IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2020 02284

IN THE MATTER OF IPO WEALTH HOLDINGS NO 2 PTY LTD & ORS

BETWEEN:

VASCO TRUSTEES LTD as trustee of the IPO Wealth Fund — Plaintiff

v

IPO WEALTH HOLDINGS NO 2 PTY LTD & ORS — Defendants

JUDGE:	Robson J
WHERE HELD:	Melbourne
DATE OF HEARING:	3, 16 and 17 September 2020
DATE OF REASONS:	6 November 2020
CASE MAY BE CITED AS:	Re IPO Wealth Holdings No 2 Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2020] VSC 733

CORPORATIONS – Applications to wind up companies in a managed investment scheme – Under scheme investors acquired units in a trust fund and that fund was lent to companies managed by an investment manager – Unitholders were promised a fixed return much like a deposit account – Scheme not required to be registered under the *Corporations Act 2001* (Cth) – Application by the trustee and provisional liquidators of the companies for winding up of the borrowing companies the on grounds of insolvency and the just and equitable ground – Provisional liquidators' previously appointed to the companies – Findings that companies were badly and irresponsibly managed – Finding that borrower of investment moneys was insolvent – Finding that it was just and equitable to wind up the companies – Orders made to wind up the companies – Consideration of whether receivers should be appointed over trust fund to wind up the fund.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J L Evans QC and Ms C G Rome-Sievers	Madgwicks Lawyers
For the Defendants	Mr M J Galvin QC and Ms N L Papaleo	Thomson Geer
For the Contradictors	Mr S J Maiden QC and Ms F J Hudgson	Altus Lawyers
For ASIC	Dr J P Moore QC with Ms C van Proctor	ASIC
For James Mawhinney	In person	

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HIS HONOUR:

Introduction

1 IPO Wealth is a managed investment scheme. Under the scheme, investors acquired units in the IPO Wealth Fund (the Fund), a unit trust of which Vasco Trustees Ltd (the Trustee) is the trustee. The investors were to receive payments in the nature of interest and be able to withdraw their investment upon the completion of the agreed term. The Fund was marketed as an alternative to a bank deposit. It was only open to investors who were characterised as wholesale investors. The scheme was not required to be registered under the *Corporations Act 2001* (Cth). In reality, many investors were unsophisticated and invested superannuation and retirement funds.

2 Some 180 unitholders invested some $80 million in units issued by the Trustee. These trust moneys were then lent by the Trustee to IPO Wealth Holdings Pty Ltd (the Borrower), a company controlled by Mr James Mawhinney. The Borrower then applied the bulk of the trust moneys to purchase investments held in sixteen companies owned by the Borrower, similarly named but differentiated as IPO Wealth Holdings No 2 through to No 17, and referred to as SPV 2, SPV 3 etc (the SPVs). The Borrower and the SPVs invested the trust money in a range of investments chosen by the investment manager of the Fund, which was IPO Wealth Pty Ltd, a company controlled by Mr Mawhinney (the Investment Manager).

3 The scheme was the brainchild of Mr Mawhinney and was one of several schemes he has in what he grandiosely calls the Mayfair 101 Group. The scheme has failed. The money has been lent and invested in poor investments. The Trustee has called up the trust moneys loaned to the Borrower. The Borrower has failed to repay the moneys due. The Borrower is insolvent. The unitholders stand to lose a great deal of money. On 17 September 2020, I ordered that the Borrower and the sixteen SPVs be wound up and I delivered preliminary reasons for my decision. I reserved the delivery of full reasons. I now do so.

Mismanagement of the funds

4 The mismanagement of the funds invested was extensive. The conduct engaged in by Mr Mawhinney in managing the investments was irresponsible and primarily driven for his own benefit at the expense of the unitholders. It is important to the unitholders, and to regulators and others interested in maintaining a fair and properly supervised investment market, that I explain in some detail the misconduct engaged in by Mr Mawhinney which justified the winding up of the companies, and the disastrous effects of his misconduct on the unitholders in this scheme. Hopefully, this catastrophe can be prevented from happening again with better regulation of managed investment schemes that are not required to be registered. Without purporting to address the regulation that should be considered, the defects in this scheme suggest that they should be supervised by a regulator to ensure proper accounts are kept and audited and that the trustee is provided with proper valuations of the scheme investments and with proper reports of the scheme's performance.

The applications

5 At the hearing, I heard and determined applications by the Trustee and the provisional liquidators of the IPO Wealth Group companies, Messrs Hamish MacKinnon and Nicholas Giasoumi, for the winding up of the IPO Wealth Group companies on the ground of insolvency and on the just and equitable ground. The IPO Wealth Group comprises the Borrower and the SPVs.

The IPO Wealth scheme

6 The Fund was promoted by Mr Mawhinney. It was extensively advertised and potential investors were provided with an information memorandum. Investors nominated the 'target income return' they would seek to achieve from a range of investment options. These were fixed returns. The target income varied according to the term of the investment. The greater the target return, the longer the funds had to be invested, although the Trustee retained a right to refuse withdrawal. Investors were informed they could expect to receive regular income payments generated through investment of the trust moneys. There was a maximum an investor could

earn but not a minimum amount. No income was guaranteed.

7 The Trustee held the Fund and appointed the Investment Manager to select investments to be made with the trust moneys. At the Investment Manager's direction, the Trustee lent the entirety of the trust moneys to the Borrower. This loan is the sole investment of the Fund. Both the Investment Manager and the Borrower are wholly owned by Online Investments Pty Ltd, a company which in turn is wholly owned by Mr Mawhinney. Mr Mawhinney was the guiding mind of the Investment Manager and the Borrower.

8 The Borrower advanced the loan moneys to the SPVs. The Borrower held all the shares in each of the SPVs. Each SPV invested the loan moneys in a particular asset, although the Borrower ultimately held some scheme assets directly. In practice, Mr Mawhinney assumed responsibility for making and managing the investments made by the Borrower and the SPVs. In general, the scheme funds were invested in private equity investments. Investments were not made in listed equities or liquid investments.

9 The Trustee remains as trustee of the Fund. The Trustee has agreed to wind up the trust fund, and has taken the necessary steps to set in train the winding up of the Fund. I will deal later with the suggestion by ASIC that I appoint a receiver and manager to the Fund, and effectively remove the Trustee from managing and winding up the Fund.

The structure of the scheme

10 By a constitution dated 17 March 2017 (the constitution), the Trustee declared the IPO Wealth Fund unit trust.

11 The constitution contemplated that the Fund may or may not form part of a managed investment scheme under Chapter 5C of the *Corporations Act*. The scheme was not registered, and was not required to be. The constitution provided that in the event of registration, the Trustee was to be the responsible entity.

12 The constitution provided for units in the Fund to be managed as follows. The Trustee had the power to offer units in the Fund to investors for subscription or sale. Unitholders could make a request to withdraw their funds to realise a specified amount. Where the Fund was not a registered scheme, the Trustee had an absolute discretion to deny withdrawal of units from the Fund. If approved, a withdrawal would render the withdrawing unitholder a creditor of the Fund.

13 The constitution also afforded the unitholders certain powers. The Trustee could convene a meeting of unitholders, at which the unitholders could vote to, among other things, retire the Trustee in certain circumstances, and to amend the constitution.

14 The constitution provided that the purpose of the Fund was the acquiring and holding of investments, to be selected by an investment manager in accordance with parameters which were set out in the 'offer documents'. 'Offer documents' was defined to mean any document offering an interest in the Fund. As it was, the investment manager nominated was IPO Wealth Pty Ltd. By an investment management agreement dated 23 March 2017, the Trustee appointed IPO Wealth Pty Ltd as investment manager.

15 The constitution did not define the term 'investment manager'. It did not specify remuneration for any investment manager appointed.

16 The constitution also provided for the payment of certain expenses out of the Fund. The Trustee was given the power to pay out of the Fund the fees and expenses payable to any investment manager, as well as the costs and expenses incurred in the establishment and initial promotion of the Fund. The Investment Manager was also given a right of indemnity out of the trust assets in respect of any 'indemnified matter', a term defined to include all expenses, liabilities, costs and any other matters in connection with the Fund.

17 Taken alone, the constitution of the Fund provided little insight into the ultimate form the scheme would take. The details of the scheme were given in an information memorandum, which constituted an offer document, as referred to above. Several

information memorandums were produced throughout the life of the scheme.

18 The information memorandums provided that the scheme was only open to 'qualifying investors', which included investors who invested $500,000 or more, or who had at least $2.5 million in net assets, or an average income of at least $250,000 over two years.

19 The information memorandums dated 27 March 2017 and 8 May 2017 each identified the 'investment objective' of the scheme as providing investors with an attractive target income return by investing in a range of corporate finance transactions. They stated that the investments were expected to include debt finance investments, equity investments, being the purchase of shares in companies, and may include asset purchases. The information memorandums noted that these investments would be in 'some instances' investments in related parties of the Investment Manager.

20 A later information memorandum dated 18 December 2017 provided that the Fund monies will be loaned to entities related to the Investment Manager. The most recent information memorandum placed in evidence, dated 1 March 2019, stated that the investment strategy of the Fund was to lend funds to the Borrower or related entities, who would then invest in what are described as 'underlying assets'.

21 The provisional liquidators have not been able to identify any asset purchases. All investments appear to be debt finance or equity finance. The information memorandum said that a security interest would likely be taken subject to negotiation with the investee company. As discussed below, the provisional liquidators have found that the practice of Mr Mawhinney was not to take security, and that where security was taken, it was not registered as it should have been by Mr Mawhinney.

22 Under the heading 'Provision of debt finance' the March 2017 memorandum said that the Investment Manager had access to corporations in Australia, Asia and abroad seeking debt financing for their business activities. It was said that these corporations were typically experiencing a period of high growth, needed capital to fund their expansion plans, and had already exhausted traditional funding sources such as

banks. The memorandum said that the Fund would provide debt finance (loans) to these corporations subject to fulfilling the Investment Manager's due diligence requirements. A rate of return of 15% per annum and above was said to be expected to be charged for this form of finance to support the target income returns to unitholders.

23 The March 2017 information memorandum stated that the debt financing transactions provided the Fund with regular liquidity events due to the fast turnaround of these investments, plus the ability to generate monthly cash flow when interest payments were required at regular intervals. The provisional liquidators found, however, that a feature of the investments actually made were that they tended to be illiquid and long-term investments, contrary to what was foreshadowed in the information memorandum provided to investors. The provisional liquidators found that generally no, or occasionally very limited, interest payments were made on loans. This was largely due to the fact that the companies who were borrowers did not have the capacity to repay the money or even make interest payments.

