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

BETWEEN:

VASCO TRUSTEES LIMITED (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:	29, 30 June & 2 July 2020
DATE OF JUDGMENT:	9 September 2020
CASE MAY BE CITED AS:	Re IPO Wealth Holdings No 2 Pty Ltd
MEDIUM NEUTRAL CITATION:	[2020] VSC 549

CORPORATIONS – Application for the appointment of provisional liquidators over a group of related companies pending the hearing and determination of winding-up applications of those companies – Court-appointed receivers and managers already appointed – Consideration of whether receivers and managers already appointed to the companies was sufficient to preserve and protect the several companies pending the hearing and determination of the winding-up applications – Evidence of suspicious transactions and poorly kept accounts warranting examination of officers of the companies – Orders for appointment of provisional liquidators made.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms CG Rome-Sievers	Madgwicks
For the Defendants	Mr MJ Galvin QC	Thomson Geer
For James Mawhinney	Mr SD Hay SC and Mr M Grady	KHQ Lawyers
For the Voluntary Administrators of IPO Wealth Holdings Pty Ltd (Receivers and Managers Appointed)	Mr P Fary	Norton Rose Fulbright
For ASIC	Mr JP Moore QC and Ms C van Proctor	ASIC solicitor

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HIS HONOUR:

Introduction

1 The plaintiff, Vasco Trustees Limited ('the Trustee'), seeks an order that the current receivers and managers of IPO Wealth Holdings Pty Ltd and its subsidiaries ('the receivers and managers') be appointed as provisional liquidators of those companies. In addition, the defendants, now under the control of the receivers and managers, seek similar orders as explained below. On 24 June 2020, I made the orders sought. I delivered less than complete reasons for my decision, due to the urgency of the matter before me. I reserved delivering complete reasons. These are those reasons.

2 IPO Wealth is a managed investment scheme that was open to high net worth members of the public. The scheme is not required to be registered under the *Corporations Act 2001* (Cth) ('*Corporations Act*'). IPO Wealth was created and largely managed by Mr James Mawhinney. Those aspects of the scheme managed by Mr Mawhinney are managed within the Mayfair 101 Group of companies. The scheme is no longer open to investors.

3 The scheme is structured as follows. Investors acquire units in a unit trust called the IPO Wealth Fund. In return they are promised payments in the form of interest. Investors are entitled to redeem their units at the end of their agreed investment term. Under the terms of a constitution dated 17 March 2017, the IPO Wealth Fund is held on trust by the Trustee. The Trustee is not associated with Mr Mawhinney. Under the scheme, the Trustee lends the money subscribed by the investors to IPO Wealth Holdings Pty Ltd ('the Borrower'), a company controlled by Mr Mawhinney, which trades as Mayfair 101 Holdings. The Borrower was incorporated on 18 April 2017. Its sole director is Mr Mawhinney. Its sole shareholder was Online Investments Pty Ltd, an entity related to Mr Mawhinney. If the return from investments was greater than the amount required to repay the loan from the Trustee to the Borrower, then that surplus would be profit of the Borrower. Some 180 investors have invested some $80 million in the scheme.

4 In accordance with the structure of the scheme, the Borrower has advanced the investors' moneys to 16 companies of which Mr Mawhinney is the sole director. The first company that has borrowed from the Borrower under the scheme is named IPO Wealth Holdings No 2 Pty Ltd and the 15 other companies that have borrowed from the Borrower under the scheme are similarly named but differentiated as No 3, No 4 etc, to No 17. These 16 companies are known under the scheme as special purpose vehicles ('the SPVs').

5 Save for the Trustee's role as described above, the scheme is managed by IPO Wealth Pty Ltd ('the Investment Manager'), as appointed by the Trustee. Mr Mawhinney is the sole director of the Investment Manager. Collectively, the Borrower and the SPVs comprise the IPO Wealth Group.

6 Under the scheme, investment opportunities are identified by the Investment Manager and taken up according to its investment strategy. According to the receivers and managers, the investments made through the SPVs are generally of a relatively illiquid nature. The investments made through the SPVs are not guaranteed. The receivers and managers also note that by their nature, some of these investments would be successful and others would not.

7 As security for the loans made to the Borrower by the Trustee, from funds provided by the investors who have acquired units in the unit trust, the Trustee holds a charge over the assets and undertaking of the Borrower. The Borrower is the sole shareholder of all the SPVs. The Borrower's shares in the SPVs are subject to the Trustee's charge.

8 For reasons I will explain below, on 22 May 2020, the Trustee appointed Messrs Hamish MacKinnon and Nicholas Giasoumi, who are registered liquidators practising as Dye & Co. Pty Ltd insolvency practitioners and chartered accountants, as joint and several receivers and managers of the assets and undertakings of the Borrower. The appointment of Messrs MacKinnon and Giasoumi was made pursuant to the terms of the security that the Trustee holds from the Borrower as security for funds lent by the Trustee to the Borrower. The Borrower has defaulted in making payments due to the

Trustee on the loan moneys advanced to the Borrower, on behalf of the investors. The Trustee has now called up all moneys lent to the Borrower.

Background to the proceedings

9 In an affidavit of 22 May 2020, Mr Craig Dunstan, a director of the Trustee, summarises the concerns of the Trustee which led to the present proceedings.

10 Mr Dunstan deposes that according to an independent valuation undertaken in July 2019 at the Trustee's request, the value of the assets held by the IPO Wealth Group was then estimated at some $124 million.

11 Mr Dunstan deposes that in early 2020, the Borrower failed to pay various instalments of interest and principal to the Trustee. These non-payments have continued. As a result, at the date of Mr Dunstan's affidavit of 22 May 2020, the Borrower was in arrears under the loan agreement with the Trustee in the sum of $6,651,137.98.

