SUPREME COURT OF QUEENSLAND

CITATION:	*Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC 143
PARTIES:	**SING CHUK CHARLES CHAN** (first plaintiff) and **WAI LAP VICTOR CHAN** (second plaintiff) and **WAI TAK KWOK** (third plaintiff) **v** **MACARTHUR MINERALS LIMITED** **ACN 103 011 436** (first defendant) and **ALAN PHILLIPS** (second defendant) and **JOE PHILLIPS** (third defendant)
FILE NO:	No 518 of 2016
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2019
JUDGE:	Flanagan J
ORDER:	**1. Paragraphs 53, 54, 55, 56, 57, 58, 59, 59A, 59B, 65(a)(ii), (b) and (c) of the Third Further Amended Statement of Claim be struck out.** **2. The proceeding be dismissed.** **3. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT PLEADINGS – GENERALLY – where the second and third defendants and first and third plaintiffs had discussions to exploit certain mining tenements – where the plaintiffs

became directors of a company which entered into an option agreement to purchase those mining tenements – where it is pleaded that the first defendant represented that it would enter into an option agreement to purchase the shares in the company – where it is pleaded that, in reliance on that representation, the plaintiffs caused the company to incur debts and in so were exposed to the risk of personal liability for those debts – where it is alleged that the first defendant decided not to enter into the proposed option agreement without communicating that decision to the plaintiffs – where it is alleged that the second and third defendants were knowingly involved in the first defendant's alleged misleading or deceptive conduct – where the plaintiffs eventually suspended the company's operations – where the company went into liquidation – where a judge of the Supreme Court ordered the plaintiffs to pay amounts representing the company's outstanding debts – where the pleading alleges a causal link between the defendants' conduct and the judgment debt – whether the pleading should be struck out for failing to disclose a reasonable cause of action

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT PLEADINGS – GENERALLY – where the defendants argue that allegations essential to the cases against each of the defendants cannot be supported or are inadequately particularised – whether these allegations should be struck out

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – GENERALLY – where the plaintiffs' pleading has been amended on four occasions – where a previous version of the pleading has been struck out – where the plaintiffs took over a year to file a new pleading after the previous version was struck out – where the defendants apply for the proceeding to be dismissed – whether the pleading discloses a reasonable cause of action – whether the proceeding is frivolous, vexatious or an abuse of process

Trade Practices Act 1974 (Cth), s 52, s 75B
Uniform Civil Procedure Rules 1999 (Qld), r 157, r 171, r 292, r 293

Agar v Hyde (2000) 201 CLR 552, cited
Chan & Ors v Macarthur Minerals Ltd & Ors [2017] QSC 13, considered
Custodial Ltd v Greig [2005] 2 Qd R 115, cited
Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited

Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87, cited
First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Anor [2014] QSC 60, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Gray v Morris [2004] 2 Qd R 118, cited
Haggarty v Wood (No 2) [2015] QSC 244, considered
Jonker v Thomas International Limited [2017] FCA 1397, cited
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259, cited
Republic of Peru v Peruvian Guano Company (1887) 36 Ch D 489, cited
Spencer v Commonwealth (2010) 241 CLR 118, cited

COUNSEL: L F Kelly QC with D J Pyle for the defendants/applicants
R G Bain QC with C Jennings for the plaintiffs/respondents

SOLICITORS: Shand Taylor for the first defendant/first applicant
Clayton Utz for the second and third defendants/second and third applicants
McBride Legal for the plaintiffs/respondents

[1] In these proceedings, which commenced on 11 January 2016, the plaintiffs allege that the defendants' contraventions of s 52 of the *Trade Practices Act* 1974 (Cth) caused the plaintiffs to suffer loss or damage.

[2] The history of the proceedings reveals that the plaintiffs have principally had difficulties in pleading how the alleged contraventions caused the plaintiffs to suffer loss or damage. The plaintiffs have also struggled to particularise allegations that are essential to the case against each of the defendants.

[3] A previous attempt to plead causation in the further amended statement of claim (which I will refer to as the original pleading), was struck out by Bond J on 1 March 2017 with leave to re-plead. His Honour's Reasons[1] identified that the plaintiffs had failed to plead a relationship of cause and effect between the alleged misleading or deceptive conduct and the alleged loss or damage. His Honour also struck out certain allegations that were material to the overall assertion that the first defendant engaged in misleading or deceptive conduct.

[4] On 14 September 2018, which was one-and-a-half years after Bond J delivered his Reasons, the plaintiffs filed the second further amended statement of claim.

[5] On 4 December 2018, the defendants applied to strike out the second further amended statement of claim on the primary basis that it did not disclose a reasonable cause of

[1] *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13.

action in circumstances where there was not, and could not be, a sufficient pleading of any causal link between the conduct complained of and the losses alleged to flow from that conduct.

[6] The defendants' strikeout application came before me in Applications on 13 March 2019. At that hearing, the defendants submitted that the plaintiffs' failure to do what Bond J indicated was necessary to plead their case as regards causation bore testimony to the plaintiffs' inability to plead such a case. In such circumstances, the defendants submitted that leave to re-plead should not be granted, as the proper application of the relevant principles concerning strike out support only the conclusion that the proceeding should be dismissed to the extent that losses representing the plaintiffs' liabilities arising from insolvent trading were incapable of being re-pleaded. Such liabilities constitute all but $25,001.38 of the losses claimed.[2] As the defendants were seeking that the second further amended statement of claim be struck out either wholly or partially with no leave to re-plead, Senior Counsel for the plaintiffs was offered, and accepted, an opportunity, which in effect constituted one last chance, to plead causation. That opportunity was accepted by Senior Counsel without any concession that the second further amended statement of claim had not sufficiently pleaded causation.[3]

[7] On 29 March 2019, the plaintiffs filed a third further amended statement of claim, which I will refer to as the present pleading. On 8 May 2019, the first defendant on the one hand and the second and third defendants on the other filed separate amended applications. These applications seek orders under r 171(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) that certain paragraphs of the present pleading be struck out; that the claim and present pleading be struck out entirely; that the proceeding be dismissed; and that costs be awarded to the defendants.

The present pleading

[8] The plaintiffs' case as pleaded is relatively straightforward. The first defendant, Macarthur Minerals Limited, held, either on its own account or by a subsidiary, exploration rights to an area of Western Australia known as Lake Giles.[4] The second defendant, Alan Phillips, was the chairman of the board of Macarthur Minerals, as well as its chief executive officer.[5] The third defendant, Joe Phillips, was an employee of Macarthur Minerals.[6]

[9] In 2009, contiguous with the Lake Giles tenement precinct there were certain tenements that were granted under the *Mining Act* 1978 (WA) (**Area 317**) and held by a Mr Dalla-Costa.[7]

[10] On 5 September 2009, Joe Phillips represented to the third plaintiff, Mr Kwok, that Area 317 could be developed by:[8]

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2 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 49.
3 Transcript of Proceedings, 13 March 2019, T1-5, lines 45-47.
4 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 1(f).
5 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 1(d).
6 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 1(e).
7 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 4.
8 Third Further Amended Statement of Claim filed 29 March 2019 paragraph 5.

(a) a new company being established to obtain and hold a 12-month option to purchase Area 317 from Dalla-Costa exercisable after the new company had invested $2.5 million in drilling and exploration of Area 317;

(b) Macarthur Minerals entering into an option agreement with the new company to purchase Area 317 at a higher price than the new company had paid under that option agreement with Dalla-Costa.

