of the *Corporations Act* 2001 and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* 2001 by the appellant, the second respondent, IPO Capital Pty Ltd and Australian Income Solutions

Pty Ltd although the first respondent did not allege that any such contraventions had been committed.

3. Alternatively to paragraph 2, the appellant was denied procedural fairness by the failure of the first respondent in advance of trial to give notice of the following allegations:

   (a) the conduct relied on to constitute the misleading or deceptive conduct by the second respondent and by Australian Income Solutions Pty Ltd, which was not a party to the proceeding, contrary to s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* 2001;

   (b) how that conduct was alleged to be misleading or deceptive;

   (c) representations comprising the misleading or deceptive conduct which were alleged to be representations as to future matters;

   (d) the allegation that IPO Capital Pty Ltd, which was not a party to the proceeding, contravened s 911A(1) of the *Corporations Act*;

   (e) the material facts supporting the allegations that the appellant was a person involved in contraventions by the second respondent, IPO Capital Pty Ltd and Australian Income Solutions Pty Ltd of ss 911A(1) and 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act,* within the meaning of s 79(c) of the *Corporations Act* and s 12GB(1)(d) of the *Australian Securities and Investments Act*;

   (f) the allegation that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, "circumvented" the order made on 16 April 2020 in proceeding no VID 228 of 2020 by the marketing and issuing of Australian Property Bonds.

4. The appellant was denied procedural fairness by the concurrent trial of issues of liability and penalty and by being denied a separate opportunity to adduce evidence and make submissions on penalty after findings were made on liability.

5. The learned judge erred by admitting into evidence at the trial the reports of Jason Tracy dated 12 June 2020, 12 August 2020 and 14 September 2020 ("Tracy Reports").

6. The learned judge should have ruled the Tracy Reports inadmissible under s 76 of the *Evidence Act* 1995 because they contained opinions on issues of ultimate fact in the proceeding and did not contain opinions admissible within s 79 of the *Evidence Act.*

7. Alternatively to paragraph 5, the learned judge should have ruled the Tracy Reports inadmissible under s 135 of the *Evidence Act* because:

   (a) they were based on incomplete information,

   (b) in so far as they contained admissible opinions, those opinions were provisional only and of little probative value,

   (c) in respect of the reports dated 12 June 2020 and 12 August 2020, they were based on materially incorrect instructions.

8. The learned judge should have ruled the report dated 24 September 2020 of the provisional liquidators appointed to the second respondent (the "M101 PL Report") inadmissible under s 135 of the *Evidence Act* because:

   (a) it contained opinions on questions of ultimate fact and of law,

   (b) it was based on incomplete information,

   (c) in so far as it contained admissible opinions, those opinions were provisional only and of little probative value, and

   (d) it was based in part on information which the appellant was compelled to supply in abrogation of his privilege against self-exposure to penalty.

9. The learned judge should have ruled the reports dated 28 May 2020, 23 June 2020, 27 August 2020 and 15 October 2020 of the receivers and managers and provisional liquidators appointed by the Supreme Court of Victoria to IPO Wealth Holdings Pty Ltd and related companies (the "IPO PL Reports") inadmissible under s 135 of the *Evidence Act* because:

   (a) they contained opinions on questions of ultimate fact and of law,

   (b) they were based on incomplete information,

   (c) in so far as they contained admissible opinions, those opinions were provisional only and of little probative value, and

   (d) they were based in part on statements made by the appellant in his liquidator's examination and in respect of which he had claimed privilege under s 597(12A) of the *Corporations Act*.

10. The learned judge erred by adopting conclusions of ultimate fact and of law from the Tracy Reports, the M101 PL Report and the IPO PL Reports and by failing to reach his own conclusions of ultimate fact and of law.

11. The learned judge erred in making the following findings of fact and in not finding in respect of each such fact that the first respondent had failed to prove it to the requisite standard under s 140 of the *Evidence Act* 1995:

    (a) IPO Wealth Holdings Pty Ltd and its related companies, which were not parties to the proceeding, operated an investment scheme which was inherently risky and fatally flawed, as it was based on speculative long-term investments which were illiquid and did not generally provide any short-term return.