12 The Trustee received regular asset portfolio summaries from the Borrower that reported on the assets in the IPO Wealth Group. Mr Dunstan deposes that on 21 April 2020, the Trustee received an asset portfolio summary from the Borrower that indicated the total value of assets in the IPO Wealth Group had dropped by approximately $17.7 million. This drop appeared to relate to two investments the IPO Wealth Group held: one identified as the Accloud PLC investment, and another as the PayMate India investment. The Trustee sought an explanation from Mr Mawhinney for the drop in value, by a letter sent 23 April 2020. By a letter received on 5 May 2020, Mr Mawhinney informed the Trustee that shares in the Accloud PLC investment had been transferred to a related entity, 101 Investments Ltd. Subsequently, the receivers and managers' report to the Court of 28 May 2020 disclosed that 101 Investments Ltd is a British Virgin Islands company associated with Mr Mawhinney. Mr Mawhinney provided no information to the Trustee on the PayMate India investment at that time.

13 As a result of the abovementioned non-payments due to the Trustee, Mr Dunstan entered into discussions with the Borrower. Agreement was reached between the

Borrower and the Trustee for a payment program to be undertaken. Subsequently, the Borrower failed to pay an agreed instalment of $2 million by 15 May 2020. The Trustee's solicitors put forward a work-out proposal, but as at the date of the 22 May 2020 affidavit of Mr Dunstan, no response had been received from the Borrower.

14 Mr Dunstan deposes that on 20 May 2020, he received an email from Mr Mawhinney which suggested that the Borrower was in discussions regarding dealing with and realising the assets of the IPO Wealth Group. Mr Dunstan said that this was the first occasion that the Borrower had indicated that it intended to realise assets with what appeared to be a 'wholesale method'. Mr Mawhinney had provided no details as to what led to this change in strategy.

15 As a result of its concerns, the Trustee immediately sought advice as to the defaults of the Borrower and as to the best method for the Trustee to take control of the Borrower's assets in order to preserve their value.

16 Mr Dunstan deposes that accordingly, on 22 May 2020, the Trustee appointed Messrs MacKinnon and Giasoumi as receivers and managers over the property and assets of the Borrower under the general security agreement held by the Trustee.

17 On 22 May 2020, on the application of the Trustee, I further appointed Messrs MacKinnon and Giasoumi as receivers and managers of each of the SPVs pursuant to s 37(1) of the *Supreme Court Act 1986* (Vic).

18 In addition to appointing Messrs MacKinnon and Giasoumi as receivers and managers of the SPVs and specifying their powers, I ordered that the books and records of the SPVs be delivered up to them. I also ordered that by 28 May 2020, the receivers and managers were to provide a written report to the court and to Mr Mawhinney on certain matters referred to by Mr Dunstan in his affidavit. I adjourned the further hearing of the application to 29 May 2020.

19 On 29 May 2020, the matter came back on before me. I received into evidence a report of the receivers and managers of 28 May 2020 prepared pursuant to my order. I heard

several submissions from investors, including an accountant's report on the Accloud PLC investment. While I did not treat those submissions as evidence, they did give investors who stand to lose money a chance to have their say.

20 I informed the parties that I considered the appointment of receivers and managers by the court an interim measure and that I expected the Trustee and the receivers and managers to put forward some proposal to resolve the matter. I adjourned the further hearing of the matter to 24 June 2020.

21 Later that day, 29 May 2020, the Trustee issued an application for orders that the Borrower be joined as a party to the proceeding as the 17th defendant and sought for Messrs MacKinnon and Giasoumi to be appointed jointly and severally as provisional liquidators of the Borrower. Further, or alternatively, the Trustee applied that the Borrower be wound up pursuant to s 461(1)(k) of the *Corporations Act* on the ground that it is just and equitable to do so, and that Messrs MacKinnon and Giasoumi be appointed jointly and severally as liquidators of the Borrower for the purpose of that winding up.

22 Also later that day, 29 May 2020, the SPVs, now in the hands of the receivers and managers, applied in the existing proceeding (2284 of 2020) for orders that Messrs MacKinnon and Giasoumi be appointed jointly and severally as provisional liquidators of each of the SPVs. Further, or alternatively, the SPVs applied that each SPV be wound up pursuant to s 461(1)(k) of the *Corporations Act* on the grounds that it is just and equitable to do so, and that Messrs MacKinnon and Giasoumi be appointed jointly and severally as liquidators of each of the SPVs for the purpose of their winding up.

23 On 19 June 2020, the receivers and managers applied for and received further discovery orders against Mr Mawhinney, ultimately by consent. On that occasion, Mr Mawhinney applied to have the hearing of the applications for the appointment of provisional liquidators adjourned. His application was refused.

24 On 22 June 2020, Barry Wight, Rachel Burdett and Darryl Kirk of Cor Cordis ('the

administrators') were appointed as administrators of the Borrower by Online Investments Pty Ltd.

25 On 23 June 2020, the court received a second report from the receivers and managers on the affairs of the IPO Wealth Group.

26 On 24 June 2020, the respective applications of the Trustee and the receivers and managers for the appointment of provisional liquidators to the Borrower and the SPVs came on for hearing before me. Mr Mawhinney applied for an adjournment of those applications on the ground that he had just received the second report of the receivers and managers dated 23 June 2020. Mr Mawhinney's application was granted and the hearing of the application for the appointment of provisional liquidators was adjourned to 29 June 2020.

27 At the hearing on 24 June 2020, the Trustee was granted leave to amend its application so as to seek an order that, pursuant to s 532(2) of the *Corporations Act*, leave be granted for Messrs MacKinnon and Giasoumi to act as provisional liquidators or liquidators of the Borrower, as well as to seek an order that the administration of the Borrower commenced on 22 June 2020 therewith end by operation of s 435C(3)(g) of the *Corporations Act* or alternatively by exercise of the court's discretion under s 447A(1) of the *Corporations Act*.

28 On 24 June 2020, the SPVs sought, and were granted, leave to amend their application so as to seek that Messrs MacKinnon and Giasoumi be granted leave pursuant to s 532(2) of the *Corporations Act* to execute a written consent to act as provisional liquidators and as liquidators of the SPVs.

