

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2020] FCA 494

File number: VID 228 of 2020

Judge: **ANDERSON J**

Date of judgment: 16 April 2020

Catchwords: **CONSUMER LAW** – misleading and deceptive conduct – false or misleading representations – where regulator alleges statutory contraventions in relation to promotion of financial products by defendants – where regulator applies for interlocutory injunction restraining defendants from promoting, receiving investment in, or issuing, financial products – where defendants offer to make undertaking to Court to cease engaging in certain forms of promotion pending trial – whether serious question to be tried – whether balance of convenience favours grant of injunction – whether interlocutory injunction should be granted

Held: interlocutory injunction granted, but in terms different to those proposed by regulator – terms of injunction proposed by regulator would disproportionately impede defendants’ business pending trial – injunction granted in a form directed to protecting consumers, not shutting down substantial part of defendants’ business

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 1(2), 12DA(1), 12DB(1)(a), 12DB(1)(e), 12GD, 12GD(3), 12GD(5), 12GD(6), 12GD(7)
Corporations Act 2001 (Cth) ss 1041H, 1041H(1), 1101B, 1101B(1), 1101B(1)(a), 1101B(5), 1101B(6), 1324, 1324(1), 1324(4), 1324(6), 1324(7), 1324(8)
Federal Court of Australia Act 1976 (Cth) s 23
Trade Practices Act 1974 (Cth)
Federal Court Rules 2011 (Cth) r 29.07

Cases cited: *Australian Broadcasting Corp v O'Neill* [2006] HCA 46; 227 CLR 57
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; 208 CLR 199
Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd (No 4) [2013] FCA 318

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 2
Australian Securities and Investments Commission v Linchpin Capital Group Ltd [2018] FCA 1104
Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd [2002] NSWSC 741; 42 ACSR 605; 20 ACLC 1637
Australian Securities and Investments Commission v Sweeney [2001] NSWSC 114
Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd [2017] FCA 477
Beecham Group Ltd v Bristol Laboratories Pty Ltd [1968] HCA 1; 118 CLR 618
Bullabidgee Pty Ltd v McCleary [2011] NSWCA 259
Castlemaine Tooheys Ltd v South Australia [1986] HCA 58; 161 CLR 148
Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1) (1986) 11 ACLR 566; (1987) 5 ACLC 269

Date of hearing: 16 April 2020

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Category: Catchwords

Number of paragraphs: 81

Counsel for the Plaintiff: Mr J P Moore QC with Ms C van Proctor

Solicitor for the Plaintiff: Australian Securities and Investment Commission

Counsel for the Defendants: Mr S D Hay QC with Mr J P Stoller

Solicitor for the Defendants: KHQ Lawyers

ORDERS

VID 228 of 2020

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **MAYFAIR WEALTH PARTNERS PTY LTD**
First Defendant

M101 HOLDINGS PTY LTD
Second Defendant

M101 NOMINEES PTY LTD (and another named in the Schedule)
Third Defendant

JUDGE: **ANDERSON J**

DATE OF ORDER: **16 APRIL 2020**

For the purposes of this Order:

- (a) **“M+ Fixed Income Product”** means the financial product referred to by this name and issued by the Second Defendant;
- (b) **“M Core Fixed Income Product”** means the financial product referred to by this name and issued by the Third Defendant;
- (c) **“Mayfair’s Websites”** means:
 - (i) www.mayfair101.com; and
 - (ii) www.mayfairplatinum.com.au;
- (d) **“Online Search Platform Advertisements”** includes advertising through Google AdWords and Bing Ads; and
- (e) **“Prohibited Phrases”** means the following phrases:
 - (i) “bank deposit”;
 - (ii) “capital growth”;
 - (iii) “certainty”;
 - (iv) “fixed term”;
 - (v) “term deposit”; and
 - (vi) “term investment”.

THE COURT ORDERS THAT:

Pursuant to subsections 1101B(5) and 1124(4) of the *Corporations Act 2001* (Cth) and subsection 12GD(3) of the *Australian Securities and Investment Commission Act 2001* (Cth), and until further order:

1. each of the Defendants, by themselves and their servants, agents and employees, be restrained from:
 - (a) using the Prohibited Phrases in any advertising, promotion or marketing by the Defendants, including on Mayfair's Websites and through any Online Search Platform Advertisements; and
 - (b) advertising, promoting or marketing the M+ Fixed Income Product and the M Core Fixed Income Product.
2. each of the Defendants:
 - (a) add to each of Mayfair's Websites; and
 - (b) provide to each prospective new investor in either the M+ Fixed Income Product or the M Core Fixed Income Product a copy of,
a notice which includes the following statement:

The Mayfair 101 Group of companies reminds investors prior to investing in the products offered by the Mayfair 101 Group that:

1. *Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government's Financial Claims Scheme (colloquially known as the 'Government Bank Guarantee' which covers deposits up to A\$250,000 per depositor, per bank).*
2. *As with all investment products, there are risks in investing in the Mayfair 101 Group's products.*
3. *Investing in the products offered by the Mayfair 101 Group is not the same as depositing money in a term deposit offered by a bank. Investing*

in Mayfair 101 Group products has a higher level of risk compared to investing in a bank term deposit.

4. *In certain circumstances, the Mayfair 101 Group can exercise the right to suspend some or all redemptions at the end of the fixed term. The Mayfair 101 Group exercised this right on 11 March 2020. As such, all redemptions are currently suspended until such time as management agrees to lift the suspension and process redemptions. Your investment in the products offered by the Mayfair 101 Group may also be subject to suspension of some or all redemptions at the end of the fixed term. This is a risk that you should take into account.*
3. The costs of the Plaintiff's application for interlocutory relief are reserved.
4. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ANDERSON J:

Introduction

- 1 This decision addresses the claim by the plaintiff (**ASIC**) for interlocutory relief against the defendants (together, **Mayfair**) pending the final determination of this proceeding.
- 2 The Mayfair defendants are part of the Mayfair 101 group of companies (**Mayfair Group**). The Mayfair Group conducts a business of raising funds from investors, and invests those funds in various opportunities, including Australian and international real property, businesses operating in emerging markets, and businesses operating in the growth phase of their development. The aim of the business is to generate income and gains to pay returns to investors and cover the costs of, and generate profit for, the Mayfair Group.
- 3 The Mayfair Group raises funds through three investment products. Relevantly for present purposes, this includes, first, unsecured promissory notes known as “M+ Fixed Income” and, second, secured promissory notes known as “M Core Fixed Income” (together, **Mayfair Products**). Generally speaking, when an investment in one of the Mayfair Products reaches its redemption date, the investor can decide to redeem their investment, or reinvest it with Mayfair. However, Mayfair has the option to suspend payment of the redemption where, broadly, to do so would threaten Mayfair’s liquidity to pay present or future redemptions.
- 4 ASIC alleges that Mayfair, in respect of the promotion of the Mayfair Products, have engaged, and are continuing to engage, in conduct that is misleading or deceptive, or likely to mislead to deceive, and have otherwise made false or misleading representations, in contravention of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
- 5 The particular acts of Mayfair that ASIC argues constitutes the contravening conduct are representations allegedly made by Mayfair to consumers that, in broad terms:
 - (a) the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits;
 - (b) on maturity of the Mayfair Products, the principal would be repaid in full;
 - (c) the Mayfair Products carried no risk of default; and
 - (d) the Mayfair Products provided capital growth opportunities.