24 By a loan facility agreement dated 21 April 2017, the trust moneys were lent to the Borrower at an interest rate of 10% per annum, calculated and accruing daily and payable monthly. The loan facility agreement was executed alongside a general security agreement also dated 21 April 2017, which gave the Trustee a general security over the assets of the Borrower, which included the shares held by the Borrower in the SPVs. As mentioned above, this secured loan was the sole investment held by the Fund. The Trustee held no security over the assets acquired by the SPVs with the unitholders' funds. The loan does not provide the Trustee with any interests in the profits of investments subsequently made with the loan moneys.

25 The Borrower went on to advance the loan moneys to the SPVs. Sixteen substantially identical facility agreements between the Borrower and each of the sixteen SPVs were executed. Each facility agreement was on 10-year term with interest at 12% per annum. Each facility agreement had a limit of $20 million. Interest payments were to be made annually. Events of default were defined but there was no provision as to

what was to happen in the event of default. The loan agreements provided that repayment of the loans could be made by the borrower entity issuing shares in itself. This is an extraordinary provision, as it essentially meant the loans did not have to be repaid. Issuing further shares to the Borrower would be of little use as the Borrower already owned 100% of the SPVs. Mr Mawhinney contended that the moneys advanced to the SPVs were not loans but was consideration for new shares in the SPVs. The provisional liquidators contended that as the SPVs were already wholly owned by the Borrower, purchasing shares in the SPVs would have been of no benefit to the Borrower.

26 In any event, as mentioned above, the provisional liquidators have found executed loan agreements between the Borrower and each of the SPVs. These were executed by Mr Mawhinney as both a director of the Borrower and the relevant SPV.

27 Mr Mawhinney claimed the loan agreements were never acted upon, and all the investments were equity. The provisional liquidators have not been able to find any documents to support this contention by Mr Mawhinney. Also, there is no evidence of any dividends being declared by the SPVs to enable income to be distributed to their investors. During Mr Mawhinney's public examination, in view of his claim that no loans were made, he was asked why the loan agreements were executed by him. He answered that he could not recall. Mr Mawhinney said that the loan agreements may have been entered into as the money had been lent, but that was not how they were subsequently treated. Mr Mawhinney was the sole director of all the IPO Wealth Group companies. In substance, he said that although they were originally recorded as loans and supported by formal loan documents, he subsequently decided that they were not loans but the purchase of shares in the SPVs.

28 Ultimately, Mr Mawhinney said that he entered into the loan agreements so that if they should need to treat any of the money as having been lent, they could rely on the loan documents. The provisional liquidators said that according to Mr Mawhinney, the loan agreements were merely a matter of convenience and he could call them loans if it became convenient to do so for some reason, or as happened in his examination,

it suited him to call them equity investments.

29 Under the constitution, the Trustee was given wide powers to carry out business anywhere in the world with the funds received from the unitholders. The Trustee was given the power to advance and lend moneys to any persons; to apply for listing of the Fund on any stock exchange; to invest in any form of investment in any region or market; to share risk and returns with any other person or trust; and to appoint any person as its delegate to perform any act, carry out any obligation, or exercise any power that the Trustee might make under the constitution. As it was, the only investment made by the Trustee was to lend the whole of the trust moneys to the Borrower. Accordingly, the Trustee had no power to select, vet, approve or disapprove of any of the investments ultimately made with the trust moneys.

30 The sole asset of the Fund valued under a provision of the constitution was the loan to the Borrower. The constitution did not provide for valuation and reporting obligations in relation to the assets of the Borrower and the SPVs. Some valuation and reporting obligations to the Trustee were placed on the Investment Manager and the Borrower under the terms of the loan agreement, the general security agreement, and the investment management agreement. Whether by convention or under these agreements, an arrangement was reached where the Trustee received regular 'asset summaries'.

31 As mentioned above, Online Investments Pty Ltd, one of Mr Mawhinney's companies, was the sole shareholder of the Borrower, and the Borrower owned all the shares issued by the SPVs. This was a key feature of the scheme, so far as Mr Mawhinney was concerned. Any surplus profit made by the SPVs over the obligations of the Borrower to pay interest for unitholders and to repay withdrawn funds for unitholders would accrue to Mr Mawhinney. On the other hand, if there was any deficiency in interest payments or the repayment of unitholders, Mr Mawhinney would not be liable to make up any deficiency. As will be discussed below, this may explain the extraordinarily risky investments chosen by Mr Mawhinney. If they came off, he stood to make a good deal of money from the use of the unitholders' moneys.

On the other hand, if the investment did not come off, he was not exposed to any loss personally. Tails he wins, heads unitholders lose.

Background to the present applications

32 In April 2020, the Trustee received a report from the Borrower that showed a drop in the value of certain scheme assets. In particular, substantial devaluations were reported for two assets of the scheme: an investment in Accloud PLC (Accloud) and one of three investments in Paymate India. The Trustee requested an explanation for the drop in value. Mr Mawhinney's response did not reassure them. Subsequently, in May 2020, the Borrower defaulted on an interest payment due to the Trustee under the loan. Discussions between the Trustee and the Borrower were fruitless. Accordingly, on 22 May 2020, the Trustee exercised its right under the general security agreement to appoint Messrs Hamish MacKinnon and Nicholas Giasoumi, registered liquidators practising as Dye & Co Pty Ltd, as receivers and managers over the property and assets of the Borrower.

33 The Trustee also applied to this court under s 37(1) of the *Supreme Court Act 1986* (Vic) for receivers and managers to be appointed over the assets and undertaking of each of the SPVs. On 22 May 2020, I appointed Messrs MacKinnon and Giasoumi as receivers and managers over the property and assets of each of the SPVs and ordered that the books and records of the SPVs be delivered up to the receivers and managers. I ordered that the receivers report to the court by 28 May 2020 on the concerns raised by the Trustee.

34 On 29 May 2020, the matter came back before me. On that day, I received into evidence a report of Messrs MacKinnon and Giasoumi on the affairs of the SPVs prepared pursuant to my order of 22 May 2020. I also heard submissions from unitholders. While I did not treat those submissions as evidence, they gave the unitholders the opportunity to have their say.

35 On 29 May 2020, I also joined Mr Mawhinney as a party in this matter, with a view to ensuring that a contradictor was present to oppose the applications. At that time,

Mr Mawhinney was represented by counsel.

36 Subsequent to the hearing before me, by an interlocutory process dated 29 May 2020, the Trustee sought that the Borrower be joined as 17th defendant to the proceedings. The Trustee also sought an order that the Borrower be wound up on the just and equitable ground, and that Messrs MacKinnon and Giasoumi be appointed jointly and severally as provisional liquidators of the Borrower.

37 Also subsequent to the hearing before me, by an interlocutory process dated 29 May 2020, Messrs MacKinnon and Giasoumi, as receivers and managers of the SPVs, sought an order that each of the SPVs be wound up on the just and equitable ground, and that they be appointed jointly and severally as provisional liquidators of the SPVs.

38 On 22 June 2020, the Borrower's sole shareholder, Online Investments Pty Ltd, appointed Barry Wight, Rachel Burdett and Darryl Kirk of Cor Cordis as voluntary administrators of the Borrower.

39 On 23 June 2020, the court received a second report from Messrs MacKinnon and Giasoumi on the affairs of the Borrower and the SPVs.

40 On 29 and 30 June 2020, I heard the applications for the appointment of provisional liquidators of the Borrower and the SPVs. At this hearing, Mr Mawhinney was represented by counsel, who opposed the applications.

41 At the conclusion of the hearing, I delivered short oral reasons and reserved giving fuller reasons. I ordered that Messrs MacKinnon and Giasoumi be appointed as provisional liquidators of the Borrower and the SPVs, pending the hearing of the winding up applications. I granted leave pursuant s 532(2) of the *Corporations Act* to allow Messrs MacKinnon and Giasoumi to consent to act as provisional liquidators of both the Borrower and the SPVs. I also ordered that the voluntary administration of the Borrower thereby end, and that the Borrower be joined as 17th defendant to this proceeding. My reasons for doing so were published on 9 September 2020 in *Re IPO*

Wealth Holdings No 2 Pty Ltd.[1]

42 On 21 July 2020, Messrs MacKinnon and Giasoumi, now provisional liquidators of the Borrower and the SPVs, applied for a public examination of Mr Mawhinney. A public examination of Mr Mawhinney took place on 17, 19, and 20 August 2020.

43 On 27 August 2020, the provisional liquidators produced a third report on the affairs of the Borrower and the SPVs.

44 On 31 August 2020, the matter came back before me for directions. I fixed hearing of the winding up applications for 3 September 2020. At this directions hearing, Mr Mawhinney was self-represented.

45 At the hearing, the court was informed that Mr Mawhinney was canvassing votes from unitholders with a view to replacing the Trustee and rearranging the assets and structure of the scheme. The results of Mr Mawhinney's canvassing indicated significant concern among unitholders as to the effect of the winding up, and a desire to explore alternatives to the winding up process.

46 Prior to the hearing of the winding up applications on 3 September 2020, Mr Mawhinney in his capacity as a party to the proceedings, made written submissions to the court.

47 At the winding up applications on 3 September 2020, I informed the parties that, in light of unitholders' concerns, I intended to appoint a contradictor to represent the unitholders' interests at the winding up applications. I found that Mr Mawhinney would not be an adequate contradictor, especially as he was no longer represented by counsel. I expressed the view that Mr Mawhinney's interests were not in line with those of the unitholders. I adjourned the hearing of the winding up applications until 16 September 2020, to allow for the contradictor to be appointed and to prepare for the hearing. I asked ASIC, who was represented by counsel before me on 3 September 2020, to nominate three senior counsel who they considered would be appropriate to

[1] [2020] VSC 549.

act as contradictor, which ASIC did. ASIC sought to be excused at this stage from the further hearing of the winding up applications.

48 On 4 September 2020, I appointed Mr S J Maiden, one of Her Majesty's counsel, and Ms F J Hudson of counsel as contradictors in this proceeding. On 7 September 2020, I appointed Altus Lawyers as instructing solicitors to assist the contradictors.

49 By interlocutory process dated 4 September 2020, the Trustee applied for an injunction restraining Mr Mawhinney from communicating with unitholders to garner support for a proposed restructure of the IPO Wealth scheme. On 7 September 2020, I heard the application and granted an interim injunction until the hearing of the winding up applications. In substance, I found that Mr Mawhinney had misused a confidential register of unitholder contact details and made misleading representations to unitholders about the state of affairs of the scheme.

50 The winding up applications came on for hearing on 16 and 17 September 2020. At the hearing, I received into evidence an electronic court book, a supplementary court book, and a third report of Messrs MacKinnon and Giasoumi as to the affairs of the Borrower and the SPVs. The supplementary court book included the transcript of the public examinations of Mr Mawhinney.

