SUPREME COURT OF QUEENSLAND

CITATION:	*Chan & Ors v MacArthur Minerals Limited & Ors [2020] QCA 143*
PARTIES:	**SING CHUK CHARLES CHAN** (first appellant) **WAI LAP VICTOR CHAN** (second appellant) **WAI TAI KWOK** (third appellant) **v** **MACARTHUR MINERALS LIMITED** ACN 103 011 436 (first respondent) **ALAN PHILLIPS** (second respondent) **JOE PHILLIPS** (third respondent)
FILE NO/S:	Appeal No 7121 of 2019 SC No 518 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 143 (Flanagan J)
DELIVERED ON:	30 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2019
JUDGES:	Philippides JA and Henry and Brown JJ
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – SUMMARY DISPOSAL – where the primary judge struck out various paragraphs of the appellants' third further amended statement of claim and dismissed the proceeding brought by the appellants against the respondents for misleading and deceptive conduct causing the appellants, in their personal capacity, to suffer loss and damage – where the personal capacity in which the appellants suffered loss or damage was pleaded to have arisen by orders made by the Supreme Court in 2014, consequent on a proceeding being brought by the liquidators of a company (of which the appellants were all directors) for insolvent trading, following the winding up of that company in 2010 – where the appellants have attempted on multiple occasions to produce a

competent pleading, with the first pleading being struck out (with leave to re-plead) on the basis that the appellants failed to plead a causative relationship between the misleading and deceptive conduct and the alleged loss or damage – where the second pleading was also the subject a strike out application before the primary judge, after which the appellants were given "one last chance to plead causation" – whether the primary judge erred in striking out the relevant paragraphs of the third further amended statement of claim on the basis that the appellants failed to plead a sufficient causal nexus between the alleged misleading conduct and the loss and damage claimed – whether the primary judge erred in dismissing the proceeding in its entirety

Corporations Act 2001 (Cth), s 588G, s 588M
Trade Practices Act 1974 (Cth), s 52, s 75B

Chan & Ors v Macarthur Minerals & Ors [2017] QSC 13, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Ors [2014] QSC 60, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, cited

COUNSEL: F Corsaro SC, with G Handran, for the appellants
L Kelly QC, with D Pyle, for the respondents

SOLICITORS: McBride Legal for the appellants
Shand Taylor Lawyers for the respondents

THE COURT:

[1] This appeal is against the decision of the primary judge (Flanagan J) given on 7 June 2019 striking out various paragraphs of the appellants' third further amended statement of claim, and dismissing the proceeding[1] brought by the appellants, Mr Charles Chan, Mr Victor Chan and Mr Kwok, who were directors of First Strategic Development Corporation Ltd (First Strategic). The proceeding was brought against Macarthur Minerals Ltd (Macarthur Minerals) (the first respondent), Mr Alan Phillips, as chairman of the board of Macarthur Minerals and its chief executive officer (the second respondent) and Mr Joe Phillips, an employee of Macarthur Minerals (the third respondent), for misleading or deceptive conduct, in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) (the TPA), causing the appellants, in their personal capacity, to suffer loss or damage.

[2] The personal capacity in which the appellants suffered loss or damage was pleaded[2] to have arisen from court orders made on 4 April 2014 by McMurdo J (as his Honour then was) in *First Strategic Development Corporation Ltd (in liq) & Anor v Chan & Ors*[3] (the *First Strategic* decision). That proceeding was brought by the liquidator of First Strategic for insolvent trading, consequent on First Strategic being wound up on or around 17 November 2010.[4]

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1 *Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC 143 (Reasons).
2 Third Further Amended Statement of Claim (ASC) at paras [44(a)], [64(a)], [65].
3 [2014] QSC 60.
4 ASC para [60(a)].

[3] The appellants had experienced difficulties in producing a competent pleading. The first pleading was struck out by Bond J on 1 March 2017,[5] but with leave to re-plead, on the basis that the appellants had failed to plead a causative relationship between the misleading and deceptive conduct and the alleged loss or damage. The second attempt was the subject of a strikeout application on 13 March 2019 before Flanagan J on the basis that the appellants still had not addressed the deficiency concerning the issue of causation. Flanagan J granted the appellants the opportunity for "one last chance to plead causation", which was accepted.[6] The result was the third further amended statement of claim filed on 29 March 2019 (the ASC) that is the subject of this appeal.

