FEDERAL COURT OF AUSTRALIA

Australian Securities and Investment Commission v Aviation 3030 Pty Ltd

[2019] FCA 377

File number(s):	VID 1223 of 2018
Judge(s):	**O'CALLAGHAN J**
Date of judgment:	19 March 2019
Catchwords:	**CORPORATIONS –** application by ASIC to wind up solvent companies on the just and equitable ground – s 461(1)(k) of the *Corporations Act 2001* (Cth) – where company is solvent – where private proceeding also on foot – where pattern of unlawful and misleading behaviour – application to wind up managed investment scheme pursuant to s 601EE(2) of the Corporations Act – applications granted
Legislation:	*Corporations Act 2001* (Cth)
Cases cited:	*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013); 93 ACSR 189, [2013] FCA 234 *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 *Australian Securities and Investments Commission v Finchley Central Funds Management Ltd (Receiver and Manager appointed)* [2009] FCA 1110 *Australian Securities and Investments Commission v Great Northern Developments* (2010) 79 ACSR 684; [2010] NSWSC 1087 *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121 *Costa and Duppe Properties Ltd v Duppe* [1986] VR 90 *CPT Custodian Pty Ltd v Commisioner of State Revenue (Vic)* (2005) 224 CLR 98 *Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission* (2018) 129 ACSR 363; [2018] QCA 181 *Guildford International Group Pty Ltd, in the matter of Aviation 3030 Pty Ltd v Aviation 3030 Pty Ltd* [2018] FCA 600 *In re Romford Canal Company* (1883) 24 ChD 8 *Menard v Horwood and Company Limited* (1922) 31 CLR 20

Dates of hearing:	25 February 2019, 26 February 2019, 27 February 2019, 28 February 2019, 1 March 2019
Date of last submissions:	1 March 2019
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Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	227
Counsel for the Plaintiff:	Mr M R Pearce SC with Ms Z E Maud
Counsel for the Defendants:	Mr P D Crutchfield QC with Mr J S Graham and Mr N M Elias
Solicitor for the Defendants:	DLA Piper Australia
Counsel for the First Intervener:	Mr J D S Barber
Solicitor for the First Intervener:	De Wet Partnership Solicitors
Counsel for the Second Intervener:	Mr C R Northrop
Solicitor for the Second Intervener:	Scammel Beach and Mileo
Counsel for the Third Intervener:	Dr O Bigos
Solicitor for the Third Intervener:	HWL Ebsworth Lawyers

ORDERS

VID 1223 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION** Plaintiff
AND:	**AVIATION 3030 PTY LTD** First Defendant
	AVIATION 3030 INVESTMENT PTY LTD Second Defendant
	AVIATION 3030 HOLDINGS PTY LTD (and others named in the Schedule) Third Defendant
	KHAY SUONG TAING AVIATION 3030 PTY LTD First Intervener
	LAO HOLDINGS PTY LTD Second Intervener
	INVESTOR GROUP (named in the Schedule) Third Intervener
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**19 MARCH 2019**

THE COURT ORDERS THAT:

1. Pursuant to s 461(1)(k) of the *Corporations Act 1995* (Cth) (**the Corporations Act**) the first to sixth defendants be wound up.

2. George Georges and John Lindholm (together, the **liquidators**), official liquidators of Level 43, 600 Bourke Street, Melbourne, Victoria be appointed as joint and several liquidators of the first to sixth defendants for the purposes of the winding-up.

3. Pursuant to s 601EE(2) of the Corporations Act, the managed investment scheme (the **Scheme**) operated by the first defendant including the Aviation 3030 Investment Unit Trust, Aviation 3030 Holdings Unit Trust, Aviation 3030 Heng Ly Unit Trust, Point Cook Aviation 3030 Unit Trust and the Aviation 3030 HL Unit Trust (together, the **Aviation Unit Trusts**) be wound up.

4. The liquidators be appointed joint and several liquidators of the Scheme with all the powers of a liquidator pursuant to s 477 of the Corporations Act in respect of the property of the Scheme.

5. Pursuant to s 601EE(2) of the Corporations Act and s 48 of the *Trustee Act 1958* (Vic), the liquidators be appointed as trustees of each of the Aviation Unit Trusts.

6. The plaintiff's costs be taxed and be reimbursed out of the property of the first defendant in accordance with s 466(2) of the Corporations Act.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

INTRODUCTION

1 In May 2011 the first defendant (**Aviation**) bought 240 acres of land in Point Cook, Victoria for $7.8 million (the **Aviation land** or the **land**). The purchase price was payable in three instalments, the last of which was paid in December 2015, when Aviation became the registered proprietor of the land. Aviation raised money from investors to help fund the purchase price for the Aviation land and other costs associated with the acquisition and rezoning of the Aviation land. At the time of purchase the land was within the "Green Wedge Zone", which meant that it could not be subdivided for residential development. In September 2012, the land was rezoned "Farming Zone", which is often a preliminary step to land being rezoned "Residential", something which obviously brings about a significant increase in the value of the land. In October 2018, Aviation entered into a contract to sell the land, still zoned as "Farming", to a property development company for $135 million. The purchaser paid Aviation a deposit of $27 million. The balance of $108 million is payable in April 2023.

2 The plaintiff (**ASIC**) seeks to wind up Aviation and the other related defendant companies. It also seeks to wind up a related managed investment scheme, including various unit trusts, which it says operated in contravention of s 601ED(5) of the *Corporations Act 2001* (Cth) (the **Corporations Act**). ASIC seeks the winding up of the first to sixth defendants, pursuant to s 461(1)(k) of the Corporations Act and the managed investment scheme (the **Aviation scheme**, or **scheme**) operated by Aviation, including the Aviation 3030 Investment Unit Trust, Aviation 3030 Holdings Unit Trust, Aviation 3030 Heng Ly Unit Trust, Point Cook Aviation 3030 Unit Trust and the Aviation 3030 HL Unit Trust (together, the **Aviation Unit Trusts**), pursuant to s 601EE(2) of the Corporations Act.

3 Without knowing more, one might wonder why the regulator would be seeking winding up orders in circumstances where Aviation, and the investors, stand to make significant profits. ASIC, for which Mr M R Pearce SC and Ms Z E Maud appeared, however, says that the conduct of the directors of the defendants is such that winding up orders are necessary for the public interest, to ensure investor protection and to enforce compliance with the law. That position was supported by a group of 12 investors, for whom Dr O Bigos appeared.

4 The defendants, for which Mr P D Crutchfield QC appeared with Mr J S Graham and Mr N M Elias, oppose the winding up orders. Two interveners, Lao Holdings Pty Ltd and Khay Suong Taing Aviation Pty Ltd, who are defendants in a related proceeding, and for which Mr C R Northrop and Mr J D S Barber respectively appeared, also oppose the granting of the relief that ASIC seeks.

5 ASIC agrees that because Aviation is solvent, a strong case that the public interest is relevantly affected must be made. ASIC says that there is such a strong case, and relies on evidence which falls within the following descriptions:

- directors issuing to themselves and to their associates large numbers of shares at a gross undervalue;
- fabrication of documents, including correspondence and invoices;
- provision of false instructions to the companies' external solicitors;
- misleading investors, including by concealing from them the terms of an "option agreement," and by duping some of them into signing a document that the directors must have known was untrue or misleading;
- related party loans; and
- unauthorised and exorbitant expenditures.

6 ASIC submits that the directors and managers are unfit for their roles and that the court should accordingly grant the relief that it seeks.

7 The defendants and the interveners resist the making of the winding up orders primarily on the following grounds:

- the events upon which ASIC relies are "historical";
- the investors were only ever promised 1/240th an interest for every million shares, and that is precisely what they still have and will continue to have;
- investors were slow to complain and have not themselves sought the winding up of the defendants;
- ASIC's conduct of its investigations has been protracted;
- the directors have successfully negotiated the sale of the land at a price many times the purchase price;

- the companies, being single purpose entities, have no substantial function to perform, other than to receive the balance of the purchase price in 2023; and
- various undertakings proffered by the defendants, including not to deal with or encumber any asset of Aviation and to continue to retain professional advisers and an independent director, will suffice to protect the interests of the investors in the meantime.

8 The defendants also submit that the grievances of the investors are more conveniently to be aired in proceeding no VID 1460 of 2016, *Guildford International Group Pty Ltd, in the matter of Aviation 3030 Pty Ltd v Aviation 3030 Pty Ltd* (the **Guildford proceeding**, or **Guildford**). The plaintiff in that proceeding is a disgruntled investor in the scheme. The proceeding is not far from being ready for trial, and the defendants contend that, in the exercise of the court's discretion, it should decline to appoint the liquidators, and instead allow all the matters that the applicant seeks to raise to proceed to trial.

9 For the reasons set out below, the case that ASIC makes is overwhelming and the orders that it seeks will be made.

10 In order to understand how all this came to be, it is necessary to set out in some detail the relevant facts about the purchase of the land, the raising of funds from investors via the issue of shares and through unit trusts, bank borrowings, agreements entered into by Aviation and its associated entities, various related party loans and other dealings.

11 It is to those matters that I now turn.

AVIATION BUYS THE LAND

12 In 2010 Mr Hakly Lao (**Mr Lao**) identified the land, now known as 756 Aviation Road, Point Cook (the **Aviation land**) as a possible investment. Later that year, in December, Mr Lao procured someone called Mr Vuong Minh Do, one of his employees, to enter into a contract with the registered proprietor to purchase the land for $7.8m.

13 Aviation was registered on 4 May 2011, at which time Mr Lao and Mr Khay Suong Taing (**Mr Khay Taing**) were the directors. Mr Lao held all of the issued share capital.

14 The next day, Aviation entered into an agreement with a company called Kayla Holdings Pty Ltd (**Kayla**), by which Kayla agreed to "arrange and procure for [Aviation] to enter into the

Contract of Sale for the [Aviation land] as purchaser", in consideration for payment of an arranger's fee by Aviation of $2 million net of taxes.

15 The directors of Kayla were Tola Sin Chea and Charnchai Trangadisaikul. All of the shares in Kayla were held by JCNY Pty Ltd, a company of which Mr Lao was the sole director and shareholder.

16 The contract for the sale of the Aviation land between Mr Vuong and the vendor was subsequently terminated and on 20 May 2011 the vendor entered into a contract of sale with Aviation. The purchase price ($7.8 million) was payable in three instalments. The final payment of $4.55 million was due, and was paid, on 13 December 2015.

The auDirect Agreement

17 On 15 July 2011 Aviation entered into an agreement with auDirect Property Group Pty Ltd (**auDirect Property**) (the **auDirect Agreement**), by which Aviation engaged auDirect Property to provide project management services in relation to the Aviation land, for an annual fee of $120,000, plus reimbursement of costs.

18 auDirect Property also agreed to facilitate Aviation becoming the purchaser of the Aviation land, in return for which Aviation was required to pay auDirect Property the sum of $2 million (net), and to arrange for the issue of 10% or 24 million of Aviation's shares to auDirect Property.

19 By clauses 5.1 and 5.2 of the auDirect Agreement, Aviation agreed to:

> 5.1 … make such and all following arrangements to auDirect or its nominated entity:
>
> …
>
> (iv) Ownership entitlements via share issue of any unissued shares after settlement of the property and any zone change to include the land within the UGB. auDirect nominates Hakly Lao and Khay Taing ('**the Founders**') to be the beneficiaries of such shares with the goal of issuing 1/3 of total shares for capital raising and 1/3 to each of the Founders. For the avoidance of doubt, both parties acknowledge that the maximum number of shares on issue is 240 million.
>
> (v) Majority seating of the Board of Aviation 3030.
>
> 5.2 Aviation 3030 acknowledges its obligations and agrees to act and do all things necessary to carry out all of clause 5.1 and to comply with any reasonable instructions issued by auDirect under this clause.

20 By clause 8 of the auDirect Agreement, the parties were required to keep it confidential and "only disclose it to their advisors and financiers on a need to know basis".

21 All of the issued shares in auDirect Property were owned by Mr Lao and then YLKAH Holdings Pty Ltd, a company ultimately owned by Lao. Mr Lao was the sole director of auDirect Property until it was deregistered on 6 April 2018.

22 On 25 July 2011, Aviation paid a total of $3,048,913.74 to Kayla as "Contract Arrangement Fees".

23 auDirect Property never provided services to Aviation. Instead it assigned its right to manage the Aviation land to a subsidiary, another of Mr Lao's companies called Aviation 3030 Management Pty Ltd (**Aviation 3030 Management**). That agreement was cancelled in early 2015. Aviation has since that time paid monthly directors fees in excess of $6,500 per month to each director of Aviation 3030 Management.

INVESTMENT IN AVIATION

24 Aviation had to raise capital to fund the acquisition and development of the Aviation land.

25 In mid-2011, Aviation began distributing at least two versions of an information memorandum, one dated 1 July 2011 and relating to the sale of shares in Aviation, and the other dated 31 May 2011 and relating to the issue of units in the Aviation 3030 Investment Unit Trust.

26 The section headed "Summary of Investment Opportunity" in the information memorandum relating to the sale of shares provided the following:

> 2. [Aviation] has entered into a Contract of Sale dated 20 May 2011 to acquire the property located at Lot 1, Aviation Road, Werribee South/Point Cook, Victoria 3030 ('the Property').
>
> …
>
> 4. [Aviation] intends to raise the funds for the project by issuing shares in [Aviation] via personal offers and to sophisticated investors ('Capital Raising')…
>
> 5. The funds raised under the Capital Raising will be used for the purposes of meeting required purchase price instalment payments under the contract of sale for the Property, costs associated with the Property including land tax, rates, re-zoning costs, management costs and the general working capital needs of [Aviation] as set out in the 'Disbursement of Funds' section of this IM.
>
> 6. [Aviation] intends to apply for a re-zoning of the Property. If [Aviation] is successful at achieving a re-zoning of the Property, [Aviation] intends to either sell the Property or raise more funds to develop the Property. However, there

is no guarantee that the Property can be re-zoned.

27 The information memoranda further provided:

> 21. If, within three years from settlement or prior to the date of rezoning of the Land (whichever is earlier), further funding is required for any costs associated with the Property (including without limitation, rezoning costs), [Aviation] intends to issue further Shares in [Aviation] provided that the number of Shares on issue at any given time does not exceed 240 million Shares. [Aviation] may also elect to retain, and not to issue, Shares if further funding is not required.
>
> 22. Upon the full funds being raised as set out in the 'Disbursement of Funds' section of this IM, any remaining Shares not allocated shall be retained by the founders or their nominated entities.