6 Mayfair either denies making these representations, or denies that they are misleading or deceptive, or are likely to mislead or deceive. Mayfair accordingly denies that it has engaged in any of the statutory contraventions alleged by ASIC.

7 As an interim measure pending the final determination of the proceeding, ASIC seeks an interlocutory injunction that, broadly, Mayfair be restrained from promoting, receiving investment into, and issuing, the Mayfair Products. However, Mayfair argues that such relief would effectively shut down a substantial part of Mayfair's business pending trial, and accordingly the balance of convenience weighs against the award of such an injunction.

8 Mayfair have instead offered to provide an undertaking to the Court to stop employing certain forms of promotion of its business prior to the final determination of the proceeding, and also to publish on its websites, and to provide Mayfair's prospective investors with, a notice that informs each prospective investor of certain features of, and risks associated with, the Mayfair Products. Mayfair argues that the undertaking is sufficient to address any potential for investors to be misled.

9 My view, in summary, is that there are serious questions to be tried in relation to Mayfair's promotion of the Mayfair Products, and that the balance of convenience favours the award of an interlocutory injunction. The undertaking proffered by Mayfair is inadequate in light of the need to protect the public from what this Court may determine, after a full trial, to be serious statutory contraventions. The inadequacy of an undertaking in these circumstances is cemented by the failure of Mayfair to provide sufficient detail to support its assertion that the imposition of an injunction would be detrimental to its financial position.

10 That said, the terms of the interlocutory relief proposed by ASIC are disproportionately burdensome on Mayfair. At this preliminary stage, there has been no determination of any statutory contravention by Mayfair, and to prohibit the receipt of investment into, and the issuing of, the Mayfair Products would be to shut down a substantial part of Mayfair's business prior to the determination of any unlawful conduct. The law is concerned to prevent premature impositions of this kind.

11 For the reasons expressed below, I will instead award a more limited form of interlocutory injunction which prohibits Mayfair from engaging in certain forms of promotion of Mayfair's business. As prescribed in the terms of my order, the injunction is targeted at prohibiting, on

an interim basis, the particular conduct criticised by ASIC, much of which Mayfair voluntarily offered to temporarily cease under its proposed undertaking.

- 12 The interlocutory injunction will continue until further order of the Court. This will permit the matter to proceed to full trial, which will provide the Court a full opportunity to examine the allegations made by ASIC against Mayfair.

This proceeding

- 13 This proceeding was commenced by ASIC on 3 April 2020. On that date, ASIC filed an originating process dated 3 April 2020 (**Originating Process**), accompanied by a concise statement dated 3 April 2020 (**Concise Statement**) and an affidavit of Lisa Saunders (**Ms Saunders**), a solicitor at ASIC, dated 3 April 2020 (**First Saunders Affidavit**). The First Saunders Affidavit was electronically signed by Ms Saunders, but was unwitnessed.
- 14 On 6 April 2020, I made orders (which were revised on 14 April 2020) listing ASIC's application for interlocutory relief for hearing, and providing for the filing of written submissions and evidence in advance of that hearing.
- 15 On 9 April 2020, ASIC filed written submissions in support of its interlocutory application (**ASIC's written submissions**), two further affidavits: an affidavit of Lisa Saunders dated 9 April 2020 (**Second Saunders Affidavit**) and an affidavit of Dayle Buckley, a solicitor at ASIC, dated 9 April 2020 (**Buckley Affidavit**). These two affidavits were electronically signed by the deponent, but were unwitnessed.
- 16 Yesterday, on 15 April 2020, Mayfair filed written submissions in response to ASIC's interlocutory application (**Mayfair's written submissions**) and three affidavits; an affidavit of Paul Benjamin Welling (**Mr Welling**), solicitor of Mayfair, dated 15 April 2020 (**First Welling Affidavit**), a further affidavit of Mr Welling dated 15 April 2020 (**Second Welling Affidavit**) and an affidavit of James Mawhinney (**Mr Mawhinney**), the Group Managing Director of the Mayfair Group, dated 15 April 2020 (**Mawhinney Affidavit**). Each of these affidavits filed on behalf of Mayfair were electronically signed by the deponent, but were unwitnessed.
- 17 Later in the day, ASIC filed sworn versions of the First Saunders Affidavit, Second Saunders Affidavit and the Buckley Affidavit.
- 18 ASIC's application for interlocutory relief was heard at 9.30am today, on 16 April 2020, via telephone. Mr Moore QC, with Ms van Proctor of counsel, appeared for ASIC, and Mr Hay

QC, with Mr Stoller of counsel, appeared for Mayfair. After hearing the parties' submissions, I adjourned the hearing to 4.00pm, when I pronounced my orders and published these reasons.

Unsworn affidavit evidence

19 Before turning to ASIC's allegations in this proceeding, it is necessary to briefly note a preliminary procedural matter.

20 On 23 March 2020, the Chief Justice of the Federal Court of Australia issued a Special Measures Information Note entitled "Special Measures in Response to COVID-19 (SMIN-1)" (SMIN-1). SMIN-1 was updated on 30 March 2020, and prescribes certain arrangements for the continued operation of this Court during the COVID-19 pandemic.

21 Relevantly for current purposes, SMIN-1 provides the following:

4. SIGNATURES ON DOCUMENTS AND AFFIDAVITS

4.1 To facilitate the electronic filing of all documents, if access to scanning technology is limited, the Court will temporarily allow documents to be signed electronically, including by having the person signing the document type their name in the relevant space in the signature block in lieu of physically signing the relevant document.

4.2 The Court also acknowledges that remote working arrangements may pose significant challenges to having affidavits sworn or affirmed. The Court will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.

22 Presumably on the basis of SMIN-1, ASIC initially filed the First Saunders Affidavit, Second Saunders Affidavit and the Buckley Affidavit in a format that was electronically signed by the deponent, but not witnessed.

23 Yesterday, on 15 April 2020 at 8.59am, my associate, upon my instruction, wrote to the solicitors for ASIC in relation to its unsworn affidavits. That email included the following:

His Honour acknowledges that paragraphs 4.1 and 4.2 of *SMIN-1: Special Measures in Response to COVID-19* provides that the Court will temporarily permit the electronic signing of affidavits and the filing of unsworn affidavits. The filing of unsworn affidavits is only permitted "on the understanding that, if required, these will later be sworn or affirmed when circumstances allow". Although SMIN-1 refers to the *filing* of affidavits, it does not expressly refer to reliance on affidavits to establish facts in a proceeding.

I am raising this matter as Justice Anderson seeks ASIC's submissions (either prior to, or at, the hearing) in relation to ASIC's reliance on the unsworn affidavits to support its claim to interlocutory relief. In this regard, I note that rule 29.07 of the *Federal Court Rules 2011* (Cth) relevantly provides that "[a] party must apply for the leave of the Court to use an affidavit ... has been filed but is irregular in form".

24 At or around midday yesterday, Mayfair filed the First Welling Affidavit, the Second Welling Affidavit, and the Mawhinney Affidavit, each of which were electronically signed by the deponent, but unwitnessed.

25 Then, at or around 4.15pm yesterday, ASIC filed sworn versions of the First Saunders Affidavit, Second Saunders Affidavit and the Buckley Affidavit.