[4] The appellants' grounds of appeal were condensed in oral submissions to three issues, being that the primary judge erred:

1. in striking out paragraphs [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC on the basis of a finding that a sufficient causal nexus between the respondents' alleged misleading conduct and the loss and damage claimed was not pleaded;

2. in striking out the allegation in [53] of the ASC that Macarthur Minerals made a decision in April 2010 not to proceed to enter into an option arrangement, contrary to representations made earlier; and

3. in striking out paragraphs [55] and [57] of the ASC as to the respondents' knowledge and involvement in Macarthur Minerals' decision not to proceed with the option arrangement.

The pleaded case

[5] Macarthur Minerals held mineral exploration rights over tenements in Western Australia,[7] contiguous to which were tenements owned by a Mr Dalla-Costa, referred to as "Area 317".[8]

[6] On 5 September 2009, Macarthur Minerals, through Mr Joe Phillips, represented to Mr Kwok (the third appellant) that Area 317 could be developed by:

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

(b) Macarthur Minerals entering into an option agreement with that company to purchase Area 317 at a higher price than the company had paid under the option agreement with Mr Dalla-Costa.[9]

[7] On 21 October 2009, Mr Alan Phillips and Mr Joe Phillips met with Mr Charles Chan (the first appellant) and Mr Kwok and stated, amongst other matters, that there existed an opportunity to expand mining exploration over Area 317, but that Macarthur Minerals required funding to undertake further mining exploration. Mr Kwok or Charles Chan responded that they could assist Macarthur Minerals to raise

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5 *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13.
6 Reasons at [6].
7 ASC para 1(f).
8 ASC para 4.
9 ASC para 5.

funds by a subscription of new shares in Macarthur Minerals. Mr Alan Phillips then proposed that, *inter alia*:[10]

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

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

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

(d) 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 those exploration licences over Area 317, 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 licences over Area 317 under the relevant option agreement.

[8] On 28 October 2009, Mr Joe Phillips emailed Mr Kwok that he was having a simple agreement prepared that provided for First Strategic (which was the new company to be used) to enter into the option agreement with Mr Dalla-Costa, to hold an option to purchase Area 317 on condition that it spend $2.5 million on exploration (to be managed by Macarthur Minerals), with Macarthur Minerals holding a call for the purchase of Area 317 from First Strategic on more favourable terms than those by which First Strategic purchased Area 317 from Mr Dalla-Costa.[11]

[9] Mr Charles Chan and Mr Kwok became shareholders and directors of First Strategic on 25 November 2009[12] with Mr Victor Chan becoming a director on 5 March 2010.[13]

[10] In November 2009, Mr Joe Phillips provided an option agreement between Mr Dalla-Costa and First Strategic to acquire Area 317, which was executed on 27 November 2009 and 3 December 2009.[14]

[11] On 12 February 2010, Mr Joe Phillips sent a draft option agreement between First Strategic and Internickel Australia Pty Ltd (a wholly owned subsidiary of Macarthur Minerals) to Mr Charles Chan and Mr Kwok, in terms consistent with earlier discussions (the draft MMS option agreement).[15]

[12] On 25 February 2010, an email was sent by Mr Alan Phillips to Mr Kwok and Mr Victor Chan, stating that completion of the draft MMS option agreement and the management agreement sent to First Strategic in January 2010 (the MMS management agreement) remained outstanding, and the board of Macarthur Minerals had agreed to execute those agreements but required First Strategic to approve those documents.[16]

[13] On 13 April 2010, Mr Alan Phillips met with Mr Charles Chan and Mr Victor Chan, informed them that the relationship with Mr Kwok had broken down and inquired

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10 ASC paras 6, 7.
11 ASC para 8.
12 ASC para 12.
13 ASC para 26.
14 ASC paras 13, 15.
15 ASC paras 20, 21.
16 ASC para 24.

whether the draft MMS option agreement could proceed without his involvement. Mr Charles Chan responded that he would be willing to proceed without Mr Kwok's involvement but that he required Macarthur Minerals to enter a "back to back option agreement" whereby it would acquire Area 317 from First Strategic once it had acquired it from Mr Dalla-Costa.[17]

[14] In May 2010, Mr Alan Phillips told Mr Charles Chan that Macarthur Minerals would enter into a back to back option agreement and would execute the draft MMS option agreement.[18] On 26 and 27 May, a "Project Management Agreement" was executed by Macarthur Minerals and First Strategic.[19] In July 2010, Mr Charles Chan informed Mr Alan Phillips that proposed amendments to the draft MMS option agreement would be sent to him "the following week" to which Mr Alan Phillips responded that that was "okay".[20]

[15] The appellants alleged (in para 39A of the ASC) that, by reference to meetings in April,[21] May[22] and July[23] together with emails, that the following representation was made by the respondents:

> "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."

