FEDERAL COURT OF AUSTRALIA

Tresize v National Australia Bank Limited [2020] FCA 902

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| File numbers: | VG 200 of 1992  VID 1382 of 2018 |
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| Judge: | **MOSHINSKY J** |
|  |  |
| Date of judgment: | 26 June 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for summary dismissal – where the applicant claimed that consent orders made in 1993 should be set aside on the basis of fraud on the part of the respondent – where the applicant had brought at least three earlier proceedings seeking to have the consent orders set aside – whether the claims should be permanently stayed or dismissed on the basis of abuse of process, *Anshun* estoppel, *res judicata* or issue estoppel – whether the claims should be dismissed on the ground that they had no reasonable prospect of success or constituted an abuse of process |
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| Legislation: | *Corporations Act 2001* (Cth)  *Criminal Code Act 1995* (Cth)  *Federal Court of Australia Act 1976* (Cth), s 31A  *National Consumer Credit Protection Act 2009* (Cth)  *Trade Practices Act 1974* (Cth)  *Federal Court Rules 2011*, rr 26.01, 39.05  *Crimes Act 1958* (Vic)  *Transfer of Land Act 1958* (Vic) |
|  |  |
| Cases cited: | *Ashby v Slipper* [2014] FCA 973  *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256  *Harrington v Lowe* (1996) 190 CLR 311  *Harvey v Phillips* (1956) 95 CLR 235  *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273  *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22  *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589  *Spencer v The Commonwealth of Australia* (2010) 241 CLR 118  *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691  *Telstra Corporation Ltd v Australian Competition & Consumer Commission* (2008) 171 FCR 174  *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507  *Trkulja v Google LLC* (2018) 263 CLR 149  *UBS AG v Tyne* (2018) 265 CLR 77  *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 |
|  |  |
| Date of hearing: | 30 January 2020 |
|  |  |
| Date of last submissions: | 23 June 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 138 |
|  |  |
| Counsel for the First Applicant in VG 200/1992 and Counsel for the Applicant in VID 1382/2018: | Mr Tresize appeared in person |
|  |  |
| Counsel for the Respondent in each Proceeding: | Mr DC Morgan |
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| Solicitor for the Respondent in each Proceeding: | King & Wood Mallesons |

ORDERS

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|  | | VG 200 of 1992 |
|  | | |
| BETWEEN: | JOHN COLIN MAXWELL TRESIZE  First Applicant  MONICA ANN TRESIZE  Second Applicant  REMEA PTY LTD (ACN 006 356 047) (and others named in the Schedule)  Third Applicant | |
| AND: | NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)  Respondent | |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 26 JUNE 2020 |

THE COURT ORDERS THAT:

1. The first applicant’s interlocutory application filed on 5 July 2018 be dismissed.
2. Within 14 days, each party provide a written submission (of no more than three pages) on the issue of the costs of the interlocutory application.

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

ORDERS

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|  | | VID 1382 of 2018 |
|  | | |
| BETWEEN: | JCM TRESIZE  Applicant | |
| AND: | NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)  Respondent | |

|  |  |
| --- | --- |
| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 26 JUNE 2020 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application dated 16 June 2020 be dismissed.
2. The proceeding be dismissed pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) and r 26.01 of the *Federal Court Rules 2011* on the basis that each of the claims constitutes an abuse of process or has no reasonable prospect of success, or both.
3. The applicant’s interlocutory application provided to the Court on 14 December 2018 be dismissed.
4. Within 14 days, each party provide a written submission (of no more than three pages) on the issue of costs.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. In 1992, John Colin Maxwell Tresize, who is known as Max Tresize (**Mr Tresize**), his wife, Monica Tresize, their family company, Remea Pty Ltd (**Remea**), and others commenced a proceeding in this Court against the National Australia Bank Ltd (the **Bank**) in relation to the financing of certain property transactions (the **1992 Proceeding**). The proceeding was settled after seven and a half days of hearing. On or about 31 March 1993, the parties executed a deed of settlement (the **Deed of Settlement**). On 1 April 1993, a judge of the Court (Ryan J) made consent orders in the proceeding (the **Consent Orders**), providing for the Bank to recover possession of certain properties, the applicants to pay certain sums to the Bank, and the proceeding to be otherwise dismissed.
2. By an interlocutory application filed in July 2018 in the 1992 Proceeding, and by a new proceeding commenced in October 2018 (the **2018 Proceeding**), Mr Tresize claims that the Consent Orders should be set aside on the basis of fraud on the part of the Bank.
3. On at least three previous occasions, Mr Tresize has commenced proceedings seeking to have the Consent Orders set aside. First, in 1993, Mr Tresize and others commenced a proceeding in this Court against the Bank seeking to have the Consent Orders set aside (the **1993 Proceeding**). This proceeding was summarily dismissed by Northrop J on the basis that it disclosed no reasonable cause of action. An appeal from that decision was dismissed by a Full Court of this Court (Black CJ, Sweeney and Heerey JJ): *Tresize v National Australia Bank Ltd* (1994) 50 FCR 134.
4. Secondly, in 1994, Mr Tresize, Monica Tresize, Remea and Mr Tresize’s brother, Kevin Tresize (who had also been an applicant in the 1992 Proceeding) commenced a proceeding in this Court against the Bank seeking to have the Consent Orders set aside (the **1994 Proceeding**). Although Max Tresize was an applicant to this proceeding at the time it was commenced, he ceased to be an applicant after being declared bankrupt. Following a trial, the proceeding was dismissed by French J. An appeal from that decision was dismissed by a Full Court of this Court (Spender, Emmett and Katz JJ) in circumstances where the appellants failed to appear.
5. Thirdly, in 2004, Mr Tresize and Remea commenced a proceeding against the Bank seeking to have the Consent Orders set aside (the **2004 Proceeding**). A substantial part of the statement of claim was struck out by Sundberg J: *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706. The proceeding was subsequently dismissed by Sundberg J in circumstances where the applicants had failed to file an amended statement of claim within time.
6. In the 2018 Proceeding, Mr Tresize contends that the Bank obtained both the Consent Orders and the Deed of Settlement by fraud, misleading or deceptive conduct, or unconscionable conduct. In particular, he claims that, prior to the Deed of Settlement being entered into, the Bank falsely represented the amounts owing by the applicants (to the 1992 Proceeding) to the Bank and that certain mortgages were in default. He also contends that the Consent Orders differ significantly from, and do not reflect, the Deed of Settlement. Further, Mr Tresize claims that the Bank refuses to disclose details concerning the application of the proceeds of realisation of the secured properties pursuant to the Deed of Settlement, and refuses to provide copies of certain security documents. Mr Tresize makes other allegations concerning the Deed of Settlement and the Consent Orders, as described later in these reasons.
7. Mr Tresize’s contentions in the 2018 Proceeding also relate to a property in Baxter Tooradin Road, Cannons Creek, Victoria, known as Lot 2, Kenmure Park (**Lot 2, Kenmure Park**), on which the family home is located. The property is also referred to as the Cannons Creek property in some of the documents. Under the Terms of Settlement, Monica Tresize, who had multiple sclerosis, was given the right to use and occupy the property for life, subject to certain conditions. Monica resided at the property until her death in 2011. Since then, Mr Tresize has continued to reside at the property. At all material times, the property has been registered in the name of Remea. Mr Tresize contends in the 2018 Proceeding that the Bank is liable for certain rates levied by the City of Casey in respect of the property and for the costs of repair of a broken water line. He contends that the Bank took possession of the property pursuant to the Deed of Settlement, and is therefore liable for these expenses. Further or alternatively, he contends that the Bank was obliged to, but did not, transfer ownership of the property from Remea to the Bank’s own name. Had it done so, he contends, it would have been liable for the expenses.
8. In December 2018, the Bank filed an interlocutory application in the 2018 Proceeding seeking an order that the proceeding be permanently stayed or dismissed on the grounds of *Anshun* estoppel, *res judicata*, issue estoppel or abuse of process. Alternatively, the Bank seeks summary dismissal of the proceeding on the grounds that it has no reasonable prospect of success or is an abuse of process.
9. Also in December 2018, Mr Tresize provided to the Court (in the course of a case management hearing) an interlocutory application in the 2018 Proceeding seeking default orders (for failure to file a defence) or an order that the Bank file a defence.
10. The Bank’s interlocutory application and Mr Tresize’s interlocutory application were the subject of a hearing on 30 January 2020. Also set down for hearing was Mr Tresize’s interlocutory application in the 1992 Proceeding, in circumstances where there is a complete overlap between that interlocutory application and the 2018 Proceeding. On 16 June 2020, while judgment was reserved, Mr Tresize filed an interlocutory application seeking to correct one of the annexures to one of his affidavits. In substance, Mr Tresize sought leave to re-open his case to rely on further material. Orders were made for the filing of submissions by each party, both on the question of whether leave to re-open should be granted and on the substance of the matters sought to be relied on (should leave to re-open be granted), and for the interlocutory application to be determined on the papers. The parties then filed submissions on these points.
11. For the reasons that follow, I have concluded that the Mr Tresize’s interlocutory application dated 16 June 2020 should be dismissed. I have also concluded that the 2018 Proceeding should be dismissed on the basis that each of the claims constitutes an abuse of process or has no reasonable prospect of success, or both. It follows that Mr Tresize’s interlocutory application provided to the Court in December 2018 should be dismissed. It also follows that Mr Tresize’s interlocutory application in the 1992 Proceeding should be dismissed.

## The hearing

1. At the hearing on 30 January 2020, the Bank relied on the following affidavit material:
2. affidavits of Samantha Jane Kinsey, a partner of King & Wood Mallesons, the solicitors for the Bank, dated 7 December 2018 and 9 May 2019; and
3. an affidavit of Mark Anthony Troiani, a partner of King & Wood Mallesons, dated 10 December 2018.
4. Mr Tresize relied on affidavits sworn by him and dated 26 June 2018, 11 September 2018, 12 April 2019, 5 July 2019 and 20 January 2020.
5. There was no cross-examination of the deponents of the affidavits. In circumstances where the hearing related to both the 1992 Proceeding and the 2018 Proceeding, an order was made that the evidence in one proceeding was evidence in the other and vice versa.
6. Mr Tresize appeared in person at the hearing. He was assisted by his son, Shane, and his daughter, Tania. The Bank was represented by counsel.
7. Both parties filed outlines of submissions and supplementary submissions in advance of the hearing. In addition, during the course of the hearing, Mr Tresize provided the Court and the Bank with a copy of his speaking notes for the purposes of his oral submissions.
8. At the outset of the hearing, Mr Tresize sought an adjournment so as to prepare an amended statement of claim in the 2018 Proceeding and to enable a mediation to take place. I refused the application for the adjournment for reasons given at the time. These included the lengthy procedural history of the matter. Among other things, the Bank’s interlocutory application seeking a permanent stay or summary dismissal of the 2018 Proceeding had been listed for hearing on two earlier occasions, and each of those dates had been vacated to give Mr Tresize more time to prepare his material. In refusing the application for an adjournment, I indicated that, in considering the Bank’s interlocutory application, I would have regard to allegations in Mr Tresize’s affidavits as well as those in his statement of claim.

