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

SEC 2020 02284

B E T W E E N :

IN THE MATTER OF **IPO WEALTH HOLDINGS NO 2 PTY LTD (ACN 620 610 157) & Ors according to the attached Schedule**

BETWEEN:

VASCO TRUSTEES LIMITED (ACN 138 715 009) as trustee of the IPO Wealth Fund (ABN 71 456 233 724)

Plaintiff

- and -

IPO WEALTH HOLDINGS NO 2 PTY LTD (ACN 620 610 157) & Ors according to the attached Schedule

Defendants

OUTLINE OF SUBMISSIONS
of the Plaintiff for the winding up of the Seventeenth Defendant
on the just & equitable ground 2 September 2020

1. By an interlocutory process filed 29 May 2020, the plaintiff seeks orders –
   1) pursuant to section 461(1)(k) of the *Corporations Act 2001* (**Act**) that the 17th defendant IPO Wealth Holdings Pty Ltd (**Borrower**) be wound up, and
   2) that Hamish Alan MacKinnon and Nicholas Giasoumi of Dye & Co Pty Ltd be appointed as liquidators of the Borrower for the purposes of the winding up.
2. This application is opposed by Mr James Mawhinney, director of the Borrower.
3. The plaintiff relies principally upon –
   - Mr MacKinnon and Mr Giasoumi's report filed as provisional liquidators of the defendants dated 27 August 2020 (**Provisional Liquidators Report**),
   - The affidavit of Craig Mathew Dunstan of 2 September 2020 (**Fourth Dunstan Affidavit**),
   - The affidavits of Lisa Maree McNicholas of 28 August 2020 and 31 August 2020,
   - The Fifth MacKinnon Affidavit of 1 September 2020, and
   - Its submissions of 31 August 2020.
4. The plaintiff also relies upon the first, second and third affidavits of Craig Mathew Dunstan of 22 May 2020, 28 May 2020 and 18 June 2020.

Background[1]

The Fund

5. The IPO Wealth Fund (**Fund**) is held by the plaintiff as an independent trustee (**Trustee**) for the benefit of investors who acquire units in the Fund. The Fund is structured as an unregistered unit trust established pursuant to its Constitution of 17 March 2017.[2]
6. The Fund is solvent. Its principal asset comprises the loan described below. It also holds an operations account, as well as a capital protection reserve in which performance fees accumulate and are held to provide some measure of protection to unitholders against capital loss, and a cash reserve. Together, the operations account and the capital protection reserve hold $6,633,832.10.[3]

The Loan to the Borrower / the IPO Wealth Group

7. The funds raised were invested by way of secured loan by the plaintiff to the Borrower which traded as "Mayfair 101 Holdings" - the 17th defendant.[4] There the moneys were managed by the IPO Wealth companies. As explained to investors in the Information Memorandum, the Trustee had no oversight regarding the subsequent investments made by the Borrowers using the money loaned, and relied on periodic confirmation from IPO Wealth that the monies were being used appropriately.[5]
8. The Borrower was required to repay the loan, with interest of 10% pa, to the Trustee. The sole director who controlled both the Borrower and the Investment Manager – indeed all of the IPO Wealth companies - is James Mawhinney.[6]
9. The Borrower set up special purpose vehicles (**SPV**s) for each investment made. The SPVs are the 1st–16th defendants. These SPVs existed for the sole purpose of investing the monies lent by the Fund and did not otherwise trade.[7] The Borrower on-loaned the monies borrowed from the Fund to the SPVs for each investment.[8] The returns on the investments were to be fed back up the chain of the Fund by way of loan principal and interest

[1] By way of fuller background, the plaintiff refers to its outlines of submissions of 28 May 2020 (includes chronology) and 23 June 2020.
[2] See [4] of the affidavit of Craig Mathew Dunstan of 22 May 2020 (**Dunstan Affidavit**). The Constitution of the Fund is exhibit CMD-1.
[3] See [4] of the Dunstan Affidavit.
[4] See [8]-[10] of the Dunstan Affidavit. The loan agreement is exhibit CMD-5, and the GSA is exhibit CMD-6.
[5] The IPO Wealth Information Memorandum is exhibit CMD-2 to the Dunstan Affidavit. See page 10 as to the disclosed role of the Trustee.
[6] See exhibit CMD-3 and CMD-4 of the Dunstan Affidavit. Mr Mawhinney has also acknowledged that he was the ultimate decision-maker in the IPO Wealth Group of companies - see the Provisional Liquidators Report at p11.
[7] See [15] of the Dunstan Affidavit.
[8] See the Provisional Liquidators Report at pp6 and 22.