[16] The appellants alleged that Macarthur Minerals, by the representation and its silence thereafter until 20 July 2010, engaged in misleading and deceptive conduct. That conduct was that, contrary to the representation, and without communication to the appellants, in April 2010, Macarthur Minerals resolved or decided that it could not or would not (itself or through a subsidiary):[24]

(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 (the April decision).

[17] It was also alleged that Mr Alan Phillips and Mr Joe Phillips were, pursuant to s 75B of the TPA, knowingly involved in Macarthur Minerals' misleading or deceptive conduct.[25]

[18] On 20 July 2010, Mr Victor Chan handed a further version of the draft MMS option agreement to Mr Alan Phillips who told him that he was having difficulty getting Macarthur Minerals' directors to agree to execute the draft MMS option agreement

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17 ASC paras 27, 28.
18 ASC paras 33, 33A.
19 ASC para 35A.
20 ASC paras 38, 38A.
21 ASC paras 27, 28.
22 ASC paras 33, 33A.
23 ASC paras 38, 38A.
24 ASC paras 53, 53A.
25 ASC paras 55-58.

and needed time to sort out the matter.[26] On 28 July 2010, Mr Charles Chan told Mr Alan Phillips that he would not continue with the Area 317 project if Macarthur Minerals would not enter into an agreement to acquire Area 317 from First Strategic, to which Mr Alan Phillips responded that Macarthur Minerals' board had expressed concerns about entering into the draft MMS option agreement and he needed more time to resolve the concerns.[27]

[19] On 6 August 2010, Mr Charles Chan decided to suspend the exploration of Area 317 and stopped lending to First Strategic to fund its debts. He emailed Mr Alan Phillips and Mr Joe Phillips to suspend exploration, stating that the buy option had been secured from the tenement owner but that it did not make sense to proceed further as the sell option to Macarthur Minerals had not been secured. He also stated that he understood that First Strategic was responsible for the exploration costs and other expenses that had accrued so far and that it would settle Macarthur Minerals' account.[28]

[20] From 25 November 2009 (when he became a director of First Strategic) up until 6 August 2010, Mr Charles Chan had been willing and able, and did, lend funds to First Strategic to meet its liabilities, from time to time, including those arising under and related to the option agreement with Mr Dalla-Costa.[29] His willingness to lend such funds rested on his accepting the truth of the representations made or communicated to him and his consequential belief that Macarthur Minerals would enter into an agreement substantially to the effect of the MMS option agreement.[30] During the period from 25 November 2009 to 6 August 2010, First Strategic had available and relied on those loans from Mr Charles Chan to fund payment of its creditors.[31]

[21] First Strategic became indebted to a number of creditors for debts incurred after April 2010, referred to as "post-April 2010 debts", totalling $993,896.44, including under the project management agreement with Macarthur Minerals.[32] It was alleged that the appellants permitted and allowed First Strategic to become indebted in reliance upon the truth of the representations.[33] First Strategic had no capacity to pay the post-April 2010 debts except from funds lent to it by Mr Charles Chan.[34] When First Strategic was incurring the post-April 2010 debts, each appellant was liable as a director to pay those debts, if otherwise unpaid, in the event of it being wound up, pursuant to s 588M of the *Corporations Act* 2001 (Cth) (the Act). However, prior to 6 August 2010, First Strategic would not be wound up because it had the benefit of loans from Mr Charles Chan to meet its debts.[35]

[22] The appellants claimed as loss and damage (by paras 64 and 65) payments each made to First Strategic pursuant to the orders of 4 April 2014 made against them under s 588M(2) of the Act, including an amount representing the then unpaid

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26 ASC para 45A.
27 ASC para 46.
28 ASC para 47.
29 ASC para 12A(a).
30 ASC para 12A(b).
31 ASC para 12A(c).
32 ASC para 40.
33 ASC paras 42.
34 ASC para 41.
35 ASC para 44.