## Background facts

### The 1992 Proceeding

1. In 1992, Mr Tresize, Monica Tresize, Remea and others commenced the 1992 Proceeding against the Bank (Federal Court proceeding VG 200 of 1992). A convenient summary of the allegations in the statement of claim in the 1992 Proceeding is provided in the judgment of French J in the 1994 Proceeding:

The statement of claim [in the 1992 Proceeding] alleged an agreement between Max and Monica Tresize and Remea on the one hand and the Bank on the other made in July 1988 whereby if the Tresizes channelled all their property business through the Bank it would give favourable consideration to applications for finance to fund purchases of property made by them and provide expertise and advice in relation to the funding and financial side of their business. The agreement was said to have been constituted by conversations between Max Tresize and [Jeffrey] Smallacombe [, the manager of the Somerville branch of the Bank,] over a number of meetings in July and August 1988. Alleged terms of the agreement were that the Bank would act in good faith for the benefit of the Tresizes, would act with reasonable care in relation to the provision of advice to them on matters concerning financial aspects of their business and carrying out actions on their behalf and would act honestly. These were all said to be implied terms of the agreement.

Under the agreement, Max and Monica Tresize and Remea commenced to channel all their property business through the Bank, made applications exclusively to the Bank for finance and refinanced all of their financial commitments through the Bank.

They alleged that the Bank failed to act in good faith in that in or about September 1989 Smallacombe and [Daryl] Pearce [, a regional manager of the Bank, based in Mornington,] threatened to withdraw Bank support unless they agreed to enter into a partnership with them to share the profits of the Park Lane enterprise. Pearce and Smallacombe allegedly took advantage of the relationship between themselves and the Tresizes and the trust which had been established and did so in order to enrich themselves. Moreover it was said that after Max Tresize had agreed to enter into a partnership with Smallacombe and Pearce they provided advice and took actions designed to profit and enrich themselves and that they preferred the property in which they had an interest at the expense of other properties owned by Max and Monica Tresize and Remea.

The Bank was also said to have breached its duty to take reasonable care in relation to the provision of advice and actions taken on behalf of the Tresizes. This allegation was based in part on advice provided by Smallacombe and Pearce that the Tresizes should not accept an offer to purchase Park Lane at a profit of $300,000 but should enter into an arrangement with Smallacombe and Pearce personally so as to share profits from that enterprise. Other matters pleaded included an advice that allotments in Park Lane should not continue to be sold and that funds should be channelled from the development of a property at Hastings into the development of the Park Lane property. Also the Bank’s officers had allegedly advised the Tresizes to take out an offshore loan in circumstances where they had no realistic prospect of obtaining such a loan and where the Bank lacked the necessary infrastructure to undertake its administration. Further advice in relation to the offshore loan complained of included the referral to the financial broker, Uren, and the suggestion in 1990 and 1991 that the Tresizes conduct their affairs on the assumption that they would obtain an overseas loan and should not dispose of certain properties but maintain an essential core to be used as security for that loan. It was said that Smallacombe and Pearce advised Max and Monica Tresize to get a partner to inject capital into their enterprise and made arrangements with Gary Condon for the Bank to lend him $400,000 to the credit of the Tresizes so that he could purchase a half share of profits from the development of the property called Nyora. This was in circumstances where there was little realistic prospect of repayment. Again, in December 1990 it was alleged they advised the Tresizes to arrange to inject mortgage funds from a former solicitor of Max Tresize’s, Brian Kollias, into their business when there was no realistic prospect of repayment of such funds.

The statement of claim also pleaded that Smallacombe and Pearce acted carelessly and made damaging and carleess statements in relation to a property at Cranbourne. In breach of the duty to act honestly, it was said they acted dishonestly and to enrich themselves at the expense of the Tresizes. Representations as to Pearce’s expertise in matters of property development and subdivision were false and induced the Tresizes to act in accordance with his advice. Representations made by Pearce as to the readiness of the Bank to provide finance in connection with the development of specific properties were said to have been [dishonest]. The representations and other elements of the conduct of Pearce and Smallacombe also constituted misleading or deceptive conduct or conduct likely to mislead or deceive under s 52 of the *Trade Practices Act* 1974 (Cth) and/or s 11 of the *Fair Trading Act* 1985 (Vic). It was said to be unconscionable for the Bank to resile from its representations and promises. It had failed in its duty of care in various ways particularised. By reason of all of these matters it was pleaded the Tresizes had suffered loss and damage.

1. In November 1992, a defence and cross-claim was filed by the Bank seeking orders for possession of various secured properties. These included Lot 2, Kenmure Park. The applicants’ pleading was amended on several occasions. The final version was the fourth further amended statement of claim dated 24 February 1993. For present purposes, the above description of the applicants’ allegations, from the judgment of French J, is sufficient.
2. On 1 March 1993, the trial of the 1992 Proceeding commenced. On or about 12 March 1993, an agreement was reached to resolve the matter and the hearing was adjourned so that terms of settlement could be prepared. (See the judgment of French J in the 1994 Proceeding at pp 39-51.)
3. A deed of settlement was prepared over the following days. The executed version of the deed (referred to in the reasons as the Deed of Settlement) is dated “March 1993”, that is, it does not have the date in March completed. It appears from the reasons for judgment of French J in the 1994 Proceeding at p 57 that it was executed on or about 31 March 1993.
4. Given its significance for present purposes, it is appropriate to set out in some detail the provisions of the Deed of Settlement. The parties to the deed were Mr Tresize (referred to as Max), Monica Tresize (referred to as Monica), Remea, the other applicants to the 1992 Proceeding (identified by their first names), the applicants’ solicitors, Williams & Williams, and the Bank. The recitals to the deed were as follows:

A. Max, Monica, Remea, Allan, Lorraine, Martin and Mary (collectively “the Applicants[”]) sued the Bank in the Federal Court of Australia being proceeding no. VG 200 of 1992 (“the Federal Court proceeding”) and the Bank cross-claimed against each of the Applicants in the Federal Court proceeding for debt and possession of the properties listed in “Schedule 1” hereto.

B. The Bank sued Allan and Lorraine in the Supreme Court of Victoria in proceeding no. 8170 of 1992 (“the first Supreme Court proceeding”) for possession of the property known as Cardinia Park which proceeding was transferred to the Victorian Registry of the Federal Court and heard concurrently with the Federal Court proceeding.

C. The Bank sued Allan in the Supreme Court of Victoria in no. 8169 of 1992 (“the second Supreme Court proceeding”) for possession of the property known as Bower Park which proceeding was transferred to the Victorian Registry of the Federal Court and heard concurrently with the Federal Court proceeding.

D. The Bank sued Monica in the Magistrates’ Court of Victoria being proceeding no. E00951781 of 1992 (“the Magistrates’ Court proceedings”) for debt incurred on Mastercard No. 5313 5839 0830 9640 in the sum of $1,979.19 together with interest and costs.

Janine Veronica Tresize is indebted to the Bank on account no. 04-512-0831 in the sum of $96,712.55.

Janine and Shane trading as Tooradin Conversions are indebted to the Bank on account no. 04-723-8200 in the sum of $18,935.09.

Westernport Rural Fencing is indebted to the Bank on account no. 04-629-1181 in the sum of $39,093.95.

E. The Applicants and the Bank enter into this Deed fully and finally to settle their claims against each other in the Federal court proceeding, the first Supreme Court proceeding, the second Supreme Court proceeding and the Magistrates’ Court proceeding.

F. The payments made by the Bank under clauses 9 and 11 of this deed are made ex gratia, for compassionate reasons, and with a complete denial of liability by the Bank.

1. The terms of the Deed of Settlement included:

1. **The Applicants agree that they are severally indebted to the Bank free of any set-off or counterclaim in the amounts set out in column 2 of Schedule 1** and that their debts are secured in favour of the Bank by registered mortgage over the land set opposite their names in column 3 of Schedule 1.

2. The Applicants and the Bank shall consent to orders in the Federal Court proceeding, as soon as practicable:

(a) granting the Bank possession of the land referred to in column 3 of Schedule 1 save and except for the property described as lots 14 and 15 Bass Highway, Grantville;

(b) **for judgment against the first, second and third Applicants in respect of the debts set opposite their names in column 2 of Schedule 1**;

(c) otherwise dismissing the Federal Court proceeding with no orders as to costs.

3. The Applicants acknowledge that the Bank may deal with the land referred to in column 3 of Schedule 1 in its absolute discretion and agree that they will make no claim against the Bank relating to the Bank’s possession, development or disposition of that land.

…

7. Within 14 days the Bank shall settle on Perpetual Trustees Victoria Limited or (at its option) on another professional trustee an amount of $250,000 to be held on the terms of the proposed deed in Schedule 2 hereto.

8. (a) For so long as she lives, Monica shall be entitled personally (together

with any person permitted by her) to use and occupy Lot 2 of the property defined in column 3 of Schedule 1 and known as Kenmure Park, and the residence thereon, **on condition that she pays the expenses and other outgoings attributable to lot 2 and its use and occupation, and maintains lot 2 (including the residence thereon and all fences, fixtures and fittings) in good and substantial repair and order.**

(b) **During the subsistence of Monica’s rights under this clause, the Bank shall not enforce the order for possession of Kenmure Park referred to in paragraph 2 hereof in respect of lot 2 of Kenmure Park.**

(c) During the subsistence of Monica’s rights under this clause, the Bank shall be entitled upon reasonable notice and at reasonable times to enter lot 2 of Kenmure Park to carry out works from time to time as the Bank sees fit in relation to land adjoining lot 2 and in relation to lot 2 itself. Monica will not oppose or frustrate or otherwise impede any proposal of the Bank in relation to the use or development of lots 1, 3 and 4 of Kenmure Park or any part thereof.

(d) Monica accepts that no duty of care is or will be owed by the Bank to her in respect of her occupation of lot 2 of Kenmure Park.