28 The unitholder information memorandum does not contain any equivalent to [21] – [22] of the shareholder information memorandum.

29 The shareholder information memorandum does not otherwise refer to the issue of shares to the founders, and certainly says nothing about the grant of share options to the founders, any entitlement of auDirect Property to shares, or the possibility that Aviation shares would be issued to the founders for virtually nothing.

30 Nonetheless, Aviation insists that when the information memorandum said that Aviation "may also elect to retain, and not to issue, Shares if further funding is not required" and that "any remaining Shares not allocated shall be retained by the founders or their nominated entities" it is to be taken that all of the investors were therefore aware that Mr Lao and Mr Khay Taing (who claim to be "the founders") could allocate to themselves all unissued share capital at $1/100^{th}$ of a cent per share.

31 The shareholder information memorandum said that Aviation intended to raise $19.795 million. The unitholder information memorandum said the figure was $21.194 million. Nothing turns on the different figures, at least for present purposes. In the end, it seems that the former reflected the true or eventual requirements.

32 The shareholder information memorandum told prospective investors that the $19.795 million would be disbursed in accordance with a list set out in the memorandum, including an "Acquisition Cost/Rights to Contract" payment of $2,857,142; "Finders Fees" of $270,998; and "Investment Referral Fees" of $3 million, among others. A list of annual budgeted expenses forecast annual expenses of $643,374 over three years, which included a number of items, including a "project managers" fee of $75,000.

33 A letter addressed to "Sophisticated Investors" in the unitholder information memorandum also told prospective investors:

> The aim of this project is to raise all the capital required, will allow [Aviation] rights to the [Aviation land]. Once a participant chooses to invest they will then become an additional unitholder within the Aviation 3030 Investment Unit Trust.
>
> [Aviation] is the trustee of Aviation 3030 Investment Unit Trust.
>
> Aviation 3030 Investment Unit Trust is limited to 240 million units respective of the 240 acres … A minimum of 1 million units can be purchased by an investor but no less at any given time.

34 The unitholder information memorandum also contained the following statements:

> 5. The company intends to raise the funds for the project by issuing units in the Trust via personal offers and to sophisticated investors ('**Capital Raising**'). [Aviation] issues this Information Memorandum ('**IM**') for the purposes of the Capital Raising.
>
> 6. The funds raised under the Capital Raising will be used for the purposes of meeting required purchase price instalment payments under the contract of sale for the Property, costs associated with the Property including land tax, rates, re-zoning costs, management costs and the general working capital needs of the company. However, this is not confirmed and [sic] subject to change.
>
> …
>
> 8. ….
>
> (a) [Aviation] shall pay a project manager fee of $50,000 per annum
>
> ...
>
> 9. An investor who decides to invest in units in the Trust under the Capital Raising will be issued with ordinary units in the Trust ('**Units**') as consideration for their investment monies.
>
> 10. Pursuant to the Trust Deed for the Trust, the Trust can issue a maximum of 240 million Units.
>
> …
>
> 13. [Aviation] presently intends to raise $21,194,676.09 from investors for the purposes of the Capital Raising. However the Company reserves the right to raise a lesser sum if it so elects.
>
> …

35 For reasons that remain unexplained (because none of the directors of Aviation testified in this proceeding, and the answer is not otherwise apparent) the structure of an investment trust with a single trust with Aviation 3030 Investment Unit Trust was not proceeded with. Instead, what Mr Pearce described as "a hybrid structure" was adopted, whereby shares were issued directly by Aviation 3030 Pty Ltd to investors and further shares were issued to five trustee companies,

who then in turn issued units to investors. It also seems that another company, Aviation 3030 Investment Pty Ltd, became the trustee of the trust referred to in the unitholder information memorandum and in turn became a shareholder in Aviation.

36 Between 18 July 2011 and 20 February 2012 Aviation raised a total of around $10.59 million from 39 shareholders and 34 unitholders via the **Aviation Trust Companies**, each of which is a shareholder and a corporate trustee of an Aviation Unit Trust, as follows:

Aviation Trust Company	**Aviation Unit Trust**	**Current Directors**	**Shareholders**	**No of shares in Aviation**
Aviation 3030 Investment Pty Ltd	Aviation 3030 Investment Unit Trust	Huy Taing Hakly Lao	Hakly Lao	8 Million
Aviation 3030 Holdings Pty Ltd	Aviation 3030 Holdings Unit Trust	Huy Taing Hakly Lao	Hakly Lao Khay Suong Taing	15 million
Aviation 3030 Heng Ly Pty Ltd	Aviation 3030 Heng Ly Unit Trust	Huy Taing Hakly Lao	Hakly Lao Khay Suong Taing	9 million
Point Cook Aviation 3030 Pty Ltd	Point Cook Aviation 3030 Unit Trust	Huy Taing Hakly Lao	Hakly Lao	3 million
Aviation 3030 HL Pty Ltd	Aviation 3030 HL Unit Trust	Hakly Lao	Hakly Lao	4 million

37 The share issues for the same period were as follows:

No.	**Shareholders**	**Date of issue**	**Shares issued**	**Amount raised**
1	Pisey Poi	18/07/2011	2,000,000	$20
2	Vibol Duong	18/07/2011	2,000,000	$20
3	Sotheavy Pol	18/07/2011	3,000,000	$30

4	Socheat Cheng	18/07/2011	1,000,000	$10
19	Aviation 3030 Holdings Pty Ltd	22/07/2011	3,000,000	$396,000
22	Aviation 3030 Holdings Pty Ltd	28/07/2011	1,000,000	$120,000
23	Aviation 3030 Investment Pty Ltd	4/08/2011	7,000,000	$699,999
24	Aviation 3030 Investment Pty Ltd	4/08/2011	10,000,000	$1,594,000
29	Aviation 3030 Heng Ly Pty Ltd	19/12/2011	5,000,000	$704,000
31	Aviation 3030 Investment Pty Ltd	20/02/2012	1,000,000	$195,001

38 In a letter sent by Aviation's solicitors, Pointon Partners, on 8 February 2016, Aviation agreed that the offer of securities between 18 July 2011 to 20 February 2012 was in contravention of s 706 of the Corporations Act and that the company was further in contravention of s 727(1) of the Corporations Act by failing to lodge a disclosure document with ASIC in relation to the offer of securities during that period.

39 Having raised approximately $10.59 million from investors by the issuing of shares and units, Aviation was left with a shortfall of almost $9 million, which it funded with borrowings secured by a first registered mortgage over the Aviation land. By the end of 2017, Aviation had borrowed over $11.68 million, which was subsequently repaid, and the mortgage discharged, using part of the deposit that Aviation was paid pursuant to its $135 million contract of sale.

40 As things currently stand, the balance of the deposit sum is retained in the trust account of Aviation's solicitors.

41 It is now necessary to set out the (almost entirely undisputed) facts of various matters upon which ASIC relies in making its applications, concerning directors issuing to themselves and to their associates shares at a gross undervalue, the fabrication of documents, the provision of false instructions to the companies' external solicitors, the misleading of investors, related party loans; and unauthorised and exorbitant expenditures. By the time he came to his closing submissions, Mr Pearce had marshalled 24 different points which, he submitted, warranted the making of the winding up order. The most important of them is the March 2016 share issue. It is the most important because it is not "historical" and it involves the directors issuing to themselves 63.33% of the shares in Aviation for next to nothing.

THE MARCH 2016 SHARE ISSUE

42 The Aviation land was rezoned to Farming Zone in September 2012.

43 That resulted in the value of the land sky-rocketing.

44 Mr Huy Taing had replaced his father (Mr Khay Taing) as a director of Aviation in October 2011. Mr Terence Grundy, a solicitor, was appointed a director in June 2012. He holds no shares in Aviation and no units, and in that sense is referred to as an "independent" director. On 18 September 2012, a few days after the rezoning was announced, the board of directors of Aviation (Messrs Huy Taing, Lao and Grundy) met to decide whether to enter into an **Option Agreement** that purported to grant to Mr Lao's mother (Mrs Heng Kim Ou) and Mr Khay Taing (or their nominees) options collectively to purchase up to 160 million shares in Aviation, in equal proportions.

45 The Option Agreement recited (in recital A) that Aviation "agreed to grant [Mr Lao] and [Mr Khay Taing] options to subscribe for ordinary shares in [Aviation] … as the founders of [Aviation] on the terms and conditions **as set out in a Grant of Options Letter annexed to this Agreement at Annexure A**…" (emphasis added).

46 Recital B was in these terms: "the parties acknowledge that [Mr Lao] has assigned all of his rights and interest under the Former Option Agreement to his mother … so that she becomes a founder in place of [Mr Lao] in accordance with [Mr Lao's] letter to the company dated #". No such letter has ever been produced, dated "#" or otherwise.

47 The Option Agreement also provided that Mrs Ou and Mr Khay Taing would pay $1,000 for each of the 1 million shares they would acquire upon exercise of the options, which could only be exercised if, following their exercise, the total number of shares issued by Aviation did not exceed 240 million.

48 The letter referred to, which was produced by Mr Lao at the 18 September 2012 board meeting to prove that the Option Agreement was enforceable, was fabricated. It bore the date 4 May 2011, but it was in fact prepared by Aviation's solicitor at Pointon Partners, on the day of the board meeting, in furtherance of an instruction from Mr Lao.

49 The letter from Aviation to Mr Lao and Mr Khay Taing (the **Grant of Options Letter**) is important because it purports to grant options to Mr Lao and Mr Khay Taing (or their nominees)

collectively to subscribe for 160 million Aviation Shares, on the terms set out in the letter, as follows:

> …
>
> Dear Hakly & Khay,
>
> **Re: Aviation 3030 Pty Ltd (The Company') – Grant of Options**
>
> By this letter, Aviation 3030 Pty Ltd hereby grants to you options (or your respective nominees) to collectively subscribe for one hundred and sixty million (160 million) shares in the Company in your capacity as Founders on the followings terms:
>
> - The options may only be exercised in multiples of one million shares
> - Exercise price of $1000per million shares subscribed for;
> - Both Founders must sign options exercise notice and shares are allocated to Founders (or their respective nominees) in equal proportions;
> - Five year exercise period from date of this letter;
> - Option not capable of exercise if at time of purported grant the Company is currently in default under contract to purchase Lot 1, Aviation Road, Point Cook;
> - Options cannot be exercise if such exercise results in the Company having more than 240 million shares on issue;
> - Options granted herein are assignable by the Founder by notice in writing to the Company
>
> Yours faithfully,
>
> Aviation 3030 Pty Ltd

50 I return to describe what happened at the 18 September board meeting.

51 Mr Lao and Mr Huy Taing said that they proposed to abstain from voting on the resolution proposing entry into the Option Agreement, and that Mr Grundy should be the only director to vote on the resolution.

52 Mr Grundy was in a dilemma. The conflict of interest of his fellow directors was doubtless obvious, and he was unsure whether the Option Agreement was enforceable. That was understandable enough. Among other issues that would have leapt off the page was the inconsistency between recital A, which asserts that Aviation had agreed to grant the options on the terms and conditions set out in the letter at annexure A, and clause 1.1 of the Option Agreement which states: "[Aviation] hereby grants to the Founders the Options …".

53 In any event, Mr Grundy was unsure about the enforceability of the Option Agreement, and with that in mind, he telephoned Michael Bishop at Pointon Partners, and asked him whether the Option Agreement was enforceable. Mr Bishop told him it was.

54 Although Mr Grundy was, as he put it during an examination conducted on 27 September 2016, pursuant to s 19 of the *ASIC Act 2001* (Cth) (**s 19 examination**), "very uncomfortable about it", he nonetheless voted in favour of the resolution proposing Aviation's entry into the Option Agreement and then executed it on behalf of Aviation, relying on Mr Bishop's advice.

55 The minutes of the meeting are as follows:

> **MINUTES OF A MEETING OF DIRECTORS OF AVIATION 3030 PTY LTD**
>
> | | |
> |---|---|
> | DATE | 18 September 2012 |
> | HELD | Unit 610, 530 Little Collins Street, Melbourne |
> | PRESENT | Terence Grundy (Chairman)
Huy Taing
Hakley Lao |
> | NOTED | It was noted that Hakly Lao had a material interest in the Option Agreement and accordingly would not vote on the resolution of the Company. |
> | NOTICES TABLED | Tabled before the meeting were the following documents:
1. The Company's letter to Hakly Lao and Khay Suong Taing dated 4 May 2011;
2. Letter to the Company from Hakly Lao dated 1 July 2011; and
3. Option Agreement between the Company, Heng Kim Ou and Khay Suong Taing. |
> | RESOLUTION | It was resolved by the Board for the Company that the Company enter into the Option Agreement with Heng Kim Ou and Khan Suong Taing on the term and conditions of the Agreement as tabled before the meeting. |
> | CLOSURE | There being no further business the meeting was declared closed. |

56 Mr Bishop did not tell Mr Grundy that the Grant of Options Letter had in fact been created on 18 September 2012, not on the date that it purported to bear, viz 4 May 2011.

57 Mr Grundy and Mr Huy Taing then executed the Option Agreement on behalf of Aviation.

58 As would be apparent, the resolution of the Board was purported to be passed by Mr Grundy's single vote. I again use the word "purported" because, as counsel for the defendants accepted,

the meeting was inquorate. Whether that means that Mr Lao and Mr Huy Taing are to be taken to have known that the resolution was invalid, and whether the Option Agreement is void, are questions, among others, that are not necessary to resolve here (see s 1322(2) of the Corporations Act; cf *In re Romford Canal Company* (1883) 24 ChD 85 at 90).

59 Almost three years later, on 25 August 2015, Ms Ou and Mr Khay Taing each exercised their options to purchase 76 million Aviation shares for a total price of $76,000 each.

60 On 29 February 2016, Aviation obtained legal advice from M+K Lawyers in relation to the exercise of options in Aviation by Mr Lao and Mr Huy Taing.

61 The ultimate conclusion of the legal advice was that the exercise of the options by those two individuals would not prejudice the then current ASIC investigation. The advice also said that the options were "at arms [sic] length and will remain enforceable against the suggestion of appointment of a Liquidator".

62 The legal advice, however, was expressly and repeatedly premised upon instructions obtained from Aviation that every investor had been made aware of the Option Agreement. That instruction was false.