"post-April debts".[36] The payments made by each were of an amount being one third of the post-April 2010 debts of First Strategic.[37]

[23] In addition, Mr Charles Chan claimed as loss and damage, "post-April payments" of $25,001.38 of the post-April 2010 debts made in reliance upon the truth of the representations.[38]

Causation as pleaded in paras [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of ASC

The First Strategic decision

[24] Before turning to paras [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC, it is convenient to refer to the reasons of McMurdo J in the *First Strategic decision* for concluding that the appellants were liable as directors to compensate First Strategic for insolvent trading. His Honour found the appellants had, in contravention of s 588G of the Act, incurred debts at a time when First Strategic was insolvent and there were reasonable grounds for suspecting its insolvency. In that regard, the primary judge quoted the following passages from the decision of McMurdo J:

> "[78] … there were many circumstances which must have made [Mr Charles Chan], at any point, reluctant to contribute anything to the exploration of these tenements and otherwise to the expenses of [First Strategic], 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 [him] to be a reliable source of funds.
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> [79] The reliability or otherwise of [Mr Charles Chan] 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 [Macarthur Minerals] and not to any other creditor.
>
> [80] In my conclusion the degree of preparedness of [Mr Charles Chan] 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." (original emphasis)

Paras [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC

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36 ASC paras 64(a), 65.
37 ASC para 65.
38 ASC paras 43, 65.

[25] As mentioned, the causal relationship between the impugned misleading and deceptive conduct and the appellants' loss was pleaded in paras [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC which alleged, in relation to their liability for the post April 2010 debts of First Strategic:

> "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 April 2010 decision], the plaintiffs would:
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> (a) have immediately suspended and terminated the exploration of Area 317 by First Strategic and would have caused First Strategic not to:
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> (i) enter into the MMS project management agreement;
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> (ii) accept the OD Quote; or
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> (iii) incur the post-April 2010 debts
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> (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 representation], the Plaintiffs caused First Strategic to:
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> (a) enter into the MMS project management agreement;
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> (b) accept the OD Quote;
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> (c) incur the post-April 2010 debts.
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> 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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> 65. In the premises of the allegations in this pleading, the defendants' contravention of s 52 of [the TPA], as alleged in paragraph 54 [the misleading and deceptive conduct] herein, has caused the plaintiffs to suffer loss or damage in the following amount:
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> (a) as to Mr Charles Chan, the amount of $356,300.20 comprising:
>
> (i) …[39]
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> (ii) $331,298.82, as one-third of the post-April 2010 debts within the said order on 4 April 2014; and

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[39] This paragraph referred to the amount of $25,001.38 being the post-April 2010 payments pleaded in [43] of the ASC.

(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."

The primary judge's decision

[26] The primary judge observed that the claims by each appellant for loss and damage, in paras 64 and 65 of the ASC, of $331,298.82, being one third of the post-April 2010 debts, reflecting the orders made on 4 April 2014, were in effect in the same terms as in the original pleading, although other claims were also made. His Honour considered that the reasons of Bond J in respect of that version should be "understood in the context that his Honour was considering the causation issue in the same context as arises from the present pleading".[40] The primary judge noted that, in relation to those claims, Bond J identified[41] the deficiency in the pleading as being 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.

[27] Referring to Bond J's detailed analysis of the relevant cases on causation including *Medlin v State Government Insurance Commission*,[42] the primary judge stated that the causation issue to be determined was:[43]

> "… whether the [appellants] 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'."

[28] The primary judge outlined the respondents' submission that the appellants had failed to heed the reasons of Bond J in failing to plead material facts which justify a reasonable inference that the impugned conduct was a contributing case for the appellants' decision to cause First Strategic to incur debts whilst insolvent, such that there was no reasonable cause of action pleaded. The primary judge stated:[44]

> "For the purposes of considering the causation issue, I proceed on the basis that the [respondents] 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 [appellants'] case as now pleaded is that the relevant conduct on the part of the [respondents] exposed the [appellants] to the risk of and ultimately, actual personal liability for the post-April 2010 debts.[45] The losses

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40 Reasons at [27].
41 Reasons at [30], referring to *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13 at [62].
42 (1995) 182 CLR 1.
43 Reasons at [33], referring to *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13 at [47].
44 Reasons at [34].
45 ASC paras 59(b) and 59B.

> claimed are therefore pleaded to constitute a foreseeable consequence of the [respondents'] contraventions of [the TPA].[46]"

[29] His Honour noted that the original pleading did not plead causation in any significantly different way, observing that para 59 of the original pleading stated:[47]

> "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."

[30] In striking out the paragraphs in question, his Honour reasoned:[48]

> "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 [appellants] is pursuant to the orders made by Philip McMurdo J. Those orders were made on the basis that First Strategic was insolvent when it incurred the relevant debts, which in turn required each of the [appellants] to compensate First Strategic for its insolvent trading. The liability of the [appellants] was therefore for unlawful conduct in their capacity as directors of First Strategic for insolvent trading.[49] The [respondents] 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.[50] Any risk of personal liability in respect of the [appellants] arose because of a course of conduct engaged by them as directors of First Strategic.[51]
>
> I do not accept the [appellants'] submission that the deficiencies in the earlier pleadings identified by Bond J are now remedied. In terms of causation, it must be accepted that the [respondents] had nothing whatsoever to do with permitting First Strategic to trade insolvently."