9. Within 14 days the Bank shall pay an amount of $200,000 to Williams & Williams for application only in satisfaction of disbursements and costs incurred by the Applicants (other than the first, second and third Applicants) in the Federal Court proceeding, by Allan and Lorraine in the first Supreme Court proceeding, by Allan in the second Supreme Court proceeding and by Monica in the Magistrates’ Court proceeding.

10. Save as aforesaid the parties thereto shall bear their own costs and disbursements of the Federal Court proceeding, the first Supreme Court proceeding, the second Supreme Court proceeding and the Magistrates’ Court proceeding.

…

12. (a) It is agreed that each of the properties in column 3 of Schedule 1 stands

as security for each of the debts in column 2 of Schedule 1.

(b) **The Bank agrees to release and forever discharge each of the debts in column 2 of Schedule 1 insofar as the Bank does not obtain satisfaction on realising the land referred to in column 3 of Schedule 1**.

(c) The Bank may, in its discretion, allocate the proceeds of realisation of each of the properties in column 3 of Schedule 1 in reduction or satisfaction of any of the debts in column 2 of Schedule 1.

13. Within 14 days of being requested to do so, the registered proprietors of any parcel of land referred to in column 3 of Schedule 1 shall execute a transfer of that land in favour of the Bank or as the Bank shall direct, and if they do not do so the Bank is authorised in their name by force of this clause to execute the transfer on their behalf.

14. The Applicants jointly and severally release and forever discharge the Bank from all actions, claims, costs, expenses, suits and demands, howsoever arising, in respect of the matters alleged in any of the proceedings referred to in this deed.

(Emphasis added.)

1. Schedule 1 to the Deed of Settlement was arranged in three columns, headed “Party”, “Debt” and “Property”. Insofar as it related to Mr Tresize, Monica Tresize and Remea, the schedule provided:

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|  | **SCHEDULE 1** |  |
|  |  |  |
| **Column 1**  **Party** | **Column 2**  **Debt** | **Column 3**  **Property** |
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| JCM Tresize  and | A/C No 51-605-3824  $4,853,373.71 | **Baxter-Tooradin Road:**  C/T Vol 8041 Fol 898 |
|  |  |  |
| MA Tresize | A/C No 95-799-6799  $3,047,704.25 | **South Gippsland Highway, Tooradin:**  C/T Vol 8252 Fol 840  C/T Vol 9484 Fol 283 |
|  |  |  |
|  | A/C No 51-648-4843  $53,913.64 | **Lot 17 Cranbourne-Frankston Road, Cranbourne:**  C/T Vol 9899 Fol 850  C/T Vol 9899 Fol 851  (Derived from C/T Vol 4396 Fol 175) |
|  |  |  |
|  | Bank Guarantee  $7,240.00 | **Lyne Street, Tooradin:**  C/T Vol 9774 Fol 433  C/T Vol 9815 Fol 975  C/T Vol 9788 Fol 116 |
|  |  |  |
|  |  | **Lyne Street, Tooradin (balance of land remaining untransferred):**  C/T Vol 8340 Fol 819 |
|  |  |  |
|  |  | **Bayview Road, Tooradin:**  C/T Vol 9148 Fol 592  C/T Vol 9148 Fol 593 |
|  |  |  |
|  | *2nd mortgage {*  *1st mortgage {*  *To Commonwealth {*  *Bank {* | **Bass Highway, Grantville:**  C/T Vol 9626 Fol 298  C/T Vol 9605 Fol 226  C/T Vol 8045 Fol 941 |
|  |  |  |
|  | *2nd mortgage {*  *{*  *{*  *1st mortgage {*  *To Westpac {* | **South Gippsland Highway, Tooradin (Crown Allotment 103C):**  C/T Vol 9630 Fol 365 |
|  |  |  |
|  | *2nd mortgage {*  *{*  *1st mortgage {*  *To Brian Kollias {* | **Bayview Road, Tooradin:**  C/T Vol 8995 Fol 384  C/T Vol 9026 Fol 823 |
|  |  |  |
|  |  | **Westernport Road, Lang Lang:**  C/T Vol 9896 Fol 255  C/T Vol 9896 Fol 246  C/T Vol 9896 Fol 234  C/T Vol 9896 Fol 235  C/T Vol 9896 Fol 236  C/T Vol 9896 Fol 237  (Derived from C/T Vol 9286 Fol 906) |
|  |  |  |
| Remea Pty Ltd | A/C No 95-799-1891  $3,414,332.70 | **McDonalds Track, Lang Lang:**  C/T Vol 9908 Fol 255  C/T Vol 9908 Fol 256  (Derived from C/T Vol 9828 Fol 234) |
|  |  |  |
|  |  | **Ballarto Road, Cranbourne (rear Cranbourne)**  C/T Vol 10031 Fol 089  (Derived from C/T Vol 8050 Fol 802) |
|  |  |  |
|  |  | **Kenmure Park**  C/T Vol 9911 Fol 511 (Lot 1)  C/T Vol 9911 Fol 512 (Lot 2)  C/T Vol 9911 Fol 513 (Lot 3)  C/T Vol 9911 Fol 514 (Lot 4)  (Derived from  C/T Vol 9674 Fol 786  C/T Vol 9674 Fol 785) |

1. It is convenient to note that the total of the amounts specified for Mr Tresize and Monica Tresize was $7,962,231.60.
2. On 1 April 1993, Ryan J made consent orders in the 1992 Proceeding (referred to in these reasons as the Consent Orders). It is appropriate to set these out in full, given their significance for present purposes:

1. The Respondent recover possession of the land:

(a) at or near Baxter-Tooradin Road, described in Certificate of Title volume 8041 folio 898;

(b) at or near South Gippsland Highway, Tooradin, described in Certificate of Title volume 8252 folio 840 and Certificate of Title volume 9484 folio 283;

(c) known as Lot 17 Cranbourne-Frankston Road, Cranbourne, being the land described in Certificate of Title volume 9899 folio 850 and Certificate of Title volume 9899 folio 851;

(d) at or near Lyne Street, Tooradin, described in Certificate of Title volume 9774 folio 433, Certificate of Title volume 9815 folio 975 and Certificate of Title volume 9788 folio 116;

(e) at or near Lyne Street, Tooradin, being the balance of the land remaining untransferred out of Certificate of Title volume 8340 folio 819;

(f) at or near Bayview Road, Tooradin, described in Certificate of Title volume 9148 folio 592 and Certificate of Title volume 9148 folio 593;

(g) at or near South Gippsland Highway, Tooradin, described in Certificate of Title volume 9630 folio 365;

(h) at or near Bayview Road, Tooradin, described in Certificate of Title volume 8995 folio 384 and Certificate of Title volume 9026 folio 823;

(i) at or near Westernport Road, Lang Lang, described in Certificate of Title volume 9896 folio 255, Certificate of Title volume 9896 folio 246, Certificate of Title volume 9896 folio 234, Certificate of Title volume 9896 folio 235, Certificate of Title volume 9896 folio 236 and Certificate of Title volume 9896 folio 237;

(j) known as McDonalds Track, Lang Lang, being the land described in Certificate of Title volume 9908 folio 255 and Certificate of Title volume 9908 folio 256;

(k) at or near Ballarto Road, Cranbourne, described in Certificate of Title volume 10031 folio 089;

(l) known as Kenmure Park, being the land described in Certificate of Title volume 9911 folio 511, Certificate of Title volume 9911 folio 512, Certificate of Title volume 9911 folio 513 and Certificate of Title volume 9911 folio 514;

(m) known as Bower Park, being the land described in Certificate of Title volume 9549 folio 797.

2. The first and second Applicants pay the Respondent $7,962,231.60.

3. The third Applicant pay the Respondent $3,414,332.70.

4. The proceeding is otherwise dismissed with no order as to costs.

1. These orders were entered on 2 April 1993. The amount referred to in the Consent Orders as being payable by Mr Tresize and Monica Tresize, namely $7,962,231.60, is the same as the total of the amounts set out alongside their names in Schedule 1 to the Deed of Settlement. The amount referred to in the Consent Orders as being payable by Remea, namely $3,414,332.70 is the same as the amount set out alongside that company’s name in Schedule 1 to the Deed of Settlement.

### The 1993 Proceeding

1. In November 1993, Mr Tresize, Monica Tresize, Remea and certain other members of the Tresize family commenced the 1993 Proceeding against the Bank (Federal Court proceeding VG 489 of 1993). By this proceeding, the applicants sought to have the Deed of Settlement and the Consent Orders set aside. On 17 February 1994, Northrop J ordered that the 1993 Proceeding be dismissed on the ground that it disclosed no reasonable cause of action. His Honour’s reasons for making that order were published later, on 15 March 1994.
2. As noted at p 4 of the reasons of Northrop J, the applicants relied on an affidavit of Mr Tresize and certain other affidavits. The affidavits referred to the conduct of the then solicitors and counsel for Mr Tresize and the state of mind of Mr Tresize. Northrop J indicated that, without making any findings, the Court was prepared, for the purposes of the motion seeking summary dismissal only, to assume that the conduct of the then solicitors and counsel for Mr Tresize could constitute duress or undue influence on their part which induced Mr Tresize to enter into the Deed of Settlement, that Mr Tresize was of unsound mind and that he entered into the deed under unilateral mistake. Northrop J then stated at p 4: “Nowhere, however, in the material is there any allegation adverse to the Bank. No attack is made on the conduct of the Bank.”
3. Justice Northrop discussed relevant principles at pp 6-10. His Honour stated at p 7:

Normally, a judgment or order made by consent of the parties will not be set aside after it has been entered except on grounds that would enable a contract to be set aside. Similarly, if a judgment or order is made by consent pursuant to an agreement between the parties to the action, normally that judgment or order will not be set aside, even before it is entered, unless there are established grounds sufficient to set aside that agreement.

1. Justice Northrop stated at p 10 that, even on the assumptions of fact made in favour of Mr Tresize, “it must appear that the deed pursuant to which the order was made and entered was obtained by the fraud of the Bank”. His Honour also stated: “The fraud must be fraud on the part of the Bank. No allegation of fraud, or, for that matter, of unconscionable conduct, has been made against the Bank.” In these circumstances, the proceeding was summarily dismissed.
2. The applicants appealed from the orders of Northrop J. On 17 May 1994, the Full Court, comprising Black CJ, Sweeney and Heerey JJ, dismissed the appeal: *Tresize v National Australia Bank Ltd* (1994) 50 FCR 134. It appears that the appellants’ argument on appeal went beyond that presented at first instance. As noted by Black CJ at 136, the appellants argued that the Bank had actual notice of circumstances sufficient to put a person of ordinary prudence on inquiry and that it should have imputed to it such knowledge as might have been obtained by the exercise of reasonable diligence. All members of the Full Court held that the appeal should be dismissed. Insofar as the appellants relied on the proposition that the Bank was on notice of sufficient circumstances to put a person of ordinary prudence on inquiry, this was rejected on the basis of the material before the Court: see at 137-138 per Black CJ, and at 147-149 per Sweeney and Heerey JJ.

