SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Pty Ltd (in liq) v Ernst & Young & Ors* [2017] QSC 73
PARTI ES:	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288** (plaintiff) v **EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)** (first defendant) and **PAULA McLUSKIE** (second defendant) and **MICHAEL JAMES REID** (third defendant)
FILE NO/S:	2166 of 2015
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	8 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	15 December 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. the plaintiff amend the second further amended statement of claim to delete the causes of action:** **(a) based upon sections 38 and 99 of the FTA or upon a retrospective operation of sections 18 and 236 of the ACL;** (b) **alleged in paragraphs 85(a)(xx), 85(g)(ix), particular (ii) under paragraph 85(k) and paragraphs 93(e) and 95(m) of the second further amended statement of claim to the extent that they relate to breaches that occurred before 14 April 2010 that were not breaches of contract or**

negligence.

CATCHWORDS: **PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where a claim for damages was commenced against the auditors of a managed investment scheme for breach of contract, or negligence, or contraventions of the *Fair Trading Act* 1989 (Qld), *Trade Practices Act* 1974 (Cth), *Competition and Consumer Act 2010* (Cth), *Corporations Act 2001* (Cth) and *Australian Investments and Securities Commission Act* 2001 (Cth) – where a Further Amended Statement of Claim and a Second Further Amended Statement of Claim were filed – where an application was brought by the defendants for the Further Amended Statement of Claim and Second Further Amended Statement of Claim to be struck out, or for the amendments made in them to be disallowed under rr 171 and 379(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the applicants argued that the amendments added causes of action which were time barred at the commencement of the original claim or at the time when the amendments were made – where the respondent argued that some of the causes of action had been concealed by the fraud of the applicants – whether the Further Amended Statement of Claim and Second Further Amended Statement of Claim, or parts thereof, should be struck out**

Acts Interpretation Act 1954 (Qld), s 20
Australian Investments and Securities Commission Act 2001 (Cth), s 12DA, s 12GF
Civil Proceedings Act 2011 (Qld), s 16
Competition and Consumer Act 2010 (Cth)
Corporations Act 2001 (Cth), s 1041H, s 1041I, s 601HG
Fair Trading Act 1989 (Qld), s 38, s 99
Fair Trading (Australian Consumer Law) Act 2010 (Qld)
Limitation of Actions Act 1974 (Qld), s 10, s 38
Trade Practices Act 1974 (Cth), s 52, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 171, r 375, r 376, r 379

Australian Iron & Steel Ltd v Hoogland (1962) 108 CLR 471, cited
Baker-Morrison v State of New South Wales (2009) 74 NSWLR 454, cited
Banque Commerciale SA (en liq) v Akhil Holdings Ltd (1990) 169 CLR 279, cited
Bird v John Sharp & Sons Ltd (1942) 66 CLR 233, discussed
Grundy v Lewis (1995) 62 FCR 567, cited
Hugh Francis Arthur Williamson v Elders Ltd & ors [2016] NSWSC 450, cited
Kitchen v Royal Air Force Association [1958] 1 WLR 563, considered

Levy v Watt [2014] 308 ALR 748, cited
Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, cited
New South Wales v McCloy Hutcherson Pty Ltd (1993) 43 FCR 489, cited
Palmdale Insurance Ltd v L Grollo & Co Pty Ltd [1986] VR 408, cited
Paul v Westpac Banking Corporation Ltd [2016] QCA 252, considered
Prepaid Services Pty Ltd v Atradius Credit Insurance NV (2013) 302 ALR 732, cited
re Player; ex parte Harvey (1885) 54 LJ (QBD) 553, discussed
re Ashcroft; ex parte Todd (1887) 19 QBD 186, discussed
Riches v Director of Public Prosecutions [1973] 1 WLR 1819, cited
Ronex Properties Ltd v John Laing Construction Ltd [1983] QB 398, cited
Seymour v Seymour (1996) 40 NSWLR 358, considered
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, cited

COUNSEL: B Roberts SC for the applicants
R Derrington QC with D Ananian-Cooper for the respondent

SOLICITORS: King and Wood Mallesons for the applicants
Gadens Lawyers for the respondent

1. **Jackson J:** The amended application seeks orders that the Further Amended Statement of Claim filed on 14 April 2016 ("FASOC") and the Second Further Amended Statement of Claim filed on 2 August 2016 ("2FASOC") be struck out or that the amendments made in them be disallowed pursuant to r 171 and r 379(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). In the alternative, an order is sought pursuant to rule 379(2) that the amendments introducing a new cause of action that is or may be time barred take effect on and from 14 April 2016 and 2 August 2016 respectively.

2. The subject matter of the proceeding is a claim for damages against auditors for breach of contract, or negligence, or contraventions of the *Fair Trading Act* 1989 (Qld) ("FTA"), *Trade Practices Act* 1974 (Cth) ("TPA"), *Competition and Consumer Act* 2010 (Cth) ("CCA"), *Corporations Act* 2001 (Cth) ("CA") or *Australian Investments and Securities Commission Act* 2001 (Cth) (ASIC Act").

3. There are several grounds of the application. One is that some of the amendments add new causes of action that have always been time barred by s 10 of the *Limitation of Actions Act* 1974 (Qld) ("LAA"), s 99(3) of the FTA, s 82(2) of the TPA, s 236(2) of the *Australian Consumer Law* ("ACL"), s 1041I(2) of the CA and s 12GF(2) of the ASIC Act. Another is that some of the amendments add new causes of action that were not time barred when the proceeding was started but were time barred when the amendment was made and do not arise out of substantially the same facts under rule 376 of the UCPR. A third is that some of the amendments that allege fraudulent concealment under s 38(1)(b) of the LAA of rights of action

for damages for breach of contract or negligence are insufficiently supported by pleaded facts. The last is that the proceeding was commenced more than three years after any causes of action for damages under s 38 and 99 of the FTA accrued, contrary to s 99(3) of the FTA.

Background facts

4. At all material times the First Mortgage Investment Fund ("the Fund") was a registered managed investment scheme under Ch 5C of the CA.

5. The plaintiff was the responsible entity obliged to operate the scheme and perform the functions conferred on it by the scheme's constitution and the CA.[1]

6. The plaintiff sought investment from the public for the Fund. It issued prospectuses or public disclosure statements. Investors subscribed for units in the Fund. The plaintiff invested the money raised by making loans secured by registered mortgages over real property.

7. Under the CA, the Fund was required to have a constitution,[2] the plaintiff was required to ensure that the constitution met the relevant requirements,[3] the Fund was required to have a compliance plan,[4] the plaintiff was required to ensure that the compliance plan met the relevant requirements[5] and the plaintiff was required to comply with the compliance plan.[6]

8. Also under the CA, the plaintiff was required to prepare a financial report including financial statements and notes for the Fund on a yearly[7] and (because the Fund was a disclosing entity[8]) a half yearly[9] basis. The annual financial reports were required to be audited.[10] So too was compliance with the compliance plan.[11] The half-yearly financial report was required to be reviewed or audited.[12] The plaintiff was required to engage a registered auditor to review or audit the financial reports and to engage a registered auditor to audit compliance with the compliance plan.[13]

9. For the financial years from 2008 to 2012, the first defendant was engaged as the auditor of the Fund. For each financial year, there were three engagements: first, to review and provide a report on the half yearly financial report; second, to audit and provide a report on the annual financial report; and third, to audit and provide a report on compliance with the Fund's compliance plan.

10. The second defendant was the registered auditor who led the reviews and audits of the financial reports for each half-yearly and annual period.

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1 *Corporations Act* 2001 (Cth), s 601FB(1).
2 *Corporations Act* 2001 (Cth), ss 601EA(4)(a), 601GA and 601GB.
3 *Corporations Act* 2001 (Cth), s 601FC(1)(f).
4 *Corporations Act* 2001 (Cth), ss 601EA(4)(b), 601HA and 601HB.
5 *Corporations Act* 2001 (Cth), s 601FC(1)(g).
6 *Corporations Act* 2001 (Cth), s 601FC(1)(h).
7 *Corporations Act* 2001 (Cth), ss 292(1)(d) and 295(1)(a).
8 *Corporations Act* 2001 (Cth), s 111AC(2) and 111AFA(1).
9 *Corporations Act* 2001 (Cth), s 302(a).
10 *Corporations Act* 2001 (Cth), ss 301(1)
11 *Corporations Act* 2001 (Cth), s 601HG(1).
12 *Corporations Act* 2001 (Cth), and 302(b).
13 *Corporations Act* 2001 (Cth), s 601HG(1).

11. The third defendant was the registered auditor who led the audits of compliance with the compliance plan for each year.

12. On 3 March 2009, the plaintiff declared that the Fund would not accept applications from new investors and withdrawal requests would be paid up to 365 days after maturity.

13. On 19 March 2013, John Park and Ginette Muller of FTI Consulting were appointed voluntary administrators of the plaintiff under Pt 5.3A of the CA.[14]

14. On 11 July 2013, Deutsche Bank AG, as a secured creditor, appointed Joseph Hayes and Anthony Connelly of McGrath Nicol as receivers and managers of property of the Fund.