[11] At a meeting on 21 October 2009 between Alan Phillips, Joe Phillips, Mr Kwok and the first plaintiff, Mr Charles Chan:

(a) Alan Phillips or Joe Phillips stated that:

(i) there was an opportunity to expand exploration for iron ore in the Lake Giles area;

(ii) Macarthur Minerals required funding to undertake further mining exploration;

(iii) an opportunity existed to expand mining exploration over Area 317;

(b) Mr Kwok or Mr Charles Chan responded to the effect that they could assist Macarthur Minerals to raise funds by way of a subscription of new shares in Macarthur Minerals;

(c) in response to that statement by Mr Kwok or Mr Charles Chan, Alan Phillips proposed that:

(i) Mr Kwok and Mr Charles acquire an interest in a new company;

(ii) they would secure an option agreement with Dalla-Costa for that new company to purchase the exploration licences over Area 317;

(iii) Mr Dalla-Costa would require $2.5 million to be spent on exploration of Area 317 during the option period;

(iv) once the new company had acquired the exploration licence over Area 317, Macarthur Minerals would purchase the shares in that new company or would purchase the licence, for cash or equity in Macarthur Minerals, for a total price that was more than what was paid to Mr Dalla-Costa for the exploration licence over Area 317. [9]

[12] The new company referred to in these representations ultimately was First Strategic Development Corporation Ltd (**First Strategic**). Mr Charles Chan and Mr Kwok became shareholders and directors of First Strategic on 25 November 2009.[10] The second plaintiff, Mr Victor Chan, became a director of First Strategic on 5 March 2010.

[13] Prior to any of the plaintiffs becoming directors of First Strategic, Joe Phillips, on 28 October 2009, sent an email to Mr Kwok to the effect that he was having a simple agreement prepared that provided for First Strategic to hold an option to purchase Area 317 on the condition that First Strategic spent $2.5 million on exploration.[11] The option term would be 12 months and the first defendant would hold a call for the purchase of

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9 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 7.
10 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 12.
11 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 8.

Area 317 from First Strategic on terms more favourable to First Strategic than the purchase of Area 317 from Mr Dalla-Costa.[12]

[14] In November 2009, Joe Phillips provided an option agreement between First Strategic and Mr Dalla-Costa.[13] On or about 3 December 2009, the option agreement between First Strategic and Mr Dalla-Costa was executed.[14]

[15] On 12 February 2010, Joe Phillips sent a draft option agreement between First Strategic and Internickel Australia Pty Ltd, which was a wholly owned subsidiary of Macarthur Minerals, to Mr Charles Chan and Mr Kwok, in terms consistent with earlier discussions. This option agreement is referred to in the pleading as the "draft MMS option agreement".[15]

[16] On 25 February 2010, Alan Phillips sent an email to Mr Kwok and Mr Victor Chan wherein he stated, in effect:

(a) the completion of the draft MMS option agreement and the MMS management agreement were outstanding;

(b) those agreements had been sent by Joe Phillips to First Strategic in January 2010;

(c) the board of Macarthur Minerals had agreed to execute those documents but required First Strategic to approve those documents.[16]

[17] By reference to meetings conducted in April, May and July, together with emails, the plaintiffs plead that the following representation was made by the defendants:[17]

> "That Macarthur Minerals, or a subsidiary company of Macarthur Minerals, would enter into an option agreement to purchase the shares in First Strategic in the terms of, or substantially to the effect of, the draft MMS option agreement."

[18] Together with the above representation, and the alleged silence thereafter, the pleaded misleading or deceptive conduct is that contrary to the above representation, in April 2010, Macarthur Minerals, the first defendant, had resolved or decided, without communicating this to the plaintiffs, that it could not or would not itself or through a subsidiary:

(a) enter into an option agreement in the terms of, or substantially to the effect of, the draft MMS option agreement; or

(b) otherwise enter into an option agreement for the purpose of holding a call to purchase the shares in First Strategic; and

(c) further or alternatively, had resolved or decided to put further negotiation of such agreement(s) on hold.[18]

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12 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 8(a), (b)(i).
13 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 13.
14 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 15.
15 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 20.
16 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 24.
17 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 39A.
18 Third Further Amended Statement of Claim filed 29 March 2019, paragraphs 53 and 53A.

[19] This can be referred to compendiously as the first defendant's decision in April 2010 to not enter into the pleaded option agreements, being the agreements referred to in 18(a) and (b) above, and to put negotiations on hold. It can also simply be referred to as the first defendant's decision in April 2010. It is further alleged that the second defendant was responsible for, or knew of, the first defendant's decision in April 2010, and similarly that the third defendant knew of the first defendant's decision in April 2010.[19] Combined with other facts, it is then alleged that the second and third defendants were knowingly involved in the defendants' misleading or deceptive conduct for the purposes of s 75B of the *Trade Practices Act* 1974 (Cth).[20]

[20] On 6 August 2010 Mr Charles Chan decided to suspend the exploration of Area 317.[21] Prior to this decision, from 25 November 2009, when Mr Charles Chan became a director of First Strategic, to 6 August 2010 he had been willing and able and did lend to First Strategic sufficient funds to meet all its liabilities from time to time, including those under and related to the option agreement with Mr Dalla-Costa.[22] It is pleaded that Mr Charles Chan's willingness to lend such funds to First Strategic rested on:

(i) his accepting as truth the representations made by the defendants to him or communicated to him, and

(ii) his consequential belief that Macarthur Minerals would, directly or through a subsidiary, enter into an agreement in the terms of, or substantially to the effect of, the draft MMS option agreement.[23]

[21] It is further pleaded that from 25 November 2009 to 6 August 2010, First Strategic had available to it, and relied on, those loans from Mr Charles Chan to fund payment of its creditors.[24]

[22] The present pleading identifies two amounts constituting the plaintiffs' loss and damage. The first is referred to as the post-April 2010 debts for which First Strategic, from April 2010, became indebted to a number of creditors. The post-April 2010 debts total $993,896.44. It is pleaded that First Strategic had no capacity to pay these debts except from funds lent to it by Mr Charles Chan and that each of the plaintiffs permitted and allowed First Strategic to become indebted for this amount in reliance upon the truth of the representations.[25]

[23] The second category of loss and damage is referred to as the post-April 2010 payments. These are payments amounting to $25,001.38 made by Mr Charles Chan of the post-April 2010 debts in reliance upon the truth of the representations.

[24] The post-April 2010 debts are, of course, debts of First Strategic. The present pleading identifies how the plaintiffs became liable for those debts. As a number of these

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19 Third Further Amended Statement of Claim filed 29 March 2019, paragraphs 55 and 57.
20 Third Further Amended Statement of Claim filed 29 March 2019, paragraphs 56 and 58.
21 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 47.
22 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 12A(a).
23 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 12A(b)(i).
24 Third Further Amended Statement of Claim, paragraph 12A(c).
25 Third Further Amended Statement of Claim filed 29 March 2019, paragraphs 40-42.

paragraphs are sought to be struck out,[26] I set them and other relevant paragraphs out in full:

> "59. Had the defendants (or any of them) informed the plaintiffs (or any of them) of any of the matters referred to in paragraph 53 *ante*, the plaintiffs would:
>
> (a) have immediately suspended and terminated the exploration of Area 317 by First Strategic and would have caused First Strategic not to:
>
> ~~(a)~~ (i) enter into the MMS project management agreement;
>
> ~~(b)~~ (ii) accept the OD Quote; or
>
> ~~(c)~~ (iii) incur the post-April 2010 debts;
>
> (b) thereby have avoided any exposure to, or actual, personal liability for or reflecting the post-April 2010 debts.
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> 59A. Rather and in consequence of the Defendants' failure to inform the Plaintiffs of the matters in paragraph 53 *ante*, or any of those, the Defendants' silence otherwise and in continuing reliance on the truth of the matters set out in paragraph 39A *ante*, the Plaintiffs caused First Strategic to:
>
> ~~Further, the plaintiffs caused First Strategic to do the following acts in reliance on the truth of the matters set out in paragraph 39A *ante*:~~
>
> (a) enter into the MMS project management agreement;
>
> (b) accept the OD Quote;
>
> (c) incur the ~~debts the subject of the~~ post-April 2010 debts.
>
> 59B. In consequence of the matters in paragraph 59A, in the premises the Plaintiffs were exposed to the risk of, and ultimately, actual, personal liability for the post-April 2010 debts.
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> 60. (a) On or about 17 November 2010, First Strategic resolved that it be wound up and a liquidator be appointed, as was done.
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> (b) That liquidator was later removed by order of the Court and the Second Defendant in [2014] QSC 60 *post* was appointed in lieu.
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> …
>
> 64. (a) On 4 April 2014, the Supreme Court of Queensland [*First Strategic Development Corporation Limited (in liq) and Anor v Chan and Ors* [2014] QSC 60] ordered that:
>
> (i) Mr Kwok and Mr Charles Chan pay to First Strategic, pursuant to s 588M(2) of the *Corporations Act 2001,* the sum of $1,349,131.03, which sum included an amount representing the post-April 2010 debts, then unpaid;

[26] In particular, paragraphs 59, 59A, 59B and 65.

