

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



SECI 2020 02284

Case: S ECI 2020 02284

Filed on: 07/09/2020 09:17 AM

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

Defendants

- and -

JAMES PETER MAWHINNEY

Other Party

**OUTLINE OF SUBMISSIONS OF THE PLAINTIFF IN RESPECT OF ITS
APPLICATION FOR AN INJUNCTION AGAINST JAMES MAWHINNEY
6 September 2020**

1. By an interlocutory process filed 4 September 2020, the plaintiff (**Vasco**) seeks an injunction that

Mr Mawhinney by himself, his servants, agents, employees and any company of which he is an officer or member, is restrained from communicating in any way with unit holders of the IPO Wealth Fund –

- 1) in relation to, or to seek support for, any proposal for the restructure of the IPO Wealth Fund,
 - 2) in relation to the matters referred to in the report of the Provisional Liquidators appointed to the Defendants dated 27 August 2020,
 - 3) in relation to anything otherwise to do with the IPO Wealth Fund, the Plaintiff or the Defendants, or
 - 4) in relation to any financial product or any financial advice.
2. Given the period of notice given to Mr Mawhinney as respondent to the interlocutory process, Vasco seeks an interlocutory injunction pending a final hearing on 16 September 2020, being the date when Vasco's application for winding up orders against the first to seventeenth defendants is listed for final hearing.

3. Vasco relies principally upon the affidavit of Craig Mathew Dunstan of 4 September 2020 (**Fifth Dunstan Affidavit**). By way of background matters it also relies upon the (First) Dunstan Affidavit of 22 May 2020 and the Second Dunstan Affidavit of 28 May 2020.
4. The plaintiff seeks leave also to rely upon -
 - The affidavit of Robert John Storai of 2 September 2020 filed by the Defendants in this proceeding (**Storai Affidavit**), and
 - The affidavit of James Peter Mawhinney of 2 September 2020 filed by Mr Mawhinney in this proceeding (**Mawhinney Affidavit**).
5. In relation to Mr Mawhinney's latest plan, the more recent focus of his emails and phone calls to unitholders, the plaintiff refers to its submissions of 31 August 2020.¹

Background

Unitholders

6. Vasco is the trustee of the IPO Wealth Fund (**Fund**), which is a unit trust established by trust deed (known as a Constitution).² Investors in the IPO Wealth Fund 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.³
7. There are approximately 181 investors (**Unitholders**) in the Fund.⁴ Investors are not retail clients, but are wholesale clients as defined in s761G of the *Corporations Act* 2001 (Cth) (**Act**). Some are investment or trading companies. Some are private investors who have relied 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, people 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 other investors, some of whom had apparently invested in the belief that the investment product would achieve the investment objectives promised by IPO Wealth Pty Ltd, the Fund's Investment

¹ By way of background to this application, the plaintiff refers to its outline of submissions of 2 September 2020, as well as the fuller chronology in its submissions of 28 May 2020.

² Exhibit "CMD-1" to the Dunstan Affidavit.

³ 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.

⁴ Dunstan Affidavit at [14].

Manager, which Mr Mawhinney is the director of. Whilst each was technically a wholesale investor within the meaning of that term in the Act, others have written in their previous submissions to the Court that they were “definitely not sophisticated investors” (emphasis in one investor’s handwritten submission).⁵

8. Vasco, as trustee of the Fund, owes the Unitholders as a whole equitable duties to act in their best interests in the management of the Fund.
9. Mr Mawhinney personally stands in no contractual or other legal relationship with the Unitholders. As is explained further below, he has obtained the details and contact information of the Unitholders by reason of a company of which he is director, IPO Wealth Pty Ltd (not a party to the proceeding) having acquired those details for the sole purpose of carrying out his contractual obligations to Vasco.⁶ IPO Wealth Pty Ltd has a contractual relationship with Vasco, pursuant to the Investment Management Agreement (IMA).⁷ It has no contractual or other legal relationship with the Unitholders.

