FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v One Tech Media Ltd

[2020] FCA 46

File number:	VID 848 of 2016
Judge:	**DAVIES J**
Date of judgment:	5 February 2020
Catchwords:	**CORPORATIONS** – binary options trading offered through websites – whether "financial services business" carried on in Australia – whether Australian financial services licence required – s 911A of *Corporations Act 2001* (**Corporations Act**) contravened – meaning of "arranging for" issue of financial product in s 766C(2) of Corporations Act – whether provision of paying agency services constituted "arranging for" issue of binary options – meaning of "provide a custodial or depository service" under s 766E of Corporations Act – whether money may be a "facility" for the purpose of s 763A(1) of the Corporations Act – failure to issue product disclosure statement when offering to issue financial product – s 1012B(3) of Corporations Act contravened – false statements, misleading or deceptive conduct and dishonest conduct – ss 1041H, 1041E and 1041G of the Corporations Act – unconscionable conduct under s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) – application of factors in s 12CC(1) of ASIC Act
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA, 12BAB, 12CA, 12CB, 12CC(1) *Corporations Act 2001* (Cth) ss 206E, 761D, 761E(3), 761G(1), 761GA, 762C, 763A(1), 763B, 764A(1)(c), 766A(1), 766C, 766E, 911A, 911D, 1010C(2)(a), 1011B, 1012B(3), 1041E, 1041G, 1041H *Corporations Regulations 2001* (Cth) sub-regs 7.1.04, 7.1.40(1)(c) *Excise Tax Act* (1985) (CA) s 123(1) *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) arts 25, 26
Cases cited:	*Australian Securities and Investments Commission v Goldsky Global Access Fund Pty Ltd & Ors* [2019] QSC 114

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; 93 ALR 743

Australian Securities and Investments Commission v Munro [2016] QSC 9

Australian Securities and Investments Commission v National Exchange Pty Ltd [2005] FCAFC 226; 148 FCR 132

Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; 205 FCR 120

Canadian Imperial Bank of Commerce v Crown [2018] TCC 109

Canadian Medical Protective Association v Crown [2009] CAF 115

Commercial Bank of Australia v Amadio [1983] HCA 14; 151 CLR 447

Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17; 169 CLR 594

Gibson Motor Sport Merchandise Pty Ltd v Forbes [2005] FCA 749

Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd [1978] HCA 11; 140 CLR 216

Paciocco v ANZ Banking Group [2015] FCAFC 50; 236 FCR 199

Re The Inertia Partnership LLP [2007] EWHC 539 (Ch)

United Dominions Corporation Ltd v Brian Pty Ltd [1985] HCA 49; 157 CLR 1

Wang v Australian Securities and Investments Commission [2019] FCA 1178

Yorke v Lucas [1985] HCA 65; 158 CLR 661

Date of hearing:	29 and 30 April, 1 May 2019
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Sub-category:	Regulator and Consumer Protection
Category:	Catchwords
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Counsel for the Plaintiff:	Mr M R Pearce SC with Ms N Moncrief
Counsel for the Third, Fourth, Fifth, Sixth, Eighth and Ninth Defendants:	Mr M D Wyles QC with Mr R M Peters
Solicitor for the Third, Fourth, Fifth, Sixth, Eighth and Ninth Defendants:	HWL Ebsworth Lawyers

ORDERS

VID 848 of 2016

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Plaintiff
AND:	**ONE TECH MEDIA LIMITED** (and others named in the Schedule) First Defendant

JUDGE:	**DAVIES J**
DATE OF ORDER:	**5 FEBRUARY 2020**

THE COURT ORDERS THAT:

1. The proceedings against the second defendant are discontinued with leave of the Court.
2. Within 14 days the parties file draft minutes containing the form of declarations reflecting the reasons for decision of the Court and proposed orders for timetabling a hearing as to penalties.

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

REASONS FOR JUDGMENT

DAVIES J:

1 The plaintiff ("**ASIC**") has alleged numerous contraventions by the first, third, fourth, fifth, sixth, eighth, ninth, tenth and eleventh defendants of the *Corporations Act 2001* (Cth) ("**Corporations Act**") and, by the first defendant only, the *Australian Securities and Investments Commission Act 2001* (Cth) ("**ASIC Act**"). If the contraventions are established, ASIC seeks only declarations of contraventions at this stage and will apply at a further trial for penalties and disqualification orders.

2 As against the second, seventh and twelfth to sixteenth defendants, the proceedings have been discontinued.

THE DEFENDANTS

3 The first defendant ("**One Tech**") is a company incorporated in the Seychelles, redomiciled to the Marshall Islands on 2 March 2016.

4 The third defendant ("**Allianz Australia**") is a company incorporated in Australia of which the fourth defendant ("**Eustace**") is the sole director and shareholder.

5 The fifth defendant ("**Sansen**") is a company incorporated in Australia of which Sandra Senese ("**Sandra**") is the sole director and shareholder. Sandra is the wife of Eustace.

6 Sandra is also the sole director of the sixth defendant ("**Transcomm Australia**"), a company incorporated in Australia. Sansen is the sole shareholder.

7 The eighth defendant ("**Bianco**") is a company incorporated in Australia of which the ninth defendant ("**Cameron**") is the sole director and shareholder.

8 The tenth defendant ("**IMC**") is a company incorporated in Australia of which the eleventh defendant ("**Ida**") is the sole director and shareholder.

9 No disrespect is intended by referring to Eustace, Sandra and Cameron by their first names. The use of their first names is for convenience only, as each of them has the surname Senese.

OVERVIEW

10 As a brief overview, the claims made by ASIC relate to the conduct of One Tech in offering trading in binary options on websites it operated at www.titantrade.com and www.tradettn.com

("**the website(s)**" or "**Titantrade**") between at least 5 January 2016 and 5 July 2016 ("**the relevant period**"). ASIC has alleged that One Tech, by operating the websites, conducted a financial services business in Australia without holding an Australian financial services licence, contrary to s 911A of the Corporations Act, and that it issued financial products, namely binary options, without issuing requisite product disclosure statements, contrary to s 1012B(3) of the Corporations Act. ASIC has also alleged that One Tech's conduct directed at its customers ("**website customers**") consisted of false and misleading statements and was misleading or deceptive and dishonest conduct in relation to financial services, contrary to ss 1041E, 1041G and 1041H of the Corporations Act, and unconscionable conduct, contrary to s 12CB, or alternatively s 12CA, of the ASIC Act.

11 As against the third to sixth and eighth to eleventh defendants, ASIC has alleged they were participants in an unincorporated joint venture ("**joint venture**") that provided paying agency services to the financial services business conducted by One Tech. It is alleged that the paying agency services involved:

(a) opening bank accounts at the Westpac Banking Corporation ("**Westpac**") in Melbourne pursuant to a contract between a Seychelles company, Allianz Metro Limited ("**Allianz Seychelles**"), of which Ida is the sole director and shareholder, and One Tech and a subcontract between Allianz Seychelles and Allianz Australia;

(b) receiving deposits into the Westpac accounts from website customers (including Australian customers) to be applied towards acquiring binary options from One Tech;

(c) checking customer identification details received from One Tech against customer deposit details;

(d) transferring amounts received from website customers, including Australian customers, to bank accounts as specified and directed by One Tech; and

(e) retaining, by way of commission, 7.5% or more of the amounts deposited by website customers, including Australian customers.

12 It is alleged that by reason of their individual contributions to the joint venture, each alleged joint venturer "arranged for" (within the meaning of s 766C(2) of the Corporations Act) One Tech to deal in a financial product (namely to issue binary options) and thereby themselves conducted a financial services business without holding an Australian financial services licence

in contravention of s 911A of the Corporations Act. It is also alleged that by "offering to arrange for" the issue of a financial product to the website customers without giving them the requisite product disclosure statement, the alleged joint venturers contravened s 1012B(3) of the Corporations Act.

13 ASIC has further alleged that the activities of Allianz Australia in operating the bank accounts amounted to providing a custodial or depository service within the meaning of s 766E of the Corporations Act, and alleged that Allianz Australia thereby conducted a financial services business without an Australian financial services licence in contravention of s 911A of the Corporations Act and offered to issue a financial product without issuing the requisite product disclosure statement in contravention of s 1012B(3) of the Corporations Act.

14 ASIC has relied on the following affidavits in support of its claims:

(a) three affidavits of Bruce Standfield, an officer of ASIC;

(b) affidavits from five investors – namely, Kenneth Wyatt, Robert Bowyer, Curtis Tottman, Helen Malland and Wendy Graham ("**the investor affidavits**").

15 The first, tenth and eleventh defendants did not appear and did not contest the claims against them. The third, fourth, fifth, sixth, eighth and ninth defendants (collectively the "**Senese defendants**") did appear and have disputed the alleged contraventions, claiming that ASIC has not established the elements of their alleged contraventions.

CONTRAVENTIONS BY ONE TECH

16 During the relevant period, the websites offered trading in binary options. To trade, a customer applied for and set up an account through the websites into which the customer deposited a minimum of US$250 ("**Titantrade account**"). Adopting ASIC's gambling analogy, the funds were then used for betting on the movement in the price of an asset in a defined period. The websites allowed the website customers to select the underlying asset, the direction of the movement (up or down), the time period and the amount that the customer wished to place. At the expiry of the trade, the customer either received the amount back into their Titantrade account with a return on the trade if the asset price moved in the period as predicted by the customer, whether up or down, or if the customer lost on the trade, the amount placed on the bet was automatically deducted from the customer's account.

Failure to hold an Australian financial services licence

17 By s 911A of the Corporations Act, a person who carries on a financial services business in "this jurisdiction" must hold an Australian financial services licence covering the provision of the financial services. One Tech did not hold an Australian financial services licence. Section 911A(1) of the Corporations Act relevantly provides:

> Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

18 Section 911A is found in Part 7.6 of ch 7 of the Corporations Act. Section 911D sets out when a financial services business is taken to be carried on "in this jurisdiction":

> (1) For the purposes of [Chapter 7], a financial services business is taken to be carried on in this jurisdiction by a person if, in the course of the person carrying on the business, the person engages in conduct that is:
>
> (a) intended to induce people in this jurisdiction to use the financial services the person provides; or
>
> (b) is likely to have that effect;
>
> whether or not the conduct is intended, or likely, to have that effect in other places as well.
>
> (2) This section does not limit the circumstances in which a financial services business is carried on in this jurisdiction for the purposes of [Chapter 7].

19 Section 766A(1) in div 4 of pt 7.1 in ch 7 of the Corporations Act relevantly provides that a person provides a financial service if they deal in a financial product: s 766A(1)(b).

20 Section 766C of the Corporations Act provides that a person "deals" in a financial product by issuing a financial product: s 766C(1)(b).

21 Section 764A in div 4 of pt 7.1 in ch 7 of the Corporations Act contains specific inclusions to the definition of "financial product" for the purposes of ch 7. Relevantly, by s 764A(1)(c), a "derivative" is a financial product for the purposes of ch 7.

22 Section 761E(3) provides that a derivative is issued to a person when the person enters into the legal relationship that constitutes the derivative.

23 The term "derivative" is defined in s 761D of the Corporations Act, which relevantly provides that:

> (1) For the purposes of [Chapter 7], subject to subsections (2), (3) and (4), a derivative is an arrangement in relation to which the following conditions are satisfied:

(a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and

(b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and

(c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity.

(2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a derivative for the purposes of this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).

…

24 Sub-regulation 7.1.04 of the *Corporations Regulations 2001* (Cth) ("**the Regulations**") relevantly provides that:

(1) For paragraph 761D(1)(b) of the Act, the prescribed period is:

…

(b) in any other case – 1 business day.

(2) For subsection 761D(2) of the Act, and subject to this regulation, an arrangement is declared to be a derivative if the following conditions are satisfied in relation to the arrangement:

(a) the arrangement is not a foreign exchange contract;

(b) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time (which may be less than 1 day after the arrangement is entered into) consideration of a particular kind or kinds to someone;

(c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity.