63 Mr Grundy referred to the advice from M+K Lawyers during his s 19 examination as follows:

> [W]hen I joined the board I wasn't aware … of the founders agreement but ultimately I did [sic] and I was asked to sign an agreement, which I did, because I got advice from the company's solicitors that said that the options were enforceable. I was very uncomfortable about it, didn't like it, but on legal advice I signed the document. I subsequently gave considerable thought to it and when this issue of the options came up I said that the company should get further advice on the point because Phil Webb [Aviation's accountant] and I have got together and did the chart about the dilution of equity and the effect of these options on the original shareholders. And I looked at the information memoranda … and I thought well, you know, does this pass a reasonable man test, you know. And I thought, you know, I don't feel comfortable about this so I voiced my disdain and objection and I was literally shouted down. And I refused to agree to it. I then got a letter from [Mr Lao's] lawyers, M+K Lawyers … who made a veiled threat and said that it will be going through. And I said, 'Well, do so and you will bear the consequences', or words to that effect. And I had a severe falling out with [Mr Lao and Mr Huy Taing] but I remain a board member.

64 On 8 March 2016, the board resolved to accept the options exercise notices, and for Aviation's solicitors to start the process of issuing the shares.

65 Another board meeting was hurriedly convened for 10 March 2016 by Mr Huy Tang, who told his co-directors that he had "some urgent matters" to discuss. Because of the short notice, Mr Grundy was unable to attend.

66 Nonetheless, the meeting went ahead in Mr Grundy's absence.

67 The minutes of the meeting, which refer, among other things, to the advice from M+K Lawyers discussed above, read as follows:

AVIATION 3030 PTY LTD

BOARD OF DIRECTORS MEETING

MINUTES

Date: Thursday 10 March 2016

Time: 1.04pm

Venue: 2/2 Fiveways Bvd Keysborough Vic 3173

Attendees: Huy Taing, Hakly Lao (via teleconference),

Invitees: Heng Kim Ou, Khay Taing, Say Kim Taing & Marintha Lao

Chairman: Huy Taing

…

2. OPTION AGREEMENT

Tabled: a) Option Agreement dated 2012

b) …

c) M & K Lawyers Memorandum of Advice dated 29 February 2016

d) Option Exercise Notice for both founders dated 25 August 2015

Hakly Lao confirmed perusal of the documents tabled prior to the meeting

The founders present the advice they sought from MK Lawyers. This … asserts that the Option Agreement does comply with the company's regulations and that the founders are entitled to exercise the option at their own discretion, provided they meet the terms of the agreement – which they have.

The Board recognised that both memorandums by these independent legal firms make no statement as to why the option cannot be granted.

The Board acknowledged the notice to exercise was made by the founders since 25 August 2015 and sincerely commend them for their patience.

Resolution:

The Board resolved to accept the exercise notice from both founders and made note that each founder is required to make a payment to the company in accordance to the share price as stipulated. The Board is to issue the shares within 7 days of the notice provided. Huy Taing motioned this arrangement and Hakly Lao seconded it.

The board resolved for Hakly Lao to instruct Michael Bishop from Pointon Partners to state the process to issue the shares.

…

68 Mrs Ou later nominated Lao Holdings Pty Ltd as trustee for the Lao Holdings Trust to hold the 76 million shares issued following the exercise of her options. Mr Lao is the sole shareholder of Lao Holdings and at the time of its nomination to receive the Aviation shares he was the sole director. (Mr Lao's sister, Ms Marintha Lao, is now the sole director).

69 The Aviation board approved the allotment of 76 million shares to Lao Holdings and Khay Taing's nominee on 17 March 2016. Mr Grundy abstained.

70 The minutes of the board meeting are as follows:

> **Minutes of Aviation 3030 Pty Ltd**
>
> **Board meeting on 17 March 2016 at Level 10, 452 Flinders Street, Melbourne VIC 3000**
>
> **Present**
>
> Terry Grundy
>
> Hakly Lao
>
> Huy Taing (Chairman)
>
> Khay Taing
>
> Kim Heng Ou
>
> Philip Webb
>
> Marintha Lao
>
> …
>
> | | |
> |---|---|
> | **Allotments of Shares:** | It was resolved to approve the following allotments of shares:
LAO HOLDINGS PTY LTD
ACN: 160 597 142
No of shares: 76,000,000
ORDINARY SHARES FULLY PAID

KHAY SUONG TAING AVIATION 3030 PTY LTD
ACN: 151 010 678
No of Shares: 76,000,000
ORDINARY SHARES FULLY PAID |
> | **Preparation of Documents:** | Mr Grundy abstained from voting on the allotment |

> It was resolved to complete the new share certificates pursuant to the rules that govern the execution of documents by the company and to cancel any certificates that are no longer required.

…

ASIC expresses concerns about March share issue

71 On 15 August 2016, ASIC wrote to Mr Bishop at Pointon Partners about Aviation. The letter expressed ASIC's concerns and preliminary views (in summary) as follows:

> 1.5 ASIC has concerns about the extent, accuracy, and timing of disclosure to Aviation Investors of information concerning the issue by Aviation of 76 million shares (**the Founder Shares**) on 17 March 2016 to *each of* two companies controlled by current Aviation director Hakly Lao and former Aviation director Khay Suong Taing.
>
> 1.6 On the information currently available to ASIC, ASIC's view is that Aviation has not made proper disclosure to at least some Aviation Investors of either:
>
> a) the fact of, and basis for, the issue of the Founder Shares on 17 March 2016; and
>
> b) the fact that the issue of the Founder Shares has very substantially diluted the value of the interests held in Aviation by Aviation Investors (from 100% to 37%).
>
> 1.7 ASIC's preliminary view (in summary) is that:
>
> a) Aviation may have contravened the disclosure obligations it had pursuant to Chapter 6D.2 of the [Corporations] Act, in particular by failing to provide prospective Aviation Investors with a Prospectus that complies with s.710 of the Act;
>
> b) Aviation may have made false or misleading statements and/or engaged in conduct in relation to a financial product that is misleading or deceptive or is likely to mislead or deceive and may therefore have contravened ss 1041E and/or 1041H of the Act; and
>
> c) the directors of Aviation may have breached their statutory and fiduciary obligations.

72 ASIC also asked Aviation to provide certain detailed information to investors, including about the diluting effect of the March 2016 share issue.

Aviation calls "urgent" investor meeting

73 The very next day, 16 August 2016, Aviation called what it described as an "urgent" meeting of investors, to be held that night. Investors were told that the purpose of the meeting was to seek investor input in relation to the proposed sale of the Aviation land.

74 When those investors who were able to attend the meeting at such short notice arrived at the meeting, they were asked to sign two separate forms.

75 One form asked for approval to sell the Aviation land for an amount in excess of $120 million. It was not contended in this proceeding that investor approval of a sale in those, or any terms, was in fact necessary.

76 The other form asked the investors for an "acknowledgment", as follows:

> As per the IM issued to me at the time of my investment, I acknowledge that I was made aware of the Founders entitlement (options) to retain the unissued shares, with the right to issue these at a later time from when the company was formed on 4 May 2011.
>
> The founders are "Hakly Lao" and "Khay Suong Taing" or their nominated entity.
>
> I acknowledge that the founders are not entitled to issue shares to themselves or their nominated entity if it exceeds 240,000,000.00 [sic] shares, but can do so if it is up to 240,000,000.00 [sic].
>
> My investment is therefore a multiple of approximately 1/240 share/s in the company and will not be diluted from the founders exercising their entitlement to themselves or their nominated entity.

77 Many investors signed both forms at the 16 August 2016 meeting.

78 A number of them have given evidence by way of affidavit about what happened at the meeting.

79 Ms Gothe gave evidence, unchallenged, as follows:

> 24. In the afternoon of 16 August 2016 I received a telephone call advising me that an urgent investor meeting had been called for that same night at Aviation's office in Keysborough. Although I no longer recall who the caller was, I do recall that it was a woman. I had not spoken with the woman previously. The caller told me that I could choose from three time slots 6pm, 8pm and 9pm and that the same information would be conveyed to the investors at each meeting. The caller told me that there was an imminent sale of the Point Cook Land which would be discussed at the meeting. I do not recall any other proposed subject matter of the meeting being raised by the caller. Prior to this telephone call I had not heard from anyone at Aviation since I received the newsletter dated 1 May 2013. I, Kurt and my partner Emmanuel attended the meeting together. The meeting lasted around 15 - 20 minutes. There were around 15 people present. There was a presentation. I don't recall there being time allotted for questions, but if there was then I don't recall any questions being asked. There were two people presenting to the investors at the meeting. I think one of the presenters introduced herself as Marintha Lao … and the other presenter, whom I did not recognise, was a middle-aged man of Asian appearance.
>
> 25. Marintha and the male presenter told the meeting words to the effect that:
>
> (a) Aviation had found a prospective buyer for the Point Cook Land who

was willing to pay $140,000,000 and that when the land had been sold all the investors would receive a return on their investment;

(b) this was a one time offer that Aviation needed to accept now;

(c) the settlement period would be over 12 months;

(d) she had two forms that each of us needed to sign in order to allow the sale to proceed; and

(e) if we didn't sign the forms it would hold up the sale of the Point Cook Land and everyone would lose money.

26. When Marintha handed copies of the two forms to Kurt and me, she requested that we complete the name and address details on both forms. Marintha then pointed to the parts of the forms we needed to read and requested that we sign the forms. I felt pressured by her to sign both the forms immediately and I was not given time to read them. Kurt and I did sign both forms immediately and returned them to Marintha. I did not understand what I was signing except that according to Marintha it was necessary so that we wouldn't lose the buyer. Once Kurt and I had signed the forms Marintha collected them and we were not given a copy.

...

80 Ms Li also gave evidence, unchallenged, as follows:

27. On the afternoon of 16 August 2016, Marintha Lao called me while I was driving to say that there would be a meeting that night for Aviation investors at its office in Keysborough. She asked me to call my investors to get them to attend. I asked her why the meeting was being called at such short notice and she said that investor approval was urgently needed to approve a sale of the Aviation Land for $145 million. I told her that I could not expect my investors to attend a meeting at such short notice.

28. Even though I had told Marintha Lao that I could not expect my investors to attend the meeting, when I got back to my office, I sent text messages to our referred investors about the meeting that evening. I have since changed phones and do not have these text messages now. The message said that the Aviation Land would likely be sold for $145 million, that approval from investors was needed for the sale to go ahead and that there was going to be a shareholder meeting that night to approve the sale.

29. I remember that the following people called me back and confirmed that I could agree on their behalf to approve the sale of the Aviation Land:

(a) Joanna Chu of JS Fotia Pty Ltd, who also told me that she knew the Aviation Land had been sold and that she thought it was for a good price. She also said that if more investors were needed to agree with the sale then I should approve for her;

(b) Fei Wang, who lives in Sydney and who also requested me to send her a copy of any form I signed on her behalf;

(c) Kin Yuen of J Yuen Pty Ltd;

(d) Queenie Kia (who invested jointly with Katie Ho Kwok Heng);

(e) Xing You Song of Intellenet Pty Ltd; and

(f) Ping Sing Wong.

30. I did not speak to the following investor groups:

(a) Gui Fang Chen and Jing Feng Zhang;

(b) Ying Wen, Wei Xia Qu, Jing Meng and Jun Liu (except for Jing Meng);

(c) Jing Meng, Jing Lui Wang, Yi Li and Ying Wen (except for Jing Meng);

(d) Jing Dai.

This is because the person who introduced these investors to Aviation was Jing Meng and I did not have their individual contact details. However, I spoke to Jing Meng who told me that I could consent to the sale of the Aviation Land on behalf of her investors.

31. I went to the meeting, which was in a meeting room at Aviation's Keysborough office, at around 8:00 pm on 16 August 2016. I had been to the Keysborough office a couple of times before. I arrived late to the meeting. When I walked in, everyone was seated around a table. It was crowded, and we had to get an extra seat for me. I saw about 10 other investors around the table, some of whom I recognised. From Aviation, I saw Khay Taing, Huy Taing (who is Khay Taing's son), Marintha Lao (who is Hakly Lao's sister) and Kim Lao (who is Hakly Lao's mother). Hakly Lao was not at the meeting.

32. As I had arrived late, I did not see anyone make a speech or presentation. By the time I had arrived, I knew that some people had already signed forms and left the meeting because a friend, who is also an Aviation investor, had called me to say that she had signed the forms and already left. Some investors were still signing forms when I was there. Marintha Lao had a checklist and was checking off the names of Aviation investors who had attended the meeting and signed the forms.

33. After I arrived, I told Marintha Lao that some of my referred investors could not attend. I said I could sign forms on behalf of those who had given me permission. Marintha Lao gave me some blank forms that I was told needed to be signed for each of my investors. There were two forms on separate pieces of paper for each investor. They were not stapled together. I cannot remember in which order I received the forms. I was also given the checklist of names of Aviation investors. From the checklist, it looked like most investors had signed the forms because they had a tick next to their name. There were other documents on the table in front of me, but I was not given them and did not read them.

34. I looked at each form, but I did not read them carefully to understand each word because I had seen from the checklist that a lot of investors had already signed the forms. I cannot now remember in which order I read the forms. No one explained the content of the forms to me at the meeting. I thought investors had to sign both forms in order for the sale to go ahead, because the sale required 51% investor approval and the smaller investors together was not enough. I thought that one of the forms related to the founders shares because approval of the sale by the founders was required in order for there to be 51% shareholder approval.

35. I looked at the list of investor names that Marintha Lao gave me, and when I recognised the names of investors that I had referred, and who had given me permission earlier that day to approve the sale, I wrote in their name, address and investment details and then signed each form on their behalf. I did this for 10 investors / investor groups. I felt a bit rushed at the meeting because I had arrived late and I had a lot of forms to sign. I also felt some pressure to sign the forms because I did not want to lose the opportunity of the sale, especially because my referred investors had told me from time to time that the sale was taking too long and they wanted their money…

36. The process of filling in the forms manually took me a while, after which I socialised for about 10 minutes. I spent around an hour at the meeting.

37. For the purpose of this affidavit, I have read the longer form entitled "Shares Entitlement" again. The third paragraph states that "I acknowledge that I was made aware of the Founders entitlement (options) to retain the unissued shares, with the right to issue these at a later time from when the company was formed on 4 May 2011". In 2011, I had not spoken to Khay Taing or Hakly Lao about whether they owned shares in Aviation, but I assumed that, as the founders, they would have some kind of ownership in Aviation. The only information that I had received about an entitlement of the founders to retain unissued shares was what was in the IM. Before 2016, when ASIC started investigating Aviation, neither Khay Taing nor any other person had told me that he or any other person had options to purchase Aviation shares. At some stage after Aviation's involvement with ASIC began, Khay Taing told me words to the effect that he and Lao were entitled to get their shares earlier.