15. On 1 August 2013, following a resolution of the plaintiff's creditors that it be placed into liquidation and that John Park and Ginette Muller be appointed liquidators, the plaintiff was deemed to have resolved to be wound up voluntarily under s 491 of the CA.[15]

16. On 21 August 2013 an order was made directing that the Fund be wound up[16] and David Whyte, Partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd, was appointed by the court to take responsibility for ensuring that the Fund was wound up in accordance with its constitution and as receiver of the Fund's property ("the receiver").[17]

17. On 2 March 2015, the plaintiff started this proceeding by filing the claim and statement of claim ("SOC"). Although brought in the name of the plaintiff, the receiver has conduct of the proceeding

SOC

18. The claim as pleaded addressed two of the audit engagements of the defendants for the 2008 financial year, that is:

    (a) first, the audit of the Fund's annual financial report;
    (b) second, the audit of the plaintiff's compliance with the compliance plan.

19. Paragraph 52 alleged that the relationships between the plaintiff on the one hand and the first, second and third defendants were such that the first, second and third defendants owed duties to exercise reasonable care and skill and diligence when:

    (a) conducting the audit of the Fund's financial report for the 2008 financial year;
    (b) carrying out the audit of the plaintiff's compliance with the compliance plan and reporting thereon in accordance with section 601HG(3) of the Act; and
    (c) identifying circumstances that ought to be reported to ASIC, and reporting thereon, in accordance with s 601HG(4) or s 601HG(4B) of the CA.

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14 *Corporations Act* 2001 (Cth), s 436A.
15 *Corporations Act* 2001 (Cth), s 446A.
16 *Corporations Act* 2001 (Cth), s 601NE(1).
17 *Corporations Act* 2001 (Cth), s 601NF(1).

20. Paragraph 56 alleged that for the purpose of meeting its statutory obligations to prepare a financial report for the financial year ended 30 June 2008, the plaintiff prepared financial statements for the year.

21. Paragraph 58 alleged that pursuant to the financial report audit engagement, the first and second defendants carried out an audit of the financial report.

22. Paragraph 59 alleged that on or about 10 March 2009, the first defendant and the second defendant issued an audit report upon the financial report.

23. Paragraph 63 alleged that contrary to the financial statements the value of the mortgage investments of the Fund was materially overstated, the Fund held assets whose value ought to have been impaired and the Fund had impairment losses in respect of mortgage investments that were greater than the amounts reported.

24. Paragraph 64 alleged that because of the matters alleged in par 63 the financial statements did not present fairly the financial position of the Fund as at 30 June 2008 or its financial performance for the 2008 financial year and did not comply with the relevant standards and reporting requirements.

25. The allegations of breach of contract, negligence and misleading or deceptive conduct in relation to the audit of the financial report appeared in paras 97 to 101. The plaintiff alleged many breaches of the obligations in contract and tort, including failure to exercise reasonable skill, care and diligence in the preparation of the report; failure to ensure that the report was drawn up in accordance with the CA, relevant standards and other requirements; failure to use reasonable skill, care and expertise; failure to undertake sufficiently extensive audit enquiries and tests; failure to report fully to members as to the non-compliances of the financial report; failure to report fully to the plaintiff in relation to any significant matter; failure to report to the members whether any additional information was necessary, or of any defect or irregularity in the financial report, or of any deficiency, failure or other shortcoming; failure to ensure that there was full disclosure in the financial report of any material event that occurred after year end and failure to identify that there was objective evidence that assets were impaired.

26. As well, the plaintiff alleged that the same matters rendered the representations made in connection with the audit of the financial statements and the report thereon misleading or deceptive.

27. Paragraph 65 alleged that the first and third defendants carried out an audit of the plaintiff's compliance with the compliance plan for the 2008 financial year.

28. Paragraph 66 alleged that on or about 10 March 2009 the first and third defendants issued an audit report for compliance with the compliance plan for the year ended 30 June 2008 (this was subsequently amended by par 102(a) of the FASOC to allege that this report was issued on 11 May 2009).

29. Paragraph 69 alleged that in the conduct of the compliance plan audit the first and third defendants should have been aware of the matters alleged in par 63, that those matters were a breach of the lending policy in the compliance plan, that the loan to value ratios of loans were incorrectly calculated, that loans had been varied or extended without an updated valuation, that security properties or loans had not

been revalued and that loan extensions had been granted on the basis of capitalised interest arrangements where there had been defaults by borrowers who were poor credit risks.

30. In par 70 these matters were alleged to be breaches that amounted to contraventions of the CA that the first and third defendants had reasonable grounds to suspect and in par 71 it was alleged that the first and second defendants contravened subsections of s 601HG of the CA in failing to notify ASIC of the matters alleged in par 69 and in failing to provide the plaintiff or its directors with a report as required under s 601HG(3)(c) of the CA.

31. The allegations of breach of contract, negligence or misleading or deceptive conduct in relation to the audit of compliance with the compliance plan appear in paras 75, 76, 79 and 86 of the SOC.

32. It would add unnecessarily to the length of these reasons to set out the allegations of breach in relation to the compliance plan audit in detail. They may be summarized, at the risk of some over simplification. It was alleged that the first and third defendants wrongly failed to identify and to report to ASIC matters required to be reported under ss 601HG(4) and (4B) of the CA and to provide a non-compliance report. There were also allegations of breach in the performance of the audit work and failure to report to the plaintiff that the plaintiff had failed to comply with the compliance plan.

33. The SOC thus alleged facts going to causes of action alleged for damages for breach of contract, negligence, or under ss 38 and 99 of the FTA, ss 52 and 82 of the TPA, ss 1041H and 1041I of the CA and ss 12DA and 12GF of the ASIC Act.

34. A number of paragraphs of the SOC alleged that the defendants' breaches of contract, negligence or contraventions of the FTA, TPA, CA or ASIC Act caused the plaintiff loss or damage. They were organized separately around the categories of breaches relating to the financial report audit and the compliance plan audit respectively.

35. Paragraph 95 (in relation to the breaches relating to the compliance plan audit) alleged that the plaintiff would have put in place a system to ensure that the Fund maintained sufficient liquidity in the event of a downturn in the property and credit markets, including by retaining investor funds as cash to meet its liquidity requirements, and would have remedied the systemic failings to ensure that non-compliance with the compliance plan did not occur again.

36. Paragraph 96 alleged that if the steps described in paragraph 95 had begun no later than 28 days after the end of three months after the end of the financial year ending on 30 June 2008, the plaintiff would not have made further advances on loans which were not compliant with the compliance plan and which were not recoverable; would not have made any further payments which did not comply with the compliance plan; would have recovered loans which did not comply with the compliance plan; the Fund would not have been exposed to a lack of liquidity; the residual value of the assets held by the plaintiff upon the winding up of the Fund would have been greater than is in fact the case; and the plaintiff would have ceased paying itself management fees and repaid the excessive management fees it had previously paid itself.

37. Paragraph 104(e) (in relation to the breaches or contraventions relating to the financial report audit) alleged that the Fund would have been made illiquid earlier than it in fact was (I repeat that it is alleged that it stopped accepting or paying in relation to members' deposits or withdrawals on 3 February 2009) and would have been wound up which would have reduced the ongoing costs and increased the realisable value of the Fund assets.

Amendments leading to the 2FASOC

38. Between the SOC and the 2FASOC there were two further iterations of the statement of claim, made by the amended statement of claim ("ASOC") and the FASOC. Most of the amendments were made by the time of the FASOC.

39. The defendants filed an original application to strike out amendments made in the FASOC. As now amended, the application relates also to the 2FASOC.

40. For present purposes, it is unnecessary to distinguish between the amendments introduced by the ASOC and the FASOC on the one hand and those made by the 2FASOC on the other. I do not ignore that for the purposes of the application of r 376 of the UCPR the question whether a new cause of action was out of time when the amendment was made turns on the date of the relevant amendment. But in the circumstances of this application, no party submitted that the dates of the relevant amendments should be distinguished as between the dates of the ASOC, the FASOC and the 2FASOC. Instead, the date chosen by the parties to answer whether a new cause of action was out of time when added was the date of the FASOC, namely 14 April 2016. Accordingly, I am able to refer to the amendments without focussing on which of the iterations of the statement of claim added them.

41. In my view, a court should be slow to criticise pleadings because of matters of style that do not go to the substance of the function of pleadings, because an overly critical appraisal does not serve either the interests of justice or the objects of r 5 of the UCPR. However, sometimes to allow the pleadings to run off the rails to a significant extent can waste an unacceptable amount of time and costs in quelling the controversy between the parties. Insisting that the pleadings be brought into shape to define the issues that must be tried to decide the case, no more and no less, serves to control the waste of time and costs.

42. In the present case, it is not practically possible to describe the scope of the amendments with precision in these reasons, because of the combination of their length, the "philosophy" adopted by the pleaders in drawing them, the effect of the device of "rolled-up" allegations made by the use of complex definitions, the maze-like number of cross references, the absence of proper attention to pleading only material facts and the pleaders' determination to allege every possible permutation and combination of the arguable causes of action.

43. Sometimes the number of evidentiary facts alleged in a pleading creates an impression of precision that is false. Analysis of such a pleading requires the examiner to look at each of those facts to ascertain its role. But at the end of the analysis the case is not well disclosed. Issue is joined by denials and non-admission, expensive and wide ranging disclosure follows, yet the parties cannot tell the Judge asked to review the case with precision what the case to be decided is

or what relief will follow. This is not consistent with the philosophy of r 5 of the UCPR.

44. Overly long and detailed pleadings are the antithesis of the material fact model of pleading that was introduced by the *Judicature Acts* of 1873 and 1875 (UK) in England and Wales and adopted throughout the common law world. The material fact model of pleading informs and is the basis of the UCPR rules as to pleading.