(ii) Victor Chan pay to First Strategic, pursuant to s 588M(2) of the *Corporations Act 2001,* the sum of $1,322,867.35, which sum included an amount representing the post-April 2010 debts, then unpaid;

(b) The plaintiffs have each paid one-third of the amount of $1,349,131.03 the subject of the said order on 4 April 2014;

(c) In result, the plaintiffs have collectively complied with those orders of the Court.

Damages

65. In the premises of the allegations in this pleading, the defendants' contravention of s 52 of the *Trades Practices Act,* as alleged in paragraph 54 herein, has caused the plaintiffs to suffer loss or damage in the following amount:

(a) as to Mr Charles Chan, the amount of $356,300.20 comprising:

(i) $25,001.38, being the post-April 2010 payments; and

(ii) $331,298.82, as one-third of the post-April 2010 debts within the said order on 4 April 2014;

(b) as to Mr Victor Chan, $331,298.82, as one-third of the post-April 2010 debts within the said order on 4 April 2014; and

(c) as to Mr Kwok, $331,298.80, as one-third of the post-April 2010 debts within the said order on 4 April 2014.

66. In the premises of the allegations in paragraphs 1, 2, 4C, 4D, 4E, 7, 12, 12A, 15, 16, 28, 35A, 35B, 40, 41, 42, 44 and 45 herein, the losses and damages claimed each were the, or a, foreseeable consequence of the defendants' contravention of the *Trade Practices Act* as alleged herein."

[25] In *First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Ors*,[27] which is the case referred to in paragraph 64(a) of the present pleading, the principal claim was by the liquidator of First Strategic against the first, second and third plaintiffs in their capacity as directors of First Strategic. The liquidator's claim was made pursuant to s 588M(2) of the *Corporations Act* 2001 (Cth) on the basis that, as directors of First Strategic, the plaintiffs had contravened s 588G as "First Strategic had incurred debts at a time when it was insolvent and there were reasonable grounds for suspecting its insolvency."[28] Philip McMurdo J (as his Honour then was) found that First Strategic was insolvent at all material times and each of the subject debts was incurred when the company was insolvent.[29] In support of that finding, his Honour observed as follows:[30]

> "[78] Therefore there were many circumstances which must have made the first defendant, at any point, reluctant to contribute anything to the

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27 [2014] QSC 60.
28 *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13, [13].
29 *First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Anor* [2014] QSC 60, [80].
30 [2014] QSC 60, [78]-[80].

> exploration of these tenements and otherwise to the expenses of the company, to any extent beyond that which was required to be paid immediately in order to avoid the collapse of the entire proposal at that point. His 'degree of commitment' was thereby low. It was dependent upon so many contingencies that, had there been an independent board of directors, they could not have considered the first defendant to be a reliable source of funds.
>
> [79] The reliability or otherwise of the first defendant is also indicated by the way in which he ultimately showed no sense of responsibility for the payment of debts which he had caused the company to incur. In his letter of 6 August 2010, he asked for the outstanding accounts so that he could have them paid. But none of them was paid. He sought to explain this in his evidence by saying that he felt that he had been 'cheated'. But that allegation, whatever its content, was apparently directed to the controllers of MMS [Macarthur Minerals] and not to any other creditor.
>
> [80] In my conclusion the degree of preparedness of the first defendant to pay the debts of the company as they fell due, was not such as to provide a sufficiently reliable source of funds by which the company became *able* to pay its debts as they fell due." [emphasis in the original]

[26] Philip McMurdo J therefore determined that each of the directors (that is, the first to third plaintiffs) was required to compensate for First Strategic's insolvent trading and that the liquidator pursuant to s 588M(2) "should recover from each of them, as a debt due to the company, the sum which was claimed."[31]

The strike out of the original pleading and the Reasons of Bond J

[27] One of the complaints made in relation to the original pleading was that no causal link between the misleading or deceptive conduct and most of the losses alleged was properly pleaded. The losses claimed in the original pleading included amounts paid by Mr Charles Chan for legal services relating to the appointment of the liquidators and for the services of the liquidators, as well as expenses incurred by the plaintiffs in unsuccessfully defending the insolvent trading proceeding before Philip McMurdo J.[32] These claims for losses are not repeated in the present pleading. The original pleading, however, contained a claim for losses in the same terms as those pleaded in paragraphs 64 and 65 of the present pleading, namely $331,298.82 for each plaintiff as one-third of the post-April 2010 debts, which were reflected in the orders made by Philip McMurdo J on 4 April 2014.[33] The Reasons of Bond J should therefore be understood in the context that his Honour was considering the causation issue in the same context as arises from the present pleading.

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[31] *First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Anor* [2014] QSC 60, [96]. An appeal from his Honour's judgment was dismissed: *Chan v First Strategic Development Corporation Limited (in liq)* [2015] QCA 28.

[32] Statement of Claim filed 11 January 2016, paragraphs 61, 63, 67(b), (d), (e), (f) and (g).

[33] Statement of Claim filed 11 January 2016, paragraphs 64(a), 65(a), 66(c).

[28] In the course of his Reasons, Bond J, correctly in my view, identified what is required to establish causation in misleading or deceptive conduct cases:[34]

> "[37] The relevant aspects of the substantive law may be briefly stated:
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> (a) A plaintiff is entitled pursuant to s 82 of the *Trade Practices Act* to recover loss or damage which the plaintiff has suffered 'by' conduct which contravened s 52.
>
> (b) The plaintiff must show that the losses suffered are causally related to the contravening conduct. In this regard, in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525, the joint judgment of Mason CJ, Dawson, Gaudron and McHugh JJ stated that s 82(1) should be understood as taking up the common law practical or common-sense concept of causation as discussed in *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.
>
> (c) Of course, the offending conduct need not be the sole cause of the plaintiff's loss: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [33] and [216]. It will suffice if the contravening conduct was a cause which materially contributed to the loss, despite the fact that there may have been other causes.
>
> (d) The reference to 'by' in s 82 has been interpreted as including the common law's approach in contract and tort to limiting damages by reference to concepts such as remoteness. As McHugh J stated in *Henville v Walker* (2001) 206 CLR 459 at [136] (Gummow J agreeing):
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> > 'Given the long history of the common law's recognition of the concept of remoteness in assessing damages in contract and tort and its relationship with the issue of causation, it seems proper to read the term "by" in s 82 as including the concept of remoteness. By remoteness, I mean that the loss or damage was not reasonably foreseeable even in a general way by the contravener.'
>
> [38] As many of the defendants' complaints concern the adequacy of the plaintiffs' pleading of the causal link between the conduct which the plaintiffs impugn and the loss which they say they suffered, it is also appropriate to set out some general propositions concerning the requisite content of an adequate pleading of a causal link in such circumstances.
>
> [39] As a general proposition, the defendants are entitled to have pleaded a direct and unambiguous identification of the material facts relied on to establish the causal link which the law requires and which, at least arguably establishes that link: *Lee v Abedian* [2016] QSC 92 at [81].

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[34] [2017] QSC 13, [37]-[40].