repayments to the Trustee and through to investors, less the fees and expenses provided for,[9] although at times the Borrower made repayments to the Trustee from money coming from the wider Mayfair Group.[10]

Investors

10. Investors selected from different term-based investment options, enabling investments for a defined period of 3, 6, 12, 24, 36 or 60 months with the option of regular income distributions to be paid out or reinvested.[11] Distributions were generally paid each calendar quarter for which they are calculated up to a capped amount. Investors could elect at the outset whether to re-invest their distributions or have them paid out into their nominated accounts. Where there was not sufficient cash-flow to fund the distributions, the Fund could make up the deficiency in subsequent quarters or months where possible.[12] The risks associated with investing in the Fund were explained in the Information Memorandum, and included that distributions and capital returns / redemptions of units were not guaranteed.[13]

11. There are approximately 181 investors in the Fund. Investors are not retail clients, but are wholesale clients as defined in s761G of the *Corporations Act*. Some are investment or trading companies. Some are private investors who rely upon the income they have been receiving and were counting on the return of their capital. These include retirees who have invested superannuation savings with the Fund, individuals who had invested their life savings or divorce property settlements for a period prior to settling on property purchases or needing the money to build a home, and others, who had invested in the belief that the investment product was "like a term deposit". Whilst some were sophisticated investors, others wrote in their submissions to the Court that they were "definitely not sophisticated investors" (emphasis in one investor's handwritten submission).[14]

Events of late 2019 and 2020

12. In July 2019 the Trustee had engaged PKF Melbourne, an independent accounting firm, to value the assets of the Borrower as at 30 June 2019, including the value of the underlying assets owned by the SPVs. PKF's work extended into 2020 and was subject to the qualification that PKF could not verify the existence, carrying value and expected date of

[9] See p8 and Section 4 at page 14 of the Information Memorandum at CMD-2 of the Dunstan Affidavit.
[10] See the Provisional Liquidators Report at p24.
[11] See p4 of the Information Memorandum at CMD-2 of the Dunstan Affidavit – a letter to investors from the CEO of the Investment Manager IPO Wealth Pty Ltd.
[12] See p6 of the Information Memorandum at CMD-2 of the Dunstan Affidavit.
[13] See p3, p7 and Section 5 commencing p15 of the Information Memorandum at CMD-2 of the Dunstan Affidavit.
[14] See [9] of the Second Dunstan Affidavit and see the investor communications and submissions at CMD-41 and CMD-42 of the Second Dunstan Affidavit.

liquidity for all assets directly.[15] PKF relied upon information provided to it by the Borrower (as provided for by the Information Memorandum).

13. From February 2020 onwards, the Borrower began repeatedly to breach its repayment obligations to the Trustee. The Trustee began engaging with the Borrower to seek to bring its payment obligations into line so that redemption payments could be met, and seeking information from Mr Mawhinney, and continued to do so.[16]

14. Unfortunately these efforts were unsuccessful. The Borrower continued to default, and Mr Mawhinney's responses to requests for information were inadequate, evasive and increasingly concerning. What information or responses were received from Mr Mawhinney only increased concerns. An instalment arrangement agreed also quickly fell into default.