38. Before I signed the forms on behalf of the investors that I had referred, I did not discuss with them the specific contents of the two forms. I did not ask the investors on whose behalf I signed whether the statements in the longer form were correct. I signed the forms because the investors that I had spoken to before the meeting had told me that they were happy for me to approve the sale for $145 million, and I thought that both forms were necessary for that approval.

Subsequent developments

39. Around 5 September 2016 I received an email attaching a letter of the same date from Aviation's lawyer, Pointon Partners, addressed to Maxland. The letter attached a document they described as an option agreement, which was a document that I had not seen before. In the letter, Pointon Partners explained that earlier in 2016, Aviation had issued 76 million shares to each of Hakly Lao and Khay Taing's companies for around 0.1 cents per share. I had no previous knowledge of this share issue. I did not know anything about those companies being given options. ...

40. If it is the case that the forms I signed on 16 August 2016 say that I and the investors on whose behalf I signed the forms were aware of this option agreement, then the forms are incorrect, and I should not have signed them. When signing the forms, I did not appreciate they may have had this meaning and I would not have signed them if I had appreciated that. I did not think I would be asked to sign anything which was incorrect and believed that the forms were necessary to enable a sale of the land.

81 Mr Johnson gave evidence, about which he was cross-examined, as follows:

24. On the evening of 16 August 2016 I received a telephone call from Jenny. Jenny advised me that an urgent investor meeting had been called for the same night at Aviation's office in Keysborough. I was told by her that there was an imminent sale of the Point Cook Land which would be discussed at the meeting. I told Jenny that I could get to Aviation's offices by approximately 8pm that night. When I arrived at Aviation's office I was greeted by Jenny and I noticed that there appeared to be three groups of investors, with approximately five people in each group. I did not join any of the groups. I spoke separately to Jenny who advised me of the following:

    (a) Aviation had found a prospective buyer for the Point Cook Land who was willing to pay between $125,000,000 to $140,000,000 and,

    (b) when the Point Cook Land was sold investors would receive a return on their investments and,

    (c) there were some forms that investors needed to sign authorising the sale of the Point Cook Land.

    Jenny also gave me a calculator, and both of us together went over the numbers. We calculated that a sale of the units I owned would likely result in a profit of around $340,000 for me.

25. I recall that I spoke to Jenny for around 10 to 15 minutes. She only spoke to me about the proposed sale, I was then handed the forms by Jenny and she requested that I complete the name and address details on both forms and sign and date the forms immediately and provide them back. I decided to call William prior to signing anything. I took the forms and went outside to call William. William told me he had been at Aviation's office earlier that day and was given the same forms. William said that he had signed the forms so that the Point Cook Land could be sold and we could all get our money. I went back inside and signed the forms, Jenny witnessed my signature. I did not really take much notice of the content of the forms. I merely filled them in as requested. Once I had signed the forms they were collected, and I was not given a copy.

    …

Finding out about the 17 March 2016 share issue

26. I heard no further from Aviation until around 6 September 2016 when I received in the post a letter from Pointon Partners, who acted for Aviation (**Letter**). The Letter explained firstly, as I had been told in the 16 August 2016 meeting, that Aviation had entered into negotiations with a prospective purchaser of the Point Cook Land at a proposed sale price of $145,000,000.

27. The second thing the Letter explained was that Aviation had issued 76 million shares to Lao Holdings Pty Ltd (**Lao Holdings**) and a further 76 million shares to Khay Suong Taing Aviation 3030 Pty Ltd. The Letter noted that Lao Holdings is a company controlled by Hakly Lao (**Hakly**), a director of Aviation, and that KST is a company controlled by a Khay Suong Taing (**Khay**), a former director of Aviation. The Letter further noted that each of Hakly and Khay paid $76,000 for their 76 million shares, representing a price of 0.1 cents per share. Attached to the Letter was an 'Option Agreement' dated 18 September 2012 and a copy of a further letter dated 4 May 2011 addressed to Hakly and Khay regarding Aviation and the grant of Options. This letter detailed the terms under which Aviation had granted options of 152 million

> shares to Hakly and Khay. I had never seen or heard of the Option Agreement dated 18 September 2012 or the letter dated 4 May 2011 before and I knew nothing of the extra shares that had been issued or the circumstances in which this had taken place.
>
> 28. The Letter further explained that due to the 152 million extra shares that had been issued I would receive less return on my investment. The Letter explained, as an example, that if Aviation made $100,000,000 profit from selling the Point Cook Land, the return on an investment of l,000,000 shares had dropped by $719,696.97. As I had bought 500,000 units I understood that the value of my units had gone down in value by half this amount. This came as a considerable shock to me…

82 During his cross-examination, the following exchanges occurred between counsel for Lao Holdings Pty Ltd and Mr Johnson:

> MR NORTHROP: And the next paragraph refers to:
>
> > As per the IM issued to me at the time of my investment, I acknowledge that I was made aware of the founders' arrangement.
>
> Did you read that? -- It says that on this document here, does it?
>
> Yes? -- Where does it state that?
>
> In the third paragraph? -- The founders .....
>
> In the third paragraph? -- Yes.
>
> So you read that and understood it? -- They:
>
> > The founders are not entitled to issue shares to themselves or the nominated entity.
>
> Yes, I understood that.
>
> If it exceeds 240 million? -- Yes.
>
> All right. And – all right. So is there any part of this document that you didn't read or understand? -- No.
>
> And then immediately above your signature, there's a proposition:
>
> > My investment is therefore a multiple of approximately one two hundred and fortieth shares in the company –
>
> and that's just stating what was always your understanding; is that correct? -- Correct, yes.
>
> Continuing:
>
> > …and will not be diluted from the founders exercising their entitlement to themselves or their nominated entity.
>
> Do you see that? -- Sure.
>
> And… ? -- It didn't say anywhere that they could issue shares to them for free as well. All right?

> Well… ? -- And my assumption is – is when you – if there's ever any shares issued, it's at fair market value.
>
> Right. Well, you yourself had gone through the process of negotiating the price of shares, had you not? -- Yes.
>
> And would you expect everyone to pay the same price? –- Guess not.
>
> HIS HONOUR: It's a bit different if you're negotiating with yourself.
>
> MR NORTHROP: I will move on, your Honour.

83 Mr Pearce put ASIC's case about the meeting in the course of his oral closing address, colloquially, perhaps, but strikingly, in these terms:

> So, your Honour, that – there's the evidence about that meeting and it's plain beyond any sensible argument, in my submission, that these investors were, indeed, duped. And the fact – the fact of their being duped is another very telling aspect of the conduct of these directors. ASIC wrote them a letter on 15 August saying, "We're concerned about non-disclosure of the option agreement." They hastily call a meeting. They call it on a false pretence. They stick a couple of forms in front of the investors, get the investors to sign the forms and then they like to pretend that the investors have made an acknowledgement in those circumstances.

84 It is not surprising in those circumstances that the directors of Aviation do not now seek to rely on the signed acknowledgments as amounting to anything. But the meeting was obviously a ruse. There was no need to get any investor to sign the first form, and the second form was a (now) transparent attempt to create some "evidence" to produce to ASIC in support of a case that they had not misled investors.

Aviation admits share dilution in letter to investors

85 On 5 September 2016, in accordance with its agreement with ASIC, Aviation, via its solicitors, Pointon Partners, wrote a letter to the investors, which included much of that which ASIC had required to be disclosed, including, among many other things, that:

(1) the March 2016 share issue resulted in 63.33% of Aviation's shares now being held by Lao Holdings Pty Ltd and Khay Suong Taing Aviation 3030 Pty Ltd;

(2) Mr Lao and Mr Khay Taing paid $76,000 each for their 76 million shares, representing a price of 0.1 cents per share; and

(3) as a result of that share issue the proportion of Aviation's shares held by each investor had substantially decreased and the amount of any profits distributed by Aviation to an investor would be substantially lower than was the case before the share issue.

86 Relevantly, the letter, which Aviation's solicitor in this proceeding agreed in cross-examination was appropriate disclosure, provided as follows:

We confirm that we act for Aviation 3030 Pty Ltd (ACN 150 720 317) ('**the Company**').

You are receiving this letter as an investor in the Company ('**Investor'**, and collectively '**the Investors**'), that has made an investment in the Company either as a shareholder of the Company or as a unitholder of the Aviation 3030 Investment Unit Trust, the Aviation 3030 Holdings Unit Trust, the Aviation 3030 Heng Ly Unit Trust, the Point Cook Aviatation3030 Unit Trust and/or the Aviation 3030 HL Unit Trust.

The purpose of this letter is to provide you with:

(a) details of a proposed sale of the Company's primary asset; and

(b) corrective disclosure in relation to matters concerning your investment, = of [sic] which you may be unaware.

This letter is being sent to you as part of an agreement between the Company and the Australian Securities and Investments Commission.

…

Corrective disclosure

(b) On 17 March 2016, the Company issued 76 million shares to Lao Holdings Pty Ltd and Khay Suong Taing Aviation 3030 Pty Ltd ('**the 17 March 2016 Share Issue**').

(c) Lao Holdings Pty Ltd is a company controlled by Hakly Lao, a director of the Company.

(d) Khay Suong Taing Aviation 3030 Pty Ltd is a company controlled by Khay Suong Taing, a former director of the Company and father of current director of the Company, Chong Huy Taing.

(e) Prior to the 17 March 2016 Share Issue, the Company had a total of approximately 88 million shares on issue.

(f) Following the 17 March 2016 Share Issue, the Company has a total of approximately 240 million shares on issue.

(g) The 17 March 2016 Share Issue resulted in 63.33% of the Company's shares now being held by Lao Holdings Pty Ltd and Khay Suong Taing Aviation 3030 Pty Ltd, both of which previously held no shares.

(h) Each of Hakly Lao and Khay Suong Taing paid $76,000 for their 76 million shares, representing a price of 0.1 cents per share of the Company.

(i) Other shareholders of the Company who purchased their shares prior to the 17 March 2016 Share Issue paid prices which ranged between 0.001 and 20 cents per share of the Company.

(j) The 17 March 2016 Share Issue was made pursuant to a document termed 'Option Agreement' between the Company, Khay Suong Taing and Heng Kim Ou (mother of Hakly Lao) dated 18 September 2012, which in turn annexed a letter dated 4 May 2011 from Aviation to both of Hakly Lao and Khay Suong Taing. Copies of these documents are **attached** for your reference.

(k) The 4 May 2011 letter purports to record a grant by the Company to Hakly Lao and Khay Suong Taing (in their capacity as 'Founders' of the Company) of options to collectively purchase up to 160 million shares in the Company at a

price of $1,000 per million shares.

(l) The 18 September 2012 'Option Agreement' purports to record a grant by the Company to Heng Kim Ou (Hakly Lao's mother) and Khay Suong Taing of options to collectively purchase up to 160 million shares in the Company at a price of $1,000 per million shares.

(m) The Information Memorandum that may have been provided to Investors did not refer to the 4 May 2011 letter or, after 18 September 2012, to the 18 September 2012 'Option Agreement'. Paragraph 22 of the Information Memorandum states:

Upon the full funds being raised as set out in the 'Disbursement of Funds' section of this IM, any remaining Shares not allocated shall be retained by the founders or their nominated entities

(n) The 'Disbursement of Funds' section of the Information Memorandum anticipated approximately $19.8 million being raised by the Company from Investors.

(o) At the time of the 17 March 2016 Share Issue, the Company had not raised $19.8 million from investors.

(p) As a result of the 17 March 2016 Share Issue:

a. The proportion of the Company's shares held by each Investor has substantially decreased; and

b. the amount of any profits distributed by the Company to an Investor will be substantially lower than was the case prior to the 17 March 2016 Share Issue.

For your information, please refer to the table below for a comparison of effect of the 17 March 2016 Share Issue on the entitlement of typical Investors to any profits distributed by the Company.

Please note that the table below is based on the Company earning a net profit of approximately $100,000,000 following the Sale, after accounting for the transactions costs associated with the Sale and taxation ('**Net Profit**') (that is, assuming the Sale in fact takes place and settlement of the purchase is completed).

Please note that nothing contained in this letter shall be deemed or construed as a guarantee, or assurance that the Sale will proceed on the terms specified in paragraph (a), if at all. Accordingly, and as noted above, the table below only provides a hypothetical comparison of the entitlement of typical Investors to any profits distributed by the Company.

Shares held by typical investor	**Entitlement to net profit prior to the 17 March 2016 Share Issue**	**Entitlement to net profit prior to the 17 March 2016 Share Issue**	**Net Change to Net entitlement profit**
1,000,000	**$1,136,363.64**	**$416,666.67**	**($719,696.97)**
2,000,000	**$2,272,727.27**	**$833,333.33**	**($1,439,393.94)**
3,000,000	**$3,409,090.91**	**$1,250,000**	**($2,159,090.91)**

4,000,000	**$4,545,454.55**	**$1,666,666.67**	**($2,878,787.88)**
5,000,000	**$5,681,818.18**	**$2,083,333.33**	**($3,598,484.85)**

> Upon consideration of the above, you may wish to seek independent legal advice as to your rights as an Investor in relation to the amount you may expect to receive based on your investment.

87 It is remarkable that, despite the admissions made in the letter about the dilution, Aviation has conducted this case on the basis that this letter could be explained away because it was sent to investors as part of an "agreement" that it reached with ASIC. That is something that, of itself, reflects badly on the board, because it suggests that they are not to be taken at their word.

OTHER OPTION/SHARES ISSUED AT AN UNDERVALUE

12 million options to Mr Lao

88 Mr Lao produced to ASIC during the course of its investigations an unsigned letter from Mr Khay Taing on behalf of Aviation to Mr Lao, bearing the date 16 July 2011. The letter, which was not signed on behalf of Aviation, says relevantly as follows:

> We hereby confirm our agreement that you and/or your nominee are to be issued with twelve million (12,000,000) options which each carry a right to be issued with one ordinary share in [Aviation] on the terms set out below. The options are issued to you as consideration for performing your role as Director of [Aviation] and for managing the Aviation 3030 Project.
>
> …
>
> … Each option entitles the registered Option holder to acquire one (1) ordinary share in [Aviation] at the exercise price of $0.00001 per share.
>
> …
>
> … Please sign and return a copy of this letter to our registered office as an acknowledgement of your consent to the terms set out above.