Mr Mawhinney’s pursuit of Unitholders

10. On 22 May 2020 Vasco appointed the Receivers to the assets of the Borrower under the terms of its security. On its application to Court, the Receivers were also appointed to the assets of the SPVs. Further hearings were held by this Court, including one on 29 May 2020 at which Unitholders were invited to make written or oral submissions.⁸
11. Shortly after the hearing on 29 May 2020, “Mayfair 101” (being an entity controlled by Mr Mawhinney) issued a media release *inter alia* condemning the appointment of Receivers, criticising the choice of Dye & Co as Receivers, the Trustee, and misleadingly referring only to one missed loan repayment which was blamed on Covid-19.⁹ It issued a further media release on 31 May 2020 *inter alia* claiming that “the Group is best placed to manage the assets of IPO Wealth Holdings Pty Ltd”.¹⁰
12. At some point Mr Mawhinney began contacting Unitholders directly. Below is

⁵ See [9]-[12] of the Second Dunstan Affidavit and see the investor communications and submissions at CMD-41 and CMD-42 of the Second Dunstan Affidavit.

⁶ Fifth Dunstan Affidavit at [35]

⁷ Exhibit “CMD-91” to the Fifth Dunstan Affidavit.

⁸ 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. Some investors may have sent submissions directly to the Court.

⁹ CMD-67 to the Fifth Dunstan Affidavit.

¹⁰ CMD-68 to the Fifth Dunstan Affidavit.

reference to some of these communications. There may have been more.

13. On 10 June 2020 Mr Mawhinney used the confidential register of Unitholders contact details (which was acquired to him, as the sole director of IPO Wealth Pty Ltd for the purpose of IPO Wealth Pty Ltd performing its obligations under the IMA, and not otherwise) to send an email to all Unitholders¹¹ presenting himself and his team as though they were the ones acting to protect the interests of Unitholders, claiming *inter alia* that

My team and I will not rest until this serious injustice has been put right and we have exhausted all avenues to ensure the full return of your capital;

that

We have been working non-stop to develop a solution for protecting your investment in IPO Wealth from potential liquidation;

that

We...are confident we can get the Fund back to business as usual;

and asserting a unitholder meeting “must” be called to put forward “our plan”, to

give you the best possible chance of protecting your investment rather than a liquidator fire-selling the assets which is likely to result in a significant capital loss for all investors. (emphasis in original)

14. This was misleading. It claimed that it was a liquidation which would cause significant capital loss for investors - rather than events that had already occurred, including Mr Mawhinney’s misdirection of large amounts of IPO Wealth companies’ funds.
15. Strikingly, these communications sent to Unitholders by and for Mr Mawhinney (see also below), display four key themes, playing upon Unitholders’ fears without compunction –
- 1) A sense of urgency. An implied message of: “YOU MUST ACT NOW – DO NOT LET RECEIVERSHIP/LIQUIDATION HAPPEN OR ALL IS LOST!” (the stick), coupled with
 - 2) Confident reassurance, also conveyed with some urgency: “JOIN WITH ME AND TOGETHER WE CAN WIN!” / “I AND ONLY I CAN SAVE YOU!” / “YOU CAN GET MOST OF YOUR MONEY BACK BUT ONLY WITH ME!” (the carrot),
 - 3) Blaming others: “What is happening is not my fault. This is all some else’s

¹¹ CMD-69 to the Fifth Dunstan Affidavit.

fault” - variously Covid-19, the Trustee, Dye & Co (the Provisional Liquidators’ firm), ASIC, Pinnacle Advisory (Mr Mawhinney’s former accountants),¹² and

4) “Trust me”.

16. The picture this paints for Unitholders is that all is not yet lost, and their investments could still be saved – but only by Mr Mawhinney. There is no disclosure as to the truth of what he has done with the funds they invested, and how this has benefitted him and his companies and trusts.

17. The next day, 11 June 2020, a further media release was published by “Mayfair”,¹³ claiming success –

Investors in Mayfair 101 Group’s IPO Wealth Fund have thrown their support behind the urgent calling of a unitholder meeting to discuss the Fund’s future after the receivers were appointed....