15. Redemptions were frozen on 7 April 2020, in light of the Borrower's repeated failures to meet interest and principal payment obligations in February, March and April to date, and following Mr Mawhinney's suggestion that redemptions be frozen in light of financial difficulties impacting his Group in light of COVID-19 and that he had frozen redemptions on his Mayfair Platinum products.[17]

16. On 22 May 2020 the Trustee acted to protect the Fund and preserve the underlying assets on behalf of investors. It appointed the Receivers to the assets of the Borrower under the terms of its security, and on its application to this Court, the Receivers were also appointed to the assets of the SPVs. There then followed a series of hearings held by this Court, including one on 29 May 2020 at which unitholders were invited to make written or oral submissions.[18] Further written submissions from investors were placed before the Court when Mr Mawhinney sought to adjourn the hearing of the application to appoint provisional liquidators on 19 June 2020, including those expressing that they were "*angry and upset*" at Mr Mawhinney who "*seem[ed] relentless in his continuing harassment of us (Unitholders)*", and was

> being extremely underhanded in the way he is directly addressing Unitholders. He is obviously trying to rally Unitholders in leading a mutiny against Vasco and I'm sure is counting on our inexperience, fear, vulnerability and trust to do so….His "aim" of resuming monthly distributions and returning all capital to us is a callous dangling carrot indeed, and I truly resent his desperate attempts to undermine Vasco as trustee and the entire court process currently unfolding…I am definitely NOT In favour of holding a meeting. I am definitely NOT in favour of removing the Receivers. I have been suffering extreme stress and anxiety throughout this

[15] See [17] of the Dunstan Affidavit and CMD-9.
[16] See the plaintiff's submissions of 28 May 2020 for a chronology of these events at [14]-[45], indexed to the affidavit material.
[17] See [7(d)] and CMD-31 of the Second Dunstan Affidavit as to Mr Mawhinney's email of 25 March 2020. Mr Mawhinney stated that the Borrower planned to bring loan and interest payments up to date with equity release proceeds from the Mayfair Group's Mission Beach properties. See also [23] and CMD-13 of the Dunstan Affidavit as to the Trustee's Investor Update of 7 April 2020.
[18] See the investor communications and submissions at CMD-41 and CMD-42 of the Second Dunstan Affidavit. Additional investor submissions are at CMD-56 to the Third Dunstan Affidavit.

entire process…".[19]

17. On 28 May 2020 the Receivers filed their First Report. On 23 June 2020 the Receivers filed a Second Report as to the results of their investigations to date, and on 2 July 2020 the Court joined the Borrower to this proceeding as the 17th defendant and appointed the Receivers as Provisional Liquidators of all the defendant companies, and delivering reasons for doing so.

18. It is uncontroversial that the Borrower is insolvent.[20] Prior to the provisional liquidation of the Borrower, on 3 June 2020 the Trustee called in all monies due under the loan agreement and the GSA namely $79,062,394.02, including unpaid interest. The Provisional Liquidators have confirmed that the Borrower did not and does not have the capacity to pay this due debt.[21] Mr Mawhinney does not dispute the Borrower owes the Trustee this sum plus accruing interest, and has acknowledged that it is unable to pay this debt.[22] The financial position of the Borrower is explained by the Provisional Liquidators in their report at page 14. On present information and the current level of cooperation from Mr Mawhinney and his related entities, the Provisional Liquidators do not expect the SPVs will realise sufficient funds from their investments to enable the Borrower to pay back its debt to the Trustee in full.[23]

19. On 27 August 2020 the Provisional Liquidators filed a further Report with the Court pursuant to orders requiring them to do so. Whilst it appears they still have not had access to all the books and records of the defendants,[24] it details the results of their further investigations to date.

20. Recently, in the last week before the hearing of this application, it appears that Mr Mawhinney has been busy drumming up support with investors for a scheme he has in mind. His new effort appears to be to replace the Trustee, amend the trust constitution, release to him capital protection moneys held to benefit unitholders, and for him to take back control of all the assets of the Fund and the defendants, dangling promises of a return of money. This activity is deeply concerning, and is discussed further below and in the plaintiff's written submissions of 31 August 2020.

Principles

[19] See the plaintiff's written submissions of 19 June 2020 and the sample unitholders submissions there set out, extracted from the Third Dunstan Affidavit exhibit CMD-56.
[20] See the Provisional Liquidators Report at p23.
[21] See the Provisional Liquidators Report at p6.
[22] See the Provisional Liquidators Report at p14.
[23] See the Provisional Liquidators Report at p14.
[24] They have been awaiting Mr Mawhinney's response to a list of documents so that they can then have access to the documents less any Mr Mawhinney objects to, since 11 August 2020.