[40] In *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, Jackson J collected some further general statements of principle, to similar effect (emphasis added and footnotes omitted):

> '[26] However, there is no shortage of relevant case law [concerning the extent of pleading required to establish causal link between breaches of contract or negligence and loss]. In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*, Chesterman J said:
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> > **"In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. …"**
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> [27] Another well-known judgment in this area is *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*, where French J said:
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> > "**The material facts establishing the necessary causal link should be pleaded**. In cases of contravention of s 52 said to be constituted by misrepresentation this will generally require more than appears in the opening words of par 50: 'by reason of such conduct ...'.
> >
> > Some guidance to the proper approach may be derived from the ordinary rule of pleading applicable in cases of fraud of which Lord Watson said in *Dow Hager Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 221:
> >
> > > '... The ordinary rule of pleading applicable to cases of fraud, ... was thus expressed by Earle Selborne in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697: "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. **There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.**'

> A perusal of the relevant precedents in [Bullen, Leake & Jacob's *Precedents of Pleadings* 12th ed, pp 702–7] supports the view that **the approach enunciated by Lord Watson is equally applicable to actions for negligent misstatement**."""" [footnotes omitted]

[29] His Honour identified the defects in the original pleading necessitating a strike out in the following terms:[35]

> "[44] The defendants' contention is that the pleading does not set out material facts which lead to a reasonable inference that –
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> (a) the misleading and deceptive conduct complained of (effectively the relevant non-disclosure of Macarthur's true intention once the alleged April 2010 decision had been made); and
>
> (b) the alleged later event (here the first plaintiff's decision to pay legal expenses incurred in relation to the appointment of the liquidator to First Strategic, or for the services provided by the liquidator),
>
> stand to each other in the relation of cause and effect. The defendants say the cause of the loss was obviously the first plaintiff's decision to incur the relevant expenses, not anything else.
>
> [45] For their part, the plaintiffs submitted that they had pleaded a classic 'no transaction' case: no agreements would have been entered, payments made or debts incurred if Macarthur had advised the plaintiffs that it would not enter into an option agreement to purchase the shares or Area 317. The plaintiffs submitted that the defendants' proposition that there was no causal link between the impugned conduct and the plaintiffs' decision was the kind of approach rejected by the High Court in *Medlin v State Government Insurance Office* (1995) 182 CLR 1 because it wrongly focussed on the intervening decision. They relied on the highlighted parts of the following passage (at 6-7) from the judgment of the plurality (although expressed in relation to the law of negligence, the observations are just as relevant to causation under the *Trade Practices Act*):
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> > 'For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of commonsense and experience (16). And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the "but for" test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test (17). If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or decision be

[35] [2017] QSC 13, [44]-[49].

> disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. **The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision. It will be seen that, on the plaintiff's evidence, the present was such a case.**'

[46] I agree with the defendants' complaints. The plaintiffs' argument seems to assume that in a 'no transaction' case, all pecuniary losses which would not have been incurred but for the impugned conduct must be regarded as having been caused by the impugned conduct. That is incorrect. The argument ignores the earlier part of the passage quoted from *Medlin*. In a case where the question of causation is complicated by an intervening act or decision of the plaintiff, reliance merely on 'but for' causation is inadequate as a comprehensive positive test. It is certainly inadequate on the facts of this case.

[47] The appropriate course here is to require the plaintiffs to articulate the material facts which establish the causal link in the way required by the cases I have referred to at [39] and [40] above. That will require the articulation of facts which as a matter of common sense and experience lead to a reasonable inference that the impugned conduct and the relevant category of loss stand in the relationship of cause and effect. In this case, absent a pleading of facts which establish a reasonable inference that the impugned conduct was itself a direct or indirect contributing cause of the plaintiffs' decision to appoint a liquidator and then to pay the expenses claimed under this heading, it is difficult to imagine how the requisite causal link could be established.

[48] The plaintiffs' pleading does not articulate material facts which justify the reasonable inference that the impugned conduct was itself a direct or indirect contributing cause of the plaintiffs' decision to appoint a liquidator and to incur the expenses. If there is a way to do that, it has not yet been done. The pleading of the two counterfactual propositions identified at [43](d)] and [43](e)] above are not sufficient and amount to little more than 'but for' propositions. I note too that there is merit in the defendants' further criticism of the plea 'would not have had to' in [66(c)]. What is intended to be encompassed by that proposition is entirely unclear.

> [49] The defendants argued that statement of claim [61] should be struck out, together with any claims to recover the expenditure referred to in that paragraph. I agree."

[30] In dealing with the amounts paid by the plaintiffs pursuant to the orders of Philip McMurdo J, Bond J observed as follows:[36]

> "[62] But quite apart from those flaws – which I regard as matters of detail which are easily fixed – the same problems exist as have been identified under the previous two headings. Again:
>
> (a) It is difficult to see how the impugned conduct and the decision to cause First Strategic to incur debts whilst insolvent could arguably stand in the relationship of cause and effect.
>
> (b) If there is a way to plead material facts which justify a reasonable inference that the impugned conduct was itself a direct or indirect contributing cause of the plaintiffs' decision to cause First Strategic to incur debts whilst insolvent, it has not yet been done.
>
> (c) The same problems with the pleaded counterfactual concerning the use of the language 'would not have had to make' also exist.
>
> [63] The defendants argued that statement of claim [40], [64], and [65] should be struck out, together with any claims to recover the expenditure referred to in that paragraph. I agree.
>
> [64] I note that the plaintiffs' further written submissions filed after the hearing of the application advised of the plaintiffs' intention to amend statement of claim [59] so that the allegation becomes a reference to the plaintiffs having 'incurred a liability' to First Strategic (rather than simply having exposed themselves to being liable to First Strategic and any liquidator appointed to it). That amendment does not sufficiently address the problem because the pleading still omits the pleading of facts which justify a reasonable inference that the impugned conduct was itself a direct or indirect contributing cause of the plaintiffs' decision to act in the way which led to the incurring of the liability."

[31] His Honour also dealt with a complaint that there was no support for the allegation that the first defendant had decided in April 2010 not to enter into the pleaded option agreements[37] and to put negotiations on hold. This is relevant because the defendants submit that the present pleading suffers from a similar problem.

Consideration

[32] The defendants seek the striking out of paragraphs 53, 54, 55, 56, 57, 58, 59, 59A, 59B and 65 of the present pleading. Paragraphs 53 to 58 consist of allegations that are

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[36] [2017] QSC 13, [62]-[64].

[37] It should be noted that the pleaded option agreements in the original pleading were in slightly different terms to the pleaded option agreements that now appear in the present pleading.

essential to the misleading or deceptive conduct and knowing involvement cases. Paragraphs 59, 59A, 59B and 65 form part of the pleaded causal link between the defendants' impugned conduct and the plaintiffs' losses. I will first deal with the paragraphs concerning causation, as the majority of the parties' submissions were directed towards this issue. I will then turn to the paragraphs concerning misleading or deceptive conduct and knowing involvement.

(a) Paragraphs 59, 59A, 59B and 65 – Causation

[33] As is evident from the Reasons of Bond J and his Honour's analysis of the relevant cases, the issue is whether the plaintiffs have pleaded material facts in the present pleading which "as a matter of common sense and experience lead to a reasonable inference that the impugned conduct and the relevant category of loss stand in the relationship of cause and effect".[38] The defendants submit that the plaintiffs have failed to heed Bond J's reasoning and that no attempt has been made to plead material facts which justify a reasonable inference that the impugned conduct was a direct or indirect contributing cause for the plaintiffs' decision to cause First Strategic to incur debts whilst insolvent. The consequence of this, according to the defendants, is that the plaintiffs have failed to plead a relationship of cause and effect between the impugned conduct and the losses alleged such that the present pleading fails to disclose any reasonable cause of action.[39]

[34] For the purposes of considering the causation issue, I proceed on the basis that the defendants did engage in the pleaded misleading or deceptive conduct. The issue is whether the plaintiffs have pleaded the necessary causal link between that conduct and their alleged losses arising from the orders of 4 April 2014. The plaintiffs' case as now pleaded is that the relevant conduct on the part of the defendants exposed the plaintiffs to the risk of and ultimately, actual personal liability for the post-April 2010 debts.[40] The losses claimed are therefore pleaded to constitute a foreseeable consequence of the defendants' contraventions of the *Trade Practices Act*.[41] The original pleading did not plead causation in any significantly different way. Paragraph 59 of the original pleading stated:

> "In committing First Strategic to the obligations under the Drilling Agreement and the Project Management Agreement, and allowing First Strategic to incur the debts referred to in paragraph 40 Mr Charles Chan, Mr Victor Chan and Mr Kwok as directors of First Strategic exposed themselves to being liable to First Strategic or any liquidator appointed to First Strategic for the obligations made under those agreements and for those debts."