26 As indicated in my associate's email to ASIC's solicitors, r 29.07 of the *Federal Court Rules 2011* (Cth) (**Rules**) provides as follows:

Use of affidavit not filed or in irregular form

A party must apply for the leave of the Court to use an affidavit that has not been filed, or that has been filed but is irregular in form.

27 Examples of this rule, or its predecessor, being applied are *Australian Securities and Investments Commission v SunEnergy Asia Pacific Pty Ltd* [2011] FCA 275 at [7] per Mansfield J and *Discovery Africa Ltd v Nichol* [2015] FCA 1497; 330 ALR 739; 110 ACSR 467; 256 IR 157 at [37] per Gilmour J.

28 At this morning's hearing, counsel for the parties confirmed that the parties had agreed not to raise any challenges to unsworn affidavit evidence. In these circumstances, it is unnecessary to further consider the effect of r 29.07 of the *Rules*.

ASIC's substantive allegations

29 The substantive allegation made by ASIC in this proceeding is that Mayfair have, in respect of the Mayfair Products:

- (a) engaged, and are continuing to engage, in conduct that is misleading or deceptive, or likely to mislead or deceive, in contravention of s 1041H(1) of the *Corporations Act* and/or s 12DA(1) of the *ASIC Act*; and
- (b) made false or misleading representations in contravention of s 12DB(1)(a) and (e) of the *ASIC Act*.

30 The factual background to ASIC's allegations against Mayfair are set out in the affidavits filed on behalf of ASIC. It is unnecessary to detail these affidavits for the purposes of these reasons. It is instead convenient to extract the facts set out in the Concise Statement that ASIC alleges gives rise to the statutory contraventions by Mayfair:

1. The First Defendant, Mayfair Wealth Partners Pty Ltd trading as Mayfair

Platinum (**Mayfair**), promotes financial products, being promissory notes called “M+ Fixed Income Notes” and “M Core Fixed Income Notes”, to investors in Australia (the **Mayfair Products**). The Second Defendant, M101 Holdings Pty Ltd (**M101 Holdings**), issues the M+ Fixed Income Notes. The Third Defendant, M101 Nominees Pty Ltd (**M101 Nominees**), issues the M Core Fixed Income Notes.

2. The Fourth Defendant, Online Investments Pty Ltd trading as Mayfair 101 (**Online Investments**), participates in the marketing of the Mayfair Products. Online Investments is the holding company of Mayfair and operates a website (www.termdepositguide.com) which promotes and markets the Mayfair Products.
3. The application form for the M+ Fixed Income Notes referred to providing a “Fixed Income ... term-based investment opportunity.”
4. The application form for the M Core Fixed Income Notes described the product as “secured promissory notes” and referred to it as a “Fixed Income...secured, asset-backed, term-based investment opportunity”.
5. The Mayfair Products are and were during the Relevant Period (being from 3 July 2019) marketed and promoted by the defendants in a number of ways, including via Mayfair’s websites www.mayfairplatinum.com.au and www.mayfair101.com, as well as the website www.termdepositguide.com, newspaper advertising and online advertising, including the use of sponsored link internet advertising with specific ‘adwords’.
6. The marketing and promotional material for the Mayfair Products included the following words and expressions:
 - (a) “term deposit alternative”;
 - (b) “term investment” and “fixed term”;
 - (c) “certainty” and “confidence”; and / or
 - (d) “capital growth”.
7. The sponsored link internet advertising is conducted via the Google AdWords program and Bing Ads program, and included the use of:
 - (a) meta-title tags such as “term deposit rates – best term deposit options”;
 - (b) domain names such as “term deposit guide”; and
 - (c) ‘adwords’ for sponsored searches including “bank deposits” and “term deposits”.
8. The Mayfair Products were marketed to wholesale but inexperienced investors, at least a substantial subset of whom were unlikely to understand the significant risk associated with the Mayfair Products.
9. By engaging in the conduct in paragraphs 2 to 8, the defendants, in the course of trade or commerce, made representations to consumers that the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits (**Bank Term Deposit Representations**).
10. The Bank Term Deposit Representations were as to future matters and the defendants did not have reasonable grounds for making them. In this regard,

ASIC relies on s 12BB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 769C of the *Corporations Act 2001* (Cth) (**Corporations Act**).

11. Alternatively, the Bank Term Deposit Representations were false, misleading or deceptive or likely to mislead or deceive consumers because:
 - (a) the Mayfair Products are debentures and dissimilar in nature and risk profile to bank term deposits;
 - (b) the Mayfair Products are not sufficiently similar to a term deposit for the purposes of comparison;
 - (c) the Mayfair Products have a significantly higher risk profile than bank term deposits;
 - (d) the Mayfair Products lack the prudential regulations that apply to bank term deposits;
 - (e) the Mayfair Products are not the subject of any bank or other guarantee;
 - (f) investors in the Mayfair Products might not receive interest and / or capital repayments;
 - (g) at maturity and after a valid withdrawal notice, Mayfair could elect to extend time for repayment to investors for an indefinite period of time.
12. By engaging in the conduct in paragraphs 2 to 8, the defendants, in the course of trade or commerce, made representations to consumers that on maturity the principal would be repaid in full (**Repayment Representation**).
13. The Repayment Representation was as to a future matter and the defendants did not have reasonable grounds for making it. ASIC refers to and repeats paragraph 10.
14. In the alternative to paragraph 13, the Repayment Representation was false, misleading or deceptive or likely to mislead or deceive consumers because:
 - (a) investors in the Mayfair Products might not receive capital repayments at maturity or at all; and
 - (b) at maturity and even after a valid withdrawal notice, Mayfair could elect to extend time for repayment to investors for an indefinite period of time.
15. The marketing and promotional material for the Mayfair Products included statements that the products were specifically designed for investors seeking “certainty and confidence in their investments”.
16. By engaging in the conduct in paragraph 15, the defendants, in the course of trade or commerce, made representations to consumers that the Mayfair Products carried no risk of default (**No Risk of Default Representations**).
17. The No Risk of Default Representations were as to future matters and the defendants did not have reasonable grounds for making them. ASIC refers to and repeats paragraph 10.
18. In the alternative to paragraph 17, the No Risk of Default Representations were false, misleading or deceptive or likely to mislead or deceive consumers

because:

- (a) investors in the Mayfair Products may not receive interest and / or capital repayments,
- (b) at maturity and after a valid withdrawal notice, Mayfair could elect to extend time for repayment to investors for an indefinite period of time;
- (c) investors could lose some or all of their principal investment;
- (d) the matters set out in paragraph 11 above.

19. The marketing and promotional material for the Mayfair Products included statements that the Mayfair Products provided “income and capital growth opportunities”.

20. By engaging in the conduct in paragraph 19, the defendants, in the course of trade or commerce, made representations to consumers that the Mayfair Products provided capital growth opportunities (**Capital Growth Representations**).

21. The Capital Growth Representations were as to future matters and the defendants did not have reasonable grounds for making them. ASIC refers to and repeats paragraph 10.

22. In the alternative to paragraph 21, the Capital Growth Representations were false, misleading or deceptive or likely to mislead or deceive consumers because the Mayfair Products carried no capital growth opportunities for investors.

...

