

# SUPREME COURT OF QUEENSLAND

CITATION: *Coco v Ord Minnett Ltd* [2012] QSC 324

PARTIES: **SALVATORE COCO**  
(applicant/defendant)  
v  
**ORD MINNETT LIMITED ACN 002 733 048**  
(respondent/plaintiff)

FILE NO/S: BS4530/11

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 26 October 2012

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2012

JUDGE: Jackson J

ORDER: **DIRECT THE PLAINTIFF TO AMEND THE STATEMENT OF CLAIM IN ACCORDANCE WITH THESE REASONS ON OR BEFORE 15 NOVEMBER 2012**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the applicant applies to strike out the fourth amended statement of claim pursuant to *UCPR* 171 – where the claim is for damages and statutory interest or the taking of accounts – where the causes of action pleaded by the statement of claim include breach of contract, breach of fiduciary obligation, negligent misrepresentation and misleading or deceptive conduct – where the pleading of misleading or deceptive conduct is incomplete – where the pleading does not identify the relevant statutory provision as required by *UCPR* 149(1)(e) – where the applicant conceded that the pleading required deletion of allegations of fraudulent conduct that the applicant no longer wished to pursue – where the pleading would be amended substantially as a consequence – where confusing language and other obvious errors in cross referencing would require amendment of the pleading – whether the defects are sufficient to warrant an order in the exercise of discretion that the whole pleading be struck out

*Uniform Civil Procedure Rules 1999* (Qld), rr 5, 149(1)(e), 150(2), 154, 171

*Ali v Hartley Poynton Limited* (2002) Aust Torts Rep 81-665, cited  
*Banque Commerciale SA in liquidation v Akhil Holdings Pty Ltd*  
 (1990) 169 CLR 279, referred  
*Berndale Securities Limited v How Trading Pty Ltd* [2010] VSC  
 216, cited  
*Bruce v Odhams Press Ltd* [1936] 1 KB 697, referred  
*Davy v Garrett* (1878) 7 Ch D 473; *Turner v Bulletin Newspaper  
 Co Pty Ltd* (1974) 131 CLR, cited  
*Daly v Sydney Stock Exchange Ltd* (1985-1986) 160 CLR 371,  
 cited  
*Forrest v Australian Securities and Investment Commission* [2012]  
 HCA 39, cited  
*Fortescue Metals Group Ltd v Australian Securities and Investment  
 Commission* [2012] HCA 39, referred  
*General Steel Industries Inc v Commissioner for Railways (NSW)*  
 (1964) 112 CLR 125, referred  
*Giann and Giann Pty Ltd; ex parte ASIC* [2005] FCA 81, cited  
*Hanly v Securities and Exchange Commission* 415F 2d 589, cited  
*Madden v Kirkegard Ellwood & Partners* [1975] Qd R 363,  
 referred  
*Magill v Magill* (2006) 81 ALJR 254, cited  
*Quadrant Constructions Pty Ltd (in liq) v Morgan Stanley Smith  
 Barney Australia Pty Ltd* [2011] VSC 164, cited  
*Re Campbell and Australian Securities and Investments  
 Commission* (2001) 37 ACSR 238, cited  
*Rogers v Whittaker* (1992) 175 CLR 479, cited  
*Seymour v Ockwell* [2005] EWHC 1137, cited  
*Story v NCSC* (1988) 13 NSWLR 661, cited  
*Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69, cited  
*Wallingford v Mutual Society* (1880) 5 App Cas 685, referred

COUNSEL: R Ashton for the applicant/defendant

S Shearer for the respondent/plaintiff

SOLICITORS: Sparke Helmore for the applicant/defendant

Romans & Romans for the respondent/plaintiff

[1] **Jackson J:** The defendant (Ord Minnett) applies to strike out the fourth amended statement of claim (“the statement of claim”) pursuant to *UCPR* 171.