[35] In both instances, what is pleaded is an exposure to the risk of personal liability. The only personal liability that arises in respect of the plaintiffs is pursuant to the orders made by Philip McMurdo J. Those orders were made on the basis that First Strategic

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38 [2017] QSC 13, [47].
39 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 34.
40 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 59(b) and 59B.
41 Third Further Amended Statement of Claim filed 29 March 2019, paragraph 66.

was insolvent when it incurred the relevant debts, which in turn required each of the plaintiffs to compensate First Strategic for its insolvent trading. The liability of the plaintiffs was therefore for unlawful conduct in their capacity as directors of First Strategic for insolvent trading.[42] The defendants submit, and I accept, that the factual bases for the findings by Philip McMurdo J have nothing to do with the alleged misleading or deceptive conduct. To the contrary, other entirely unrelated matters form the basis of his Honour's judgment. As a consequence, the allegations of misleading or deceptive conduct cannot be said to have in any way caused the losses sought to be recovered in the present proceedings.[43] Any risk of personal liability in respect of the plaintiffs arose because of a course of conduct engaged by them as directors of First Strategic.[44]

[36] I do not accept the plaintiffs' submission that the deficiencies in the earlier pleadings identified by Bond J are now remedied.[45] In terms of causation, it must be accepted that the defendants had nothing whatsoever to do with permitting First Strategic to trade insolvently.[46]

[37] Accordingly, paragraphs 59, 59A, 59B, 65(a)(ii), (b) and (c) should be struck out for failing to disclose a reasonable cause of action.

(b) Paragraphs 53 and 54 – Misleading or deceptive conduct of the first defendant

[38] In paragraph 53, the plaintiffs assert that:

> "In April 2010, Macarthur Minerals, by the MMS directors, had resolved or decided that it could not or would not, itself or through a subsidiary:
>
> (a) enter into an option agreement in the terms of, or substantially to the effect of, the draft MMS option agreement; or
>
> (b) otherwise enter into an option agreement for the purpose of holding a call to purchase the shares in First Strategic; and
>
> (c) (further or alternatively) had resolved or decided to put further negotiation of such agreement(s) on hold."

[39] Paragraph 54 is then a conclusion of law, namely that, in consequence of the matters pleaded (including paragraph 53), the first defendant engaged in misleading or deceptive conduct in trade or commerce and that the second and third defendants were involved in such conduct for the purposes of s 75B of the *Trade Practices Act*.

[40] It can be immediately observed that paragraph 53 is unaccompanied by particulars. Prior to that, when the matter was before Bond J, paragraph 53 included particulars of an email sent by the second defendant to the first plaintiff on 27 August 2010, and an

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42 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 7.
43 Further Submissions of the Defendants/Applicants filed 23 April 2019, paragraph 4.
44 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 6.
45 Submissions for the Plaintiffs on the Defendants' Application to Strike Out the Statement of Claim filed 20 February 2019, paragraph 20; Plaintiffs' Outline of Submissions on the Defendants' Application to Strike Out filed 3 May 2019, paragraph 4.
46 Transcript of Proceedings 8 May 2019, T1-10, lines 7-8.

internal email between the third defendant and the first defendant's legal advisors. These emails are relevant to other parts of the present pleading, which I will address below, however, for present purposes it suffices to say that Bond J struck out paragraph 53 because these emails did not support the allegation contained therein.

[41] The plaintiffs' response to this was to change the expression but otherwise preserve the substance of the allegation in paragraph 53, and simply remove the particulars of the allegation. Paragraph 53 is now a bald assertion and, on its face, fails to comply with r 157, which requires parties to include particulars necessary to "(a) define the issues for, and prevent surprise at, the trial; (b) enable the opposite party to plead".

[42] The second and third defendant's solicitors have since requested the plaintiffs to provide particulars of the allegation contained in paragraph 53.[47] The plaintiffs have replied,[48] and continue to maintain,[49] that they are not in a position to provide particulars prior to interlocutory processes, apparently because the allegation concerns a matter solely within the knowledge of the defendants.

[43] Where particulars are required under the UCPR, a party can, in certain circumstances, delay the provision of those particulars until after interlocutory processes, such as discovery. This may be because, as maintained here, the allegation concerns a matter solely within the other party's knowledge. However, even at a preliminary stage, there must be some basis for the making of the allegation in question. That proposition is made clear by *Jonker v Thomas International Limited,*[50] which concerned an unparticularised allegation that representations were made by unidentified representatives to unspecified third parties. In that case, Derrington J stated, "Where all that the Court has before it on an application to strike out (or on an application for discovery) is a bald allegation in the pleading which cannot be appropriately particularised and an absence of evidence that a case exists, the allegation is embarrassing and should not stand".[51] His Honour further observed that if a party sought to prove an allegation by way of inference of other matters, then the party should "identify the facts which it intends to establish for the purposes of asking the Court to draw the necessary inferences",[52] or, at the very least, "the party relying upon the bald assertions of fact ought to identify the matters from which the facts will be inferred. They might be identified as particulars or in affidavit evidence."[53] More generally, Derrington J noted that a respondent to a strike out application "ought to adduce what evidence it can to indicate that it has or, perhaps, believes that it has, a good cause of action or defence as the case may be."[54]

[44] It may be accepted that paragraph 53 concerns the first defendant's internal decisions, which is a matter that may be solely within the first defendant's knowledge. However, the plaintiffs must still have a basis for making the allegation. As to that, the plaintiffs

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47 Exhibit CME-46 to the affidavit of Chris Michael Erfurt filed 4 December 2018, page 78.
48 Exhibit CME-47 to the affidavit of Chris Michael Erfurt filed 4 December 2018, pages 83-84.
49 Submissions for the Plaintiffs on the Defendants' Application to Strike Out the Statement of Claim filed 20 February 2019, paragraph 30.
50 [2017] FCA 1397.
51 [2017] FCA 1397, [29].
52 [2017] FCA 1397, [25].
53 [2017] FCA 1397, [25].
54 [2017] FCA 1397, [28].

submit that the basis for the allegation in paragraph 53 is identified in the pleading itself, in particular, the inferences that arise having regard to the alleged chronology of dealings between the parties.[55] However, the plaintiffs have not particularised or otherwise specifically identified the inferences that are to be drawn, and nor have they shown how those inferences provide a basis for the allegation in paragraph 53. There is therefore no basis for the allegation in paragraph 53. Accordingly, it should be struck out because it tends to prejudice or delay the fair trial of the proceeding.[56]

[45] As the allegation in paragraph 53 is essential to the conclusion of law in paragraph 54, it follows that paragraph 54 should also be struck out.

(c) Paragraphs 55 and 56 – the second defendant's knowing involvement in the first defendant's misleading or deceptive conduct

[46] Paragraphs 55 and 56 form part of the plaintiffs' case against the second defendant. Paragraph 55 provides:

> "55. Mr Alan Phillips:
>
> (a) was the person in Macarthur Minerals, alternatively was one of the MMS directors, who some time in April 2010, prior to 20 April 2010:
>
> (i) decided that Macarthur Minerals could not or would not, itself or through a subsidiary, enter into a share option agreement in the terms of the draft MMS option agreement;
>
> (ii) and that it would not otherwise enter into an option agreement for the purpose of holding a call to purchase the shares in First Strategic; and
>
> (iii) (further or alternatively) had resolved or decided to put further negotiations towards such agreement on hold; and
>
> (iv) (in the further alternative) had put the process for negotiating such an agreement on hold;
>
> (b) (further, or alternatively) knew, at some time in April 2010 on or prior to 20 April 2010 that Macarthur Minerals had decided that it would not, itself or through a subsidiary, enter into an option agreement in terms of the draft MMS option agreement and had decided to put negotiation of such agreement on hold; or (in the further alternative) had put the process for negotiating such an agreement on hold.
>
> (c) on 27 August 2010 sent an e-mail to Mr Charles Chan in these terms: [*sic*]

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[55] Submissions for the Plaintiffs on the Defendants' Application to Strike Out the Statement of Claim filed 20 February 2019, paragraph 30.

[56] UCPR, r 171(1)(b).