29 On 29 and 30 June 2020, I heard the Trustee's application and the SPVs' application for the appointment of provisional liquidators. I reserved my decision.

30 ASIC sought leave to appear on the applications for the appointment of provisional liquidators. Mr Moore, one of Her Majesty's Counsel, with Ms van Proctor of counsel, appeared for ASIC. I was greatly assisted by their appearance. ASIC provided cogent

reasons in support of the applications for the appointment of the provisional liquidators. The appearance of ASIC was particularly helpful to the court as the public investors in the scheme, who stood to lose by reason of its failure, were otherwise unrepresented.

31 In summary, both the Borrower and the SPVs are in receivership. The Trustee seeks the appointment of provisional liquidators to the Borrower. The SPVs, who are also in receivership, seek the appointment of provisional liquidators to themselves.

Relevant principles

32 The Trustee submits that the following principles apply to an application for the appointment of provisional liquidators. These principles are not disputed.

33 As Gordon J noted in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* ('*ASIC v ActiveSuper (No 2)*'),[1] an applicant must satisfy the court as to two matters:

(a) 'that there is a reasonable prospect that a winding-up order will be made,'[2] and

(b) 'that there are present factors sufficient to require the exercise of the court's discretion to appoint a provisional liquidator prior to the final hearing.'[3]

34 As to the first matter, the principles applying on an application to wind up on the just and equitable ground are well established. They are conveniently stated by Gordon J in *ASIC v ActiveSuper (No 2)*.

35 The just and equitable ground is 'not closed', and each case should be determined on

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1 (2013) 93 ACSR 189 ('*ASIC v ActiveSuper (No 2)*').

2 *ASIC v ActiveSuper (No 2)* (n 1) 192 [15]. See also *Tickle v Crest Insurance Co of Australia Ltd* (1984) 2 ACLC 493, 494 (McLelland J); *Australian Securities Commission v Solomon* (1996) 19 ACSR 73, 80 [7] (Tamberlin J) ('*ASC v Solomon*').

3 *ASIC v ActiveSuper (No 2)* (n 1) 196 [25].

its own circumstances.[4]

36 A winding up application can be granted where there is 'a justifiable lack of confidence in the conduct and management of the company's affairs' such that there is a risk to the public interest.[5]

37 The requisite lack of confidence can arise where, upon a thorough examination, the court cannot have confidence in 'the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company.'[6]

38 There are various reasons why a court may determine that there exists a risk to the public interest.[7] The court might require a winding up order to 'ensure investor protection', to 'prevent and condemn repeated breaches of the law', or to intervene 'where a company has not carried on its business candidly and in a straightforward manner with the public'.[8]

39 Where a company is 'prosperous, or at least solvent' a stronger case may need to be made out.[9] However, '[s]olvency … is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the [*Corporations Act*].'[10]

40 As to the second matter, the principles are also well established as to when there will exist factors sufficient to require the exercise of the court's discretion to appoint

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4 Ibid 194 [19].

5 *Loch v John Blackwood Ltd* [1924] AC 783, 788 (Shaw L). See also *ASIC v ActiveSuper (No 2)* (n 1) [20].

6 *Galanopoulos v Moustafa* [2010] VSC 380, [32] (Sifris J). See also *ASIC v ActiveSuper (No 2)* (n 1) 195 [21].

7 *ASIC v ActiveSuper (No 2)* (n 1) 195 [23].

8 Ibid.

9 *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506, [96] (Mandie J).

10 *ASIC v ActiveSuper (No 2)* (n 1) 195 [24]. See also *ASIC v ABC Fund Managers* (2001) 39 ACSR 443, 470–272 [124]–[130] (Warren J).

provisional liquidators:

(a) The court has a 'wide' discretion whether or not to appoint provisional liquidators.[11] The court may appoint provisional liquidators 'on any ground.'[12] All that is required to enliven the power is 'a bona fide application constituting sufficient ground for the making of the order.'[13]

(b) The appointment of a provisional liquidator pending the determination of a winding up application 'is a drastic intrusion into the affairs of the company and will not be done if other measures would be adequate to preserve the status quo.'[14]

(c) Accordingly, an applicant 'must point to some good reason for intervention' if they seek to have provisional liquidators appointed.[15]

(d) There is a significant overlap between those considerations that determine whether the court has discretion to appoint provisional liquidators, and those considerations that determine whether a company should be wound up on the just and equitable ground due to a lack of confidence in a company's affairs or a risk to the public interest.[16]

(e) Of relevance also are the six principles stated by Tamberlin J in *ASC v Solomon*:

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11 *Re Huntford Pty Ltd* (1993) 12 ACSR 274, 277 (Seaman J).

12 *ASIC v CME Capital Australia Pty Ltd* [2015] FCA 1489, [15] (Moshinsky J). See also *Re New Cap Reinsurance Corporation Holdings Ltd (1999)* 32 ASCR 234, 238 [23] (Young J).

13 *Re New Cap Reinsurance Corporation Holdings Ltd* (1999) 32 ACSR 234, 238 [23] (Young J), citing *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732, 738 (Master Lee QC) and *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625, 636 (Kirby P) ('*Constantinidis*'). See also *ASIC v ActiveSuper (No 2)* (n 1) 192 [11]–[12].

14 *ASIC v ActiveSuper (No 2)* (n 1) 192 [11]–[12]. See also *Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd* (2003) 47 ACSR 197, 217 [105] (Austin J).

15 *Allstate Exploration NL v Batepro Australia Pty Ltd* [2004] NSWSC 261, [30] (Austin J); *ASIC, in the matter of Bennett Street Developments Pty Ltd v Weerappah (No 2)* [2009] FCA 249, [8] (Goldberg J); *ASIC v ActiveSuper (No 2)* (n 1) 192 [14].

16 *ASIC v ActiveSuper (No 2)* (n 1) 195 [21]–[22].