### The 1994 Proceeding

1. Two proceedings were commenced by Mr Tresize, Monica Tresize, Remea and certain other members of the Tresize family during 1994. The first proceeding (Federal Court proceeding VG 326 of 1994) was commenced on 26 September 1994, but discontinued on 6 October 1994. That proceeding can be put to one side for present purposes.
2. Subsequently, on 21 October 1994, Mr Tresize, Monica Tresize, Remea and Kevin Tresize commenced the proceeding that is referred to in these reasons as the 1994 Proceeding (Federal Court proceeding VG 372 of 1994). Although Mr Tresize was initially an applicant to the proceeding, he ceased to be an applicant after being declared bankrupt. (See the judgment of French J at p 59.) The respondents to the proceeding were the Bank and Williams & Williams, Mr Tresize’s solicitors in the 1992 Proceeding. In the 1994 Proceeding, the applicants contended that their consent to the terms of settlement of the 1992 Proceeding had been wrongly procured. They contended that John Williams, of Williams & Williams, had a conflict of interest and breached his duty to the applicants because he was seriously indebted to the Bank. The applicants also contended that the Bank took advantage of the situation to induce Mr Williams to coerce the applicants into a settlement.
3. The proceeding went to trial, before French J, in April 1998. The applicants, the Bank and Williams & Williams were each represented by senior and junior counsel. The hearing lasted for seven days.
4. On 25 September 1998, French J delivered reasons for judgment, concluding that the application as against the Bank should be dismissed. Where I refer in these reasons to the judgment of French J, it is to his Honour’s reasons for judgment dated 25 September 1998 in the 1994 Proceeding (a copy of which appears as exhibit “MAT-23” to Mr Troiani’s affidavit).
5. In relation to the claim against Williams & Williams, French J concluded (at p 72) that the potential for conflict of interest was such that Mr Williams had a duty to disclose to his clients the details of his relationship with the Bank, and that to fail to do so was, in the circumstances, a breach of his duty to them as a fiduciary. However, that failure did not, in his Honour’s opinion, affect the outcome of the litigation and did not entitle the applicants or any of them to set aside the Deed of Settlement. French J stated: “That involved an innocent third party in the form of the Bank. Moreover it involved settlement of litigation and consent orders of this Court.” Justice French reserved for further argument the question of what, if any, relief should be ordered as against Williams & Williams.
6. The judgment of French J contains a detailed narration of the facts leading up to the trial of the 1992 Proceeding, the course of that trial, and the discussions relating to the settlement of the proceeding (both as between the applicants and their then solicitors and counsel, and as between the legal representatives of the applicants and the legal representatives of the Bank). The judgment also describes, at pp 52-58, the preparation and execution of the Deed of Settlement and the making of the Consent Orders.
7. The claims made by the applicants in the 1994 Proceeding are summarised at pp 59-61 of the judgment of French J:

By the amended statement of claim the applicants allege that they and other members of the Tresize family named as respondents engaged Williams & Williams, Solicitors, in relation to proceedings commenced in the Federal Court on 12 June 1992 (VG 200 of 1992) in which they were applicants and the National Australia Bank was the respondent. There were said to have been implied terms of engagement and a duty imposed upon Williams & Williams to act honestly and in good faith, to not allow their personal interests to conflict with the interests of the applicant and to exercise due, care, skill and diligence in the conduct of the proceedings and associated advice.

Williams & Williams are said to have breached each of these duties. The particulars of the breaches alleged are lengthy. In summary they assert that at all material times between 12 June 1992 and 1 April 1993 Williams & Williams had an overdraft facility and fully drawn advance with the Bank and that the overdraft was considerably in excess of its limit and that they were in arrears in relation to the payment of the fully drawn advance. On or about 7 December 1992 it is alleged the Bank served demands upon Williams & Williams demanding payment of the total amount owing. Reference is then made in the particulars to the Bank’s further demands upon Williams & Williams including letters in January and March 1993 to the effect that it was no longer prepared to remain as their bankers and would enforce its securities unless the debt was cleared by 31 March 1993. In particular it is alleged that in a telephone conversation on 22 March between Mr Williams and Mr Charlton, a controller employed by the Bank, Mr Williams proposed to pay the Bank a sum of $100,000 within fourteen days and a further $100,000 fourteen days thereafter and refinance the balance of the debt. He requested an extension of time which was refused. Williams & Williams are said to have failed to advise the applicants as to any of these matters.

On or about 12 March 1993 it is alleged that Williams & Williams advised the applicants in the proceedings against the Bank to accept an offer of settlement under which they substantially abandoned their claims and submitted to the cross-claims of the Bank but which included the payment by the Bank of a sum of $200,000 to Williams & Williams for legal costs. It is said that the solicitors threatened not to continue to act for the applicants in relation to those proceedings if they did not accept the offer of settlement. Moreover, Williams & Williams did not object on behalf of the applicants when senior and junior counsel threatened not to continue to act for them. And on 14 March 1993, it is said that Williams & Williams falsely advised the applicants that the proceeding had been settled in a legally binding way and that it was too late to go on with the proceeding even though the terms of the settlement had not been concluded nor any writing signed. It is also alleged they advised the applicants to execute the deed without explaining its meaning and effect. Particulars then set out the terms of the deed.

Alternatively to the alleged breaches of duty it is said the applicants were induced to settle by the undue influence of Williams & Williams. The solicitors’ alleged failure to disclose the various matters particularised was also said to have constituted conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 11 of the *Fair Trading Act* 1985 (Vic).

As against the Bank, it is said that the Bank wrongfully and unconscionably applied commercial pressure on Williams & Williams for the purpose of and with the intention that they would breach the terms of their engagement and their duties and/or would exert undue influence upon the applicants or engage in misleading or deceptive conduct in order to procure the applicants to agree to settle the proceedings on terms being offered by the Bank.

The particulars repeated the factual elements of the financial relationship between the Bank and Williams & Williams earlier referred to. It was said that the various steps taken by the Bank were taken by officers who had knowledge of the first proceeding including Messrs. Kavanagh, Charlton, Willcock and Copsey. All of the steps were calculated to put pressure on Williams & Williams to procure the original applicants to settle the first proceeding. It is alleged that the Bank was aware that the applicants did not know of these dealings between Williams & Williams and the Bank. In the alternative, it is said, that between 11 March and 1 April 1993 the Bank knew of the breaches by Williams & Williams of the terms of their engagement and of their duties, the undue influence exerted by them and the circumstances from which a presumption of undue influence arose and of the misleading or deceptive conduct engaged in by Williams & Williams. The Bank it is said, was put upon inquiry as to whether Williams & Williams were breaching the terms of their engagement, exerting undue influence or engaging in misleading or deceptive conduct. The deed of settlement, signed and executed by the applicants in circumstances constituting equitable fraud on the part of the Bank, was voidable at their election which they have exercised and they are entitled to have the proceeding reinstated as between them and the Bank and have the consent orders set aside.

The failure of the Bank to disclose to the applicants its financial relationship to Williams & Williams was said to be misleading or deceptive conduct on its part. The Bank having sold the properties referred to in the deed the applicants say they have suffered loss and damage. It is said that the applicants were prevented from proceeding with their claim, and from defending the cross claim of the Bank. It is also asserted that the first, second and third applicants have lost the properties recorded in their names and hence any profits from their development and resale.

1. The core reasoning of French J in relation to the applicants’ case against the Bank appears at pp 62-67 of the judgment. After summarising the principal factual findings that had been made regarding the conduct of the Bank, French J concluded, at p 65, that at no time did the Bank wrongfully and unconscionably apply commercial pressure on Williams & Williams with the intention that the firm breach its duties to its client or with the intention that the firm would exert undue influence on its clients by procuring the execution of the Deed of Settlement. Further, French J found that there was no basis to conclude that the Bank, by its legal representatives or officers, formed the view that there had been any breaches of duty by Mr Williams or any exercise of undue influence by Mr Williams over the applicants.
2. Justice French also considered whether the Bank had knowledge of circumstances that should have put it on inquiry. His Honour concluded, at p 66, that he was satisfied that there were no circumstances upon which the Bank should have been put upon inquiry as to the conduct of Williams & Williams with respect to the Tresizes.
3. Justice French concluded at p 67 that the Deed of Settlement was not executed in circumstances constituting equitable fraud on the part of the Bank. Accordingly, the case against the Bank was dismissed.
4. The applicants appealed from the judgment of French J. On 1 September 1999, a Full Court comprising Spender, Emmett and Katz JJ dismissed the appeal, in circumstances where there was no appearance for the appellants.

### Supreme Court of Victoria proceeding in 1999

1. On 8 October 1999, Monica Tresize, by her administrator trustee Tania Tresize, commenced a proceeding in the Supreme Court of Victoria against Mr Smallacombe and the estate of Mr Pearce. It appears that there was a substantial overlap between the claims made in this proceeding and those made in the 1992 Proceeding. On 24 April 2001, the Supreme Court proceeding was permanently stayed by Master Wheeler. An appeal from that decision was dismissed by Justice Beach on 18 May 2001. It is not necessary for present purposes to refer to this proceeding in any detail.

### The 2004 Proceeding

1. In March 2004, Mr Tresize and Remea commenced the 2004 Proceeding against the Bank (Federal Court proceeding VG 338 of 2004). In November 2004, the Bank filed a notice of motion to strike out the applicants’ amended statement of claim on the basis that, among other things, it disclosed no reasonable cause of action.
2. On 11 August 2005, Sundberg J ordered that paragraphs 79-92 of the amended statement of claim be struck out: *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706. As noted at [13] of the judgment, the applicants’ claims in the 2004 Proceeding were based on an allegation that the Bank failed to discover three documents in the 1992 Proceeding (described at [13] of the judgment of Sundberg J). The applicants claimed that the undiscovered documents: were discoverable in the 1992 Proceeding; were not discovered in that proceeding; and were directly material to the issues in that proceeding. The applicants contended that, by proceeding with the trial of the 1992 Proceeding on the basis of certain allegations in its defence and counterclaim, or without effecting discovery of the undiscovered documents, the Bank fraudulently sought to derive an advantage in the 1992 Proceeding to the detriment of the applicants. On the basis of those allegations, the applicants sought (among other things) orders that the Deed of Settlement be rescinded and that the Consent Orders be set aside.
3. Justice Sundberg concluded, at [20], that paragraphs 84-89 of the amended statement of claim should be struck out as they had a tendency to cause embarrassment because, taken as a whole, they: were susceptible to different meanings insofar as they sought to describe the legal basis upon which the applicants’ claims in the proceeding were founded; and pleaded fraud on the part of the Bank without the requisite high degree of specificity and particularity.
4. Justice Sundberg then dealt with certain subsidiary allegations in the amended statement of claim, concluding at [44] that they should be struck out as they had a tendency to cause embarrassment in the proceeding. His Honour also struck out the paragraphs claiming relief, in circumstances where the basis for them had been removed.
5. The applicants were given leave to re-plead the paragraphs that had been struck out, but did not do so within the permitted time. On 24 February 2006, Sundberg J made orders striking out the whole of the amended statement of claim, and dismissing the proceeding: *Tresize v National Australia Bank Ltd* [2006] FCA 150.