- [2] The claim is for damages and statutory interest or the taking of accounts. The causes of action pleaded by the statement of claim are breach of contract, breach of fiduciary obligation, negligent misrepresentation and misleading or deceptive conduct. The subject matter of the proceeding is the claim by the plaintiff (Coco) that Ord Minnett acting as Coco's stock broker and investment advisor caused Coco a loss of \$1,511,496.88, of which \$1,215,256.31 was lost in respect of "naked" option trades. There are issues raised on the pleadings as to the nature of the retainer, the terms of the retainer, representations alleged to have been made by Ord Minnett's representatives, whether trading on Coco's account was carried out by Ord Minnett in accordance with Coco's instructions and whether the loss suffered by Coco was the result of any breach of contract, breach of obligation or tortious misrepresentation by Ord Minnett.
- [3] It is necessary to summarise the statement of claim in a little more detail to understand the challenge to its adequacy. Coco alleges that:
- (a) by an agreement made in or about 2005 Coco retained and engaged Ord Minnett as stockbroker and investment advisor;<sup>1</sup>
  - (b) the terms of the retainer included that Ord Minnett would exercise due care, skill and diligence, act in the interest of Coco, invest Coco's funds and/or advise Coco as to investing Coco's funds so that Coco would derive substantial profits and that Ord Minnett would not buy or sell any shares or options, or both, without the express written or oral authority of Coco;<sup>2</sup>
  - (c) Ord Minnett did not exercise due care, skill and diligence, did not act in the interest of Coco, did not invest Coco's funds and/or advise Coco as to investing Coco's funds so that Coco derived substantial profits, or any profit, and bought and sold options when Coco did not hold the underlying security (the "naked" option trades) without the written or oral authority of Coco to do so;<sup>3</sup>

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<sup>1</sup> Paragraph 2 of the statement of claim

<sup>2</sup> Paragraph 3 of the statement of claim

<sup>3</sup> Paragraph 5 of the statement of claim

- (d) by reason of those matters Coco suffered loss and damage in the amount of \$1,215,256.31 as particularised in an expert report.

[4] The allegations of breach of fiduciary obligation are summarised as follows:

- (a) Ord Minnett owed to Coco fiduciary duties to act in good faith and honesty in relation to the affairs of Coco, to provide full and accurate accounts of all information and matters relevant to the affairs of Coco, to avoid a conflict of interest with the “interests” of Coco, to avoid profiting personally (other than by way of the deriving of appropriate brokerage and other proper professional fees) from Coco’s investments and trading by Coco in options, and to account for the benefits obtained (other than brokerage and other proper professional fees charged) by reason of acting as stockbroker and/or investment adviser to Coco;<sup>4</sup>
- (b) Ord Minnett did not at all times act in good faith and honesty in relation to the affairs of Coco, did not provide full and accurate accounts of all information of matters material to the affairs of Coco, was guilty of a conflict of its interest with “interests” of Coco, profited personally from acting as stockbroker and investment adviser of Coco beyond the earning or brokerage and other proper professional fees in that the defendant engaged in naked option trades in the name of Coco without Coco’s express and written instructions or authority to do so and thereby generated additional brokerage and fees Ord Minnett was not entitled to and Ord Minnett has not accounted to Coco for the benefits obtained by it;<sup>5</sup>
- (c) By reason of those matters Coco suffered the same loss and damage as damages claimed for breach of contract.<sup>6</sup>

[5] The misrepresentation (and misleading and deceptive conduct) is as follows:

- (a) Ord Minnett’s staff represented to Coco that Ord Minnett would invest Coco’s funds and/or advise Coco as to investing Coco’s funds so that Coco

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<sup>4</sup> Paragraph 7 of the statement of claim

<sup>5</sup> Paragraph 8 of the statement of claim

<sup>6</sup> Paragraph 9 of the statement of claim

would derive substantial profits, being profits in the order of 20 percent per annum, Ord Minnett would at all times carry out the instructions of Coco, and that trading in options with Ord Minnett on the advice of Ord Minnett was not risky and Coco would not be exposed to losses;<sup>7</sup>