18. On 18 June 2020 the Trustee heard from multiple Unitholders about a letter from Mayfair 101 that day, expressing concern or distress about Mr Mawhinney’s communications to Unitholders. One showed how seductive an effect Mr Mawhinney’s assurances could have on some Unitholders, if they trusted in him, although this Unitholder on reflection had reservations –

...I was buoyed by the thought of Mayfair’s desire to reinstate dividend payments and repay all the unit holders their capital investments. However, upon further reflection, it occurred to me that perhaps Mayfair is trying to gain time to perhaps act in its own best interest, and not in the interest of unitholders. I hope other unit holder were not seduced by these offers...I was one unit holder who signed the request for a meeting...I will certainly not be endorsing the removal of the Receivers and Managers...¹⁴

19. Another showed that at least some Unitholders had misunderstood Mr Mawhinney’s communications and on whose authority he wrote to Unitholders –

I am sorry i have been mis leded by Mr James Mawhinney by replying his email to support an unitholders meeting. I did not know the situation and i thought the email was coming from the Receivers and Managers.¹⁵

20. Another unitholder was distressed and objected to Mr Mawhinney’s pursuit of

¹² In addition to the multiple accounting firms Mr Mawhinney has blamed since 22 May 2020, it is notable that Mr Mawhinney has gone through two sets of legal teams – the Melbourne law firm and senior and junior counsel which represented him in this proceeding until July 2020, and the Brisbane law firm and counsel which acted for him July-August 2020 and represented him at the public examinations conducted by the Provisional Liquidators.

¹³ CMD-70 to the Fifth Dunstan Affidavit.

¹⁴ CMD-71 to the Fifth Dunstan Affidavit.

¹⁵ CMD-72 to the Fifth Dunstan Affidavit.

Unitholders and their support –

I am angry and upset, as Mr Mawhinney seems relentless in his continuing harassment of us (Unitholders).

I feel Mr Mawhinney is 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 entire process and the thought that the Courts may further delay proceedings makes me sick to my stomach.¹⁶

21. On 16 August 2020, the day before the public examinations of Mr Mawhinney commenced, Mr Mawhinney issued a further, lengthy media release via the Mayfair 101 website, seeking to deflect blame from himself. In it he attacked the Trustee, trying to blame the Trustee and "their accomplices" for the losses to Unitholders, and falsely claiming the Trustee hadn't engaged with him (for months) to find a workable solution after the Borrower began defaulting. These "accomplices"¹⁷ appear to include just about everyone but himself. Mr Mawhinney asserts the Court was wrong, his own former accountants the Pinnacle Advisory Group were to blame for what the IPO companies' accounts showed, criticises the work of the Provisional Liquidators' firm Dye & Co and questions their independent role, calls for an Australian government investigation including into ASIC's role, defends his transferring of assets, and paints himself as a white knight, fighting against the odds to protect unitholders' investments.¹⁸
22. The next day the Trustee heard from Unitholders expressing their distress at the situation.¹⁹

¹⁶ CMD-73 to the Fifth Dunstan Affidavit.

¹⁷ Page 1 of the media release.

¹⁸ CMD-75 to the Fifth Dunstan Affidavit.

¹⁹ CMD-76 the Fifth Dunstan Affidavit.

Mr Mawhinney's recent, heightened pursuit of Unitholders

23. Recently, commencing on 26 August 2020 and in the last week before the next scheduled date for the winding up applications, it appears that Mr Mawhinney has been busy drumming up support with investors for a scheme he has in mind.²⁰ His latest plan appears to be to replace the Trustee with a company nominated by Mayfair 101,²¹ to amend the trust constitution in way that would erode the independence of any trustee where a core of Unitholders appear to be under Mr Mawhinney's influence, to release to him \$2.3m of capital protection moneys held to benefit unitholders,²² and for his new company to take back control of all the assets of the Fund and the defendants, dangling promises of a return of over 90% of Unitholders' money. This activity is deeply concerning. It is discussed and analysed in Vasco's written submissions of 31 August 2020.
24. The concerned communications of some Unitholders received by the Trustee are set out in the Fifth Dunstan Affidavit from [18] onwards. Some notable aspects of these include –
- 1) A misunderstanding in one case that the release of performance fees was to make proportionate payments back to Unitholders. In fact Mr Mawhinney's proposal was that the \$2.3 million in performance fees accrued in the capital protection reserve would be released to his company, less just \$250,000 to be released to Unitholders.²³
 - 2) Very little time for any Unitholder to obtain independent advice given the urgency pressed upon Unitholders by Mr Mawhinney, as well as a lack of facility to obtain any such advice for unitholders without their own financial planners or lawyers.²⁴
 - 3) A lack of understanding in another case of what was proposed,²⁵ noting Mr Mawhinney's plan and its various parts were not straightforward or easy to understand.
 - 4) Feeling harassed, intimidated, disturbed and distressed by Mr Mawhinney's emails, and his efforts to remove the Trustee, worried that he might succeed,