45. In this and other jurisdictions there are ongoing calls for stringent and rigorous review of civil procedural processes and rules to streamline and reduce the costs of litigation. It is worthy of comment that the pleading process that is the critical step in defining the extent of a dispute into which litigants and courts pour resources at both the interlocutory and trial stages has seemed to drift towards ever longer and more complex statements of cases that cover up rather than expose the truly critical issues that must be decided.

46. An early credible trial date for the final resolution of a civil dispute is one of the most important parameters for controlling and containing the delays and cost of litigation. But if the scope of the issues to be decided at the trial is not set by a pleading process that conforms to the minimum requirements necessary to rationally and comprehensibly state the issues, it is not possible to meet that essential goal across the run of cases with the limited court resources available for the management and trial of civil proceedings. Cases take longer to get to trial and run for longer.

47. It will be recalled that the SOC was confined to causes of action based on the audit of the financial report for the year ended 30 June 2008 (now defined in the 2FASOC as the "2008 Financial Statements Audit") and the audit of compliance with the compliance plan for the same year (now defined as the "2008 Compliance Plan Audit"). The first major change introduced by the amendments now appearing in the 2FASOC is that new causes of action were introduced for audits of the financial reports for later years, as defined in the 2FASOC as follows:

    (a) 2009 Financial Statements Audit;
    (b) 2009 Financial Review;
    (c) 2010 Financial Statements Audit;
    (d) 2010 Financial Review;
    (e) 2011 Financial Statements Audit;
    (f) 2011 Financial Review; and
    (g) 2012 Financial Statements Audit.

48. The name "Financial Review" is given to the half-yearly financial report review, while the name "Financial Statements Audit" is given to the audit of the annual financial report for the year ending on 30 June of the relevant year.

49. As well, new causes of action are introduced for later audits of the compliance plans as follows:

    (a) 2009 Compliance Plan Audit;
    (b) 2010 Compliance Plan Audit;
    (c) 2011 Compliance Plan Audit; and
    (d) 2012 Compliance Plan Audit.

50. There can be no complaint, in general, about the plaintiff amending to add additional causes of action based on the later reviews and audits. Yet, there is a difficulty in disentangling many paragraphs of the 2FASOC, caused by the rolled-up definitions, because it is not possible to identify with precision which allegation of breach applies to which review or audit or report. There is, however, generally a division between the allegations made about the financial report audits and the financial report reviews, on the one hand, and those made about the compliance plan audits on the other hand.

51. A second major change introduced by the amendments is that the obligations of the defendants as auditors are pleaded out extensively, but in the abstract. By that I mean that the pleading is not confined to allegations of obligations of which a specific breach is alleged. On the contrary, the obligations and the breaches are not specifically tied together, so that at the end the examiner is left to speculate what the available permutations and combinations might be. In a pleading of the length and complexity of the 2FASOC, that presents a real challenge in ascertaining the scope of the plaintiff's case.

52. The third major change introduced by the amendments is that there are numerous allegations that the plaintiff's directors and members of the Fund relied on the plaintiff to carry out the extensive range of duties of an auditor in carrying out the engagements undertaken by the defendants, again pleaded in the abstract. That is to say, positive allegations of reliance are made by the plaintiff that are not tied to specific allegations of breach or loss caused by breach.

53. The fourth major change introduced by the amendments is the addition of many representations alleged to have been made by the defendants in the course of carrying out their review or audit engagements. The relevance of the additional representations is to found causes of action based on contravention of the statutory norms proscribing misleading or deceptive conduct or conduct likely to mislead or deceive under s 38 of the FTA, s 52 of the TPA, s 18 of the ACL, s 1041H of the CA and s 12 DA of the ASIC Act.

54. The fifth major change introduced by the amendments is that the subject matter of the alleged breaches by the defendants of the respective obligations was expanded.

Loss or damage

55. The allegations of reliance in the 2FASOC previously mentioned are lengthy. But the hypothesis of the loss or damage ("loss") alleged to have been suffered is a repeated theme. In effect, the plaintiff alleges that if the defendants had not breached the alleged contractual and tortious duties, and statutory norms, the plaintiff would have avoided some of the losses made by the Fund because it did not alter its management of the Fund and go into winding up the Fund at an earlier time.

56. A claim for damages on that basis posits rigorous pleading and proof of a comparison between what has occurred and past hypothetical facts, being what the plaintiff alleges would have occurred if the breach alleged had not happened. This is a "but for" the breach analysis of factual causation of the loss alleged.

57. Paragraph 93 of the 2FASOC alleges that had the first and second defendants not engaged in misleading or deceptive conduct the Fund would have been wound up

promptly. Paragraph 95 alleges that had the first and second defendant not been negligent or in breach of contract the Fund would have been promptly wound up. Paragraph 98 repeats those allegations, inter alia, and continues with allegations that earlier winding up would have substantially reduced the ongoing costs, avoided the substantial decline in the realisable value of the Fund's assets, would have prevented payments to B class unit holders for distributions or redemptions and would have avoided any further losses in relation to the impaired loans and receivables, without incurring additional costs and losses, by realising the real property securities and expenses for the administration of the Fund paid to the plaintiff or for services rendered to the plaintiff. These are cash flow losses, to be ascertained by comparing the actual receipts and expenses with the hypothetical receipts and expenses that the plaintiff alleges would have occurred.

58. Notably, there is no further pleading or particularisation in the 2FASOC of any of the receipts that would have been increased or the expenses that would have been decreased, either as to the relevant dates or amounts.

Overall complexity and difficulties

59. The overall complexity of the pleading can be summarized, although doing so does not capture fully the relevant permutations and combinations.

60. As against the SOC, which dealt only with the 2008 financial report audit engagement and report and the 2008 compliance plan audit engagement and report, the 2FASOC deals with each of those engagements and reports for the four subsequent years as well. Second, it also deals with the half-yearly financial report review engagement and report over the four years from 2008 to 2011. That is to say, the 2FASOC deals with 14 separate review and audit engagements and reports over a five year period, as opposed to 2 separate audit engagements and reports for a one year period. Second, adding the half-yearly reports means that the 2FASOC alleges breaches as at and over nine separate reporting periods and dates as opposed to the single reporting period and date in the SOC.

61. Third, the raft of additional auditing and reporting obligations and representations alleged in the 2FASOC means that the number of separate allegations of breach of contract, negligence and contravention of statute has increased from the SOC to the 2FASOC not by tens but by hundreds. The true extent of that increase is masked by the allegations that the errors in each prior period audit engagement and report were repeated by not correcting them in the next audit and report ("prior period errors"). That has a snowballing effect upon the extent of the allegations of breach or contravention in each successive period. The number of separate allegations made is incapable of a meaningful calculation.

62. Fourth, the true extent of the increase in the scope of the facts alleged is again multiplied when consideration is given to the method by which the alleged loss will have to be further pleaded or particularised and proved. Because there are now nine separate reporting periods and dates over which the alleged breaches range, the development of the hypothetical model of the comparison between what did happen and what would have happened if the particular alleged breaches had not occurred will have to be done over up to nine different scenarios.

63. For the audits for the 2008 financial year the hypothetical scenario of a prompt winding up thereafter and the increased receipts and decreased expenses that the plaintiff alleges would have been achieved will be significantly different from the hypothetical scenario for the audits for later periods.

64. When the permutations and combinations alleged are unpacked in this way the potential for oppression in the case as presently pleaded emerges, leaving aside the detail of the extent of the evidentiary allegations in the pleading that are not material facts. It is difficult to accept that at trial the plaintiff will press for a separate finding in relation to each of the alleged permutations and combinations. It is not likely that there is any practical way that could be done.

65. The difficulties of pleading and proof of causation of loss in a claim against an auditor for trading losses that might have been avoided by an earlier winding up have been considered in a number of intermediate appellate court and other cases.[18] They were not made the subject of submissions and need not be considered in these reasons.

66. It is unnecessary to set out the extent of the additional subject matters in the 2FASOC any further at this point. That is because the application is made on a number of discrete fronts and from this point these reasons may be confined to those points.

When the causes of action arose

67. The starting point for analysis is when the challenged causes of action arose or accrued.

68. Each of the alleged causes of action for breach of contract arose on the date of the breach.[19] Each of the alleged causes of action for damages for negligence[20] or contravention of s 82 of the TPA[21] arose or accrued on the date when damage was suffered first. The same reasoning applies to each of the causes of action for damages based on s 99 of the FTA, s 236 of the ACL or s 12GF of the ASIC Act.

69. For a particular cause of action, loss must have been suffered first when the hypothetical scenario of what would have happened but for the breach alleged would have resulted in a receipt that did not occur or would have avoided an expense that was made, or would have avoided a trading loss over a relevant period.

70. Those dates are not presently alleged. But as a practical matter, since the plaintiff alleges that the breaches in respect of the 2008 financial year delayed the winding up of the Fund that otherwise would have occurred promptly and would have avoided losses of the kinds alleged, ex hypothesi, loss or damage must have been suffered soon after the alleged breaches. In effect, the defendants submit that must

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18 For example, *Harris Scarfe (recvrs and mgrs apptd) (in liq) v Ernst & Young* [2005] SASC 255; *Latrobe Country Credit Cooperative Ltd v Smith* [1999] 1 VR 440; *Bishopsgate Insurance Australia Ltd (in liq) v Deloite Haskins & Sells* [1999] 3 VR 863; *Sew Hoy & Sons Ltd (in receivership and in liquidation) v Coopers & Lybrand* [1996] 1 NZLR 392; *Daniels v Anderson* (1995) 37 NSWLR 438; *Galoo Ltd (in liq) v Bright Grahame Murray* [1994] 1 WLR 1360; *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310.