- (b) acting on the faith and truth of the representations and induced thereby and not otherwise Coco entered into the retainer and paid the sum referred to in the particulars given under paragraph 6 [sic] (the reference should be to paragraph 4(a));<sup>8</sup>
- (c) each of the representations was false and untrue;<sup>9</sup>
- (d) further or alternatively Ord Minnett well knew that if the defendant made the representations to Coco which were false and/or not borne out Coco would suffer loss and damage;<sup>10</sup>
- (e) Ord Minnett owed to Coco a duty to take reasonable care in the making of the representations;<sup>11</sup> in breach of the duty of care Ord Minnett made the representations negligently;<sup>12</sup>
- (f) had the representations not been made Coco would not have entered into the retainer and would not have paid Ord Minnett the sum paid referred to in the particulars under paragraph 6 [sic] (the reference should be to paragraph 4(a));<sup>13</sup>
- (g) by reason of those matters Coco suffered loss and damage particularised as the amount of \$1,215,256.31 and the loss of opportunity to invest his funds of \$1,800,000 by purchasing blue chip stocks and by investing in fixed term deposits with banks so as to derive capital appreciation, dividends and interest.<sup>14</sup>

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<sup>7</sup> Paragraph 10 of the statement of claim  
<sup>8</sup> Paragraph 11 of the statement of claim  
<sup>9</sup> Paragraph 13 of the statement of claim  
<sup>10</sup> Paragraph 14 of the statement of claim  
<sup>11</sup> Paragraph 15 of the statement of claim  
<sup>12</sup> Paragraph 16 of the statement of claim  
<sup>13</sup> Paragraph 17 of the statement of claim  
<sup>14</sup> Paragraph 18 of the statement of claim

- [6] In the (incomplete) plea of misleading and deceptive conduct Coco alleges:
- (a) Ord Minnett made the representations set out above in trade or commerce;<sup>15</sup>  
and
  - (b) insofar as the representations involved future matters Ord Minnett did not have reasonable grounds for making the same.<sup>16</sup>
- [7] The brief summary set out above does not refer to the particulars that are included under various paragraphs in the statement of claim. That is a deliberate distinction I make because it is not permissible to set out material facts in particulars, which serve a different purpose.<sup>17</sup>
- [8] There are numerous complaints that could be made about aspects of the pleading but Ord Minnett has focussed on three points in particular. First, although the paragraphs which allege the claim for damages for breach of contract are structured as I have set out above, and result in a claim for a loss of \$1,215,256.31 as unauthorised naked trades, particular (vii) of paragraph 8(c) alleges “a loss of \$1,215,256.31 in respect of the naked option trades, and a total net loss of \$1,511,496.88 to the plaintiff”. That loss is alleged to have resulted from Ord Minnett entering into option trades without Coco’s authority or instruction. However, paragraph 9 of the statement of claim makes it clear that the only loss claimed in respect of breach of fiduciary obligation under paragraph 8 is the amount identified in paragraph 6, which is the sum of \$1,215,256.31.
- [9] Ord Minnett also challenges that the statement of claim does not clearly identify which transactions Coco alleges were not entered into without the “written or oral authority of Coco” (paragraph 5(g)) or “without the express instructions of and/or contrary to the express instructions of the plaintiff” (particular (iii) and see also particular (iv) of subparagraph 8(b)). Ord Minnett points out that paragraph 4(b) alleges that Coco gave instructions to Ord Minnett to buy or sell shares and options and that allegation is not made in the alternative to the allegation that Coco gave no express written or oral authority to buy options. Of course, a party is entitled to

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<sup>15</sup> Paragraph 19 of the statement of claim

<sup>16</sup> Paragraph 20 of the statement of claim

<sup>17</sup> *Bruce v Odhams Press Ltd* [1936] 1 KB 697

plead inconsistent allegations, but only if they are expressed to be in the alternative, pursuant to *UCPR* 154.

