SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Munro & Anor* [2016] QSC 9
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (applicant) **v** **ROGER GARETH MUNRO** (first respondent) **KATHLEEN SUSAN MUNRO** (second respondent)
FILE NO:	Supreme Court No 7253 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	3 February 2016
DELIVERED AT:	Brisbane
HEARING DATES:	5, 12, 13 November 2015; 2 December 2015. Further submissions received 16 November 2015 (respondents); 18 November 2015 (applicant); 1 December 2015 (respondents) and 2 December 2015 (applicant) Respondents afforded opportunity to provide further submissions prior to 4.00 pm, 17 December 2015. No further submissions were provided.
JUDGE:	Flanagan J
ORDERS:	1. **The Court declares that between 1 January 2011 and 7 August 2015, the first respondent, by seeking, accepting, obtaining and/or receiving financial investments from persons ordinarily domiciled in Australia, including Robyn Cannon, Norma Swanepoel and Francis Armstrong, each of whom intended their financial investment to generate a financial return or benefit, contravened section 911A of the *Corporations Act* 2001 (Cth) ("the Act"), by carrying on a financial services business in this jurisdiction (Australia) without holding an Australian Financial Services Licence covering the provision of the financial services.**

2. **The first respondent, either by himself, his servants and/or agents, is permanently restrained from carrying on a financial services business in this jurisdiction, without holding an Australian Financial Services Licence, including by:**

   (a) **dealing in a financial product;**

   (b) **dealing with, using or applying, Investor Funds, or authorising the dealing, use or application of Investor Funds, held in or by any of the following financial institutions or brokerage accounts:**
      (i) **Interactive Brokers;**
      (ii) **J.P. Schultz;**
      (iii) **TradeStation Securities Inc;**
      (iv) **TradeStation Futures;**
      (v) **Bank of Montreal;**
      (vi) **Royal Bank of Canada;**
      (vii) **PNC Bank;**
      (viii) **Any other financial institution or brokerage account in which Investor Funds are held or located, whether in Australia or elsewhere;**

      except to the extent necessary to return Investor Funds to investors.

   (c) **receiving or obtaining money or money's worth (contribution) from another person ordinarily domiciled in this jurisdiction if the other person intends that the contribution will be used to generate a financial return or other benefit;**

   (d) **engaging in conduct that is intended to induce persons in this jurisdiction to use the financial services the first respondent provides, or which is likely to have that effect; or**

   (e) **holding a financial product (within the meaning of the Act, including a contribution intended to be used to generate a financial return or other benefit) or a beneficial interest in a financial product in trust for or on behalf of, any other person ordinarily domiciled in this jurisdiction.**

3. **Nothing in Order 2 prevents the first respondent from returning to any Investor any Investor Funds provided to him in relation to any financial services business carried on by him prior to the making of this order.**

4. **For the purposes of Order 2, Order 3, Order 5 and Order 6:**

"*financial services business*" includes any activity concerning the trading (whether inside or outside this jurisdiction), of commodities, currencies, securities or derivatives (including futures), for or on behalf of persons who are ordinarily domiciled in this jurisdiction.

"*in this jurisdiction*" means in Australia.

"*Investor*" includes any of the persons or entities known by the following names:

(a) **Robyn Cannon, also known as Robyn Grundy;**
(b) **Fast Forward Charters Pty Ltd as trustee for the Jackpot Superannuation Fund;**
(c) **Greg Von Harten;**
(d) **Norma Swanepoel;**
(e) **Catherine Heyer, also known as Anna Turner;**
(f) **Frank Armstrong;**
(g) **Anne Gale;**
(h) **Teagarden or the Tea Garden Family Trust;**
(i) **Narelle Wearne;**
(j) **Brooke Hobbs;**
(k) **Anthony Hobbs;**
(l) **Bob Terrill;**
(m) **Jean Florence Munro;**
(n) **Hannah Munro; and**
(o) **Helen Munro.**

"*Investor Funds*" means any monies provided by any Investor to the first respondent, his servants and/or agents, since 1 January 2011 (including any interest, profit or dividend on those monies), in relation to any financial services business carried on by him.

5. **The second respondent be permanently restrained from permitting or authorising the first respondent from using any bank or brokerage accounts in the second respondent's**

name for the purposes of the first respondent carrying on a financial services business within this jurisdiction (Australia).

6. **Nothing in Order 5 prevents the second respondent from permitting or authorising the first respondent from using any bank or brokerage accounts in the second respondent's name in order to return to any Investor any Investor Funds provided to the first respondent in relation to any financial services business carried on by the first respondent prior to the making of this order.**

7. **Orders 2 and 3 made on 7 August 2015 are vacated.**

8. **The first and second respondents pay the applicant's costs of the proceeding.**

CATCHWORDS: CORPORATIONS – FINANCIAL SERVICES AND MARKETS – FINANCIAL SERVICES PROVIDERS – LICENSING AND REGULATION – LICENCE: WHEN REQUIRED – where the first respondent would approach potential participants in Australia requesting them to provide money which would be pooled and used by the first respondent to conduct trading through an offshore trading platform – where the first respondent used the second respondent's Australian bank account to deposit money from participants – where the first respondent used a third party's overseas trading platform account to trade the pooled funds – where the second respondent would write blank cheques for the first respondent from her Australian bank account to pay dividends to participants – where the second respondent played no further part in the requesting, receiving, pooling and transferring of funds for trading – where the first respondent managed and had control over the pooled funds for trading – where the first respondent provided quarterly reports to participants – where the first respondent took 20 per cent of the profit generated by the trades as his fee – where neither the first nor second respondent held an Australian Financial Services Licence – where the respondents submit that the participants provided funds for trading by way of a loan – where the respondents submit that the trading conduct was outside the jurisdiction of the *Corporations Act* 2001 (Cth) and the Australian Securities and Investments Commission as it occurred offshore by an offshore entity – where the first respondent submits that his role was that of manager, operating in a supervisory context, and that he did not carry on a financial services business –

where the applicant sought both declaratory and injunctive relief against the first and second respondents as a consequence of alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a financial services business in Australia without holding an Australian Financial Services Licence – whether the first respondent carried on a financial services business by dealing in financial products – whether the second respondent provided a custodial or depository service – whether the second respondent carried on a financial services business by providing a custodial or depository service – whether the second respondent aided and abetted the first respondent in carrying on a financial services business without the relevant licence – whether s 79 of the *Corporations Act* 2001 (Cth) operates so as to permit the making of a declaration against a party by virtue of aiding and abetting another party in contravening a section of the *Corporations Act* 2001 (Cth) that does not, of itself, impose liability on a person involved in the contravention – whether an injunction can be granted, pursuant to s 1324(1) of the *Corporations Act* 2001 (Cth), so as to restrain a party who has not previously contravened the Act, from contravening the Act in the future – whether the court should provide declaratory and/or injunctive relief

CORPORATIONS – SUPERVISION – AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (AND ITS PREDECESSORS) – EXAMINATIONS – PROCEDURAL MATTERS – PRIVILEGE – where the applicant was investigating the first and second respondents into alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a financial services business in Australia without holding an Australian Financial Services Licence – where the first and second respondent participated in an examination with the applicant pursuant to s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) – where the first and second respondent claimed privilege with respect to a number of answers during the examinations – where the applicant instituted proceedings against the first and respondents seeking declaratory and injunctive relief – whether the examinations conducted pursuant to s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) were admissible in the application with respect to privileged answers

CORPORATIONS – SUPERVISION – AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (AND ITS PREDECESSORS) – EXAMINATIONS – PROCEDURAL MATTERS – EVIDENTIARY USE OF INFORMATION – where the applicant was investigating the first and second respondents into alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a

financial services business in Australia without holding an Australian Financial Services Licence – where the first and second respondent participated in an examination with the applicant pursuant to s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) – where the first and second respondent claimed privilege with respect to a number of answers during the examinations – where the first and second respondents did not sign the transcripts of their respective examinations – where the applicant instituted proceedings against the first and second respondents seeking declaratory and injunctive relief – whether the examinations were admissible in the application notwithstanding the fact they had not been signed by the first and second respondents – whether the examinations conducted were admissible in the application with respect to privileged answers