(a) The court should only appoint a provisional liquidator where it is satisfied that there is a valid and duly authorised winding up application and that there is a reasonable prospect that the order will be made …

(b) The fact that the assets of the corporation may be at risk is a relevant consideration.

(c) The provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all concerned and to enable the court to decide, after a further examination, whether the company should be wound up …

(d) The court should consider the degree of urgency, the need established by the applicant creditor and the balance of convenience … The power is a broad one and circumstances will vary greatly. Commercial affairs are infinitely complex and various and it is inappropriate to limit the power by restricting its exercise to fixed categories or classes of circumstances or fact.

(e) It may be appropriate to appoint a provisional liquidator in the public interest where there is a need for an independent examination of the state of accounts of the corporation by someone other than the directors …

(f) Where the affairs of the company have been carried on casually and without due regard to legal requirements so as to leave the court with no confidence that the company's affairs would be properly conducted with due regard for the interests of shareholders, it may be appropriate to appoint a provisional liquidator ...[17]

41 Counsel for the Trustee further submitted that where an application is made and an appearance is filed in opposition, the onus is not as heavy on the applicant. The court takes into account the opportunity the opponent has of putting before it any relevant factors as to why a provisional liquidator ought not be appointed. Relevantly, Young J in *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* observed that:

> If the plaintiff's affidavits raise matters to which a court would expect there to be some answer and there is no answer provided then that in itself raises a matter of suspicion that it may well be in the public interest to put in a provisional liquidator.[18]

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17 *ASC v Solomon* (n 2).

18 *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* (1986) 10 ACLR 865, 866 (Young J); see also *ASIC v ActiveSuper (No 2)* (n 1) 194 [18]; *ASIC v CME Capital Australia Pty Ltd* [2015] FCA 1489 [20] (Moshinsky J).

Accloud PLC concerns

42 As mentioned above, reports of the receivers and managers were produced on 28 May 2020 and 23 June 2020. Those reports raise substantial concerns that the receivers and managers submit enliven the court's discretion to appoint provisional liquidators to the Borrower and the SPVs.

43 The receivers and managers raise concerns in respect of the transfer of the Accloud PLC shares to 101 Investments Ltd. In particular, the receivers and managers submit that the sale of the Accloud PLC shares raises questions as to whether Mr Mawhinney has complied with his obligations as a director of the Borrower and whether the Borrower has engaged in voidable transactions under Part 5.7B of the *Corporations Act*.

44 The receivers and managers' report discloses that Accloud PLC is a software development business which was expected to be floated in the UK in March 2020. It had no revenue in its most recent accounting period. It was expected, however, to generate a large profit for its shareholders upon being floated.

45 On 27 September 2019, Accloud PLC 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.'

46 On 4 October 2019, a week after this announcement, IPO Wealth Holdings No 3 Pty Ltd, which held the Accloud PLC shares as part of the scheme investments, entered into an agreement for the sale of the Accloud PLC shares to 101 Investments Ltd, a company incorporated in the British Virgin Islands and not part of the IPO Wealth Group. According to the share sale agreement produced by the receivers and managers, the sale was backdated to be 'made effective on 30 January 2019'. The price agreed to be paid for the shares was €12,156,310.61. According to an explanation by Pinnacle Advisory Group Pty Ltd ('Pinnacle Group'), the Borrower's accountants, and as provided to the Trustee by Mr Mawhinney in his letter of 5 May 2020, this represented the market value of the shares as at 30 January 2019 and not their value at the date of execution of the agreement after the announcement of the float.

47 As mentioned above, the Trustee wrote to Mr Mawhinney expressing concern about the transfer of the Accloud PLC shares. In his letter to the Trustee received 5 May 2020, Mr Mawhinney referred to a response received from Pinnacle Group, the Borrower's accountants. That response acknowledged that the transfer of the Accloud PLC shares had occurred and stated that the shares were transferred in consideration of a €12,156,310.61 loan receivable by the vendor. The response also stated that the transaction was a vendor finance arrangement. Subsequently, in his affidavit of 18 June 2020 Mr Mawhinney deposes that the transfer of shares was in fact settled by a $14,892,632.00 reduction in an existing loan to the Borrower from Eleuthera Group Pty Ltd, a company whose sole director is Mr Mawhinney. The two explanations conflict with one another: the first being a sale in exchange for a debt due to the vendor; and the second being the reduction of an existing loan involving another company, Eleuthera Group Pty Ltd. The receivers and managers note that the second explanation was not referred to in Mr Mawhinney's correspondence with the Trustee.

48 The receivers and managers raise concerns as to an unexecuted loan facility agreement from the Borrower to 101 Investments Ltd that would have taken effect, if executed, on 30 January 2019. That agreement had been signed by Mr Mawhinney as director of the Borrower, but not by Mr Graham Cook, director of 101 Investments Ltd. The loan would have been for $100 million on a 15-year term, with neither the principal nor interest to be payable until 2034. The receivers and managers contend that the long term of the loan and lack of regular interest payments would have made this transaction disadvantageous to investors. The receivers and managers are concerned that although the copy in their possession has not been executed, another version of the loan agreement may have been executed. The receivers and managers did not go so far as to submit that the shares were transferred under such an agreement. However, they appear to invite such an inference through drawing attention to the parallel dates of the loan facility and the share sale agreement. Indeed, in their report of 28 May 2020 the receivers and managers state that it appeared the share sale transaction had been treated as a part of a $100 million facility agreement. Mr Mawhinney disputes that any form of the loan agreement has been implemented,

emphasising that the copy presented to the court is unexecuted.

49 Irrespective of the correct characterisation of the share sale transaction, the receivers and managers contend that Mr Mawhinney did not properly inform the Trustee that the transaction took place. Mr Mawhinney disputes that assertion and submits that the asset portfolio summary for March 2020 provided to the Trustee disclosed the transaction as being a transfer of shares in consideration of a reduction in the Borrower's loan from Eleuthera Group Pty Ltd. Mr Mawhinney submits that an error in that summary prevented the value of the Accloud shares held by the relevant SPV from being correctly updated to $nil. Mr Mawhinney submits that the provision of the asset portfolio summary for March 2020 puts paid to the allegation that the transaction was concealed from the Trustee.