[10] Ord Minnett’s second complaint is that the statement of claim alleges dishonest, fraudulent or other serious misconduct in a number of places but does not comply with either the common law pleading<sup>18</sup> rule of practice that fraud must be pleaded specifically and with particularity or *UCPR* 150(2) that requires pleading of any facts from which an inference of the relevant motive or condition of mind is to be drawn. In particular, Ord Minnett identifies the particulars of paragraph 5 (“so as to generate maximum brokerage commission on the buying and selling of options for itself”), paragraph 8(a) (“the defendant did not at all times act in good faith and honesty”), particular (iv) of paragraph 8 (“the defendant knowingly and deliberately bought and sold options ... without any express agreement instructions or authority ...”), particular (v) under paragraph 8 (“the defendant acted in its own interest not in the interests of the plaintiff”) and particular (c) under paragraph 13 (“the defendant never intended to carry out the instructions of the plaintiff or to only buy and sell shares with the express agreement, instructions or authority of the plaintiff ...”). There are other allegations which could be added to that list, such as the particulars under sub-paragraph (a) and (b) of paragraph 13, which are allegations of falsity of representations that it is alleged that Ord Minnett “well knew”. Such allegations appear to be in the nature of a contention that Ord Minnett, or its representatives for whom it may be vicariously liable, falsely represented that they had a state of mind. That is, the misrepresentation was made knowingly which would constitute the tort of deceit.<sup>19</sup>

[11] In oral argument, counsel for Coco appeared to say that it was not intended to allege or prosecute a case of dishonest or fraudulent intention. Initially, that concession was made, and it was submitted that appropriate amendments could be made to reflect it, in reference to Ord Minnett’s complaint about the particularity of the allegation of serious misconduct in the particulars under paragraph 5. Later in the course of the hearing I raised a concern that I had that it may have been the intention

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<sup>18</sup> *Fortescue Metals Group Ltd v Australian Securities and Investment Commission* [2012] HCA 39 at [26]; *Banque Commerciale SA in liquidation v Akhil Holdings Pty Ltd* (1990) 169 CLR 279 at 285; *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697

<sup>19</sup> See, for example, *Forrest v Australian Securities and Investment Commission* [2012] HCA 39 at [22] and *Magill v Magill* (2006) 81 ALJR 254 at [37], [59], [150] and [207]

of the plaintiff to continue with the allegations of breach of the fiduciary obligation of good faith and honesty in paragraph 8(a) as particularised by repeating the particulars under paragraph 5 (and the same could be said by reference to particular (iv) under paragraph 8). However, counsel for Coco maintained his acceptance that allegations of dishonesty could be excised from the pleading on the footing that there was an apparent acceptance of Ord Minnett's contention that the rules as to pleading fraud or compliance with *UCPR* 150(2) had not been observed.

- [12] Needless to say, this will require significant amendments to the statement of claim.
- [13] The third complaint made by Ord Minnett as to the statement of claim gathers together some miscellaneous points. First, it is contended that the particulars under paragraph 5, by alleging that "the defendant invested the plaintiff's funds in a manner which was not in accordance with the plaintiff's risk profile or suitable for a person of the plaintiff's personal circumstances. A prudent stockbroker would not have advised the plaintiff to enter positions, or have entered positions for the plaintiff, of extreme risk with a high potential to lose capital" left unparticularised what Coco's risk profile or personal circumstances were.<sup>20</sup> It was also complained that there is no allegation which identified the relevant "positions" which are complained of.
- [14] The first of those points seems to me to be a matter for particulars. In the affidavit material read before me there is an expert witness report by Neil A Kendall dated Wednesday 4 July 2012 which appears to deal with the subject matter. Ord Minnett is entitled to have the pleading confined by particulars and it may be that Coco would choose to do so by reference to the subject matter identified in that report although the particulars, strictly speaking, should be set out in the pleading rather than making a simple cross reference. In any event, the form of the particulars is a matter for the pleader.
- [15] As to the pleading of the positions which a prudent stockbroker would not have advised the plaintiff to enter, it seems to me that Ord Minnett is entitled to require