CORPORATIONS – SUPERVISION – COURTS – POWERS – INJUNCTIONS RELATING TO CONTRAVENTION OF LEGISLATION – where the first respondent would approach potential participants in Australia requesting them to provide money which would be pooled and used by the first respondent to conduct trading through an offshore trading platform – where the first respondent used the second respondent's Australian bank account to deposit money from participants – where the first respondent used a third party's offshore trading platform account to trade the pooled funds – where the second respondent would write blank cheques for the first respondent from her Australian bank account to pay dividends to participants – where the second respondent played no further part in the requesting, receiving, pooling and transferring of funds for trading – where the first respondent managed and had control over the pooled funds for trading – where the first respondent provided quarterly reports to participants – where the first respondent took 20 per cent of the profit generated by the trades as his fee – where neither the first nor second respondent held an Australian Financial Services Licence – where the respondents submit that the participants provided funds for trading by way of a loan – where the respondents submit that the trading conduct was outside the jurisdiction of the *Corporations Act* 2001 (Cth) and the Australian Securities and Investments Commission as it occurred offshore by an offshore entity – where the first respondent submits that his role was that of manager, operating in a supervisory context, and that he did not carry on a financial services business – where the applicant sought both declaratory and injunctive relief against the first and second respondents as a consequence of alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a financial services business in Australia without holding an Australian Financial Services Licence – whether the second respondent provided a custodial or depository service – whether the second respondent carried

on a financial services business by providing a custodial or depository service – whether the second respondent aided and abetted the first respondent in carrying on a financial services business without the relevant licence – whether s 79 of the *Corporations Act* 2001 (Cth) operates so as to permit the making of a declaration against a party by virtue of aiding and abetting another party in contravening a section of the *Corporations Act* 2001 (Cth) that does not, of itself, impose liability on a person involved in the contravention – whether an injunction can be granted, pursuant to s 1324(1) of the *Corporations Act* 2001 (Cth), so as to restrain a party who has not previously contravened the Act, from contravening the Act in the future – whether the court should provide declaratory and/or injunctive relief

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – APPROPRIATE FORM OF RELIEF - DISCRETION OF COURT – OTHER CASES – where the applicant sought both declaratory and injunctive relief against the first and second respondents as a consequence of alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a financial services business in Australia without holding an Australian Financial Services Licence – whether s 79 of the *Corporations Act* 2001 (Cth) operates so as to permit the making of a declaration against a party by virtue of aiding and abetting another party in contravening a section of the *Corporations Act* 2001 (Cth) that does not, of itself, impose liability on a person involved in the contravention – whether declaratory relief ought to be granted against the first and/or second respondent

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR PARTICULAR PURPOSES – TO RESTRAIN BREACH OF LEGISLATION – GENERALLY – where the applicant sought both declaratory and injunctive relief against the first and second respondents as a consequence of alleged contraventions of s 911A of the *Corporations Act* 2001 (Cth) by carrying on a financial services business in Australia without holding an Australian Financial Services Licence – whether an injunction can be granted, pursuant to s 1324(1) of the *Corporations Act* 2001 (Cth), so as to restrain a party who has not previously contravened the Act, from contravening the Act in the future – whether injunctive relief ought to be granted against the first and/or second respondent

Australian Securities and Investments Commission Act 2001 (Cth), s 19, s 24(2), s 68(2), s 68(3), s 76(1), s 76(3)
Civil Proceedings Act 2011 (Qld), s 10(2)
Corporations Act 2001 (Cth), s 9, s 79, s 761A, s 763A, s 763B(a), s 766A, s 766C(1)(a), s 766E, s 911A, s 1101B, s 1324(1)

Australian Competition & Consumer Commission v Francis (2004) 142 FCR 1; [2004] FCA 487, cited
Australian Competition & Consumer Commission v Renegade Gas Pty Ltd [2014] FCA 1135, cited
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (2015) 105 ACSR 116; [2015] FCA 342, considered
Australian Securities and Investments Commission v FUELbanc Australia Ltd (2007) 162 FCR 174; [2007] FCA 960, cited
Australian Securities and Investments Commission v Monarch FX Group Pty Ltd (2014) 103 ACSR 453; [2014] FCA 1387, considered
BMW Australia Ltd v Australian Competition & Consumer Commission (2004) 207 ALR 452; [2004] FCAFC 167, cited
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Fasold v Roberts (1997) 70 FCR 489, cited
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421; [1972] HCA 61, cited
Investment & Merchant Finance Corporation Ltd v Federal Commissioner of Taxation (1971) 125 CLR 249; [1971] HCA 35, cited
Rural Press Ltd v Australian Competition & Consumer Commission (2003) 216 CLR 53; [2003] HCA 75, cited

COUNSEL:	M Steele for the applicant The first respondent appeared on his own behalf The second respondent appeared on her own behalf
SOLICITORS:	Australian Securities and Investments Commission for the applicant The first respondent appeared on his own behalf The second respondent appeared on her own behalf

Introduction

[1] The applicant, pursuant to ss 1101B and 1324 of the *Corporations Act* 2001 (Cth) ("**the Act**"), seeks both declaratory and injunctive relief in relation to conduct of the first and second respondents which is alleged to constitute a contravention of s 911A of the Act.

[2] The primary allegation is that the respondents carried on a financial services business without holding an Australian Financial Services Licence ("**AFSL**").

[3] The respondents do not dispute that at the time of the relevant conduct alleged to constitute the carrying on of a financial services business neither of them held an AFSL.[1]

[1] Transcript of proceedings, 12 November 2015, 1-49, lines 40-43; 1-88, lines 17-22.

[4] The respondents initially opposed the application on the basis that they did not carry on a financial services business within Australia. On the second day of trial however, the respondents indicated their consent to the proposed injunctions and that they did not oppose the declaratory relief. Whether the declarations sought should be granted requires an exercise of discretion by the Court. Further, pursuant to s 1101B of the Act the Court may make such order, or orders, as it thinks fit if on the application of ASIC it appears to the Court that a person has contravened a provision of Chapter 7 of the Act. The contravention alleged in the present case is of s 911A which falls within Chapter 7.

[5] The declaratory relief sought is:

(a) a declaration that the first respondent contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an AFSL;

(b) a declaration that the second respondent contravened s 911A of the Act by carrying on a financial services business in this jurisdiction without holding an AFSL; and

(c) further, or in the alternative, that the second respondent aided or abetted the first respondent to contravene the Act, namely the carrying on by the first respondent of the financial services business in this jurisdiction without holding an AFSL.

[6] In order for the Court to make these declarations it must be satisfied that the respondents have contravened s 911A and that it is otherwise appropriate to grant the relief sought. Although the respondents consent to the injunctive relief and do not oppose the declaratory relief, as they are self-represented it is appropriate to approach the matter as a contested application. This approach is further necessitated by the fact that on 16 November 2015 (after the hearing of the application) further written submissions were received from the first respondent. These submissions address a number of issues including whether the first respondent was "trading without a licence". Submissions in response were received from the applicant on 18 November 2015.

[7] On 26 November 2015 the Court invited further submissions from the parties in respect of the following four matters:

1. What is the standard of proof required for the Court to make a declaration of contravention of s 911A of the *Corporations Act* 2001 (Cth)?

2. If the Court accepts that the second respondent provides a custodial or depository service, what is the evidence that the second respondent provided such a service as part of a financial services business?

3. For the purpose of considering declaratory relief in respect of the second respondent on the second basis proposed by ASIC, namely aiding and abetting the first respondent in his contravention of s 911A:

(a) how is s 1324(1)(c) of the *Corporations Act* relevant to the declaratory as opposed to injunctive relief?

(b) is the relevant provision s 79(a) of the *Corporations Act*?

(c) is s 79(a) available as a stand-alone provision that operates in respect of each contravention of the *Corporations Act* (including s 911A) or only those provisions which impose liability on a person involved in a contravention? See Gordon J in *ASIC v Monarch FX Group Pty Ltd* [2014] FCA 1387 at [80].

4. The width of the injunctive relief sought in respect of the second respondent.

[8] Further submissions were received from the first and second respondents on 1 December 2015 and from the applicant on 2 December 2015.