31 It can be seen from these alleged facts that there are four broad forms of infringing conduct alleged to have been engaged in by Mayfair, namely that Mayfair made representations to consumers that:

- (a) the Mayfair Products were comparable to, and of similar risk profile to, bank term deposits (**Bank Term Deposit Representations**);
- (b) on maturity of the Mayfair Products, the principal would be repaid in full (**Repayment Representation**);
- (c) the Mayfair Products carried no risk of default (**No Risk of Default Representations**); and
- (d) the Mayfair Products provided capital growth opportunities (**Capital Growth Representations**).

32 The First Saunders Affidavit outlines further facts that are alleged to have occurred shortly prior to the commencement of this proceeding.

Mayfair updates its websites

107. On or around 27 March 2020 the Mayfair Platinum Website [i.e. www.mayfairplatinum.com.au] was updated to include the following “Update to Investors”:

Update to Investors

In the current circumstances of the COVID-19 global crisis, the Mayfair 101 Group of companies feels it appropriate to remind investors that:

1. *Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government’s Financial Claims Scheme (colloquially known as the ‘Government Bank Guarantee’ which covers deposits up to A\$250,000 per depositor, per bank).*
 2. *As with all investment products, there are elements of risk in investing in the Group’s products.*
 3. *An investment in a term-based investment product offered by a non-bank financier (such as the investment products offered by the Mayfair 101 Group) is not the same as depositing money in a term deposit offered by a bank, and may therefore be seen to have a higher risk relative to a bank term deposit.*
 4. *Depending on financial circumstances, and in the Group’s sole discretion, the Group has and may exercise its right to suspend some or all redemptions until such time as sufficient liquidity exists.*
111. On or around 2 April 2020 Mayfair Wealth [i.e. the first respondent] updated its Mayfair Platinum Website to include information regarding its ‘Liquidity Prudency Policy’ as follows:

Liquidity Prudency Policy

In the current circumstances of the COVID-19 global crisis and its impact on the economy, as a precautionary measure the Mayfair 101 Group has implemented a Liquidity Prudency Policy, meaning that early and end-of-term redemptions are suspended until, at this stage 30 April 2020. New investors seeking to invest for a term ending after 30 April 2020 are not currently expected to be affected by the Group’s Liquidity Prudency Policy. However, the Group reserves the right to extend or lift the policy at any time, and will continue diligently to monitor developments and take all reasonable steps to seek to preserve value for the Group’s investors.

Mayfair’s preliminary response

- 33 As the interlocutory relief is sought by ASIC on a relatively urgent basis, Mayfair have not yet filed a formal response to ASIC’s Concise Statement. However, Mayfair’s written submissions

in response to the claim for interlocutory relief make plain that it denies engaging in any statutory contraventions. In addition, Mayfair's written submissions, and the affidavits filed on behalf of Mayfair, provide responses to ASIC's particular allegations.

Context for Mayfair's marketing

34 Mayfair first raises additional context to the availability and marketing of the Mayfair Products. Mayfair says that the Mayfair Products are, and have always been, only open to investors who qualify as "wholesale" investors within the meaning of ss 761G and 761GA of the *Corporations Act*. In addition, Mayfair says that such wholesale investors can only invest in the Mayfair Products by making a substantial investment: the minimum investment in the "M+ Fixed Income Notes" is \$100,000 and the minimum investment in the "M Core Fixed Income Notes" is \$250,000. According to Mayfair, the average investment in the Mayfair Products is approximately \$365,000.

35 Mayfair rejects ASIC's assertion that the Mayfair Products are not marketed to "inexperienced investors", and also rejects ASIC's assertion that "at least a substantial subset" of Mayfair's investors "are unlikely to understand the significant risk associated with the Mayfair Products". Mayfair contends that its target market are persons that are "well informed and capable of assessing the risks involved in financial transactions". In this regard, according to Mayfair, prospective investors are:

- (a) wholesale investors who are investing substantial sums of money;
- (b) required to complete substantial paperwork;
- (c) are required to obtain an accountant's certificate confirming their status as a wholesale investor; and
- (d) are provided with full documentation to enable them to assess and balance the relevant risks and rewards, including a brochure for the relevant product and the relevant Deed Poll for the prospective investment.

Particular alleged contraventions

36 Mayfair denies making the allegedly contravening representations defined above at [31]. The bases for these denials is summarised as follows.

37 Mayfair denies making the Bank Term Deposit Representations. Mayfair contends that any investor would have recognised that the rates of interest offered by Mayfair far exceeded the

rates of interest offered by banks on term deposits, and that the investor would have accordingly immediately appreciated that the Mayfair Products carried greater risk than bank term deposits. In any event, Mayfair says that, although the Mayfair Products have been marketed as a possible “*alternative* to term deposits”, this does not imply that the Mayfair Products are *equivalent* to bank term deposits. Moreover, the representations made by Mayfair need to be considered in the relevant context, which included repeated reference to the fact that the issuers of Mayfair Products are not banks.

38 Mayfair raises various responses to the allegation of making the Repayment Representation. First, Mayfair raises that the issuer of the Mayfair Product *is* obliged to repay the principal in full, and retains a contractual obligation to do so. As such, to have represented this to be the case is not misleading. Second, while the time for repayment can be extended beyond the term date, this is a common and well understood feature of a debenture, and one that is disclosed to all prospective investors in the Mayfair Products in the Deeds Poll. Third, ASIC is not correct to contend that the time for repayment can be extended indefinitely; the time for repayment can only be extended for a specified period in the limited circumstances set out in the Deeds Poll. And, given their assumed level of knowledge, wholesale investors must be taken to understand that, in certain circumstances, an investment might not be able to be recovered for a certain period.

39 Mayfair denies making the No Risk of Default Representations. Mayfair contends that ASIC, who has filed over 1,500 pages of evidence in this proceeding, has drawn this representation from only two occasions on which Mayfair used the words “certainty” and “confidence” in Mayfair’s marketing material: the first in a Mayfair brochure, and the second in a newspaper advertisement by Mayfair. Mayfair argues that, once these particular references are read in context, the references could not reasonably lead any prospective investor to draw any conclusions about the Mayfair Products.

40 Mayfair finally denies making the Capital Growth Representations. Mayfair contends that ASIC has drawn this representation from two references to “capital growth” on one of Mayfair’s webpages, which is a “global” page that redirects readers to other webpages. However, according to Mayfair, these references never asserted that *the Mayfair Products* provided capital growth opportunities. The reference to the possibility of capital growth was to other potential investments. In Mayfair’s argument, it is patently obvious to any investor that the Mayfair Products provided only income, and not capital growth.

ASIC's application for interlocutory relief

41 The Originating Process describes ASIC's claim for interlocutory relief as follows:

Claim for interlocutory relief

The Plaintiff also claims interlocutory relief under sections 1101B(1), 1101B(5), 1324(1) and 1324(4) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and/or section 12GD(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and/or section 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

1. An order that, until further order:
 - a. each of the Defendants, by themselves and their servants, agents and employees, be restrained from advertising, promoting or marketing the M+ Fixed Income Product and the M Core Fixed Income Product.
 - b. each of the Defendants, by themselves and their servants, agents and employees, be restrained from receiving Investor Funds.
 - c. the Second Defendant, by itself and its servants, agents and employees, be restrained from issuing redeemable promissory notes in the M + Fixed Income Product.
 - d. the Third Defendant, by itself and its servants, agents and employees, be restrained from issuing redeemable promissory notes in the M Core Fixed Income Product.