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<sup>20</sup> As to the duty of a financial adviser at common law, see *Daly v Sydney Stock Exchange Ltd* (1985-1986) 160 CLR 371 at 377 and 385; cf the formulation of a professional person's duty of care in *Rogers v Whittaker* (1992) 175 CLR 479 at 483. See also *Ali v Hartley Poynton Limited* (2002) Aust Torts Rep 81-665 at 68,895, *Seymour v Ockwell* [2005] EWHC 1137 and *Hanly v Securities and Exchange Commission* 415F 2d 589 at 595-597

that the plaintiff particularise those positions.<sup>21</sup> Coco has also served an expert report prepared by Oliver Schweizer dated 29 June 2012 which appears to deal (at 6.0) with the subject matter of what were “highly leveraged and risky options trades speculating on the direction of the movement in price of the underlying securities”<sup>22</sup>. It may be that Coco would choose to particularise the high risk position by reference to the trades which are identified in that report but that too is a matter for the pleader. Whether or not that be so, Ord Minnett is entitled to have particulars of those positions of extreme risk in the particulars of the statement of claim.

[16] There are a couple of other matters raised by Ord Minnett’s outline of argument but they are of lesser significance in my view.

[17] The application to strike out the entirety of the statement of claim calls up whether the defects, which I have just mentioned, are sufficient to warrant an order in the exercise of discretion that the whole pleading be struck out. The discretion is informed by a number of relevant principles and factors. I do not propose to essay the law for the purposes of deciding this application. However, it is an important function of pleadings that they limit the scope of and inform the issues which must be litigated at the trial so that the trial can proceed in the most efficient way. In a case of this kind, the overriding duty of a party in *UCPR* 5 does not lessen the importance of accurate pleadings – if anything it increases them.

[18] Secondly, the exercise of discretion under *UCPR* 171 varies according to which of the relevant paragraphs of that rule is in play. For example, if the court determines that a statement of claim discloses no reasonable cause of action it is determining that the facts pleaded are not capable in law of giving rise to the relief sought. Cases such as *General Steel Industries Inc v Commissioner for Railways (NSW)*<sup>23</sup> show that even lengthy argument may be necessary to dispose of what is ultimately a question of law. This is not an application of that kind.

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<sup>21</sup> See *Quadrant Constructions Pty Ltd (in liq) v Morgan Stanley Smith Barney Australia Pty Ltd* [2011] VSC 164 at [30] – [34]

<sup>22</sup> Paragraph 6.11 of MET-11 to the affidavit of ME Tills sworn 26 September 2012

<sup>23</sup> (1964) 112 CLR 125 at 130

[19] On the other hand, where the problem is one of inadequate or inaccurate pleading which has a tendency to prejudice or delay a fair trial, or the pleading contains unnecessary or scandalous allegations or frivolous or vexatious allegations, or is otherwise an abuse of the process of the court, there tends to be a more general discretion. Nevertheless, the case law recognises that a pleading may be so defective notwithstanding earnest attempts by the pleader that “it will be an act of mercy” to strike it out.<sup>24</sup> That is so, even though it is for the party pleading to formulate its case and the court’s role is primarily to consider whether a reasonable cause of action is disclosed, and to facilitate the just and expeditious resolution of the real issues rather than to dictate to a party a rigid manner in which a case should be pleaded. In summary, the courts are slow to interfere and ordinarily act only where there is some substantial objection or some real embarrassment.

[20] With some hesitation, I have come to the view that the statement of claim in the present proceeding should not be struck out in its entirety. Nevertheless, the concession made by Coco’s counsel during oral argument that the pleading needs to be amended to delete allegations of fraudulent conduct which are not going to be pursued (and therefore will not have to be particularised) means that the pleading will have to be amended substantially. Secondly, there are a number of other errors which were pointed out both in Ord Minnett’s written outline of argument and in oral argument to which Coco should attend, including some obvious errors in cross referencing and confusing language.