89 Mr Lao duly signed the letter on his own behalf.

90 Mr Lao also produced minutes of a meeting of the directors of Aviation purportedly held on 16 July 2011 that record the 16 July 2011 letter as having been tabled and a resolution passed that Aviation issue 12 million options to Mr Lao. The minutes record that it was "resolved that Aviation issue 12,000,000 options which each carry a right to be issued with one ordinary share to [Mr Lao] in accordance with the terms set out in [Aviation's] letter to [Mr Lao] dated 16 July 2011".

91 It is, again, necessary when dealing with documents critical to the issuing of shares by Mr Lao and Mr Taing to couch a description of the documents with terms like "purportedly". This is because, again, not all is as it seems.

92 Mr Bishop of Pointon Partners disclosed to ASIC during the course of its investigations that he was instructed by Ms Jenny You of Aviation on 7 November 2012 to create the letter bearing the date 16 July, which purported to be a source of Mr Lao's entitlement to 12 million options.

93 It follows that the minutes of the meeting of the board of directors held, or purportedly held, on 16 July 2011, cannot possibly be a true record of a meeting of the Aviation board. And Aviation did not attempt to contend otherwise.

8 million shares to Mr Lao's nominees/related entities

94 On 18 July 2011, 8 million Aviation shares were issued to Mr Lao's nominees, Pisey Pol, Vibol Duong, Sotheavy Pol and Socheat Cheng, for a consideration of $10 per 1 million shares.

95 On 3 December 2012, 4 million shares were issued to Aviation 3030 HL Pty Ltd, of which Mr Lao is the sole director and shareholder, for a total consideration of $40. Aviation 3030 HL is trustee of the Aviation 3030 HL Unit Trust. The unitholder register for the Aviation 3030 HL Unit Trust records that 4 million units were issued to Lao Holdings as trustee for the HL Land Holdings Unit Trust on 3 December 2012.

96 On 12 April 2012, the Aviation board resolved to reserve 2 million shares for Mr Huy Taing at a reduced price of $71,550 to account for referral fees of about $230,000 owed to him. He paid for the shares on 13 June 2013, and the shares were issued to him on that day.

RELATED PARTY LOANS MADE FOR IMPROPER PURPOSES

Khay Taing loan

97 In July 2011 Mr Khay Taing received from Mr Paul Cheong, a prospective Aviation investor, $1,016,000 for investment in Aviation. Instead of paying those funds to Aviation, Mr Taing kept them.

98 The board resolved that the debt to the company be paid immediately, but took no steps to recover it. Instead, it debited the amount to Mr Taing's loan account.

99 It appears the debt was repaid almost seven years later, in May 2018.

100 In his oral closing submission, Mr Pearce correctly characterised those events in these terms:

> It represented subscription funds owing to the company from Mr Paul Cheong. Mr Barber tells us, and there's some evidence of this in the section 19 examination by Mr Taing, that there had been prior dealings between Mr Cheong and Mr Khay Taing which resulted in Mr Khay Taing agreeing to pay Mr Cheong subscription moneys. Now, that's all well and good. But, when the subscription happened, it meant that the [sic] Mr Khay Taing owed the company a little over $1 million. And, instead of paying it, Mr Khay Taing persuaded the board simply to debit the amount to his director's loan account which took it from a credit balance of about [$]500,000 to a debit balance of about [$]400,000.

Ian Taing loan

101 On 22 December 2014, Aviation lent $1 million to Mr Ian Taing, for a term of 6 months. Mr Ian Taing is the nephew of Mr Khay Taing.

102 Along with Mr Lao and Mr Huy Taing, Mr Ian Taing was a director of a company called Gem Management Group Pty Ltd. It was the trustee of the VKK Investments Unit Trust, which invested in land in Keysborough, before it was wound up in April 2018.

103 On the same day that Aviation lent $1 million to Mr Ian Taing, he on-lent it to Gem Management Group Pty Ltd.

104 Aviation apparently regarded that arrangement as a way of avoiding the consequences of advice that it had received from Mr Bishop at Pointon Partners, and from Mr Grundy, that lending the money to Gem Management directly would be for an improper purpose. Quite how or why the directors imagined that that could possibly have been so is another of the answered questions about the conduct of Mr Lao and Mr Khay Taing.

105 Mr Pearce correctly characterised this particular conduct in his oral closing submission as follows:

> And so they think they get around that. They give it to Mr Taing. Mr Taing gives it to Gem Management. Mr Taing still hasn't paid it back because he hasn't been paid back by Gem Management which is in liquidation and awaiting a distribution. My learned friend Mr Barber [counsel for the intervener, Khay Suong Taing Aviation Pty Ltd] characterised the conduct at this board as a properly functioning board. Well, I mean, really?

KAYLA PAYMENTS

106 On 5 May 2011 Aviation made an agreement with Kayla to pay it an arranger's fee of $2 million net of applicable taxes within 21 days of entering into the contract of sale for the Aviation land. A sum in excess of $2 million was subsequently paid.

107 In September 2012 the directors of Aviation were told by the company's accountant that withholding tax of 46.5% would be payable on the fee unless a tax invoice was produced for the payment made to Kayla. The accountant's advice was as follows:

> We advise that payments totalling $3,048,913.74 have been made to the above in terms of a Head of Agreement date 05 May 2011.
>
> We note that in terms of Paragraph 2.1 of the Agreement, the payments are an "Arranger" Fee. In terms of GST legislation, such fee is taxable supply and a Tax Invoice is required form Kayla Holdings Pty Ltd (Kayla)
>
> The Tax Invoice is required to show:
>
> - Supplier identity and ABN
> - Description of services provided
> - Date service provided
> - Date of Tax Invoice
> - Amount of GST
>
> If no valid Tax Invoice is received from Kayla, we advise Aviation 3030 Pty Ltd is required to withhold tax at the rate of 46.5% or an amount of $1,417,744.88. Aviation 3030 Pty Ltd is required to deduct tax from the amount due and provide Kayla with a PAYG payment summary form then pay the tax withheld amount to the Australian Tax Office.
>
> We advise the following 3 Tax Invoices are required from Kayla to avoid payment of withholding tax to the Australian Taxation Office by Aviation 3030 Pty Ltd.
>
> | | | |
> |---|---|---|
> | 1. | Arrange Fees | $2,857,142.00 + 285,714.20 GST |
> | 2. | Contribution Costs | $ 135,499.02 + 13,549.90 GST |
> | 3. | Interest/Penalty | $ 56,271.86 + 0.00 GST |

108 Kayla had been de-registered, so it could not provide such an invoice.

109 Instead of taking the (one would have thought) obvious enough step of re-registering the company and issuing an invoice, the directors incorporated a new entity, Kayla Holdings Vic Pty Ltd (**Kayla Vic**).

110 That company, in September 2012, then issued two tax invoices both bearing the (back) date of 26 July 2011, and then, for reasons that are not explained, paid another "arrangers" fee of about $300,000.

111 Whether these transactions involve contraventions of s 286 of the Corporations Act, ss 83 and 83A of the *Crimes Act 1958* (Vic) or offences under ss 8L(1) and 382-5 of the *Taxation*

Administration Act 1953 (Cth) and ss 137.1 and 137.2 of the *Criminal Code Act 1995* (Cth) are not questions that are necessary to entertain here.

112 It is sufficient to record and to adopt Mr Pearce's submission about the proper characterisation of the conduct that he offered in his oral closing:

> I mean, ask yourself the mindset of these people. Company has been deregistered. Didn't give a tax invoice. What's the obvious thing? Re-register the company, issue a tax invoice. Instead, backdated documents, all this stuff. I mean, is this the sort of behaviour that you want, of company directors in charge of tens of millions of dollars of other people's money? It's a question you have to ask yourself, your Honour. Whether you want to characterise it as tax fraud or not – I mean, the fact of the matter is that without a genuine tax invoice from Kayla Holdings Proprietary Limited, according to the tax advice they got in September 2012, they had to pay the withholding tax. And their response to that was to fabricate a series of documents and set up a plainly sham transaction with a new company.

113 In any event, and whether or not the fee was payable to Kayla or Kayla Vic, the payment of the fee was another self-interested dealing by Mr Lao.

114 Kayla was a wholly owned subsidiary of a company in which all the shares were owned by Mr Lao, and the shares in Kayla Vic were owned by three persons with whom Mr Lao has business and personal connections.

115 Although the shareholder and unitholder information memoranda did disclose that fees of this type would be paid, they did not disclose that they were payable to interests associated with Mr Lao. Accordingly, by procuring Aviation to pay the arranger's fee, it is tolerably clear that Mr Lao contravened ss 181(1) and 182(1) of the Corporations Act. Again, counsel for Mr Lao did not seek to contend otherwise.

MISCELLANEOUS MATTERS

116 ASIC also relies on three other matters, which taken alone might not loom large, but which it says should be taken into account in the mix of the many various and (more serious) matters described above.

117 First, on 12 October 2011, Aviation entered into a lease of premises in Melbourne with KL3-11 Pty Ltd, a company owned and controlled by Mr Lao's friend, one Tola Chea. The lease expired in October 2014 and was not renewed. According to Mr Grundy, the rent paid on the premises was around three times what Mr Grundy paid for his larger office in the same building.

118 Secondly, on 20 October 2011, Aviation engaged Matchpoint Shop Fittings Pty Ltd to refurbish the office. The office was 55 square metres and the rent was $54,000 per year. Mr Lao knew the director of Matchpoint. Aviation paid it $258,819 for the refurbishment work. When examined by ASIC, Mr Lao attributed the high cost of the refurbishments to urgency but was unable to explain what gave rise to the urgency or what steps were taken to ascertain whether another building contractor could undertake the work for a lower price.

119 Thirdly, Aviation also paid management fees to Mr Lao's company Aviation 3030 Management. Aviation 3030 Management paid Ms Jenny You's salary and was reimbursed for expenses it incurred on Aviation's behalf. In addition, Aviation paid Aviation 3030 Management a fee of $286,000 per year. This was substantially more than the management fees disclosed in the information memoranda.

LEGAL PRINCIPLES

120 ASIC submits that the conduct described above, the evidence in respect of which no defendant cavils, reveals a pattern of unlawful behaviour by the company and its directors, characterised by conflicted and self-interested dealings to the prejudice of investors in the company. ASIC says that the behaviour gives rise to a justifiable lack of confidence in the management of the company, and the related entities, such as to warrant their winding up on just and equitable grounds.

121 As Mr BH McPherson said in his well-known article, *Winding Up on the 'Just and Equitable' Ground* (1964) 27 MLR 282-305 at 298-299, published when he was a lecturer in law at the University of Queensland:

> Companies have been wound up where directors or controlling shareholders have been guilty of misappropriating company property, most commonly by making fraudulent or unauthorised payments out of company funds …
>
> …
>
> Orders have been made where directors have committed breaches of their fiduciary duty to the company by exercising in their own interest a power conferred upon them for the benefit of the company, e.g., by issuing shares in order to secure or retain personal control of the company … or … with the intention of acquiring his shares at an undervalue; or again, where directors have, by placing themselves in a position of conflict between their duty and their interest, earned for themselves profits not disclosed to the shareholders at large …

122 The principles relevant to applications for a winding up under s 461(1)(k) of the Corporations Act were conveniently summarised by Gordon J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189, as follows (at [19]-[20]):

> …There is no dispute that ASIC has standing to bring an application to wind up a company on the statutory just and equitable ground: ss 462(2) and 464 of the Act. The classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case … Nevertheless, it is possible to discern some guiding principles from the authorities.
>
> It has long been established that a company may be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs and thus a risk to the public interest that warrants protection …
>
> (Citations and internal quotations omitted.)

123 As her Honour explained, a risk to the public may take many forms (at [23]):

> For example, a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public … Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law …
>
> (Citations omitted).

124 The fact that the company sought to be wound up, like Aviation, is solvent is also relevant (at [24]):

> …it has been said that a stronger case might be required where the company was prosperous, or at least solvent ...: Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act …
>
> (Citations and internal quotations omitted.)

125 In *Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission* (2018) 129 ACSR 363, McMurdo JA (with whom Sofronoff P and Gotterson JA agreed), summarised ASIC's case at trial, and the defendants' case as follows (at [4]-[6]:

> ASIC's application was filed in September 2016 and was supported by evidence of prolonged and extensive misconduct in relation to the companies' affairs. The companies had failed to lodge financial reports, report to members, hold annual general meetings and maintain accurate accounting records, resulting in numerous contraventions of the CA. They had made misrepresentations to the Australian Stock Exchange ("ASX") and to investors. Approximately $7.7 million had been raised from investors and was likely to be lost to them. The proposed business of the companies had not been successful and, as [the trial judge] found, the companies were not "clearly solvent".
>
> ASIC's case was set out in detailed written submissions which were filed in April 2017. The companies responded by saying that ASIC's allegations were "strenuously refuted" …
>
> However, the companies' case changed at the trial. Nearly all of the factual allegations made by ASIC were admitted. ASIC's case was resisted upon the basis that the companies' affairs had been put in order by the replacement of some, but not all, of the directors and by the availability of a line of credit, up to an amount of $400,000, by which the companies and their businesses could be revived. The companies argued that

> it was not just and equitable that they be wound up, because by allowing the companies a further opportunity to carry on business, there was some prospect that not all of the money which had been contributed by investors would be lost. ASIC replied that these changes were too little and too late, and that there remained a well-founded and justified lack of confidence in the management and conduct of the affairs of the companies, such that they should be wound up.

126 It was in the context of the defendants' defence that McMurdo JA said this (at [89]):

> These applications were made by ASIC upon the basis that it was just and equitable that the companies be wound up, because it was in the public interest to do so. The court was required to make a prospective assessment of the likely conduct of the companies' affairs, absent a winding up. That assessment had to be made according to the facts and circumstances as they existed at the time of the hearing. But the history of the companies was not to be ignored. The essential question for the court was whether the changes in directorships, together with the provision of [the] line of credit, put paid to an unjustified risk of further misconduct in relation to these companies, so that the public interest could be protected only by a winding up.