…

25 The effect of sub-reg 7.1.04(2)(b) is that there is no minimum period for the provision of consideration.

26 By way of summary:

(a) a person provides a financial service by dealing in a financial product: s 766A(1)(b);

(b) a person deals in a financial product by issuing the financial product: s 766C(1)(b);

(c) derivatives are financial products: s 764A(1)(c);

(d) a person deals in derivatives by entering into the legal relationship that constitutes the derivative: s 761E(3);

(e) a person who carries on a financial services business in Australia must hold an Australian financial services licence covering the provision of the financial services: s 911A;

(f) a person carries on a financial services business in Australia if, in carrying on that business, the person engages in conduct that is intended to induce people in Australia to use the financial services the person provides; or is likely to have that effect: s 911D.

27 I find that One Tech was required to hold an Australian financial services licence to offer trading in binary options.

28 First, the jurisdictional nexus under ss 911A and 911D of the Corporations Act is established by the evidence which showed that the websites, which were designed to induce people to trade in binary options through the websites, were accessible in Australia and customers in Australia traded through the websites.

29 Secondly, I am satisfied on the basis of the evidence that the binary options offered for trade through the websites were "derivatives" and hence "financial products":

(a) according to the terms and conditions on the websites during the relevant period, "trading in binary options" meant:

> that a contract is being created which gives the Client the right to estimate the direction of change in the price of an underlying asset, within a certain time frame determined by [One Tech]….

(b) also under the terms and conditions, the trading was done through a trading account which the website customer opened with One Tech. The terms and conditions provided that the client would receive a predetermined pay-out on the trade if the binary option transaction expired in-the-money and would lose a predetermined amount on the trade if the binary option transaction expired out-of-the-money;

(c) the material on the websites and the evidence in the investor affidavits show that clients were permitted to trade in binary options which expired at varying time frames from between 60 seconds and one month;

(d) in view of sub-reg 7.1.04(2) of the Regulations, all binary options offered by the websites were therefore caught by the definition of "derivative".

30 Thirdly, One Tech issued derivatives and hence financial products by entering into legal relationships with website customers to engage in binary options trading. One Tech therefore provided financial services.

31 The Senese defendants initially accepted that ASIC had proved that the binary options offered for trade through the websites were "derivatives" and that One Tech had issued derivatives for the purposes of s 761E(3) of the Corporations Act once investors had purchased binary options through the websites. However, following the presentation by ASIC of its case, senior counsel for the Senese defendants submitted that in view of the way that ASIC had put its case, it had actually failed to prove that any binary options did issue. Reference was made to ASIC's characterisation of the operations conducted by One Tech under the websites as a "scam designed to defraud investors of their money". It was submitted that if the websites were a fraud, "then it must follow that binary options did not exist" and were not issued. That submission is flawed as it was not ASIC's case that the website operations were a sham and of no legal effect. To the contrary, ASIC's case was that the trading conducted through the websites was genuine. The "fraud" said to be perpetrated on investors was the false and dishonest conduct inducing them to continue trading, leading to them losing all their money.

32 As I have found that One Tech was required to hold an Australian financial services licence to offer trading in binary options, I am therefore satisfied that ASIC has established that One Tech

contravened s 911A of the Corporations Act by carrying on a business of trading in binary options through the websites without holding an Australian financial services licence.

Failure to provide product disclosure statements

33 Section 1012B(3) of the Corporations Act provides:

> A regulated person must give a person a Product Disclosure Statement for a financial product if:
>
> (a) the regulated person:
>
> (i) offers to issue the financial product to the person; or
>
> (ii) offers to arrange for the issue of the financial product to the person; or
>
> (iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and
>
> (b) the financial product is, or is to be, issued to the person as a retail client.
>
> The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division.

34 For the following reasons, I am satisfied that ASIC has established that One Tech contravened s 1012B(3) of the Corporations Act by offering to issue binary options through the websites without providing a product disclosure statement:

(a) One Tech was a "regulated person" within the meaning of s 1011B of the Corporations Act, which provides that a "regulated person" in relation to a financial product includes "an issuer of the financial product";

(b) section 1012B(3) provides that a regulated person must give a product disclosure statement in certain circumstances, including where the regulated person "offers to issue a financial product" to a person "as a retail client";

(c) section 1010C(2)(a) provides that a reference to offering to issue a financial product includes a reference to inviting an application for the issue of the financial product. One Tech offered to issue binary options to investors by publishing the websites and the offers were made when the investors applied to place trades on the websites;

(d) section 761G(1) of the Corporations Act provides that a financial product is given to a person as a "retail client" unless it comes within certain exclusions for insurance, superannuation, trustee company services and other types of

services, or unless an Australian financial services licensee provides services to a "sophisticated investor" within the meaning of s 761GA of the Corporations Act. The provision of binary option trading through the websites to the five investors who gave evidence in this proceeding did not come within any of these exclusions and it therefore follows that the financial products were offered to those persons as retail clients;

(e) four of the five investors gave evidence that they did not receive any documentation from Titantrade other than the documents annexed to their affidavits. Since none of the affidavits of the four investors includes a product disclosure statement, I infer that those investors did not receive a product disclosure statement from One Tech or anyone else. Mr Bowyer did not give such evidence but given that he did not include a product disclosure statement amongst the documents exhibited to his affidavit, and given that the other four investors had not been given product disclosure statements, it is reasonable to infer that Mr Bowyer similarly was not given a product disclosure statement;

(f) further, as there is nothing in the comprehensive material before the Court to indicate that a product disclosure document was ever prepared and/or available for potential investors, it is reasonable to infer, and I infer, that One Tech did not provide any investor with a product disclosure statement.

35 I therefore find that One Tech committed multiple contraventions of s 1012B(3) of the Corporations Act in offering to issue binary options without issuing product disclosure statements.

Misleading or deceptive conduct and dishonest conduct

36 ASIC alleged that representations made on the websites and by Titantrade representatives ("**brokers**") to website customers were not true, namely that:

(a) binary options trading will generate large profits and returns ("**the first representation**");

(b) larger deposits would generate greater returns ("**the second representation**");

(c) certain trades are "insured" or "guaranteed" so that the customer cannot lose those trades ("**the third representation**");

(d) the broker appointed to the customer is licensed and has expertise in trading and binary options ("**the fourth representation**");

(e) the broker appointed to the customer will act in the customer's best interests to maximise their returns ("**the fifth representation**"); and

(f) profits and returns generated by trading in binary options can be withdrawn by the customer on request ("**the sixth representation**").

37 The first representation is found in webcapture shots of the websites annexed to the affidavit of Mr Standfield dated 22 December 2017 and the investor affidavits. Examples of the first representation in the webcapture shots are:

> OUR TRADER'S TOTAL PROFIT Since April 1st, 2016 $15,452,218
>
> If you're looking for a way to increase your profits, Titantrade is the place to do so…
>
> Make a deposit via one of the many options we offer, begin trading using our quick and easy platform, where you can select a multitude of assets, contract lengths and investment. Using all of those to turn a quick profit until it's time to make a safe and secure withdrawal of your funds….
>
> With relative ease and no financial degree required, anyone can make a profit.
>
> … profits will materialize in your account in no time.
>
> … Titan Trade provides you with all the tools you need to become a lucrative investor.

38 Further, it was Mr Wyatt's evidence that when he looked at the website he noticed it offered 75% returns on trading and promised a return on every trade. Ms Graham similarly gave evidence she saw that the website said it offered high returns on investments.

39 The first representation was also made to investors directly. Mr Wyatt gave evidence that in a skype message to him from a broker, David Garcia, Mr Garcia wrote that:

> I understand that you have some concerns after losing the trades but I will tell you this Ken, I am going to [do] eveything [sic] in my power to get you 250K+ in the next few weeks.

40 Mr Bowyer gave evidence that he was told by David Garcia that Titantrade could provide him with an income which would enable him to pay off his mortgage in two years.

41 The second representation was contained in a table on a webcapture shot showing the different account types on offer through Titantrade with the benefits of each account type. The most expensive of these accounts was the platinum account of US$50,000 or more which was said to offer "higher payouts", as compared to the other account types. Mr Wyatt also gave evidence that Mr Garcia told him that the more capital that Mr Garcia had to work with, "the safer and

better [he] will be able to perform" for Mr Wyatt and if Mr Wyatt was able to organise "closer to $100,000 tomorrow" he would "take care of a big bonus" to Mr Wyatt's account. Mr Bowyer gave evidence that Mr Garcia told him that he needed a reasonable amount of funds deposited with the website in order to trade successfully. Ms Graham gave evidence that another broker, Kevin Lambert, recommended to her that she should move her superannuation into the Titantrade account to "make some real money".

42 The third representation was made to Mr Tottman, Mr Wyatt, Mr Bowyer and Ms Graham:

(a) Mr Tottman's evidence was that a broker called Andrew Lee from Titantrade assured him in a Skype conversation that his trades were "insured" and he should "trade carefully with insurance and start winning money". In another Skype conversation with that broker, he was told "Great News. Insurance bonus funds are in!". Mr Tottman's evidence was that he told Mr Lee that he only wanted to use the "insured" portion of his deposit funds and he did not want to touch the other A$7,000 of his funds to which Mr Lee responded "I know that is the contract!";

(b) Mr Wyatt gave evidence to like effect. He gave evidence of an email he received from Titantrade marketing which stated:

> Dear Ken,
>
> an 100% protected capital is coming YOUR way!
>
> …
>
> Trade on Walt Disney within the next 24 hours and get a 100% protected capital on your trade!

(c) Mr Bowyer's evidence was that he received an email from Titantrade which stated that:

> In order to help get you started the first 5 trades you open with your account manager will be insured (each trade cannot exceed 20% of your current account balance).
>
> You win, you keep the winnings. You lose, we'll take the losses. That's it, no hidden strings, no catch.

(d) Ms Graham gave evidence that she was told by the broker Mr Lambert that her trades were protected and her capital would be safe.

43 The fourth representation is found in the following material on the websites: under the heading "Why Titantrade", it was stated "We've got professional brokers to aid you along every step

of the way" and, further on, there is a reference to "dedicated customer support staff" and that "when you trade with us, you have ample resources and an expert support staff at your fingertips".

44 The fourth representation was made to investors directly:

(a) Mr Wyatt's evidence was that Mr Garcia told him that he was licensed to trade in options in the UK;

(b) Mr Bowyer's evidence was that Mr Garcia told him that his advice to Mr Bowyer as Mr Bowyer's broker was based on continuous analysis done by a team of specialised analysts to predict movements in currency and commodities;

(c) Ms Graham's evidence was that she received an email from a Hary Spencer of Titantrade which stated:

> We are happy that you chose us as your binary option trader.
>
> I am happy to let you know that here at **TITANTRADE** you do not have to trade alone. We try our best to provide the best support and professionalism to suit your high standards and needs.
>
> …
>
> Our educational department and our personal junior and senior brokers are here to assist you every step of the way;

(d) Ms Malland and Mr Wyatt received emails in similar terms from an "Amanda" and a Sam Rifken, respectively.

(e) Ms Malland also gave evidence that a Dr Schulte represented to her that he held a "FTSE License", and provided a licence number to support this claim.

45 The fifth representation is found in the following statements on the websites:

> We've got professional brokers to aid you along every step of the way.
>
> … we will take care of your money by using the top safety measures available, verify your investments in a timely fashion, and strive to be quick with any requests you may have, all the while doing our best to insure [sic] your complete satisfaction with the entire process.

46 Additionally, Ms Malland, Mr Wyatt and Ms Graham each gave evidence that on opening an account they received an email which stated:

> Our educational department and our personal junior and senior brokers are here to assist you in every step of the way.

47 Mr Tottman also gave evidence that a broker, Mr Lee, stated in a Skype message:

> Lets [sic] maximize on the profits available before you make any decisions… You have an account that will generate you amounts of money which will assist you with your struggles. Let me keep working with you and assist.