[21] I have also previously mentioned that the pleading of misleading or deceptive conduct is incomplete. It does not identify the relevant statutory provision as required by *UCPR* 149(1)(e). That is not a trivial point in this case as s 52 of the *Trade Practices Act 1974* (Cth) did not apply to the supply of financial services due to the operation of s 51AF(1) of that Act.

[22] There are other potentially relevant provisions under corporations legislation.

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<sup>24</sup> *Madden v Kirkegard Ellwood & Partners* [1975] Qd R 363 at 366; see also *Davy v Garrett* (1878) 7 Ch D 473; *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69 at 88 and 97

[23] There were major relevant amendments to the *Corporations Act 2001* (Cth) (“Corporations Act”) effected on 11 March 2002 by the *Financial Services Reform Act 2001* (Cth). Their effect was to:

- (a) repeal ss 995(2) and 999 of the Corporations Act; and
- (b) introduce, inter alia, sections 944A, 945A (applicable at the relevant time), 1041E and 1041H into the Corporations Act; but
- (c) allow a transitional period of 2 years to 10 March 2004 for financial services businesses to comply with the new regime.

[24] Where advice is given to a “retail client”, a number of obligations may be engaged.<sup>25</sup>

[25] Section 944A provides:

“This Division applies in relation to the provision of personal advice (the *advice*) in the following circumstances:

- (a) the advice is provided:
  - (i) by a financial services licensee (the *providing entity*); or
  - (ii) by a person (the *providing entity*) in their capacity as authorised representative of a financial services licensee (the *authorising licensee*), or of 2 or more financial services licensees (the *authorising licensees*); and
- (b) the advice is provided to a person (the *client*) as a retail client.”

[26] Thus if the client is a retail client section 945A, applicable at the relevant time, provided:

“(1) The providing entity must only provide the advice to the client if:

- (a) the providing entity:
  - (i) determines the relevant personal circumstances in relation to giving the advice; and
  - (ii) makes reasonable inquiries in relation to those personal circumstances; and
- (b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such

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<sup>25</sup> See s 761G and, in particular, s 761G(7)

- investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and
- (c) the advice is appropriate to the client, having regard to that consideration and investigation.”

[27] Section 949A(2) provides in relation to general advice:

- “(2) The providing entity must, in accordance with subsection (3), warn the client that:
- (a) the advice has been prepared without taking account of the client's objectives, financial situation or needs; and
- (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs; and
- (c) if the advice relates to the acquisition, or possible acquisition, of a particular financial product — the client should obtain a Product Disclosure Statement (see Division 2 of Part 7.9) relating to the product and consider the Statement before making any decision about whether to acquire the product.”

[28] Failure to comply with ss 945A (applicable at the relevant time) or 949B engages s 953B(2) which provides:

- “(2) In a situation to which this section applies, if a person suffers loss or damage:
- (a) ...
- (c) if paragraph (1)(c) applies — because of the contravention referred to in that paragraph;

the person may, subject to subsection (6), recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) and (4)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (b) or (c).”

[29] On 26 June 2003, ASIC issued Policy Statement 175: Licensing: Financial Product Advisers — Conduct and Disclosure (“PS 175”). PS 175 was updated on 23 September 2003 and replaced PS 122. Clause 175.71 provides that, among other things, advice must be given in a “clear, concise and effective manner.”

[30] Additionally, advice given must be “up-to-date as at the time it is given” (clause 175.74). Clause 175.80 requires when giving advice to a retail client:

Under the “suitability” or “reasonable basis for advice” rule, where a providing entity provides personal advice to a retail client:

- (a) the providing entity must make reasonable inquiries about the client’s relevant personal circumstances;
- (b) the providing entity must give such consideration to, and conduct such investigation of, the subject matter of the advice as is reasonable in all the circumstances; and
- (c) the advice must be “appropriate” for the client: s 945A.<sup>26</sup>

[31] Clause 175.85 lists the following relevant factors when considering whether the requirements of s 945A(1)(a), applicable at the relevant time, have been met:

- potential impact of inappropriate advice on the client;
- complexity of the advice; and
- financial literacy of the client.