The appellants' submissions

[31] The appellants submitted that the power to strike out is to be used sparingly and only in clear cases and that in striking out the paragraphs in question, the primary judge must be taken to have considered it unarguable that the material facts alleged in those paragraphs could ever support a sufficient causal connection.

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46 ASC para 66.
47 Reasons at [34].
48 Reasons at [35]-[36] (footnotes omitted).
49 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 7.
50 Further Submissions of the Defendants/Applicants filed 23 April 2019, paragraph 4.
51 Submissions of Defendants/Applicants filed 21 January 2019, paragraph 6.

[32] The appellants contended that the primary judge failed to properly exercise his discretion by misconceiving the appellants' causation case and failing to properly consider that the pleaded facts were capable of supporting the causative link between the respondents' breaches and the damages claimed. The appellants submitted that the primary judge's decision in striking out the paragraphs of the ASC was so unreasonable and unjust that it must be based on some unidentifiable specific error in the *House v The King*[52] sense.

[33] The appellants argued that the primary judge erroneously proceeded on the assumption that the incurring of the post-April 2010 debts by First Strategic was to be considered as separate and distinct from the conduct of the appellants as directors. His Honour erred in considering that, the fact that those debts were incurred when the appellants, as directors knew, or ought reasonably to have known, that First Strategic was (or would be) insolvent, meant that the appellants' continued reliance after April 2010 on the respondents' representations was not a materially contributing cause to the appellants' conduct as directors. The primary judge should have found that, as a matter of common sense, the incurring of the post-April 2010 debts, although in contravention of the Act, did not preclude the appellants from maintaining the allegations in paragraphs [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC. The incurring of the debts remained a critical and sufficient link. By ignoring or paying no due regard to that fact, the primary judge "created an artificial distinction between the debts being incurred and the loss claimed" and "wrongly found that the loss claimed was unrelated to the debts, which would otherwise have been avoided".[53]

[34] The appellants' argument stems from the submission that the primary judge regarded the pleading as alleging loss and damage resulting from an exposure to the risk of personal liability, being the orders made in the *First Strategic decision*.[54] It was said that, having characterised the appellants' damages claim in that way, his Honour found that the orders made against the appellants were made because First Strategic was trading while insolvent, and the appellants breached their duty as directors to prevent it incurring the debts while insolvent. It was on that basis that his Honour considered that the respondents' impugned conduct had no part to play in the appellants' breaching their obligations as directors and that conduct could not be alleged as being a cause of the appellants' loss as a matter of common sense.[55] However, it was argued that para [59] of the ASC alleged that the appellants were induced by the respondents' misrepresentation "to not avoid exposure to the personal liability" as imposed by the *First Strategic decision* because they would have avoided First Strategic incurring the post-April 2010 debts.

[35] Expressed as a counter-factual, had the respondents not engaged in misleading conduct by failing to inform the appellants that Macarthur Minerals did not intend to enter into the option to acquire shares in First Strategic, it would not have incurred any of the debts that it did incur between April 2010 and August 2010, in which case, the appellants would not have been held liable to pay for them. Further, First Strategic would not have been insolvent or wound up, because Mr Charles Chan would not have terminated the voluntary funding arrangement he was

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52 (1936) 55 CLR 499.
53 Appellants' amended outline at [18].
54 Reasons at [35].
55 Reasons at [35].

prepared to continue so long as he believed in the truth of the respondents' representations.

[36] It was submitted that the primary judge's reasons did not reveal why, as a matter of common sense or otherwise, the allegation of inducement by the respondents' misrepresentation caused the appellants to act to their detriment by not avoiding their personal exposure in having to personally make good debts and liabilities incurred by First Strategic was not open to be alleged. Nor did the reasons state why the primary judge apparently considered the *First Strategic decision* prevented the appellants from advancing the inducement allegation.

[37] It was submitted that the underlying rationale for the primary judge striking out the alleged inducement in para [59] of the ASC, was his Honour finding that the unlawful conduct of the appellants as directors of First Strategic amounted to a supervening cause, so that the impugned conduct alleged against the respondents was not materially relevant as the cause of the loss or damage. However, in that case, the appellants' conduct was not so exceptional as to remove the causative nexus to the loss alleged, namely the avoidance of the exposure from the appellants failure to avoid First Strategic from trading while insolvent. As there was no challenge to the pleaded allegation that the loss and damage claimed by the appellants was a reasonably foreseeable consequence of the respondents' misleading conduct (paragraph [66] of the ASC), the strike out application should have been assessed by reference to the unchallenged allegation that the loss and damage alleged by the appellants was foreseeable, and therefore contrary to any suggestion of a supervening and unrelated cause being the cause of the loss alleged.