[9] Although the respondent in their further submissions confirmed that they consented to the injunctive relief and did not oppose the declaratory relief, in an earlier email sent 30 November 2015 they requested an opportunity to obtain legal advice and to provide further submissions.

[10] On 2 December 2015 I afforded the respondents this opportunity and directed that they file and serve any further submissions as advised by 4.00 pm, 17 December 2015. No further submissions were in fact filed.

The relevant conduct

[11] The first respondent has been working for the past 30 years trading international equity, bond, commodity and currency markets with an emphasis on futures format and analysis using statistical modelling.[2]

[12] The first respondent would approach potential participants in Australia, often family members or friends, requesting them to provide money which would be pooled and used by the first respondent to conduct trading through an entity. On occasions such an approach was made by the first respondent using email.

[13] ASIC relied on affidavits from three investors, namely Ms Cannon, Ms Swanepoel and Mr Armstrong. In their evidence:

(a) each of Ms Cannon,[3] Ms Swanepoel,[4] and Mr Armstrong,[5] say that the first respondent approached them about investing in a trading group, which he subsequently called "TradeStation Futures Trading Fund". Each of them received emails from the first respondent to that effect:

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2 Affidavit of Roger Gareth Munro sworn 10 November 2015, [1].
3 Affidavit of Robyn Marie Cannon affirmed 7 October 2015, [6]-[8].
4 Affidavit of Norma Maie Swanepoel affirmed 12 October 2015, [5]-[6].
5 Affidavit of Francis John Armstrong sworn 16 October 2015, [5]-[6].

(i) on 12 November 2012 the first respondent sent an email to Mr Armstrong which relevantly stated:[6]

"Dear Frank, I have been trading again now for just over two years with a small group of previous clients whilst waiting for the settlement Deed to be ratified by ALL Creditors and the Supreme Court. We are very close to a settlement and the huge injection of capital into KSM's and my coffers that such a settlement will deliver. I shall be on the phone to you straight away to invest proportionately in ACCL products.

In the meantime however, I have been quietly trading for KSM and several previous clients who could be deemed true believers (to borrow a phrase).

My results over the nine Quarters of trading so far have ranged between 32% and 54% annualized !!

Whilst I am looking forward to trading with larger sums again, I have been pleasantly surprised by the level of success I have achieved to date.

IDEA:

So I was thinking Frank….perhaps you would like to join us with a modest sum in order to spread your risk over a different class of investment.

Whilst I know that you have almost all of your free funds tied up in the Car Yards, it might be considered prudent to have some diversification, even if only temporarily.

The minimum investment level is $20,000 and multiples thereof."

(ii) To similar effect is an email sent by the first respondent to Ms Swanepoel on 13 November 2012:[7]

"Dear Norma, I have been trading for a few dear friends and family for some time now and of course once settlement occurs I intend to invite certain people to join with me again to enjoy the spoils of trading the markets. As we are getting closer now to settlement, I wanted you to know that you will be one of the chosen ones I contact. However, as this fourth Quarter we are in now has traditionally been my best for profitability over the past 23 years of trading, I thought that if you might care to get started a little earlier than the settlement time, but in a very modest way (…..if you were so inclined)."

(iii) Emails were also sent by the first respondent to Ms Cannon to similar effect. [8] The first respondent admitted sending these emails to these three participants.[9]

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6 Exhibit FJA-1 to the affidavit of Francis John Armstrong sworn 16 October 2015.
7 Exhibit NMS-1 to affidavit of Norma Maie Swanepoel affirmed 12 October 2015.
8 Exhibits RMC-1 and RMC-2 to the affidavit of Robyn Marie Cannon affirmed 7 October 2015.
9 Transcript of proceedings, 12 November 2015, 1-58, lines 29-41; 1-61, lines 29-37; 1-62, lines 16-20.

(b) each of them paid money to the first respondent as investments in "TradeStation";[10]

(c) Mr Armstrong signed an agreement with the first respondent relating to his investment in "TradeStation";[11]

(d) each of them received quarterly returns, for a period;[12]

(e) each of them received a number of quarterly reports about their investments;[13] and

(f) each of them are still owed significant sums by the first respondent;[14] including $500,000 invested by Ms Cannon.[15]

[14] ASIC also relied on an affidavit from Mr David Imgraben who allowed the first respondent to use a trading account set up in Mr Imgraben's name.

[15] Mr Imgraben states in his affidavit that although he presently owns a surf shop, he previously worked as a futures trader.[16] He says he has known the first respondent for about 20 years.[17] He further states that in or about 2011 the first respondent contacted him to ask if the first respondent could use Mr Imgraben's trading account with TradeStation Securities, a United States trading platform. Mr Imgraben says that he allowed the first respondent to use his TradeStation brokerage account until about July 2012.[18] Mr Imgraben's affidavit exhibits a number of emails between himself and the first respondent relating to the use of the TradeStation brokerage account,[19] and the first respondent's use of it to trade on behalf of other people.[20]

[16] There were a number of relevant bank accounts operated by the respondents:[21]

(a) NAB account number 084-878 04-857-9955, in the name of the first respondent ("**NAB account**");

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[10] Affidavit of Robyn Marie Cannon affirmed 7 October 2015, [9]-[12]; Affidavit of Francis John Armstrong sworn 16 October 2015, [7]-[9]; affidavit of Norma Maie Swanepoel affirmed 12 October 2015, [7].

[11] Affidavit of Francis John Armstrong sworn 16 October 2015, [8].

[12] Affidavit of Francis John Armstrong sworn 16 October 2015, [11]; affidavit of Norma Maie Swanepoel affirmed 12 October 2015, [9]-[11]; affidavit of Robyn Marie Cannon affirmed 7 October 2015, [13]-[14].

[13] Affidavit of Francis John Armstrong sworn 16 October 2015, [10]; affidavit of Norma Maie Swanepoel affirmed 12 October 2015, [12]-[14]; affidavit of Robyn Marie Cannon affirmed 7 October 2015, [15].

[14] Affidavit of Francis John Armstrong sworn 16 October 2015, [20]; affidavit of Norma Maie Swanepoel affirmed 12 October 2015, [16].

[15] Affidavit of Robyn Marie Cannon affirmed 7 October 2015, [23].

[16] Affidavit of David Rolf Imgraben affirmed 6 October 2015, [1].

[17] Affidavit of David Rolf Imgraben affirmed 6 October 2015, [2].

[18] Affidavit of David Rolf Imgraben affirmed 6 October 2015, [8], [10]-[11].

[19] Exhibit DRI-1 to the affidavit of David Rolf Imgraben affirmed 6 October 2015.

[20] Exhibit DRI-2 to the affidavit of David Rolf Imgraben affirmed 6 October 2015

[21] Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [17]-[19]; exhibits BJC-1, BJC-2, BJC-3, BJC-4, BJC-5, BJC-6, BJC-7, BJC-8.

(b) ANZ account number 014-709 5301-96602, in the name of the first respondent ("**ANZ account**");

(c) Westpac account number 037-158 40-9120, in the name of the second respondent ("**Loan account**");

(d) Westpac account number 732-552 50-0787, in the name of the second respondent ("**Rocket account**"); and

(e) Halifax Investment Services Limited account number 24000/SM057, in the name of the second respondent ("**Halifax account**").

[17] The bank statements obtained by the applicant show that investors (including Ms Swanepoel, Mr Armstrong and Ms Cannon) paid large sums of money (over $600,000 in relation to those three investors)[22] into the first respondent's NAB account.[23]

[18] A large proportion of the funds paid by investors into the NAB account were then:

(a) transferred into the Halifax account (some $409,000),[24] in the name of the second respondent;

(b) transferred into ANZ bank accounts (some $93,500),[25] in Mr Imgraben's name, but which were operated by the first respondent for the purpose of the TradeStation brokerage account (also in Mr Imgraben's name);

(c) transferred into the second respondent's Rocket account;[26]

(d) transferred to investors;[27] or

(e) withdrawn by cash withdrawal or cheques made out to cash.[28]

[19] ASIC also relied on an affidavit of Brett Crawford, a senior investigator employed by ASIC. Exhibited to this affidavit are both the recording and transcripts of examinations of each respondent conducted pursuant to s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("**ASIC Act**").[29]

[20] The second respondent stated in her examination that:[30]

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22 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [55](b), [55](e), [73], [87].
23 Transcript of proceedings, 12 November 2015, 1-77, lines 35-42.
24 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [29](a).
25 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [31](a).
26 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [44]-[45].
27 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [95].
28 Affidavit of Brett Jamahl Crawford sworn 2 November 2015, [24].
29 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibits BJC-18, BJC-19, BJC-59, BJC-60.
30 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [42], exhibit BJC-19.