21. The principles applying on an application to wind up on the just and equitable ground are well established –

    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.[25]

    2) It has long been the case that 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.[26]

    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 propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company".[27]

    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.[28] Such an order would also be appropriate where the corporation has acted fraudulently or entered into sham transactions.[29]

    5) "A stronger case might be required where the company was prosperous, or at least solvent".[30] Solvency, however, 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 Act.[31] Indeed a case in which there have been numerous contraventions of the Corporations Act is one in which it is *"precisely the situation where a solvent company should be wound up*."[32]

Relevant Matters

22. Mr Mawhinney has failed to invest IPO Wealth money in an appropriate mix of investment types for IPO Wealth, sufficient to achieve a successful balance between risk on the one

[25] *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* [2013] FCA 234; (2013) 93 ACSR 189 at [19] and the authorities there cited.
[26] *ASIC v ActiveSuper (No 2)* at [20], citing *Loch v John Blackwood Ltd* [1924] AC 783, 788; see also *ASIC v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [55].
[27] *Galanopoulos v Moustafa* [2010] VSC 380 at [32]; see also *ASIC v ActiveSuper (No 2)* at [21] and the authorities there cited.
[28] *ASIC v ActiveSuper (No 2)* at [23] and the authorities there cited.
[29] *ASIC v International Unity Insurance Pty Ltd* [2004] FCA 1059 at [139] per Lander J.
[30] *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [96].
[31] *ASIC v ABC Fund Managers* [2001] VSC 383; (2001) 39 ACSR 443 at [124]-[130]; see also *ASIC v ActiveSuper (No 2)* at [24].
[32] *ASIC v Planet Platinum* [2015] VSC 682 at [95].

hand and security of returns on the other; between long-term higher-profit investments on the one hand, and short-term income-producing investments on the other. It is now apparent that too many investments were long-term (at least 3 years) and illiquid, and some were speculative. In doing so, Mr Mawhinney's choices have failed to produce the income required by the terms of the Information Memorandum published to unitholders, and failed to ensure the return of capital unitholders expected. This failure in Mr Mawhinney's management of the IPO Wealth Fund moneys and the problems arising therefrom occurred before the COVID-19 pandemic impacted Australia,[33] although no doubt this has worsened the position.

23. More than that, Mr Mawhinney has failed in his management of the IPO Wealth Fund investments in multiple more concerning ways, including –

    1) He has repeatedly purchased assets using tens of millions of dollars of IPO Wealth money, and then assigned the rights to or transferred those assets away to companies of his own[34] - overseas in the British Virgin Islands and in the UK, where they are difficult to pursue and retrieve. Two examples are the island in Venice (Isolo San Spirito), and the Accloud shares.[35] In the case of the island in Venice, IPOW10 paid $17.5million of IPO Wealth funds[36] without an independent valuation. It entered into the purchase agreement on 15 August 2018, but Okto Holdings Ltd was substituted as purchaser by instrument dated 10 May 2019.[37] No adequate explanation has been given for this. Despite this, IPOW10 remains contractually required to provide further monies to complete development works apparently underway on the island.[38] In the case of the Accloud shares, the timing of this transfer away was telling.[39] This

[33] See also the Provisional Liquidators Report at p24 as to the Borrower's inherent problems in funding its obligations to fund the payment obligations under the loan from the Trustee pre-dating COVID-19. The Borrower was in default within 4 months of the first payment of a redemption on 3 October 2019.
[34] Mawhinney Retirement Group companies – as to which see the Provisional Liquidators Report at p19.
[35] In the case of the island in Venice, the asset which instead appeared in the books of IPO10 was a debt purportedly owed by Okto Holdings Ltd, one of his Mawhinney Retirement Group companies, at an undervalue, not due for repayment for 12 years and without security, even if security could have been effectively enforced against his overseas-registered companies. See the Provisional Liquidators Report at p18-19.
[36] Under a loan agreement with no interest or capital required to be repaid for 12 years, and no security was ever registered.
[37] See the Provisional Liquidators Report, Annexure A, p25. The purchase was of 100% of the capital of the two Italian companies which own the island.
[38] See the Provisional Liquidators Report, Annexure A, p26.
[39] It was right before two announcements were made which were likely to significant increase the value of the shares. One was as to a new deal Accloud had secured in India which promised revenue of some $5billion over 5 years. The other was as to the imminent listing of the Accloud shares on the London Stock Exchange. Regarding the Accloud shares see the Reasons of this Court of 2 July 2020 at T179 lines 10-30 and as to the concealing of the transfer away of the shares at T181 lines 18-31 and the finding that Mr Mawhinney's current description of the transactions does not fit easily with his earlier statement to the Trustee at T181 line 28 – T182 line 4. This Court also found that: "*I accept that Mr Mawhinney has not proffered a satisfactory explanation for the transfer of the Accloud shares to 101 Investments Ltd. He has had ample time to address the matter but has singularly failed to do so*."