51 At the hearing, both the Trustee and the provisional liquidators sought leave to amend their pleadings to seek winding up on the ground of insolvency, in addition to the just and equitable ground already pleaded. I granted leave for the amendments to be made.

The reports of the provisional liquidators

52 As mentioned above, the provisional liquidators have provided three reports to the court. The first two reports were made as receivers and managers, on 28 May 2020 and 23 June 2020. The third report, made as provisional liquidators, was provided to the court on 27 August 2020. The third report was made consequent to the public examination of Mr Mawhinney. The provisional liquidators submitted that the three reports are evidence given by an officer of the company as to the company's affairs,

and in most cases comprise of what was found in the books and records of the relevant companies.

53 At the hearing, the provisional liquidators relied upon six affidavits of Hamish MacKinnon, as receiver and manager and then provisional liquidator of the IPO Wealth Group companies, sworn on 28 May 2020, 11 June 2020, 19 June 2020, 24 June 2020, 1 September 2020 and 10 September 2020. The provisional liquidators also relied upon the affidavits of Craig Mathew Dunstan, an officer of the Trustee, sworn on 22 May 2020, 29 May 2020, 18 June 2020 and 2 September 2020. They also relied upon an affidavit of Robert John Storai, an accountant acting for a unitholder, sworn 2 September 2020.

The prospects of the scheme and the interests of unitholders

54 As mentioned above, some $80 million worth of units have been purchased in the Fund. In his affidavit of 2 September 2020, Mr Dunstan deposed that the Fund held cash of $4,310,417.87 in its operations account, and $2,323,414.23 in its capital protection reserve account. The main asset of the Fund was the loan of $79,062,394.02 to the Borrower, under which the Borrower was in default. At the date of the hearing, the provisional liquidators had recovered $751,018.45 from assets of the Borrower and SPVs.

55 In addition to these assets, the provisional liquidators' report of 27 August 2020 reported that they had formed a preliminary view that several causes of action may exist as assets of the scheme. Relevantly, these included recovery actions in relation to a loan of some $12 million to 101 Investments Ltd and a loan of $3,266,204 to Mayfair 101 Ltd, both of which are discussed below.

56 The provisional liquidators also reported that claims may be made against Mr Mawhinney under Part 5.7B of the *Corporations Act*, which provides for recovering property or compensation for the benefit of creditors of an insolvent company. They also reported that causes of action may exist against Mr Mawhinney for breaches of his directors' duties and misleading or deceptive conduct, which they reported may

be accompanied by applications for pecuniary penalties, relinquishment orders and/or compensation orders pursuant to Part 9.4B of the *Corporations Act*. However, the provisional liquidators emphasised that they had extensive investigations yet to complete and had not formed a final view as to the claims that might be available to them.

57 The provisional liquidators reported that it was presently their view that a full return to creditors was unlikely.

58 The contradictors submitted that the central focus of the court's inquiry in the winding up applications should be the interests of the unitholders. They submitted that the circumstances of the unitholders greatly varied. Some are substantial investors whose units represent part of a larger portfolio. Some are retirees who invested their life savings in the scheme. Some were reliant on their investments to provide income on which they or loved ones depended for their day-to-day living expenses. The contradictors submitted that the turmoil of the Fund's collapse has taken a significant emotional and even physical toll on many unitholders.

59 The contradictors submitted that, from a practical perspective, the only real creditors of the Borrower and the SPVs were the unitholders. They submitted that the Borrower was only insolvent because it owed money to the Trustee, and that the unitholders were beneficiaries on whose behalf the Trustee held the debt. Further, they submitted that if the SPVs were insolvent, they would only be insolvent because they had liabilities to the Borrower to repay moneys that were originally borrowed from the Trustee.

60 The contradictors submitted that the unitholders had a significant interest in the future of the scheme. The contradictors submitted that many of the unitholders had everything at stake in the scheme, in circumstances where the units in the scheme were marketed as an alternative to term deposits. The contradictors submitted that many unitholders invested in the scheme as they thought their capital was relatively secure and that they could get a higher rate than they would on a bank deposit.

61 Accordingly, the contradictors submitted that, insofar as the applications rested on the just and equitable ground, it could only be just and equitable to wind up the Borrower and the SPVs if it was in the unitholders' interests to do so.

62 With that in mind, I have been asked to consider two proposals for the future of the scheme. The Trustee and the provisional liquidators support the winding up of the scheme. The contradictors have considered alternatives to winding up the scheme, largely as proposed by Mr Mawhinney, as well as the possibility of adjourning the winding up applications to allow further consideration of the alternatives. Ultimately, the contradictors did not oppose the winding up applications, and agreed that the appropriate course was to wind up the Borrower and the SPVs.

Relevant principles as to winding up

63 Section 461(1)(k) of the *Corporations Act* provides that the court may order the winding up of a company if the court is of the opinion it is just and equitable that the company be wound up.

64 The Trustee made the following submissions as to the applicable principles for winding up on the just and equitable ground. These principles were not in dispute:

(1) 'The classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case'.[2]

(2) '[A] company may be wound up where there is "a justifiable lack of confidence in the conduct and management of the company's affairs" and thus a risk to the public interest that warrants protection'.[3]

(3) '[A] lack of confidence may arise where, "after examining the entire conduct of the affairs of the company" the Court cannot have confidence in "the

2 *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* (2013) 93 ACSR 189, 194 [19].

3 Ibid 195 [20], citing *Loch v John Blackwood Ltd* [1924] AC 783, 788.

propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company"'.[4]

(4) '[A] risk to the public interest may take several forms. For example, a winding-up order may be necessary to ensure investor protection, or where a company has not carried on its business candidly and in a straightforward manner with the public. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law'.[5] Such an order would also be appropriate where the corporation has acted fraudulently or entered into sham transactions.[6]

(5) '"[A] stronger case might be required where the company was prosperous, or at least solvent". Solvency, however, is not a bar to the appointment of liquidators on the just and equitable ground, particularly where there have been serious and ongoing breaches of the *Corporations Act*.'[7] Indeed a case in which there have been numerous contraventions of the *Corporations Act* is 'precisely the situation where a solvent company should be wound up.'[8]

65 As to winding up on the ground of insolvency, a company is insolvent under s 95A of the *Corporations Act* where it is unable to pay all of its debts as and when they become due and payable. An insolvent company may be wound up on application by an order of this court under s 459A of the *Corporations Act*.

66 The provisional liquidators referred to several matters in support of their applications to wind up the Borrower and the SPVs on the ground of insolvency and on the just

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4 *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* (2013) 93 ACSR 189, 195 [21], citing *Galanopoulos v Moustafa* [2010] VSC 380, [32].

5 Ibid 195 [23] (citations omitted).

6 *ASIC v International Unity Insurance Pty Ltd* [2004] FCA 1059, [139].

7 *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* (2013) 93 ACSR 189, 195 [24] citing *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506, [96] (citations omitted). See also *ASIC v ABC Fund Managers* (2001) 39 ACSR 443, 470-472 [124]–[130].

8 *ASIC v Planet Platinum (in prov liq)* [2015] VSC 682, [95].

and equitable ground. The Trustee largely adopted the provisional liquidators' submissions.

Solvency of the Borrower

67 The provisional liquidators submitted that there is no question that the Borrower is insolvent and should be wound up as a result. The evidence establishes that the Borrower had, as at 2 June 2020, a liability to the Trustee for an amount of $79,062,394.02. On 3 June 2020, the Trustee made a formal demand for payment of that debt. The demand was not met by the Borrower nor any explanation given for the non-payment of the debt. Mr Mawhinney does not contest that the amount owing by the Borrower to the Trustee is due and cannot be repaid.

68 The provisional liquidators contend that the appointment of administrators to the Borrower by Mr Mawhinney on 22 June 2020 establishes that he had formed the view that the Borrower was insolvent.

69 In their report of 27 August 2020, the provisional liquidators concluded that, based on their investigations of the financial position of the SPVs, the SPVs will not realise sufficient funds from their investments to enable the Borrower to pay back its debt to the Trustee. They reported that 'observable data' of credit impairment was present for each of the scheme's debt investments, and that only one of the equity investments has been returning dividend income.

Solvency of the SPVs

70 The provisional liquidators concluded from their examination of the financial position of the SPVs that most are insolvent. Many SPVs owe substantial sums to the Borrower and have no readily realisable assets with which to satisfy those debts.

71 Mr Mawhinney deposed that the relationship between the Borrower and the SPVs is an equity relationship. He deposed that while loan agreements exist between the Borrower and the SPVs, these loans have not been drawn. Mr Mawhinney made similar claims at his public examination. He asserted that the advance of moneys from

the Borrower to the SPVs was not lent but was paid for with 'unissued share capital'.

72 As discussed above, the provisional liquidators produced loan agreements between the Borrower and each of the SPVs that would have governed all moneys advanced by the Borrower to each of the SPVs. They contend there is no evidence to support Mr Mawhinney's claim that the moneys advanced by the Borrower to each of the SPVs was anything but a loan. The provisional liquidators said that there was no evidence of any shares being issued in the SPVs in exchange for the moneys advanced.

73 As the SPVs were already wholly owned by the Borrower, the suggestion that the Borrower would have accepted further shares in the SPVs, when it was obliged to have funds available to repay the Trustee for the moneys advanced by unitholders, is untenable. In any event, the existence of the loan agreements between the Borrower and each of the SPVs satisfies me that the unitholders' moneys were lent by the Borrower to the SPVs.

74 The provisional liquidators found that what had been recorded as loans were sought to be treated as equity investments. The provisional liquidators contended that the IPO Wealth Group made a decision to eliminate intercompany loans and record them as equity investments at a time when the liquidity and solvency of the group emerged as a concern. The provisional liquidators submitted that Mr Mawhinney's characterisation of the payments as equity investments was made in an attempt to defeat claims that the SPVs are insolvent.

75 It is not necessary for me to decide whether each of the SPVs was insolvent, as the provisional liquidators contend. They each formed an essential part of the IPO Wealth scheme, which has failed. Investors are unable to withdraw their funds from the Fund. Interest payments have ceased. For the reasons discussed below, I find that the Borrower and each of the SPVs should be wound up on the just and equitable ground.

Accounting irregularities

76 The provisional liquidators found that the accounts of the Borrower and the SPVs kept by Mr Mawhinney did not correctly record and explain their transactions and

financial position and performance, and did not enable true and fair financial statements to be prepared and audited within the meaning of s 286 of the *Corporations Act*.

77 As discussed in *Re IPO Wealth Holdings No 2 Pty Ltd*,[9] some of the SPVs' accounts include unissued shares as an asset of the Borrower. Treating unissued shares as an asset of the relevant company is a concept unknown to accounting. Unissued shares cannot constitute an asset of the company. Only issued shares can be accounted for as part of shareholders' funds, and if issued, should be matched by a corresponding increase in assets or a reduction in liabilities.