[38] Further, his Honour should have found that the paragraphs in question were sufficient to advance a claim that the respondents' misrepresentation induced the appellants to do, or refrain from doing something, which provided the foundation for the damage which they suffered. This was sufficient and adequate to establish a causal nexus between the respondents' conduct and the damage claimed.

Respondents' submissions

[39] The respondents contended that, contrary to the appellants' submissions, the primary judge's decision was not based upon a finding that the unlawful conduct of the appellants as directors was a supervening cause of their loss. Rather, it was premised on the finding that their unlawful conduct was the cause of their loss and it had not been disclosed by the pleading how the alleged misleading conduct of Macarthur Minerals had caused the loss at all. Further, if the appellants' unlawful conduct as directors of First Strategic was viewed through the lens of a supervening cause, their conduct was quite exceptional and extraordinary, such that it would break any chain of causation, although it was not necessary to analyse it this way. Nothing in the alleged misleading conduct contemplated or encouraged the appellants, in their capacities as directors of First Strategic, to contravene the provisions of the Act in their management of the affairs of First Strategic.

[40] Importantly, it was not apparent why, on any common sense basis, a representation by Macarthur Minerals to First Strategic, that it intended to enter into a form of call option agreement with it, would cause the directors of First Strategic to behave unlawfully by allowing First Strategic to incur debts when they knew it was insolvent. There was simply no causative link, as found by the primary judge. In advancing this contention, the respondents referred to the following facts to emphasise the lack of causative involvement with any conduct by the respondents:

1. First Strategic, as pleaded, had no ability to pay the post-April 2010 debts except from funds lent to it by Mr Charles Chan for that purpose, a situation that was not caused by, nor had anything to do with the respondents.
2. The post-April 2010 debts incurred were as debts of First Strategic, not as personal debts of the appellants, but the company which incurred the debts, was not the party bringing the proceeding against the respondents.
3. The appellants were pursued by the liquidator in their capacity as directors, for their liability for personal contraventions of s 588G of the Act, in allowing First Strategic to incur the post-April 2010 debts whilst insolvent. Their liability arose pursuant to s 588M of the Act for their contravention as individual directors of s 588G of the Act.
4. The respondents played no part causing First Strategic to trade whilst insolvent, nor in causing the appellants, as directors of First Strategic, to permit First Strategic to trade whilst insolvent.
5. Whether First Strategic would or would not pay its post-April 2010 debts depended entirely upon the whim of Mr Charles Chan and was not a matter caused by the respondents, as was found by McMurdo J in the *First Strategic decision*.
6. It was entirely Mr Charles Chan's decision to stop lending to First Strategic (as was pleaded in para 47(c) of the ASC) and to deprive it of funding to enable it to meet its debts, which caused First Strategic to go into liquidation. There was no sensible way to attribute a personal decision by Mr Charles Chan to allow First Strategic to go into liquidation to the respondents.

Consideration

[41] In considering whether a causative link between the impugned conduct and the alleged loss was sufficiently pleaded, the following context must be firmly kept in mind. The pleading made the following allegations of fact:

(a) The impugned conduct was that between April 2010 and July 2010, Macarthur Minerals and the other respondents misled the appellants that Macarthur Minerals would enter into an option agreement with First Strategic that would give it a call option over Area 317 in accordance with the draft MMS option agreement: para 39A of the ASC.

(b) The conduct was misleading and deceptive because Macarthur Minerals had resolved by April 2010 that it could not or would not itself or through a subsidiary enter into an option agreement in the terms of, or substantially to the effect of, the draft MMS option agreement: para 53 of the ASC.

(c) First Strategic incurred the post-April 2010 debts in circumstances where it had no capacity to pay the debts, except through funds loaned to it by Mr Charles Chan: para 41 of the ASC.

(d) While the appellants were liable under s 588M of the Act to pay such of the post-April 2010 debts as were unpaid in the event of a winding up of Frist Strategic, it "would not be wound up because it had the benefit of funding by way of such loans from Mr Charles Chan as aforesaid to meet its debts": para 44 of the ASC.