has meant that when those assets would become liquid and more valuable, the increased benefit would accrue to Mawhinney Retirement Group companies. Not to the benefit of IPO Wealth unitholders. The Provisional Liquidators described these and other transfers of assets out of the IPO Wealth Group to other entities related to Mawhinney as "of particular concern"[40] and have noted both a large number of cash movements between the Borrower and other companies related to Mr Mawhinney, as well as the disposal of assets to those companies.[41]

2) Mr Mawhinney obscured these activities from the Trustee, representing in the quarterly reports / assert portfolio summaries required by the Trustee that these assets remained held by or as part of the assets of the IPO Wealth Group.[42]

3) Mr Mawhinney caused the Borrower to provide funds to other Mawhinney-related companies for their activities on numerous occasions. An example is the $12.63m unsecured, undocumented loan from the Borrower to 101 Investments Ltd, a British Virgin Island company in the ultimate control of Mr Mawhinney and part of the Mawhinney Retirement Group, for it to invest in revenue stream agreements.[43]

4) At times Mr Mawhinney caused an IPO Wealth company to provide funds to a third party company so that that third party could then pay fees owing for Mr Mawhinney's consulting services provided to the third party.[44]

5) Mr Mawhinney failed to keep accurate, reliable books and records of the Borrower and the SPVs. This has enabled Mr Mawhinney to give multiple, conflicting explanations for transactions between entities in the IPO Wealth Group, re-characterising them when criticism is made. For example, the Provisional Liquidators have concluded that the records viewed show that the Borrower loaned funds to the SPVs pursuant to executed loan agreements, one for each SPV. Despite this, Mr Mawhinney has claimed in his public examination that rather than loans from the Borrower to the SPVs, the moneys were paid by the Borrower to acquire "unissued shares" in the SPVs.[45] Even if this were true, such payments would be manifestly uncommercial. A holding company gains nothing by acquiring even more "unissued" shares in its wholly-owned subsidiary. It is already solely entitled to receive all dividend distributions of surplus profits from its subsidiary.[46]

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[40] See the Provisional Liquidators Report at p6.
[41] See the Provisional Liquidators Report at p10.
[42] CMD-10 to the Dunstan Affidavit.
[43] See the Provisional Liquidators Report at p14.
[44] See the Provisional Liquidators Report at p16.
[45] See the Provisional Liquidators Report at pp6 and 22.
[46] See the Reasons of this Court of 2 July 2020 at T183 lines 1-7: "…*The accounts of some of the SPVs include, as shareholders' funds, unissued shares. This cannot be so. Only issued shares are accounted for as part of shareholders' funds. These entries suggest that the person responsible for keeping the accounts lacks a basic understanding of accounting principles."*

6) Mr Mawhinney has stated that the SPVs largely operated using the one bank account of the Borrower. This means that transactions between the Borrower and the SPVs can only be reconciled by reference to journal entries.[47] The problem with this is that Mr Mawhinney has also stated on affidavit that journal entries were sometimes false,[48] meaning that those too cannot necessarily be relied upon. Moreover, the IPO Wealth Group has failed to produce any signed financial statements for the 2018 and 2019 financial years. The Provisional Liquidators have observed this makes it difficult to come to a concluded view about any particular transaction recorded in the accounts as they are effectively still in draft.[49] The Borrower has signed financial statements for the 2017 financial year, however at which stage it had operated for only about 2 months. The Provisional Liquidators' view is that the income and assets for that period may have been overstated, based on their concerns as to the accuracy of the reporting of management fees as income, and the investments held as at 30 June 2017.[50] Mr Mawhinney has sought to suggest that the correct record was the quarterly investment portfolio summary provided to the Trustee. However the Provisional Liquidators note this is supported by few working papers and does not appear to have been produced from a properly maintained set of books of account.[51]