    (b) The investment scheme operated by the second respondent in issuing the Core Notes and the M+ Notes had the same flaws as the IPO scheme.

    (c) The investments in the Core Notes were not supported by first ranking, registered security but were mostly on-lent unsecured and for a term of 10 years to Eleuthera Group Pty Ltd.

    (d) The likelihood of recovery of the Eleuthera loan is low.

    (e) The assets secured by the securities held by the security trustee in respect of the Core Notes have little or no value.

    (f) Creditors of the second respondent will receive no distribution in a winding up.

    (g) The Core Notes were not supported by "dollar-for-dollar security".

    (h) The second respondent did not have any profit-making activities.

    (i) John Donald was not a wholesale or sophisticated investor but a retail client.

    (j) Australian Income Solutions Pty Ltd, which was not a party to the proceeding, engaged in "time-pressured marketing" in relation to the Australian Property Bonds.

    (k) The investment scheme operated by Australian Income Solutions Pty Ltd in issuing the Australian Property Bonds:

        (i) was essentially the same as the Core Notes and had the same flaws;

        (ii) was marketed in essentially the same way as the Core Notes; and

        (iii) did not provide direct, first ranking mortgages over specific pieces of property.

(l) Kieran Egan was not a wholesale or sophisticated investor but a retail client.

(m) Jordan Hicks was not a wholesale or sophisticated investor but a retail client.

(n) Financial products offered by entities associated with the appellant were marketed to investors who were not sophisticated or experienced and who, in some cases, invested a good deal of their life savings or retirement funds.

(o) The books and records of most of the relevant companies are in disarray and do not reflect the true position of the companies.

(p) The appellant has transferred substantial funds to the British Virgin Islands.

(q) The appellant is a cavalier financial services provider.

12. The learned judge erred in holding that IPO Capital Pty Ltd, which was not a party to the proceeding, contravened s 911A(1) of the *Corporations Act* by providing financial products or financial services without holding an Australian financial services licence.

13. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by representing to investors that the Core Notes would be supported by "first ranking, registered security" and that "the assets are otherwise encumbered".

14. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by representing to investors that the Core Notes were similar to, or comparable to, a term deposit.

15. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Act* by failing to disclose that Core Notes investors' funds would be used to lend money to the Jarrah Lodge Unit Trust No 1 and would then be on-lent to the BLP Investment Trust, the Panetta Investment Trust and the Tamminga Family Trust.

16. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by taking an investment in M+ Notes from Peter Hui without disclosing that it had implemented a "Liquidity Prudency Policy" which suspended redemptions in respect of the M+ Notes.

17. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by representing to investors that the Core Notes would be supported by "first ranking, registered security" and that "the assets are otherwise unencumbered".

18. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by representing to investors that the M+ Notes were comparable, or entailed similar risk, to a term deposit.

19. The learned judge erred in holding that the second respondent did not comply with the regime in Chapter 7 of the *Corporations Act* in relation to "retail clients" by providing financial services to John Donald.

20. The learned judge erred in holding that the second respondent contravened s 1041H of the *Corporations Act* and s 12DA(1) of the *Australian Securities and Investments Act* by failing to disclose to M+ Notes investors that their investments could or would be used to fulfil obligations to investors in the Core Notes product.

21. The learned judge erred in holding that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, "circumvented" the order made on 16 April 2020 in proceeding no VID 228 of 2020 by the marketing and issuing of Australian Property Bonds.

22. The learned judge erred in holding that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act* by making unspecified representations to the investors in Australian Property Bonds.

23. The learned judge erred in holding that Australian Income Solutions Pty Ltd, which was not a party to the proceeding, contravened s 1041H of the *Corporations Act* and s 12DA(1) of the *Australian Securities and Investments Act* by receiving $100,000 from Richard Rouse and by failing to issue Australian Property Bonds to him.