For the purposes of the claim for interlocutory relief:

"Investor Funds" means monies provided to the Defendants, whether directly or to the Defendants' authorised agents, servants and/or representatives, for the actual or ostensible purpose of investing in the M Core Fixed Income Product or the M+ Fixed Income Product.

"M+ Fixed Income Product" means the financial product referred to by this name and issued by the Second Defendant.

"M Core Fixed Income Product" means the financial product referred to by this name and issued by the Third Defendant.

ASIC's submissions

42 ASIC submits, in summary, that there is a real and substantial risk that Mayfair have, in relation to the promotion of the Mayfair Products, contravened the *Corporations Act* and the *ASIC Act* and, unless restrained, will continue to do so. In circumstances where Mayfair have now suspended redemptions of investments, yet continue to seek new investors, ASIC contends that the interlocutory relief sought would protect consumers from investing in Mayfair Products on the basis of the alleged misrepresentations. ASIC argues that the present circumstances are such that there is a significant risk that consumers will be misled and suffer loss as a result.

43 ASIC submits that the balance of convenience, in the context of an application brought in the public interest, lies in favour of the making of the injunction sought, in order to protect consumers from the misleading conduct alleged by ASIC, and from investing in the Mayfair Products in circumstances where, according to ASIC, they will almost certainly be unable to redeem their investments upon maturity.

Mayfair's proposed undertaking

44 Mayfair's written submissions raised that Mayfair were willing to provide an undertaking to the Court in the following terms:

1. The Respondents undertake that:
 - a. the website www.termdepositguide.com has been taken offline, including the associated Google AdWords and Bing Ads campaigns, and will not be placed back online until further order;
 - b. in their advertising through Google AdWords and Bing Ads, they have stopped using the phrases 'term deposits'; 'bank deposits'; in the Google AdWords and Bing advertising platforms to:
 - i. trigger text the Respondent's advertisements in search engine results pages; and
 - ii. display advertisements containing such phrases,and will not recommence advertising in this way until further order;
 - c. any reference to 'term deposits' and 'bank deposits' on the websites at www.mayfair101.com and www.mayfairplatinum.com.au (including in the meta-tags) have been removed and will not be added until further order d. a link to download ASIC's Moneysmart 'Guide to investing in unlisted debentures and unsecured notes' has been added to the M+ Fixed Income and M Core Fixed Income web pages on the www.mayfairplatinum.com.au website and will remain there until further order;
 - e. any reference on www.mayfairplatinum.com.au and www.mayfair101.com to 'capital growth opportunities' has been removed and will not be added until further order;
 - f. in any marketing collateral associated with the M Core Fixed Income and M+ Fixed Income notes, a statement will be added advising customers that the ability to redeem at the expiry of a fixed term is subject to available liquidity as follows:
 - i. "The ability to redeem at the end of an investment term is subject to available liquidity. Mayfair Platinum reserves the right to suspend redemptions for liquidity management purposes and investors should consider this prior to making a decision to invest in Mayfair Platinum's products."
 - g. they:

- i. have added to each of the following websites:
 1. www.mayfairplatinum.com.au
 2. www.mayfair101.coma notice in the terms set out at paragraph [2] below (the Notice);
 - ii. will keep the Notice on those websites until further order;
 - iii. will until further order provide each prospective new investor in their products with a copy of the Notice prior to accepting any new investment from such new investor.
2. The Notice will be in the following form:

Update to Investors

In the current circumstances of the COVID-19 global crisis, the Mayfair 101 Group of companies feels it appropriate to remind investors that:

1. Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government's Financial Claims Scheme (colloquially known as the 'Government Bank Guarantee' which covers deposits up to A\$250,000 per depositor, per bank).
2. As with all investment products, there are risks in investing in the Group's products.
3. Investing in the products offered by the Mayfair 101 Group is not the same as depositing money in a term deposit offered by a bank. Investing in Mayfair 101 Group products has a higher level of risk compared to investing in a bank term deposit.
4. In certain circumstances, the Group can exercise the right to suspend some or all redemptions at the end of the fixed term. The Group exercised this right on 11 March 2020. As such, all redemptions are currently suspended until such time as management agrees to lift the suspension and process redemptions.

45 In the Second Welling Affidavit (dated 15 April 2020), Mr Welling deposed that Mr Mawhinney (the Mayfair Group's Managing Director) had instructed him that the actions described in paragraph 1 of the proposed undertaking set out above had already been undertaken (including the publication of the proposed notice on Mayfair's websites).

Mayfair's submissions

46 Mayfair submits, in summary, that the Court should accept Mayfair's undertaking, dismiss ASIC's interlocutory application, and list the matter for hearing as soon as possible. Mayfair contends that no interlocutory relief is required in the circumstances. Mayfair submits that,

given the proposed undertaking, there is no utility in issuing an injunction, since the undertaking achieves the same objectives as the injunction.

47 In any event, Mayfair argues that ASIC has over-reached in its application for interim relief. The terms of the injunction sought by ASIC are, according to Mayfair, not directed to stopping the alleged misleading and deceptive conduct, but to stopping a substantial part of the Mayfair Group's business. According to Mayfair, any relief should be limited to addressing those allegations.

48 Mayfair accepts that there are serious questions to be tried, at least in relation to the Bank Term Deposit Representations and the Repayment Representations, but contends that it has good answers to those questions which need to be determined at trial. In Mayfair's submission, the proper balance is struck by the Court accepting the undertaking, and listing the matter for trial as promptly as possible. In this regard, Mayfair argues that:

- (a) the public interest can be served without an interim injunction:
 - (i) there is no appreciable risk of consumers being misled by the Mayfair Group's marketing pending trial;
 - (ii) any consumer who is misled by Mayfair's marketing will have an erroneous impression corrected by the Notice, which will be published on Mayfair's websites and provided to any prospective investor;
 - (iii) Mayfair's financial position is not "uncertain" and there is no basis for ASIC to contend that it is;
 - (iv) the Court can be satisfied that the undertaking will be complied with;
 - (v) subject of course to the Court's convenience, the proceeding can be promptly listed for trial; and
- (b) on the other hand, granting the injunctive relief, and thereby shutting down a substantial part of Mayfair's business with immediate effect and before the case is finally determined, would have significant, deleterious, and permanent consequences for Mayfair.

Relevant principles

49 ASIC seeks interlocutory relief pursuant to various statutory provisions, namely ss 1101B(1), 1101B(5), 1324(1) and 1324(4) of the *Corporations Act*, s 12GD(3) of the *ASIC Act* and/or s 23 of the *FCA Act*.

Statutory provisions

50 Section 1101B of the *Corporations Act* relevantly provides as follows:

Power of Court to make certain orders

Court's power to make orders in relation to certain contraventions

- (1) The Court may make such order, or orders, as it thinks fit if:
- (a) on the application of ASIC, it appears to the Court that a person:
 - (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or
 - ...
 - (vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; ...

...

Interim orders

- (5) Before considering an application to the Court under subsection (1), the Court may make an interim order of the kind applied for to apply pending the determination of the application, if in the opinion of the Court it is desirable to do so.

...