48 The sixth representation was contained in the following material on the websites:

(a) the passage that said "Using all of those to turn a quick profit until it's time to make a safe and secure withdrawal of your funds";

(b) the statement that "With our fast withdrawal process you can be sure that you will always have your funds in reach";

(c) in the frequent questions and answers section there was a question "How often can I withdraw my funds?" to which the response was "You can withdraw your funds as often as you like";

(d) the "withdrawal and compliance policy" on the websites relevantly stated:

> In order to expedite the withdrawal process we asked that within 48 hours of funding your account you send us your compliance documents by email to Compliance@titantrade.email...
>
> …
>
> This is a onetime process. Once your documents have been approved you will receive a confirmation email validating your account for withdrawals….
>
> …
>
> **Wire Transfers**:
>
> All funds deposited with a wire transfer will be withdrawn via a wire transfer. Once a withdrawal has been processed it does take up to five business days for the funds to show in your bank account. If you have a VIP account that allows 24 hour wire transfers please inform us of this at the time you sent your withdrawal request.
>
> …
>
> The first wire withdrawal of every month is free of charge, however any subsequent wire withdrawals for that month are 30 USD, GPB, EUR, CAD or AUD.
>
> …
>
> Withdrawal procedure takes up to seven business days once Client's documentation submitted and approved. The Company may cancel the Client's withdrawal order, if, according to the Company's discretion, the remaining funds (after the withdrawal) shall not be sufficient to secure open Position(s) in the Trading Account.

49 ASIC has alleged that the making of the representations constituted misleading or deceptive conduct contrary to s 1041H of the Corporations Act. ASIC has also alleged that One Tech knew the representations to be false in material particulars or to be materially misleading contrary to s 1041E, and that by making the statements knowing them to be false, One Tech also engaged in dishonest conduct in the course of carrying on a financial services business contrary to s 1041G.

50 Section 1041H(1) provides:

> A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive.

51 Section 1041E(1) provides:

> A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
>
> (a) the statement or information is false in a material particular or is materially misleading; and
>
> (b) the statement or information is likely:
>
> (i) to induce persons in this jurisdiction to apply for financial products; or
>
> (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
>
> (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
>
> (c) when the person makes the statement, or disseminates the information:
>
> (i) the person does not care whether the statement or information is true or false; or
>
> (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

52 Section 1041G (as it was during the relevant period) provided:

> (1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.
>
> (2) In this section:
>
> dishonest means:
>
> (a) dishonest according to the standards of ordinary people; and
>
> (b) known by the person to be dishonest according to the standards of

ordinary people.

53 ASIC accepted that in assessing whether the various representations were misleading or deceptive, it is to be borne in mind that trading in binary options was obviously risky and this should have been clear to investors. However, it was submitted, the representations that profits would be made were coupled with offers of expert advice from the brokers about what trades to place, and the investors could be excused for believing that the advice would be expert and would assist them to generate profits from the trades. It was submitted that it was "abundantly clear" in fact that the brokers' advice about what trades to execute was part of the deception to induce investors to invest more and more in trading in binary options until they had too much at risk to stop trading. It was submitted that the pattern of conduct which emerges from the evidence of the five investors shows there was a deliberate plan by One Tech to entice investors with early wins, and then trap them with losses and unachievable trading targets for withdrawals so that they would risk more and more money and eventually lose all of their investments.

54 It is necessary to set out the evidence of the investors in more detail.

55 Mr Wyatt's evidence was that he made an initial trade of US$25 in January 2016 which he won and which sparked his interest in trading. Shortly afterwards he was contacted by David Garcia who told him he would teach him how to do binary options trading. Mr Wyatt set up an account through the website into which he transferred A$50,000. He began to place binary option trades on the website. Each time he wanted to place a trade, Mr Garcia called him on the telephone or on a Skype voice call and guided him in the trades. His evidence was that Mr Garcia told him which trades to place and for how much. At first he was ahead trading under Mr Garcia's instruction. Mr Garcia encouraged him to provide more capital out of which to place trades. In February 2016, Mr Garcia sent Mr Wyatt a series of Skype messages saying:

> Ken, I want to get your account to $1M by the end of the year
>
> I am very confident I can do this for you
>
> My job is to put money in your pocket and a smile on your face
>
> The more capital I will have to work with the safer and better I will be able to perform for you
>
> I had client [sic] who made 6 figures PROFIT last Friday
>
> Hopefully in a few weeks from now you will get on this list as well
>
> If you will be able to organize closer to $100.000 [sic] tomorrow I will take care of a big bonus to your account

That will allow us to work with a better money management and risk control

56 At around that time, Mr Garcia asked him if he owned his house and told him that he should take out a second mortgage on his house and use the money to make even larger deposits to the website. Mr Wyatt did not take out the second mortgage. He also received an email from Titantrade marketing offering him additional bonuses if he made further deposits.

57 In about late February 2016, Mr Wyatt asked Mr Garcia if he could make withdrawals from his online trading account. At that point his online account balance was US$104,000. Mr Garcia told him he was not eligible to make withdrawals and referred him to the written terms and conditions on the website. Mr Wyatt's evidence was that after Mr Garcia refused his request to withdraw his funds "things went downhill fast". Mr Garcia told him to place more trades so he could build up his account up to a level where he could make a withdrawal. He directed him and the trades to place and within a short period of time he had lost about US$100,000. Mr Garcia promised him he would help him to recover his account. It was in that context that Mr Wyatt received the Skype message telling him Mr Garcia was going to do everything in his power to get Mr Wyatt to US$250,000 in the next few weeks. Not long after, Mr Wyatt reiterated to Mr Garcia that he wanted to withdraw his funds but Mr Garcia's response was to encourage him to continue trading with promises that he would recover his account. Mr Wyatt stopped making deposits and stopped trading. He lost all the money he had deposited, a total of US$98,606.

58 Mr Bowyer gave evidence that shortly after he made an initial trade in early January 2016, he was called by Mr Garcia who told him that he had been allocated as Mr Bowyer's account manager, and that he was trading on behalf of lots of investors and would help Mr Bowyer to trade too. Mr Garcia also told him it would be more effective to increase the funds he deposited as he would then be eligible for better advice. Mr Garcia told him that his advice to Mr Bowyer as his broker was based on continuous analysis done by a team of specialised analysts to predict movements in currency and commodities. Based on his discussions with Mr Garcia and an email that promised five "insured" trades, Mr Bowyer decided to open a trading account with Titantrade. Amongst the documents he was provided by Mr Garcia was a bonus agreement. Mr Bowyer signed and returned this agreement.

59 Mr Bowyer made a number of trades between January and August 2016. Early on, when Mr Bowyer raised his concerns with Mr Garcia about the risks of the trades Mr Garcia was instructing him to make, Mr Garcia explained to him that the only reason that Mr Bowyer felt

the exposure was high was because he had a relatively small account and "proportion-wise" exposure was high, but if he had a "$1M account" he "would feel a lot more comfortable with the open trades as most of them are currently winning". Mr Bowyer's evidence was that from the outset Mr Garcia told him to make large deposits to the website and told him that he needed a "reasonable" amount of funds in order to trade successfully. He recalled explaining to Mr Garcia that he was retired and he was funding the deposits into Titantrade through selling down his share portfolio, which made up his entire retirement savings, and that he had a mortgage over his property which he had to finance. Mr Garcia told him that Titantrade could provide an income to enable him to pay off the mortgage in two years.

60 After Mr Bowyer had been trading on the Titantrade website for about six weeks, Mr Garcia invited him to trade on a special Titantrade platform, which he was told was only offered to "VIP" clients. He was told that on the special platform a customer could not place trades directly and that all trades had to be placed by the Titantrade broker. He said that Mr Bowyer should transfer the balance of his existing Titantrade trading account to the new special platform, which Mr Bowyer did. Mr Bowyer also gave evidence that in early March 2016 Mr Garcia told him he would get him on a special offer whereby Titantrade's top analysts would control the trades. Mr Garcia told him that the minimum amount for those trades was US$500,000. At that time the balance of Mr Bowyer's account was about US$209,000. Mr Garcia told him that Titantrade would "loan" him US$290,000 to bring his balance up to US$500,000. Mr Bowyer was concerned about the amount he had deposited with Titantrade and advised Mr Garcia that he had decided to limit his exposure in the short term to approximately US$250,000. He also advised Mr Garcia that he needed to make monthly withdrawals of US$7,000 per month to meet his regular expenses. At first he was able to make the withdrawals from his account but after a while he started to encounter difficulties making withdrawals. He also grew concerned about discrepancies in the trading figures on his account. Mr Bowyer's experience over that time was that Mr Garcia was ignoring his requests for the regular withdrawals and that Mr Garcia's trades on his account were contrary to his express instructions and were resulting in losses. In August 2016, Mr Garcia was replaced by another broker, Andrew Lee, who started placing trades on Mr Bowyer's behalf. There was a rapid series of losses with an up to US$50,000 loss in one day.

61 In October 2016 Mr Lee was replaced by a Dylan Grey who advised Mr Bowyer that he could recover his funds by placing VIP trades and that the trades would be insured against any losses. Mr Grey advised that he could arrange for the debit of US$15,000 from Mr Bowyer's credit

card as he had Mr Bowyer's access codes and advised that, if he made that deposit, he could obtain an equal bonus credit and Mr Grey would arrange authorisation of a US$25,000 refund to Mr Bowyer's credit card. Mr Bowyer, with Mr Grey's assistance, made an online website refund request from his account of US$25,000. Mr Grey told him it would be processed on receipt of the US$15,000 deposit from Mr Bowyer. The deposit was made but, on checking the website the following morning to confirm that the US$25,000 refund request had been processed, Mr Bowyer discovered the request had been cancelled. When Mr Bowyer followed this up with Mr Grey, Mr Grey told him that the US$25,000 refund would not be approved. Mr Bowyer requested a refund of the US$15,000 deposit, which Mr Grey also refused. After Mr Bowyer threatened to close his account, a US$5,000 withdrawal was agreed and re-credited to his bank account. Mr Bowyer gave evidence that from January to August 2016, he deposited a total of approximately US$471,684 into his trading account, was able to withdraw A$71,444 and his final online trading account balance was approximately US$6,000. At the time of swearing his affidavit, Titantrade had closed his access to that account and to the remaining balance of US$6,000.

62 Ms Graham gave evidence that she opened an account with Titantrade in May 2016. Once she opened her account, she deposited money to her online trading account using her credit card so she could place binary options trades. She was contacted by a Kevin Lambert who advised her that he worked for Titantrade as a senior broker. Mr Lambert asked her about her financial situation and she explained that she lived on income from her superannuation savings. Her evidence was that Mr Lambert told her that the savings she had in superannuation were "going nowhere" and that "we could make [her] another $100,000 on top of her superannuation". She was encouraged to withdraw money from her superannuation fund and invest it through Titantrade and given an assurance that her money would be safe and protected. She traded in binary options using the website from about May to October 2016 and throughout that period Mr Lambert gave her instructions about which trades to place on the website and how much money to place. She did not make any personal decisions on which trades to place or how much to place but always followed Mr Lambert's instructions. Initially she made wins on her trading. In August 2016 Mr Lambert recommended that she move her superannuation into the Titantrade account "to make some real money", which Ms Graham did, with the exception of A$10,000, which she retained in her superannuation account. Her evidence was that sometimes after she placed a trade she was awarded a bonus, which encouraged her to keep trading. By September 2016 she had deposited about A$38,000 under the instructions of Mr Lambert. She

made a request to withdraw A$5,000. Although she was told by Mr Lambert that he would arrange for the repayment, that never happened. Ms Graham was later told that she had no money left in her Titantrade account. From May to October 2016 she had deposited a total of A$46,405, comprised of A$38,000 from her superannuation account and the balance from credit and debit cards, all of which she lost.