19 *Battley v Faulkner* (1820) 3 B & Ald 288; 106 ER 668.

20 *Hawkins v Clayton* (1988) 164 CLR 539, 587-588.

21 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.

have been by 30 September 2008 whereas the plaintiff submits that it will be or might be after 1 March 2009.

The limitation periods, their extension and amendments

71. With one exception, and subject to the operation of s 38 of the LAA in relation to the causes of action for breach of contract and negligence, the limitation period for each of the alleged causes of action was six years from the date when the cause of action arose or accrued.[22]

72. The exception is the group of alleged causes of action for damages under ss 38 and 99 of the FTA. Under s 99(3) of the FTA, the limitation period was three years after the date on which the cause of action accrued.

73. The plaintiff alleges that the times when the alleged causes of actions for breach of contract or negligence arose are extended under s 38 of the LAA. The equitable doctrine of fraudulent concealment operated to preclude reliance on a limitation provision for equitable claims. However, it did not operate on causes of action at common law, including damages for breach of contract and negligence.[23] Section 38 of the LAA operates to defer the beginning of the period of limitation in relation to those causes of action where a plaintiff's right of action has been concealed by fraud.[24]

74. The power of this court to permit amendment of a claim to add a cause of action that is time barred is now contained in s 16 of the *Civil Proceedings Act* 2011 (Qld):

> "(1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
> (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—
> (a) the amendment will include or substitute a cause of action or add a new party; or
> (b) the cause of action included or substituted arose after the proceeding was started; or
> (c) a relevant period of limitation, current when the proceeding was started, has ended.
> (3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made."

75. Rules 375 and 376 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provide:

> "**375 Power to amend**
> (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an

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22 *Limitation of Actions Act* 1974 (Qld), s 10(1)(a), *Trade Practices Act* 1974 (Cth), s 82(2); *Australian Consumer Law,* s 236(3); *Corporations Act* 2001 (Cth), s 1041I(2); *Australian Securities and Investments Commission Act* 2001 (Cth), s 12GF(2).

23 *Osgood v Sunderland* (1914) 111 LT 529; *Armstrong v Milburn* (1885) 54 LT 247.

24 Section 38 does not apply to the time limit under s 99(3) of the *Fair Trading Act* 1989 (Qld) because it was not one "prescribed by" the *Limitation of Actions Act* 1974 (Qld).

application or any other document in a proceeding in the way and on the conditions the court considers appropriate.

(2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.

(3) If there is misnomer of a party, the court must allow or direct the amendments necessary to correct the misnomer.

(4) This rule is subject to rule 376.

376 Amendment after limitation period

(1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.

(2) …

(4) The court may give leave to make an amendment to include a new cause of action only if—

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

76. Neither side questions the power of the court under these provisions to allow an amendment to add a cause of action based on a law of the Commonwealth that expressly provides that loss or damage suffered by a contravention may be recovered by action against the contravener, subject to a provision that the action may be commenced or begun (only) within a limited period.

77. If the limit on the period to commence or begin the action under a law of the Commonwealth went to the right rather than the remedy, State procedural laws to extend the time would not apply. However, for a claim for damages under ss 52 and 82 of the TPA, there is intermediate appellate court authority[25] and a decision of this court under the current rules[26] that amendment under r 376 of the UCPR is permitted to add a cause of action after the period to commence an action under s 82(2) of the TPA has expired.

78. In this case, I will proceed on the assumption that the same conclusion would be reached for the causes of action for damages under ss 38 and 99 of the FTA, ss 18 and 236 of the ACL, ss 1041H and 1041I of the CA and ss 12DA and 12GF of the ASIC Act. The contrary was not argued.

Causes of action that were time barred when the proceeding was started

79. The defendants submit that causes of action based on allegations of contraventions of ss 601HG(4) and (4B) of the CA during the 2008 Compliance Plan Audit should be struck out from the 2FASOC because they were time barred when the proceeding

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25 *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388; *Ramsay v McElroy* [2004] 1 Qd R 667; and *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106.

26 *Murdoch v Lake* [2013] QSC 268.

was started. This point applies to both originally pleaded and added causes of action. The submission is that in each instance the relevant contravention occurred "by no later than 30 September 2008" and "it is alleged that losses were sustained on and from the relevant breach".

80. The date of 30 September 2008 for breaches of s 601HG is derived from s 601HG(3), which required the audit and report to be carried out and provided to the plaintiff within three months after the end of the financial year.

81. An unusual feature of the way in which the defendants argued the application is that they did not identify the particular paragraphs of the 2FASOC which should be struck out. This stance makes it more difficult to assess the submission.

82. The plaintiff responds that it does not directly claim damages for any alleged contraventions of ss 601HG(4) and (4B) of the CA. It relies on those contraventions as going to the allegations of breach of contract, negligence or misleading or deceptive conduct. The plaintiff does not allege that the defendants did not carry out a compliance plan audit for the 2008 financial year. It alleges that the audit was carried out,[27] and that the report on the audit was issued to the plaintiff on 11 May 2009.[28] The plaintiff does not allege a cause of action based on loss suffered before that date because the audit was carried out and the report was provided late. To this extent, the defendant is setting up a case that the plaintiff does not make by the 2FASOC.

83. The plaintiff's response may have caught the defendants by surprise. Section 1325 of the CA provides that the Court may make compensation orders in some circumstances where a person engages in conduct in contravention of a provision of Ch 5C of the CA. The relief claimed by the plaintiff includes a claim for damages for breach of the CA, but does not identify all the "damages" sections relied upon. Even so, there is no express allegation in the 2FASOC that the first and third defendants breached s 601HG because the audit was carried out and the report was provided late.

84. A second unusual feature relating to this group of causes of action is that the defendants submit that amendments made by the time of the 2FASOC specifically removed references to dates by which one or more causes of action for the 2008 Compliance Plan Audit arose under the SOC. The defendants submit that the plaintiff should not be permitted to avoid a clear limitation problem by amending the pleading to make the date of accrual more opaque because the defendants are entitled to know with clarity what the plaintiff's case is.

85. In the same vein, the defendants submit that that there is no suggestion that the plaintiff intends to "resile" from the case that the defendants submit was expressly pleaded in the SOC that this group of causes of action accrued by no later than 30 September 2008. In effect, the defendants' position is that it cannot now be said that any alleged loss for the relevant causes of action was suffered first after 1 March 2009.

86. The plaintiff submits that the allegations of breach by the first and third defendants during the course of the 2008 Compliance Plan Audit are as follows:

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27 2FASOC, par 101.

28 2FASOC. Par 102(a).

(a) par 105 of the 2FASOC alleges that at the time of the conduct of the 2008 Compliance Plan Audit there were circumstances amounting to contraventions by the plaintiff of the Compliance Plans, the constitution and/or the CA;

(b) par 106 of the 2FASOC alleges that in conducting the 2008 Compliance Plan Audit and preparing and completing the 2008 Compliance Plan Audit Report the first and third defendants knew or had reasonable grounds to suspect that those circumstances amounted to contraventions of the compliance plans, the constitution and/or the CA;

(c) par 107 of the 2FASOC alleges that the first defendant and the third defendant contravened s 601HG of the CA by failing:

(i) to provide a report which included statements to the effect that in its opinion (1) the plaintiff had not complied with the Compliance Plans in respect of the matters pleaded which amounted to contraventions of the CA and/or the constitution; and (2) the compliance plans did not meet the requirements of Part 5C.4 of the CA;

(ii) to report to ASIC the circumstances of which they became aware in the course of carrying out the 2008 Compliance Plan Audit, which they had reasonable grounds to suspect amounted to significant contraventions of the CA, within 28 days of becoming so aware, as required by s 601HG(4) and (4B) of the CA;

(d) paras 111 and 112 of the 2FASOC allege that the first and third defendants acted negligently, as pleaded, in carrying out the 2008 Compliance Plan Audit, in preparing and completing the 2008 Compliance Plan Audit Report and in expressing the 2008 Compliance Plan Audit opinion.

87. The plaintiff submits that the defendants' challenge to the original and added causes of action that relate to the 2008 Compliance Plan Audit must fail because it is premature as a matter of law and because the claims in question were properly brought within the applicable limitation period.

88. As to prematurity, the plaintiff submits that a bar under the LAA should be raised by the defence[29] and the defendants bear the onus of proving the time when a cause of action became time barred. The plaintiff submits that it is not an abuse of process to plead a cause of action outside the applicable limitation period.[30] In addition, the plaintiff submits that it is usually undesirable for limitation questions to be decided in interlocutory proceedings.[31]

89. Ultimately, in effect, the plaintiff submits that whether breach occurred on, before or after 1 March 2009 and whether loss occurred before or after that date are issues that should be resolved at a trial of the plaintiff's claim, on the evidence.

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29 For defences under the *Limitation of Actions Act* 1974 (Qld) that bar the remedy, see *Uniform Civil Procedure Rules* 1999 (Qld), r 150(1)(c).

30 *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2001) 112 FCR 336.

31 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533.