### The 2018 Proceeding

1. On 5 July 2018, Mr Tresize filed an interlocutory application in the 1992 Proceeding seeking to have the Consent Orders set aside. It became apparent at a case management hearing that Mr Tresize alleged that the orders should be set aside on the basis of fraud on the part of the Bank. In these circumstances, I indicated to Mr Tresize, who was (and is) self-represented, that the appropriate course to seek such relief was to commence a new proceeding. Accordingly, on 25 October 2018, Mr Tresize commenced the 2018 Proceeding.
2. Mr Tresize has filed a statement of claim in the 2018 Proceeding (**SOC**). It is a lengthy document, comprising 93 paragraphs over 38 pages. Understandably, given that Mr Tresize does not have legal representation, the document is quite repetitive. Mr Tresize has filed several affidavits, which provide further detail to his allegations and some further allegations. In considering the Bank’s interlocutory application seeking a permanent stay or summary dismissal of the 2018 Proceeding, I have had regard to allegations in Mr Tresize’s affidavits as well as those in his SOC.
3. I will now seek to summarise what appear to be Mr Tresize’s main contentions in the 2018 Proceeding.
4. Mr Tresize claims that the Consent Orders should be set aside pursuant to r 39.05(b) of the *Federal Court Rules 2011* on the ground that the orders were obtained by fraud on the part of the Bank. Mr Tresize also relies on paragraphs (d), (e), (f) and (g) of r 39.05. The paragraphs of r 39.05 relied on by Mr Tresize are as follows:

**39.05 Varying or setting aside judgment or order after it has been entered**

The Court may vary or set aside a judgment or order after it has been entered if:

…

(b) it was obtained by fraud; or

…

(d) it is an injunction or for the appointment of a receiver; or

(e) it does not reflect the intention of the Court; or

(f) the party in whose favour it was made consents; or

(g) there is a clerical mistake in a judgment or order; …

1. The SOC also refers to a number of statutory provisions, including provisions of the *Crimes Act 1958* (Vic), the *Trade Practices Act 1974* (Cth), the *Corporations Act 2001* (Cth), the *Transfer of Land Act 1958* (Vic), the *National Consumer Credit Protection Act 2009* (Cth), and the *Criminal Code Act 1995* (Cth).
2. Mr Tresize’s contentions can be summarised as follows.
3. The Bank obtained both the Consent Orders and the Deed of Settlement by fraud, misleading or deceptive conduct, or unconscionable conduct. In particular:
   1. Prior to the Deed of Settlement being entered into, the Bank falsely represented the amounts owing by the applicants (to the 1992 Proceeding) to the Bank and that certain mortgages were in default. In particular:

* the applicants’ facilities were capped at $5 million, but the Deed of Settlement fraudulently stated that $11,376,564.30 (being the total of $7,962,231.60 and $3,414,332.70) was owing by Mr Tresize, Monica Tresize and Remea – SOC paragraph 11;
* the Deed of Settlement incorrectly stated that Marie Lorraine Tresize, the wife of Kevin Tresize, owed $658,522.37 to the Bank – SOC paragraphs 35, 36, 37, 38 and 39;
* the amounts referred to in the Deed of Settlement in respect of Lot 2, Kenmure Park and a property at Ballarto Road, Cranbourne did not reflect the amounts actually borrowed – SOC paragraphs 63 and 75;
* the Bank falsely represented that certain mortgages were in default when they were not – Mr Tresize’s affidavit dated 20 January 2020 (the **January 2020 Affidavit**), paragraphs 15, 36, 170, 172, 210, 218, 220;
* the interest and other charges claimed by the Bank (prior to the Deed of Settlement being entered into) were substantially overstated – January 2020 Affidavit, paragraphs 21, 26, 37, 38-45, 61, 73-101, 115, 126, 130, 158, 159, 171, 179, 197, 199;
* one of the guarantees relied on by the Bank in its cross-claim in the 1992 Proceeding was false and another was partially discharged – January 2020 Affidavit, paragraphs 21, 193;
* the amounts claimed by the Bank prior to the Deed of Settlement being entered into were substantially overstated – January 2020 Affidavit, paragraphs 27, 29, 35, 52, 53, 58, 70, 203.
  1. The Bank did not disclose, prior to Mr Tresize signing the Deed of Settlement, that the properties would be sold but the proceeds would not be applied to reduce the debt, such that the debt would remain the same indefinitely; had this been disclosed, Mr Tresize would not have signed the Deed of Settlement – SOC paragraphs 19, 20, 24 and 25.
  2. The Consent Orders differ significantly from, and do not reflect, the Deed of Settlement. In particular:
* the Consent Orders represented that the debts were separate from the debts in the Deed of Settlement – SOC paragraph 9(a);
* the Consent Orders did not reflect the agreed basis of the settlement, which was that the applicants gave the Bank possession of the properties *in lieu of* the debts – SOC paragraph 9(b)-(e);
* the Consent Orders doubled the amount of the debt, such that $22,753,128.60 became owing by the applicants – SOC paragraph 9(f);
* the Consent Orders were not sighted by the applicants prior to being made by the Court – SOC paragraph 9(g);
* the Consent Orders provided that the Bank “recovers” possession of the various properties, while the Deed of Settlement referred to the applicants “granting” possession of the properties to the Bank – SOC paragraph 12; and
* the Consent Orders incorrectly stated that the Bank recovered possession of the property known as Bower Park, in circumstances where no debt in respect of that property was identified in the Consent Orders – SOC paragraph 40.

1. The Bank refuses to disclose details concerning the application of the proceeds of realisation of the secured properties pursuant to the Deed of Settlement. In particular:
   1. the Bank has not disclosed the amounts of the proceeds realised after sales of the properties – SOC paragraphs 18, 27, 30, 32, 72 and 74;
   2. the Bank has refused to disclose to Mr Tresize the real amount of the debt, if any, owing to the Bank – SOC paragraphs 57, 58, 61 and 62;
   3. the Bank has refused to provide copies of the mortgage documents for the properties in the Deed of Settlement – SOC paragraphs 72, 73, 75 and 76.
2. The Bank has falsely claimed, and falsely claims, that the applicants (to the 1992 Proceeding) continue to owe money to the Bank. In particular:
   1. from 1993 to the present, the Bank has falsely, recklessly and fraudulently claimed that the applicants owe $22,753,128.60 – SOC paragraph 11;
   2. the Bank has sold the properties referred to in the Deed of Settlement, but the debt owing, as stated in the Consent Orders, has remained the same – SOC paragraphs 13 and 29; and
   3. the Bank, as at 2018, was claiming that Mr Tresize and Remea still owed the debts listed in the Consent Orders – SOC paragraphs 21, 22, 23 and 28.
3. The Bank took possession of and sold the properties referred to in the Deed of Settlement, but failed to apply the proceeds of sale to the debt owed by the applicants – SOC paragraphs 14, 15, 16, 26, 31 and 72.
4. The Bank has breached the Deed of Settlement, or otherwise engaged in improper conduct, in relation to Lot 2, Kenmure Park. In particular:
   1. pursuant to the Deed of Settlement, the Bank is liable for debts (including rates) in respect of Lot 2, Kenmure Park for the period up to April 2018 (when the Bank released its mortgage in respect of the property); this is because the Bank was in possession of the property from the time of the Deed of Settlement and the Consent Orders – SOC paragraphs 41, 42, 43, 51, 52, 77, 78 and 84;
   2. the Bank has represented, falsely, that it did not take possession of Lot 2, Kenmure Park – SOC paragraphs 44 and 45;
   3. there was no agreement between the Bank and Mr Tresize or Remea to the effect that they would be liable for the rates and any other utilities in relation to Lot 2, Kenmure Park; the only agreement was for Monica Tresize to be able to reside in the property during her lifetime – SOC paragraphs 46, 48, 49, 50, 69 and 79;
   4. in breach of the Deed of Settlement, the Bank left Lot 2, Kenmure Park in the name of Remea, rather than transferring the property to the Bank’s own name – SOC paragraphs 47, 64, 65 and 66;
   5. the Bank has claimed, falsely, that Remea is responsible for the rates in relation to Lot 2, Kenmure Park – SOC paragraphs 50, 67 and 80;
   6. the Bank has claimed, falsely, that Mr Tresize, by executing the Deed of Settlement, agreed to be responsible for the rates – SOC paragraphs 53 and 54;
   7. as a result of the Bank’s breaches, Remea has suffered loss or damage, namely that the City of Casey claims that Remea is responsible for outstanding rates of approximately $51,637.74, and the costs associated with a broken water line – SOC paragraph 68; and
   8. the Bank applied an incorrect amount to the mortgage of Lot 2, Kenmure Park – SOC paragraphs 71 and 74.
5. The Consent Orders no longer reflect the intention of the Court, or are misleading, and therefore should be set aside – SOC paragraph 58. In particular:
   1. the Consent Orders present a false and misleading picture, namely that substantial debts are owed by the applicants to the Bank, in circumstances where the Bank has sold the applicants’ properties in lieu of those debts – SOC paragraphs 55, 56, 58, 59, 60 and 85;
   2. if the debts remain in the Consent Orders, it would mean that the Bank has stolen the applicants’ land – SOC paragraph 81; and
   3. Lot 2, Kenmure Park should be removed from the Consent Orders in circumstances where the Bank has released its mortgage – SOC paragraphs 34, 82 and 83.
6. In August 1993, the Bank improperly sold a property at Nyora, Victoria (which is not included in the Deed of Settlement) pursuant to a mortgage given by the Tresizes to Brian Kollias and has failed to account for the proceeds – SOC paragraphs 70 and 71; January 2020 Affidavit, paragraphs 221-241.
7. The Bank has failed to discharge its mortgages with respect to two properties formerly owned by Mr Tresize, namely McDonalds Track, Lang Lang and Westernport Road, Lang Lang – January 2020 Affidavit, paragraph 216.
8. Mr Tresize claims the following relief at the end of the SOC:

1. Order setting aside the ‘deed’ and 1993 Consent Orders (or striking it out).

2. A declaration the minutes of order as ordered by this Honourable Court on 1st April, 1993 were not consented to or approved by the Applicant’s.