[32] Clause 175.104 sets out inclusive requirements for ascertaining the client’s personal circumstances where there is an investment component contained in the advice as follows:

- (a) need for regular income (e.g. retirement income);
- (b) need for capital growth;
- (c) desire to minimise fees and costs;
- (d) tolerance of the risk of capital loss, especially where this is a significant possibility if the advice is followed;
- (e) tolerance of the risk that the advice (if followed) will not produce the expected benefits;
- (f) existing investment portfolio;
- (g) need to be able to readily cash-in the investment;
- (h) capacity to service any loan provided in relation to a financial product; and
- (i) tax position, social security entitlements, family commitments, employment security and expected retirement age.

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<sup>26</sup> Applicable at the relevant time

[33] Section 1041E(1) provides:

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

[34] Section 1041H(1) provides:

- “(1) A person must not, in this jurisdiction, engage in conduct in relation to a financial product<sup>27</sup> or a financial service that is misleading or deceptive or likely to mislead or deceive.”

[35] Section 769C provides:

- “(1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:
- (a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and
  - (b) the person does not have reasonable grounds for making the representation,
- the representation is taken to be misleading.”

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<sup>27</sup> Section 764A(1)(c) provides that a “derivative” is a financial product. Section 761D(1) and regulation 7.1.04 define a “derivative” in a way that includes an option: *re Giann and Giann Pty Ltd; ex parte ASIC* [2005] FCA 81

- [36] Section 1041H(2) provides for the meaning of engaging in conduct in relation to a financial product and includes “dealing in a financial product”. Thus, ss 1041E and 1041H cover some of the ground covered formerly by ss 995 and 999 but the changes in 2003 were significant and require greater elaboration.
- [37] Since this time, the definition of “financial product advice” in s 766B has been directed to a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person or persons in making a decision in relation to a particular financial product. Thus, a recommendation to acquire a derivative is financial product advice.
- [38] By s 766A, a financial service is provided if a person provides financial product advice or the person deals in a financial product. Thus, conduct in relation to a recommendation to purchase a derivative is conduct in relation to a financial service within the meaning of s 1041H(1).
- [39] Accordingly, any conduct in relation to the recommendation that is misleading or deceptive or is likely to mislead or deceive is prohibited by s 1041H(1). Contravention of that section entitles a person who suffers loss or damage to recover the amount of the loss or damage by action against the contravener or person involved in the contravention pursuant to s 1041I.
- [40] Since March 2004, the law has imposed higher standards which protect clients when dealing with financial service providers. Every business offering “financial services” must hold an Australian Financial Services Licence (“AFS Licence”).
- [41] The licence requires the business to;
- (a) operate efficiently, honestly and fairly,
  - (b) ensure staff and representatives are properly trained and supervised,  
and
  - (c) have proper complaints handling procedures and must belong to an independent complaints scheme that the client can use at no cost.

[42] Section 912A of the Corporations Act provides:

- “(1) A financial services licensee must:
- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly<sup>28</sup> ...
  - (b) comply with the conditions on the licence; and
  - (c) comply with the financial services laws; and
  - (d) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.”

[43] Section 912B of the Corporations Act provides that:

- “(1) If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives. The arrangements must meet the requirements of subsection (2).
- (2) The arrangements must:
- (a) if the regulations specify requirements that are applicable to all arrangements, or to arrangements of that kind – satisfy those requirements; or
  - (b) be approved in writing by ASIC.
- (3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:
- (a) the financial services covered by the licence; and
  - (b) whether the arrangements will continue to cover persons after the licensee ceases carrying on the business of providing financial services, and the length of time for which that cover will continue; and
  - (c) any other matters that are prescribed by regulations made for the purposes of this paragraph.
- (4) Regulations made for the purposes of paragraph (3)(c) may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).”

[44] As well, a financial services licensee is responsible for their authorised representative’s conduct, under ss 917A and 917B.