²⁰ See [15]-[17] of the Fifth Dunstan Affidavit, CMD-77 and CMD-78.

²¹ With the new trustee selection approved by three unitholders already hand-picked by Mr Mawhinney.

²² Less \$250,000.

²³ See [18] of the Fifth Dunstan Affidavit, the email of unitholder Edwin Doughman at CMD-79, and the proposed resolutions 4 and 5, at pages 3-4 of the 17 page Schedule attached to the Request at CMD-78.

²⁴ See [18] of the Fifth Dunstan Affidavit, the unitholder email at CMD-79.

²⁵ See [19] of the Fifth Dunstan Affidavit, the unitholder email at CMD-80.

and frightened that with only one week before Court all of the Trustee's good work protecting Unitholders would come undone.²⁶

25. It appears from Mr Mawhinney's emails that he held 5 information sessions over Thursday 27 August and Friday 28 August 2020. In relation to these sessions –
- 1) Mr Mawhinney held out the hope to Unitholders of a “target return” to them of a “potential” 90c+ in the dollar within 3 years,²⁷
 - 2) He called for further money to be contributed by Unitholders,²⁸ and
 - 3) When Unitholders or their representatives tried to ask questions they were cut off from doing so and placed permanently on mute.²⁹
26. When Mr Mawhinney did not achieve enough votes to achieve the passing of his proposed resolutions without the holding of a meeting, he pursued Unitholders with emails on Friday evening, and emails and phone calls over the weekend of 29-30 August 2020,³⁰ and held a further information session on Monday morning 31 August 2020. On the evening of Monday 31 August 2020 Mr Mawhinney emailed Unitholders yet again, portraying the Court hearing that afternoon listing the winding up hearing for 3 days' time as a victory and impugning Vasco's efforts to protect Unitholders by applying to wind up the Borrower.³¹
27. The 4 key themes articulated at paragraph 14 above again emerged in Mr Mawhinney's recent communications, with the urgency and confidence elements heightened in his efforts to persuade Unitholders to support him and urging of them to sign the documents he wanted returned, including misleadingly high percentages of Unitholder support cited.³²
28. Vasco received multiple concerned notifications over the weekend and into the next week of Unitholders being pursued by multiple phone calls and multiple emails, in Mr Mawhinney's efforts to convince those who had not voted in favour of his plan to do so.³³ Noteworthy amongst these –
- 1) Unitholders had not consented to being contacted by Mr Mawhinney in this way, and in at least one case where a Unitholder had a lawyer acting he was

²⁶ See [21] of the Fifth Dunstan Affidavit, the unitholder email at CMD-82.

²⁷ On his own evidence of the PowerPoint slides he showed at these sessions – see the 10th slide at exhibit JM-7 to the affidavit of James Peter Mawhinney of 2 September 2020 filed by him in this proceeding.

²⁸ See the 15th slide of JM-7.

²⁹ See the affidavit of Robert John Storai of 2 September 2020, filed in this proceeding by the Provisional Liquidators.

³⁰ See [23]-[26] of the Fifth Dunstan Affidavit and CMD-81 to CMD-85.

³¹ See CMD-86 of the Fifth Dunstan Affidavit.

³² See [20] of the Fifth Dunstan Affidavit, the unitholder email at CMD-81, and see [27] and CMD-86.