51 Section 1101B of the *Corporations Act* is located in Ch 7 of that Act, which concerns financial services and markets. Chapter 7 of the *Corporations Act* includes, relevantly, s 1041H, which relevantly provides that “[a] person must not ... engage in conduct, in relation to a financial product of a financial services, that is misleading and deceptive or is likely to mislead or deceive”. In this proceeding, ASIC seeks final injunctive relief under s 1101B(1)(a) in respect of alleged contraventions of s 1041H by Mayfair.

52 Section 1324 of the *Corporations Act* relevantly provides as follows:

Injunctions

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
- (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or

otherwise, a person to contravene this Act; or

- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
- (f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

...

- (4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

...

- (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
- (b) whether or not the person has previously engaged in conduct of that kind; and
- (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

- (7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
- (b) whether or not the person has previously refused or failed to do that act or thing; and
- (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

...

53 Section 12GD of the *ASIC Act* relevantly provides as follows:

Injunctions

- (1) If, on the application of the Minister, ASIC or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
 - (a) a contravention of a provision of this Division; or
 - (b) attempting to contravene such a provision; or

- (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate.

...

- (3) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

...

- (5) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (6) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

54 Regardless of which statutory provision above is invoked by ASIC for its claim to interlocutory relief, the Court is prohibited from requiring ASIC to give any undertakings as to damages as a condition of making an interim order: ss 1101B(6) and s 1324(8) of the *Corporations Act* and s 12GD(7) of the *ASIC Act*.

55 Finally, s 23 of the *FCA Act* provides as follows:

Making of orders and issue of writs

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

Principles from case law

56 The decision of Palmer J in *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; 42 ACSR 605; 20 ACLC 1637 (***Mauer-Swisse***) involved an application by ASIC for an interim injunction under s 1324(4) of the *Corporations Act*. His Honour summarised the relevant principles in relation to s 1324(4) as follows at [36]:

At the risk of some repetition, I summarise the principles which I draw from the presently applicable authorities:

- the jurisdiction which the court exercises under CA s 1324 is a statutory jurisdiction, not the court's traditional equity jurisdiction;
- Parliament has made it increasingly clear by successive statutory enactments that the court, in exercising its statutory jurisdiction under s 1324, is not to be confined by the considerations which would be applicable if it were exercising its traditional equity jurisdiction;
- among the considerations which the court must take into account in an application for an injunction under CA s 1324 are the wider issues referred to by Austin J in [*Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114] and [*Australian Securities and Investments Commission v Parkes* ([2001] NSWSC 377; 38 ACSR 355)], and by Davies AJ in [*Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; 41 ACSR 561]; they may be gathered under the broad question whether the injunction would have some utility or would serve some purpose within the contemplation of the Corporations Act;
- these considerations are to be taken into account regardless of whether the application is for a permanent injunction under s 1324(1) or for an interim injunction under s 1324(4);
- where an application under s 1324(4) is made by ASIC rather than a private litigant the court is more likely to give greater weight to the broad question whether the injunction would serve a purpose within the contemplation of the Corporations Act;
- where there is an appreciable—that is, not fanciful—risk of particular future contraventions of the Corporations Act by a defendant, it would serve a purpose within the contemplation of the Corporations Act that the court grant not only a permanent injunction but, in an appropriate case, an interim injunction restraining such conduct. Section 1324 evinces an intention that the possibly severe consequences and the relative promptness of proceedings for contempt of court be added to criminal prosecutions as a deterrent to contraventions of the Corporations Act;

- although the questions whether there is a serious question to be tried and where the balance of convenience lies will not circumscribe the court's consideration in an application for an interim injunction under s 1324(4), the interests of justice will always require that those questions be examined carefully when restrictions are sought to be imposed before the case has been properly examined by the court, even where the protection of the public is said to be involved: see per Young J (as his Honour then was), in *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566 [(**Lombard Nash**)] at 570–1;
- the balance of convenience will be viewed differently according to whether the applicant under s 1324(4) is ASIC or a private litigant. Where ASIC is acting to protect the public interest, the absence of an undertaking as to damages, exempted by s 1324(8), will usually be of little consequence. However, where the proceedings are brought to advance a plaintiff's private interests, then if such an undertaking is not proffered even though it is likewise exempted by subs (8), the court may take that circumstance into account as a matter of practicality, common sense and fairness in determining where the interests of justice lie and whether "it is desirable" to grant the injunction: see per Young J in *Lombard Nash* at 571.

57 In relation to s 1101B(5) of the *Corporations Act*, Moshinsky J expressed in *Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd* [2017] FCA 477 at [15] that the principles summarised by Palmer J in *Mauer-Swisse* were also applicable to an application for an injunction pursuant to s 1101B(5). (See also *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2 (**Financial Circle**) at [12] per Moshinsky J). This view was in turn cited in *Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104 at [78] per Derrington J, also his Honour noting in passing at [79] that "the further the Court strays from the guidance provided by the equitable rules governing the granting of injunctions, the less principled any exercise of power is likely to be".

58 Similarly, in relation to s 12GD(3) of the *ASIC Act*, Moshinsky J accepted in *Financial Circle* at [13]–[14] that the principles summarised by Palmer J in *Mauer-Swisse* were also applicable to an application for an injunction pursuant to s 12GD(3).

59 To obtain these forms of statutory interim relief, it is not necessary for the Court to be satisfied that the respondent has engaged, or will engage, in contravening conduct. For the purposes of relief under s 1324(4) of the *Corporations Act* and s 12GD(3) of the *ASIC Act*, this is evident from the express terms of s 1324(6)–(7) of the *Corporations Act* and s 12GD(5)–(6) of the *ASIC Act*: see *Financial Circle* at [13(c)]–[14] per Moshinsky J. It is also true for the purposes of interlocutory relief under s 1101B(5) of the *Corporations Act*, despite there not being

equivalent provisions to the same express effect: *Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd* (No 4) [2013] FCA 318 at [21] per Gordon J.

Consideration

60 Although ASIC seeks a statutory injunction, the interests of justice still require attention to considerations traditionally familiar in equity, namely determining whether there is a serious question to be tried and, if so, identifying where the balance of convenience lies: *Mauer-Suisse* at 614, citing *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 1)* (1986) 11 ACLR 566 at 570–571; (1987) 5 ACLC 269 at 272–273 (**Lombard Nash**) per Young J. I now address these considerations in turn.

Serious question to be tried

61 There will be a “serious question to be tried” or the plaintiff will make out a prima facie case where, assuming “the evidence remains as it is”, “there is a probability that at the trial of the action the plaintiff will be held entitled to relief”: *Castlemaine Tooheys Ltd v South Australia* [1986] HCA 58; 161 CLR 148 at 153 per Mason ACJ, quoted in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 at [13] per Gleeson CJ. That “probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought”: *Australian Broadcasting Corp v O’Neill* [2006] HCA 46; 227 CLR 57 at [71] per Gummow and Hayne JJ.

62 Mayfair accepts that there are serious questions to be tried in respect of the Bank Term Deposit Representations and the Repayment Representations. My view is that these are appropriate concessions. The concession in respect of the Bank Term Deposit Representations is particularly apt given the terms of the Deed Poll specify that the payment of the redemption may be suspended by Mayfair in prescribed circumstances.