[42] In that context, the alleged causative relationship between the impugned conduct and the alleged loss was that:

(a) Had the appellants been informed of the April 2010 decision, they would have caused First Strategic not to have incurred the post-April 2010 debts and would "thereby have avoided any exposure to, or actual, personal liability for or reflecting the post-April 2010 debts": para 59 of the ASC.

(b) As a result of the respondents' failure to inform the appellants of the April 2010 decision, the appellants caused the post-April 2010 debts to be incurred: para 59A of the ASC.

(c) In consequence, the appellants "were exposed to the risk of, and ultimately, actual, personal liability for the post-April 2010 debts": para 59B of the ASC.

[43] It is apparent that paras [59], [59A], [59B], [65(a)(ii)], [(b)] and [(c)] of the ASC seek to establish a causative relationship between the pleaded misleading and deceptive conduct and the appellants' loss by focussing on the fact of the incurring of the post-April 2010 debts, but at the same time overlooking that that fact was entirely neutral. That fact did not in any material way result in the appellants suffering loss. The two critical factors that were causative of that loss were that those debts were incurred in circumstances where First Strategic was insolvent and that there were reasonable grounds for suspecting that the company was insolvent at the time that each debt was incurred.

[44] As to the first factor, the post-April 2010 debts were incurred in circumstances where the only source of funds was Mr Charles Chan, as the respondents themselves accepted by the pleading in para 41 of the ASC. But crucially, and notwithstanding what is pleaded in para 44 of the ASC (that, prior to 6 August 2010, First Strategic would not be wound up because it had the benefit of funding from Mr Chan), Mr Chan was not, as McMurdo J held, a sufficiently reliable source of funds by which First Strategic was able to pay its debts as and when they fell due, because of his lack of commitment to funding First Strategic. As mentioned, McMurdo J found that:[56]

> "…the degree of preparedness of [Mr Charles Chan] 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." (original emphasis)

[45] In that regard, his Honour observed that:[57]

> "… statements by [Mr Charles Chan] now as to his preparedness to fund the company's activity have to be assessed against what he did or did not do. As I have mentioned, he gave no credible explanation for not paying the debts which had been incurred to August 2010. And the ability or otherwise of the company to pay its debts must be assessed by looking at, from the company's perspective at the time it incurred a debt, the reliability of [Mr Charles Chan] as a source of funds, which is an assessment undertaken more accurately by reference to the surrounding facts and circumstances which I have discussed than by [Mr Charles Chan's] evidence of what was in his mind."

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56 At [80].
57 At [81].

[46] Accordingly, the foundational basis for the orders against the appellants in the *First Strategic* decision was that Mr Charles Chan's low level of financial commitment to First Strategic rendered it unable to pay its debts as they fell due in the relevant period after April 2010. That lack of commitment was not sensibly able to be said to be causally connected to the impugned conduct of the respondents. If as alleged, Mr Charles Chan's financial commitment to First Strategic was motivated by the MMS option agreement being entered into, that did not alter the fact that he remained an insufficiently reliable source of funds for First Strategic to be in a position to pay its debts as they fell due post-April 2010. Indeed, senior counsel for the appellants resorted in oral submissions to arguing that a punt was being taken by the appellants on the MMS option agreement ultimately being entered into. But that did not alter the critical fact that First Strategic was trading while insolvent, irrespective of the position concerning the entering into of the MMS option agreement.[58] Thus, accepting that the representation that the MMS option agreement would be entered into was made, the appellants were not relieved of their duty under the Act to prevent First Strategic from incurring debts while insolvent.

[47] Moreover, there is an additional aspect to the incoherency of the appellants' pleading as to the causative relationship between the impugned conduct and the appellants' claimed loss. As the respondents' senior counsel emphasised, the draft MMS option agreement pleaded in para 21 of the ASC, was a call option. Nothing was pleaded about its terms which required Macarthur Minerals to exercise the option. In the *First Strategic decision*, McMurdo J referred to the "limited value" to First Strategic of the draft MMS option agreement:[59]

> "[First Strategic] and [Macarthur Minerals] reached an advanced state of negotiations of a proposed agreement between them for the on sale of the Dalla-Costa tenements. But their proposed agreement was one whereby [First Strategic] would grant to [Macarthur Minerals] a call option, rather than an agreement which would oblige [Macarthur Minerals] to acquire the tenements (or the shares in [First Strategic])."

[48] As senior counsel for the respondents submitted, the appellants did not have any rational foundation for a belief that there was a commitment that bound Macarthur Minerals to buy the Dalla-Costa tenement from First Strategic.