³³ See [23] of the Fifth Dunstan Affidavit, the unitholder email at CMD-83-89.

asked to stop.³⁴

- 2) Another Unitholder noted that she had observed the Court hearing on Monday 31 August 2020 and that Mr Mawhinney's portrayal of it was not accurate. She expressed concern that Mr Mawhinney's conduct was irregular and causing further Unitholder funds to be depleted. She also pointed out that the figures he gave to Unitholders in his email that afternoon as to Unitholder voting were different from those he had provided to the Court that same afternoon.³⁵
 - 3) Another Unitholder was concerned about being tricked. This Unitholder stated "My vote is a definite and absolute "NO" to everything Mr Mawhinney proposes", but expressed feeling wary and frightened that Mr Mawhinney's documents contained "a 'trick' question hidden behind some clever wording, that will end with me voting the wrong way on something".³⁶
29. On 3 September 2020 Mr Mawhinney again emailed Unitholders.³⁷ Again he portrayed the hearing that day as a victory. He misrepresented what had occurred at the hearing in several ways –
- 1) He wrongly asserting that the Contradictor's role would be to express the views of Unitholders, rather than only of an unknown number of Unitholders who may oppose the winding up of the IPO Wealth companies,
 - 2) He did not convey the disquiet the Court had expressed as to Mr Mawhinney purporting to represent Unitholders when he is in a clear conflict of interest,³⁸
 - 3) He accused the Provisional Liquidators of having made misleading statements, of having "written [their report] to achieve a purpose", and promised to publish a "detailed written critique on our website within the next 7 days".
 - 4) He claimed credit for Vasco having recently distributed taxable income of the Trust, as it was required to do following the end of the financial year once approved by the Trust's accountants, as having been prompted by "our agitation";
 - 5) Having claimed credit for the distribution, he then expressed delight that

³⁴ See [24] of the Fifth Dunstan Affidavit, the unitholder email at CMD-84.

³⁵ See [27] of the Fifth Dunstan Affidavit, the unitholder email at CMD-86.

³⁶ See [29] of the Fifth Dunstan Affidavit, the unitholder email at CMD-87.

³⁷ See [32] of the Fifth Dunstan Affidavit, the unitholder email at CMD-90.

³⁸ Later in the email Mr Mawhinney did disclose the Court had "mentioned" the unitholders might be concerned to know that the report indicated some 45% of funds were advanced to companies related to him, although he dismissed this as having been done "for investment purposes".

unitholders had “finally received some funds”, as though it was Vasco’s fault that regular distributions had ceased.³⁹ In fact, the sole cause of this was Mr Mawhinney’s company, the Borrower, having defaulted on its payments due to Vasco, and Mr Mawhinney having informed Vasco on 25 March 2020 that it should freeze redemptions based on the Borrower’s inability to pay.

- 6) He misrepresented the submissions of counsel to have certain exhibits kept confidential in order to protect Unitholders from having their private information - their names, unitholdings, email addresses, phone numbers and addresses - made public, as having been an effort to keep information from Unitholders.
- 7) He kept pushing his proposal and urged Unitholders to vote.
- 8) He again portrayed himself as the protector of Unitholders, and promised to keep them informed of further developments.⁴⁰

Second Federal Court Injunction against Mr Mawhinney

30. As this Court is already aware, on 16 April 2020 in a proceeding for misleading and deceptive conduct ASIC sought and obtained interlocutory injunctions against four of Mr Mawhinney’s companies Mayfair Wealth Partners Pty Ltd, M101 Holdings Pty Ltd, M101 Nominees Pty Ltd and Online Investments Pty Ltd. These orders restrained them by themselves or their servants, agents or employees from using certain phrases in advertising, promoting or marketing investment products, and from at all advertising, promoting or marketing three particular products. The defendants were also required to publish a statement to effect that there were risks in investing in Mayfair 101 Group products, that they are not the same as bank term deposits, and redemptions could be suspended.⁴¹
31. On 13 August 2020 ASIC obtained injunctions, asset preservation orders and travel restriction orders against Mr Mawhinney personally and against M101 Nominees, and the appointment of provisional liquidators to the latter, *ex parte* in the Federal Court.⁴² ASIC relied upon an expert report of Deloitte. In summary, Anderson J

³⁹ After claiming credit for the distribution the Trustee had made, he wrote: “*We are delighted that you have finally received some funds after an absence of 4 months.*”

⁴⁰ Claiming “...today was a big step forward toward achieving the protection we have sought for unitholders from the outset. Thank you for your support and we will keep you informed of further developments.”