63 My view is that there are also serious questions to be tried in relation to the No Risk of Default Representations and the Capital Growth Representations. It is unnecessary, and undesirable, for the purposes of this interlocutory application to descend into great detail into the lengthy affidavit material underpinning ASIC’s allegations. However, for the purposes of addressing the seriousness of ASIC’s allegations in relation to the No Risk of Default Representations, I note that a corporate brochure published by Mayfair expresses that “Mayfair 101’s investment products have been specifically designed to cater to investors seeking certainty and confidence in their investments”, and a newspaper advertisement published by Mayfair states that “Mayfair

Platinum is also focused on providing investors with certainty in relation to their capital and interest payments; after all, certainty helps drive investor confidence”. Without expressing any final view, there is, in my view, at least a serious question to be tried as to whether the references to “certainty” in these publications convey to the relevant class of consumers that their investment carried no risk of default, as alleged by ASIC.

64 As for the Capital Growth Representations, Mayfair’s website on 21 January 2020 included the following statement:

Investors can enjoy the benefits of investing with Mayfair 101 through the following investment structures. We focus on providing income-producing and **capital growth investment opportunities** for qualified investors. Click on the links below to learn more.

And also, elsewhere on Mayfair’s website, the following:

We work with High Net Worth and institutional investors to provide access to unique opportunities in quality companies to deliver income and **capital growth opportunities**.

(Emphasis added.)

65 It may be that, as contended by Mayfair, these statements, upon full examination and read in the totality of the Mayfair’s marketing material, would not mislead the relevant class of consumers to thinking that the Mayfair Products offered capital growth, rather than simply an income stream. However, that is an issue to determine another day. For the purposes of the present interlocutory application, my view is that there is a serious question to be tried in relation to whether the Capital Growth Representations constituted contravening conduct as alleged by ASIC.

Balance of convenience

66 Typically, in civil law cases, the Court’s consideration of the “balance of convenience” requires an assessment of “whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted”: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; 118 CLR 618 at 623 per Kitto, Taylor, Menzies and Owen JJ. Although the broad balancing exercise is the same in the present circumstances, the balance of convenience, as stated by Palmer J in *Mauer-Swisse* at 614 [36], “will be viewed differently according to whether the applicant ... is ASIC or a private litigant”. In cases where a public regulator, such as ASIC, is seeking interlocutory relief in respect of past or continuing

contraventions of an Act, the relevant concern is the “public interest in protecting consumers against the evils that the Act was passed to guard against”: *Lombard Nash* at 11 ACLR, 571; 5 ACLC, 273. This conforms with ASIC’s public objectives set out in s 1(2) of the *ASIC Act*: see *Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114 at [34]–[35] per Austin J.

67 In commencing these proceedings, ASIC clearly is engaged in the protection of legitimate public interests. In *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259 (***Bullabidgee v McCleary***), Allsop P (as this Court’s Chief Justice then was) expressed at [69] (with the agreement of Basten and Young JJA) that the *Trade Practices Act 1974* (Cth), and its State and Territory equivalents, were

“fundamentally remedial and protective legislation” giving effect to “matters of high public policy”; and is thus to be construed so as to give the fullest relief which the fair meaning of the legislation will allow: *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 494 at 528-529 [99]–[103]. These descriptors of the legislation are apt because the legislative purpose is to promote, in the broad sphere of Australian economic activity (trade and commerce), informed commercial activity, not based on misinformation, but rather on accurate information.

68 These remarks are equally applicable to the legislative provisions of the *Corporations Act* and *ASIC Act* sought to be enforced by ASIC in the present case. In seeking to restrain Mayfair’s future conduct, ASIC is acting to ensure that prospective investors are not misled or deceived into investing their money into financial products without an informed understanding of the nature of, and risks associated with, those products.

69 On the other hand, the Court is ordinarily concerned to ensure “that the people who are legitimately trading ... are not forced to close down before the case has been properly examined by the court”: *Lombard Nash* at 11 ACLR, 571; 5 ACLC, 273. As such, “the public interest must involve not only protection of consumers, but also the public interest in being able to trade and the jobs of the persons who are involved in the industry”: *ibid.* In the present case, Mayfair contends that an injunction in the form proposed by ASIC would have the effect of shutting down a substantial part of Mayfair’s business prior to trial.

70 In his affidavit, Mr Mawhinney, Mayfair Group’s Managing Director, described the effect on Mayfair’s business of an injunction that prohibited Mayfair from receiving new investor funds. Without going into great detail, Mr Mawhinney says that such an injunction would conceivably have a negative impact on the Mayfair Group’s ability to generate and pay returns to investors. Amongst other particular impacts, the injunction would, according to Mr Mawhinney, lead to

the Mayfair Group having to prematurely terminate investments and funding arrangements, and selling investment assets. That would likely lead to a lower price than what could ordinarily be obtained for those assets. Moreover, less incoming investor funds would potentially impact the Mayfair Group's ability to make planned payments in respect of investments, potentially lead to breaches of the requirements of the Mayfair Group's funding facilities, and also potentially lead to the suspension of activities that would otherwise be generating income.

71 Two aspects of Mr Mawhinney's evidence are particularly noteworthy for present purposes. The first relates to Mayfair's financial position, and the impact of an injunction on its finances. Mr Mahwinney states that ASIC has never sought any information regarding the Mayfair's Group's financial position, or its underlying investments. (I find that surprising, but I accept it as true in the face of no contradiction from ASIC.) Although ASIC's suspicion regarding the ongoing financial position of Mayfair's business may, as submitted by Mayfair, have been predominately and ultimately aroused by the implementation of Mayfair's "Liquidity Prudency Policy" on 2 April 2020 (with the accompanying suspension of redemptions), it is not correct that ASIC's concerns have been self-invented. Aspects of Mr Mahwinney's affidavit potentially tend, on their face, to raise concerns regarding Mayfair's present financial position regardless of whether or not an injunction is granted. This includes the following statements by Mr Mahwinney:

47. As [the Mayfair Group] would have less funds [as a result of the injunctions sought by ASIC], the [the Mayfair Group] would therefore need to find other sources of funding to meet its commitments (including its commitments in respect of the development of assets). This could possibly be by means of debt or private equity investments, but is more likely to be by means of – prematurely – terminating its investment and funding arrangements with investee companies and in respect of investment properties, and selling such investment assets.

...

49. Further, I believe that an injunction preventing the [the Mayfair Group] from receiving new investor funds (or reducing the amount of funds likely to be held by the [the Mayfair Group]) may have some or all of the following effects:

...

(c) *Interest servicing risk* – Any changes in the [the Mayfair Group]'s planned return generating activities leading to investment projects being stopped mid-project would seem likely to negatively affect the [the Mayfair Group]'s ability to continue with investments in shorter-term, more liquid, cash income generating investments (such as short-term business credit provision activities of [the Mayfair Group])

investee companies), if funds cannot be deployed into those investments, conceivably leading to less free cash flow to meet interest payments due to Investors.

...

72 The second noteworthy aspect of Mr Mawhinney's evidence is the lack of supporting financial documentation provided to the Court. Mr Mawhinney asserts that "[a]s at 31 March 2020 the [Mayfair Group] held assets worth (valued on ordinary valuation principles) more than two times (2x) its liabilities (which liabilities include amounts to Investors)". There is no financial documentation to support this assertion, even on a confidential basis. Neither is there any information before the Court substantiating the identification and value of assets held, and liabilities owed, by the Mayfair Group. Moreover, there is no detail as to the assets that Mayfair would need to sell in the event that an injunction is granted.