3. A declaration the minutes of order as ordered by this Honourable Court on 1st April [1993] were entered by mistake and were not in accordance with the terms of settlement or the deed of settlement.

4. A declaration that the settlement of this action between the parties and the minutes of order dated 1st April 1993 are null and void.

5. A declaration that the Respondent is in breach of the settlement.

6. Having the debt amount disclosed by the Respondent that the NAB refers to in their email of 3rd April, 2018.

7. Disclosure of the over mortgaged land of the applicant and company Remea P/L’s name.

8. Disclosure of proceeds of sales of the properties sold by the respondent.

9. The respondent to provide all relative documents of sales of the applicants land achieving the best outcome of sales.

10. The respondent to disclose the true amount of debt as listed currently in the Federal Court.

11. The respondent discloses the full details of sales and proceeds of sales of the applicant’s properties.

12. Having the debts removed from the 1993 orders.

13. The respondent to produce the mortgages on all the land referred to [in the] VG200/1993 Consent Orders and settlement deed.

14. Disclosure from the respondent whether the debts lifted applies to Remea P/L for any debts.

15. Order for the respondent to make payment for the outstanding land rates from 29th August, 2011 to 3rd April, 2018.

16. Order for the respondent to make payment to South East Water for the wastage water incurred from a leaking pipe in 2018.

17. Damages awarded to the applicants. (Interest pursuant to the Federal Court Act [1976]).

18. Enforcement of findings of breaches of the said laws as described herein.

19. The referral of the court to the correct bodies who undertake investigation into company’s trading in breach of the laws the respondent corporation is bound by.

20. Such further or other relief as the court deems fit.

21. Any other orders, the court deems fit.

22. Reserve costs.

23. Liberty to apply

### The Bank’s email dated 3 April 2018

1. The material before the Court include correspondence between Mr Tresize and the Bank going back several years. It is not necessary to refer to this in detail. However, an email dated 3 April 2018 from Simon Thompson (of the Office of the CEO & Executive Leadership Team of the Bank) to Mr Tresize should be noted. In this email, Lot 2, Kenmure Park is referred to as the Cannons Creek Property, but for consistency within these reasons I have referred to the property as Lot 2, Kenmure Park. This email stated:

Dear Mr Tresize,

I refer to:

1. Your letter dated 19 March 2018 and the previous correspondence that has passed between the parties;

2. The meeting between you, your children, Tania and Shane, and NAB representatives Brent Musgrove and Georgina Trapman on 8 February 2018 at the NAB Business Banking Centre in Mornington;

3. The Deed of Release dated March 1993 (**attached**);

4. The mortgage (**attached**) in favour of NAB over [Lot 2, Kenmure Park]; and

5. Your complaints about NAB’s conduct in respect of the property at Poowong Road, Nyora, Victoria (**Nyora Property**), in particular the mortgage and transfer of mortgage in respect of the Nyora Property (**attached**).

**NAB’s Position**

NAB has previously advised you of its position in relation to the matters above, including in NAB’s email to you dated 22 February 2018 (**attached**). However, for the avoidance of doubt, we set out below NAB’s position in relation to the matters that have been raised by you:

1. NAB does not accept that the Promissory Note has any effect on the rights over [Lot 2, Kenmure Park]. NAB has not traded or dealt with the Promissory Note in any way and we confirm NAB’s position that the Promissory Note is not regarded by NAB as valuable consideration.

2. NAB denies that it owes you or your family any compensation.

3. NAB denies that it or its staff have engaged in any wrongdoing.

4. NAB does not have any obligation to remedy the water issue at [Lot 2, Kenmure Park].

5. As the occupier of [Lot 2, Kenmure Park], the water issue is your responsibility.

6. NAB has provided you with copies of the documents that it relies on in relation to the matters you have raised.

7. The offer contained in your letter dated 19 March 2018 is rejected and NAB will not be making any voluntary payment to you.

**Way Forward**

It appears that there are a number of matters where your views and those of NAB differ. It also appears that it is unlikely that these different views will be resolved by further exchanges of correspondence or meetings. Accordingly, in the interests of finalising this matter:

1. **NAB has released its mortgage over [Lot 2, Kenmure Park]** and we attach a copy of a title search of [Lot 2, Kenmure Park] showing that NAB’s mortgage is no longer on title; and

2. **NAB will not seek any payment from you or your family in respect of any amounts owing to NAB**.

This action is not taken lightly and is taken without any admission of liability or wrongdoing on the part of NAB. Rather, NAB wishes to move on from this matter and the long history of disputes you have had with NAB. **As NAB now has no interest in [Lot 2, Kenmure Park],** NAB will not be engaging in further correspondence with you about the matters referred to above.

[Lot 2, Kenmure Park] is now an electronic title and accordingly, NAB does not have a physical certificate of title for this property. As Remea is the registered proprietor of [Lot 2, Kenmure Park] and is deregistered, NAB will be writing to ASIC notifying it of the discharge of its mortgage.

As mentioned to you previously, the NAB strongly encourages you to seek independent legal advice regarding this matter.

NAB considers that it is in the best interest of all parties for this matter to be finalised and, by reason of the above, it is NAB’s position that this matter is now finalised.

Regards

Simon Thompson

Office of the CEO & Executive Leadership Team

Commercial Services | National Australia Bank Limited

(Emphasis added.)

1. Insofar as the email stated that the Bank will not seek any payment from “you or your family”, I take this to include Mr Tresize’s family company, Remea. In other words, the Bank will not seeking any payment from Remea in respect of any debts owing to the Bank. This is consistent with the subsequent statement in the email that the Bank “now has no interest in [Lot 2, Kenmure Park]”. It is also consistent with the way the Bank’s case was presented at the hearing.

### Additional matters

1. In Ms Kinsey’s affidavit dated 7 December 2018, she stated that she was instructed by the Bank and believed that: Monica Tresize passed away in August 2011; when she passed away, pursuant to the Deed of Settlement and Consent Orders, the Bank was no longer constrained from enforcing its right to possession of Lot 2, Kenmure Park; Mr Tresize continued to reside at the property after the passing of Monica Tresize; and the Bank has not, at any time, taken possession of the property. Ms Kinsey annexed a copy of the email dated 3 April 2018 from Mr Thompson to Mr Tresize, which has been set out above.
2. In Ms Kinsey’s affidavit dated 9 May 2019, she stated that she was instructed by the Bank and believed that the following employees referred to in Mr Tresize’s affidavit dated 12 April 2019 were no longer employed by the bank: Mr Smallacombe, Shane Campbell, Alan Copsey, Gregory Wilcox, Mr Wilcock, Bradley Neil Hubbard and Charlie Trkulja. Ms Kinsey also stated that she was instructed by the Bank and believed that the documents now held by the Bank in relation to the alleged matters and events referred to in Mr Tresize’s affidavit were limited, and that the vast majority of the documents once held by the Bank in respect of these matters and events have been destroyed pursuant to the Bank’s usual document retention processes, owing to the passage of more than 25 years since the alleged events occurred.
3. I note also that there are various references in the material (including the 3 April 2018 email) to Remea having been deregistered from time to time.

## Mr Tresize’s interlocutory application dated 16 June 2020

1. It is convenient to deal with Mr Tresize’s interlocutory application dated 16 June 2020 before turning to the other interlocutory applications. By the interlocutory application dated 16 June 2020 Mr Tresize seeks the following orders:

1. The applicant seeks leave from the honourable Federal Court in the [2018 Proceeding] to file a sworn Affidavit in correction of an ‘***Exhibit*** J.T - 1’ being a Preliminary Forensic Accounting Report filed by the applicant on 20th January 2020.

2. The correction of the Exhibit J.T-1 is of critical importance at No.7.1 of the Forensic Accounting Report, as it directly relates to the amounts in the 1993 Deed of Settlement in [the 1992 Proceeding].

The preliminary forensic accounting report referred to in the interlocutory application is a preliminary report prepared by Sharlene Anderson of Veritas Forensics dated 14 January 2020 (the **Veritas Report**), a copy of which is annexed as “JT.1” to the January 2020 affidavit.

1. In support of the interlocutory application, Mr Tresize filed an affidavit sworn by him on 16 June 2020 (the **June 2020 affidavit**). The affidavit is 57 pages long and contains a detailed analysis, undertaken by Mr Tresize, of banking documents in order to demonstrate (in broad terms) that interest amounts claimed by the Bank in the period prior to entry into the Deed of Settlement in 1993 were excessive and unreasonable. The affidavit also contains allegations that the Bank fraudulently misrepresented the amounts owing by the applicants (to the 1992 Proceeding) in the period before the Deed of Settlement. Mr Tresize does not annex to the affidavit any further report from Ms Anderson. Thus, although Mr Tresize seeks to correct the Veritas Report (in particular, the opinion expressed at paragraph 7.1 of that report that the “interest charge across the various loan accounts has been calculated and cross checked and appears reasonable based on the loan balances and approximate interest rates at the time”), this is on the basis of his own analysis of the documents rather than a further report from Ms Anderson.
2. In circumstances where Mr Tresize seeks to rely on material that was not relied on at the hearing, he needs leave to re-open his case.
3. The applicable principles concerning an application to re-open were summarised by Kenny J in *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 (***Bradshaw***) at [24]:

The authorities indicate that, broadly speaking, there are four recognised classes of case in which a court may grant leave to re-open, although these classes overlap and are not exhaustive. These four classes are (1) fresh evidence (*Hughes v Hill* [1937] SASR 285 at 287; *Smith v New South Wales Bar Association [No 2]* (1992) 108 ALR 55 at 61-2); (2) inadvertent error (*Brown v Petranker* (1991) 22 NSWLR 717 at 728 (application to recall a witness); *Murray v Figge* (1974) 4 ALR 612 at 614 (application to tender answers to interrogatories); *Henning v Lynch* [1974] 2 NSWLR 254 at 259 (application to re-open); (3) mistaken apprehension of the facts (*Urban Transport Authority of NSW v NWEISER* (1992) 28 NSWLR 471 (“*UTA*”) at 478; and (4) mistaken apprehension of the law (*UTA* at 478). In every case the overriding principle to be applied is whether the interests of justice are better served by allowing or rejecting the application for leave to re-open: see *UTA* at 478; also *The Silver Fox Company Pty Ltd as Trustee for the Baker Family Trust v Lenard’s Pty Ltd (No 2)* [2004] FCA 1310 (“*Silver Fox*”) at [22] and [25].