(a) she is a qualified teacher and remedial massage therapist;

(b) she does not have any experience in a professional capacity in the financial services industry;

(c) the first respondent, her husband, opened the Halifax account in her name in 2012 or 2013 in order for the first respondent to trade her money;

(d) she did not have any involvement in the operation of the Halifax account as it was operated by the first respondent;

(e) the first respondent would operate the Halifax account by computer located at their residential address at Benowa;

(f) the first respondent informed her as to how his trading was going and that she understood her husband's trading "completely";

(g) the first respondent is paid a management fee;

(h) the first respondent undertakes trading activities for Robyn Cannon, Frank Grundy, Greg Von Harten and Anna Turner;

(i) she and other investors receive dividends from the first respondent.

[21] The first respondent stated in his examination that:[31]

(a) in or about 2011 he recommenced to trade initially using money obtained from his parents and subsequently with money lent to him from family and friends;

(b) he trades by use of a "trade robot" which is a trading system commercially available through TradeStation. Information coming from this platform is fed into the trade robot which then generates the trades, stocks and losses;

(c) he would not describe the TradeStation Futures Trading Fund as a fund as such but rather his arrangement was "just a group of friends and family who decided they'd like to give the trade robot a run";

(d) he would not describe his arrangement with family and friends who contributed money as either a "fund", or a "scheme" but rather as a "cooperation trading enterprise" or a "cooperative trading agreement";

(e) he was the coordinating individual who supervised or oversaw the trading of the robot;

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[31] Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [42], exhibit BJC-60.

(f) he conducts all of the trading on the Halifax account;[32]

(g) he thought the TradeStation account was in the second respondent's name;[33]

(h) he operated the TradeStation account;[34]

(i) he produced quarterly reports;[35]

(j) persons including Ms Swanepoel,[36] Ms Cannon,[37] Mr Armstrong,[38] Narelle Wearne, Catherine Heyer, Anna Turner,[39] Helen Munro and Hannah Munro,[40] Bob Tyrell, Brooke Hobbs and Anthony Hobbs,[41] Greg Von Harten and Dr Wyton[42] provided funds;

(k) he used Mr Imgraben's bank account to transfer funds to a brokerage account;[43]

(l) he used the Halifax trading account set up in the second respondent's name;[44]

(m) he agreed that the Halifax brokerage account was made up of a mixture of both family money that was used for trading and friends' money that was used for trading;[45]

(n) he would provide cheques to the second respondent to sign so that redemptions could be made from her account, and that the second respondent was "like a halfway house in a sense";[46]

(o) that he earned 20% of any profit generated.[47]

[22] Neither respondent signed the transcript of their respective s 19 examinations. The respondents claimed privilege in relation to a number of questions. Both respondents accept that they participated in the examinations.[48]

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32 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [96](d).
33 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [96](e).
34 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 935-938.
35 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 938.
36 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 933.
37 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 934.
38 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 934.
39 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 934.
40 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 937.
41 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 983.
42 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 991.
43 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 947-952, 957-958.
44 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 951-952.
45 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 954.
46 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 956, 978-979.
47 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-60, 996.
48 Transcript of proceedings, 12 November 2015, 1-55, lines 4-19; 1-89, lines 13-27.

[23] Even though no objection was taken to ASIC reading the affidavit of Mr Crawford which exhibited the section 19 examinations as the respondents were self-represented it is appropriate that the Court satisfy itself as to the admissibility of the transcripts of examination.

[24] The mere fact that the respondents did not sign their respective copies of the transcript of their examinations does not affect the question of admissibility. Section 76(3) of the *ASIC Act* provides that where a written record of an examination of a person is signed by the person under s 24(2) or authenticated in any other prescribed manner, the record is, in a proceeding, prima facie evidence of the statements it records, but nothing in that Part of the *ASIC Act* (Part 3) limits or affects the admissibility in the proceeding of other evidence of statements made at the examination. As observed by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd*:[49]

> "Section 76(3) is to be understood as providing a practical means by which evidence of statements made in a s 19 examination, which is made admissible by subs (1), may be adduced. It is a recognition that the provision of a transcript will often be a convenient means of placing that evidence before a court. This being the effect of s 76(3), it would be a mistake to construe it as confining or limiting the means by which evidence of statements made at s 19 examinations may be adduced."

[25] In the present case neither respondent challenges the fact that they participated in the examinations and that the examinations were recorded. The senior investigator for ASIC Mr Crawford was cross-examined by both the first and second respondents and no challenge was made to the accuracy or otherwise of the transcript of each respondent's s 19 examination.

[26] Section 76(1) of the *ASIC Act* provides that a statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding unless:

> "(a) because of subsection 68(3), a statement is not admissible in evidence against the person in the proceeding …"

[27] Section 68(3) of the *ASIC Act* provides:

> "The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:
>
> (a) a criminal proceeding; or
>
> (b) a proceeding for the imposition of a penalty;
>
> other than a proceeding in respect of:
>
> (c) in the case of the making of a statement—the falsity of the statement; or
>
> (d) in the case of the signing of a record—the falsity of any statement contained in the record."

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[49] (2015) 105 ACSR 116, 129 [63].

[28] By operation of s 68(2), s 68(3) only applies where:

(a) before:

(i) making an oral statement giving information; or

(ii) signing a record;

pursuant to, for example, a requirement under Part 3 (which includes s 19), a person claims that the statement or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

[29] It follows that where the respondents did not claim privilege s 68(3) has no application. As to those answers which were the subject of a claim for privilege, ASIC submits that the present proceedings (which seek only declaratory and injunctive relief) do not constitute "a proceeding for the imposition of a penalty" as referred to in section 68(3)(b). ASIC further submits that there is divergence of judicial opinion concerning the question. The Court was referred to the decisions of White J in *Australian Securities and Investments Commission v ActiveSuper*[50] and Gordon J (as her Honour then was) in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd*.[51] White J in *Australian Securities and Investments Commission v ActiveSuper* stated that section 68(3) of the *ASIC Act* does not preclude reliance by ASIC on the evidence given by certain persons in their section 19 examinations. This was on the basis that section 68(3) was inapplicable to proceedings in which ASIC sought only declarations and injunctions. Gordon J in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* expressed the view that even where the proceedings were for declaratory and injunctive relief, where the orders sought had a punitive function and were to be imposed having regard to the objects of personal and general deterrence then the proceeding may be considered as one in which a penalty is sought to be imposed. What was sought in that case was an order pursuant to s 1101B of the Act that the first defendant be restrained for a period of four years from carrying on a financial services business. In the present case the injunctive relief does not have this punitive effect. Here the injunctive relief sought is that the respondents be permanently restrained from carrying on a financial services business in this jurisdiction without holding an AFSL. The injunctive relief does not therefore seek to punish the respondents but rather to ensure that the respondents comply with the relevant provisions of the Act. Given the limited nature of the relief sought in the present case it is unnecessary for me to resolve any perceived divergence of judicial opinion concerning the operation of s 68(3)(b) of the *ASIC Act*.

[30] I am therefore of the view that the transcript of each respondent's s 19 examination is admissible. Even if these transcripts were not admissible both respondents made relevant admissions in the course of cross-examination. The second respondent admitted that the Halifax account in her name was used by the first respondent.[52] The second respondent knew that the first respondent received monies from investors and would be paid a management fee for conducting the trading.[53] She knew that the management fee

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50 (2015) 105 ACSR 116, 132-133 [79]-[82] (White J).

51 (2014) 103 ACSR 453; 459 [26]-[28].