73 Mayfair correctly submitted that the ultimate onus rests on ASIC to satisfy the Court that the making of an injunction is appropriate. But Mayfair, as the defendants to this application, bear an evidential onus if they wish to establish claims in relation to the injury that they will suffer if an injunction is granted. And, for the present purposes of assessing the balance of convenience in response to this application, I am faced with bald assertions as to the potential economic and strategic impacts to Mayfair's business if an injunction were to be granted.

74 For this reason, in conjunction with the prevailing public interest of protecting consumers from potential harm, my view is that the undertaking offered by Mayfair (see above at [44]) is insufficient as an interim measure in the circumstances of the present case. Having regard to the materials filed thus far with the Court, the balance of convenience warrants the making of an interlocutory injunction pending the final determination of this proceeding.

Form of order

75 The terms of the injunction sought by ASIC were extracted above at [41]. Those terms relevantly included the following:

1. An order that, until further order:
 - a. each of the Defendants, by themselves and their servants, agents and employees, be restrained from advertising, promoting or marketing the M+ Fixed Income Product and the M Core Fixed Income Product.
 - b. each of the Defendants, by themselves and their servants, agents and employees, be restrained from receiving Investor Funds.
 - c. the Second Defendant, by itself and its servants, agents and employees, be restrained from issuing redeemable promissory notes in

the M + Fixed Income Product.

- d. the Third Defendant, by itself and its servants, agents and employees, be restrained from issuing redeemable promissory notes in the M Core Fixed Income Product.

For the reasons now explained, the first order (1(a)) sought by ASIC is appropriate, but the balance of the orders ((1)(b)–(d)) are inappropriate in the present circumstances.

76 ASIC, as an organisation, has broad ranging statutory functions and powers. But it has approached the Court in the current proceeding with a defined statutory focus. The final relief sought by ASIC in its Originating Process are certain declarations and orders in respect of what ASIC intends to establish as being misleading and deceptive conduct and false and misleading representations. Those allegations are only made in respect of defined conduct of Mayfair, namely the representations defined above at [31]. ASIC’s overriding concern on the face of this proceeding is, to quote Allsop P in *Bullabidgee v McCleary*, “to promote ... informed commercial activity, not based on misinformation, but rather on accurate information”. As such, ASIC has approached the Court with the mantle of consumer protector, but no more. In particular, ASIC is not alleging that the Mayfair Products are an unlawful form of financial product. And ASIC has not made any allegations in its Originating Process or its Concise Statement regarding the current or ongoing financial position of Mayfair Products. Those concerns, to the extent they held by ASIC, are not the focus of this proceeding.

77 As a result, there is, in my view, no warrant to restrain Mayfair per se from receiving investor funds and issuing the Mayfair Products at this interlocutory stage. I accept that the issuing of these products are a substantial part of Mayfair’s business. And, as noted above, the Court is concerned to ensure “that the people who are legitimately trading ... are not forced to close down before the case has been properly examined by the court”: *Lombard Nash* at 11 ACLR, 571; 5 ACLC, 273.

78 Ultimately, the critical concern of this proceeding, as both parties appear to recognise, is ensuring that consumers are properly informed of the nature of, and risks associated with, the financial products into which they decide to invest. The Court cannot form a final view as to whether Mayfair has failed in this regard until the completion of a trial. However, I accept at this juncture that it is necessary and appropriate to award, on an interim basis, an injunction against Mayfair directed to protecting consumers while the merits of ASIC’s allegations are determined.

Conclusion

79 Pursuant to the statutory powers provided to this Court under 1101B(5) and 1124(4) of the *Corporations Act 2001* (Cth) and subsection 12GD(3) of the *Australian Securities and Investment Commission Act 2001* (Cth), I have determined that it is appropriate to make the following interim orders pending the determination of this proceeding (or any further order of the Court):

THE COURT NOTES THAT:

For the purposes of this Order:

- (a) “**M+ Fixed Income Product**” means the financial product referred to by this name and issued by the Second Defendant;
- (b) “**M Core Fixed Income Product**” means the financial product referred to by this name and issued by the Third Defendant;
- (c) “**Mayfair’s Websites**” means:
 - (i) www.mayfair101.com; and
 - (ii) www.mayfairplatinum.com.au;
- (d) “**Online Search Platform Advertisements**” includes advertising through Google AdWords and Bing Ads; and
- (e) “**Prohibited Phrases**” means the following phrases:
 - (i) “bank deposit”;
 - (ii) “capital growth”;
 - (iii) “certainty”;
 - (iv) “fixed term”;
 - (v) “term deposit”; and
 - (vi) “term investment”.

THE COURT ORDERS THAT:

Pursuant to subsections 1101B(5) and 1124(4) of the *Corporations Act 2001* (Cth) and subsection 12GD(3) of the *Australian Securities and Investment Commission Act 2001* (Cth), and until further order:

1. each of the Defendants, by themselves and their servants, agents and employees, be restrained from:
 - (a) using the Prohibited Phrases in any advertising, promotion or marketing by the Defendants, including on Mayfair’s Websites and through any Online Search Platform Advertisements; and
 - (b) advertising, promoting or marketing the M+ Fixed Income Product and the M Core Fixed Income Product; and

2. each of the Defendants:
 - (a) add to each of Mayfair's Websites; and
 - (b) provide to each prospective new investor in either the M+ Fixed Income Product or the M Core Fixed Income Product a copy of,

a notice which includes the following statement:

The Mayfair 101 Group of companies reminds investors prior to investing in the products offered by the Mayfair 101 Group that:

1. *Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government's Financial Claims Scheme (colloquially known as the 'Government Bank Guarantee' which covers deposits up to A\$250,000 per depositor, per bank).*
2. *As with all investment products, there are risks in investing in the Mayfair 101 Group's products.*
3. *Investing in the products offered by the Mayfair 101 Group is not the same as depositing money in a term deposit offered by a bank. Investing in Mayfair 101 Group products has a higher level of risk compared to investing in a bank term deposit.*
4. *In certain circumstances, the Mayfair 101 Group can exercise the right to suspend some or all redemptions at the end of the fixed term. The Mayfair 101 Group exercised this right on 11 March 2020. As such, all redemptions are currently suspended until such time as management agrees to lift the suspension and process redemptions. Your investment in the products offered by the Mayfair 101 Group may also be subject to suspension of some or all redemptions at the end of the fixed term. This is a risk that you should take into account.*

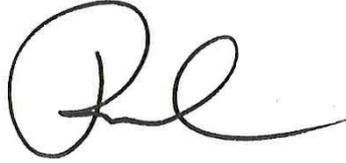
80 I will also make the following further orders:

3. The costs of the Plaintiff's application for interlocutory relief are reserved.
4. Liberty to apply.

81 My chambers will approach the parties in due course to determine an appropriate programme for the listing of a trial to facilitate the final determination of ASIC's allegations against Mayfair.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Anderson.

Associate:

A handwritten signature in black ink, consisting of a large, stylized capital letter 'A' followed by a cursive 'L' and a long horizontal flourish extending to the right.

Dated: 16 April 2020

SCHEDULE OF PARTIES

VID 228 of 2020

Defendants

Fourth Defendant:

ONLINE INVESTMENTS PTY LTD