24. The learned judge erred in holding that the appellant was involved in the contraventions by IPO Capital Pty Ltd, the second respondent and Australian Income Solutions Pty Ltd of ss 911A(1) and 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and (1)(e) of the *Australian Securities and Investments Act*, within the meaning of s 79(c) of the *Corporations Act* and s 12GB(1)(d) of the *Australian Securities and Investments Act.*

25. In so far as paragraph 1 of the final order made on 19 April 2021 was made pursuant to s 1101B(4)(a) of the *Corporations Act* the order was beyond power as it was not proved that

the appellant had persistently contravened, or was continuing to contravene, provisions of Chapter 7 of the *Corporations Act*.

26. In so far as paragraph 1 of the final order made on 19 April 2021 was made pursuant to s 1324 of the *Corporations Act* the order was beyond power as it does not enjoin the appellant from engaging in conduct that would constitute a contravention or attempted contravention of the Act or make him liable as an accessory for such a contravention.

27. The learned judge took account of the following erroneous or irrelevant considerations in assessing the period for which the appellant was restrained from carrying on a financial services business:

    (a) there were large financial losses;

    (b) the appellant has a high propensity to engage in similar activity or conduct;

    (c) if not restrained, the appellant is likely to inflict harm on persons who are not sophisticated investors and who are likely to invest a large proportion of their life savings in high risk products;

    (d) the appellant failed to express remorse or contrition; and

    (e) the appellant has a total disregard for the law and compliance with financial regulation.

28. The restraint in paragraph 1 of the final order made on 19 April 2021 is manifestly excessive.

29. The proceeding miscarried by reason of the incompetence of the solicitors and counsel who acted for the appellant in failing:

    (a) to assert on behalf of the appellant his privilege against self-exposure to a penalty and to resist various procedural steps and the reception of evidence in reliance on the privilege;

    (b) to seek exemptions from interlocutory orders dated 13 August 2020 freezing assets to enable the defendants to fund their defences;

    (c) to object to the order which made evidence at the trial in proceeding no VID 228 of 2020 evidence at the trial of this proceeding;

    (d) to object to the admission into evidence at the trial of the Tracy Reports;

(e) to object to the admission into evidence at the trial of the M101 PL Report;

(f) to object to the admission into evidence at the trial of the IPO PL Reports;

(g) to cross-examine at the trial the investors who gave evidence to test whether they were retail clients or unsophisticated investors and whether they were misled by any conduct of the appellant, the second respondent or Australian Income Solutions Pty Ltd;

(h) to adduce evidence and to make submissions at trial on the true nature of the investment schemes operated by the defendants and their constituent elements, including the Eleuthera loan, the Naplend loan, the security arrangements and the sustainability of the schemes.

Orders sought

1. The appeal is allowed.
2. Paragraphs 1 and 4 of the order made on 19 April 2021 are set aside
3. In lieu thereof it is ordered:
   (1) The proceeding is dismissed.
   (2) The plaintiff pay the defendants their costs of and incidental to the proceeding.
4. The first respondent pay the appellant and the second and third respondent their costs of and incidental to the appeal.

Appellant's address

The Appellant's address for service is:

Place: Roberts Gray Lawyers, Collins Place, Level 30, 35 Collins Street, Melbourne VIC 3000

Email: rhys@robertsgray.com.au

The Appellant's address is Level 27, 35 Collins Street, Melbourne VIC 3000.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 9 June 2021

Signed by Rhys Roberts, Senior Partner,
Roberts Gray Lawyers
Lawyers for the Appellant

Schedule

No. VID244 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

Appellant	**JAMES PETER MAWHINNEY**
Respondents	
First Respondent	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent:	M101 Nominees Pty Ltd (ACN 636 908 159)
Third Respondent:	Sunseeker Holdings Pty Ltd (ACN 632 076 469)

Date: 9 June 2021