⁴¹ *ASIC v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494.

⁴² *ASIC v M101 Nominees Pty Ltd* [2020] FCA 1166 – at CMD-74 of the Fifth Dunstan Affidavit.

was satisfied *inter alia* that there existed a considerable risk of potentially fraudulent dissipation of assets to the detriment of the relevant note holders⁴³ and the appointments and injunctions sought were warranted.

32. Relevantly, the injunctions ordered by the Court included *inter alia* a restraint against Mr Mawhinney receiving or soliciting funds in connection with any financial product including but not limited to those at issue in that proceeding, or advertising, promoting or marketing any financial product, as well as removing or transferring assets from Australia. The restraint was ordered against Mr Mawhinney and any company of which he is an officer or member. “Financial product” was expressly defined by reference to its meaning in the Act.

Relevant Principles and Agreement Terms

Interlocutory Injunction

33. The principles as to the granting of interlocutory injunctive relief are well known. The plaintiff should demonstrate –
- 1) A *prima facie* case, that there is a serious question to be tried, and a sufficient likelihood of success to justify the preservation of the *status quo* pending final determination; and
 - 2) that the balance of convenience favours granting an injunction, including that damages will not be an adequate remedy.⁴⁴
34. Generally speaking with respect to the application of these two criteria –
- 1) These two elements are inter-dependent in that the stronger the case for final relief, the lower the balance of convenience required for interim relief to be granted (and vice-versa).⁴⁵

⁴³ See [40] and [50]. At [60]-[64] his Honour found that –

- (1) As at 30 March 2020 M101 Nominees had received \$67,587,852.07 in funds from investors. As at 1 July 2020, the M Core Bank Account had just \$2,765.08,
- (2) It appeared that investor funds in the Core Notes were used to fund a loan that was not adequately secured for the benefit of investors,
- (3) Mr Mawhinney had made a statement concerning initiating a restructuring process with the stated objective of “[p]rotect[ing] our assets from recourse from receivers were practical”,
- (4) Mr Mawhinney was continuing to seek to raise funds from investors by way of an Australian Property Bonds product. ASIC held concerns Mr Mawhinney was seeking to raise funds for the stated purpose of improving the “Group’s liquidity position”. ASIC’s concern was that the arrangements were akin to a Ponzi scheme, and
- (5) The commonality of director and accountants across the Mayfair 101 Group raised a heightened risk of inappropriate coordination towards Mr Mawhinney’s stated objectives.

⁴⁴ *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, 68 (per Gleeson CJ and Crennan J) and 81-84 (per Gummow and Hayne JJ).

⁴⁵ *DC Payments Pty Ltd v Lester* [2013] VSC 469 at [41] per Digby J.

- 2) In this regard, “[T]he court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’, in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial”.⁴⁶

Confidentiality / Privacy

35. Under the Investment Management Agreement (**IMA**) between the Trustee and IPO Wealth Pty Ltd (**Investment Manager**), the Investment Manager undertook obligations to provide to the Trustee the investment management services in Schedule 1, and any other services agreed between the two parties.⁴⁷ There is no suggestion that other services have been agreed.
36. Under clause 29 of the IMA, both Vasco and the Investment Manager undertook confidentiality obligations –
- Each party will keep confidential any information acquired by it pursuant to this agreement except where the information has become publicly available other than by breach of this agreement or disclosure is required by law or regulation binding on the person making the disclosure.⁴⁸
37. Schedule 1 set out the management services, promotion and marketing services, and offer document responsibilities the Investment Manager undertook to provide to Vasco. These expressed that these services were provided to the Trustee, and were confined to promotion and marketing of the Fund. The Fund is as described in the Information Memorandum to Unitholders.⁴⁹
38. The details of the Unitholders (including their contact details and unitholdings) were provided by Vasco to the Investment Manager.⁵⁰ The details of the Unitholders are only knowable once they have subscribed for Units, and had units issued to them, under the Constitution.
39. Clause 7.3 of the Information Memorandum was entitled “Privacy” and provided –
- In applying to invest, you are providing the Trustee and the Investment Manager with certain personal details (your name, address etc). The Trustee uses this information to establish and manage that investment for you.