78 On 1 June 2020, the Pinnacle Advisory Group Pty Ltd (Pinnacle Group) ceased acting as accountants for the IPO Wealth Group. They were not replaced by any other accountants. Thus from 1 June 2020, the accounts were not kept by qualified accountants. At his public examination, Mr Mawhinney sought to blame his former accountants for some of the deficiencies in the accounts. He gave evidence that, in some instances, journal entries were made by Pinnacle Group without his instruction. The Pinnacle Group did not appear in the matters before me. I make no findings on the Pinnacle Group's conduct.

79 The provisional liquidators found that the accounts of the Borrower and the SPVs for the financial years ended 30 June 2018, 2019 and 2020 had not been completed and remained in draft form. As such, they had not been audited.

80 Mr Mawhinney gave evidence at his public examination that the Borrower and the SPVs largely operated from one bank account. According to the provisional liquidators, many of the SPVs did not have their own bank accounts. Accordingly, the provisional liquidators found that they could not identify transactions between the Borrower and the SPVs by reference to bank statements. The transactions would be effected by mere book entries, if at all.

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9 [2020] VSC 549, [68].

81 Mr Mawhinney deposed that the primary accounting document for the Borrower and the SPVs was a quarterly investment portfolio summary, also known as an asset summary, which is an Excel spreadsheet. The spreadsheet purported to record asset values of the assets held by the Borrower and the SPVs. The provisional liquidators found that the values recorded were without foundation or were misleading, and that the values were unsupported by working papers or source material.

82 Of course, a spreadsheet setting out asset values does not provide any information as to the income, if any, being generated by these investments. As mentioned above, the IPO Wealth Group had lost their accountants. The provisional liquidators were not able to identify what funds were received from investments or which investments could have been used to facilitate payments of interest to unitholders. As mentioned above, there was generally only one bank account kept for the group and the provisional liquidators have been unable to find any accounting records that identify the transactions made by each of the SPVs through the common bank account.

83 The provisional liquidators found that documentation recording the acquisition of investments by the companies was inadequate. Further they found that documents purportedly recording ownership of shares in companies did not reconcile with the share registers of those companies. The provisional liquidators found that records kept by the Borrower and the SPVs did not record whether convertible notes held as investments had or had not been converted to equity. They found a lack of up-to-date information regarding a number of investments, and a lack of consistent information as to when investments were actually made.

Difficulties valuing assets

84 The provisional liquidators found several instances where the valuation placed by Mr Mawhinney on scheme assets was inaccurate or unreliable. The provisional liquidators found that there was no readily ascertainable market value for many scheme assets, unless the assets were offered for sale. Many of the scheme shareholdings are not listed or traded in an active market and are therefore difficult to value.

85 Mr Mawhinney prepared a Report on Company Activities and Property (ROCAP) for the Borrower, which claimed $21,255.73 was owed by the Borrower to Australian Income Solutions. Investigations by the provisional liquidators have ascertained that a liability of $284,011 is in fact owed by Australian Income Solutions to the Borrower, for which a demand has been made by the provisional liquidators. The provisional liquidators reported that no response to that demand has been made.

86 Mr Mawhinney declared in the ROCAP for the Borrower that it held an investment in TF Global Markets (Aust) Pty Ltd worth $1,624,295. Mr Mawhinney, however, gave evidence at his public examination that at the time of declaring the ROCAP, he had already entered into an agreement to redeem those shares for $800,000. Evidently, the $800,000 cost price of the asset is less than half of the value of the shares as claimed in the ROCAP. The provisional liquidators reported that interim dividends of $28,322 were received from these shares.

87 Mr Mawhinney reported in the ROCAP for the Borrower that it held an investment in Paymate India valued at $6,633,813. The company is not listed. When asked in his public examination how he reached valuations for unlisted equity investments, Mr Mawhinney gave a variety of answers, claiming that in many cases the valuation is based on his knowledge of the last price paid for the shares. In the case of Paymate India, he claimed it was soon to be listed. It remains unlisted. The provisional liquidators reported that their attempts to value the Paymate India shares disclosed a loss of 78,550,746 rupees on revenues of 2,360,062,044 rupees in that company's most recent financial statements. The provisional liquidators did not submit that this meant the value afforded to the shares was inaccurate, but did give this as an example of the extreme difficulty involved in valuing the assets held by the Borrower and the SPVs.

88 Mr Mawhinney prepared a ROCAP for SPV 4. Mr Mawhinney gave an estimated asset value of $395,629.26 for the shares held by SPV 4 in 'Laundromapp Pty Ltd'. The provisional liquidators found that SPV 4 held 1,000,000 shares in the similarly named Laundromapp Holdings Ltd (Laundromapp). At his public examination, Mr Mawhinney said that he believed this valuation was based upon 'the most recent

share prices' of Laundromapp, and that he recalled receiving an email from Laundromapp advising him of the price of a recent investment. The provisional liquidators reported that Laundromapp advised them that the price for its most recently issued shares, on 9 December 2019, was $0.10c per share. Based on this share value, the value of the 1,000,000 shares held by SPV 4 would be $100,000, not $395,629.35.

89 Mr Mawhinney prepared a ROCAP for SPV 7. SPV 7 holds an investment in Bright LED Ltd (Bright LED). Mr Mawhinney said in his examination that Bright LED was also known as Bright Innovations. Mr Mawhinney described it as a smart city technology company based out of Haifa in Israel. This asset was valued in the asset summary as $1,106,685. In his ROCAP, Mr Mawhinney valued the asset at $682,039. The provisional liquidators tendered an agreement between Bright LED and SPV 7 providing for the issue of convertible notes reflecting a $600,000 investment. The provisional liquidators reported that an additional $82,039.52 had been added to this value by Mr Mawhinney in capitalised expenses. The provisional liquidators reported that Bright LED has been totally unresponsive to correspondence sent by the provisional liquidators to date and the company is not paying interest under the agreement. Mr Mawhinney acknowledged in his public examination that he was not in a position to value the assets held in Bright LED. He also acknowledged that as the company was not paying interest, there was potentially reason to suspect it may not be able to pay its debts. The provisional liquidators are concerned that Bright LED may not be able to repay the loan or current outstanding interest.

90 Mr Mawhinney declared in a ROCAP for SPV 11 that it held 7,959,380 shares in Liven Pty Ltd (Liven), with an estimated asset value of $5,200,015. The provisional liquidators reported that on 24 June 2020 the CEO of Liven, Mr William Wong, informed them that SPV 11 holds 131,560 ordinary shares, for which the Borrower paid $525,000. Mr Wong also informed the provisional liquidators that SPV 11 holds a $2.5 million convertible note, which the provisional liquidators estimate would convert to 591,000 Class A preferential shares. The provisional liquidators have not

yet been able to determine the reason for the discrepancy between the number of shares declared by Mr Mawhinney in the ROCAP and the number of shares referred to by Mr Wong.

91 Mr Mawhinney reported in a ROCAP for SPV 15 that it held $2,062,500 in equity in Adbit Pty Ltd (Adbit). The provisional liquidators reported that an ASIC search did not disclose any interest held by SPV 15 in Adbit. The provisional liquidators reported that Adbit is unlisted and that the investment is illiquid.

92 Mr Mawhinney declared in the ROCAP for SPV 15 that it also held a $1,491,258.51 debt in Adbit. At his public examination, Mr Mawhinney gave evidence that $700,000 was advanced to Adbit, with a repayable amount of two times face value. A draft binding term sheet between SPV 15 and Adbit, as well as another entity, Green Horse (Aust) Pty Ltd, was put in evidence. That term sheet provided for $1,000,000 to be paid to Adbit in three tranches. The provisional liquidators reported that $700,000 appears to have been advanced to Adbit under that term sheet. The provisional liquidators reported that on 3 August 2020, the solicitors for Adbit wrote to the provisional liquidators advising that their 'preliminary view is that the $700K advance from IPO is not repayable.' The provisional liquidators are concerned that Adbit will not repay the debt.

93 The examination of the above SPVs is not intended to fully deal with the reports on the SPVs made by the provisional liquidators but is intended to indicate the type of problems and inconsistencies that the provisional liquidators found in the accounts and affairs of the SPVs.

Improper capitalisation of expenses

94 The provisional liquidators found that expenses have been wrongly capitalised to inflate the value of scheme assets. The provisional liquidators referred to a document of the Borrower from February 2019 titled 'IPO Wealth Holdings and related entities: Investment expenses allocation policy.' Relevantly, this policy provided that

> Investment Expenses are incurred by related parties to grow the value of each SPV investment. The expenses are allocated by Eleuthera back to each SPV in a way that fairly represents the proportion of time and effort applied to each investment in growing its value. As such the Borrower has determined that the most appropriate method for the allocation of the expenses incurred is as a % of total value based on the latest fair value of each investment. Fair value estimations are undertaken quarterly and these values form the basis of the monthly allocation.

95 Eleuthera Group Pty Ltd (Eleuthera) is a treasury entity for the Mayfair 101 Group. It is not part of the IPO Wealth Group.

96 The investment expenses allocation policy also provided that

> The Borrower may elect to allocate expenses to specific SPV's [sic] if it considers a specific allocation is required in order to more accurately reflect the true expenses associated with a specific investment. This may be beneficial to enable the Borrower to more accurately measure the return on investment achieved across the portfolio.

97 As regards the references to 'fair value estimations' of investments in the investment expenses allocation policy, the provisional liquidators found that it is not apparent how valuations of assets were reached in circumstances where many assets have had their value improperly inflated through capitalisation of expenses.

98 The provisional liquidators submitted that the effect of this policy was that expenses incurred on behalf of the IPO Wealth Group were allocated across the SPVs in proportion to the estimated value of their respective investments. They submitted that where an amount of expenditure had been allocated to a particular SPV, the purported value of its assets in the balance sheet was increased *pro tanto*.

99 The provisional liquidators submitted that the investment expenses allocation policy did not explain the basis for the decision to allocate expenses in this way. At the public examination, Mr Mawhinney said that in accordance with the policy, expenses were allocated back to each SPV in a way that fairly represented the portion of time and effort applied to the SPV. He was unable to comment on whether this meant that the value of any expense could be added dollar for dollar to the value of the asset in relation to which the expense was incurred.

100 The provisional liquidators submitted that expenditure does not necessarily increase the value of an asset, particularly where the expenditure is in the nature of advertising and marketing expenditure and the assets of the company are equity or debt investments. They submitted that the expense allocation policy, as it was put into practice, artificially inflated the value of the investments. I accept this submission. The investment expense allocation policy maintained by Mr Mawhinney contained no logical foundation for increasing the value of investments by expenses that had no effect on the value of the investment.