63 Mr Tottman's evidence was that he opened an account in January 2016 after being contacted by broker Andrew Lee. Between the period January to April 2016, Mr Lee gave him directions about which trades to place on the Titantrade website. In February 2016 Mr Lee told him that if he put A$5,000 into his account he would be guaranteed to win the first three trades, which Mr Tottman thought sounded good so he put the trades on as Mr Lee instructed him. In March 2016 Mr Tottman asked to withdraw the funds from his Titantrade account, the balance of which at that point in time was approximately A$20,000. He was told by Mr Lee that he would lose half of what he had in the account as he had to reach a certain amount before he could withdraw it. Mr Lee instructed him to place a trade, which Mr Tottman agreed to because he felt "trapped by the whole situation". The trade made a profit of A$2,000. In late March and early April 2016 Mr Lee told him he needed to make a certain "turnover" figure in his online trading account before he could make a withdrawal. Mr Tottman made further trades as instructed by Mr Lee, which he lost. In May 2016 Mr Lee was replaced by a new broker, "Raymond". Like Mr Lee, Raymond directed Mr Tottman about which trades to put and Mr Tottman placed trades as instructed. Despite the promises, most of the trades he was advised to make were unsuccessful and Mr Tottman started to lose the money he had deposited. After a while, Mr Tottman told Raymond he wanted to withdraw what was left in his account. He was told he was not entitled to make a withdrawal and that he had to make a 70% profit on his deposits to release the money in his account and would have to pay a 30% exit fee. Mr Tottman made his last trade in August 2016. In total he deposited A$25,600 and when he stopped trading he had an online balance of A$1,500.

64 Ms Malland gave evidence that after she opened her account with Titantrade in late January 2016, she had regular contact initially from Bruno Gold at Titantrade and then from another Titantrade broker, Gary Hales. At first, her trades were mostly successful and her online Titantrade account was credited with bonuses. She was encouraged to deposit more and told that she would receive bonuses to trade with, but eventually she lost most of the funds she had deposited and the bonuses she had earned. Despite depositing a total of US$137,973, her

final account balance by June 2016 was approximately A$140, but with the bonuses credited to her account she still had sufficient funds to trade with.

65 In around August 2016 Ms Malland received a Skype call from a person who introduced himself as Charles Goldsmith who said he worked for Titantrade and that he was a recoveries manager. She was told that he had been specially appointed to her to help her recover the money she lost while trading on the website. She agreed to allow him to help. In August 2016 she emailed a withdrawal request form for A$3,500. In response she received an email telling her that there were turnover withdrawal requirements to meet as she had received a bonus on her account and she was told to continue trading until she reached the required turnover. In October 2016 she was contacted by a Dr Florian Schulte who told her he was a professor and senior manager of Titantrade and that he would help her to recover all her money, and any trades he helped her place would be fully insured because he had special broker's insurance. He told her that Titantrade would give her US$80,000 in order to trade and that she could trade without using her own capital but she would need to make a US$20,000 deposit in order to gain access to this special recovery arrangement. He told her to put on three trades which he said were guaranteed. Those representations are evidenced in an email from Dr Schulte, which stated:

> Dear Mrs. Helen Malland,
>
> It is an absolute pleasure being your new account manager and financial advisor. As mentioned, trading with me is fully-insured through my Broker's Insurance policy and my FTSE License (03101081).
>
> With a 20K USD deposit I will completely abolish ALL terms and conditions connected to/with the "Bonus Agreement". Therefore entitling you to a future, unproblematic withdrawal of funds. The entire balance of your Titantrade account will be available after a 14-day interim period.
>
> Your 20K deposit will go UNTOUCHED in your Titantrade account, and is available to withdraw at your request. I use these funds in order to access this legal agreement.
>
> Additionally, I will give you 80K in unbinding "Recovery Funds" to cover the lost trades with Mr. Charles Goldsmith. With these funds, we will continue to trade together, without risking ANY of the capital of your investment as specified previously.
>
> For any further questions or concerns I'm always at your bequest.
>
> Most sincere regards,
>
> Prof. Dr. Florian Schulte
>
> Chief Financial Consul-VIP Relations
>
> FTSE License-03101081

66 Ms Malland did not have US$20,000 to deposit but she made a deposit of A$7,000 to the website using her credit card. That money was used to place trades under Dr Schulte's instructions and after a few days had earned about US$47,000 in profits. The "14-day interim period" to which Dr Schulte referred in his email to Ms Malland was due to expire on 28 October 2016. By 28 October 2016 all of the active trades expired, leaving her with a balance of approximately US$1,400. In total, Ms Malland lost US$145,600 from her superannuation savings and other savings she had used to make deposits into the Titantrade account.

67 I accept that the evidence given by the investors shows a pattern of conduct by One Tech and its representatives under which:

(a) they were initially enticed to trade by a number of wins and bonuses;

(b) they were directed by the brokers on the trades to place;

(c) when they began to lose on their trades, they were pressured to deposit more into their accounts and to make larger trades to recover their loses;

(d) when they sought to withdraw the funds in their accounts their withdrawal requests were refused because they did not meet the conditions for withdrawal; and

(e) they lost all, or substantially all, of their funds.

68 There is also nothing to suggest that the persons holding themselves out as representatives/brokers of Titantrade were not acting within the scope of One Tech's authority during the relevant period and it can be readily inferred that they were.

69 Each of the representations was false or misleading. Contrary to the representations, the investor affidavits show that:

(a) while some investors initially made profits, in the long term all investors lost their money, regardless of the size of their deposit;

(b) the investors lost on trades, though encouraged to continue trading with promises that trades were insured against loss or guaranteed to win;

(c) One Tech was not licensed to offer binary options in Australia and I infer that none of the representatives/brokers of Titantrade was licensed to offer binary options in Australia either;

(d) the representatives/brokers of Titantrade did not act in the best interests of the investors;

(e) profits and returns generated by trading in binary options could not be withdrawn by the customer on request. The right to withdrawal was made conditional upon the customer meeting the "margin requirements". The terms and conditions contained the following clause:

> 7. Bonuses
>
> 7.1 Company may offer the Client Bonus as Credit or tangible gifts, from time to time, at its sole discretion.
>
> 7.2 Unless stated otherwise in writing by titantrade the client terms of any offer as a precondition for making withdrawals after receiving a trading benefit is to fulfil options trading volume of at least 20 times the amount of the benefit plus the deposit amount combined: (Total deposit + Total trading benefit)*20 = Required Trade Volume.

This was also reflected in the bonus agreements signed by the investors. In practical terms, as the required trade volume was at least 20 times the deposit amount combined with the value of the bonuses, the trading level required to be met to withdraw funds could never be achieved and an investor could never meet the condition to withdraw funds. Further, One Tech retained the right to cancel a customer's withdrawal request "if, according to [One Tech's] discretion" the remaining funds after withdrawal would not be sufficient to secure open positions(s) in the trading account: cl 4.8 of the website terms and conditions.

70 I further find that by making the representations, One Tech engaged in conduct in relation to a financial product.

71 A claim for misleading or deceptive conduct under s 1041H(1) depends upon the effect or probable effect of the conduct on the person to whom that conduct is directed, rather than upon any lack of care or a state of mind of the party which engaged in that conduct: *Yorke v Lucas* [1985] HCA 65; 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ and at 675 per Brennan J; *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J (both dealing with s 52 of the *Trade Practices Act 1974* (Cth), which is analogous to s 1041H(1) of the Corporations Act); *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd*

[2012] FCA 630; 205 FCR 120 ("***Stone Assets Management***") at [33]. The investors' evidence supports the finding that the representations were false in a material particular or materially misleading. By making those representations, One Tech engaged in conduct in relation to a financial product that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1).

72 The same evidence establishes, and I further find, that the false and misleading representations were likely to induce, and did induce, persons within Australia to apply for the trading in, or to acquire, binary options through the website and that, when making the representations, One Tech and the One Tech brokers/representatives knew them to be false in a material particular. I find therefore that One Tech committed multiple contraventions of s 1041E(1).

73 The evidence given by the investors also provides a sufficient basis for a finding of dishonest conduct against One Tech for the purposes of s 1041G(1), which I also make.

Unconscionable conduct

74 Section 12CA of the ASIC Act prohibits, in trade or commerce, conduct in relation to financial services that is "unconscionable within the meaning of the unwritten law" and does not apply to conduct that is prohibited by s 12CB. Section 12CB(1) of the ASIC Act prohibits, in trade or commerce, conduct in connection with the supply or possible supply of financial services that is "in all the circumstances, unconscionable".

75 The ASIC Act contains its own definition of "financial services", which is relevantly similar to the definition provided in the Corporations Act. Section 12BAB of the ASIC Act provides that a person "provides a financial service" if they deal in a financial product: s 12BAB(1)(b). As in pt 7 of the Corporations Act, a person deals in a financial product by issuing a financial product: s 12BAB(7). Finally, a derivative is a "financial product": s 12BAA. Unlike pt 7 of the Corporations Act, there is no definition of "derivative" in the ASIC Act. The ordinary meaning of the word in the financial services context is "a financial instrument or asset, the value of which is derived from a link to some other investment or asset, such as a future contract, option contract, etc." (*Macquarie Dictionary,* 7th edition, p 412). I find that binary options constitute derivatives for the purpose of the ASIC Act, and therefore, by issuing binary options, One Tech provided a "financial service" as defined in the ASIC Act. Further, the financial services were provided "in trade or commerce". In *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; 169 CLR 594, Mason CJ, Deane, Dawson and Gaudron JJ

remarked at 604 (in relation to the phrase "in trade or commerce" as it appeared in s 52 of the *Trade Practices Act 1974* (Cth)):

> What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.

One Tech's business of offering trading in binary options by promoting its services through the Titantrade website, conducted for the purpose of financial gain, was clearly of a trading or commercial character. I therefore find that One Tech's conduct toward its website customers was "in trade or commerce" for the purpose of s 12CB(1) of the ASIC Act.

76 Section 12CC(1) of the ASIC Act sets out a non-exhaustive list of matters to which the Court may have regard for the purpose of determining whether a person has contravened s 12CB in connection with the supply of financial services to a person. Statutory unconscionability under s 12CB of the ASIC Act is wider than under equity and the general law and is not limited by the unwritten law relating to unconscionability: *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 93 ALR 743 ("***Kobelt***") at 762 [83] per Gageler J; at 773 [144] per Nettle and Gordon JJ; at 799 [295] per Edelman J; *Paciocco v ANZ Banking Group* [2015] FCAFC 50; 236 FCR 199 at 271 [283] per Allsop CJ (Besanko and Middleton JJ agreeing).

77 The matters listed in s 12CC(1) relevantly include: the relevant strengths of the bargaining positions of the supplier and the service recipient (sub-para (a)); whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier (sub-para (b)); whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services (sub-para (c)); whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient by the supplier or a person acting on behalf of the supplier (sub-para (d)); the extent to which the supplier unreasonably failed to disclose the supplier's intended conduct which might affect the service recipients' interest (sub-para (i)); where there is a contract between the service recipient and the supplier for the supply of the financial services, the terms and conditions of the contract, and any conduct that the service recipient or the suppler engaged in in connection with their commercial arrangement after they entered the contract (sub-para (j));

and the extent to which the supplier and the service recipient acted in good faith (sub-para (l)). The various indicia set out in s 12CC(1) are not exhaustive: *Kobelt* at 749 [6] per Kiefel CJ and Bell J (Keane J agreeing at 767 [114]); at 775-6 [154] per Nettle and Gordon JJ; and at 801 [302] per Edelman J.

78 Section 12CB(4)(b) provides that the section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. Thus, a systemic practice directed to exploiting consumers is capable of constituting unconscionable conduct, without the need to identify the circumstances of, or effect on, any particular consumer: *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 at [30] and [33].

79 A systemic practice directed to exploiting consumers is borne out by the evidence in this case. The common experience of the investors who gave evidence in this proceeding was that:

(a) they were initially enticed by a number of wins and bonuses (which were not paid to them but only credited to an account statement available on the website) and then quickly began to experience losses, especially after making a request to withdraw their money;

(b) when all initial deposits were depleted they were encouraged to make further and larger deposits based on the representations that their losses could be recovered though further trading;

(c) they did not exercise their own discretion as to which trades to place, but were directed by, and relied entirely on, the instructions of the broker representatives of One Tech in respect of the trades to place.

80 Further, though it is not necessary for ASIC to show that individual customers of One Tech were in a position of "special disadvantage" of the kind considered in *Commercial Bank of Australia v Amadio* [1983] HCA 14; 151 CLR 447 ("***Amadio***"), each of the investors who gave evidence were in a position of some vulnerability.