50 The receivers and managers submit that if the transaction occurred in January 2019 then the summaries provided to the Trustee from that date should have been updated to reflect this. Instead, the Accloud PLC shares continued to appear in the asset portfolio summaries as an asset of the IPO Wealth Group until at least February 2020.

51 The receivers and managers also submit that Mr Mawhinney's explanation of the date of the transaction is insufficient. In his 5 May 2020 letter, Mr Mawhinney referred to an explanation by Pinnacle Group that IPO Wealth Holdings No 3 Pty Ltd, as beneficial owner, had 'made the decision to transfer all of its Accloud shares to 101 Investments Ltd on 30 January 2019' in exchange for a 'loan receivable of EUR12,156,310.61'. Similarly, in his Report on Company Activities and Property completed for IPO Wealth Holdings No 3 Pty Ltd, Mr Mawhinney stated that IPO Wealth Holdings No 3 Pty Ltd held no assets as the 'equity investments in th[e] company were sold … on 30 January 2019.' The receivers and managers submit that the alleged decision to transfer the shares in January 2019 is difficult to reconcile with the fact that the share sale agreement is dated 4 October 2019. They submit that it is more likely that the decision to transfer the shares to a company in the British Virgin Islands was made on or shortly before the date of the share sale agreement and was inspired by Accloud PLC's announcement on 27 September 2019.

Concerns as to other transactions with director-related entities

52 The receivers and managers also raise concerns as to various other transactions with director-related entities undertaken by the Borrower and SPVs.

53 In the 28 May 2020 report, the receivers and managers note that the December 2019 asset portfolio summary disclosed three investments in PayMate India. One of these three equity investments was held by 101 Investments Ltd and listed as such in the asset portfolio summary. It had a value of $3,095,553.09. 101 Investments Pty Ltd does not form part of the IPO Wealth Group. However, the Paymate India investment it held was listed in the asset portfolio summary of the IPO Wealth Group. The carrying value of this equity investment was reduced to $nil in the asset portfolio summary of March 2020. This reduction was a source of concern for the Trustee.

54 In his affidavit of 18 June 2020, Mr Mawhinney acknowledged that an equity investment in PayMate India had been held by 101 Investments Ltd. He deposes that moneys had been lent to the Borrower by Eleuthera Group Pty Ltd, and then on-lent to 101 Investments Ltd to purchase the equity investment in PayMate India. Mr Mawhinney deposes that the reduction of the value of the 101 Investments Ltd investment in the asset portfolio summary corresponded with a reduction of equal value in the original loan from Eleuthera Group Pty Ltd to the Borrower. Accordingly, Mr Mawhinney deposes that the shares were never an asset of the Borrower and that the loan from the Borrower to 101 Investments Pty Ltd that funded the acquisition of the shares had been settled in consideration of the loan reduction. The receivers and managers submit that they have not yet established the existence of any loan agreements from Eleuthera Group Pty Ltd to the Borrower and that accordingly the matter warrants further investigation.

55 In their report of 23 June 2020, the receivers and managers also draw attention to several Accloud PLC and PayMate India related investments that were purchased by director-related entities using moneys advanced from the IPO Wealth Group. They state that these investments were recorded in the asset portfolio summaries as investments of the IPO Wealth Group, although the receivers and managers note that

they appear to have been loans.

56 The receivers and managers further note that the Borrower made payments to director-related parties in September and December 2019 for the acquisition of properties, with some indication that the properties purchased were in the vicinity of Dunk Island.

57 In his affidavit of 18 June 2020, Mr Mawhinney acknowledges that payments were made in September 2019 by the Borrower to director-related parties for the acquisition of real property. He deposes that this was a result of a daily transfer limit that applies to the Mayfair 101 Group's online banking platform. Mr Mawhinney states that the Borrower held the funds for a short period of time and that the ultimate purchase of real property was otherwise unrelated to the IPO Wealth Group.

58 Searches by the receivers and managers show recent acquisitions of Mission Beach properties by: Jarrah Lodge Holdings Pty Ltd, trustee of a trust whose sole beneficiary is Mr Mawhinney; by Tamminga Holdings Pty Ltd, an entity associated with Mr Mawhinney's sister; as well as by relations of Mr Mawhinney's partner. No evidence has been produced to link the September and December 2019 payments to these particular properties. However, Mr Mawhinney had previously communicated to the Trustee on 25 March 2020 that, in regards to meeting a scheduled payment to the Trustee, he expected an 'equity release from our Mission Beach properties'. The Trustee contends that at no point have there been assets in the IPO Wealth Group asset portfolio summaries that related to Mission Beach.

59 The receivers and managers submit that large sums have also been advanced to director-related entities, Eleuthera Group Pty Ltd, The Sunseeker Trust and M101 Holdings Pty Ltd. In his affidavit of 24 June 2020, Mr MacKinnon deposes that according to a review of actual cash payments undertaken by the receivers and managers, Eleuthera Group Pty Ltd has in fact been a debtor of the Borrower since April 2017. That debt to the Borrower reached its peak at $20,641,500.00 in 25 September 2019. It has since been progressively reduced and was $3,658,025.58 at

14 May 2020. The Borrower did not receive interest under any of these loans. Further, the receivers and managers have not been provided with loan agreements for the loans to The Sunseeker Trust and M101 Holdings Pty Ltd.

60 In his affidavit of 27 June 2020, Mr Mawhinney deposes that it is common not to create a loan agreement for intercompany loans in a privately held group setting. He notes that there is no requirement to charge interest on intercompany loans. Mr Mawhinney seems to ignore the fact that the moneys loaned to the Borrower by the Trustee were trust moneys provided by the investors.