101 The provisional liquidators found a particularly egregious instance of the improper capitalisation of expenses in the case of SPV 17. Its sole investment was in M12 Global Ltd (M12 Global). The sole director of M12 Global is Mr Mawhinney.

102 The accounts of SPV 17 record the total value of the investment in M12 Global as $31,554,782, comprised of, among other things, a drawdown of $40,000, capitalised expenses of $15,588,198, and an upwards revaluation of $13,901,174. The asset summary provided to the Trustee for the quarter ended 31 March 2020 disclosed that the carrying value of the investment was $17,626,000, with a projected value of $34,752,461, based on what was described in the asset summary as 'Investment contract term (2x investment $)'. The provisional liquidators found no evidence to suggest the investment had doubled in value. Rather, the provisional liquidators found it likely that SPV 17 had spent significant sums on marketing and advertising for the IPO Wealth Group, and that the value of the investment in M12 Global had been artificially inflated through the capitalisation of advertising expenses, on the contention that they had increased the value of the asset.

103 The provisional liquidators reported that a $100 purchase of flowers, paid for by Eleuthera, was capitalised and added to the value of the assets of SPV 17. In his public examination, Mr Mawhinney confirmed that the $100 spent on flowers would have been added to the value of SPV 17's assets. He stated that the flowers were likely purchased for the group's marketing manager as a birthday present. Mr Mawhinney claimed that the capitalisation of the expense represented an application of human

capital that created value in SPV 17. I find this claim untenable and indicative of Mr Mawhinney's ignorance of proper accounting practice.

Concerns as to sustainability of the scheme

104 The provisional liquidators found it was unclear how the debt to the Trustee was being serviced by the Borrower in circumstances where the assets of the Fund were illiquid and not yielding a steady income. They submitted that the scheme's dependency on long-term investments to provide short-term returns to unitholders was a fundamental flaw in the scheme, which doomed it to failure. The provisional liquidators submitted that Mr Mawhinney was operating a Ponzi scheme, where new investors' moneys were being used to redeem old investors' redemptions, rather than generating investment income to make the payments.

105 The provisional liquidators referred to *R v Lovell*,[10] where Chesterman JA held that

> a Ponzi scheme [is] a fraudulent investment operation that pays returns to investors from their own money or money paid into the scheme by subsequent investors rather than from any actual profit earned from money invested. The scheme entices new investors by offering returns legitimate investments cannot, returns that [are] both abnormally high and consistent. The perpetuation of the returns that a Ponzi scheme advertises and pays requires an ever increasing flow of money from subsequent investors to keep the scheme going.[11]

106 In *Finnigan v The Queen*,[12] Campbell J held that

> In one sense, … a Ponzi scheme consists of "robbing Peter to pay Paul". But there must be an endless, serial recruitment of Peters, each of whom, if he or she knew the truth, could hope for no better than to take a turn as Paul because the "entitlements" of previous investors must be paid out with the receipts obtained from the new. There is no investment.[13]

107 The provisional liquidators referred the court to two series of transactions which they said supported the view that Mr Mawhinney was operating a Ponzi scheme. On

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10 [2012] QCA 43.

11 Ibid [30].

12 [2013] NSWCCA 177.

13 Ibid [3].

reflection, it is unnecessary for me to make a finding on these transactions. It is sufficient for me to find that the investments made by the SPVs were of a kind that did not generate sufficient income to meet the interest obligations due to unitholders and that it is likely therefore that a portion of the interest payments were being met by the sale of investments or from new investment moneys from unitholders, rather than income.

Accloud PLC transaction

108 The provisional liquidators raised concerns as to a transfer of shares in Accloud from SPV 3 to 101 Investments Ltd, a Mawhinney-controlled company incorporated in the British Virgin Islands. I discussed this transaction in *Re IPO Wealth Holdings No 2 Pty Ltd*.[14] The provisional liquidators submitted that Mr Mawhinney has given no explanation for the transfer of these shares outside of the IPO Wealth Group. They submitted that Mr Mawhinney has given inconsistent information as to how the shares were paid for, and has blamed inconsistencies on his accountants.

109 The asset summary provided to the Trustee in January 2020 listed SPV 3 as holding a $2.4 million equity interest in Accloud, a software development business which was expected to be floated in the United Kingdom (UK) in March 2020.

110 On 27 September 2019, Accloud announced in a directors' report that it was 'in the process of signing a contract with a major player infrastructure provider in India for customers that over five years would represent $5bn of revenue.' On 4 October 2019, a week after this announcement, SPV 3 entered into an agreement for the sale of the Accloud shares to 101 Investments Ltd. Mr Mawhinney is the ultimate owner of 101 Investments Ltd. According to a share sale agreement produced by the provisional liquidators, the sale was backdated to before 27 September 2019, when the announcement was made, to be 'made effective on 30 January 2019'. The price agreed to be paid for the shares was €12,156,310.61.

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14 [2020] VSC 549, [42]–[51].

111 As discussed in my previous judgment,[15] Mr Mawhinney characterised the transaction differently at different times.

112 In a letter to the Trustee dated 5 May 2020, Mr Mawhinney reiterated advice from Pinnacle Group that claimed the shares were transferred to 101 Investments Ltd in consideration of a €12,156,310.61 loan to SPV 3, which Pinnacle Group contended represented the market value of the shares as at 30 January 2019.

113 Subsequently, Mr Mawhinney deposed that the transfer of shares was in fact settled by a $14,892,632 reduction in an existing loan to the Borrower from Eleuthera. In an email to the director of 101 Investments Ltd dated 14 July 2020, Mr Mawhinney stated that, as at 31 December 2019, Eleuthera had loaned $20,881,614 to the Borrower, and that the Accloud shares were sold to 101 Investments Ltd to repay that loan to Eleuthera, who had financed 101 Investment Ltd's share purchase. The provisional liquidators have not been able to establish the existence of any loan to the Borrower from Eleuthera. A facility agreement and drawdown notice between Eleuthera and 101 Investments Ltd are dated 15 July 2020, after provisional liquidators had been appointed, but are stated to be effective from 30 January 2019.

114 As discussed in my previous judgment,[16] Mr Mawhinney has also given insufficient explanation for the backdating of the transaction. Initially, in his 5 May 2020 letter to the Trustee, Mr Mawhinney reiterated Pinnacle Group's explanation that SPV 3 had 'made the decision to transfer all of its Accloud shares to 101 Investments Ltd on 30 January 2019.' Similarly, in his ROCAP for SPV 3, Mr Mawhinney claimed that SPV 3 held no assets as the equity investments were sold on 30 January 2019. At the application to appoint provisional liquidators, the receivers and managers (now provisional liquidators) submitted that this alleged decision to transfer the shares in January 2019 was difficult to reconcile with the fact that the share sale agreement was dated 4 October 2019. They also noted that the shares continued to appear in the asset

15 Ibid.

16 Ibid.

summaries as an asset of the IPO Wealth Group until at least February 2020.

115 The provisional liquidators submitted that Mr Mawhinney has not since given an adequate explanation for the transaction, despite being pressed at length on the point at the public examination. At the public examination, Mr Mawhinney acknowledged that it 'appears to be the case' that the effect of the share sale agreement of 4 October 2019 as it was executed was to backdate the sale. He claimed he was not aware at the time he executed the agreement that its effect was to backdate the sale of shares. He stated that he had executed the share sale agreement with an effective date of January 2019 on advice from Pinnacle Group that that was the appropriate way to act on the transaction. When the examiner put it to Mr Mawhinney that the purpose of a backdated sale was to justify the sale of the shares for their January 2019 price, rather than the price at 4 October 2019, Mr Mawhinney stated that he did not believe that to be the case, and that that was not the purpose of the transaction. He stated that a reason for why the transaction was executed with an effective date of 30 January 2019 was that that date was on or around the same date that 101 Investments Pty Ltd was incorporated, and that the effective date of the transaction was 'aligned' with the incorporation date. I accept the provisional liquidators' contention that Mr Mawhinney has not given an adequate explanation to justify the backdating of the sale of the Accloud shares.

Paymate India transaction

116 As discussed in *Re IPO Wealth Holdings No 2 Pty Ltd*,[17] the provisional liquidators raised concerns about transactions relating to shares in Paymate India. According to Mr Mawhinney, Paymate India was a financial technology provider in India.

117 In short, the December 2019 asset summary disclosed three investments in Paymate India, one of which was held by 101 Investments Ltd. It had a value of $3,095,553.09. Although 101 Investments Ltd is not part of the IPO Wealth Group, the Paymate India investment it held was listed in the asset summary of the group. The carrying value

17 Ibid [53]–[54].

of this equity investment was reduced to $nil in the asset summary of March 2020, which was a source of concern for the Trustee.

118 Mr Mawhinney acknowledged that an equity investment in Paymate India had been held by 101 Investments Ltd, and deposed that moneys had been lent to the Borrower by Eleuthera and then on-lent to 101 Investments Ltd to purchase the equity investment. Mr Mawhinney deposed that the reduction of the value of the 101 Investments Ltd investment in the asset summary corresponded with a reduction of equal value in the original loan from Eleuthera to the Borrower. Accordingly, Mr Mawhinney deposed that the shares were never an asset of the Borrower, and that the loan from the Borrower to 101 Investments Ltd that funded the acquisition of the shares had been settled in consideration of the loan reduction.

119 The provisional liquidators found that the existence of any loan agreements from Eleuthera to the Borrower is not supported by the books and records that they have so far seen. In other words, what records Mr Mawhinney did keep do not support his explanation of how he purchased the Paymate India shares. I accept the provisional liquidators' finding.

Loan to 101 Investments Ltd

120 The provisional liquidators submitted that the Borrower lent some $12 million to 101 Investments Ltd, and that the loan was unsecured. As mentioned, 101 Investments Ltd is a company incorporated in the British Virgin Islands. Mr Mawhinney is the ultimate owner of the company, but Graham Cook was the company's director at the relevant time. Mr Cook has no financial interest in the company.

121 The provisional liquidators found that there was no properly executed loan agreement in existence between the Borrower and 101 Investments Ltd. A facility agreement for $100 million was signed on behalf of the Borrower by Mr Mawhinney, but the agreement has not been signed on behalf of 101 Investments Ltd. There was provision for signing by Mr Cook.

122 Mr Mawhinney claimed that, although Mr Mawhinney was the ultimate owner of 101 Investments Ltd, Mr Cook made up his own mind about these transactions and that he did not answer to Mr Mawhinney.

123 Mr Mawhinney did not include the $12 million loan in the ROCAP for the Borrower. I accept that that the status of this loan has yet to be resolved.