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<sup>28</sup> *Story v NCSC* (1988) 13 NSWLR 661; *Re Campbell and Australian Securities and Investments Commission* (2001) 37 ACSR 238.

[45] Section 917A provides:

- “(1) This Division applies to any conduct of a representative of a financial services licensee:
- (a) that relates to the provision of a financial service; and
  - (b) on which a third person (the *client*) could reasonably be expected to rely; and
  - (c) on which the client in fact relied in good faith.
- (2) In this Division, a reference to a representative's conduct being *within authority* in relation to a particular financial services licensee is, subject to subsection (3), a reference to:
- (a) if the representative is an employee of the licensee or of a related body corporate of the licensee – conduct being within the scope of the employee's employment; or
  - (b) if the representative is a director of the licensee or of a related body corporate of the licensee – conduct being within the scope of the director's duties as director; or
  - (c) in any other case – conduct being within the scope of the authority given by the licensee.
- (3) If:
- (a) a person is the representative of more than one financial services licensee in respect of a particular class of financial service; and
  - (b) the person engages in conduct relating to that class of service; and
  - (ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of paragraph 917C(3)(ba); and
  - (c) any one or more of the licensees issues or transfers a financial product of that kind as a result of the conduct; then, for the purposes of this Division:
  - (d) the person is taken, in respect of the conduct, to have acted *within authority* in relation to the licensee or to each licensee who issued or transferred a financial product of that kind as a result of the conduct; and
  - (e) the person is, in respect of the conduct, taken not to have acted *within authority* in relation to any licensee who did not issue or transfer a financial product of that kind as a result of the conduct.”

[46] Section 917B provides:

“If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.”

[47] Section 917E provides:

“The responsibility of a financial services licensee under this Division extends so as to make the licensee liable to the client in respect of any loss or damage suffered by the client as a result of the representative's conduct.”

[48] A separate provision is s 991A which provides:

- “(1) A financial services licensee must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable.
- (2) If a person suffers loss or damage because a financial services licensee contravenes subsection (1), the person may recover the amount of the loss or damage by action against the licensee.”

[49] There are other specific sections in the Corporations Act which confer rights of recovery of compensation, for example, s 1317HA for financial services civil penalty provisions, which includes s 985K, and s 1041I for contraventions of ss 1041E or 1041H.

[50] A curious feature of the ASIC Act, since 2002, is that it covers some of the same ground as provisions of the Corporations Act set out above.

[51] Section 12DA of the ASIC Act was amended in 2000 by the introduction of ss (1A) to remove dealings in securities from the operation of s 12DA(1). However, from 11 March 2002, ss (1A) was again amended to narrow the exclusion, relevantly, to conduct “in relation to a disclosure statement within the meaning of section 953A of the Corporations Act”. Otherwise, s 12DA(1) continues to apply to conduct in relation to a financial service.<sup>29</sup>

[52] At the same time, a number of other sections were introduced into the ASIC Act which could be relevant, including:

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<sup>29</sup> For example *Berndale Securities Limited v How Trading Pty Ltd* [2010] VSC 216; *Giann and Giann Pty Ltd; ex parte ASIC* [2005] FCA 81.

- (a) by s 12CB(1) a person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable;
- (b) by s 12DF(1) a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.

[53] Section 12GF(1) provides that a person who suffers loss or damage by conduct of another person done in contravention of either of those sections may recover the amount of the loss or damage by action against that other person or any person involved in the contravention.

[54] The statement of claim does not rely on any of these complex statutory provisions as the basis of the claim by the plaintiff against the defendant. As previously stated, it doesn't even identify the provision which forms the basis of the claim for misleading or deceptive conduct. There are a number of necessary factual elements for the application of any relevant provision. Considerable care and skill is required to formulate a properly pleaded case by reference to them. As yet, that has not been done.

[55] Accordingly, I propose to direct the plaintiff to amend the statement of claim in accordance with these reasons, as he may be advised, on or before 15 November 2012.

[56] I will hear the parties on costs.