⁴⁶ *Bradto v State of Victoria* (2006) 15 VR 65 at [35] per Maxwell P and Charles JA; *ABC v O’Neill* at 81-84.

⁴⁷ Clause 2 of the IMA – CMD-91 to the Fifth Dunstan Affidavit.

⁴⁸ Page 17 of the IMA.

⁴⁹ The Information Memorandum is CMD-2 to the Dunstan Affidavit.

⁵⁰ Fifth Dunstan Affidavit at [34].

Under the Privacy Act 1988 (Cth), you can access personal information about you held by the Trustee, except in limited circumstances. Please let the Trustee know if you think the information is inaccurate, incomplete or out of date. You can also tell the Trustee at any time not to pass on your personal information by advising it in writing...

Under various laws and regulatory requirements, the Trustee may have to pass on certain information to other organisations, such as the [ATO] and [AUSTRAC].

By applying to invest, you give the Trustee permission to pass information it holds about you to other companies which are involved in helping it administer the Fund, or where they require it for the purposes of compliance with AML/CTF law or in connection with the holding of Application Money. The Trustee may use your information to provide you with details of future investment offers made by it or the Investment Manager.⁵¹

40. At section 11 of the application form at the end of the Information Memorandum, the declarations the then prospective unitholders were required to sign, included this one –

I/we acknowledge that I/we have read and understood the information under the heading “Privacy policy” in the relevant IM. I am/We are aware that until I/we inform Vasco otherwise, I/we will be taken to have consented to all the uses of my/our personal information (including marketing) contained under that heading and I/we have consented to my/our financial adviser providing such further personal information to Vasco as is required or reasonably deemed necessary by Vasco under applicable law.

41. Obligations of confidentiality may arise under contract between parties, as they do here. Even in the absence of a contractual obligation of confidentiality, equity may imply an obligation of confidence to restrain the disclosure or use of information other than for the purpose for which it was communicated, if the nature of the information and the circumstances in which it was communicated impose a duty of confidence to be respected by reference to notions of conscience.⁵²

Why the injunction ought be granted

42. There is a good *prima facie* case that Mr Mawhinney’s use of the private information of the Unitholders, was in breach of equitable duty of confidence owed by him to Vasco in respect of that information:
- 1) The Unitholders provided their personal information to Vasco, in making

⁵¹ Exhibit CMD-2 to the Dunstan Affidavit.

⁵² *Crown Resorts Ltd v Zantran Pty Ltd* [2020] FCAFC 1; (2020) 374 ALR 739 at [25] per Allsop CJ and the authorities there cited; see also *Wheatley v Bell* [1982] 2 NSWLR 544.

their investments in the Fund, on terms restricting their disclosure and use.

- 2) That information was to be available to Vasco and to the Investment Manager for the stated purpose: to establish and manage that investment for you.
- 3) Under those terms only Vasco would be entitled to use their personal information to provide details of future investment offers being made available by either it or the Investment Manager.
- 4) Under clause 29 the Investment Manager and Vasco undertook confidentiality obligations with each other, requiring them to keep confidential any information acquired by each of them pursuant to the agreement.
- 5) Vasco provided the Investment Manager with the confidential information in order for the Investment Manager to carry out its obligations to provide the required services to the Trustee (and not otherwise).
- 6) Mr Mawhinney was and is the sole director of the Investment Manager. It is an irresistible inference that he acquired the confidential information of Vasco with respect to the Unitholders by reason of that role, and not otherwise.⁵³
- 7) Further, it is an irresistible inference that Mr Mawhinney was aware of the fact that Vasco provided the Unitholders' information to the Investment Manager in circumstances where he knew that the information was confidential. An action for breach of the equitable duty of confidence thus lies against Mr Mawhinney,⁵⁴
- 8) Mr Mawhinney personally, and Online Investments Pty Ltd (which trades as Mayfair 101) at the direction of Mr Mawhinney, have been bombarding Unitholders with emails and phone calls in recent months, as described above. This has been for extraneous purposes of their own, not as part of the Investment Manager carrying out its duties to the Trustee under the IMA.
- 9) Vasco has not given the Investment Manager any permission to use Unitholders' confidential information in this way and for these purposes.⁵⁵ Following the closure of the fund to new applications or subscriptions on 7 April 2020,⁵⁶ there can be no further permissible reason for the Investment