Loan to Mayfair 101 Ltd

124 An unsecured loan of $3,266,204.13 was made from SPV 3 to Mayfair 101 Ltd. Mayfair 101 Ltd is registered in the UK and Mr Mawhinney is one of its directors. Mr Mawhinney declared the existence of this loan in his ROCAP for SPV 3. Although the books of SPV 3 record this loan, the provisional liquidators found that no loan agreement existed between SPV 3 and Mayfair 101 Ltd.

Isola San Spirito transaction

125 The asset summaries produced by Mr Mawhinney record that SPV 10 held shares in two Italian companies, Poveglia SRL and Retta SRL (the Italian companies). The Italian companies own a Venetian island, the Isola San Spirito.

126 The provisional liquidators found that SPV 10 in fact held no shares in the Italian companies. They found that SPV 10 entered into an agreement dated 15 August 2018 to acquire the entire capital of those companies. However, prior to the settlement date, SPV 10 substituted Okto Holdings Pty Ltd (Okto Holdings) as purchaser of those shares. Okto Holdings is a UK-based company related to Mr Mawhinney. At his public examination, Mr Mawhinney said that SPV 10 had lent the funds to Okto Holdings which Okto Holdings used to acquire the shares. The provisional liquidators produced a loan agreement commencing 27 June 2019 wherein SPV 10 agreed to lend up to €30 million to Okto Holdings. The loan is unsecured, although the loan documents provided for security. The provisional liquidators found that the security agreement was defective and was never registered in the UK.

127 At his public examination, Mr Mawhinney said that although there had been discussions around SPV 10 acquiring the shares in the island, it made more sense for a UK-based company to acquire the shares. The best Mr Mawhinney could do in justifying this transaction was to suggest that Italy was closer to the UK than to Australia and that this would make future fundraising activities easier.

128 The provisional liquidators reported that the substitution of purchaser put the Borrower and SPV 10 at a significant disadvantage as they are now reliant on an unsecured loan being repaid by Okto Holdings. Under the loan agreement, no interest or principal is payable for 10 years.

129 I accept that the loan was not made in the interests of SPV 10. The IPO Wealth Group will not have the benefit of any increase in the value of the property, but any increase in value will accrue for the benefit of Okto Holdings, and therefore for Mr Mawhinney. I accept that this loan is of questionable validity.

Lack of security for scheme assets

130 The provisional liquidators found in most instances where loans had been made by SPVs, they were made on an unsecured basis, and the loan agreements did not provide for the provision of security. Where a loan agreement did provide for security, the relevant security was either not executed or not registered.

131 During his public examination, Mr Mawhinney was unable to give a satisfactory explanation for not requiring security or not taking security. Mr Mawhinney gave evidence that the IPO Wealth Group had a 'consistent template or structure' that it followed for investments of this nature, and that template included not seeking security, despite the information memorandums saying that a security interest would likely be taken in investments, as mentioned above. Mr Mawhinney stated that instead, a premium was charged for the moneys loaned.

132 A loan was made from SPV 9 to ABCredit. The asset summary lists the value of the loan as $8,757,604. Mr Mawhinney's ROCAP for SPV 9 stated that the debt owed to SPV 9 by ABCredit was valued at $7,195,120.28. A general security agreement existed

for this loan. In his public examination, Mr Mawhinney said that an employee had been in charge of arranging the registration of the security. Mr Mawhinney said the employee had sent Mr Mawhinney login details to enable the registration of the charge but that this was not done. He claimed that the failure to register the charge was both his error and the collective error of him and the employee.

133 The provisional liquidators found that Mr Mawhinney decided not to secure a loan from SPV 8 to Navag8 Pty Ltd, although the agreement explicitly provided for security. Mr Mawhinney gave evidence in his public examination that the IPO Wealth Group 'didn't consider that it was essential to complete' a security agreement with Navag8 Pty Ltd because it 'had developed quite a strong relationship with the, ah, people at the business' and had formed the view that holding a general security agreement over an early stage company 'would not necessarily render all that much value.'

134 As mentioned above, the Borrower's loan to 101 Investments Ltd, SPV 3's loan to Mayfair 101 Ltd and SPV 10's loan to Okto Holdings are all unsecured. All three borrower entities are related to Mr Mawhinney. I accept that these loans are all of questionable validity.

Submissions of the contradictors

135 Contradictors were appointed by the court to represent the unitholders' interests at the winding up applications. The contradictors considered any alternatives to liquidation, including a scheme put forward by Mr Mawhinney to avoid liquidation. Mr Mawhinney named the scheme the Mayfair proposal. The contradictors ultimately submitted that the Mayfair proposal should not be accepted by the court. The contradictors agreed that liquidation of the IPO Wealth Group companies was the proper course and in the best interests of unitholders.

Role of the contradictors

136 The contradictors made submissions on the role of the contradictor. They referred the

court to *Bolitho v Banksia Securities Ltd (No 6)*,[18] where J Dixon J held that 'a contradictor's role is to maintain the adversarial nature of the court's processes.'[19]

137 The contradictors submitted that while the contradictor is appointed to assist the adversarial process, it need not necessarily oppose the application in question. They referred to *Merit Protection Commissioner v Nonnenmacher*,[20] where Beaumont, Lee, and Dowsett JJ stated:

> The term "contradictor" describes the person with whom the applicant for relief is in dispute. That person must be joined in the proceedings as a party thereto, but it is not necessary that he or she attend to resist the application. If he or she does not do so, a binding order may still be made. The requirement for a "contradictor" is not designed to secure actual opposition.[21]

138 The contradictors submitted that they considered their role was to identify whether there is a better outcome for unitholders than that sought by the Trustee and the provisional liquidators and, if so, to agitate for that outcome. The contradictors submitted that if no better outcome was identified, then their role was to explain to the court the universe of outcomes and articulate why it is in the unitholders' interests that the Trustee's and provisional liquidators' applications should be granted.

The process of the contradictors

139 As mentioned above, Mr Mawhinney put forward a scheme to avoid winding up IPO Wealth by liquidation of the Borrower and the SPVs, termed the Mayfair proposal. The scheme required approval by the unitholders. In essence, the scheme involved replacing the Trustee with a new trustee and Mr Mawhinney realising the assets of the Fund.

140 The contradictors investigated the proposal. They sent a series of questions about the proposal to Mr Mawhinney over a number of days and received answers to those

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18 [2019] VSC 653.

19 Ibid [96].

20 (1999) 86 FCR 112.

21 Ibid 116 [12].

questions, which they circulated to the unitholders. They also sent questions to, and received answers from, the Trustee and the provisional liquidators.

141 The contradictors also consulted with unitholders. They reported that the consultation process raised a broad spectrum of questions and concerns which enabled the contradictors to more thoroughly interrogate the alternative proposal put forward by Mr Mawhinney. They reported that in turn, the interrogation process caused Mr Mawhinney to make investor-favourable improvements to the proposal.

142 On Friday 11 September 2020, the contradictors and their solicitors held a virtual meeting with unitholders, which comprised a presentation by Mr Maiden and a lengthy question and answer session. The presentation addressed the court process, the purpose of the appointment of the contradictors and the respective merits of liquidation and Mr Mawhinney's proposal.

143 As a result of that meeting, the contradictors submitted further questions to Mr Mawhinney and to the Trustee and obtained further feedback from unitholders.

The Mayfair proposal

144 The initial Mayfair proposal was filed with the court on 15 September 2020. It was subsequently amended during the course of the hearing. Under the proposal, a new company (NewCo) would be established to acquire the debt presently owed by the Borrower to the Trustee. NewCo would be a wholly-owned subsidiary of the Investment Manager. It would have a board of two independent directors. All the assets held by the SPVs and an additional 5 million shares in Accloud would be transferred to NewCo. Mr Mawhinney stated that the 5 million Accloud shares would be an *ex gratia* contribution of 101 Investments Ltd.

145 In return for acquisition of the debt, NewCo would agree to pay the trustee of the Fund the proceeds of realisation of the assets transferred to NewCo, less management fees, over a three-year period, up to a maximum amount of $77,065,000. The proposal aimed only to return capital and not to provide income or interest to unitholders.

146 The proposal provided that funds from the realisation of assets would be paid to the Trustee by NewCo within 30 days of realisation. A minimum of $3 million was proposed to be paid by the end of each of years one and two of the three-year period. These minimum payments would be dependent on the anticipated asset realisations being achieved.

147 Under the proposal, debts owing under intercompany loans from the Borrower and the SPVs to other Mayfair 101 Group companies would be transferred to NewCo. The contradictors noted that the offer may not include intercompany debts that the provisional liquidators found are owed to the scheme by Mayfair 101 Ltd and 101 Investments Ltd, as Mr Mawhinney denies the existence of these debts.

148 Under the proposal, the trustee of the Fund would be given security over the assets held by NewCo and could choose to enforce the security and realise the assets at the end of the three-year period if the full $77,065,000 was not paid.

149 The only funds which would be injected into NewCo would be taken from the capital protection reserve of the Fund. This reserve is currently held in the Fund for the benefit of the unitholders and stands at around $2.3 million. The Mayfair proposal required that $500,000 be paid to the Investment Manager and $750,000 be transferred to NewCo, which would be used as working capital. Only the remaining $1.05 million of the capital reserve would remain in the Fund.

150 In addition to the $500,000 payment, the Investment Manager would be paid management fees from asset realisations which vary according to the value of assets realised: 10% for up to $25 million; 12.5% for up to $50 million; and 15% for up to $77,065,000.

Replacement of the Trustee

151 Originally, replacement of the Trustee was a condition precedent to Mr Mawhinney effecting the Mayfair proposal. However, Mr Mawhinney subsequently removed this requirement. Mr Mawhinney was prepared to accept a decision of the court as to who would fulfil the role of trustee under the Mayfair proposal, including retaining Vasco

or appointing a trustee recommended by ASIC.

Implementing the Mayfair proposal

152 The contradictors submitted the viability of the Mayfair proposal was dependent upon it being capable of implementation.

153 In essence, the proposal required unitholders to pass a special resolution at a unitholders' meeting to make substantial amendments to the constitution, including to introduce a mechanism to direct the trustee as follows. The proposed amendment allowed for 5% of unitholders to call a meeting, at which a direction to the trustee could be proposed. If 50% of unitholders voted in favour, the trustee would be compelled to undertake that direction.

154 The Mayfair proposal contemplated using this direction mechanism to direct the trustee to take steps to implement the proposal, by directing the trustee to apply to the court to end the provisional liquidation, and to make the required payments out of the capital protection reserve detailed above.

155 The contradictors submitted that the power of unitholders to amend the constitution required a special resolution, which means a resolution passed by 75% of the votes cast by members entitled to vote on the resolution. While Mr Mawhinney asserted that he had the requisite numbers to effect the changes, the contradictors said it was unclear that that remained the case.