52 Transcript of proceedings, 12 November 2015, 1-88, lines 45-47; 1-89, lines 1-2.

53 Transcript of proceedings, 12 November 2015, 1-89, lines 9-16, 29-32.

received by her husband for conducting the trading was 20% of the profit. She also knew that investors, including herself, received dividends from the first respondent. She would sign blank cheques on her Rocket account in order to assist the first respondent to pay dividends to some of the investors who had provided him with funds.[54]

[31] The first respondent admitted in cross-examination that investors would transfer money into his bank account. He would then transfer some of that money to the Halifax account and to Mr Imgraben's ANZ accounts.[55] The first respondent admitted that once the money had been transferred to Mr Imgraben's ANZ accounts he would organise the transfer of funds to a TradeStation account.[56] He accepted that he paid dividends to all participants.[57] He explained the arrangement as follows:[58]

> "In a – a group or pooled trading resource which is the – what TradeStation is. It, basically, is a pool of funds, and people join that pool, and that pool of funds, then, is regarded as a single entity – and in order to be able to trade the number of futures required to make it profitable. And so it's that entity which trades."

[32] The first respondent admitted that he was the person who managed and had control over the TradeStation pool of funds. He admitted that the participants did not have control over the pooled funds.[59] He accepted that he caused dividends to be paid to participants in the arrangement and the reason he paid dividends was because they had transferred monies into the pool.[60] He provided quarterly reports to participants.[61] He made his livelihood by taking 20% of the profit generated by the trading activity using the pool of funds.[62] He accepted that he would conduct activity on his wife's Halifax account.

[33] The first respondent referred to funds provided by the participants in the arrangement as being loans.[63] Exhibit FJA-2 to the affidavit of Mr Armstrong[64] is a document entitled "Trade-Station Futures Limited". The document is executed by the first respondent as "Manager – Trade-Station Futures Limited" with a handwritten date of "1/4/2014". The document refers to two transfers of monies by Mr Armstrong, on 11 March 2013 for an amount of $20,000 and 1 April 2013 for a second amount of $20,000. The actual transferee was not Mr Armstrong himself but rather the Armstrong Super Fund. Whilst the document acknowledges receipt of the $40,000 it further states:

> "This receipt is to confirm that funds totalling $AUD40,000, were deposited by of loan funds on the 11th of March 2013 (first amount $20,000) and the 1st April 2013 (second amount of $20,000 by the ARMSTRONG SUPER FUND in order to be part of a participatory Trading Group utilizing their combined loan funds as trading group (the Participants) comprised of experienced

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54 Transcript of proceedings, 12 November 2015, 1-89, lines 38-40.
55 Transcript of proceedings, 12 November 2015, 1-50, lines 30-46; 1-51, lines 1-35.
56 Transcript of proceedings, 12 November 2015, 1-51, lines 37-43.
57 Transcript of proceedings, 12 November 2015, 1-52, lines 20-25.
58 Transcript of proceedings, 12 November 2015, 1-52, lines 27-31.
59 Transcript of proceedings, 12 November 2015, 1-78, lines 14-34.
60 Transcript of proceedings, 12 November 2015, 1-52, lines 39-45; 1-53, lines 1-7.
61 Transcript of proceedings, 12 November 2015, 1-53, lines 6-34.
62 Transcript of proceedings, 12 November 2015, 1-58, lines 25-28.
63 Transcript of proceedings, 12 November 2015, 1-50, lines 30-31.
64 Affidavit of Francis John Armstrong sworn 16 October 2015, exhibit FJA-2.

> individuals and entities (all of whom are Sophisticated Entities as defined in section 708 of the Corporations Act 2001). The trading activity undertaken by the Participants is concentrated in certain specific futures contracts including Equity Indices (SPI, DOW, S&P500, DAX, FTSE, NIKKEI and HANG SANG), USA and Australian Treasury Bonds and certain Currency pairs …"

[34] The document also states that the futures trading is implemented using a "proprietary Trading System and administered for a fee by the Trade Manager, Dr. R.G. Munro" (the first respondent):

> "Any net profit resulting from the deduction of a Twenty Percent (20%) management fee, certain operating costs and administration expenses are disbursed equitably to the Participants as a variable interest payment or participatory dividend at the end of each Quarter by the Trade Manager."

[35] The document continues:

> "It is acknowledged that each depositing Participant may, in it's sole discretion, alter the loan amount deposited with the group, always provided that three (3) months written notification is given to the Trade Manager of that Participant's intentions."

[36] The first respondent admitted that he signed the document and that it was "very likely" that he signed it on the date shown, namely 1 April 2014,[65] which is a year after the second transfer for $20,000 on 1 April 2013. The first respondent did however suggest that the date 1 April 2014 may be an error[66] and he could not recall when he actually signed the document.[67] According to the first respondent the participants made unsecured personal loans to TradeStation Futures which was located offshore "and outside the jurisdiction over which ASIC could exercise legal dominion or could exert control via legal enforcement".[68]

[37] It was suggested to the first respondent that his evidence that the participants provided the funds by way of a loan was a concoction.[69] This suggestion was refuted by the first respondent. I do not accept that the funds were advanced by the investors as unsecured personal loans to TradeStation or TradeStation Futures. The true nature of the arrangement is, in my view, reflected in the content of the emails referred to in paragraph [13](a) above. The email to Mr Armstrong predates the alleged TradeStation Futures Limited "loan agreement" by several months even if one accepts that the correct date is 1 April 2013 and not as appears on the document, 1 April 2014.

[38] The first respondent's email to Mr Armstrong dated 12 November 2012 is consistent with an arrangement whereby the first respondent was seeking to trade on behalf of investors using pooled funds. The payment of dividends and the provision of quarterly reports are

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65 Transcript of proceedings, 12 November 2015, 1-60, line 12; 1-61, lines 10-18.
66 Transcript of proceedings, 12 November 2015, 1-60, lines 14-16; 1-79, lines 13-30.
67 Transcript of proceedings, 12 November 2015, 1-61, lines 1-4.
68 Affidavit of Roger Gareth Munro sworn 10 November 2015, [15].
69 Transcript of proceedings, 12 November 2015, 1-79, lines 42-45.

also consistent with such an arrangement. The fact that the investors were paid dividends rather than interest is inconsistent with the relationship being one of lender and borrower. Also inconsistent with such a relationship is the fact that the first respondent was paid a "management fee" based on 20% of the profits from trading with the pooled funds.

Relevant Legislative Provisions

[39] Section 911A(1) of the Act provides that a person who "carries on a financial services business" in this jurisdiction (Australia),[70] must hold an AFSL. Neither the first respondent nor the second respondent hold an AFSL.

[40] The term "financial service business" is defined in section 761A to mean a business of providing financial services. The term "financial services" is defined in Division 4 of Chapter 7. Section 766A(1) provides:

> "**766A When does a person provides a *financial service*?**
>
> *General*
>
> (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
>
> (a) provide financial product advice (see section 766B); or
>
> (b) deal in a financial product (see section 766C); or
>
> (c) make a market for a financial product (see section 766D); or
>
> (d) operate a registered scheme; or
>
> (e) provide a custodial or depository service (see section 766E); or
>
> (f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph."

[41] Section 766C states the meaning of "dealing" in a financial product and includes applying for or acquiring a financial product or issuing a financial product.

[42] Section 766E states the meaning of providing "a custodial or depository service":

> "**766E Meaning of provide a custodial or depository service**
>
> (1) For the purposes of this Chapter, a person (the ***provider***) provides a ***custodial or depository service*** to another person (the ***client***) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.

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[70] *Corporations Act* 2001 (Cth) s 9.

(2) The following provisions apply in relation to a custodial or depository service:

(a) subject to paragraph (b), for the purposes of this Chapter, the time at which a custodial or depository service is provided is the time when the financial product or beneficial interest concerned is first held by the provider as mentioned in subsection (1);

(b) for the purposes of Part 7.6, and of any other provisions of this Act prescribed by regulations made for the purposes of this paragraph, the continued holding of the financial product or beneficial interest concerned by the provider as mentioned in subsection (1) also constitutes the provision of a custodial or depository service.