"Charles thank you for your email ! It is truly unfortunate it has come to this. Macarthur advised you at our meeting in april in brisbane this year between yourself. victor ,john tiogo and myself that under the circumstance macarthur could not enter into an assignment of the option agreement. The reasons given were (1) Option period was too short with only 8 months remaining. (2) It would be challenging to fulfil the expenditure obligations of $ 2.5 million and complete a resource report before expiry of the option period. (3) The option exercise price was beyond macarthurs finantial capability. (4) The. Acquisition would require shareholder approval which would not be easily obtained. (5) Edward Kwoks litigation created yet another problem as he was then and remains now a director of FSDL. The only possible solution was for FSDL to gain an extension to the option from the Vendor. This was discussed in brisbane in july at a meeting between yourself .victor ,john tiogo and myself. I understood that this was achieved at our site visit in late july where yourself , victor , doug betts negotiated directly with the vendor. Macarthur was very suprised at the sudden and unexpected suspension of activities. CHARLES. You are a highly successful international businessman held in great regard by your peers . . As a director of FSDL along with Victor and edward you have a responsibility to pay the substantial overdue creditors. It would not be conceivable that you of all people would not do this. I respectfully suggest you give this matter your every consideration. Kind regards.

ALAN

Particulars

(a) ~~Mr Charles Chan, Mr Victor Chan and Mr Kwok rely upon the fact that,. i~~In ~~the~~ that email, sent by Mr Alan Phillips on 27 August 2010 to Mr Charles Chan, ~~he~~ Mr Phillips then alleged~~s~~ that he had told Mr Charles Chan in April (being a reference to April 2010) that Macarthur Minerals would not enter into an "assignment of the ~~share~~ option agreement".

(b) That was in the circumstances that the only agreement relevantly the subject of negotiations between the parties was in terms of the draft MMS option agreement.

(c) Such reference to "assignment of the option agreement" by Mr Alan Phillips (a layman) was to the draft MMS option agreement.

(d) In those premises it is to be inferred that Mr Alan Phillips (alone or with others) did and knew the things in (a) and (b)."

[47] Paragraph 56 is a conclusion of law to the effect that the second defendant was knowingly involved in the first defendant's misleading or deceptive conduct.

[48] The email of 27 August 2010 excerpted in paragraph 55(c) was previously a particular in support of the allegation in paragraph 53 of the original pleading, which was in similar terms to the allegation in paragraph 53 of the present pleading, namely that the first defendant had decided that it could not or would not enter into the pleaded option agreements and had decided to put negotiations on hold. The email is now pleaded as a material fact itself, although the particulars to paragraph 55, particularly (d), suggest that the email is effectively in support of the allegations in paragraph 55(a) and (b), which, put broadly, are that the second defendant was either responsible for, or knew of, the first defendant's decision in April 2010.

[49] The email is said to support these allegations because the author, the second defendant, contended in that email that he had told the first plaintiff in April 2010 that the first defendant would not enter into an "assignment of the option agreement", and that this was a reference to the option agreements pleaded in paragraph 55 and elsewhere in the present pleading.

[50] As to that, the defendants submit that the second defendant's email of 27 August 2010 to the first plaintiff is incapable of supporting the allegations in paragraph 55 for essentially the same reasons that Bond J concluded that it could not support the allegations in paragraph 53 of the original pleading.[57] The effect of his Honour's reasoning was that the email, on an ordinary reading, concerned the existing option agreement between First Strategic and Mr Dalla-Costa; the email did not refer to the pleaded option agreement(s) concerning First Strategic, the plaintiffs, and the first defendant.[58]

[51] The plaintiffs submitted before Bond J that it could be inferred from the context of the email that the second defendant was indeed referring to the option agreement(s) pleaded in paragraph 55 and elsewhere in the present pleading. His Honour considered that such context would have to be pleaded.[59] The present pleading now contains particulars that the email was sent in circumstances where the only agreement relevantly the subject of negotiations between the parties was in terms of the draft MMS option agreement (particular (b)) and that the second defendant's reference to the "assignment of the option agreement" should be properly understood as a reference to the draft MMS option agreement, given that he is a layman (particular (c)). The plaintiffs submit that the particulars in (b) and (c) now give "contextual force and clarity to what was referred to, erroneously, as the assignment of the option agreement."[60]

[52] The particulars in paragraph 55 do not provide sufficient context from which it can be inferred that the second defendant was referring to the pleaded option agreements. In my view, what Bond J contemplated was the provision of specific extrinsic facts that

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57 Transcript of Proceedings, 8 May 2019, T1-13, lines 34-38.
58 [2017] QSC 13, [26].
59 [2017] QSC 13, [27].
60 Transcript of Proceedings, 8 May 2019, T1-23, lines 4-5.

would shed a different light on the ordinary meaning of the email. The particulars in (b) and (c) are too broad to provide any meaningful context.

[53] In addition, the proposition in (b), which is said to be borne out by the circumstances of the party's dealings referred to in the preceding paragraphs of the pleading,[61] is arguably contradicted by the pleading itself. Paragraphs 7, 8, 9 and 13 show that the defendants were, prior to the email of 27 August 2010, considerably involved in the preparation and execution of the option agreement between First Strategic and Mr Dalla-Costa. Therefore, when one reads the present pleading, it is apparent that the defendants were not solely concerned with the pleaded option agreements concerning First Strategic, the plaintiffs and the first defendant, but also had a hand in the option agreement between First Strategic and Mr Dalla-Costa. Indeed, the characteristics of the option agreement between Mr Dalla-Costa and First Strategic are consistent with the email's references to an existing option with a remaining term of eight months,[62] an expenditure requirement in the amount of $2,500,000,[63] and a vendor (ie, Mr Dalla-Costa) as the grantor of the option.

[54] In the absence of specific contextual matters, the particulars cannot support an inference that the second defendant's email of 27 August 2010 was referring to the option agreements pleaded in paragraph 55 and elsewhere. In turn, the email cannot support the allegations in paragraphs 55(a) and (b). Accordingly, paragraph 55 should be struck out. It follows that the conclusion of law in paragraph 56, which is in the premises of paragraphs 55 and 55A, cannot stand and should also be struck out.

(d) Paragraphs 57 and 58 – the third defendant's knowing involvement in the first defendant's misleading or deceptive conduct

[55] Paragraphs 57 and 58 allege the knowing involvement of the third defendant in the first defendant's conduct, and follows the same structure of the allegations against the second defendant in paragraphs 55 and 56.

[56] Paragraphs 57 and 58 provide:

> "57. Mr Joe Phillips knew at some time(s) in April 2010 on or prior to 20 April 2010 that Macarthur Minerals had decided it would not, itself or through a subsidiary, enter into an option agreement to purchase the shares in First Strategic in terms of the draft MMS option agreement and had put the process for negotiating such agreements on hold; or (alternatively) had put the process for negotiating such an agreement on hold.
>
> **Particulars**
>
> ~~Mr Charles Chan, Mr Victor Chan and Mr Kwok rely upon~~ Such knowledge is to be inferred from the facts that:

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[61] Transcript of Proceedings, 8 May 2019, T1-22, lines 11-12.
[62] The option period was 12 months at the time of execution on or about 3 December 2009: paragraph 16(c).
[63] Paragraph 16(a).

(a) Mr Joe Phillips was the son of Mr Alan Phillips and an employee of Macarthur Minerals and was routinely informed by Mr Alan Phillips of decisions made by Mr Alan Phillips and/or of the MMS directors relating to Macarthur Minerals;

(b) Mr Joe Phillips sent an email on 28 April 2010 to Maggie McGuinn of McGuinn Legal and was copied in on an email from Mr David Taplin (consistent with his own and not contradicted by him) stating that the share option agreement was on hold.

57A. Mr Joe Phillips engaged in the conduct referred to in paragraphs 36 and 39.

58. In the premises of the matters referred to in paragraphs 57 and 57A, Mr Joe Philips was knowingly involved within the meaning of Section 75B of the Act in the misleading and deceptive conduct referred to in paragraph 54."

[57] Consistently with their submissions concerning the allegations against the second defendant, the defendants submit that the particulars in paragraph 57, which are essentially the same as those provided in the second further amended statement of claim, cannot establish the alleged knowing involvement of the third defendant.[64] Accordingly, it is necessary to consider whether the propositions in particular (a) provide a sound basis for inferring the matters in paragraph 57.