Intercompany finance arrangements

61 In his affidavit of 27 June 2020, Mr Mawhinney deposes that the benefits of the Accloud PLC transaction to investors flowed from a reduction effected in the Borrower's loan account with Eleuthera Group Pty Ltd. This loan, Mr Mawhinney deposes, provided an important liquidity benefit for investors, and the Accloud transaction should be seen in light of this.

62 More generally, Mr Mawhinney maintains that intercompany loans formed part of the Mayfair 101 Group's liquidity management strategy. Relevantly, Mr Mawhinney refers to the Mayfair 101 Group's investment strategy and operations manual which states that it is 'our intention to use monies raised via IPO Wealth more readily as a means of financing the purchase of more assets, with the view to transition these assets elsewhere in the group as they mature in exchange for liquidity.' Mr Mawhinney deposes that the Trustee was aware of this strategy and did not object when the strategy was brought to its notice. Mr Mawhinney draws attention to a need for Eleuthera Group Pty Ltd to advance funds to the Borrower in the second half of 2019 in order for the Borrower to meet an increased number of redemptions.

63 In my opinion, it is questionable whether the scheme was financially viable from the outset if, by virtue of the illiquid nature of its assets and the limited revenue they generated, the Borrower was compelled to seek loans to meet redemptions.

64 In accordance with this explanation, Mr Mawhinney contends that Eleuthera Group

Pty Ltd was a creditor under a loan arrangement with the Borrower. This position differs substantially from that disclosed by the receivers and managers' report of 23 June 2020. As noted above, the receivers and managers' report states that Eleuthera Group Pty Ltd has been continuously in debt to the Borrower from April 2017. Detailed accounts would be necessary to reconcile these two positions. As discussed below, adequate accounts of these transactions are lacking. It goes without saying that there is a significant difference between Eleuthera Group Pty Ltd owing moneys to the Borrower and the Borrower owing moneys to Eleuthera Group Pty Ltd, so far as the administration of the scheme is concerned.

Accounting irregularities

65 The receivers and managers submit that the accounts kept by Mr Mawhinney of the Borrower and the SPVs are misleading at worst and sloppy at best. The IPO Wealth Group at present has no outside accountants assisting in the preparation of the accounts. Their previous accountants, Pinnacle Group, ceased acting on 1 June 2020. Mr Mawhinney deposes that it was not uncommon for Pinnacle Group's journal entries to be made incorrectly and for the Mayfair 101 Group to seek explanation and correction.

66 The Mayfair 101 Group's accounts, and by extension those of the IPO Wealth Group, are maintained on Xero. Mr Mawhinney deposes that the Xero accounting records have not yet been finalised for the 2019 and 2020 financial years. In lieu of finalised Xero records, Mr Mawhinney deposes that the primary accounting record for this period is the quarterly asset portfolio summaries, which are in an Excel spreadsheet. Accordingly, Mr Mawhinney claims that if the Excel spreadsheet is inconsistent with the accounts kept in order to produce the statutory accounts, then the accounts kept in order to prepare the statutory accounts need to be corrected. This concession by Mr Mawhinney would tend to support the receivers and managers' view that the accounts for that part of the scheme for which Mr Mawhinney is responsible are misleading at worst and sloppy at best. It is also relevant to note in considering the state of the schemes accounts for which Mr Mawhinney is responsible, that significant

arithmetical errors have been identified in the asset portfolio summaries, including in the entries for those transactions whose propriety is contested.

67 Further, the Trustee and the receivers and managers draw the court's attention to several accounting practices that require further investigation. They submit that assets of particular concern to the Trustee have been revalued in circumstances where the receivers and managers cannot find documentation to support those revaluations. They also submit that expenses of the Borrower and the SPVs have been capitalised in the accounts in a manner which the receivers and managers submit does not represent their fair market value. Mr Mawhinney disputes these submissions in his affidavit of 27 June 2020.

68 The receivers and managers' report of 23 June 2020 notes that some of the SPVs' accounts include unissued shares as an asset of the Borrower. The receivers and managers submit that 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.

69 In their report of 23 June 2020, the receivers and managers raise concerns with certain accounting practices of the Borrower and the SPVs that do not align with the investment structure of the scheme as it was originally contemplated. As mentioned above, under the scheme the Borrower is intended to on-lend the moneys provided by investors to the SPVs, who would invest the moneys in particular investment opportunities. However, the receivers and managers note that a debt investment in Bright Innovation and an equity investment in ThinkMarkets were held by the Borrower directly, rather than an SPV. The receivers and managers also note that the Accloud PLC investment, mentioned above, was ultimately found to be registered to the Borrower rather than the appropriate SPV. Similarly, as discussed above, a Paymate India investment was held by an entity that is not within the IPO Wealth Group. The receivers and managers also note that IPO Wealth Holdings 10 Pty Ltd

was reported to have held an equity investment in an island off Venice. However, the share registry of the relevant entity records those shares as being held by Okto Holdings Ltd, a wholly owned subsidiary of Mayfair 101 Ltd. Mayfair 101 Ltd is an entity that appears to be related to Mr Mawhinney.

Mr Mawhinney's submissions

70 Mr Mawhinney submits that the appointment of provisional liquidators is a remedy of last resort. He submits that, even if a winding up order is likely to be made in this proceeding, the court still should decline to appoint provisional liquidators to the Borrower and the SPVs.

71 Mr Mawhinney emphasises that provisional liquidation is a drastic step and should not be taken where it is not necessary to do so. Mr Mawhinney draws attention to *Constantinidis v JGL Trading Pty Limited* ('*Constantinidis*'),[19] where Kirby P affirmed the proposition in *Zempilas v J N Taylor Holdings*[20] that the appointment of a provisional liquidator is 'not to be contemplated if other measures would be adequate to preserve the status quo.'[21]

72 Mr Mawhinney submits that the observations in *Constantinidi*s are binding considerations on this court. Accordingly, Mr Mawhinney argues that the determination of the application should turn on three questions: firstly, whether the receivership can stay in place; secondly, whether the receivership is apt to secure the status quo pending determination of the winding up hearing; and thirdly, whether a continuation of the receivership would be less drastic and damaging than a provisional liquidation.