(3) However, the following conduct does not constitute providing a ***custodial or depository service***:

(a) the operation of a clearing and settlement facility;

(b) the operation of a registered scheme, or the holding of the assets of a registered scheme;

(c) the operation of a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust(within the meaning of the *Superannuation Industry (Supervision) Act 1993*) by the trustees of that fund or trust;

(ca) the operation of a statutory fund by a life company (within the meaning of the *Life Insurance Act 1995*);

(d) the provision of services to a related body corporate;

(e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph ."

[43] The general definition of "financial product" is relevantly set out in section 763A(1). That section provides:

"**763A General definition of *financial product***

(1) For the purposes of this Chapter, a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:

(a) makes a financial investment (see section 763B);

(b) manages financial risk (see section 763C);

(c) makes non-cash payments (see section 763D).

This has effect subject to section 763E."

The First Respondent

[44] In order to establish a contravention of s 911A of the Act the evidence must show that:

(a) the first respondent carries on the financial services business;

(b) in this jurisdiction;

(c) without an AFSL.

[45] The fact in (c) is admitted.

[46] The declaratory relief sought in respect of the first respondent is stated in [5](a) above. The declaration sought is simply that the first respondent contravened s 911A of the Act. There are two matters that arise from the nature of the relief sought. First, in order for the Court to declare that the first respondent has contravened s 911A, it must be satisfied that there is sufficient evidence to support the declaration to the standard identified in *Briginshaw v Briginshaw*.[71]

[47] Secondly, the Court should pay close attention to the form of the proposed declaration, particularly of those "by consent".[72] As stated by Gordon J in *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd*[73]:

> "[d]eclarations are not made as a matter of course. Where it is appropriate for a declaration to be made, attention must be given to the form of the declaration, so that it is at least informative as to the basis on which the court declares that a contravention has occurred. The declarations should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act: *Rural Press Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 53 at [90]; *Australian Competition & Consumer Commission v Francis* (2004) 142 FCR 1 at [113] and *BMW Australia Ltd v Australian Competition & Consumer Commission* (2004) 207 ALR 452 at [35]."

[48] The applicant submits that the evidence establishes that the first respondent carried on "a business of providing financial services",[74] in that he dealt with financial products.[75] Section 766A(1)(b) of the Act states that a person provides a financial service if they deal in a financial product. This includes, pursuant to s 763A, a facility through which a person makes a financial investment. In the present case the participants intended that the first respondent would use their contribution (pooled with other contributions) to generate a financial return for them.[76] The attaining of contributions from participants constitutes the acquiring of a financial product and therefore a dealing in the financial product by the first respondent.[77]

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71 (1938) 60 CLR 336, 361-362 (Dixon J); *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* (2014) 103 ACSR 453, 467-468 [64] (Gordon J). This proposition was accepted by the applicant in its further submissions dated 2 December 2015, [2]-[3].

72 *Rural Press Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 53, 91 [90] (Gummow, Hayne and Heydon JJ).

73 [2014] FCA 1135, [66]. See also *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* (2014) 103 ACSR 453, 467-468 [64] (Gordon J).

74 *Corporations Act* 2001 (Cth), s 761A (definition of "financial services business").

75 Applicant's submissions undated, [41].

76 *Corporations Act* 2001 (Cth), s 763B(a)(ii).

77 *Corporations Act* 2001 (Cth), s 766C(1)(a).

[49] This dealing in a financial product constituted a business. It was the way the first respondent earned his livelihood. It involved large sums of money with a minimum investment of $20,000 and multiples thereof.[78] The first respondent's dealing in the financial product had the necessary "system, repetition and continuity" so as to constitute a business. It was done for the purposes of seeking to achieve profitable returns.[79]

[50] The first respondent submits that the true nature of the relationship between the participants and himself (or rather the entity through which the trading was conducted) was that of lender and borrower and he was not therefore dealing in a financial product. For the reasons stated in paragraphs [33] to [38] above I do not accept this submission.

[51] In his further written submission the first respondent states:[80]

> "ASIC regarded the central assertion of their case against Roger Gareth Munro as being one of 'trading without a licence'. They did not seek a penalty beyond that point. However, if one looks at the actual trading undertaken by pTradeStation [sic] Futures, not one Trading statement was produced by ASIC to show any trading actually being undertaken by Roger Gareth Munro. At the commencement of trading in late 2011, trading Accounts owned and opened by David Imgraben (who indicated at the time he held a current financial services licence) and his company Midshipman Services Pty Ltd were utilised for trading, including direct trading by David Imgraben himself. Accounts with TradeStation Securities International and Halifax Limited were open in the name of Kathleen Susan Lord and trading by TradeStation slowly commenced in those accounts. This activity changed in composition over time as David Imgraben went through a divorce and ceased trading himself to become a Surf Shop retailer in Port Douglas. With a new trading entity TradeStation coming fully on line, it continued to trade for the pool of Participants using the pool of unsecured loan funds. At no stage did Roger Gareth Munro have any accounts opened in his name or beneficially owned by him. The documents and contracts entered into with the participants by Roger Gareth Munro clearly define his role as acting as 'MANAGER' who operated in a supervisory context to ensure trades were executed according to the set of trading rules adopted by the Participants and to manage the required distribution of trading deposits and the hoped for profit and dividends."

[52] This submission is inconsistent with the first respondent's role identified in the emails quoted in paragraph [13](a) above. The email to Mr Armstrong for example, refers to the first respondent trading and the results that he was achieving. The email also refers to the first respondent "looking forward to trading with large sums again". The email to Ms Swanepoel also refers to the first respondent "trading for a few dear friends and family for some time now". Further, it is irrelevant whether the trading was being done in the first respondent's name or in the name of an entity. The evidence establishes that it was the first respondent who conducted all the trading and who produced the relevant

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78 See [9](a)(i) above.

79 Applicant's submissions undated, [48], citing *Investment & Merchant Finance Corporation Ltd v Federal Commissioner of Taxation* (1971) 125 CLR 249, 255 (Barwick CJ).

80 First respondent's further submissions dated 16 November 2015.

quarterly reports for participants. As identified in paragraph [32] above, the first respondent admitted that he was the person who managed and had control over the TradeStation pool of funds and that participants did not have control over the pooled funds. It was also the first respondent who caused dividends to be paid to participants in the arrangement.

[53] The applicant submits that the first respondent conducted a financial services business within the jurisdiction:[81]

> "Section 9 of the Act defines 'this jurisdiction' as including the geographical area of each state and mainland territory, and coastal seas. Section 911D provides that a person is taken to have carried on a financial services business 'in this jurisdiction' if, in the course of carrying on the business, the person engages in conduct that is 'intended to induce people in this jurisdiction' to use the financial services or 'is likely to have that effect'. In this case each of Ms Swanepoel, Mr Armstrong and Ms Cannon are ordinarily resident in this jurisdiction."

[54] The first respondent, however, submits that he did not conduct a financial services business in this jurisdiction because the trading was not done in Australia but rather overseas by an entity (TradeStation or TradeStation Futures), not registered in this jurisdiction.[82] The place of registration of the entity whereby the trading was undertaken is irrelevant to whether the "financial investment" by the various participants occurred in Australia. As already observed, s 911D provides that the relevant business will be taken to have been carried on in Australia if in the course of carrying on the business the first respondent "engages in conduct" that is "intended to induce people in this jurisdiction to use the financial services the person provides". The relevant conduct in that respect occurred within this jurisdiction.

[55] The first respondent in both sets of his written submissions raised other matters in opposition to the relief sought by the applicant. These include an allegation of political influence in the bringing of the present application and perceived inadequacies in ASIC's investigation.[83] These matters are irrelevant in determining whether the first respondent carried on a financial services business in this jurisdiction without holding an AFSL.

[56] I am satisfied to the requisite standard the evidence establishes that the first respondent has contravened s 911A of the Act.

The second respondent

[57] The applicant identifies two bases for the declaratory relief sought in respect of the second respondent. The first is that by permitting her Westpac "Rocket" account[84] to be used as the channel through which a large amount of the funds passed and permitting her Halifax

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81 Applicant's submissions undated, [49].

82 Affidavit of Roger Gareth Munro sworn 10 November 2015, [5]-[6], [15], respondents' submissions dated 4 November 2015, [3].

83 Respondents' submissions dated 4 November 2015, [1]-[2]; first respondent's further submissions dated 16 November 2015, [1]-[2], [5]-[6].