156 Mr Mawhinney asserted that amendments to the constitution would not be necessary to affect the proposal, as court orders would be sufficient. The contradictors submitted that Mr Mawhinney fundamentally misconceived the role of the court in the winding up applications. They submitted that the court cannot, on the present applications, make an order allowing the Mayfair proposal to go ahead.

157 The contradictors concluded that there was no apparent method by which the Mayfair proposal could be given certain effect. There was no certainty that a meeting of all unitholders would resolve to take the necessary actions to change the constitution and

then give the required direction to the trustee of the Fund. Then, the Trustee would probably take action to withhold sufficient assets to indemnify itself against potential actions brought against it in the proper exercise of its duties. Therefore the required payments to NewCo and the Investment Manager from the capital protection reserve may not be possible. Further, the contradictors were aware of unitholders who might bring proceedings to challenge any attempt to effect the Mayfair proposal. The contradictors were not aware of any attempt to bring court proceedings to try to effect the proposal by court order.

Governance

158 The Mayfair proposal included promises of an independent board of directors, externally prepared and audited accounts, and quarterly reports to the trustee of the Fund. It also contemplated the appointment of a security trustee over the assets, a unitholders' committee, and the provision of copies of bank statements of NewCo to the trustee of the Fund.

159 The contradictors submitted that suitable independent directors willing to act had not yet been identified, nor had accountants, auditors, tax advisors or lawyers. They suggested it might also be difficult to find a trustee willing to act.

160 The contradictors submitted that the difficulty with the proposal was that, as NewCo would be a wholly-owned subsidiary of the Investment Manager, there was no way for unitholders or the court to ensure that any or all of these governance measures would be implemented or would remain in place. The proposed corporate structure was easily manipulable. Any independent directors would serve at the pleasure of the directors of the Investment Manager and could be dismissed at the will of that company. Similarly, any accountants and auditors would be appointed and retained by the directors. Auditors would, of course, be subject to statutory responsibilities regardless of the circumstances of their appointment, however this did not prevent the directors from dismissing them.

161 In contrast, the liquidation process was transparent and highly regulated. Liquidators were officers of the court regulated by ASIC, their behaviour could be reviewed by the court, and their fees and charges must be approved by creditors or the court. Liquidators must file annual returns about the affairs of the companies they were appointed to with ASIC.

Assets available in liquidation and the alternative proposal

162 The proceeds of realisation of the assets held by the SPVs would be available to unitholders under both proposals. In a liquidation, the assets available to unitholders included:

a) the proceeds of realisation of the assets held in the SPVs;

b) the existing balance of the capital protection reserve; and

c) the proceeds of any actions available to the liquidators. Such actions might include actions in relation to the transfer of the Accloud shares, the Isola San Spirito transactions, the loans to 101 Investments Ltd and Mayfair 101 Ltd, insolvent trading and breaches of directors' duties.

163 Under the Mayfair proposal, the assets available to unitholders included:

a) the proceeds of realisation of the assets held in the SPVs;

b) $1.05 million in the capital protection reserve after payments to the Investment Manager and NewCo; and

c) 5 million Accloud shares transferred from 101 Investments Ltd.

164 The contradictors submitted that, as there was no reliable, independent valuation of the assets available, they were unable to comment on the likely recoveries from realisation of the assets under either proposal.

165 The Mayfair proposal included the transfer of 5 million Accloud shares from 101 Investments Ltd. The shares were already the subject of the provisional

liquidators' investigations. They might be the subject of a recovery action if liquidators were appointed. The proposal would only return to unitholders a portion of the Accloud shares which were the subject of the provisional liquidators' investigations. However the ownership of the Accloud shares was a contestable issue. Mr Mawhinney claimed the Accloud shares were the property of 101 Investments Ltd and have been paid for in full, and accordingly none of the shares would be returned to the Fund in liquidation.

166 Further, the contradictors submitted that it was impossible for them to value the Accloud shares as the shares were not publicly traded, there was no evidence of any tangible business being carried on by Accloud, and Mr Mawhinney's valuation was unreliable as to its method and factual basis. Indeed, they submitted that the valuation method used by Mr Mawhinney across the Mayfair proposal was likely 'the most extraordinary valuation methodology' the court had come across.

Respective merits of liquidation and the alternative proposal

167 The contradictors summarised the merits of each proposal as follows. The principal advantage, according to Mr Mawhinney, of the Mayfair proposal was that he was most well equipped to realise the SPVs' assets on favourable terms, as he bought the assets and has developed them over time. He claimed he had connections to the markets in which the assets sit, and relationships with management and other stakeholders in the relevant investment companies. I discuss the contradictors' submissions on these claims below.

168 On the other side of the ledger, not only was Mr Mawhinney not injecting any capital into the scheme, only the 5 million Accloud shares which are already the subject of the provisional liquidators' investigations, but the capital protection reserve would be eroded by payments to Mawhinney-related companies, with no certainty of it providing any benefit to unitholders. Only around $1.05 million of the $2.3 million capital protection reserve would remain. Liquidation offered the preservation of the entirety of the $2.3 million, less the costs of liquidation.

169 In terms of the fees payable under each option, liquidation would involve substantial fees, based on hourly charges, which would be subject to the scrutiny of ASIC and the court. Such fees would continue to be incurred until all the assets were disposed of, and accordingly there was a risk that capital in the fund would be eroded with limited or no positive outcome. By contrast, under the Mayfair proposal, Mr Mawhinney would be paid only on a success fee basis. However, he would take a very significant success fee for each realisation, between 10% and 15% depending on the value of assets realised. He might also be entitled to the Investment Manager fees under the current investment management agreement. Further, Mr Mawhinney would pass on to the Fund any charges incurred employing accountants, auditors and lawyers, all of which would be charged on an hourly basis. The contradictors contended that it was difficult to conceive of the quantum of liquidators' fees exceeding the sum of the $1.25 million payable from the capital reserve, and any success fees payable under the Mayfair proposal.

170 The contradictors submitted the scheme assets might be further diluted by the need to move the assets from the SPVs to NewCo. Mr Mawhinney provided no information on the likely tax burden of such transactions for the IPO Wealth Group companies or NewCo. While he suggested that another Mayfair 101 Group company would bear any such burden for NewCo, it was unclear how that company could properly bear such a burden for the IPO Wealth Group companies.

171 The Mayfair proposal would also not deliver the benefit of any litigation to recover assets or antecedent transactions, or actions for breaches of duties which may be available. The contradictors were not in a position to determine whether such actions could be brought, or the potential value of any such actions. However, the transactions in question, as discussed above, were of very substantial quantum, and some involved assets closely connected to real property assets. Accordingly, the contradictors submitted the unitholders would benefit at least from having those transactions further investigated.

172 Another difference between liquidation and the Mayfair proposal involved timing of asset realisation. Liquidation was an open-ended process; there was no fixed time by which it would conclude. By contrast, the alternative proposal purported to offer a three-year pathway for realisation of the assets, after which time the trustee could enforce its security over any remaining assets. However, the contradictors submitted that this attraction was more apparent than real, as there was no certainty as to when and for what price the assets would be realised. The contradictors submitted that there was a distinct possibility, perhaps even a probability, that the Mayfair proposal would result in a liquidation some three years hence in any event.

173 In sum, the contradictors submitted that under the Mayfair proposal there were fewer assets. The assets would be realised by a Mawhinney-related entity, which would presumably engage Mr Mawhinney, and the scheme would involve a significant success fee before the money was returned to the unitholders.

Mr Mawhinney's investment acumen

174 As the principal advantage of the Mayfair proposal was said to be Mr Mawhinney's involvement in realising the assets, the contradictors questioned Mr Mawhinney about his experience. They asked him to identify specific investments which he had realised at a substantial profit. Mr Mawhinney provided details of three transactions, however he did not provide sufficient details to enable the contradictors to assess the transactions and the extent of Mr Mawhinney's involvement.

175 It cannot be doubted that Mr Mawhinney has contacts and knowledge which might assist in the realisation of the assets held in the SPVs. However, Mr Mawhinney has not stated how his ongoing assistance would be secured, nor how that could be done in a manner which did not compromise the independence of NewCo. The contradictors submitted that, contrary to being a benefit, Mr Mawhinney's continuing engagement may be of concern given the reports of the provisional liquidators as to how Mr Mawhinney had managed the scheme to date.

176 The contradictors submitted that as a restructuring plan, the Mayfair proposal was unusual in that NewCo would be capitalised using the unitholders' own money. There was no injection of funds from interests associated with Mr Mawhinney, save for the 5 million Accloud shares, which were arguably already the assets of the scheme. The contradictors submitted the lack of a capital injection from interests associated with Mr Mawhinney might suggest a potential lack of confidence in his investment acumen.

177 Mr Mawhinney claimed that a number of assets would benefit from a capital injection to enable their development in a way which maximised the value of the investment, and that he was uniquely placed to source funding for this purpose. The contradictors submitted that, in such circumstances, it was remarkable that he had failed to inject capital from his own resources or to procure alternative external funding. They submitted that this may indicate a lack of capital available to Mr Mawhinney and interests associated with him.

178 Mr Mawhinney has criticised the capacity of the provisional liquidators to realise the scheme assets because they were principals in a locally based firm and the assets were largely located overseas and involve technology start-ups, and because the provisional liquidators had no prior connection to the management of the assets. The contradictors submitted that the provisional liquidators were experienced professionals whose daily grist was asset realisation, and they have demonstrated that they will rely on a network of similar professionals, corporate advisors and brokers, both Australian and foreign. Indeed, the provisional liquidators have already appointed suitable advisors to assist them in key overseas jurisdictions in which the assets are held.

179 Mr Mawhinney also alleged that the provisional liquidators had conflicts of interest which made them inappropriate choices as liquidators. The contradictors considered Mr Mawhinney's allegation, but found the facts provided in support of that allegation did not establish the existence of a conflict.

Conclusion of the contradictors

180 The contradictors reported that their consultation was as extensive as could be performed in the time available, and with regard to the need to conserve unitholders' funds. They reported that a significant proportion of unitholders participated in the process, and that the views of unitholders varied widely.

181 The contradictors submitted that their consultation process was thorough, but did not reveal any proposal for the future of the Fund other than the Mayfair proposal and liquidation.

182 The contradictors concluded that voluntary administration, which was the only obvious alternative means of restructuring the Fund, would be fruitless. The Trustee was the sole significant creditor of the Borrower, and could accordingly procure liquidation at the second meeting of creditors. The Trustee's application to appoint liquidators indicates it was not interested in a deed of company arrangement.