[49] The second factor that the appellants have overlooked is that, in making the orders of 4 April 2014 against the appellants which is said to constitute their loss, McMurdo J found that each of the appellants had reasonable grounds for suspecting that First Strategic was insolvent for the purposes of s 588G(1)(c) of the Act but failed to prevent First Strategic from incurring the post-April 2010 debts whilst it was insolvent, in contravention of s 588G(2) of the Act. As McMurdo J found:[60]

> "The next question is whether, in terms of s 588G(1)(c), there were reasonable grounds for suspecting that the company was insolvent at the time that each debt was incurred. In my conclusion, there were grounds. The company had no assets or external line of credit. Its

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58 Further, the arrangement was referred to by senior counsel for the appellants as an assignment, whereas it was pleaded as back to back option agreements.

59 At [73].

60 At [82].

> only prospect of paying any of its debts was from voluntary contributions by [Mr Charles Chan]. The circumstances, as discussed above, which made that an insufficiently reliable source of funds were or should have been apparent to each of the directors. The relevant circumstances were always apparent, even before April/May 2010 after which [Mr Kwok] is said to have been less involved. A reasonable person in [Mr Victor Chan's] position would have been aware of those circumstances, and thereby the company's insolvency, from the time at which he became a director. I infer that he was so aware. There were ample grounds for a suspicion of insolvency, as the [appellants] were or should have been aware."

[50] The incurring of debts when First Strategic was insolvent and additionally when the appellants had reasonable grounds for suspecting that First Strategic was insolvent was an essential factor in rendering the appellants liable as directors to compensate First Strategic pursuant to s 588M(2) of the Act and was entirely distinct from and unconnected in any rational way to the impugned conduct alleged against the respondents.

[51] Further, the inability to articulate in the ASC material facts which, as a matter of common sense, lead to a reasonable inference that the respondents' alleged conduct caused the appellants' loss in terms of cause and effect cannot be overcome by simply pleading that the losses were a *foreseeable consequence* of the respondents' contravention of the TPA.

[52] For the reasons stated above, it is apparent that the appellants cannot succeed in their claim that there was any error in the primary judge's exercise of his discretion, identifiable or otherwise. The primary judge did not create "an artificial distinction between the debts being incurred and the loss claimed". On the contrary, it is the alleged causative relationship that is artificial. The post-April 2010 debts of First Strategic were not debts or losses incurred by the appellants. Rather, the appellants' losses were personal liabilities arising under s 588M of the Act, consequent on their failing, as directors of First Strategic, to prevent it from incurring those debts in circumstances where it was insolvent and there was reason to so suspect under s 588G of the Act.

[53] The failure to plead a coherent case on causation is fatal to the viability of the claim sought to be made against the respondents. As mentioned, the appellants have had a number of attempts at producing competent pleadings. The deficiency in the pleading of causation is one that has persisted since the original pleading and notwithstanding the opportunities given to the appellants to re-plead and make multiple amendments. In those circumstances, the primary judge was correct, in addition to striking out the relevant paragraphs, to dismiss the proceeding in its entirety.

[54] Therefore, the failure to plead a coherent case on causation is fatal to the claim, such that the appeal cannot succeed. However, even if that was not the case, the appellants could not succeed in relation to either issue 2 or 3, for the following reasons.

[55] No particulars were provided of [53] of the ASC despite request and in circumstances where particulars had been provided in relation to an allegation in substantively the same terms had previously been struck out by Bond J because they

did not support the allegation contained therein. As Flanagan J pointed out, the appellants' response was to change the expression, but otherwise preserve the substance, of the allegation in [53] and simply remove the particulars of the allegation. It therefore stood as a bald assertion to which no particulars were provided. This was not a case where the appellants could properly defer providing particulars at a later date after further steps had been taken. His Honour correctly struck out the allegation given that there was no pleaded basis for the allegation because it tended to prejudice or delay the fair trial of the proceeding. There was no error in his Honour refusing to exercise his discretion to delay the requirement for the appellants to provide further particulars of the allegation.

[56] As to [55] of the ASC, his Honour's thorough consideration of the allegation in [55] demonstrated that the particulars in [55(c)] did not support the inference for which the appellants contends supported the allegation in [55(c)] and that [55(c)] in turn did not support the allegations in [55(a)] and [55(b)] of the ASC. The appellants' alternative construction was not reasonably open. Given [57] relied substantively on the allegations in [53] and [55], which his Honour had determined should be struck out, it was also liable to be struck out. The appellants' contention that the allegations of knowing involvement could otherwise be supported by the pleadings in [1], [2] and [4C] alone or together with the allegations in [55] and [57] is misconceived.

Order

[57] For the reasons stated above, the appeal is dismissed with costs.