7) The asset valuation methodology Mr Mawhinney and his staff employed had no sound basis in accounting, and misled the Trustee as to the realisable value of the assets.[52] The IPO Wealth Group's practice of not only allocating expenses amongst the SPVs but treating them as increasing the capital value of the assets is not justified by ordinary accounting principles and artificially inflated the value of the investments as represented to the Trustee.[53] As an example, the Borrower or the 16th defendant IPOW17 transferred $15,633,577 to M12 Global Ltd (**M12 Global**). Mr Mawhinney is sole director of M12 Global. This payment was presented in the accounts as a debt investment of IPOW17 with a total investment value of more than double that amount $31,544,782. The Provisional Liquidators have identified that this figure artificially inflated the actual value of the "investment" and was made up, amongst other things, of capitalised expenses of $15,588,198 and an upwards revaluation of $13,901,174.[54]

[47] See the Provisional Liquidators Report at p11.
[48] Fourth Mawhinney Affidavit of 27 June 2020 at [21] and [23].
[49] See the Provisional Liquidators Report at p11.
[50] See the Provisional Liquidators Report at p11.
[51] See the Provisional Liquidators Report at p11.
[52] The Provisional Liquidators have observed for example that the value of the "asset" held by IPOW17 as communicated to the Trustee was artificially inflated - see the Provisional Liquidators Report at p17.
[53] See the Provisional Liquidators Report at p13.
[54] See the Provisional Liquidators Report at p17-18.

8) It appears Mr Mawhinney and his staff failed to conduct adequate due diligence on prospective investments, in order to exercise the care and diligence to be expected of an investment manager.[55]

9) Mr Mawhinney failed to obtain security for debt investments made for the IPO Wealth Fund, and even where it was obtained and it was often not registered. In some cases Mr Mawhinney has given evidence that this was through administrative oversight.[56] Regardless of the reasons, this has necessarily reduced the prospect of IPO Wealth Group moneys being retrievable from those investments.

10) The Provisional Liquidators have identified other concerning deficiencies in Mr Mawhinney's handling of IPO Wealth money and affairs, including for undocumented loans to Mawhinney-related entities reporting them to the Trustee as investments, poor documentation around the acquisition of investments, agreements not fully executed, security interests not registered, investments acquired on terms requiring payment of interest where there was never any realistic prospect of interest could be paid, non-recipe of interest income on loans, failures to attempt to collect overdue interest payments, documents suggesting ownership of shares that were inconsistent with the share registers of those companies, inconsistent information as to whether convertible notes had been converted to equity, a range of other inconsistent or conflicting information.[57]

24. Mr Mawhinney is continuing to fail to act in the unitholders' interests –

1) He has failed to co-operate with the Provisional Liquidators from the time of their appointment as Receivers on 22 May 2020 with the provision of adequate and accurate information, and the full books and records of the IPO Wealth Companies, despite orders made from the outset compelling him to do so. The Provisional Liquidators have been forced repeatedly to make application to Court to seek to compel Mr Mawhinney's compliance,[58] and still they do not have all the documents they require to perform their job.[59]

2) During the receiverships he failed to provide the ROCAPs required, and those eventually provided were incomplete. He continues to fail to provide any ROCAPs required for the provisional liquidations.[60]

3) Mr Mawhinney has also failed to assist the Provisional Liquidators to achieve the