183 The contradictors highlighted that liquidation would not necessarily prevent a dissident group of unitholders attempting to wrest control of the trust assets from the Trustee for the purpose of attempting an alternative restructure. At an earlier hearing, ASIC submitted that if the court made orders winding up the IPO Wealth Group companies, the liquidators should be appointed as receivers over the trust assets in order to protect those assets. The contradictors submitted that such an approach might avoid unitholders attempting to obtain control of the trust assets using the constitution, however, there appeared to be no momentum among the unitholders to take such action. The contradictors submitted they could not speak to the respective merits of an appointment of receivers or otherwise.

184 The contradictors submitted that the Borrower was clearly insolvent and therefore the Fund's assets must be realised and the proceeds distributed. The question of what was in the best interests of the unitholders was a question of what manner of realisation was likely to maximise the benefit for those unitholders.

185 On that question, the contradictors submitted as follows. The Mayfair proposal involved one potential benefit which liquidation does not offer: the potential ongoing involvement in the realisation process of Mr Mawhinney. However, as discussed above, Mr Mawhinney's involvement was not secured under the Mayfair proposal, and in any event the contradictors concluded that, contrary to being a benefit, his continuing engagement might be of concern.

186 The contradictors submitted that the Mayfair proposal brought other significant disadvantages.

187 First, the proposal involved significant dilution of assets. The capital protection reserve would be eroded by payments to Mawhinney-related companies, with no certainty of it providing any benefit to unitholders. Any asset realisations would be significantly diluted by payment of the Investment Manager's commissions. The scheme assets might be further diluted by tax payable on the transactions which move the assets from the SPVs to NewCo. Although liquidation would involve substantial fees, the contradictors concluded these were extremely unlikely to exceed the sum of the required payment from the capital reserve and the significant success fees payable under the Mayfair proposal.

188 Secondly, the Mayfair proposal would not deliver the benefit of any litigation to recover antecedent transactions or actions for breaches of duties which might be available.

189 Thirdly, there were significant impediments to the Mayfair proposal proceeding, meaning there was no apparent method by which it could be given certain effect.

190 Finally, Mr Mawhinney and several of his companies were the subject of regulatory proceedings and investigations, which include the potential of criminal proceedings being brought against Mr Mawhinney. Of course, no conclusions could be drawn about those proceedings without the benefit of a hearing. However, the contradictors submitted that the potential of ongoing regulatory intervention created further uncertainty as to the success of the Mayfair proposal. Among other things, the capital

and attention of Mr Mawhinney and the Mayfair Group might be diverted by the ongoing and prospective litigation.

191 In light of the problems described above, the contradictors submitted that the Mayfair proposal was not sufficiently attractive to justify an adjournment of the court's own motion to determine the appetite of unitholders for the proposal going ahead. Further, the contradictors were not aware of any extant proposals under which the Mayfair proposal could be improved sufficiently to overcome the problems described above.

192 The contradictors concluded that, on balance, having regard to all apparent options, in light of all the information available, and having the benefit of substantial consultation with a large body of the unitholder group, the objective interests of the unitholders as a group are best served by the liquidation of the IPO Wealth Group companies.

Conclusion

193 The IPO Wealth scheme has failed. It is no longer open to investors and is unable to meet its obligations to the unitholders. The continued operation of the Borrower and the SPVs poses a risk to the public interest and to the unitholders in the scheme. To ensure the orderly winding up of the scheme the Borrower and the SPVs should be wound up.

194 The accounts of the Borrower and the SPVs are in a shambles. The companies do not have a qualified accountant keeping the accounts. The accounts for 2018, 2019, and 2020 are in a draft form and Mr Mawhinney has given evidence that suggests they cannot be relied on. The only other alternative available record of the Borrower and SPVs' operations appears to the be asset summary, which is kept in an Excel spreadsheet.

195 Mr Mawhinney accounted for part of the value of the scheme in terms of 'unissued shares.' 'Unissued share capital' is a concept unknown to accounting. The adoption of this practice seems to display an ignorance of accounting principles, or worse, a means of falsely inflating the value of investments.

196 Mr Mawhinney has pursued policies which give false and misleading valuations of the assets of the scheme. Significant expenses incurred in advertising and promoting the Fund were treated as an asset and added to the value of investments made by the SPVs. Under accepted accounting principles, they ought to have been treated as operating expenses. It is difficult to conceive how anyone could come to the view that advertising the existence of the Fund could add to the value of individual investments in the Fund.

197 I am satisfied the books and records of the IPO Wealth Group companies in which the funds have been invested have not been properly kept and are misleading. I do not have confidence that, if control of the companies were returned to Mr Mawhinney, proper accounting obligations would be complied with.

198 Bearing in mind the state of the accounts, the provisional liquidators have attested to the immense difficulty they face in confirming the value of the assets in the fund. There may be no buyer for many of the assets held by the Fund.

199 The investments made by Mr Mawhinney on behalf of the Fund were generally long-term and illiquid. The investments were not of the kind to produce an income stream to enable interest to be paid to unitholders. Rather, the investments were highly speculative and generated no immediate income. In accordance with this, the provisional liquidators suggest that some of the repayments made on the loan to the Trustee were serviced using new investments, rather than income generated from the assets of the Fund. The provisional liquidators described this as the essential characteristic of a Ponzi scheme.

200 The scheme was not managed in a manner which suggests Mr Mawhinney properly considered the unitholders' interests. Unitholders' money was distributed to the SPVs under loan agreements. A remarkable clause in those loan agreements provided that the repayment of the loan could be made by the issue of shares in the borrowing SPV at the election of the borrowing SPV. Further interest payments could also be met by the issue of shares, again at the discretion of the borrowing SPV.

201 Mr Mawhinney has engaged in transactions with scheme assets which appear to have transferred assets of the Fund to entities related to him, with little to no benefit to the scheme. He has consistently been unable to explain these transactions. After several months, Mr Mawhinney has still not given an adequate reason for backdating the sale of Accloud shares to 101 Investments Ltd, the entity in the British Virgin Islands which he controls. The best excuse Mr Mawhinney could come up with was that his accountant said that the backdating of the sale of the shares to his own company was appropriate. I do not accept that explanation. I am satisfied that Mr Mawhinney provided inconsistent information to the court and the provisional liquidators in relation to the transfer of the Accloud shares.

202 The Paymate India transaction and the Isola San Spirito transaction are also of concern. I am satisfied that Mr Mawhinney's governance has seen the transfer of valuable assets out of the IPO Wealth Group to the benefit of himself, without justification.

203 Mr Mawhinney has also consistently failed to register security interests over assets where it was his duty to do so. I am satisfied that Mr Mawhinney has grossly mismanaged the scheme to the loss and disadvantage of unitholders.

204 In my view, this conduct epitomises the cavalier way Mr Mawhinney has administered the unitholders' funds. At the hearing, Mr Maiden informed the court of the sad and tragic circumstances of many unitholders who invested in this fund.

205 As the sole asset of the Fund was a loan, had the scheme succeeded and any of the investments realised value over the amount due on interest and principal, that value was to be entirely the property of Mr Mawhinney. From the way the scheme was structured, and the type of speculative investments Mr Mawhinney made, one can only draw the conclusion that the scheme was essentially run for the personal benefit of Mr Mawhinney, who was willing to, and did put, the unitholders' funds at risk in the hope of making a windfall gain for himself.

206 Contradictors were appointed in the absence of any party opposing the winding up of the companies. The contradictors have consulted widely with unitholders. The

contradictors' thorough submissions were of significant assistance to the court. In particular, the contradictors have considered an alternative proposal to liquidation which has been put forward by Mr Mawhinney.

207 The contradictors do not submit that the applications for winding up should be adjourned to enable Mr Mawhinney's proposal to be considered by unitholders. Rather, after examining the proposal, the contradictors formed the view that it was in the best interests of the unitholders that the IPO Wealth Group companies be wound up, as is sought by the provisional liquidators and the Trustee.

208 In essence, the Mayfair proposal put forward by Mr Mawhinney provides for the assets held by the SPVs to be transferred to a new company, NewCo. NewCo would have two independent directors, although it would be owned and therefore ultimately controlled by Mr Mawhinney. In essence, NewCo would aim to realise the assets transferred to it over a three-year period with the assistance of Mr Mawhinney.

209 Mr Mawhinney would receive a fee for conducting the realisation process. Mr Mawhinney is also prepared to transfer 5 million of the Accloud shares that were transferred to 101 Investments Ltd to New Co. The provisional liquidators have raised the possibility of recovering those shares through a cause of action under the *Corporations Act*. Needless to say, such assets that the provisional liquidators may have had in taking proceedings against Mr Mawhinney for wrongful transactions could not be pursued if the Mayfair proposal were undertaken.

210 The contradictors were asked what benefits the Mawhinney proposal would have over liquidation. The contradictors said that Mr Mawhinney claimed that as he is more familiar with them, having made the investments in the first place, he would be better placed to realise the assets for the best possible price.

211 I am satisfied that Mr Mawhinney's proposal would not be in the interests of unitholders. First and foremost, Mr Mawhinney's observance of the principles of good governance is far from what should be expected of a company director or a company officer. His failure to keep proper accounts, his practice of making loans

without security, and his record of transferring scheme assets to his own companies demonstrate that Mr Mawhinney is not a person who should realise the assets of the Fund, or be the director of the relevant companies.

212 I am therefore not prepared to adjourn the winding up applications to enable Mr Mawhinney to seek to implement the Mayfair proposal.

213 The contradictors referred me to submissions of ASIC made at the 3 September 2020 hearing, urging that I appoint a receiver to the trust fund in the event of a successful winding up application. However, the Trustee has undertaken to the court that it will implement any necessary steps under the constitution to terminate and wind up the trust fund which, coupled with the liquidations of the Borrower and the SPVS, will allow distributions to be made to the unitholders. I am satisfied with this proposal. Accordingly, I will not appoint receivers over the trust fund.

214 I am satisfied that the Borrower is insolvent, having defaulted on its debt to the Trustee and should be wound up accordingly. In light of the above evidence on the managing of the scheme, I am also satisfied that the Borrower should be wound up on the just and equitable ground.

215 For the reasons above, I ordered that the Borrower and the SPVs be wound up on the just and equitable ground and in the case of the Borrower on the additional ground of insolvency.

216 The contradictors considered whether the appointment of the same liquidators to all 17 defendant companies might cause conflict, but in the absence of any significant third party creditors in any of the companies, and given the wholly-owned subsidiary structure, they submitted that there is no immediately apparent conflict caused by the proposed group appointment. I accept that submission and I ordered that the provisional liquidators be appointed liquidators to the Borrower and each of the SPVs.

CERTIFICATE

I certify that this and the 50 preceding pages are a true copy of the reasons for judgment of Justice Robson of the Supreme Court of Victoria delivered on 6 November 2020.

DATED this sixth day of November 2020.

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Associate