81 In relation to Mr Wyatt, One Tech knew from his passport details that he was elderly; represented to him that his broker would teach him how to trade in binary options; instructed him to take a second mortgage over his house in order to withdraw funds for binary options trading; instructed him as to which trades to place and for how much; refused his request in February 2016 to make withdrawals from his online account balance, being US$104,000, on

the basis that he had not satisfied the necessary trade "level" in order to be eligible for withdrawals; refused his request in March 2016 to close his online account; and instructed him to place further trades. Mr Wyatt relied on those instructions and as a consequence lost all money he deposited in the total sum of US$98,606.

82 In relation to Mr Tottman, One Tech knew he was living with a disability; knew he was taking strong prescription pain medication which was having a significant physical effect on him, including affecting his ability to think clearly and taking him "away with the fairys [sic]"; knew he had significant ongoing medical expenses; encouraged him to spend money he had saved for his spinal surgery; encouraged him to draw further funds from his credit card; became hostile in Skype messages when Mr Tottman was reluctant to place further trades; instructed him to place further trades which caused him to lose all the money he had deposited, being a total of A$25,600; and refused repeated requests (including in March and July or August 2016) to withdraw his money on the basis that he had to "reach a certain amount" in order to be eligible for withdrawals.

83 In relation to Mr Bowyer, One Tech knew he was elderly and retired; knew he was a self-funded retiree; knew he was required to make significant mortgage repayments; encouraged him to draw on his retirement savings; encouraged him to sell his shares in order to make deposits for binary options trading, which he did, raising A$103,000; instructed him to make large deposits in the order of US$250,000; placed trades on his behalf but for greater amounts and time periods than what he had authorised; ignored his request in August 2016 to withdraw the agreed monthly withdrawal amount; placed loss-making trades without authority; continued to trade on his behalf despite instructions to stop trading; instructed him to pay US$15,000 from his credit card account in order to obtain a US$25,000 "refund" but then cancelled the refund request upon receipt of the US$15,000 "deposit" and abruptly ceased all contact with him and did not return his calls.

84 In relation to Ms Malland, One Tech knew she was elderly and was drawing on her superannuation fund to trade through the website; instructed her as to which trades to place and for how much, as a result of which she lost all the money she had deposited, being a total of US$137,973; told her she could enter a "recovery arrangement" to win back her losses by depositing a further US$20,000; told her she could withdraw amounts won under the "recovery arrangement" within 14 days; accepted a deposit of US$5,700 towards the "recovery arrangement" and then abruptly ceased all contact with her.

85 In relation to Ms Graham, One Tech knew that she was retired and living off superannuation; knew of her ill health (chronic pain); knew that she had debts; knew that she only had A$50,000 in superannuation; encouraged her to deposit approximately 80% of her remaining superannuation (A$39,500) into her Titantrade account; instructed her as to which trades to place and for how much, as a result of which she lost all of the money she had deposited, being the sum of A$46,405; and ignored her request to withdraw A$5,000 from her online trading account and abruptly ceased all contact with her.

86 The evidence revealed a deliberate deception of vulnerable people to trap them into parting with their money in a way that deprived them of any opportunity to recover it. I find that One Tech engaged in unconscionable conduct in connection with the financial services contrary to s 12CB(1) of the ASIC Act:

(a) the investors were in a much weaker bargaining position relative to One Tech, as they were inexperienced in trading in binary options and, except in the case of Mr Bowyer, inexperienced in trading on the share market and managing a financial portfolio;

(b) the trading volume required to withdraw funds once a bonus had been paid was not adequately disclosed, impossible to achieve and was not reasonably necessary to protect the interests of One Tech;

(c) a number of the investors did not fully understand the documents relating to the operation of their accounts, in particular the terms of the bonus agreement limiting their ability to withdraw funds;

(d) unfair tactics were used to entice investors to place trades;

(e) unfair tactics were used to pressure investors into depositing substantial amounts of money;

(f) One Tech acted outside of societal norms of acceptable commercial behaviour by placing pressure on investors who were elderly, living with disability or ill health, retired and living off superannuation funds, to take funds on which they lived and use those funds in risky trades in binary options which they were bound to lose. The pressure continued even in the face of resistance by the investors, or protestations that they needed their funds to meet their living expenses (in the case of Mr Bowyer), repay debts (Ms Graham), or for surgery (Mr Tottman). When investors sought to limit their exposure and withdraw

remaining funds those withdrawal requests were refused. Further, in the case of Mr Bowyer, there was evidence of One Tech representatives making unauthorised loss-making trades on his behalf and without his knowledge.

87 By engaging in this conduct, One Tech contravened s 12CB(1) of the ASIC Act. As the contravention of s 12CB(1) has been made out, whether there was a contravention of s 12CA need not be considered. But if it were necessary to decide, I would find that the conduct in relation to each of the investors who gave evidence constituted the knowing exploitation of a special disadvantage in the *Amadio* sense and was a contravention of s 12CA of the ASIC Act. Each of those investors was in a position of great vulnerability which was known by, or should have been sufficiently evident to, the Titantrade brokers who dealt with them and who took advantage of their vulnerabilities in a morally culpable way.

CONTRAVENTIONS BY THE OTHER DEFENDANTS

88 ASIC has made two claims against the third to sixth and eighth to eleventh defendants. The first claim is that from 5 January until 5 July 2016, each of them contravened s 911A of the Corporations Act by "arranging for" One Tech to issue binary options without any of those defendants having an Australian financial services licence. The second claim is that each of those defendants contravened s 1012B(3) of the Corporations Act by "offering to arrange the issue of financial products", namely binary options, to website customers in Australia without giving them a product disclosure statement. The basis of ASIC's allegation against these defendants is not that each of them engaged in conduct which, standing alone, constituted the contraventions. Rather, ASIC has alleged they participated in an "unincorporated joint venture" to conduct a paying agency business, which provided paying agency services to One Tech to enable One Tech to issue binary options by collecting, remitting and facilitating payments made by website customers to One Tech.

89 It was contended that:

(a) Ida provided his services to the paying agency business through IMC;

(b) Eustace provided his services to the paying agency business through Sansen; and

(c) Cameron provided his services to the paying agency business through Bianco.

90 The alleged joint venture participants were said also to include Allianz Australia, Transcomm Australia and two non-parties:

(a) Transcomm Global Limited, a company incorporated in Gibraltar ("**Transcomm Gibraltar**"). A Shahid Tanveer ("**Mr Tanveer**"), an Indian national, was recorded as the sole director and shareholder, though Ida held himself out as a director and Eustace said the beneficial owners were Sansen and IMC; and

(b) Allianz Seychelles.

91 In its written opening submissions, ASIC also identified a third non-party, Allianz Metro Limited Inc., a company incorporated in the Philippines, ("**Allianz Philippines**") as conducting the joint venture.

92 In its written submissions, ASIC alleged that the alleged joint venturers provided two key services to the operators of the Titantrade website:

(a) payment processing services by means of credit cards ("**credit card business**"); and

(b) paying agency services by bank ("or wire") transfers ("**paying agency business**").

93 The Senese defendants denied ASIC's allegations that they "arranged for" anyone to "issue" a binary option or "offered to arrange for the issue" of binary options. Ida and IMC (who did not appear) did not file a Concise Statement in response to the allegations against them.

94 ASIC has a third claim against Allianz Australia. ASIC has alleged that Allianz Australia contravened s 911A and s 1012B(3) of the Corporations Act because it provided a custodial or depository service within the meaning of s 766E of the Corporations Act without holding an Australian financial services licence or providing produce disclosure statements. This claim has also been denied.

95 Finally, ASIC has alleged that Eustace, Ida and Cameron have twice or more contravened the Corporations Act while as company directors, or have been directors of companies which twice or more contravened the Corporations Act, and are therefore liable to disqualification under s 206E of the Corporations Act. Eustace and Cameron have denied these allegations against them on the basis that neither they nor any company of which they were the directors have contravened the Corporations Act.

The evidence

96 The website identified three ways of making payments: by credit card deposits, by an "alternative payment method" known as "electronic wallets" and by wire transfers. The investors who gave evidence each used the first and third methods to place deposits into their Titantrade accounts.

97 The following analysis in ASIC's written submissions at [52]–[58] of the contractual arrangements involving Transcomm Gibraltar and Transcomm Australia with respect to the credit card business was accepted by the Senese defendants as accurate:

> Between 2014 and 2015 Transcomm Gibraltar was involved in providing credit card payment services based in the Philippines and then India. The services were software programs and associated services described as the "Transcomm Gateway" which enabled online merchants to receive payments from customers via the customers' credit cards. It appears that Transcomm Gibraltar operated in the Philippines, with a call centre, staff and offices based there. These additional services may have been provided by Allianz Philippines. Transcomm's operations in the Philippines were managed by Shahid Tanveer, who reported to Eustace.
>
> On 18 June 2015, Transcomm Gibraltar entered into the Payment Solutions Agreement with Primero Capital Solutions Ltd, an Anguilla (BWI) incorporated company ("**Primero**"). Primero is recorded in the agreement as "trading as URL www.titantrade.com". There is evidence that people at both Primero and One Tech have email addresses "@migfin" and so it may reasonably be inferred that the two entities are connected. Ida admits he signed the Payment Solutions Agreement on behalf of Transcomm Gibraltar.
>
> The Recitals to the Payment Solutions Agreement provide: "[Transcomm Gibraltar] will provide electronic commerce payment solutions and services to [Primero] including online payment processing and settlement of Transactions."
>
> Transcomm Gibraltar had a number of other clients using the Transcomm Gateway in addition to One Tech/Primero. A transaction summary spreadsheet produced by Cameron shows "the online payment gateway transactions that occurred for those gateway accounts". The spreadsheet shows that the Transcomm Gateway facilitated a significant volume of trades (payments totalling $696,014 in 2 weeks in July 2015).
>
> The spreadsheet appears to show seven credit card transactions (only 3 are recorded as successful) made, or attempted to be made, during 1 and 13 July 2015 by customers with address details in Australia.
>
> Since at least May 2014, Transcomm Australia has held a Business One account at Westpac Bank, having account number 332644 (**Transcomm Business One Account**). Between May and December 2015, Transcomm Australia received numerous payments into the Transcomm Business One Account from Transcomm Gibraltar and Allianz Philippines. It can be inferred that these payments were received in consideration of Transcomm Australia providing the Transcomm Gateway and related services. To the extent that Eustace, Cameron and Ida provided services to Transcomm Australia through the companies controlled by them (Sansen, Bianco and IMC Holdings respectively), each of them received payments from the Transcomm Business One Account. During 2015, Cameron received a fee of $20,000 per month

> for his work for Transcomm Australia. The payments were described as "Cons Fee" (i.e. consulting fees) or "Fees". Transcomm Australia also paid for items such as the fraud detection software (Kount), which Transcomm Australia used to provide the services under the Payment Solutions Agreement and for ASIC fees related to Ida's company, IMC Holdings.
>
> In mid to late 2015, it appears that Transcomm Gibraltar experienced some difficulties in the Philippines, including with the Fraud Control Department of the Bank of the Philippine Islands because of excessive chargebacks, i.e refund requests by credit card holders. This resulted in the closure of the Transcomm credit card payment business, including the Transcomm Gateway, and the call centre in the Philippines. According to Ida, the credit card payment business in the Philippines was shut down due to "a huge amount of charge backs."
>
> (footnotes omitted)

98 The Senese defendants also did not dispute the following events which occurred in 2016 following the cessation of the provision of the Transcomm credit card payment business:

(a) on 5 January 2016, Eustace incorporated Allianz Australia. The sole director and shareholder of Allianz Australia is Eustace;

(b) on 6 January 2016, Eustace opened a Westpac Business One account in the name of Allianz Australia with himself as sole signatory. The evidence also showed that he subsequently opened additional accounts for the specific currencies: Euro, British Pound and US Dollar (together, "**Allianz Business One Accounts**");

(c) on 13 January 2016 Ida, on behalf of Allianz Seychelles, entered into a payment agency services agreement with One Tech ("**Paying Agency Agreement**"); and

(d) on 18 January 2016, Allianz Seychelles and Allianz Australia entered into a sub-agency agreement in relation to Allianz Seychelles' Paying Agency Agreement with One Tech ("**Sub-Agency Agreement**").