84 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-2.

account to be used for similar purposes,[85] the second respondent provided a custodial or depository service within the meaning of s 766E of the Act. The second basis is that the second respondent aided and abetted the first respondent in his contravention of s 911A of the Act.

[58] As to the first basis, a person provides a financial service if they provide a custodial or depository service.[86] I have already quoted s 766E above. This section would apply to the second respondent as follows. The second respondent, by permitting her bank accounts to be used for the transfer and passage of funds from participants, provided a custodial or depository service to those participants. This was not pursuant to any direct arrangement between the second respondent and the participants but as between the second respondent and the first respondent with whom the participants had an arrangement. Here the custodial or depository service was in relation to funds provided by participants. As I have already observed these funds were a financial product because the participants made a financial investment where the first respondent sought to use the invested funds to generate a financial return.[87]

[59] Whilst it may be accepted that the second respondent provided a financial service in that she provided a custodial or depository service, the declaration sought by the applicant is that the second respondent contravened s 911A by carrying on a financial services business without holding an AFSL.

[60] In order to grant such a declaration the Court must be satisfied, to the requisite standard, that not only did the second respondent provide a custodial or depository service but that such provision constituted a financial services business.[88] That is, the applicant must establish that the second respondent carried on a financial services business by providing a custodial or depository service.

[61] The Court sought further submissions from the parties as to what evidence established that the second respondent provided such a service as part of a financial services business.

[62] By reference to the statement of Sackville J in *Fasold v Roberts*,[89] the applicant submits that the word "business" usually imports the "notion of system, repetition and continuity."[90] These aspects are said to be present here because the second respondent allowed the first respondent to use her Westpac "Rocket" account and her Halifax account to "channel funds".[91] This "service" by the second respondent was (as submitted by the applicant) "to support the trading undertaken by her husband".[92]

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85 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, [29], [42].
86 *Corporations Act* 2001 (Cth) s 766A(1)(e).
87 *Corporations Act* 2001 (Cth) ss 763A(1)(a), 763B(a)(i).
88 *Corporations Act* 2001 (Cth) s 761A (definition of "financial services business").
89 (1987) 70 FCR 489, 524.
90 Applicant's further submissions dated 2 December 2015, [5]-[6].
91 Applicant's further submissions dated 2 December 2015, [4].
92 Applicant's further submissions dated 2 December 2015, [6].

[63] The applicant seeks to support these submissions by specific reference to admissions made by the second respondent in the course of her s 19 examination and her cross-examination.[93]

[64] Upon proper analysis I am not satisfied to the requisite standard that the second respondent's admissions establish that she carried on a financial services business. It was her husband who opened the Halifax account in her name.[94] It was opened by him in 2012 or 2013. The second respondent stated that the account was opened to permit her husband to trade her money of approximately $100,000 which she had inherited from her mother.[95] The second respondent had no involvement in the operation of the account.[96]

[65] She did not know who deposited funds to the Halifax account but was aware that her husband had transferred money from the Halifax account to her account.[97] Apart from her own $100,000 being traded through the Halifax account, she is not aware of whether any other person's money has been traded through this account.[98]

[66] The statement by the second respondent that she understands her husband's trading "completely"[99] must be understood in context. Her understanding was that she would receive monthly dividends in the range of $6,000 to $10,000. She knew her husband was trading "from day to day, week to week" and he would orally inform her whether in terms of trading the month would be a good month or "a bit skinny".[100]

[67] In cross-examination the second respondent was not at all certain what accounts were used in receiving the funds of participants:[101]

> "… You knew that people including Ms Cannon, Frank Grundy and Greg Von Harten had provided money to – or transferred money into an account held by your husband?---Actually, no, I wasn't really up to speed with the comings and goings of the accounts, who was in the pool, really."

[68] She accepted that she signed blank cheques on one of her Westpac accounts for her husband to pay dividends to some participants.[102] The second respondent also accepted in cross-examination that she gave at least an implied permission to the first respondent to open the Halifax account in her name.[103]

[69] This evidence falls short of establishing to the requisite standard that the second respondent carried on a business of providing a custodial or depository service. As

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93 Applicant's further submissions dated 2 December 2015, footnotes 5, 10, 11.
94 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 569.
95 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 569, 572, 576.
96 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 569.
97 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 570.
98 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 572.
99 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 576.
100 Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 576.
101 Transcript of proceedings, 12 November 2015, 1-89, lines 4-8.
102 Transcript of proceedings, 12 November 2015, 1-89, lines 38-40.
103 Transcript of proceedings, 12 November 2015, 1-88, lines 45-47.

identified above, she is a qualified teacher and remedial massage therapist who does not have any experience in a professional capacity in the financial services industry. The evidence is consistent with the second respondent as the wife of the first respondent, complying with her husband's requests to use her name for opening a trading account operated exclusively by him and to sign blank cheques.

[70] As to the second basis, the applicant submits that the admissions of the second respondent[104] demonstrates that the second respondent aided and abetted the first respondent in his breach of s 911A of the Act.

[71] The applicant expressly did not rely on s 79 of the Act which deals with involvement in contraventions:

> "A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention …"

[72] As observed by Gordon J in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd*,[105] there is some doubt whether s 79 is available as a stand-alone provision which operates in respect of each contravention of the Act or only those provisions which impose liability on a person involved in a contravention. Section 911A is not such a provision. There is therefore some doubt as to whether s 79 may operate so as to permit the making of a declaration that the second respondent has breached s 911A by aiding and abetting the first respondent in his breach. In any event the applicant did not rely on s 79.

[73] A further difficulty with granting a declaration on this basis is the question of whether the evidence is sufficient to find that the second respondent aided and abetted the first respondent in contravening s 911A. In *Giorgianni v The Queen*[106] Gibbs CJ and Mason J adopted the observation of Cussen ACJ in *R v Russell*[107] where his Honour observed that words such as "aid" and "abet" are illustrative of a single concept, namely:

> "… [t]hat the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission."

[74] The first respondent swears to the following facts:[108]

(a) the second respondent played no active involvement in the first respondent's dealing with TradeStation;

(b) the second respondent's role was passive and limited to the ownership of two Westpac bank accounts and one offshore TradeStation account;

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[104] See [20] and [30] above.
[105] (2014) FCR 453, 470 [80].
[106] (1985) 156 CLR 473, 480 (Gibbs CJ), 493 (Mason J).
[107] [1933] VLR 59, 67.
[108] Affidavit of Roger Gareth Munro sworn 10 November 2015, [28](a)-[28](h).

(c) it was convenient for the first respondent to use the second respondent's accounts;

(d) the second respondent has not undertaken a single trade in the past 25 years;

(e) the second respondent has never assisted with any TradeStation administration;

(f) the second respondent has never written any reports nor corresponded with any participants on TradeStation matters;

(g) the second respondent was not aware of the names of all the participants nor the amounts they had loaned to TradeStation for trading purposes;

(h) the second respondent's role with TradeStation was strictly limited to signing an open cheque from time to time.

[75] The mere fact that the second respondent's accounts were to her knowledge used by the first respondent is insufficient to establish to the requisite standard that the second respondent was "linked in purpose" with the first respondent's contravention of s 911A.

[76] In her s 19 examination, the second respondent admitted that she knew her husband did not hold an AFSL.[109] However, on the whole of the evidence considered above, I am not satisfied, given her limited role and knowledge, that the second respondent aided and abetted her husband in contravening s 911A.

[77] Even if I am wrong in this conclusion I would not otherwise grant the declaratory relief in respect of the second respondent.

[78] It was the first respondent who wrote and sent the emails referred to in paragraph [13](a) above to potential investors. It was the first respondent who conducted all trading. He was the person who caused the Halifax account to be opened in his wife's name and for her to sign blank cheques. It is the first respondent's conduct, rather than the second respondent's conduct, that requires "marking the Court's disapproval".[110] Injunctive relief is in my view, the appropriate mechanism by which the Court should mark its disapproval of the second respondent's conduct.[111]

Should the declaratory and/or injunctive relief be granted?

[79] As to the first respondent, the applicant seeks a declaration that he has contravened s 911A and injunctive relief.

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[109] Affidavit of Brett Jamahl Crawford sworn 24 July 2015, exhibit BJC-19, 585.