90. To use the defendants' language, this is an opaque position. As to when loss was first suffered, par 134 of the 2FASOC alleges that the defendants' breaches caused the plaintiff loss being:

> "(a) the amount of the advances which the plaintiff made on impaired loans which amounts are not now recoverable;(b) the amount of payments made by the plaintiff which did not comply with the Act and/or the constitutions and/or the Fund's product disclosure statements and/or the Compliance Plans including, but not limited to, the distributions and/or redemptions paid to Class B unit holders as particulars in paras 105(o) and 105(s) above;
> (c) the amount of the loans which are not now recoverable because the plaintiff failed to take action to recover those loans in a timely manner;
> (d) the diminution in the value of the Fund which arose because the Fund was not liquidated in a timely manner;
> (e) the amount of management fees, including further loan management fees, which were paid to the plaintiff and/or LM Administration Pty Ltd when such fees ought not to have been paid;
> (f) …
> (g) insofar as the plaintiff is prevented from agitating any claim advanced in this statement of claim through effluxion of time, the value of the loss of the opportunity to advance that claim by proceedings commenced inside the limitation period applicable to it, as pleaded in the 2FASOC."[32]

91. It is impossible to tell exactly when loss or damage was first suffered for the relevant causes of action because the 2FASOC does not allege any amounts or dates of the loss alleged. However, given that the first and third defendants' audit report for the 2008 compliance plan audit engagement issued on 11 May 2009, no loss suffered as a result of the report as made (as opposed to a failure to make the report or to take some action during the period while the audit was being conducted and the report was being prepared) can have been suffered before that date.

92. The plaintiff's argument as to prematurity has some support in authority as well as logic. In current statements of high authority, it is accepted that most (but not all) limitation periods operate as a bar to the remedy rather than the right of action and, therefore, that they operate as a defence. It follows that a defendant has to plead the defence in response to a common law claim. However, that was not necessarily so for a right of action conferred by statute. As Windeyer J said:[33]

> "It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the Statute of Limitations as a defence to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it..."

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32 No argument was directed to par 89(g) but at first blush it is an extraordinary allegation. The loss of the ability to bring a claim against a defendant because the cause of action is time barred is not itself a species of compensable loss against the same defendant.

33 *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, 488.

93. In the present case, there is no doubt that that the time limit under s 10 of the LAA to bring an "action"[34] for a cause of action for breach of contract and negligence[35] operates as a defence that the defendants will have to plead. And it is settled that a limitation defence under s 82(2) of the TPA for a cause of action under ss 52 and 82 of the TPA for damages for misleading or deceptive conduct is in the same category.[36] It is unnecessary to explore these sorts of distinctions further.[37]

94. A corollary of the procedural rule that most limitation provisions operate as a defence is that it is not an abuse of process, per se, for a plaintiff to plead a time barred cause of action. Before the procedural amendments that permitted a defendant to apply for summary judgment,[38] a defendant faced with such a time barred cause of action had the procedural options of going to trial (either on all issues or a separate question) or to apply to dismiss summarily the proceeding in the inherent jurisdiction[39] or under a rule of court.[40] Before defence, however, it was not usual for a defendant to apply for summary dismissal.

95. Even so, at least since *Riches v Director of Public Prosecutions*,[41] courts have entertained such applications on occasion and the practice has been sanctioned at intermediate appellate court level,[42] despite contrary views.[43] A court can strike out a cause of action that is clearly time barred. That is not an aberration. It should not be forgotten that many of the relevant statutory limitation provisions expressly provide to the effect that "no action shall be brought" after a period of years from when the cause of action arose or accrued. In most cases, it brings justice into disrepute for an expensive trial to proceed to the point of judgment only for it to be found that the action should not have been brought in the first place because of a limitation defence, particularly if the plaintiff otherwise would have succeeded. That result does not reflect a just and expeditious resolution of the real issues in civil proceedings at a minimum of expense, which is the "philosophy" of r 5 of the UCPR.

96. In general, it is unnecessary to decide the question of prematurity in this case. In my view, it would be inappropriate to decide that the 2FASOC alleges that loss was suffered by 30 September 2008 because that may have been the effect of an earlier version of the pleading as to when loss was suffered first. There is no other evidence as to when the relevant loss was suffered first. There are two possible exceptions. One is that par 105(s) of the 2FASOC alleges that distributions were paid to the Class B unit holders in 2008 and those distributions may be a relevant loss that

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34 The word "action" is no longer used in the principal procedural statutes or rules of court in this State – it has been replaced by "proceeding" but the *Limitation of Actions Act* 1974 (Qld) antedates those changes.

35 *Limitation of Actions Act* 1974 (Qld), s 10.

36 *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245.

37 I note also, without further considering the point, that modern rules of court as to pleading make it unnecessary to plead a condition precedent to a cause of action in the statement of claim – see *Uniform Civil Procedure Rules* 1999 (Qld), r 153(1).

38 *Uniform Civil Procedure Rules* 1999 (Qld), r 293.

39 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129.

40 *Uniform Civil Procedure Rules* 1999 (Qld), r 171.

41 [1973] 1 WLR 1819..

42 *Baker-Morrison v State of New South Wales* (2009) 74 NSWLR 454, 459 [14]; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398, 405; *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019.

43 *Palmdale Insurance Ltd v L Grollo & Co Pty Ltd* [1986] VR 408.

caused time to run on some causes of action. But this was not a point made by the defendants in their submissions and was not otherwise clearly established either as a matter of common ground or by evidence. The other relates to the causes of action for damages under ss 38 and 99 of the FTA considered below.

97. Still, it would be unsatisfactory to permit the plaintiff to vex the defendants by persisting in a clearly time barred claim by deliberately pleading the material fact of suffering the relevant loss in a way intended to avoid stating when the loss was suffered first, so as to prevent a successful application to strike out. The remedy is to direct the plaintiff to plead its damages case which should enable the parties to further assess the question when loss was suffered first.

98. The resolution of the present application on this group of causes of action lies in three points. First, it is not clear yet that the causes of action are time barred, even before any consideration is given to an extension of the period for fraudulent concealment. Second, if the period of limitation did not begin to run until the plaintiff discovered the fraud of the defendants in concealing the plaintiff's right of action, the period will not have expired before 2 March 2009. Third, if these causes of action prove to have been time barred when the proceeding was started, the plaintiff will have gained no substantial benefit in adding some of them by amendment, unlike causes of action added that would be time barred when added but were not time barred when the proceeding was started.

Fair Trading Act causes of action

99. The last of the defendants' complaints is that the 2FASOC includes causes of actions claiming damages for contravention of the FTA that are time barred and should be struck out.

100. The causes of action that rely on the FTA are also broken into separate sections for the financial report reviews, audits and reports on the one hand, and the compliance plan audits and reports on the other. The relevant causes of action rely on ss 38 and 99 of the FTA as in force until 1 January 2011.

101. The financial report section is in paras 80 to 85, 86, 87A, 88 to 91 and 99 of the 2FASOC. In particular, par 91(b) of the 2FASOC alleges that particular representations made in the course of the 31 December 2008 financial report audit engagement were misleading or deceptive, contrary to s 38.

102. The compliance report section is in paras 118 to 122, 123, 132 and 134 of the 2FASOC. In particular, par 123(b) of the 2FASOC alleges that representations made in the course of compliance plan audit engagement for each of the 2008, 2009 and 2010 financial years were misleading or deceptive, contrary to s 38.

103. Until 1 January 2011, s 38 of the FTA provided:

> "(1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
> (2) Nothing in this division shall be taken as limiting by implication the generality of subsection (1)."

104. Section 99, also until 1 January 2011, provided, relevantly:

> "(1) A person who suffers loss or damage by an act or omission of another person that is a contravention of part 3 or 4 or of an injunction granted under section 98 may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention.
> (2) …
> (3) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued."

105. The plaintiff submits that ss 38 and 99 as in force until 1 January 2011 were amended in a way that extended the time to commence a proceeding for damages under s 99 for breach of s 38 to six years after the cause of action accrued. The hinge on which this argument turns is that the repeal of the relevant sections of the FTA ("original provisions") and the enactment of the provisions of the Australian Consumer Law ("replacement provisions") replaced the three year period of limitation for misleading or deceptive conduct under the FTA with a six year period.

106. On 1 December 2010, the *Fair Trading (Australian Consumer Law) Act* 2010 (Qld) ("replacing Act") commenced. It amended the FTA as from 1 January 2011 in relevant respects. By s 18 of the replacing Act, Part 3 of the FTA up to that time was omitted. By s 44, ss 98 to 100 were omitted. By s 6, the Australian Consumer Law text, as in force from time to time, applies as a law of this jurisdiction and as so applying is referred to as the Australian Consumer Law, Queensland ("ACLQ").

107. The effect of the omission of ss 38 and 99 of the original provisions was to repeal those provisions as at and from 1 January 2011. At common law, the effect of repeal is as if the statutory provision had never existed. That is, repeal operates retrospectively. The operation of the common law rule is altered by the effect of s 20 of the *Acts Interpretation Act* 1954 (Qld) ("AIA"):

> "(2) The repeal or amendment of an Act does not—
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act ; or
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act ; or
> (d) affect a penalty incurred in relation to an offence arising under the Act ; or
> (e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).
>
> (3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened."

108. As well, s 122 of the FTA, as amended by the replacing Act, provides in part:

> "(2) After the commencement, a relevant proceeding may be started, and may be completed, under this Act as if the amending Act had not been enacted.
>
> (3) Subsection (2) applies only if, at the time the proceeding is started, it could have been started under this Act if the amending Act had not been enacted."

109. The causes of action for damages alleged in the 2FASOC under ss 38 and 99 of the FTA were rights accrued under the repealed original provisions. Under s 20 of the AIA, and s 122 of the FTA, those rights of action under ss 38 and 99 of the FTA continued, as if the replacing Act's provisions had not been enacted.