127 The Court of Appeal dismissed the companies' appeal, essentially because it held that the following passage from the reasons of the trial judge, extracted at [92] of McMurdo JA's reasons, was correct:

> The evidence before the court demonstrably supports the conclusion that there is a well-founded and justified lack of confidence in the conduct and management of the companies' affairs, such as to give rise to a real risk to the public interest that warrants protection – to protect existing and the prospect of any future investors, the public, and creditors, where the companies have not carried on their business candidly and in a straightforward manner with the public, and have been mismanaged, as well as to prevent and condemn the repeated and continuing breaches of the Corporations Law.

128 As Mr FH Callaway explained in his work, *Winding Up on the Just and Equitable Ground*, (Law Book Co. 1978) (at p 83):

> [O]nce misconduct has been proved it is open to the Court to draw an inference that it is likely to be repeated and it is generally an essential part of the petitioner's case to persuade the Court that that inference should be drawn. For no matter whether the conduct complained of has been dishonest or oppressive or involved an abuse of statutory or contractual power, it is usually necessary to show that the petitioner has justifiably lost confidence in the controllers for the future [citing *Menard v Horwood and Company Limited* (1922) 31 CLR 20].

129 Having described the facts in *Menard*, Mr Callaway concluded (at pp 83-84): "[i]t is not however be supposed that justice and equity may not sometimes require a company to be wound up when its business affairs have been irreparably or even very substantially prejudiced by misconduct on the part of controllers who have since repented or have so fully achieved their ends that they are willing to desist for the future".

THE GROUNDS UPON WHICH THE DEFENDANTS RESIST ASIC'S APPLICATION

130 I have earlier in these reasons summarised the grounds upon which the defendants resist ASIC's application. They are as follows:

(1) the events upon which ASIC relies are "historical";

(2) the investors were only ever promised 1/240th an interest for every million shares, and that is precisely what they still have and will continue to have;

(3) investors were slow to complain and have not themselves sought the winding up of the defendants;

(4) ASIC's conduct of its investigations has been protracted;

(5) the directors have successfully negotiated the sale of the land at a price many times the purchase price;

(6) the companies, being single purpose entities, have no substantial function to perform, other than to receive the balance of the purchase price in 2023; and

(7) various undertakings proffered by the defendants, including not to deal with or encumber any asset of Aviation and to continue to retain professional advisers and an independent director, will suffice to protect the interests of the investors in the meantime.

131 The defendants also submit that the grievances of the investors are more conveniently to be aired in the Guildford proceeding.

132 I take each of these points in turn.

Historical

133 The first point is inaccurate. The most significant matter upon which ASIC relies – the March 2016 share issue – can hardly be called "historical". It is true that some of the limitation periods with respect to some of the matter going back to 2011 may have expired by now, but that is of little relevance to the question of the public interest involved here.

Investors only ever promised 1/240th

134 The second point is the 1/240th "mantra", oft repeated by Aviation since ASIC commenced its investigations, including by Aviation's counsel at the trial of this proceeding, that the investors were promised a 1/240th interest per 1 million shares, and that is what they had and still have.

In my view, the mantra is wrong. First, it has not been established that all the investors believed that their "only" entitlement was to 1/240th of an interest. But secondly, and more importantly, even if that is correct, it cannot justify, and does not address, the issuance of shares by directors to themselves or their associates for virtually nothing. As the investor Mr Johnson put it when he cross-examined by Mr Northrop, counsel for the intervener Lao Holdings Pty Ltd:

> MR NORTHROP: [Reading from the form Mr Johnson signed at the meeting on 16 August 2016] "My investment is therefore a multiple of approximately one two hundred and fortieth shares in the company"–
>
> and that's just stating what was always your understanding; is that correct? -- Correct, yes.
>
> Continuing:
>
> …and will not be diluted from the founders exercising their entitlement to themselves or their nominated entity.
>
> Do you see that? -- Sure.
>
> And? -- **It didn't say anywhere that they could issue shares to them for free as well. All right**?
>
> Well? -- And my assumption is – is when you – if there's ever any shares issued, it's at fair market value.
>
> (Emphasis added)

135 And of course the point that Mr Johnson makes in the bolded language above is exactly the critical point, which Aviation and its directors, to this day, fail to address.

136 Mr Barber submitted that the word "retained" in clause 22 of the information memoranda should be construed to mean "issued". I do not accept that such a construction is open, but even it were, it hardly opens the door to the notion that the investors could have been expected to have known that the "founders", whoever they were, could issue to themselves the majority of the "remaining" shares for virtually nothing.

The investors were slow to complain and do not seek a winding up order

137 This is one of the more baffling lines of defence.

138 It is not clear to me what the investors were supposed to do that they did not do, but in any event, as Mr Pearce put it in closing, "it's a bit rich" to say that the investors did not launch a pre-emptive strike against Aviation or any other defendant when their solicitors, DLA Piper, had been involved in actively seeking to dissuade investors from joining the litigation already commenced in this court by the investor, Guildford International Group Pty Ltd.

139 DLA Piper, for example, wrote to investors on behalf of Aviation on 8 October 2018 in relation to the Guildford litigation, telling them that "[l]itigation is expensive" and that the costs to the company of that litigation "are wasted and simply erode the benefit to all shareholders". In light of the way in which this proceeding has been conducted by the defendants, the suggestion in the solicitor's letter that rather than joining the Guildford litigation, investors should "contact Aviation to discuss their concerns" or "send a letter to me" rings hollow, to say the least.

ASIC's conduct of its investigations has been protracted

140 The defendants make a number of points about ASIC's conduct of its investigation, none of which I accept as having any bearing on the exercise of the discretion whether to grant ASIC the relief it seeks. Many of the points they make are also simply inaccurate.

141 The defendants written closing submission in that regard was as follows:

> 19. ... The protracted history of ASIC's investigation and the actions taken by ASIC to date are not consonant with the asserted need for urgent protection of investors and the public through the drastic step of appointing liquidators *at this time*, after the sale of the land.
>
> 20. ASIC first wrote to Aviation in December 2015 in relation to concerns about Aviation's fundraising activities, and it commenced its formal investigation back in May 2016.
>
> 21. The first proceeding which ASIC commenced against Aviation later in 2016 [sic]. In that proceeding ASIC sought the appointment of receivers and s 1323 relief, to freeze what were then anticipated to be the proceeds of sale from a contract that never went through. That proceeding was dismissed by consent after Aviation made corrective disclosure to investors, as ASIC required.
>
> 22. ASIC recommenced taking active steps in its investigation in August 2017. This included further s 19 examinations, in addition to those which ASIC had previously conducted in 2016, including with Hakly Lao (11 March 2018, 28 May 2018 and 7 June 2018), Khay Taing (22 February and 8, 9 and 16 March 2018), Huy Taing (21 March 2018), Marintha Lao (22 March 2018), Terry Grundy (15 March 2018), Michael Bishop (20 February and 18 May 2018) and Jenny You (16 May 2018). The last such examination was on 7 June 2018.
>
> 23. It was not until 25 September 2018 that ASIC commenced this proceeding. That was at a time when the Aviation land was being marketed for sale and ASIC believed that the current management of Aviation lacked the skills and ability to finalise a transaction of that kind. As was the case with the first proceeding in 2016, the prospect and proximity of an imminent sale no doubt loomed large at the moment ASIC finally moved to seek a winding up of Aviation and the appointment of provisional liquidators in late September 2019. That moment passed on 25 October 2019 when the contract of sale with Dahua was agreed, whereupon ASIC agreed to orders adjourning its interlocutory application on the basis of the undertakings given to the Court by Aviation and DLA Piper.
>
> 24. In respect of the past transactions about which ASIC has raised concerns, it is to be observed that ASIC has not commenced actions for contravention against Aviation

> or its directors or used its referral powers, and that is so notwithstanding ASIC's extensive and protracted investigations to date. It is also to be observed that ASIC did not seek a winding order during the course of the company's life at any time prior to 25 September 2018, and then it acceded to a position whereby the current management conducted the sale of the land. None of this is said as criticism of ASIC. Rather, it is submitted that this chronology of the regulator's actions against the company informs the assessment that the Court will make on the instant application and tells against an appointment being made *at this time*.
>
> (Footnotes omitted)
>
> (Emphasis in original)

142 I do not accept that ASIC has been dilatory or has acted in any way that is inconsistent with the relief it now seeks.

143 Mr Pearce summed up ASIC's response to the defendants submissions on this point in his oral submissions, as follows:

> Let me, then, deal with the last of these issues, your Honour, which is that, somehow or another – and, of course, again, this is one of these points that's insinuated … that somehow or another this is an abuse of process because of the earlier ASIC litigation.
>
> Your Honour, ASIC knew much less in 2016 than it knows now and, your Honour, ASIC in 2016 did not know about the back dating of the option agreement documents. It learnt that in May 2018 after discontinuing the 2016 proceeding. It did not know about the backdating of the Kayla tax invoices which it learnt in 2018. By that stage, I think it had only examined Mr Lao and Mr Huy Taing…[I]t first examined Mr Grundy in September 2016 and again in March 2018. And Mr Bishop [in] March 2018. And Mr Bishop, Ms Zhu, Mr Khay Taing and Ms Marintha Lao were all examined after the 2016 proceeding had been concluded. And the critical stuff in the examinations of Mr Grundy and Mr Bishop came after … the backdating of documents, in particular – came after the 2016 proceeding had been dismissed.
>
> And the 2016 proceeding, your Honour – and your Honour can see it; I think, the initiating process is – or originating process is before the court. It's a very limited application. It was in anticipation of a sale of the property. This was the sale of the property that was the pretence for the meeting in August 2016 and it looked like there was going to be a sale and ASIC, at that point, was very concerned about what would happen to the sale proceeds and it made an application under [s] 1323 for a freeze of those proceeds. Now, they say, "It was an application for receiver," but I think your Honour probably knows the learning on [s] 1323 is, if you want to get a freezing order, you have to also ask for a receiver. It's just a pro forma thing. That's the only relevance to the fact that ASIC sought a receiver. It's – what it was after was freezing the proceeds of sale. Now, that sale fell over, your Honour. It did not proceed. And once the sale didn't proceed, there was no reason for ASIC to maintain its proceeding. And what prompted ASIC, then, to institute this proceeding, of course, was the imminent sale of the property which has now happened and ASIC is very strongly of the view, while the company is sitting there without selling the property, there's not much it can do. It hasn't got proceeds to distribute. The big – you know, key issue is, how should the proceeds of sale properly be distributed to the investors? And if there's no proceeds of sale there, well, it's a bit of a moot point.
>
> If the company had fallen over without being able to resell the land – which is what

> happened in *Gem Management*, well, then you've got grounds to put in a liquidator, but on a completely different basis, really. There's no concern about how the proceeds are going to be distributed. And my learned friend Mr Crutchfield asked the question and he said, "Well, what's the point of appointing a liquidator," and I think Mr Northrop said, "There's no assets to get in." He has overlooked the small matter of $100 million in sale proceeds.

144 All of that is an accurate summary of ASIC's conduct, in so far as it is relevant to the submissions made by the defendants on their "timing" point. For those reasons, I reject as unfounded in fact the suggestion of the defendants that ASIC has been dilatory in pursuing its investigations and seeking relief in this court.

Directors sold the land for a large profit

145 So much may readily be accepted, and was accepted by ASIC.

Single purpose entity/injunctions will suffice

146 The fifth and sixth points are related. The submission amounts to the proposition that, in light of the undertakings, no additional harm can be done between now and the receipt in 2023 of the balance of the purchase monies.

147 I do not accept that proposition.

148 In my view, the proffered undertakings, which are contained in Annexure A to these reasons, are not a workable or satisfactory regime for the continued operation of this company.

149 In particular, the proposal involves the conducting of an extraordinary general meeting of the company to deal with the March 2016 share issue, and to determine the proper allocation or distribution of proceeds of sale. As Mr Pearce said in his oral closing submission:

> Well, you can imagine what would go on behind a meeting like that with these people in control of it. I mean, it's a totally unrealistic proposal from ASIC's point of view in any event … I mean, they will stand up and say, 'Well, we hold 63.3 per cent of the shares, so we get 63.3 per cent.' And - well, you know, you can imagine the kind of influencing that might go on in a meeting like that with investors like the ones that are involved here.

150 Dr Bigos appeared for a group of investors as an intervener, and made a number of other telling points about the inadequacy of the undertakings.

151 As Dr Bigos submitted, if the defendants are not wound up the current directors and management may be able to continue to prejudice investors' rights. They could, by way of example only, continue to encumber the assets by granting unregistered securities (which can be granted even though the purchaser has lodged a caveat which prohibits registered dealings).

152 The proffered undertakings also only prevent dealings and encumbrances until the conclusion of the Guildford proceeding.

153 They also permit a $50,000 aggregate payment without notice to ASIC over a seven day period, which over a 52 week period could amount to unsupervised expenditure of $2.5 million.

154 And the fact that the board undertakes to keep one independent director is of little comfort when Mr Lao and Mr Taing are manifestly conflicted on the issues at the heart of this application.

155 As Mr Callaway said in his work *Winding Up on the Just and Equitable Ground*, (Law Book Co. 1978) (at p 83), to which reference is made above, "once misconduct has been proved it is open to the Court to draw an inference that it is likely to be repeated". I would draw that inference here.