73 As to the first question, Mr Mawhinney submits that the court's statutory power to

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19 (1995) 17 ACSR 625 ('*Constantinidis*').

20 *Zempilas v J N Taylor Holdings Ltd (No 2)* (1990) 3 ACSR 518.

21 *Constantinidis* (n 15), 635 (Kirby P) citing *Zempilas v J N Taylor Holdings Ltd (No 2)* (1990) 3 ACSR 518, 522 (King CJ).

appoint receivers where it is just and convenient to do so is a broad power. It is a flexible equitable remedy that is not limited to interim preservation.[22] Accordingly, where receivers have already been appointed there does not need to be a 'next step' that involves further intervention by the court prior to a winding up hearing.

74 As to the second question, Mr Mawhinney submits that the receivership has already secured the assets of the Borrower and of each of the SPVs and diverted their management from Mr Mawhinney. The receivers and managers are in control of each entity and have been investigating and continue to investigate their affairs. The receivers and managers were invested with broad powers upon their appointment, including powers to carry on the business of the entities, bring or defend proceedings in their names, and acquire or sell property.

75 Significantly, Mr Mawhinney submits that neither the receivers and managers nor the Trustee have identified any want of power. It is put to the court that, owing to the functional similarity of receivership and provisional liquidation, in their present position there is nothing that the receivers and managers wish to do but cannot do.

76 Mr Mawhinney submits that the only powers that have been alluded to and which would evade the receivers and managers are the power to conduct a public examination and the power to bring proceedings in respect of voidable transactions.

77 Mr Mawhinney submits that the power to conduct a public examination is not beyond the receivers and managers' reach in view of their position. They would merely require the written consent of ASIC to attain such a power. Mr Mawhinney submits that the court should infer such consent would be forthcoming if it were requested, taking into account ASIC's involvement in this proceeding and its vocal support of the receivers and managers.

78 As for the power to bring a voidable transaction claim, Mr Mawhinney submits that any such claim should be made once the court has determined that the Borrower and

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22 *Re United Medical Protection Ltd* [2002] NSWSC 413, [5] (Austin J).

the SPVs should be wound up, and not before. Mr Mawhinney submits that no such claim has been identified by the receivers and managers, and that even if one had been, no reason has been advanced as to why such a claim would need to be commenced urgently.

79 As to the third question, Mr Mawhinney submits that the court should not appoint a provisional liquidator because it would be an unnecessary and drastic step that would damage any entities related to Mr Mawhinney.

80 Mr Mawhinney submits that a court will generally not need substantial evidence to find that an entity 'is likely to be adversely affected, and potentially substantially adversely affected, by the appointment of a provisional liquidator.'[23] Mr Mawhinney also draws attention to the observation of Austin J in *Roumanus v Orchard Holdings* that 'the very appointment of a provisional liquidator can have a drastic effect on the company's business, perhaps even leading to its commercial death.'[24]

81 In particular, in his affidavit of 23 June 2020, Mr Mawhinney deposes as to his concerns about the reputational damage an appointment of provisional liquidators might cause. If the appointment were made and Mr Mawhinney were to be ultimately successful in resisting final orders for winding up, Mr Mawhinney submits that the IPO Wealth Group would be prejudiced by potential damage to their goodwill and public standing flowing from the stigma attached to the appointment of provisional liquidators. There would, he submits, also be a risk that the appointment would impact the standing of other entities in the Mayfair 101 Group against which winding up orders are not sought.

82 In response to the contention of the Trustee that any reputational damage that could be suffered by Mr Mawhinney and the IPO Wealth Group has already occurred through the appointment of receivers and managers, Mr Mawhinney submits that

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23 *Re Therma Truck Pty Limited* [2016] NSWSC 266 [55] (Black J).

24 *Roumanus v Orchard Holdings* [2007] NSWSC 1480 [9] (Austin J).

although it has been held that the difference between a receiver and a provisional liquidator in a functional sense is 'not great',[25] there may well be a greater degree of stigma, and thus commercial damage, attached to the appointment of a provisional liquidator. He submits that while receivers are appointed for a variety of reasons and to undertake a variety of tasks, provisional liquidators tend to foretell the end of a company's life.

83 Mr Mawhinney submits that a consideration of these factors led Rees J to decline to appoint provisional liquidators *Re Crow Inn Pty Limited*,[26] instead appointing receivers and managers. In that case, after stating that she did not consider there to be 'any practical difference between appointing a receiver and manager or a provisional liquidator', Rees J declined to appoint a provisional liquidator due to the 'unnecessary damage' it may cause to the goodwill of the company, finding that the 'better course' was to appoint a receiver and manager.[27]

84 Moreover, Mr Mawhinney submits that conversion to provisional liquidation would foreclose the voluntary administration process and, with it, consideration of a deed of company arrangement (DOCA). Two drafts of a proposed DOCA have been put into evidence by the administrators: one provided by Mr Mawhinney on 23 June 2020 and another by a related entity of the Borrower on 26 June 2020. Further, Mr Mawhinney submits that the conversion to a provisional liquidation would also occur before the views of the investors had been properly ascertained. Mr Mawhinney submits that there is significant support amongst investors for a unitholders' meeting to be held. Mr Mawhinney submits that their actual views would be relevant to whether it is just and equitable that the Borrower and SPVs be wound up, in light of the emphasis placed in the relevant principles on the interests of investors.

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25 *Re Allco Securities Pty Limited* [2011] NSWSC 1113 [17] (Barrett J).

26 [2020] NSWSC 601 (*'Re Crow Inn*').

27 Ibid [62]–[63].

Conclusion

85 I find that my discretion to appoint provisional liquidators has been enlivened. As mentioned below, both the Borrower and the SPVs are likely to be wound up. Further, on the evidence disclosed in the receivers and managers' reports, I find that there are sufficient grounds to warrant the appointment of provisional liquidators by the court prior to the hearing of any winding up application.