[58] Particular (a) contains three propositions:[65]

(i) the third defendant was the son of the second defendant;

(ii) the third defendant was an employee of the first defendant; and

(iii) the third defendant was routinely informed by the second defendant of decisions made by the second defendant and/or the first defendant's directors relating to the first defendant.

[59] As to (i) and (ii), it is hard to see how the third defendant would be aware of the first defendant's pleaded decision in April 2010 merely by virtue of the fact that he was the second defendant's son and the first defendant's employee. Implicit in (iii) is the premise that the second defendant or its directors were responsible for the first defendant's decision in April 2010. Put another way, (iii) relies upon the allegations in paragraphs 53 and 55. These have already been struck out for being baseless assertions.

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64 Submissions of Defendants/Applicants filed 21 January 2019, paragraphs 28(b) and 41.

65 Submissions for the Plaintiffs on the Defendants' Application to Strike Out the Statement of Claim filed 20 February 2019, paragraph 25.

[60] Particular (b) cites emails involving the third defendant on 28 April 2010. Those emails provide as follows:[66]

> "(a) email from Ms McGuinn of McGuinn Legal to Mr Taplin of Taplin & Associates, copied to Mr Joe Phillips:
>
> David
>
> On 28 January 2010, you sent me the draft MMS Option Agreement marked up with comments by MMS (see below).
>
> When I spoke to you subsequently, you indicated that this was in fact for discussion with Joe Phillips and that you/he would get back to me. I have not heard from either of you since then and am writing to enquire where this is at.
>
> Will you please let me know the current status?
>
> (b) email from Mr Joe Phillips to Ms McGuinn:
>
> Maggie
>
> I will call you to discuss. Little complicated.
>
> Rgds
>
> Joe
>
> (c) Email from David Taplin of Taplin & Associates to Ms McGuinn of McGuinn Legal, copied to Mr Joe Phillips:
>
> Hi Margaret.
>
> This matter has been placed on hold for the moment following determination of some issues.
>
> I will update you again when these issues have been determined, but no action is required for the time being.
>
> Regards
>
> David"

[61] These emails were used by the plaintiffs in paragraph 53 of the original pleading. As with the email sent by the second defendant on 27 August 2010, Bond J concluded that the emails involving the third defendant could not support the allegation. His Honour's reasoning was as follows:[67]

> "[29] Although it is obvious enough that the email exchange arguably supports the proposition that the 'draft MMS Option Agreement' to which the legal adviser referred had been placed on hold at some time on or prior to 28 April 2010, how it is that that connects up with –
>
> (a) the 'could not or would not' part of the pleaded case; or
>
> (b) either of the two pleaded types of option agreements,
>
> is entirely unclear.

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[66] These emails are found in exhibits CME-22 and CME-23 to the affidavit of Chris Erfurt filed 1 September 2016, pages 191-192. For clarity, I have excerpted Bond J's Reasons [2017] QSC 13, [28], which in turn quote these emails in chronological order.

[67] [2017] QSC 13, [29]-[30].

> [30] Whether or not the emails can support some part of what is pleaded in [53] of the statement of claim turns on how the reference to the 'draft MMS Option Agreement' is interpreted. It is for the plaintiffs to explain what their case is concerning the reference, and to do so in a way which makes it clear how the email arguably supports the pleaded case. The present problem is that the reference to the emails does not, without some further pleaded context, support the pleaded allegation. And even if that is done, how are the emails relevant to the proposition that a decision was made that Macarthur could not or would not have done something?"

[62] Unlike the original pleading before Bond J, the present pleading clarifies that the pleaded option agreement(s) which the first defendant allegedly reneged on was in the terms of, or was in similar terms to, the draft MMS option agreement. It may be accepted that this change in the present pleading provides a new relevance to the above emails. However, in my view, further context is required in order for the emails to support an inference of the matters in paragraph 57. The emails only disclose that the third defendant knew that the draft MMS option agreement was, as at 28 April 2010, temporarily on hold "following the determination of some issues". In my view, this falls short of providing a sound basis for the allegation that the third defendant knew that the first defendant had decided it could not or would not enter into the pleaded option agreements and had put negotiations on hold.

[63] I therefore accept the defendant's submission that paragraph 57 is based upon matters which do not establish knowing involvement on the part of the third defendant. Paragraph 57 should be struck out, and consequently paragraph 58 should also be struck out.

Should the proceedings be dismissed?

[64] Concerning the post-April 2010 debts and the related issue of causation, the defendants submit that the plaintiffs' inability to plead their case, despite four attempts, is, of itself, decisive and supports the conclusion that the proceeding should be dismissed to the extent that losses arising out of the post-April 2010 debts are concerned.[68] In relation to both the post-April 2010 debts and the post-April 2010 payments, the defendants submit that the plaintiffs' inability to progress the allegations of misleading or deceptive conduct beyond bald assertions is reason alone to dismiss the entire proceeding against all of the defendants, as is the failure to disclose a reasonable basis for asserting any knowing involvement on the part of the second and third defendants.[69]

[65] There are two bases for summarily dismissing proceedings: r 293 of the UCPR and the Court's inherent jurisdiction. (There is also the power under r 16(e) to set aside an originating process, which the Court may exercise on the same grounds that are applicable to the exercise of the inherent jurisdiction.[70]) In their amended applications, the defendants did not apply for a dismissal of proceedings under r 293 and I note that no defence is yet to be filed in respect of the present pleading. By implication, the

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[68] Submissions of Defendants/Applicants filed 21 January 2019, paragraph 49.
[69] Submissions of Defendants/Applicants filed 21 January 2019, paragraph 50.
[70] *Custodial Ltd v Greig* [2005] 2 Qd R 115.

defendants must instead be seeking to invoke the Court's inherent jurisdiction. The Court's inherent jurisdiction to stay or dismiss a proceeding is enlivened either where the proceeding is an abuse of process, frivolous or vexatious, or where the pleadings do not disclose a reasonable cause of action.[71]

[66] It is trite that the power to summarily dismiss a proceeding in the Court's inherent jurisdiction should be treated with caution.

[67] As to that, in *Dey v Victorian Railways Commissioners*, Dixon J, speaking of the inherent jurisdiction to dismiss frivolous or vexatious proceedings or proceedings amounting to an abuse of process, cautioned that:[72]

> "A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

[68] Regarding the inherent jurisdiction to dismiss proceedings where the pleading does not disclose a reasonable cause of action,[73] Barwick CJ warned in *General Steel Industries Inc v Commissioner for Railways (NSW)* that the jurisdiction is to be "sparingly employed" and is only to be used in a "clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion."[74]

[69] These sentiments have been endorsed by the High Court on numerous occasions, both in relation to the Court's inherent jurisdiction and similar powers under rules of court:

(a) In *Fancourt v Mercantile Credits Ltd*, the High Court (per curiam) stated, in the context of the predecessor to r 292, that "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."[75]

(b) In *Agar v Hyde*, Gaudron, McHugh, Gummow and Hayne JJ noted that "a court… should not decide the issues raised in… proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to

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71 Cairns, *Australian Civil Procedure* (2013, 10th edition, Thomson Reuters), 508 [12.470]; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 128-130 (Barwick CJ): pleadings fail to disclose reasonable cause of action; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91 (Dixon J): proceeding is an abuse of process, frivolous or vexatious.

72 (1949) 78 CLR 62, 91.

73 In addition to relying upon the Court's inherent jurisdiction, the defendants also relied upon the High Court of Australia's rules of court at the time, see (1964) 112 CLR 125, 127.

74 (1964) 112 CLR 125, 128-9.

75 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99.