156 For those reasons, the proffered undertakings do not offer appropriate safeguards.

The Guildford proceeding

157 In the course of submissions made by counsel for the plaintiff in *Guildford International Group Pty Ltd, in the matter of Aviation 3030 Pty Ltd v Aviation 3030 Pty Ltd* [2018] FCA 600 concerning an application that the plaintiff provide security for the first defendant's costs, counsel for the applicant summarised its case in the proceeding in the terms set out below. As is readily apparent, it bears many similarities to the matters upon which ASIC relies here:

> 6. This is an oppression proceeding. The plaintiff alleges that [Aviation] has engaged in various forms of oppressive conduct, in respect of which it seeks consequential relief. In its amended statement of claim filed 29 March 2017 (**ASOC**), the plaintiff alleges that:
>
> **Kayla Payment**
>
> (a) the entry or purported entry by [Aviation] into the "Kayla Agreement" with [Kayla] (a company owned by Mr Lao, a director of [Aviation] and sole shareholder of the Lao) and the "Kayla VIC Agreement" with [Kayla Vic], and the payment of sums thereunder, was contrary to the interests of, oppressive or unfairly prejudicial to [Aviation's] members or alternatively, to the plaintiff;
>
> **Taing and Ian Taing related party loans**
>
> (b) the entry of [Aviation] into the "Taing Loan" (with Khay Soung Taing, an alternate director of [Aviation] and sole shareholder of Taing) and "Ian Taing Loan" (with Mr Taing's nephew) was contrary to the interests of, oppressive or unfairly prejudicial to [Aviation's] members or alternatively, to the plaintiff;

July 2011 Share Issue

(c) the "July 2011 Share Issue" by [Aviation] - by which it issued eight million shares to "Favoured Recipients" for $90 - was contrary to the interests of, oppressive or unfairly prejudicial to the [Aviation's] members or alternatively, to the plaintiff;

Dec 2011 Share Issue

(d) the "Dec 2012 Share Issue" by [Aviation] - by which it issued four million shares to Aviation HL Pty Ltd (a company owned by Mr Lao) for $40 - was contrary to the interests of, oppressive or unfairly prejudicial to [Aviation's] members or alternatively, to the plaintiff;

March 2016 Share Issue

(e) the "March 2016 Share Issue" by [Aviation] - by which it issued each of Lao and Taing (owned by Messrs Lao and Taing respectively) with 76 million shares for $76,000 - was contrary to the interests of, oppressive or unfairly prejudicial to [Aviation's] members or alternatively, to the plaintiff; and

ASIC investigation and lack of communication

(f) in addition to the above, amongst other things, [Aviation]:

i. ceased communicating with its shareholder and unitholder investors in 2015, failed to notify them of the March 2016 Share Issue or the share option agreement pursuant to which that issue was purported effected, and failed to notify them of the existence and terms of offer made to purchase the Property until compelled to do so by ASIC, following its institution of a proceeding in this Honourable Court in VID 998 of 2016; and

ii. otherwise failed to disclose to investors the existence of an investigation by ASIC into suspected contraventions of the Corporations Act and Australian Securities and Investments Commission Act by [Aviation], its directors, employees and others or of ASIC's proceeding.

7. The plaintiff seeks declarations that the conduct of [Aviation's] affairs as regards the Kayla Payment, the Taing Loan, the Ian Taing Loan and the July 2011, Dec 2012 and March 2016 Shares Issues (as those terms are defined in the ASOC) are oppressive and an order that [Aviation] buy-back the plaintiff's shares at their fair value.

8. In the alternative, the plaintiff seeks a declaration that the March 2016 Share Issue was invalid, void and of no effect or, alternatively, an order that [Aviation] buy-back the shares it issued to the second and third defendants by the March 2016 Share Issue for their purchase price, with an appropriate reduction in [Aviation's] capital.

9. [Aviation] admits the overwhelming majority of allegations of fact said to constitute oppression, but denies (in most cases, without more) that those facts give rise to oppression. Most relevantly, [Aviation] alleges that the March 2016 Share Issue was effected pursuant to the terms of a share option agreement dated 18 September 2012. This is a contention supported by the

second and third defendants.

10. [Aviation] also counterclaims against the plaintiff, seeking the relief particularised in its amended interlocutory process filed 13 February 2018 and, in particular, the cancellation of its shares in [Aviation].

158 The defendants in this proceeding contend that, in the exercise of the court's discretion, it should not make the orders sought by ASIC because the Guildford proceeding would be a preferable way of investigating the grievances of all shareholders and unitholders (despite the fact that the applicant is only one such investor, and does not represent any other investor).

159 In their written closing submissions, the defendants submit that "it is a particular and peculiar circumstance in this case that there is already a shareholder proceeding on foot in which this Court will determine the propriety and validity of past transactions upon which ASIC founds its winding up application." They also point to the fact that it is expected that the Guildford proceeding will be set down for trial again in the near future. They submit that "[t]he circumstance that there is already a parallel shareholder action on foot tells strongly against the appointment of liquidators".

160 The defendants further submit that ASIC seeks a winding up "on the basis that it is necessary so that the past transactions can be independently investigated, with access to all relevant material including privileged communications with its lawyers, so that a view can be formed as to the validity of the March 2016 share issue and other past transactions. However, this ignores that these matters already will be investigated, in this Court, and that binding determinations will be made as to the validity of the March 2016 share issue and any rectification of the share register. This means that there is no need to appoint liquidators so as to achieve that result".

161 They further submit that:

> A winding up order will only result in an automatic stay of the Guildford proceeding, requiring the plaintiff shareholder to obtain leave to continue the action or the liquidator to accede to that course after the liquidator's own investigations. The liquidator may instead choose instead to pursue separate action, by exercising powers under the Act or commencing fresh court proceedings, and the majority shareholders will inevitably join issue in any such action. Whichever course ensues, the appointment will only entail duplication of costs and delay in the hearing and determination of the matters which are already in issue and to be tried in the Guildford proceeding.
>
> The forthcoming trial in the Guildford proceeding also means that adjudication of the same matters in the context of ASIC's winding up application carries with it the risk of pre-judgment and inconsistent findings, and unfairness for Aviation and the other defendants to that proceeding, as referred to further below.

162 I do not accept these submissions. It seems to me that the existence of a private proceeding brought by one disgruntled investor even if it covers much of the same has little, if any, bearing on the question of whether it is in the **public** interest that winding up orders be made.

163 As Gilmour J said in *Australian Securities and Investments Commission v Finchley Central Funds Management Ltd (Receiver and Manager appointed)* [2009] FCA 1110 at [3], ASIC stands in a different position to a private applicant in an application for winding up on the just and equitable ground because of the public interest considerations attaching to ASIC as the corporate regulator. As his Honour said, " … where there is evidence of serious mismanagement or repeated breaches of the [Corporations] Act so that there is a risk to the public, and in circumstances where ASIC has lost confidence in the company to comply with the relevant law, the court may act to wind up that company on the just and equitable ground". Mr Pearce put the point perfectly, if I may say so, as follows:

> ASIC doesn't contest that the investors have private rights and remedies that they are in a position to pursue against Aviation 3030 … I made it clear in opening, your Honour. ASIC is a regulator. It makes judgments about the public interest, irrespective of the rights of private individuals and private entities and whatever litigation they may choose to embark upon. These issues are just of, at most, marginal peripheral relevance to the case … It's not [a] contest. They've got rights and remedies and they can … pursue them in private litigation. That's not a relevant factor for ASIC in deciding to bring this litigation in the public interest.

164 ASIC has a responsibility, as Mr Pearce put it in his closing submission, in the public interest to ensure that "people like this aren't running – certainly not this company".

165 For those reasons I do not accept the defendants submission that the Guildford proceeding is an adequate alternative remedy, or anything of the sort.

Other matters

166 The defendants made a submission about the provisions of the contract of sale that contains a clause that, on one view of it, might entitle the purchaser to rescind the contract if the vendor goes into liquidation. Quite how and why the directors of Aviation could ever have agreed to such a clause remains a mystery.

167 The defendants' written closing submission on the point is speculative, and I do not think it is at all relevant.

168 Aviation also relies on the fact that it has retained an independent accountant and auditors. One would have thought that the retention of such advisers would have gone without saying.

CONCLUSION ON WINDING UP AVIATION

169 In my view, the case that ASIC makes to wind up Aviation is an overwhelming one. As I have described in detail above, directors have issued to themselves and to their associates large numbers of shares at a gross undervalue; they have fabricated correspondence and invoices; they have provided false instructions to the company's external solicitors; they duped and misled investors; they entered into related party loans; and they made unauthorised and exorbitant expenditures. The audacity of the March 2016 share issue alone could well be enough to warrant a winding up order, but it is not necessary to decide the case on that sole basis because of the many and varied ways that the directors have demonstrated that they are unfit to sit on the board of Aviation.

WINDING UP OF THE AVIATION SCHEME

170 ASIC seeks an order pursuant to s 601EE(2) of the Corporations Act for the winding up of the Aviation scheme, on the basis that it is a managed investment scheme that has been operated in contravention of s 601ED(5) of the Corporations Act.

171 It submits that the Aviation scheme was required to be registered because it has more than 20 members, and at least some of the issues of interests in the scheme would have required the giving of a Product Disclosure Statement (PDS) under Division 2 of Part 7.9 of the Corporations Act if the scheme had been registered (see ss 601ED(1)(a) and 601ED(2)).

172 By conducting the Aviation scheme, ASIC further submits, Aviation has contravened s 601ED(5), and prima facie the Aviation scheme should therefore be wound up (see *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at [73]).

173 By the time of closing submissions, it was apparent that the scope of the dispute between the parties on the managed investment scheme point is a narrow one.

174 It is convenient now to set out the relevant provisions of the Corporations Act.

175 Section 601ED relevantly provides as follows:

> **When a managed investment scheme must be registered**
>
> (1) Subject to subsections (2) and (2A), a managed investment scheme must be registered under section 601EB if:
>
> (a) it has more than 20 members; or

(b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or

(c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.

(2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

…

(4) For the purpose of this section, when working out how many members a scheme has:

(a) …

(b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:

(i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or

(ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.

(5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

176 "Managed investment scheme" is in turn defined in s 9, relevantly as follows:

"**managed investment scheme** " means:

(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions);

…

177 "Interest" in s 9 is turn defined relevantly to mean "a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)".

Definition of managed investment scheme

178 ASIC submits that since at least the issuing of the information memoranda in mid-2011 there has existed a "scheme" for the purpose of the definition of a "managed investment scheme" in s 9 of the Corporations Act, in the sense of there being a "program, or plan of action" (cf *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 129 (per Mason J)).

179 ASIC submits that the Aviation scheme involves the payment of money by investors to Aviation in return for the issue of shares in Aviation or, alternatively, units in the Aviation 3030 Investment Unit Trust, or one of the other four Aviation Unit Trusts, and the issue of an equal number of shares in Aviation to the trustee of the relevant Aviation Unit Trust. The money paid to Aviation by the investors for subscription of shares in Aviation or units in one of the Aviation Unit Trusts was pooled and used by Aviation to purchase the Aviation land and to fund its rezoning.

180 ASIC submits that the program or plan of action outlined in the shareholder memoranda was implemented because the purchase of the Aviation land has been completed, the land has been successfully rezoned from Green Wedge Zone to Farming Zone and it has now been sold.

181 ASIC submits that the Aviation scheme has the features described in s 9(a)(i) to (iii) of the definition (set out at [176] above) of "managed investment scheme" for these reasons.

182 The shareholders in Aviation and the unitholders in the Aviation Unit Trusts have contributed money as consideration for the acquisition of rights to benefits produced by the Aviation scheme. The "rights" acquired by investors are the rights to a share of the profits and assets of Aviation and of the Aviation Unit Trusts, in proportion to the number of shares or units held by the investor. Paragraph (a)(i) of the definition of managed investment scheme is therefore satisfied.

183 The defendants and the interveners take issue with that submission, for reasons that I shall return to shortly.

184 In relation to paragraph (a)(ii) of the definition, at least by July 2011, ASIC submits that Aviation's intention was that the contributions of the investors would be pooled or used in a common enterprise to purchase the Aviation land. That intention formed part of the "scheme" and it was formed prior to the making of contributions. The contributions were in fact pooled, as they were deposited into an account maintained by Aviation's solicitors, Pointons, in the

name of Aviation. Further, the contributions were used for a common enterprise, being payment of the purchase price for the Aviation land and other costs associated with the acquisition and rezoning of the Aviation land.

185 Finally, ASIC submits that paragraph (a)(iii) is satisfied because Aviation, rather than the members of the scheme, has day-to-day control over the operation of the Aviation scheme.

186 The defendants did not contest these propositions.

187 Accordingly, subject to the defendants' point about the nature of the "interest" of the unitholders within the meaning of s 9 (to which I shall return shortly), the scheme promoted and operated by Aviation for the acquisition of shares in Aviation and units in the Aviation Unit Trusts is a managed investment scheme within the meaning of the definition in s 9 of the Corporations Act.

More than 20 members

188 Subject to s 601ED(2) (addressed further below), s 601ED(1) of the Corporations Act requires a managed investment scheme to be registered if, inter alia, it has more than 20 members.

189 Section 9 of the Corporations Act defines member in relation to a managed investment scheme to mean "a person who holds an interest in the scheme."

190 There are 39 shareholders, including the five trustee companies, in Aviation, which satisfies the requirements of s 601ED(1).

191 It is therefore unnecessary to rely on s 601ED(4) to add in the unitholders of the trusts (who number 34), though they would also qualify as members under that provision.

192 In his oral closing submissions, Mr Crutchfield faintly sought to contend otherwise, but it seems to me beyond argument that there are more than 20 members.

Issue of interests required Product Disclosure Statement (PDS)

193 Because the Aviation scheme has more than 20 members, it was required to be registered unless none of the issues of interests in the scheme would have required the giving of a PDS under Division 2 of Part 7.9 (s 601ED(2)).

194 ASIC contended, and again the defendants did not seek to say otherwise, at least some of the issues of interests in the Aviation scheme required a PDS, and therefore s 601ED(2) does not operate to exclude the requirement of registration in this case.

195 ASIC submits that the shareholders in Aviation have entitlements to dividends paid by Aviation out of its profits because the unitholders in the trusts have entitlements to distributions of the trust estates, made possible by the payment of dividends to the trustees by Aviation. ASIC says that the investors therefore have "rights to benefits produced by the scheme" within s 9.

196 ASIC agrees that the shares held directly by the investors in Aviation are securities within s 761A and under ss 764A(1) and 1010A(1) of the Corporations Act. Therefore Part 7.9 does not apply to issues of the Aviation shares, and there was no requirement for a PDS under Part 7.9 in relation to the issues of these shares.

197 However, the position is different in respect of the units in the Aviation Unit Trusts. Although the estates of these trusts include securities (namely the shares in Aviation) the unitholders do not hold legal or equitable rights or interests in the shares. Each trust deed provides:

> 2.4 General entitlement of Unitholders
>
> The Unitholders are entitled to the benefit of the Trust Fund in the proportion in which they are registered as holding Units from time to time but an individual Unitholder is neither entitled to any particular asset, Security or investment comprised in the Trust Fund nor to the transfer to that Unitholder of any property or assets comprised in the Trust Fund except in accordance with the provisions of the Deed.

198 ASIC submits, and again the defendants and the interveners did not contend otherwise, that clause 2.4 reverses the normal position that unitholders in a unit trust have equitable interests in the property comprising the trust estate (see *Costa and Duppe Properties Ltd v Duppe* [1986] VR 90 (per Brooking J); cf *CPT Custodian Pty Ltd v Commisioner of State Revenue (Vic)* (2005) 224 CLR 98). It thus takes the units outside the definition of "security" in s 761A(1). Accordingly, ss 764A(1) and 1010A do not operate to exclude from Part 7.9 the issue of the units in the Aviation Unit Trusts.