[110] *Australian Securities and Investments Commission v FUELbanc Australia Ltd* (2007) 162 FCR 174, 184 [61] (Heerey J).

[111] See *ASIC v Monarch FX* at [81].

[80] The Court may make a declaration both within its inherent jurisdiction and pursuant to s 10(2) of the *Civil Proceedings Act* 2011 (Qld). The Court's discretion to make a declaration is extremely wide.[112] The applicant referred to the decision of Gordon J in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd*, where her Honour considered the discretionary matters relevant to the making of a declaration including:[113]

> "… whether the declaration will have any utility, whether the proceeding involves a matter of public interest and whether the circumstances call for the marking of the court's disapproval of the contravening conduct."

[81] In the present case, the first respondent has sought and obtained funds from investors within Australia who have paid him large sums of money for trading in international markets in circumstances where he does not hold an AFSL. In such circumstances the public interest and the marking of the Court's disapproval of such conduct makes it appropriate to grant some form of declaratory relief.

[82] As observed in [47] above, the Court should pay close attention to the form of the declaration so that it contains appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act. The declaration I will make identifies the approximate period of the first respondent's conduct from 1 January 2011 to the granting of interim orders by Mullins J on 7 August 2015. The wording of the declaration particularises the conduct of the first respondent which constitutes the carrying on of a financial services business in this jurisdiction.

[83] The injunctive relief sought in respect of the first respondent also has utility. I accept the applicant's submission that the injunctions sought are tailored to avoid further breaches of the Act. In effect the injunctive relief requires the first respondent not to operate a financial service business without an AFSL and prevents him from operating certain trading or bank accounts.

[84] The injunctions also seek to restrain the first respondent from dealing with investor funds save for the return of investor funds to investors.[114]

[85] As to the injunctive relief sought in relation to the second respondent, the applicant relies on s 1324(1)(c) of the Act which permits the granting of an injunction where a person has engaged, is engaging, or is proposing to engage in conduct that constituted, constitutes or would constitute aiding and abetting a person to contravene the Act. Whilst injunctive relief in respect of the first respondent can be fashioned in such a way so as to restrain him from using his wife's accounts for the purposes of carrying on a financial services business without holding an AFSL, I am of the view that in the circumstances of this case it is also appropriate to restrain the second respondent from permitting or authorising the first respondent from using any bank or trading accounts in her name for the purposes of the first respondent conducting a financial services business whilst he is not the holder of an AFSL.

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[112] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435 (Gibbs J).
[113] (2014) 103 ACSR 453, 467 [63].
[114] Applicant's submissions undated, [59]-[61].

[86] As I have already observed the applicant, for the purposes of establishing accessorial liability in respect of the injunctive relief sought against the second respondent, does not rely on s 79 of the Act but only on s 1324(1)(c). As recently stated by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd*,[115] even if s 79 is not available to establish accessorial liability, s 1324(1) has an independent operation:

> "That independent operation makes it necessary to consider the conduct of the alleged accessories in respect of whom an applicant seeks an injunction."

[87] His Honour rejected the submission that s 1324(1) does not authorise the issue of an injunction restraining a person other than a contravener of the Act:[116]

> "There is no reason to suppose that it is confined only to those accessories who are regarded themselves as having contravened the primary proscription."

[88] In circumstances where the Court has found that the first respondent has carried on a financial services business in this jurisdiction without holding an AFSL, if the second respondent were to continue to permit accounts in her name to be used by the first respondent, this would constitute in accordance with s 1324(1)(c), the second respondent aiding and abetting the first respondent in contravening the Act.

[89] As to the question of costs, the applicant has been successful in obtaining the relief sought against the first respondent and limited injunctive relief against the second respondent. The respondents submit that the appropriate order for cost should be that each party bear their own costs on the basis that the respondents' ultimate "consent" to the relief sought could have been achieved much earlier.[117] I do not accept this submission. The proceedings have been necessitated by the fact that the first respondent has carried on a financial services business without the relevant licence and the second respondent has permitted accounts in her name to be used by the first respondent. The appropriate order is that the respondents pay the applicant's costs of the proceeding.

Disposition

1. The Court declares that between 1 January 2011 and 7 August 2015, the first respondent, by seeking, accepting, obtaining and/or receiving financial investments from persons ordinarily domiciled in Australia, including Robyn Cannon, Norma Swanepoel and Francis Armstrong, each of whom intended their financial investment to generate a financial return or benefit, contravened section 911A of the *Corporations Act* 2001 (Cth), by carrying on a financial services business in this jurisdiction (Australia) without holding an Australian Financial Services Licence covering the provision of the financial services.

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[115] (2015) 105 ACSR 116, 190 [421].
[116] (2015) 105 ACSR 116, 190 [423].
[117] Email Roger Munro to Associate to Flanagan J dated 17 November 2015 at 4.51 pm.

2. The first respondent, either by himself, his servants and/or agents, is permanently restrained from carrying on a financial services business in this jurisdiction, without holding an Australian Financial Services Licence, including by:

   (a) dealing in a financial product;

   (b) dealing with, using or applying, Investor Funds, or authorising the dealing, use or application of Investor Funds, held in or by any of the following financial institutions or brokerage accounts:
   (i) Interactive Brokers;
   (ii) J.P. Schultz;
   (iii) TradeStation Securities Inc;
   (iv) TradeStation Futures;
   (v) Bank of Montreal;
   (vi) Royal Bank of Canada;
   (vii) PNC Bank;
   (viii) Any other financial institution or brokerage account in which Investor Funds are held or located, whether in Australia or elsewhere;
   except to the extent necessary to return Investor Funds to investors.

   (c) receiving or obtaining money or money's worth (**contribution**) from another person ordinarily domiciled in this jurisdiction if the other person intends that the contribution will be used to generate a financial return or other benefit;

   (d) engaging in conduct that is intended to induce persons in this jurisdiction to use the financial services the first respondent provides, or which is likely to have that effect; or

   (e) holding a financial product (within the meaning of the Act, including a contribution intended to be used to generate a financial return or other benefit) or a beneficial interest in a financial product in trust for or on behalf of, any other person ordinarily domiciled in this jurisdiction.

3. Nothing in Order 2 prevents the first respondent from returning to any Investor any Investor Funds provided to him in relation to any financial services business carried on by him prior to the making of this order.

4. For the purposes of Order 2, Order 3, Order 5 and Order 6:
   "*financial services business*" includes any activity concerning the trading (whether inside or outside this jurisdiction), of commodities, currencies, securities or derivatives (including futures), for or on behalf of persons who are ordinarily domiciled in this jurisdiction.

   "*in this jurisdiction*" means in Australia.

   "*Investor*" includes any of the persons or entities known by the following names:
   (a) Robyn Cannon, also known as Robyn Grundy;
   (b) Fast Forward Charters Pty Ltd as trustee for the Jackpot Superannuation Fund;
   (c) Greg Von Harten;

(d) Norma Swanepoel;
(e) Catherine Heyer, also known as Anna Turner;
(f) Frank Armstrong;
(g) Anne Gale;
(h) Teagarden or the Tea Garden Family Trust;
(i) Narelle Wearne;
(j) Brooke Hobbs;
(k) Anthony Hobbs;
(l) Bob Terrill;
(m) Jean Florence Munro;
(n) Hannah Munro; and
(o) Helen Munro.

"*Investor Funds*" means any monies provided by any Investor to the first respondent, his servants and/or agents, since January 2011 (including any interest, profit or dividend on those monies), in relation to any financial services business carried on by him.

5. The second respondent be permanently restrained from permitting or authorising the first respondent from using any bank or brokerage accounts in the second respondent's name for the purposes of the first respondent carrying on a financial services business within this jurisdiction (Australia) without the first respondent holding an Australian Financial Services Licence.

6. Nothing in Order 5 prevents the second respondent from permitting or authorising the first respondent from using any bank or brokerage account in the second respondent's name in order to return to any Investor any Investor Funds provided to the first respondent in relation to any financial services business carried on by the first respondent prior to the making of this order.

7. Orders 2 and 3 made on 7 August 2015 are vacated.

8. The first and second respondents pay the applicant's costs of the proceeding.