110. Accordingly, the plaintiff could have brought a claim on those causes of actions as if no repeal had occurred. However, the plaintiff does not seek to rely on s 99 of the FTA as if the repeal had not occurred. It seeks instead to rely on that section as if s 99(3) did not operate, by reason of the repeal, and as if it did not affect the right accrued within the meaning of s 20(2).

111. Instead, the plaintiff seeks to rely on ss 18 and 236 of the ACLQ. Section 18 is in Ch 2 of the ACLQ and provides that:

> "(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
> (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1)."

112. Under s 236 of the ACLQ, it is provided that:

> "(1) If:
> (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
> (b) the conduct contravened a provision of Chapter 2 or 3;
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
> (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued."

113. Sections 18 and 236 do not apply retrospectively under either common law principles or under the provisions of the AIA. Section 2 of the replacing Act provides that the Act commenced on the date fixed by proclamation. The word "Act" is defined in the AIA to include the provisions in the Act. And s 32F of the AIA provides that a reference to commencement is a reference to the time the Act or provision comes into operation. Nothing in those sections applies ss 18 and 236 retrospectively.

114. An Act or provision of an Act may operate retrospectively, either if that is expressly provided or if, properly construed, the Act or provision is intended to operate that way.

115. As stated, the saving provision of s 20 of the AIA and the transitional provision of s 122 of the FTA continued the pre-existing right of action that a person may have had for damages under ss 38 and 99 of the FTA. There is no apparent mischief to remedy or purpose to be better achieved by a construction of ss 18 and 236 of the ACLQ that would erect a parallel liability for damages for misleading or deceptive conduct operating from before the commencement of the replacing Act.

116. The plaintiff seeks to meet this constructional question in two ways.

117. First, the plaintiff submits that the "amendment" of the limitation period in s 236(2) of the ACLQ applied retrospectively to the cause of action for damages under ss 38 and 99 of the FTA. This is a misconceived submission. Section 236(2) of the ACLQ did not purport to amend the limitation period for a proceeding under ss 38 and 99 of the FTA. In terms it applies to an "action under subsection (1)", being an action for damages under s 236(1) for contravention of Ch 2 or Ch 3, relevantly s 18 of the ACLQ, nothing more.

118. Second, the plaintiff invoked the common law principle of statutory interpretation that where there is a repeal of a provision followed by reenactment of a new provision, substantially identical to the earlier one, the new provision may be construed to apply retrospectively.[44] This principle of retrospective replacement derives from the cases of *re Player; ex parte Harvey*,[45] *re Ashcroft; ex parte Todd*[46] and *Bird v John Sharp & Sons Ltd*.[47]

119. There are differences in the scope of operation of ss 38 and 99 of the FTA on the one hand and ss 18 and 236 of the ACLQ on the other hand. But in reaching my decision, I do not rely on them as determinative.

120. More importantly, the principle of retrospective replacement is not engaged where the rights under the repealed provisions have been preserved by statute, notwithstanding the repeal. The point of that distinction appears from the discussion of Lord Esher of the provision considered in *Ashcroft*:

> "But, if that part of s 47 which is old be not retrospective, what would be the result? The Act of 1869 is repealed, and a number of settlements to which it applied would be left untouched by reason of the repeal. In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act—who had been doing that which the legislature thought to be wrong—should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act."[48]

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44 *Commonwealth of Australia v South East Queensland Aboriginal Corporation for Legal Services* [2006] 1 Qd R 12, 24 [58].
45 (1885) 54 LJ (QBD) 553, 554.
46 (1887) 19 QBD 186.
47 (1942) 66 CLR 233, 247.
48 (1887) 19 QBD 186, 195

121. The plaintiff's reliance on the principle of retrospective replacement illustrates why it is important to put the analysis of old cases in their historical context. Before 1890 in England and Wales, there was no provision of an *Interpretation Act* that had the effect that s 20(2) of the AIA has. That was the position when both *Player* and *Ashcroft* were decided. Accordingly, there was no provision preserving the rights under the repealed Act relevant to the construction of the later provisions in those cases.

122. However, from 1890 in England and Wales, s 38(2) of the *Interpretation Act* 1889 (UK) was introduced, which was a forerunner to and model for later provisions such as s 20(2) of the AIA. Equivalent provisions have been enacted across many common law jurisdictions. Accordingly, the scope for retrospective operation of a later Act because of the repeal of a near identical or similar earlier Act will not arise in the modern legal context in the same way as it did before 1890.[49]

123. In my view, the question whether ss 18 and 236 of the ACLQ operate retrospectively is not a question of difficulty. They do not. There is no reasonable basis for an argument that the limitation period applicable to a contravention of the FTA which occurred before 1 December 2010 is six years because of the operation of s 236 of the ACLQ.

124. It follows, in my view, that all of the causes of action for damages under ss 38 and 99 of the FTA would be statute barred if the proceeding was started more than three years after loss was suffered first. Accordingly, unless loss was suffered first after 1 March 2013, those causes of action under the FTA are clearly time barred. It does not seem possible that loss will have been suffered after that date on any of the relevant causes of action.

125. In my view it follows that the causes of action based on ss 38 and 99 of the FTA or that allege that s 18 and 236 of the ACLQ apply retrospectively should be struck out from the 2FASOC.

Fraudulent concealment delaying when time begins to run

126. Section 38(1) of the LAA provides:

> "(1) Where in an action for which a period of limitation is prescribed by this Act –
>
> (a) the action is based upon the fraud of the defendant or the defendant's agent or of a person through whom he or she claims for his or her agent; or
>
> (b) the right of action is concealed by the fraud of a person referred to in paragraph (a); or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or as the case may be, mistake or could with reasonable diligence have discovered it."

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49 See, for example *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, 259-260 referred to in this connection in Greenberg, *Craies on Legislation*, 9 ed, p 441.

127. The plaintiff alleges in the 2FASOC that all the causes of action for breach of contract or negligence were concealed by the fraud of the defendants and that the plaintiff did not discover the fraud until "around June 2015", so that the period of limitation did not begin to run from when the breach of contract occurred or loss or damage was first suffered until the date when the fraud was discovered.[50]

128. It will be remembered that the plaintiff was placed into administration on 19 March 2013 and that it went into liquidation, the Fund was ordered to be wound up and the receiver was appointed by 21 August 2013.

129. Again the plea is broken into separate sections for the financial report reviews, audits and reports on the one hand and the compliance plan audits and reports on the other.

130. As to the financial report reviews, audits and reports, paras 136 to 155 of the 2FASOC allege many facts as to the first and second defendants' awareness, ranging over the period from October 2008 to December 2010, culminating in par 156 with the allegation that the plaintiff's rights of action for breach of contract and for negligence were concealed by fraud of the first and second defendants within the meaning of s 38 of the LAA.

131. As to the compliance plan audits and reports, par 158 alleges that the first and third defendants, being aware of the matters set out in par 105 in relation to each of the compliance plan audit engagements did not, in the course of the compliance plan audit engagement in question, adequately communicate the matters set out in par 105 to the plaintiff and did not provide a qualified opinion that the plaintiff as the responsible entity of the Fund had not complied with the compliance plan during the financial year in question and/or that the compliance plan did not continue to meet the requirement of Part 5C.4 of the Act, despite knowing that the opinion should have been a qualified opinion or being wilfully blind or recklessly indifferent to that fact. Paragraph 160 alleges that the plaintiff's rights of action with respect to those audits and reports for breach of contract and for negligence were concealed by fraud of the first and third defendants within the meaning of s 38 of the LAA.

132. These are unconventional pleas in a statement of claim. Because a defendant is required to raise a limitation plea in the defence, reliance on s 38 of the LAA is conventionally raised in the plaintiff's reply. The plaintiff in the present case has sought to do it pre-emptively in the 2FASOC. The defendants challenge this pleading, but not because it is made prematurely.

133. Section 38 applies to a cause of action for damages for breach of contract or negligence. That flows from that part of the text of the section that it applies to a "period of limitation is prescribed by this Act" and from s 7 of the LAA which provides that the LAA does not apply to an action for which a limitation period is fixed by an enactment other than the LAA.

134. None of the periods of limitation provided under s 82(2) of the TPA, s 236(2) of the ACL, s 1041I(2) of the CA or s 12GF(2) of the ASIC Act is a period of limitation prescribed by the LAA. Each of them is fixed by another enactment. See also

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50 There is no question at this stage that the plaintiff could with reasonable diligence have discovered the fraud at an earlier date.

Hugh Francis Arthur Williamson v Elders Ltd & ors.[51] As well, there is authority that supports the conclusion that the equitable doctrine of fraudulent concealment does not apply to a cause of action for damages under s 82 of the TPA.[52] That conclusion would extend, by analogy, to causes of action for damages under s 236 of the ACL, s 1041I of the CA, or s 12GF of the ASIC Act.

135. There are a number of potential difficulties with the plaintiff's allegations of fraudulent concealment as a response to a defence that the causes of action for damages for breach of contract or negligence are time barred under s 10 of the LAA. Some of them were ventilated in argument in a way that is not necessary to decide.

136. The plaintiff submits that a number of express allegations are not allegations of fraud in the sense of dishonesty, including:

(a) in par 154(a), that the first and second defendants did not communicate a range of matters despite knowing that they were required to do so or being wilfully blind or recklessly indifferent to that fact;
(b) in par 154(b) that the first and second defendants did not provide qualified opinions as to whether the financial statements gave a true and fair view of the Fund's financial position at each material date despite knowing that the opinion should have been a qualified opinion or being wilfully blind or recklessly indifferent to that fact;
(c) in par 158(b), that the first and third defendants did not give a qualified opinion despite knowing that the opinion should have been a qualified opinion or being wilfully blind or recklessly indifferent to that fact.