199 That being so, s 1012B required the offers of the units in the Aviation Unit Trusts to be accompanied by a PDS if the issuer was a "regulated person" and the investor was a "retail client".

200 Section 1011B defines "regulated person" in relation to a financial product to include "an issuer of the financial product". That would plainly catch the trustee companies which issued the units.

201 Section 761G(1) provides that for the purposes of Chapter 7, a financial product is provided to a person as a "retail client" unless subsection (5), (6), (6A) or (7), or s 761GA, provides

otherwise. Subsections 761G(5), (6) and (6A) plainly have no application in this case, nor does s 761GA, which is limited to a financial product provided by a financial services licensee. Subsection 761G(7) provides that a financial product will be provided to a person as a retail client unless one of paragraphs (a) to (d) applies. The only potentially relevant provision is s 761G(7)(a), which, when read with reg 7.1.18(2) of the *Corporations Regulations 2001* (Cth), provides that a product is provided to a person as a retail client unless the price for the financial product equals or exceeds $500,000.

202 Many investors in the trusts paid significantly less than $500,000 for their units. They were therefore "retail clients" and the issues of the units would have required the giving of a PDS under Division 2 of Part 7.9 if the scheme had been registered when the issue was made.

203 Section 601ED(2) therefore does not operate to exclude the requirement that the Aviation scheme be registered.

204 As ASIC submitted, it does not matter that the issues of the shares did not require a PDS under Part 7.9. If the scheme comprised both the shares and the units then as long as at least one issue of the units required a PDS under Part 7.9, then the whole scheme is caught by Chapter 5C, and the scheme is liable to be wound up under s 601EE(2) if it is unregistered.

The defendants' contention about "interest"

205 I return now to the defendants' contention that unitholders did not acquire "interests" within the meaning of s 9 because they did not acquire "a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)."

206 In their written submissions, counsel for the defendants submitted as follows:

> ASIC identifies the 'rights to benefits produced by the scheme' as the rights available to unitholders under the trust deeds of the relevant Aviation Trusts and contends that, therefore, "*the Unitholders hold an entitlement to the benefits produced by the Aviation MIS*". However, the terms of the trust deeds do not refer to the Aviation shares and do not require that trust funds be invested in Aviation shares. Nor do they refer to or create any interest in property owned by Aviation (eg the Aviation Land and the proceeds of sale of that property). What unitholders have is an expectation of benefit in profits distributed by Aviation to shareholders including the trustees of the Aviation Trust, but for the purposes of s 9 of the Act, mere expectation of benefit is not sufficient.

207 The defendants cite *Australian Securities and Investments Commission v Great Northern Developments* (2010) 79 ACSR 684 for the proposition that for the purposes of the definition of "managed investment scheme" in s 9 of the Corporations Act, mere expectation of benefit is not sufficient. But that case is not authority for such a proposition. In the passages relied on,

White J addressed an error in a submission put to him, because it (the submission) conflated "an expectation that a return will be generated from a scheme" on the one hand with "a right to receive a benefit from the scheme which is consideration for the member's contribution" (at [76]). That is abundantly clear from these passages (at [75]-[77]):

> The question in the examination of Mr Edwards "And in terms of the – the retail investors – did they ever specify to you ... why they were seeking to invest in this particular development or opportunity" was not justified by any previous answer of Mr Edwards. He made no admission that any investor sought to invest in a particular development. No admission was obtained from this question.
>
> In my view, it is a mistake to conflate an expectation that a return will be generated from a scheme with a right to receive a benefit from the scheme which is consideration for the member's contribution. The question is what was the consideration for the contribution of money or money's worth? Unless the consideration was the right (even if unenforceable) to acquire benefits produced by the scheme, then para (a)(i) of the definition of "managed investment scheme" is not satisfied. (Prima facie it is not easy to see how an unenforceable right to acquire benefits produced by a scheme could be consideration for the contribution, but contracts that are unenforceable for want of writing could provide examples.)
>
> In summary, it was neither a term of a promissory note, nor was there any evidence of a representation being made to a holder of a promissory note, that the holder had a right, even an unenforceable right, to acquire benefits produced by GND's business of raising money from lenders and developing and selling properties. The holders have the right to interest and repayment of principal. No doubt all parties expect these payments to be made from the revenue of the business. But the holders have no right to obtain payment from that source.

208 ASIC submits that the evidence in this case is plain that the unitholders did acquire an interest within the meaning of s 9.

209 It points first to the terms of the unit trust information memorandum. I have set out above the scheme as described in that information memorandum, where there was to be a single unit trust with Aviation 3030 Pty Ltd as the trustee, and which was not proceeded with. Instead a hybrid scheme was adopted whereby shares in Aviation were issued to 5 trustee companies (the second to sixth defendants). It was those trustees who then issued units. ASIC submitted, however, that the unitholder information memorandum was still relevant to determining the nature of the rights acquired by the unitholders. I agree.

210 Among other things, the unitholder information memorandum informed potential investors that "[t]he aim of the project is to raise all the capital required which will allow [Aviation] rights to the property".

211 It also points to the clauses already set out above in the unitholder information memorandum, under the heading "summary of investment opportunity", as follows:

> 5. The company intends to raise the funds for the project by issuing units in the Trust via personal offers and to sophisticated investors ('**Capital Raising**'). [Aviation] issues this Information Memorandum ('**IM'**) for the purposes of the Capital Raising.
>
> 6. The funds raised under the Capital Raising will be used for the purposes of meeting required purchase price instalment payments under the contract of sale for the Property, costs associated with the property including land tax, rates, re-zoning costs, management costs and the general working capital needs of the company. However, this is not confirmed and [sic]subject to change.
>
> …
>
> 8 …
>
> a. [Aviation] shall pay a project manager fee of $50,000 per annum
>
> ...
>
> 9. An investor who decides to invest in units in the Trust under the Capital Raising will be issued with ordinary units in the Trust ('**Units**') as consideration for their investment monies.
>
> 10. Pursuant to the Trust Deed for the Trust, the Trust can issue a maximum of 240 million Units.
>
> …
>
> 13. [Aviation] presently intends to raise $21,194,676.09 from investors for the purposes of the Capital Raising. However [Aviation] reserves the right to raise a lesser sum if it so elects.

212 ASIC also points to clauses 20 and 21:

> 20. The Directors of [Aviation] may pay distributions out of the Trust's profits to [Aviation's] then current unitholders proportionally based on the number of Units held.
>
> 21. At the completion of the project being undertaken by [Aviation], it is intended that profits made by [Aviation] from the project (less any necessary deductions, payments or applicable taxes of any kind) will be distributed to [Aviation's] then current unitholders by way of trust distribution proportionally based on their number of Units held.

213 ASIC submitted that the right to the profits referred to in [21] is a precise description of the right to benefits produced by the scheme within the meaning of s 9.

214 ASIC further submits that the unit trust deeds in conventional format are to similar effect. There are five separate trust deeds because there are five separate unit trusts, but they are each relevantly identical.

215 Taking the Point Cook Aviation 3030 unit trust deed as an example, clause 2.4 provides as follows:

> The Unitholders are entitled to the benefit of the Trust Fund in the proportion in which they are registered as holding Units from time to time but an individual Unitholder is neither entitled to any particular asset, Security or investment comprised in the Trust Fund nor to the transfer to that Unitholder of any property or assets comprised in the Trust Fund except in accordance with the provisions of this Deed.

216 It is accepted that the unitholders do not obtain any legal or equitable interest in any of the specific assets that comprise the trust fund. But, by clause 2.4 of the unit trust deed, the unitholders are entitled to the benefit of the trust fund as a whole.

217 It is also instructive to consider the provisions concerning the power of unitholders to direct the trustee in relation to the administration of the trust and the obligation of the trustee to allocate income to the unitholders.

218 Clause 9.5 provides:

> Subject to clause 2.4, the Unitholders have power generally to direct the Trustee in relation to the administration of the Trust in the exercise of its powers under this Deed in the same manner as is specified in clause 9.4.

219 Clause 9.4 in turn provides:

> Wherever in this Deed the powers of the Trustee are subject to the consent of the Unitholders or the Trustee may be directed in any way by the Unitholders, that consent or direction must be effected by the Unitholders in writing unanimously consenting to or directing the Trustee to act in a particular manner, and such consent or direction shall be at each Unitholder's absolute discretion.

220 Clause 11.1 is entitled "Allocation of Income" and provides:

> The Trustee must as at the last day of each Financial Year:
>
> (a) determine the amount (if any) of the Income of the Trust for that year which is to be set aside by way of reserve and carry that amount to a reserve account in the accounts of the Trust; and
>
> (b) transfer the balance (if any) of the Income of the Trust for that year to a distribution account pending distribution to the Unitholders.

221 ASIC contends that these provisions in the trust deed make it abundantly clear that the unitholders have a right to benefits of the scheme within the meaning of s 9 of the Corporations Act.

222 In my view, that conclusion is, with respect, inescapable.

Conclusion about managed investment scheme

223 For these reasons, Aviation has been operating a managed investment scheme that was required to be registered pursuant to s 601ED(1).

224 As the scheme has never been registered, Aviation has contravened s 601ED(5).

225 The power to wind up the Aviation scheme pursuant to s 601EE is therefore engaged.

226 In circumstances where I am satisfied that there has been misconduct and mismanagement in the affairs of the scheme of the type described in detail above, I will make the orders ASIC seeks in respect of the Aviation scheme being wound up.

CONCLUSION

227 I will accordingly grant the relief that ASIC seeks.

I certify that the preceding two hundred and twenty-seven (227) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 19 March 2019

ANNEXURE A – PROFERRED UNDERTAKINGS

UPON THE FIRST DEFENDANT UNDERTAKING TO THE COURT THAT:

1. Until further order, Aviation, whether by itself, its directors, employees, servants, or agents (including its solicitors) will not:

   1.1 transfer or in any way dispose of, deal with, or cause or permit to be transferred or in any way disposed of or dealt with, any asset of Aviation, including the land described in certificate of title Volume 08778 Folio 181, being Lot 1 on Plan of Subdivision 084675, and known as 756 Aviation Road, Point Cook, Victoria 3030 **(Aviation Land);**

   1.2 charge, mortgage, encumber or use as security howsoever, or cause or permit to be charged, mortgaged, encumbered or used as security howsoever, any asset of Aviation, including the Aviation Land;

   1.3 issue any shares, units, options or other security; or enter into any transaction that in any way alters or dilutes the share capital of Aviation 3030 Pty Ltd; or reduces the value of any unit in any of the unit trusts for which any of the 2nd to 5th defendants is trustee;

   1.4 from the date of this order, all director's and administration fees paid to any director or a related party of any director, be limited to $7,000 per month for the independent director, $3,000 per month for each non-independent director and $5,000 per month for administration expenses, including GST;

   1.5 not propose, declare or pay any dividend without such motion being approved by special resolution at a meeting of members made on 21 days notice to all shareholders and ASIC; such meeting to be carried out pursuant to all relevant provisions of the Corporations Act;

   unless Aviation has provided at least 21 business days' prior written notice to the plaintiff **(ASIC),** with the following exceptions namely that Aviation shall be entitled without notice to ASIC to:

   1.3 give effect to the sale of the Aviation Land to Dahua Group Melbourne Number 4 Pty Ltd **(Dahua)** pursuant to a contract of sale dated 25 October 2018 between Aviation (as vendor) and Dahua (as purchaser);

   1.4 enter into any transaction insofar as such transaction is in relation to an amount less than $25,000 individually, or $50,000 in aggregate over a 7 day period;

   1.5 meet its reasonable legal expenses incurred in connection with Federal Court proceeding VID1223/2018, Federal Court proceeding VID1460/2016 (the **Guildford proceeding**) and for legal expenses incurred in relation to the sale of the Aviation Land; and for convening any meeting of shareholders;

   1.6 pay the reasonable costs of the selling agents that trade as Colliers International and Biggin & Scott Land in connection with the sale of the Aviation Land. (These have been paid – no longer needed).

AND UPON HAKLY LAO AND CHONG HUY TAING UNDERTAKING TO THE COURT THAT:

2. Until further order, acting in their capacities as directors of Aviation:
   2.1 they will maintain the appointment of an independent director to the board of Aviation, being someone who does not have any direct or indirect interest in any shareholding in Aviation;
   2.2 they will retain and continue to retain professional advisers, including solicitors and accountants, to advise and act for Aviation;
   2.4 they will observe the undertakings given by Aviation.

AND UPON THE FIRST DEFENDANT AND DLA PIPER UNDERTAKING TO THE COURT THAT:

3. Until further order:
   3.1 all proceeds of the sale of the Aviation Land shall be paid into an account or accounts maintained by DLA Piper (the **DLA Piper Trust Accounts**);
   3.2 no monies will be withdrawn, transferred or otherwise paid out of the DLA Piper Trust Accounts, except for the payment of a transaction as permitted by paragraph 1 above;
   3.3 DLA Piper will provide to ASIC on a weekly basis a current statement of all transactions in relation to the DLA Piper Trust Account.

(numbering as in original)

SCHEDULE OF PARTIES

VID 1223 of 2018

Defendants

Fourth Defendant:	AVIATION 3030 HENG LY PTY LTD
Fifth Defendant:	POINT COOK AVIATION 3030 PTY LTD
Sixth Defendant:	AVIATION 3030 HL PTY LTD
Investor Group:	SIERRA NEVADA MANAGEMENT PTY LTD AS TRUSTEE FOR THE DEVA FAMILY TRUST
	JS FOTIA PTY LTD AS TRUSTEE FOR JS FOTIA SUPERFUND
	HARBORLINK WEALTH PTY LTD AS TRUSTEE FOR THE ZOU FAMILY TRUST AND ZOUMOK PTY LTD AS TRUSTEE FOR THE ZOU & MOK FAMILY SUPERANNUATION FUND
	SERGIO VALENTINO AND DARRYL WILLIAMS
	SANG AUNG
	HONG ZHANG AS TRUSTEE FOR SUN'S FAMILY TRUST
	YUANTONG PTY LTD AS TRUSTEE FOR THE YUANTONG FAMILY TRUST
	HENG AUNG
	YOKE NGOH WONG
	CEN@TEK PTY LTD
	HAI YING OU AND JIAN PING SUN
	JESSIE LUXTON, COLIN LUXTON, JUN ZHU, YING ZHU AND FE PANG MA