99 Under the Paying Agency Agreement:

(a) One Tech appointed Allianz Seychelles as "paying agent": s 1.01;

(b) Allianz Seychelles (or its associate) was obliged to open a number of accounts in the name of "Allianz Metro Limited" or the name of the associate, including a USD account at Westpac, and to provide details of the bank accounts to One Tech: s 1.02. The accounts were to be used to receive deposit funds from One Tech's clients: s 1.03;

(c) One Tech was obliged to collect certain identification and authorisation documents from its customers and send them to Allianz Seychelles at the email address "confirmationaml@cvspayments.com" ("**Confirmation Email Address**"): s 1.02.2. The documentation included an "Acknowledgment and Indemnity Letter" ("**Indemnity Letter**"). The evidence showed that the Confirmation Email Address was set up by Cameron at the request of Eustace and was accessible by, at least, Eustace, Cameron and Ida. Eustace sent the Confirmation Email Address to Ida and instructed him to notify "wiring clients to use it for all communication";

(d) Allianz Seychelles was obliged to hold all funds received from clients "as custodian for the benefit of" One Tech. The funds were stated to be for the purpose of receiving "Forex Services", which were defined to include "binaries options": s 1.03;

(e) funds received to the bank accounts were to be disbursed or remitted by Allianz Seychelles as directed by One Tech (less its Paying Agent Fees): s 1.04;

(f) Allianz Seychelles was entitled to a Paying Agent Fee of 7.5% on each deposit for its services: s 5.01 and Exhibit A to the Paying Agency Agreement.

100 Under the Sub-Agency Agreement, Allianz Australia agreed to provide wire transfer services to Allianz Seychelles. Clause 2.8 provided that Allianz Australia held deposited funds for the benefit of Allianz Seychelles to be disbursed in accordance with Allianz Seychelles' instructions. By cl 3.1, Allianz Australia was entitled to a fee of 7.5% of each deposit and €100.00 for each settlement for its services.

101 There was also general agreement between the represented parties about the typical procedure for a customer to make payments for trading in binary options on the websites from January 2016 onwards:

(a) most of the investors learned about the Titantrade website by browsing on the internet;

(b) the customer submitted an online application to open a Titantrade account;

(c) the customer was contacted by a representative of One Tech and asked to submit certain identification details (passport, utility bills) and a signed trading authorisation form;

(d) the customer was also required to sign the Indemnity Letter, which was then sent by One Tech to the Confirmation Email Address;

(e) the customer deposited the amounts with which they wished to trade into one of the Allianz Business One Accounts (together with a unique reference code) by wire or bank transfer, and sent a remittance advice confirming the deposit;

(f) the customer made a trade and the customer's Titantrade account was reduced by the purchase price. If the trade was successful, the customer's Titantrade account was increased by the amount predetermined when the binary option was purchased. Proceeds of successful trades and bonuses were credited to the customer's Titantrade account.

102 The Indemnity Letter contained acknowledgments and indemnities given by the website customer to Allianz Seychelles and its associates governing the basis upon which funds would be deposited into the bank accounts established and operated by Allianz Seychelles or its associates as paying agent for One Tech, and the extent and limit of the duties and liabilities of Allianz Seychelles and its associates to the website customer.

103 ASIC submitted that the evidence showed that Allianz Australia performed its role as an "Allianz Associate" under the Paying Agency Agreement through Eustace, Ida and Cameron by:

(a) receiving deposits from customers of the website into the Allianz Business One Accounts;

(b) receiving (and checking) detailed identification documents and remittance details from One Tech which showed the amounts to be deposited by website customers and their address details, including in Australia;

(c) engaging in day to day communications with One Tech in relation to customer identification details;

(d) holding website customers' funds in the Allianz Business One Accounts pending receipt of appropriate identification documents for the customers from One Tech;

(e) checking and reconciling amounts deposited by website customers against remittance advices received from One Tech;

(f) dealing with disputes about customer deposits; and

(g) transferring the customer funds (less commissions) to One Tech or as otherwise specified by One Tech under the Paying Agency Agreement.

104 It was not disputed that Allianz Australia performed its obligations under the Sub-Agency Agreement nor was it disputed that Allianz Australia did so through Eustace. In the written submissions for the Senese defendants it was accepted that Eustace was one of the persons who did the work that resulted in the performance of Allianz Australia's obligations and that Allianz Australia paid Sansen (Eustace's family trust), from its own commission, for providing Eustace's services. The evidence also showed that Eustace withdrew amounts from the Allianz Business One Accounts for personal expenses, including finance on his car and to pay his home loan.

105 It was also not disputed that Ida provided services for which he received significant payments out of the Allianz Business One Accounts, directly and through his company, IMC, with descriptions such as management fees and salary and expenses. In his examination conducted by the Israel Securities Authority on 16 January 2017, the transcript of which was annexed to Mr Standfield's affidavit of 22 December 2017, Ida admitted that he took more than the 7.5% commission fee allowed under the Paying Agency Agreement as "leverage" and used it for both company and personal purposes.

106 Nor was it disputed that Cameron, through Bianco, provided IT services to Allianz Australia and, like Eustace and Ida, Cameron (via Bianco) also received substantial payments from the Allianz Business One Accounts described as "consulting fees". However, it was submitted for Cameron that his role was merely to set up the Confirmation Email Address and provide high-level IT support for the paying agency business and he was not otherwise involved in Allianz Australia's paying agency business. The Senese defendants submitted that the consulting fees Cameron was receiving throughout 2016 related mainly to work he was undertaking for Transcomm Australia in developing a new gateway to process credit card transactions.

Was there an unincorporated joint venture?

107 ASIC submitted that the evidence showed "a web of legal persons and transactions which cannot be easily untangled so as to enable legal responsibility for particular acts to be attributed to particular persons". It was submitted that:

> In reality … a common enterprise was conducted by a number of natural persons on behalf of various corporate entities with the natural persons paying little attention to

> which particular legal person should be fixed with the responsibility for which particular acts. Such inattention to detail should not be, and is not, a shield against legal liability. It calls instead for an analysis which makes the best use of the relevant evidence to attribute responsibility on a common sense basis to the relevant legal persons.
>
> The most natural and satisfactory treatment of this evidence is to characterise the conduct of the relevant persons as the carrying on of a paying agency business through an unincorporated joint venture…
>
> (footnotes omitted)

108 The term "joint venture" does not have a settled common law meaning and joint ventures can take many forms: *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749 at [81]. A common form of joint venture is an association of persons combining their efforts and interests for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill: *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; 157 CLR 1 at 10 per Mason, Brennan and Deane JJ. The contractual arrangements between Allianz Seychelles and Allianz Australia demonstrate those features, and it may be apt to describe their relations as a joint venture, but whether or not their relations constitute a joint venture has no legal consequences in the consideration of the alleged contraventions. In relation to those companies, their contractual obligations are the source of their contravening conduct, if such liability arises.

109 The salient question is whether the other defendants can also be said to be participants in the alleged contravening conduct. For the reasons that follow, I am of the view that such a finding can be made in respect of Eustace and Ida.

110 First, the inference that Eustace and Ida engaged in the relevant conduct, paying little heed to the corporate entities, is available from the fact that they made substantial payments to themselves (or their private companies) out of the Allianz Business One Accounts described variously as commissions and fees, as well as taking out funds for personal benefit and "shared" costs. The "sharing of costs" was evidenced by bank statements for Transcomm Australia from 2016, which showed numerous credits to Transcomm Australia's bank account from the Allianz Business One Accounts during 2016, described variously as "Advance Internl", "Advance from AMPL", "Advance optg exps" and similar, and the payment of various expenses out of Transcomm Australia's bank account, although the credit card business had ceased sometime in 2015. In his examination conducted in Italy on 21 and 22 December 2016

by the Commissione Nazionale per le Società e la Borsa ("**CONSOB**"), the transcript of which was annexed to Mr Standfield's affidavit of 22 December 2017, Eustace explained that:

> No, we had been running the Transcomm business and building the Transcomm business and there was more development business going on the IT side and things we were going to do because we had stopped operating, as I mentioned yesterday, since about mid-2015 and there were costs and things that were going on which were effectively, if you like, shared costs and [Ida] was contributing towards those efforts and we, between us, agreed that from time to time we would pay some money over to him to cover those shared costs. Again, those shared costs that we sent out of Allianz [Australia] were out of our rights and our commissions or money that had been provided that were not client money…

111 Secondly, I am satisfied on the evidence that the paying agency business was a joint commercial enterprise which Eustace and Ida effected and controlled for their mutual advantage and commercial gain. The evidence showed that Eustace and Ida carried on their business ventures exercising joint control and without distinguishing corporate entities.

112 Eustace used the term "joint venture" to describe his prior dealings with Ida in the context of explaining why he was a signatory to IMC's bank account, saying that:

> Because at various times we were involved in business together and at times we were doing joint ventures and things together and he could delegate me to be a signatory, as is the case there. He was also a signatory.

113 Although Eustace was, and is, the sole director and shareholder of Allianz Australia, in an email from Eustace to Westpac he described Ida as the beneficial owner of Allianz Australia. When asked about this Eustace said:

> That's more speaking like as a group than Allianz [Australia] itself because all of that ecommerce and software and payment services is all really an overall operation and I think that Westpac was being given the big picture here…it's rather confusing. This is where, I guess, it's trying to give Westpac one big picture under one collective description of everything that the whole Allianz companies do…

114 Nor was any real distinction drawn by Eustace between Allianz Seychelles and Allianz Australia. In his CONSOB examination, in giving an explanation of the work conducted by "Allianz" under the Paying Agency Agreement, Eustace answered:

> Funds were sent to the Allianz bank account by clients under the direction of the clients' broker. The transactions were initiated or sold, or whatever they did, between the client and the broker. Allianz was in no way involved in those stages at all and subsequent to those parties arriving at a transaction and an account, they would be given the paying agency and paying agent clearing account, wiring details to send the money to, which they did, and then the broker would send to us, somewhere along contemporaneously, the details of the remittance, a copy of the bank remittance, the clients' KYCs, including passport or driver's licence, utility bill and other identification material and also a standard and signed indemnity and acknowledgment

> letter from the client stating to the effect that they clearly understood that Allianz was strictly and only a paying agent for the broker and that Allianz had no business or involvement in the business of the broker or in the FX or binary and that we were purely and only involved in the payment clearance business and that if they had any issue, problem, complaint, question, whatever, to do with the binary investment or FX investment, that they understood that they would do that by calling and contacting the broker and not Allianz, which had no business in it, and they would have signed every time and copied to us every time.
>
> When all of that material was in hand, Allianz would deduct the appropriate costs, bank fees and whatever was agreed under the agreement and a commission due to Allianz deducted from the broker because it was the broker's money and it then remitted the funds to the bank account as directed, and there were a number of bank accounts that were provided to send the money to for the broker, either for the benefit of the broker at their direction or directly to the broker.

When asked whether he was referring to Allianz Seychelles, Allianz Australia, or both of them, Eustace replied that:

> Well, effectively the flow of – the substance of that applies to both. In all cases, the client would wire the money to the account that they were told that was the designated account for wiring to in consequence of that broker's arrangement. So they were both doing the same thing, funds were wired into a designated bank account as provided and, in turn, then all the rest of it was common ….

115 In his CONSOB examination, in the context of questions concerning the Transcomm credit card services business, Eustace answered that Transcomm Gibraltar, Transcomm Australia and Allianz Philippines could "loosely" be described as a group of companies and that:

> They were all kind of part of a family of companies, if you like, that were all controlled by the same managers and people but they were not structured such that they were a classic, you know, holding company structure.

116 The company search of Transcomm Gibraltar showed Mr Tanveer as its sole director and shareholder. However, Ida signed the Payment Solutions Agreement on behalf of Transcomm Gibraltar as "director".

117 The sole director of Transcomm Australia was and remains Sandra, Eustace's wife, but the evidence showed that she played no role in the affairs of the company.

118 It was said that "further confusion of this kind" could be seen in an application form submitted by Eustace to Westpac for a bank account of IMC (Ida's private company of which Ida is the sole director and shareholder), dated 22 May 2013, in which Eustace described himself as the CEO of that company.