⁵³ See also Confidential Exhibit "JM-8" to the affidavit of Mr Mawhinney dated 2 September 2020.

⁵⁴ *Wheatley v Bell* [1982] 2 NSWLR 544.

⁵⁵ See [35] of the Fifth Dunstan Affidavit.

⁵⁶ See [36] of the Fifth Dunstan Affidavit.

Manager using the confidential information to communicate with Unitholders.

- 10) Nothing in the communications by Mr Mawhinney which Vasco is aware of, and has deposed to, have anything to do with the functions of the Investment Manager under the IMA.
 - 11) There is a good argument that Mr Mawhinney and his agents and entities are already restrained from doing what they have been doing by the Second Federal Court injunction of 13 August 2020, given that any proposal to the Unitholders which involves a change to the rights of the Unitholders is probably a “financial product” under section 763A of the Act.
43. In this case, the balance of convenience weighs strongly in favour of granting the injunction sought -
- 1) Unitholders are receiving, unsolicited, a barrage of information, some of it misleading, and all of it designed to not only persuade them but indeed to pressure them to support Mr Mawhinney in his efforts, which are designed to further Mr Mawhinney’s personal interests, not the interests of the Unitholders. This should be seen in the context where Mr Mawhinney has not fully (or at all) explained the circumstances by which assets of the SPVs have been transferred to entities related to Mr Mawhinney;
 - 2) Some Unitholders have misunderstood what Mr Mawhinney has written to them;
 - 3) Multiple Unitholders are distressed and worse at being harassed by Mr Mawhinney’s pursuit of them and push for their vote in favour of his proposal,
 - 4) Unitholders have access to the whole of the documentation in the present proceeding, via the website of the Provisional Liquidators, so that they will not lack information if the injunction is granted;
 - 5) The injunction will not prevent the Unitholders, among themselves, from seeking to put forward any proposal for the recapitalisation of the Fund or one or more of the SPVs;
 - 6) Mr Mawhinney’s efforts surge and intensify each time a key Court hearing approaches. This has been the case leading up to the hearing of the applications to appoint provisional liquidators, the public examinations of Mr Mawhinney, and the applications to wind up the IPO Wealth companies. If he is not stopped, they will continue until the latter applications are heard on

16 September 2020 and indeed until judgment is delivered.

- 7) Mr Mawhinney's efforts also put Unitholders' interests at risk, in his attempts to remove Vasco as trustee of the Fund and replace it with a Mayfair-nominated company. At this stage, aside from the Provisional Liquidators which the Court has appointed to the IPO Wealth companies, Vasco is the only independent entity standing between Mr Mawhinney and Unitholders. Mr Mawhinney seeks to sweep Vasco aside, and pursue his various other strategies to erode the independence of the replacement trustee, and obtain control of the Fund.
- 8) Before the Court, Contradictors are now appointed to argue the case for those Unitholders who oppose the winding up the IPO Wealth companies which is sought by the Trustee and the Provisional Liquidators.
- 9) In the meantime, the sooner Mr Mawhinney and all associated with him are compelled to stop pursuing Unitholders and trying to achieve his own ends the better. The Court's supervisory jurisdiction ought be able to be exercised without activities being engaged in outside of the Court's processes aimed at undermining their conclusion.

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C G ROME-SIEVERS

Counsel for the Plaintiff

Lonsdale Chambers
7 September 2020