86 In my opinion, there is a real prospect that a winding up order will be made against the Borrower and the SPVs. The scheme has failed. No further investment is sought for the IPO Wealth Fund. The IPO Wealth managed investment scheme will need to be wound up. The investors are not receiving their interest payments. The Borrower is in default and is unable to pay the moneys due to the Trustee when they fall due. The Borrower is unable to repay its $80 million odd debt to the Trustee. The action of Mr Mawhinney in placing the Borrower into voluntary liquidation of itself admits insolvency.

87 There are several aspects of the administration of the scheme, as discussed in the receivers and managers' reports above, which strongly suggest that assets of the Borrower and the SPVs have been wrongly dealt with to the detriment of the investors. There is a prima facie case that Mr Mawhinney has diverted assets of the Borrower and the SPVs to several director-related entities, including a company associated with him in the British Virgin Islands. At the very least, the benefits these transactions provided to the scheme are questionable. In particular, I am satisfied that Mr Mawhinney has not proffered a satisfactory explanation for the transfer of the Accloud PLC shares to 101 Investments Ltd. He has had ample time to address the matter but has singularly failed to do so. The Accloud PLC shares account for almost a quarter of the IPO Wealth Group's assets. The share transfer is central to the Trustee's concerns in this proceeding. Accordingly, the inadequacy of Mr Mawhinney's explanation of the share transfer induces a lack of confidence in the way in which the affairs of the Borrower and SPVs have been conducted.

88 The accounts of the Borrower and the SPVs are, according to the receivers and

managers, sloppy at best and misleading at worst, and therefore cannot be relied on. In what can be discerned, there appears to be a possibility of substantive misreporting. There are entries, particularly those which concern 'unissued shares', that suggest that the person responsible for keeping the accounts lacks a basic understanding of accounting principles. The assertion by Mr Mawhinney that the accurate and reliable accounting records are those in an Excel spread sheet, rather than the accounts kept in order to prepare the statutory accounts as required under the *Corporations Act*, highlights the need for accurate information on the dealings of the Borrower and the SPVs to be obtained and properly recorded in the accounts.

89 I find that the suggestions of improper dealings with assets and the significant issues with the accounts, as detailed above, indicate that is likely to be just and equitable to wind up the Borrower and the SPVs. These grounds further indicate that there are good reasons for the court to intervene by appointing provisional liquidators prior to a winding up hearing.

90 I acknowledge Mr Mawhinney's submission that receivers would be able to sufficiently preserve and protect the assets. However, in my opinion provisional liquidators would be better placed to protect the interests of investors and creditors in the scheme. In light of the state of the accounts, there is a need for accurate and reliable information to be produced which will allow the true state of affairs of the IPO Wealth Group to be obtained and any returns available to the investors to be identified. This is particularly so, where we are dealing with a scheme that solicited investments from the public.

91 Provisional liquidators would be better placed to retrieve this information in light of the powers afforded to them under the *Corporations Act*. It seems highly likely that the provisional liquidators will have to exercise their powers to examine Mr Mawhinney. Mr Mawhinney seems to be the repository of much relevant information. Any delay in obtaining that information may well be disadvantageous to the investors. That information would enable the provisional liquidators to prepare proper accounts of the Borrower and the SPVs and of what has happened to their

assets. Given the state of the asset portfolio summaries, I doubt that they will enable the true state of affairs of the IPO Wealth Group to be ascertained and the returns to the investors to be identified, without further investigation by the provisional liquidators.

92 I acknowledge Mr Mawhinney's submissions that other Mayfair 101 Group schemes may be adversely affected by the appointment of provisional liquidators. However, in my opinion the main consideration of the court must be the interests of the investors and creditors in the IPO Wealth Fund. Further, in my opinion any relevant reputational damage to either the IPO Wealth Group or the larger Mayfair 101 Group would already have occurred through the appointment of the receivers and managers to the IPO Wealth Group entities by the court and by the Trustee.

93 I find that the circumstances of this case can be distinguished from *Re Crow Inn*. That case dealt with a family dispute. In the present matter, provisional liquidators are to be appointed to a public managed investment scheme. Further, in *Re Crow Inn* the business was a going concern. There was no question of insolvency, as there is here. Accordingly, the possibilities of reputational and commercial damage that Rees J considered are of diminished relevance in the present matter.

94 I acknowledge Mr Mawhinney's submission that a successful DOCA presents an alternative to insolvency. However, the administrators submit that the fate of any proposed DOCA is entirely in the hands of the Trustee. The Trustee holds the majority value of debt in the Borrower. Moreover, the Trustee has appointed receivers to each subsidiary. Those subsidiaries hold assets that account for the value of the Borrower. Despite their belief that a DOCA is worth exploring, the administrators note that in its current form the DOCA is likely to be unacceptable to the Trustee. Accordingly, as the Trustee has indicated that it will not support the DOCA in its current form, it cannot succeed. In those circumstances, I am satisfied that the proposed DOCA constitute no impediment to the appointment of a provisional liquidator over the Borrower.

95 Taking into account all these matters, I consider that it is in the best interests of the investors, and the proper administration of the Borrower and the SPVs, that provisional liquidators be appointed. In my opinion, the interests of investors in ascertaining the true state of affairs of the SPVs and the Borrower is of primary importance. Affording the receivers and managers the power to conduct public examinations will avoid any delay in this regard, which can only be to the advantage of the investors. Accordingly, I find that, on balance, I should exercise my discretion to appoint provisional liquidators.

96 The SPVs also sought leave for the receivers and managers under s 532(2) of the *Corporations Act* to execute a written consent to act as provisional liquidators and liquidators of the defendants. This application was not opposed. Leave is granted.

97 The Trustee also seeks a similar order which I shall make.

98 The plaintiff's application to join the Borrower in their proceeding as the 17th defendant is granted.

CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the reasons for judgment of Justice Robson of the Supreme Court of Victoria delivered on 31 August 2020.

DATED this ninth day of September 2020.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

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Associate