137. In each of these paragraphs, the allegation of actual knowledge of breach is used as an alternative to "being wilfully blind or recklessly indifferent" to the fact of knowledge of breach. Read in that context, it is not reasonable to construe the identified allegations as being allegations of conduct that was not fraudulent. As well, wilful blindness[53] and reckless indifference[54] are themselves expressions that connote fraud.

138. The plaintiff submits that it does not need to plead or prove actual fraud in order to come within the meaning of "concealed by… fraud" in s 38(1)(b) of the LAA. The plaintiff based this submission on statements extracted from a 1958 decision of the Court of Appeal of England and Wales in *Kitchen v Royal Air Force Association*.[55] The plaintiff submits that the decision was considered at length without disapproval in the Court of Appeal of Victoria in *Levy v Watt.*[56] However, another relevant case is *Seymour v Seymour*,[57] where the point was made by the Court of Appeal of NSW that what constitutes a right of action that is concealed by fraud in this context does

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51 [2016] NSWSC 450, [46].
52 *Grundy v Lewis* (1995) 62 FCR 567, 577; *New South Wales v McCloy Hutcherson Pty Ltd* (1993) 43 FCR 489, 504.
53 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 144.
54 *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732.
55 [1958] 1 WLR 563, 569.
56 [2014] 308 ALR 748.
57 (1996) 40 NSWLR 358.

not include everything that might constitute equitable fraud.[58] The plaintiff submits that where there is a duty to disclose and non-disclosure occurs, no more is required to constitute fraudulent concealment under s 38. I am inclined to reject that submission as unsupported by the text of s 38 or the context from which it was derived.

139. However, it is not necessary to decide the scope of what may constitute "concealed by… fraud" within the meaning of s 38, at this stage, since the 2FASOC does allege what is plainly deliberate wrongdoing by actual knowledge of breach, or wilful blindness, or reckless indifference. Accordingly, the question whether less serious misconduct amounts to concealing by fraud is not ripe for decision, because a decision in the defendants' favour will not result in any significant strike out of paragraphs of the 2FASOC.

140. The defendants' principal attack is that the allegations that the plaintiff's rights of action were concealed by fraud are insufficient because of the absence of pleaded facts from which the inference of fraud is to be drawn.

141. Where a plaintiff alleges serious misconduct amounting to fraud, there are pleading requirements that attach to those allegations. An often cited passage on this question is from *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* as follows:

> "The substance of the proviso to s 69(1) of the Act is to allow a limitation defence to be defeated. …It is also a significant matter of substance that it is fraud that may defeat the defence. It has long been recognised that fraud may take a variety of forms and is, on that account, incapable of precise definition… The variety of matters which may constitute fraud prevents any construction of the proviso to s 69(1) of the Act which would require a defendant to negate fraud. That variety effectively deprives a party who may or may not have acted fraudulently from ascertaining precisely what must be negatived. Indeed, it is this feature of fraud which underlies the rule of practice, now embodied in Pt 15, r 13 and Pt 16, r 2 of the Rules, that fraud must be pleaded specifically and with particularity… And the same feature necessitates that the proviso be construed as requiring a plaintiff to establish fraud to defeat a limitation defence."[59] (citations omitted)

142. That statement was made about the NSW equivalent to s 27(1) of the LAA. The relevant rules of court in this State are UCPR, r 150(1)(f) and 150(2), under which any fact from which an inference of fraud is claimed must be specifically pleaded.

143. The plaintiff submits that the pleading is adequate to measure up to these requirements and that any further particulars will be provided later.

144. As to the financial report audits and reviews and the reports thereon, the defendants submit that the allegation in paras 154 and 156 of the 2FASOC that the first and second defendants knew that their opinions should have been qualified from and including the 31 December 2008 Financial Report but did not do so and thereby concealed the plaintiff's rights of action by fraud are serious allegations of actual dishonesty that are unsupported. Paragraph 156 cross refers to numerous

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58 (1996) 40 NSWLR 358, 372.

59 (1990) 169 CLR 279, 285.

allegations made in paras 137 to 155. The defendants submit these are not capable of supporting the plaintiff's allegation of actual dishonesty.

145. As to the compliance plan audits and reports, the defendants submit that the allegation in paras 158 and 160 that the first and third defendants were aware of the matters set out in par 105 but did not communicate the matters set out in that paragraph or provide a qualified audit opinion despite knowing that the opinion should have been qualified and thereby concealed the plaintiff's rights of action by fraud are also insufficient, because par 106 alleges that those defendants knew or had reasonable grounds to suspect the matters alleged in par 105, and reasonable grounds to suspect are not enough.

146. In my view, the defendants have failed to take account of the careful collection of facts from which the plaintiff alleges that the defendants' fraudulent concealment may be found. A plaintiff who alleges fraudulent concealment may not be able to point to direct evidence or some other smoking gun to base an inference of fact of fraudulent concealment. But it may still be able to construct a sufficient set of circumstances from which the inference should or could be drawn. That is what the plaintiff has sought to do by the cross-referenced allegations in paras 156 and 160 of the 2FASOC.

147. In my view, at the pleading stage, on consideration under r 171 of the UCPR, it cannot be concluded that the inferences of fraudulent concealment that the plaintiff alleges will not be drawn. It may be that the complex of the cross-referenced facts, when viewed in the light of the proofs offered at trial, will not justify the inferences of fraudulent concealment alleged. But that is not the question. The plaintiff alleges facts from which it is possible that the inferences may be drawn. That is enough to justify the plea.

148. It follows that paras 137 to 156 and 157 to 160 of the 2FASOC should not be struck out.

149. It is arguable, therefore, that for causes of action for damages for breach of contract or negligence time did not begin to run when loss or damage was suffered first, but began to run later, when the rights of action were no longer concealed.

New causes of action not time barred when the proceeding was started but time barred when the amendments were made

150. The defendants challenge three groups of amendments as added causes of action where a relevant period of limitation, current at the date the proceeding was started, had ended when the amendment was made.

151. The hypothesis for the defendants' argument on this point is that the relevant period of limitation had not expired as at 2 March 2015 but had expired as at 14 April 2016. In other words, either the breach of contract, negligence or misleading conduct occurred after 2 March 2009 or loss or damage was suffered first after that date but the relevant breach occurred and loss was suffered first before 14 April 2010. It will be recalled that the defendants made the audit report for the 2008 financial report on 10 March 2009.

152. In considering these arguments, it is convenient to put to one side the conclusion that time may not have begun to run for causes of action for breach of contract or negligence because of fraudulent concealment. That conclusion does not apply to the other causes of action.

Section 311 of the CA

153. First, the challenge is to a group of causes of action that the defendants submit were added in relation to the financial report audit engagement for the 2008 financial year (or the half year ending December 2008) and the 2009 financial year, for a failure or failures by the first and second defendants to notify ASIC under s 311 of the CA or to warn the plaintiff of the same matters.

154. New allegations contained in the 2FASOC (substantially made first in the FASOC) allege breaches relating to s 311 of the CA as follows:

(a) s 311 of the CA obliged the first and second defendants to notify ASIC in writing as soon as practicable and in any event within 28 days if they became aware of circumstances that they had reasonable grounds to suspect amounted to a contravention of the Act;[60]

(b) the plaintiff relied upon the first and second defendants to inform it whether there was any matter required to be reported to the plaintiff, ASIC or the members under the Act of any matter arising in the course of the audits or reviews.[61]

(c) the first and second defendants were required to exercise the care and skill of reasonably competent auditors;[62]

(d) loss or damage was reasonably foreseeable if there was a failure to report to ASIC or the members in accordance with the requirements of s 311;[63]

(e) the first and second defendants owed a duty to exercise reasonable skill and care and diligence when identifying circumstances that should be reported to ASIC pursuant to s 311 of the Act;[64]

(f) breaches of duty arose out of an alleged failure or failures to report contraventions of the Act to ASIC under s 311;[65]

(g) loss was caused by the first and second defendants failure or failures to report contraventions of the CA to ASIC under s 311;[66]

(h) the breaches occurred prior to the delivery of the audit report upon the financial report by reason of the failure to notify ASIC pursuant to s 311 "in the course of conducting the respective Audits and Reviews" and "in any case within 28 days after becoming aware of the contraventions ";[67]

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60 2FASOC, paras 38(g) and 39(c).
61 2FASOC, par 41(a)(vii).
62 2FASOC, par [42].
63 2FASOC, particular D under par 59(b)(i).
64 2FASOC, par 60(d).
65 2FASOC, paras 84(a), 85(g) and 85(k).
66 2FASOC, paras 93(a)(ii), 94(b), 95(e), 95(g)(ii) and 98(g).
67 2FASOC, paras 94(b) and 95(g)(ii).

(i) but for the first and second defendants' failures to notify ASIC pursuant to s 311, the Fund would have been promptly wound up upon the notification having been given.[68]

155. Section 311(1) and (3) of the CA provide that it is a contravention to fail to notify ASIC of circumstances of which a lead auditor is aware that they have reasonable ground to suspect amounts to a contravention of the CA that is significant or will not be dealt with by comment in the auditor's report or by bringing it to the attention of the directors.

156. The defendants submit that the causes of action based on a failure to notify ASIC or to warn the plaintiff of the same matters during the relevant audit period are different causes of action from a pre-existing cause of action of breach of contract or negligence or misleading or deceptive conduct in providing the 2008 financial report audit report. To begin with, they submit that the act or omission said to constitute the breach will have occurred before the time of providing the audit report, which means that the breach occurred at a different time to the pre-existing causes of action. The defendants submit that the new causes of action in this category do not arise out of substantially the same facts as the pre-existing causes of action.