119 Ida gave similar evidence in relation to the activities that were conducted. When asked about his relationship to Allianz Australia and whether he had an agreement with Eustace about it, he said that:

> We never had a written agreement it was always verbally, always fifty-fifty.

120 In another part of the CONSOB examination, Eustace was asked who decided to incorporate or set up Allianz Philippines, Allianz Australia and Allianz Seychelles. His answer was that it was a "collective decision" mostly between him, Ida and Mr Tanveer:

> The decisions – like the decisions were all organic for the reasons that there was a need for a particular purpose in each place, like paying agency in Australia, paying agency from [Ida] in Israel for the Seychelles company; India for the overhead costs and, you know, running the staff there; Philippines for the call centre, customer service, administration. So they all had a reason to come out of the ground.
>
> QUESTION: But then was it a collective decision? Would you say it was a collective decision by [Ida] or [Mr Tanveer] or …
>
> ANSWER: It would be mostly between me, [Ida] and [Mr Tanveer]. We'd talk, like, "We're going to," you know, "we're going to move some parts of the business to India, we need to incorporate something," and then the decision would be made, "oh, well, [Mr Tanveer], you're in India, incorporate the thing," you know, and he'd go off and incorporate it and he'd say, "Send me the money". We'd send him the money and he'd incorporate and get the Apple Steels and all those things. The same in the – in the Philippines, we had a law firm do it for us. In Australia, I did it myself. In the case of the Seychelles, you'd have to ask [Ida] how he did it, but that was incorporated in the Seychelles and so he would have used a service to do that.

121 It appeared from the evidence that Ida's main areas of responsibility were marketing and client acquisition and Eustace's main areas of responsibility were management and administration, although, it was submitted, the evidence showed considerable overlap in the functions they actually carried out. ASIC submitted that the evidence showed also that Cameron and his private company Bianco did more than just provide IT services but also participated in the business operations, pointing to the evidence that Cameron, via Bianco, received substantial payments from the Transcomm Australia and Allianz Australia bank accounts and became involved in management matters concerning Transcomm Philippines. The overlapping nature of the responsibilities of Eustace, Ida and Cameron was said to be amply demonstrated by an exchange of emails between them in July 2015 concerning a dispute with Primero which had both technical and commercial aspects.

122 Whilst it appeared that Cameron had greater involvement with the Transcomm credit card business than just IT, the evidence was insufficient in my view to show that Cameron or Bianco had involvement in the paying agency business run by Allianz Seychelles and Allianz Australia

beyond setting up the Confirmation Email Address and providing IT support. The highest the evidence went towards showing an asserted involvement beyond the provision of IT support services was an internet chat between Eustace and Cameron on 14 March 2016 in which Cameron told Eustace that he saw some recent activity in the confirmation mailbox. He was questioned about this in his ASIC examination conducted on 1 August and 21 December 2016 in Melbourne, the transcript of which was annexed to Mr Standfield's affidavit of 22 December 2017. When asked to explain what he could recall from that, he responded that he did not specifically recall but "as an administrator of the platform hosting the mail, you know, you're able to see statistics of mail sent, email boxes, so most probably that's what I'm referring to". The explanation that he had access because he was the IT administrator can be accepted as credible and I do not think that the imputation sought be made by ASIC arises. There was otherwise no evidence to show that Cameron or Bianco performed any managerial tasks or "payment type work" for Allianz Seychelles or Allianz Australia or had any dealings with the investors or website customers generally.

123 The remaining defendant which ASIC contended was a participant in the relevant conduct is Transcomm Australia. ASIC submitted that it could be inferred that Transcomm Australia was involved in the paying agency business in 2016 by reason of the payments made to it from the Allianz Business One Accounts during 2016 and the fact that there was a withdrawal of A$14,363.69 from the Transcomm Australia bank account on 4 January 2016 described as "Wiring Settlement Chesterfield" ("**Chesterfield transaction**"). As the Chesterfield transaction was the only entry of that kind to which the Court was directed, and it happened the day before the incorporation of Allianz Australia, it may be inferred that Transcomm Australia was used just the one time. Further, the evidence suggested that the genesis of payments from the Allianz Business One Accounts related to a new gateway that Cameron was developing for Transcomm Australia in 2016, not for the paying agency business. Both the description "Advance Internl" and Eustace's evidence in his CONSOB examination that "there was more development business going on the IT side" with respect to Transcomm in 2016 and he and Ida had agreed to share the costs, which they paid out of the Allianz Business One Accounts, tend to support the conclusion that the payments were not for the paying agency business in 2016.

124 In summary, I accept that the evidence supports the finding, which I make, that Eustace and Ida were participants in the alleged contravening conduct together with the two Allianz entities but otherwise reject ASIC's case against Cameron and Bianco. Further, Sansen and IMC were

not shown to have a role other than, respectively, as Eustace's and Ida's private corporate entities. In the circumstances, I reject ASIC's submission that those companies should also be found to have engaged in the relevant conduct.

Did any of the other defendants "arrange for" the issue of binary options by One Tech?

125 Section 766C(2) of the Corporations Act provides that:

> Arranging for a person to engage in conduct referred to in subsection (1) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice.

126 The Corporations Act does not define the expression "arranging for" as that expression is used in s 766C(2). In *Stone Assets Management*, Besanko J considered whether the conduct of a company which promoted and facilitated online access to a website offering contracts for difference, and received commissions for doing so, amounted to "arranging" for another person to deal with a financial product for the purposes of s 766C(2) of the Corporations Act. Besanko J found that the facilitation of the company's client's access to the platform, which in turn allowed the client to acquire the contracts for difference, was sufficient to bring the activity within s 766C(2) and consequently amounted to the provision of "financial services" under s 766A(1) of the Corporations Act. Besanko J reasoned at 126 [22]:

> The defendant's facilitation of their client's access to the MetaTrader4 platform, which in turn allows the client to acquire CFDs, is sufficient to bring the activity within s 766C(2), and consequently amount to the provision of "financial services" under s 766A(1) of the Act. Although there is no express evidence that the company has in fact "arranged for a person to acquire" CFDs by using the MetaTrader4, the plaintiff submits that such an inference should be drawn from the defendant's bank records, obtained upon a notice to produce, from the Commonwealth Bank. The records, which were exhibited to the First Long Affidavit, show a sum totalling $10,397,612.42 was deposited into the defendant's Foreign Currency Account in the period from 1 April 2010 and 30 December 2011. Although there is no express evidence of the nature of or reason for these deposits, the plaintiff asks me to infer, and I think that it is proper to infer, that these sums were paid by way of commission, charged by the defendant for allowing access to the MetaTrader4. I find that the defendant did "arrange for a person" to apply for or acquire a financial product, namely, the CFDs offered by the MetaTrader4. It follows that the defendant was engaged in the provision of financial services for the purposes of s 766A(1) of the Act.

It was submitted for ASIC that the conduct of the defendant in *Stone Assets Management* was very similar to the conduct of Allianz Australia, except that ASIC has direct evidence of the purpose of the deposits whereas Besanko J inferred the purpose of the deposits by customers. ASIC further submitted that English and Canadian authority on the meaning of the expression "arranging" in financial regulatory legislation also supported ASIC's contention that each of the alleged joint venturers "arranged for" One Tech to issue binary options.

127 In *Re The Inertia Partnership LLP* [2007] EWHC 539 (Ch) ("***Re Inertia Partnership***") the question was whether various services which a partnership provided to companies that sold shares amounted to "making arrangements for" another person to sell shares within the meaning of art 25 of the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK): at [39]. The relevant article provided:

> (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is –
>
> a. a security,
>
> b. a relevant investment, or
>
> c. an investment of the kind specified by article 86, or article 89 so far as relevant to that article,
>
> is a specified kind of activity.
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.
>
> …

Article 26 contained an exception to art 25, namely:

> …arrangements which do not or would not bring about the transaction to which the arrangements relate.

It was held that sending out application forms, collecting cheques and making payments to the companies selling their shares fell within art 25. Jonathon Crow QC reasoned that the word "arrangements", depending on the context, was capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights and, in the context of art 25 and art 26, the word "arrangements" was used in contradistinction to the word "transaction" and that a person may make arrangements within art 25 even if the person's actions do not involve or facilitate the execution of every step necessary for entering into and completing the transaction: *Re Inertia Partnership* at [39].

128 In *Canadian Medical Protective Association v Crown* [2009] CAF 115 (Federal Court of Appeal, Canada), the issue was whether services provided by an investment manager which invested and managed funds for a medical liability insurer were exempt from goods and services tax as a "financial service" within the defined meaning of that term in s 123 of the *Excise Tax Act* (1985) (CA) ("**Canadian ET Act**"). Section 123(1) of the Canadian ET Act provided that a "financial service" means, relevantly:

…

(d) the issue, granting, allotment, acceptance, endorsement, renewal, transfer of ownership or repayment of a financial instrument,

…

(l) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (a) to (i), or

…

In issue was the meaning to be given to the word "arrange" in s 123(1)(l): at [30]. It was held that the services provided by the investment managers "considered as a whole" fell within paras 123(1)(d) and (l) as the end result of their services was to "cause to occur a transfer of ownership… of a financial instrument": at [64].

129 *Canadian Imperial Bank of Commerce v Crown* [2018] TCC 109 (Tax Court of Canada) concerned the same definition of "financial service". It was an agreed fact that Visa "develops, operates, manages and promotes a proprietary global retail electronic payments network that facilitates global commerce through the transfer of value" and that Visa provided "a bundle of rights and services to the [Canadian Imperial Bank of Commerce ('**CIBC**')]": at [5]. The issue was whether the services provided by Visa fell within the definition of "financial service": at [3]. Under para 123(1)(a) of the Canadian ET Act "financial service" also included:

> the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,

It was held that the service provided by Visa to the CIBC was a "financial service" under paras 123(1)(a) and (l) but was excluded from that definition under other paragraphs of s 123(1). In finding that the supply provided by Visa to the CIBC was a "financial service" under paras 123(1)(a) and (l), Rossiter CJ reasoned at [92]–[93]:

> Visa acts as a financial intermediary by facilitating the transfer of payments between issuers, acquirers and merchants. The services provided by Visa are linked to the financial services provided by CIBC in that they form an essential part of the ability for CIBC to offer credit card based services to their clients, as Visa helps to ensure that merchants are successfully paid after a CIBC client uses a visa credit card to purchase goods and services. The services provided by CIBC and the services provided by Visa are linked in their purpose to a degree where it can be said that Visa is "arranging for" the credit services offered by CIBC, through acting as an intermediary in the transfer of money. As a result, the conditions in paragraphs (a) and (l) are satisfied.
>
> This conclusion is reinforced when looking at the case law concerning the relevant UK VAT legislation, which like its Canadian counterpart exempts services that involve "the arranging for" a financial service. In *Customs and Excise Commissioners v Civil Service Motoring Association*, 1998 BVC 21 (Eng C.A.), the English Court of Appeal concluded that developing and maintaining standard arrangements to govern the

> issuance of credit cards was the arranging of a financial service, which in that case was the issuance of credit.

130 By parity of reasoning, ASIC argued that the paying agency services provided by Allianz Australia were "clearly an essential part of the arrangements for the issue of the binary options in this case" and that without those arrangements, the binary options would not have been issued as there would have been no ability to pay for them

131 It was argued for the Senese defendants, on the other hand, that all of the conduct which, in *Stone Assets Management*, amounted to "arranging for" was engaged in by One Tech, which operated the websites, and the investors' evidence clearly demonstrated that the persons who "arranged for" One Tech to enter into a contract for a binary option were the Titantrade brokers. It was submitted that none of the Senese defendants, whether their actions are viewed alone or in conjunction with others' actions, "arranged for" One Tech to issue binary options to website customers like the investors.