1. One of the relevant matters in considering whether to grant an application for leave to re-open is the reasons why the evidence was not led in the first place: *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 at 478. Another relevant consideration is whether it is probable to the required degree that the additional evidence will affect the result: see *Telstra Corporation Ltd v Australian Competition & Consumer Commission* (2008) 171 FCR 174 at [207]-[211]; *Ashby v Slipper* [2014] FCA 973 at [10].
2. It does not appear that the circumstances fall within the first, second or fourth categories referred to in *Bradshaw*. It is arguable that the circumstances fall within the third category (mistaken apprehension of the facts). However, in any event, I am not satisfied that it would be in the interests of justice to grant Mr Tresize leave to re-open his case to rely on the material in the June 2020 affidavit. First, no explanation has been provided why this evidence was not led in the first place. It does not appear that any of the documents sought to be relied on by Mr Tresize were not available before the hearing. To the contrary, it appears that the documents were available to him before that hearing and that Mr Tresize has carried out further analysis of those documents. Secondly, even if the material in the June 2020 affidavit were taken into account, it would not assist Mr Tresize. I will explain why that is so later in these reasons, in the context of considering the Bank’s interlocutory application.
3. Accordingly, I refuse leave to Mr Tresize to re-open his case to rely on the June 2020 affidavit. Mr Tresize’s interlocutory application dated 16 June 2020 will therefore be dismissed.

## The Bank’s interlocutory application

1. By its interlocutory application filed on 10 December 2018 in the 2018 Proceeding, the Bank seeks the following orders:

1 The proceeding be permanently stayed or dismissed pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), or in the exercise of the Court’s inherent or implied power to control its own process and procedure, on the grounds of:

(a) abuse of process; further and alternatively

(b) *Anshun* estoppel; further and alternatively

(c) *res judicata*; further and alternatively

(d) issue estoppel.

2. Alternatively, the proceeding be summarily dismissed, in whole or in part, pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) and/or r 26.01 of the *Federal Court Rules 2011* (Cth) on the ground that the proceeding has no reasonable prospect of success or is an abuse of process.

3. In the further alternative, the Originating Application filed 26 October 2018 and the Statement of Claim filed on 26 October 2018 both be struck out, in whole or in part, pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) on the ground that the pleading:

(a) contains frivolous or vexatious material;

(b) is likely to cause prejudice, embarrassment or delay in the proceeding;

(c) fails to disclose a reasonable cause of action or other case appropriate to the nature of the pleading; or

(d) is otherwise an abuse of the process of the Court.

4. The Applicant to pay the Respondent’s costs of, and incidental to, this interlocutory application and of the proceeding.

5. In addition to order 1 and/or 2, and order 4, any further proceedings brought by the Applicant (in his personal capacity or as director of Remea Pty Ltd) or Remea Pty Ltd against the Respondent on the same or substantially the same cause of action be stayed, in whole or in part, pursuant to r 39.03(2) of the *Federal Court Rules 2011* (Cth).

6. Such further or other orders as the Court considers appropriate.

1. I will deal with this application before dealing with Mr Tresize’s interlocutory application provided to the Court in December 2018, by which he seeks default orders (for failure to file a defence) or an order for the filing of a defence. This is because, if the Bank’s application is successful, it would not be appropriate to make the orders sought in Mr Tresize’s interlocutory application.

### Applicable principles

1. The principles relating to *res judicata*, issue estoppel and *Anshun* estoppel (after *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589) were discussed by French CJ, Bell, Gageler and Keane JJ in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 (***Tomlinson***) at [20]-[23]. In relation to *Anshun* estoppel, their Honours stated at [22]:

The third form of estoppel is now most often referred to as “*Anshun* estoppel”, although it is still sometimes referred to as the “extended principle” in *Henderson v Henderson*. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a “true estoppel” and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

(Footnotes omitted.)

1. An *Anshun* estoppel will only arise where it appears that the matter relied upon in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff’s claim and its subject matter, it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding: see *Port of Melbourne Authority v Anshun Pty Ltd* at 602 per Gibbs CJ, Mason and Aickin JJ. Circumstances which might justify a party not litigating an issue in one proceeding and wishing to litigate it in another include expense, importance of the particular issue and motives extraneous to the actual litigation: see *Port of Melbourne Authority v Anshun Pty Ltd* at 603.
2. The principles relating to abuse of process were discussed by French CJ, Bell, Gageler and Keane JJ in *Tomlinson* at [24]-[26]:

24 … The doctrine of abuse of process is informed in part by similar considerations of finality and fairness. Applied to the assertion of rights or obligations, or to the raising of issues in successive proceedings, it overlaps with the doctrine of estoppel. Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.

25 Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court’s procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

26. Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel.

(Footnotes omitted.)

See also *UBS AG v Tyne* (2018) 265 CLR 77 at [43]-[46] per Kiefel CJ, Bell and Keane JJ, at [61]-[62], [68] per Gageler J.

1. A proceeding may be stayed as an abuse of process where the lapse of time is so serious that a fair trial is not possible: *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256.
2. Also relevant are the principles relating to summary dismissal of a proceeding. Section 31A of the *Federal Court of Australia Act 1976* (Cth) provides in part:

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

1. Rule 26.01 of the *Federal Court Rules* provides in part:

26.01 **Summary judgment**

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

(b) the proceeding is frivolous or vexatious; or

(c) no reasonable cause of action is disclosed; or

(d) the proceeding is an abuse of the process of the Court; or

…

(4) If an order is made under subrule (1) dismissing part of the proceeding, the proceeding may be continued for that part of the proceeding not disposed of by the order.

1. Section 31A was discussed by the High Court in *Spencer v The Commonwealth of Australia* (2010) 241 CLR 118 (***Spencer***). In that case, Hayne, Crennan, Kiefel and Bell JJ stated at [53]:

… s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered. Those earlier provisions were understood as requiring formation of a certain and concluded determination that a proceeding would necessarily fail. That this was the basis of earlier decisions may be illustrated by reference to two decisions of this Court often cited in connection with questions of summary judgment: *Dey v Victorian Railways Commissioners* and *General Steel Industries Inc v Commissioner for Railways (NSW)*.

(Footnotes omitted.)

1. Their Honours continued at [56] and [58]-[60]:

56 Because s 31A(3) provides that certainty of failure (“hopeless” or “bound to fail”) need not be demonstrated in order to show that a plaintiff has no reasonable prospect of prosecuting an action, it is evident that s 31A is to be understood as requiring a different inquiry from that which had to be made under earlier procedural regimes. It follows, of course, that it is dangerous to seek to elucidate the meaning of the statutory expression “no reasonable prospect of successfully prosecuting the proceeding” by reference to what is said in those earlier cases.

…

58 How then should the expression “no reasonable prospect” be understood? No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is “no reasonable prospect”. The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like “no reasonable prospect” is to be avoided. Consideration of the difficulties that bedevilled the proviso to common form criminal appeal statutes, as a result of judicial glossing of the relevant statutory expression, provides the clearest example of the dangers that attend any such attempt.

59 In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like “clearly”, “manifestly” or “obviously”) as “frivolous”, “untenable”, “groundless” or “faulty”. But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word “reasonable”, in the phrase “no reasonable prospect”, be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a “frivolous”, “untenable”, “groundless” or “faulty” claim.

60 Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is “no reasonable prospect” of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to “no reasonable prospect” can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase “just and equitable” when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

(Footnotes omitted.)

1. See also *Spencer* at [24] per French CJ and Gummow J and *Trkulja v Google LLC* (2018) 263 CLR 149 at [22] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
2. Also relevant are the principles applicable to an application to set aside a judgment or order of the Court, in particular an order made by consent. In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, Lindley LJ stated at 280:

... nor have I the slightest doubt that a consent order can be impeached, *not only on the ground of fraud* but upon any grounds which invalidate the agreement it expresses in a more formal way than usual … To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good. If it can be, the consent order is bad.

(Emphasis added.)

1. The above passage was cited with apparent approval by the High Court in *Harvey v Phillips* (1956) 95 CLR 235 at 244. See also *Harrington v Lowe* (1996) 190 CLR 311 at 325 (fn 36); *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 696-697; and *Tresize v National Australia Bank Ltd* (1994) 50 FCR 134 at 145-147.

### Application of principles in the present case

1. I have summarised, at [55] above, Mr Tresize’s allegations in the 2018 Proceeding. It is convenient to consider whether Mr Tresize’s claims should be permanently stayed or dismissed by reference to that summary of Mr Tresize’s contentions. Accordingly, I will now consider in turn each of the contentions summarised in [55] above.

#### Paragraph (a)(i)

1. Mr Tresize contends that the Deed of Settlement and Consent Orders should be set aside on the basis that, prior to the Deed of Settlement being entered into, the Bank falsely represented the amounts owing by the applicants (to the 1992 Proceeding) to the Bank and that certain mortgages were in default. More specific allegations are as follows:

* the applicants’ facilities were capped at $5 million, but the Deed of Settlement fraudulently stated that $11,376,564.30 (being the total of $7,962,231.60 and $3,414,332.70) was owing by Mr Tresize, Monica Tresize and Remea – SOC paragraph 11;
* the Deed of Settlement incorrectly stated that Marie Lorraine Tresize, the wife of Kevin Tresize, owed $658,522.37 to the Bank – SOC paragraphs 35, 36, 37, 38 and 39;
* the amounts referred to in the Deed of Settlement in respect of Lot 2, Kenmure Park and a property at Ballarto Road, Cranbourne did not reflect the amounts actually borrowed – SOC paragraphs 63 and 75;
* the Bank falsely represented that certain mortgages were in default when they were not – January 2020 Affidavit, paragraphs 15, 36, 170, 172, 210, 218, 220;
* the interest and other charges claimed by the Bank (prior to the Deed of Settlement being entered into) were substantially overstated – January 2020 Affidavit, paragraphs 21, 26, 37, 38-45, 61, 73-101, 115, 126, 130, 158, 159, 171, 179, 197, 199;
* one of the guarantees relied on by the Bank in its cross-claim in the 1992 Proceeding was false and another was partially discharged – January 2020 Affidavit, paragraphs 21, 193; and
* the amounts claimed by the Bank prior to the Deed of Settlement being entered into were substantially overstated – January 2020 Affidavit, paragraphs 27, 29, 35, 52, 53, 58, 70, 203.