157. The plaintiff submits that the causes of action in this group alleging a failure to warn the plaintiff are not new causes of action. Alternatively, the plaintiff submits that both those causes of action and those alleging a failure to notify ASIC arise out of substantially the same facts as the pre-existing causes of action.

158. A recent decision considering the operation of the requirement under r 376 of the UCPR that an added cause of action arises out of substantially the same facts as the pre-existing cause or causes of action is *Paul v Westpac Banking Corporation Ltd*.[69] Fraser JA said:

> "In an appropriate case leave to amend to add a new cause of action which is statute barred may be granted even though it involves reliance upon facts in addition to those out of which a pleaded cause of action arises, provided that those additional facts are substantially the same as facts already pleaded. The question in each case is whether the facts out of which a new cause of action arises are substantially the same as facts relied upon in a cause of action for which relief has already been claimed in the proceeding. As has been mentioned in other cases, this may involve questions of degree and fine judgment, but the answer to that question should be informed by an appreciation that the policies underlying the applicable statute of limitation may be inappropriately undermined if the required analysis is conducted at too high a level of generality. If those underlying policies are not threatened by a proposed amendment, the test in UCPR r 376(4)(b) may be found to be satisfied even though the new claim involves some variation in the facts. This approach is consistent with the careful way in which the rule has generally been applied since it was enacted."[70] (footnotes omitted)

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[68] 2FASOC, para 98(h)
[69] [2016] QCA 252.
[70] [2016] QCA 252, [15].

159. In my view, the new causes of action under consideration do arise substantially out of the same facts as the pre-existing causes of action. The subject of the alleged failure or failures to notify ASIC or to warn the plaintiff of the same matters are the same subjects that inform the pre-existing causes of action for breach of contract or negligence in relation to the 2008 financial report audit engagement and report.

160. That the obligations to give notice to ASIC or to warn the plaintiff of the same matters may have arisen at an earlier date than 10 March 2009 when the 2008 financial report audit report was issued does not distinguish the facts to a degree that the causes of action do not arise out of substantially the same facts as the pre-existing causes of action.

Prior period errors

161. Second, the defendants' challenge a group of causes of action based on allegations that the first and second defendants failed to consider, correct and disclose prior period errors in carrying out later financial report reviews and audits and reporting thereon.

162. These causes of action were added in relation to the reviews and audits and reports for the financial report audit engagements subsequent to the 2008 financial report audit and report. The defendants submit that the causes of action based on prior period errors for the half-year ending 31 December 2008 and the 2009 financial year were time barred when the amendments were made.

163. The effect of the new allegations of prior period errors breaches is as follows:

(a) each of the financial statements subsequent to the 30 June 2008 financial statements were untrue, misleading or deceptive in that they (each) failed properly to disclose and correct material prior period errors;[71]

(b) by reason of the financial statements failing properly to disclose and correct material prior period errors, the financial statements did not give a true and fair view of the financial position of the Fund, did not comply with the Australian Accounting Standards; did not comply with the International Financial Reporting Standards and did not comply with other mandatory professional reporting requirements in Australia;[72]

(c) an auditor exercising reasonable care, skill and diligence would have become aware during the course of conducting the audits and reviews that the financial statements failed properly to disclose and correct material prior period errors, did not give a true and fair view of the financial position of the Fund and did not comply with the Australian Accounting Standards and the Regulations;[73]

(d) the first and second defendants breached their duties in that they failed to report to ASIC in accordance with section 311 of the Act

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71 2FASOC, para 80(g).

72 2FASOC, para [81].

73 2FASOC, par 82.

that the financial statements failed properly to disclose and correct material prior period errors;[74]

(e) the first and second defendants breached their duties in that they failed to comply with the Australian Auditing Standards by reason of the financial statements failing properly to disclose and correct material prior period errors;[75]

(f) the audit representations and the further audit representations were misleading and deceptive by reason of the Financial Statements failing properly to disclose and correct material prior period errors;[76]

(g) if the first and second defendants had not engaged in misleading or deceptive conduct, they would have reported that the financial statements failed properly to disclose and correct material prior period errors and would have reported the matter to ASIC;[77] and

(h) those authorised to commence proceedings on behalf of the plaintiff would have commenced legal proceedings on behalf of the plaintiff and recovered the loss in respect of such contraventions.[78]

164. The plaintiff submits that these new causes of action arose out of substantially the same facts as the pre-existing causes of action.

165. An important fact is that the prior period errors are themselves allegations of breaches of contract, negligent or misleading or deceptive conduct for the prior period. Another important fact is that the loss alleged to be suffered as a result of this group of causes of action will be the same loss alleged to have been suffered as a result of or by the other causes of action alleged for the same period. For example, the ASOC alleged that loss was suffered as a result of other breaches of contract, or negligence or misleading or deceptive conduct in carrying out the financial report review engagement for the half-year ended 31 December 2008.

166. Accordingly, the additional facts for this group of causes of action are the failure to report the prior period errors or take them into account in carrying out the audit and making the reports for the later periods, specifically the half-year ended 31 December 2008 and the 2009 financial year.

167. The additional questions will be whether the prior period errors should have been notified, warned or reported and whether, if that had occurred, the plaintiff would have avoided the later period losses.

168. In my view, those additional facts do not remove these added causes of action from causes of action that arose out of substantially the same facts as the pre-existing causes of action alleged in the SOC.

Management Fees and Class B Unitholders

169. Lastly, the defendants submit that the 2FASOC includes causes of action based on allegations (introduced first in the FASOC) that the first and second defendants failed to determine or report matters in connection with management fees and

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74 2FASOC, par 84(a).
75 2FASOC, particular (xvi) under par 84(d).
76 2FASOC, paras 88 and 89.
77 2FASOC, par 93(a).
78 2FASOC, paras 93(f)], 95(i), 98(n) and 134(g).

expenses paid to the plaintiff[79] and the non-compliance of distributions or redemptions paid to Class B unitholders[80] in carrying out the reviews and audits of the financial reports of the plaintiff and reporting thereon.

170. It is alleged that, but for these breaches, the losses occasioned by the payment of management fees and expenses paid to the plaintiff and distributions or redemptions paid to Class B unitholders would have been avoided.[81]

171. There was no allegation in the SOC of any error in the auditing of the financial reports in respect of these points. Accordingly, they are added causes of action. The defendants submit that they are new causes of action that do not arise out of substantially the same facts as the pre-existing causes of action.

172. However, there were pre-existing allegations that the first and second defendants' breaches included not determining the impairment of the values of the Fund's mortgage investments and that the loss suffered by the plaintiff for other alleged breaches included the management fees and expenses paid to the plaintiff.[82]

173. There was also a pre-existing allegation that on 3 March 2009, the plaintiff declared that withdrawal requests would be paid up to 365 days after maturity.[83]

174. The plaintiff submits that the first and second defendants' conduct of the reviews and audits of the financial reports was already generally in issue, so that these allegations of breach arise out of substantially the same facts as pre-existing causes of action, because they do not go beyond the transaction or story already raised by the SOC.

175. In my view, the causes of action based on allegations that the first and second defendants' breaches included a failure to determine or report on the management fees paid to the plaintiff, arise out of substantially the same facts as those alleged in the pre-existing causes of action.

176. However, in my view, the same cannot be said of the allegations of the first and second defendants' breaches in failing to determine or report upon the non-compliance of distributions to Class B unitholders. Those alleged breaches do not appear to relate to the audit of the financial reports as such. They appear to relate to payment of the Class B unitholders notwithstanding that redemptions for unitholders were suspended, and a breach of the compliance plan.[84] No allegation previously raised a cognate basis of claim against the auditors of the financial reports.

177. Accordingly, in my view, paras 85(a)(xx), 85(g)(ix), particular (ii) under par 85(k) and paras 93(e) and 95(m) of the 2FASOC should be struck out to the extent that they relate to breaches that occurred before 14 April 2010, to the extent that those breaches were not breaches of contract or negligence.

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79 2FASOC, paras 85(a)(xx) and 85(g)(viii).

80 2FASOC, paras 85(a)(xxi) and 85(g)(ix). An unusual feature of this allegation is that it is of non-compliance with the constitution and compliance plan but is set up as a breach of the financial report audit obligations.

81 2FASOC, paras 93(e), 98(j), 98(l) and 98(m).

82 SOC, par 96(f).

83 SOC, par 3.

84 2FASOC, par 105(o).

Conclusions

178. From the foregoing, in my view, the plaintiff should be directed to amend the 2FASOC to delete the causes of action based upon ss 38 and 99 of the FTA or upon a retrospective operation of ss 18 and 236 of the ACL and to delete the causes of action under paras 85(a)(xx), 85(g)(ix), particular (ii) under par 85(k) and paras 93(e) and 95(m) of the 2FASOC to the extent that they relate to breaches that occurred before 14 April 2010

179. As well, in my view, the plaintiff should be directed to amend the 2FASOC so as to plead the loss or damage alleged to have been suffered as a result of or by the alleged breaches of contract, negligence, or misleading or deceptive conduct, identifying the actual amounts and dates of or periods of the relevant cash flow receipts and expenditures that have occurred on the one hand and the amounts and dates of or periods of the cash flow receipts and expenditures that would have been incurred but for the alleged breaches of contract, negligence, or misleading or deceptive conduct on the other hand.