> place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[76]

(c) More recently, in *Spencer v Commonwealth*, concerning the power to order summary judgment under s 31A of the *Federal Court of Australia Act* 1976 (Cth), French CJ and Gummow J reiterated, "the exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process. The same applies where such a disposition is sought in a summary judgment application supported by evidence."[77]

[70] It is also noteworthy that the powers to give summary judgment in rr 292 and 293 are also subject to the same precautions. In the Court of Appeal case of *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*, Holmes J (as her Honour then was) repeated Barwick CJ's warning in *General Steel Industries Inc* in the context of an appeal from a summary judgment application.[78] Similarly, in *Gray v Morris*, Philip McMurdo J considered the High Court's cautionary statement in *Fancourt v Mercantile Credits Ltd*[79] to be "forceful and authoritative guidance" in the exercise of the power under r 293.[80] Justice Chesterman (as his Honour then was) made a similar observation in *Gray v Morris*:[81]

> "The reasons which lie behind the caution expressed by the High Court and the Privy Council are still valid. A plaintiff who claims to have a cause of action should not be prevented from prosecuting his claim unless it be obvious that he cannot succeed… The new rules, just as the old, are concerned with depriving a litigant of participation in the process which the law has always regarded as being the appropriate means of determining rights. The deprivation should only occur in a clear case, as the High Court said."

[71] The proposition which emerges from these cases is that the Court must exercise "great care"[82] if it exercises a discretion to terminate proceedings prior to trial, bearing in mind that the consequence is to deprive a party of the chance to prove his or her claim or defence at trial.

[72] With this in mind, it is now appropriate to turn to the problems with the proceeding and assess whether, in light of these problems, the proceeding is vexatious, frivolous or an abuse of process, and further whether the present pleading fails to disclose a reasonable cause of action. I will first address the plaintiffs' inability to plead a causal link

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76 (2000) 201 CLR 552, 575-6 [57].
77 (2010) 241 CLR 118, 131 [24].
78 [2003] 1 Qd R 259, 265 [7] (Davis JA and Mullins J agreeing).
79 (2000) 201 CLR 552.
80 [2004] 2 Qd R 118, 133 [46].
81 [2004] 2 Qd R 118, 125 [11].
82 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87.

between the defendants' conduct and their liability under Philip McMurdo J's orders. I will then deal with the plaintiffs' failure to substantiate allegations that are essential to the pleaded case, namely that the first defendant had decided in April 2010 that it could not or would not enter into the pleaded option agreements and to put negotiations on hold, and that the second and third defendant either were responsible for, or knew of, that decision.

(a) The plaintiffs' inability to plead a causal link between the defendants' conduct and the post-April 2010 debts

[73] It is important to identify the precise nature of the defect in the present pleading insofar as it seeks the recovery of amounts paid pursuant to Philip McMurdo J's orders. The defendants argued, and it has been accepted, that even if the material facts in the pleading are assumed to be true, the plaintiffs cannot show a relationship of cause and effect between the defendants' conduct and the debt arising from Philip McMurdo J's orders, as required by the *Trade Practices Act*. In that sense, the defect is that the majority of the pleading is demurrable.

[74] A similar situation to the present one was considered by Jackson J in *Haggarty v Wood (No 2)*[83] in the context of an application under both rr 171 and 293 and where a prior statement of claim had already been struck out.[84] In its second further amended statement of claim, the plaintiffs failed to link breaches of an alleged contract and unconscionable conduct by a third party testator with the relief claimed against the defendant. The pleading was struck out on that basis. On the issue of summary judgment, Jackson J observed as follows:[85]

> "In my view, it will not be appropriate always under r 293 UCPR to give final judgment in a case in the fashion of a decision upon demurrer where a plaintiff has not pleaded a viable case capable of proof at trial by evidence, but might be able to. However, an application under r 293 UCPR presupposes that the defendant has filed a defence in response to a properly prepared and filed claim and statement of claim, so the court should not be too wary of treating a plaintiff as having nailed their colours to the mast. That approach is all the more justified where the plaintiff has had numerous attempts to articulate their case over a lengthy period.
>
> Whether a particular case fits into this category calls for the exercise of a discretionary judgment. Sometimes, a pleader's skills may be the problem but the facts otherwise proved or indicated by the evidence will give pause to a Judge acting under r 293 UCPR. However, in other cases, the difficulty will lie in the absence of a factual stratum to make a necessary allegation, not in the failure to allege it in the pleading. In my view, r 293 UCPR is properly engaged in such a case."

[75] In my view, Jackson J's comments are relevant here notwithstanding that his Honour was proceeding under r 293 whereas the present application proceeds under the Court's inherent jurisdiction and r 171. The plaintiffs have had four opportunities to plead a

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83 [2015] QSC 244.
84 *Haggarty v Wood* [2013] QSC 327.
85 [2015] QSC 244, [81]-[82].

proper causal link between the defendants' impugned conduct and the alleged loss. Justice Bond has previously given them specific guidance in this regard. The present pleading does not address his Honour's concerns. Given the history of the pleadings, it is unlikely that any further iteration of the pleading will do so. This is not because of a failure to allege a material fact that has hitherto been omitted, but rather because the facts, as they are, do not establish causation. In that sense, the impugned part of the present pleading is, to use Chitty J's expression,[86] worse than demurrable: it cannot be saved by any legitimate amendment. Accordingly, the proceeding should be dismissed to the extent that the plaintiffs seeks compensation arising out of their liability under Philip McMurdo J's orders of 4 April 2014. This is on the basis that the pleading does not disclose a reasonable cause of action for the recovery of such amounts.

(b) The plaintiffs' failure to substantiate allegations that are essential to their case

[76] As submitted by the defendants, the plaintiffs have been unable to progress allegations that are key to their case against each of the defendants. With respect to the first defendant, the present pleading does not disclose a basis for the allegation in paragraph 53 that in April 2010, it decided or resolved that it would not, directly or indirectly, enter into the pleaded option agreements, and to put negotiations on hold. This is in circumstances where the plaintiffs attempted to rely on the second and third defendant's emails to substantiate a materially similar allegation in the original pleading. However, following Bond J's conclusion that the emails were inadequate for this purpose, the plaintiffs have not sought to substantiate the allegation by any other means.

[77] The plaintiffs now rely upon the emails in question for a similar purpose, that is, to support the allegations that the second defendant was responsible for, or knew of, the first defendant's decision in April 2010, and that the third defendant similarly knew of the first defendant's decision. I accept the defendant's submissions that Bond J's reasoning concerning these emails applies with equal force here. The second defendant's email to the first plaintiff on 27 August 2010 does not appear to refer to the pleaded option agreements at all. The pleaded context to the email is unconvincing and, in my view, is too broad to contradict the email's otherwise plain meaning. As concerns the emails of 28 April 2010 involving the third defendant, while the emails suggest the third defendant knew that a "draft MMS option agreement" was temporarily on hold at that time, they fall short of showing that he knew that the first defendant had made the decision in April 2010 pleaded in paragraph 53.

[78] What the above reveals is that the plaintiffs' case against the defendants in this respect essentially consists of piecemeal evidence that is, at best, speculative of the pleaded case. Justice Bond made it clear that the original pleading required further context to make good the case insofar as it turned upon the first defendant's uncommunicated decision in April 2010. That further context is not forthcoming in the present pleading. From this, it can be deduced that the plaintiffs are unable to plead the material facts that are essential components to their case. Further, the differences between the original pleading, the second further amended statement of claim, and the present pleading, suggest that any subsequent pleading will purport to bolster these allegations by simply repurposing parts of the pleading that have already been considered to be deficient for related purposes. It is also noteworthy that the plaintiffs filed the second further

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[86] *Republic of Peru v Peruvian Guano Company* (1887) 36 Ch D 489, 496.

amended statement of claim as late as 18 months after Bond J struck out the original pleading.

[79] In these circumstances, to allow the proceeding to progress to interlocutory stages, such as disclosure, would, as the defendants submit, allow the plaintiffs to merely fish for a case.[87] In my view, the proceeding is vexatious or frivolous, and would operate as an abuse of process if it were to continue. Accordingly, the proceeding should be dismissed in its entirety.

Disposition

[80] I order that:

1. Paragraphs 53, 54, 55, 56, 57, 58, 59, 59A, 59B, 65(a)(ii), (b) and (c) of the present pleading be struck out.

2. The proceeding be dismissed.

3. I will hear the parties as to costs.

[87] Reply Submissions of the Defendants filed 14 March 2019, paragraph 13.