[55] See the Provisional Liquidators Report at p12-13.
[56] See the Provisional Liquidators Report at p16-17.
[57] See the Provisional Liquidators Report at p12-13.
[58] By interlocutory processes of 15 June 2020 and 26 June 2020.
[59] There was a late provision of a large amount of material just on 19 August 2020, and since 11 August 2020 they have been awaiting Mr Mawhinney's response to the list of documents imaged by the forensic IT consultant, to that they may view the documents. See the Provisional Liquidators Report at pp6-10.
[60] See the Provisional Liquidators Report at p15.

best outcome possible in the potential realisation of assets, which may take time. He could immediately cause his companies to transfer back assets to the IPO Wealth companies that he had transferred away. He could answer the Provisional Liquidators questions and requests for information to assist their realising value for unitholders. He could assist the Provisional Liquidators in engaging with companies in which IPO Wealth had invested, He has done none of these things.

4) Each time a Court hearing date has approached for the appointment of provisional liquidators or the winding up of the companies, Mr Mawhinney has sought to avoid the orders being made "by the back door". He has not respected the Court's processes and oversight. Rather, he has engaged in conduct designed to avoid the orders being made – first by the classic device of an appointment of voluntary administrators to the Borrower just prior to the hearing of the provisional liquidator application, and more recently by trying to drum up the support of unitholders (see next).

5) Troublingly, in the week before this hearing of the applications to wind up the defendant companies, Mr Mawhinney has engaged in a concerted campaign to unitholders. He has been making hopeless promises to unitholders of a return of 97 cents in the dollar. He has inappropriately used the unitholder register confidential to the Investment Manager to contact unitholders in his own capacity and advocate to them for their support of his proposal. His proposal involves the replacement of the Trustee by a Mayfair nominee, concerning amendments to the Trust constitution which would erode the independence of any trustee where a core of unitholders appear to be under Mr Mawhinney's influence, release to his company of nearly all of the $2.3m capital protection reserve held for unitholders, and a proposed deal which if it succeeded would see Mr Mawhinney through his company regain control over all of the assets. Mr Mawhinney has pursued unitholders relentlessly over the past week by multiple emails and phone calls, holding at least 6 information sessions over Thursday, Friday and Monday, and chasing unitholders who had not voted in favour of his proposed resolutions following information sessions over the weekend and into this week. Some unitholders have written to the Trustee variously expressing their "*concern*" and "*suspicions*" of Mr Mawhinney's conduct, describing being "*harassed or intimidated by James Mawhinney*", speaking of being "*frightened*" that "*with only one week to go until Court resumes that all your good work protecting us as Unitholders will come undone*".[61]

25. On the question of the views of the unitholders as to what the Court should do, it is

[61] See the affidavits of Lisa Maree McNicholas of 28 August 2020 and 31 August 2020. The plaintiff's analysis of Mr Mawhinney's proposal is set out in its written submissions of 31 August 2020.

submitted –

1) The Court's supervisory jurisdiction has been engaged over the fate of the IPO Wealth defendant companies, and the assets which they hold or used to hold. That being so, the Court makes its decision on applications made before it based on evidence, having regard to legal principle and legislative provisions, not based on salesmanship, incomplete information, and promises of a large flow of money which is unlikely to appear.[62]
2) A key problem with the Court accepting the views of unitholders who have been persuaded to support Mr Mawhinney, is the entirely one-sided views, promises and apparently misleading material their views may be based upon. This, combined with the position of severe financial distress that many of them may be in, unfortunately infects any ability of the Court to assess the basis of their belief in Mr Mawhinney's promises as to his control of their money and tantalising promises of a potential return of most if not all of their capital. A similar observation has been made before –

> At a general level, I should not be taken as opposing consulting the members as to the fate of the fund. However…I anticipate at least the possibility that any meeting held…would be subject to contention between rival factions within the fund and litigation to test those rival contentions. Further…**there is a real possibility that the members will be showered with a great deal of information** about rival contentions **and that some of it may be misleading**. Those circumstances must **reduce the quality of the "democracy" invoked, and in my view make it desirable that I ought make the [winding up] order**.[63] (emphasis added)

3) Another problem is that there are other unitholders who find Mr Mawhinney's harassment of them disturbing and distressing, who are confused by who he seems to be speaking for, and do not want his proposals to go ahead.[64]
4) All of the unitholders of course are entitled to the Court's protection in this case, and given the evidence of all that has happened, it is submitted that the unitholders are best-served and stand the best chance of a recovery of as much funds as is achievable by liquidators being appointed to the Borrower. This recovery could be greatly enhanced for unitholders if Mr Mawhinney would return to the liquidators the assets he transferred away from the IPO Wealth companies, and if he worked with, not against, the liquidators.