132 The question is whether the paying agency services constituted "arranging for" One Tech to deal in a financial product, namely the issue of binary options. The evidence plainly showed, in my view, that the paying agency services were an essential part of the trading in binary options through the website. The verb "to arrange" has a broad meaning which includes "to make preparations" (*Macquarie Dictionary*, 7th edition, p 76) and there is no warrant for giving the term "arranging for" in the context of s 766C(2) of the Corporations Act a narrow or restricted meaning. The services included the provision of the bank accounts to be used to receive deposit funds from One Tech's website customers, the vetting of customer information to open an account for trading and the facilitation and dealing with the receipt and remittance of website customers' funds. Those services were integral to the binary options trading by website customers using the bank transfer method through the websites and the issue of binary options by One Tech.

133 I therefore find that Allianz Australia contravened s 911A of the Corporations Act by arranging for One Tech to issue binary options without holding an Australian Financial Services Licence. I further find that Eustace and Ida, as the effective controllers directing the operations for their mutual commercial gain, also participated directly in arranging for One Tech to issue binary options and thereby each of those defendants also contravened s 911A of the Corporations Act by arranging for One Tech to issue binary options without holding an Australian financial services licence.

Did any of the other defendants contravene s 1012B(3) of the Corporations Act?

134 Section 1012B(3) of the Corporations Act provides:

> A regulated person must give a person a Product Disclosure Statement for a financial product if:
>
> (a) the regulated person:
>
> (i) offers to issue the financial product to the person; or
>
> (ii) offers to arrange for the issue of the financial product to the person; or
>
> (iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and
>
> (b) the financial product is, or is to be, issued to the person as a retail client.
>
> The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division.

135 Section 1012B(3) requires a "regulated person" to provide a product disclosure statement in certain circumstances when a financial product is issued to a retail client. Section 1011B defines "regulated person" to mean, relevantly "any person who is required to hold an Australian financial services licence but who does not hold such a licence".

136 Based on the finding that Ida, Eustace and Allianz Australia were all required to hold Australian financial services licences, each of them was a "regulated person" for the purposes of s 1012B(3). Given my finding that Eustace and Ida, as the effective controllers directing the operations for mutual gain, also participated directly in arranging for One Tech to issue binary options, I find they also contravened s 1012B(3) multiple times by offering to arrange for the issue of financial products to website customers without giving them a product disclosure statement.

137 ASIC next argued that the Indemnity Letter duly signed by each investor (save for Ms Graham, who did not make any deposits into the Allianz Business One Accounts), which One Tech was obliged to provide to Allianz Seychelles under cl 1.02.2 of the Paying Agency Agreement, constituted an offer, sent by One Tech on behalf of Allianz Seychelles and Allianz Australia, to arrange for the issue of the binary options within the meaning of s 1012B(3)(a)(ii). It was further argued that if the Court accepted ASIC's analysis of the way the paying services business operated, it followed that the "offer" should be construed as an offer made on behalf of all the alleged joint venture participants conducting the paying agency business. However, whilst I have found that Allianz Australia, Eustace and Ida, through the paying agency business,

did "arrange for" One Tech to deal in a financial product, I do not accept the characterisation of the Indemnity Letter as an offer to arrange for the provision of binary option trading through the websites. It was a requirement of Allianz Seychelles that One Tech obtain a signed Indemnity Letter from each website customer who made payments via the Allianz Business One Accounts but, properly considered, the characterisation of the Indemnity Letter as an offer is inaccurate. Rather, the Indemnity Letter constituted an agreement by the investor in relation to their rights as against Allianz Seychelles and the Allianz Associates in relation to the remittance of funds. Accordingly, I find that Allianz Australia did not contravene s 1012B(3) of the Corporations Act.

Did Allianz Australia provide a custodial or depository service?

138 ASIC contended that Allianz Australia also contravened s 911A by providing a custodial or depository service within the meaning of s 766E(1) without having an Australian financial services licence. Section 766A(1) of the Corporations Act relevantly provides that for the purposes of ch 7 of the Corporations Act, a person provides a financial service if they provide a custodial or depository service: s 766A(1)(e). Section 766E(1) defines a custodial or depository service as follows:

> … 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.

139 Section 763A(1) relevantly provides that for the purposes of ch 7, a "financial product" is "a facility through which, or through the acquisition of which, a person... makes a financial investment": s 763A(1)(a). Section 763B defines when a person makes a "financial investment" and provides, relevantly, that for the purposes of ch 7 an investor makes a "financial investment" if:

> (a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return

> or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

140 By reg 7.1.40(1)(c) of the Regulations, conduct does not constitute the provision of a custodial or depository service if the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide.

141 It was contended that for the purposes of s 766E, Allianz Australia was a "provider" of a custodial or depository service as:

(a) it had an arrangement with:

(i) "client" (the website customer) as set out in the Indemnity Letter; and also

(ii) "another person with whom the client has an arrangement" (One Tech) as set out in the Paying Agency Agreement; and

(b) there were more than 20 website customers whose funds were held by Allianz Australia.

142 It was further argued that the deposited funds in the Allianz Business One Accounts used to make the investments in the binary options were "financial products" as defined under s 763A(1), in that such funds were used to make "financial investments" as defined, and that Allianz Australia held "a beneficial interest in a financial product", in that under the terms of its agreement with both the customer and One Tech, it held the funds deposited by the customer for binary options trading "on trust for, or on behalf of" the customer or One Tech, being "a person nominated by the client".

143 ASIC submitted that this analysis was consistent with the analysis adopted by Flanagan J in *Australian Securities and Investments Commission v Munro* [2016] QSC 9 ("***Munro***"). In that case, Mr Munro operated a scheme under which participants deposited funds into certain bank accounts which would be pooled and used by Mr Munro to trade on offshore trading platforms. Flanagan J held that the conduct of Mr Munro's wife in permitting the funds to be deposited and transferred in and from bank accounts held by her constituted "providing a custodial or depository service" under s 766E. Flanagan J said at [58]:

> As to the first basis, a person provides a financial service if they provide a custodial or depository service. 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.
>
> (footnotes omitted)

144 In *Wang v Australian Securities and Investments Commission* [2019] FCA 1178 ("***Wang***"), which was handed down after the hearing in this matter, Bromwich J similarly found at [119] that money could be a "financial product" under s 763A(1):

> It is clear from the Tribunal's findings of fact that Dr Guan gave money and thus a contribution to Easy Capital Global, intending that Easy Capital Global would use that contribution to generate a financial return for him, in circumstances in which he had no day-to-day control over the use of the contribution to generate the return. The money Dr Guan deposited into the account of Easy Capital Global was therefore a financial product. It was therefore covered by s 1041H(1).

145 Allianz Australia submitted that money is not "a facility through which, or through the acquisition of which, a person … makes a financial investment" and that Flanagan J was wrong to hold that the funds were a financial product. I agree with that submission and, with respect, would not follow *Munro* or *Wang*. In my view, their Honours incorrectly conflated the use of the funds to make a financial investment with the financial product by which the financial return is generated. In the more recent decision of *Australian Securities and Investments Commission v Goldsky Global Access Fund Pty Ltd & Ors* [2019] QSC 114 ("***Goldsky Global***"), Flanagan J considered the issue again and developed the analysis differently. Also in issue in that case was whether the respondents provided a custodial or depository service within the meaning of s 766E by holding investors' funds in bank accounts. In holding that s 766E applied, his Honour identified the bank account as the "facility" through which the investors made their "financial investments": at [31]. In my view, that was a correct analysis and I am prepared to accept that the bank account may constitute the "facility". Section 762C of the Corporations Act stipulates that for the purpose of div 3 of pt 7.1 of the Corporations Act, "facility" includes:

> (a) intangible property; or
>
> (b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or
>
> (c) a combination of intangible property and an arrangement or term of an arrangement.

This definition is not exhaustive, and in ordinary meaning, the word "facility" is, in my view, apt to cover a bank account. There are, nonetheless, a number of reasons why neither *Munro* nor *Goldsky Global* assists ASIC in the present case.

146 First, the requirements of s 763A(1) and s 763B of the Corporations Act must also be satisfied for Allianz Australia to provide a custodial or depository service. That is to say, there must be a "facility" through which the investors made "a financial investment". In my view it cannot be said that the investor "makes a financial investment" through the facility constituted by the bank accounts into which they deposited their funds. This is because Allianz Australia, under its contractual terms, neither itself used the deposited funds to generate a financial return (or other benefit) for the investors, nor intended the deposited funds be used to generate a financial return (or other benefit) for the investors. Pursuant to the Sub-Agency Agreement, it held the deposited funds "as custodian for the benefit of [Allianz Seychelles] (subject to the provisions and responsibilities of [Allianz Seychelles] under the Master [Paying Agency] Agreement" and was required to "disburse those funds by wire transfer strictly in accordance with" instructions from Allianz Seychelles: cl 2.8. Under the Paying Agency Agreement, Allianz Seychelles held the deposited funds "as custodian for the benefit of" One Tech and was required to disburse those funds in accordance with instructions from One Tech: cls 1.03 and 1.04. Further, by and under the Indemnity Letter, the investors acknowledged that the involvement of Allianz Seychelles and Allianz Australia in relation to the deposited funds was "strictly limited to the carrying out of the duties and services set forth in the Paying Agency Agreement" and that the role of those companies was as "paying agent" in connection with the receipt and disbursement of the funds. The Indemnity Letter also expressly provided that the investor acknowledged entering into a "private and separate commercial and/or investment agreement … directly with [One Tech] under which [One Tech] will apply and invest the Funds in accordance with the provisions in the Investment Agreement". The Indemnity Letter further contained the express acknowledgment that the investor confirmed their understanding "that Allianz and/or the Allianz Associates are in no way involved directly or indirectly in the investment decisions, administration or conduct of the investments as contemplated under the Investment Agreement and that the role and function of Allianz and the Allianz Associates is strictly limited to that of paying agent, as provided in the Paying Agency Agreement".

147 Secondly, there was no "arrangement" between Allianz Australia (or Allianz Seychelles) and the investors or between Allianz Australia (or Allianz Seychelles) and One Tech by which the

binary options, or a beneficial interest in such options was held by Allianz Australia (or Allianz Seychelles) in trust for, or on behalf of, the investor.

148 Accordingly I find that Allianz Australia did not provide a custodial and depository service within the meaning of s 766E(1).

SECTION 206E OF THE CORPORATIONS ACT

149 Section 206E provides:

> (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
>
> (a) the person:
>
> (i) has at least twice been an officer of a body corporate that has contravened this Act or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
>
> (ii) has at least twice contravened this Act or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 while they were an officer of a body corporate; or
>
> (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (1A) For the purposes of subsection (1), a person is an officer of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate.
>
> (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

Given my finding that Bianco did not contravene the Corporations Act as alleged, ASIC's claim for a disqualification order against Cameron under s 206E has not been made out. I will hear submissions from the parties in relation to disqualification orders against Eustace and Ida.

ORDERS

150 The parties are directed to file minutes of proposed orders within 14 days giving effect to these reasons and providing a proposed timetable for a hearing as to penalties.

I certify that the preceding one hundred and fifty (150) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 5 February 2020

SCHEDULE OF PARTIES

VID 848 of 2016

Defendants

Second Defendant:	**ULTRA SOLUTIONS MG (UK) LIMITED**
Third Defendant:	**ALLIANZ METRO PTY LTD (ACN 610 042 843)**
Fourth Defendant:	**EUSTACE SENESE**
Fifth Defendant:	**SANSEN PTY LTD (ACN 111 816 178)**
Sixth Defendant:	**TRANSCOMM GLOBAL PTY LTD (ACN 169 503 762)**
Seventh Defendant:	**SANDRA SENESE**
Eighth Defendant:	**BIANCO PTY LTD (ACN 604 778 305)**
Ninth Defendant:	**CAMERON DAVID SENESE**
Tenth Defendant:	**IMC HOLDINGS PTY LTD (ACN 138 415 291)**
Eleventh Defendant:	**YOAV IDA**
Twelfth Defendant:	**WESTPAC BANKING CORPORATION ABN 33 007 457 141**
Thirteenth Defendant:	**NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937**
Fourteenth Defendant:	**BENDIGO AND ADELAIDE BANK LIMITED ABN 11 068 049 178**
Fifteenth Defendant:	**COMMONWEALTH BANK OF AUSTRALIA (ABN 48 12 12 124)**
Sixteenth Defendant:	**CITIGROUP PTY LTD ABN 88 004 325 080**