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[62] As noted above, if Mr Mawhinney truly intended to assist unitholders get their money back, he could certainly offer to do so without also requiring control of the assets the promise of profit to go to himself or his companies.
[63] *Bruce v LM Investment Management Ltd* [2013] QSC 192; (2013) 94 ACSR 684 at [42].
[64] See the plaintiff's written submissions of 19 June 2020 and the sample unitholders submissions there set out, extracted from the Third Dunstan Affidavit exhibit CMD-56. See also the responses of unitholders per Ms McNicholas' affidavit of 31 August 2020, discussed at [25] above.

Factors warranting the winding up of the Borrower

26. All of the above principles are engaged here, in favour of ordering the winding up of the Borrower on the just and equitable ground. In all the circumstances -

    1) 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. This has heightened where Mr Mawhinney is making every effort to take back control of the companies and their assets prior to the hearing of the winding up applications.
    2) The lack of confidence arises as, after examining the entire conduct of the affairs of the company, the Court cannot have confidence in the propensity of Mr Mawhinney, the controller of the Borrower, to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company.
    3) In light of their investigations to date, which are ongoing, the Provisional Liquidators of the Borrower and the SPVs have formed the view that these companies ought be placed into liquidation;
    4) The Provisional Liquidators have identified multiple claims which would be available to liquidators appointed to the Borrower and the SPVs to make recoveries enabling distributions to be made to unitholders, including –
        i. to recover assets that have wrongly been transferred away from IPO Wealth companies, including the island in Venice and the Accloud shares
        ii. to recover payment of loans made to other companies related to Mr Mawhinney with money from the IPO Wealth companies,
        iii. claims against Mr Mawhinney for insolvent trading, breaches of directors duties and misleading and deceptive conduct.
    5) The companies are insolvent. In the Borrower's case, it is unable to repay its $80 million debt to the Trustee;
    6) The plaintiff refers to the conduct and management of the Borrower and the IPO Wealth Group described above. In particular the plaintiff refers to the irregularities in the handling of assets of SPVs and funds of the Borrower, and evidence of assets being diverted to other companies related to James Mawhinney, without an equal and corresponding benefit to the SPVs and the Borrower to protect the investments of unitholders; [65]
    7) The risk to the public interest here means that the winding up order is necessary to

[65] "Equal" does not mean simply of equal monetary value on an artificial accounting basis. It means of equal value in the context of insolvency. If a proprietary, beneficial interest in an asset on the verge of a significant increase in value is replaced with a book debt of fixed amount owed by a related entity, registered overseas, this is not equal, even assuming an ability to repay. Nor is it equal if it is replaced by a reduction of a debt allegedly owed to another related entity, in a fixed amount.

ensure investor protection. Until the companies are in liquidation, it appears Mr Mawhinney will continue to seek to make promises to unitholders which are unlikely to be kept, play on their fears, cause them unnecessary stress, and still fail to repay the Trustee so that unitholders' capital may be redeemed. Moreover, the Borrower and the IPO Wealth companies have not carried on their business candidly and in a straightforward manner. Persistently, Mr Mawhinney hid the true picture from the Trustee in the asset portfolios and other information he presented when asked. In addition, in this case, winding up is justified in order to prevent and condemn repeated breaches of the law. The Provisional Liquidators' investigations so far appear to show there may have been fraudulent conduct. A winding up order is appropriate for that reason also.

27. This Court has already found on 2 July 2020 that it is likely that the IPO Wealth defendants will be wound up. What the further investigations undertaken by the Provisional Liquidators' have exposed, as described in their report of 27 August 2020, only serves to reinforce the inevitability of that outcome. It is the only and best way the Trustee may recover as much of the debt as possible, and that unitholders are likely to recover as much of their investments as possible.

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Lonsdale Chambers
2 September 2020