1. In support of some of these allegations, Mr Tresize relies on the Veritas Report. This report does not express concluded views but rather identifies a series of matters that, Ms Anderson opines, should be investigated or further investigated.
2. In my view, it is an abuse of process for Mr Tresize to make these allegations now.
3. First, the allegations that Mr Tresize makes now are related to the claims made in the 1994 Proceeding; if the allegations were to be made at all, that was the occasion for them to be made. In the 1994 Proceeding, the applicants sought to have the Deed of Settlement and the Consent Orders set aside on the basis of equitable fraud by the Bank. While the allegations now sought to be made (essentially, that the Deed of Settlement and the Consent Orders should be set aside on the basis of false representations by the Bank) are different from those made in the 1994 Proceeding, there is nevertheless some overlap. In each case, there is or was a challenge to the Deed of Settlement and the Consent Orders based on alleged misconduct by the Bank. The 1994 Proceeding went to trial, with all parties represented by counsel and solicitors. The trial involved a detailed examination of whether there was a basis to set aside the Deed of Settlement and the Consent Orders. If the Deed of Settlement and the Consent Orders were to be impugned on the basis that they were procured by false representations by the Bank, the 1994 Proceeding was the occasion for such allegations to be raised.
4. Further, no proper explanation or justification has been provided as to why the allegations were not included in that proceeding. The fact that Mr Tresize had not previously reviewed the documents does not provide a sufficient explanation or justification for the non-inclusion of these allegations in the 1994 Proceeding. It appears that the many of the documents upon which Mr Tresize relies were held by or at least available to his solicitors at the time of the 1994 Proceeding and that Mr Tresize has now reviewed those documents himself and believes that he has identified new points not identified or taken by his solicitors at the time of the earlier proceeding. For example, in Mr Tresize’s 12 April 2019 affidavit, he stated at paragraph 5:

The contents of my affidavit are based on my own knowledge, **a review of documents from my previous solicitors (sic) files**, my own documents kept since 1988, titles office documents and my beliefs (unless otherwise stated) to the best of my memory[,] [i]ncluding, **witness statements and affidavits that I have discovered in solicitor files**, my own files and other litigation cases since VG 200 of 1992 directly relating to the respondent National Australia Bank and its officers and solicitors and their conduct.

(Emphasis added.)

To similar effect, in paragraph 63 of that affidavit, Mr Tresize stated that, due to the large volume of documents filed by the Bank in support of its interlocutory application, “I have been made to re-visit all previous documentation relating to all litigation against the respondent since the 1993 deed”. It appears, therefore, that the matters upon which Mr Tresize now seeks to rely could have been ascertained with reasonable diligence at the time of the earlier proceedings: cf *Port of Melbourne Authority v Anshun Pty Ltd* at 598. Mr Tresize relies, not on matters that could not have been known at the time of the earlier proceedings, but rather on matters that he has identified by revisiting documentation that was, in many cases, held by or available to his solicitors at the time of the earlier proceedings.

1. It is true that Mr Tresize was not a party to the 1994 Proceeding at the time it went to trial (having been removed as an applicant after he was declared bankrupt). However, he was a party to that proceeding at the time it was commenced. Further, as discussed in the authorities referred to above, the principles of abuse of process are more flexible than those of *Anshun* estoppel, such that they may apply in circumstances where *Anshun* estoppel is not directly applicable. Further and in any event, Mr Tresize was a party to the 2004 Proceeding and the considerations discussed above apply also to the 2004 Proceeding.
2. Secondly, the passage of time means that it is impossible for the Bank to fairly defend itself in relation to these allegations. The relevant events occurred more than 27 years ago. Mr Tresize’s allegations are lengthy and detailed. The majority, if not all, of the relevant people are no longer available to the Bank. Many of the relevant documents no longer exist. In these circumstances, a fair trial in relation to the allegations is not possible.
3. In Mr Tresize’s outline of submissions, he submits at p 10 that the pleadings and “fresh facts” that he relies on “have never been ruled upon”. Thus, he contends, the “the factual merits of the current case now sought to be presented have not been addressed”. (See, to similar effect, pp 8 and 27 of Mr Tresize’s speaking notes.) It may be correct that the allegations now raised by Mr Tresize have not previously been ruled upon, but that is not to the point. For the reasons given above, to allow these allegations to go forward now, given the issues raised in the earlier proceedings and the passage of time, would constitute an abuse of process.
4. For completeness, I note that, in my view, although Mr Tresize contends that the matters raised in the January 2020 Affidavit constitute fraud by the Bank, the matters relied on rise no higher than speculation. Mr Tresize relies (at least in part) on the Veritas Report. As the executive summary to that report makes clear, Ms Anderson did not express concluded views, but rather identified matters that, in her opinion, require investigation or further investigation. The problem is that the passage of time and the consequent unavailability of relevant people and documents make it difficult, if not impossible, to satisfactorily investigate these matters. See, in this regard, paragraph 3.3 of the Veritas Report.
5. For these reasons, in my view, the making of these allegations constitutes an abuse of process.

#### Paragraph (a)(ii)

1. Mr Tresize contends that the Deed of Settlement and Consent Orders should be set aside on the basis that the Bank did not disclose, prior to Mr Tresize signing the Deed of Settlement, that the properties would be sold but the proceeds would not be applied to reduce the debt, such that the debt would remain the same indefinitely; had this been disclosed, Mr Tresize would not have signed the Deed of Settlement – SOC paragraphs 19, 20, 24 and 25.
2. In my view, the considerations set out above in relation to the preceding set of allegations apply equally to this allegation. For the same reasons, it is an abuse of process to make this allegation now.
3. Further, the allegation appears to be based on a mistaken premise and thus to have no reasonable prospect of success. The allegation appears to assume that the applicants’ debts as set out in the Deed of Settlement and the Consent Orders have remained the same indefinitely. Perhaps Mr Tresize has made this assumption because the Consent Orders state that certain amounts are payable and do not refer to those debts being discharged upon sale of the secured properties. However, the Consent Orders are to be read together with the Deed of Settlement in order to ascertain the rights and obligations of the parties to the 1992 proceeding. Clause 12(b) of the Deed of Settlement (set out at [23] above) makes clear that insofar as the Bank does not obtain satisfaction on realising the land referred to in column 3 of Schedule 1 to the Deed of Settlement, the Bank releases and forever discharges each of the debts in column 2 of Schedule 1. In other words, the Deed of Settlement operates in the way Mr Tresize contends that it should operate. As Mr Tresize contends, the Bank was granted possession of the properties “in lieu of the debts” (see, eg, paragraph 13 of the SOC). The fact that this part of the Deed of Settlement is not stated in the Consent Orders does not affect the position as between the Bank, on the one hand, and Mr Tresize, Monica Tresize and Remea, on the other. The rights and obligations of the parties are, relevantly, as set out in clause 12(b) of the Deed of Settlement.

#### Paragraph (a)(iii)

1. Mr Tresize contends that the Deed of Settlement and Consent Orders should be set aside on the basis that the Consent Orders differ significantly from, and do not reflect, the Deed of Settlement. In particular, Mr Tresize contends that:

* the Consent Orders represented that the debts were separate from the debts in the Deed of Settlement – SOC paragraph 9(a);
* the Consent Orders did not reflect the agreed basis of the settlement, which was that the applicants gave the Bank possession of the properties *in lieu of* the debts – SOC paragraph 9(b)-(e);
* the Consent Orders doubled the amount of the debt, such that $22,753,128.60 became owing by the applicants – SOC paragraph 9(f);
* the Consent Orders were not sighted by the applicants prior to being made by the Court – SOC paragraph 9(g);
* the Consent Orders provided that the Bank “recovers” possession of the various properties, while the Deed of Settlement referred to the applicants “granting” possession of the properties to the Bank – SOC paragraph 12; and
* the Consent Orders incorrectly stated that the Bank recovered possession of the property known as Bower Park, in circumstances where no debt in respect of that property was identified in the Consent Orders – SOC paragraph 40.

1. As these allegations seek to challenge the Consent Orders, the considerations set out at [85]-[90] above apply also to these allegations. Thus, for substantially the same reasons, it is an abuse of process to make these allegations.
2. Further, these allegations fail to appreciate that, as discussed above, the Consent Orders are to be read together with the Deed of Settlement. Mr Tresize’s allegations appear to assume that the amounts payable as set out in the Consent Orders are separate from, and additional to, the amounts referred to in Schedule 1 to the Deed of Settlement. That assumption is incorrect. The Consent Orders refer to the same amounts as set out in Schedule 1 to the Deed of Settlement, and the liability of the applicants to pay those amounts is subject to clause 12(b) of the Deed of Settlement. As noted above, by that clause the Bank agreed to release and forever discharge each of the debts in column 2 of Schedule 1 insofar as the Bank did not obtain satisfaction on realising the land referred to in column 3 of Schedule 1.
3. I also make the following observations for completeness. Insofar as Mr Tresize points to a difference in language as between the Consent Orders (which use the word “recover”) and the Deed of Settlement (which uses the word “granting”) nothing turns on this. Again, the two documents are to be read together.
4. Insofar as Mr Tresize contends that the Consent Orders incorrectly stated that the Bank recovered possession of the property known as Bower Park in circumstances where no debt in respect of that property was identified in the Consent Orders, this does not necessarily indicate any error in the Consent Orders. Bower Park is one of the properties listed in column 3 of Schedule 1 to the Deed of Settlement. By clause 2(a) of the Deed of Settlement, the applicants consented to orders granting the Bank possession of the land referred to in column 3 of Schedule 1 (subject to an exception that does not involve Bower Park).
5. Insofar as Mr Tresize contends that he did not see the proposed consent orders before they were made, nothing turns on this provided that they were approved by his lawyers at the time. There is no material to suggest that his lawyers did not see the proposed consent orders. In the judgment of French J in the 1994 Proceeding at p 58, his Honour referred to Ryan J having made the Consent Orders “in the terms agreed in the Deed of Settlement”. There is no suggestion that the Consent Orders had not been approved by the applicants’ lawyers.

#### Paragraph (b)

1. Mr Tresize contends that the Bank refuses to disclose details concerning the application of the proceeds of realisation of the secured properties pursuant to the Deed of Settlement. In particular, he contends that:

* the Bank has not disclosed the amounts of the proceeds realised after sales of the properties – SOC paragraphs 18, 27, 30, 32, 72 and 74;
* the Bank has refused to disclose to Mr Tresize the real amount of the debt, if any, owing to the Bank – SOC paragraphs 57, 58, 61 and 62; and
* the Bank has refused to provide copies of the mortgage documents for the properties in the Deed of Settlement – SOC paragraphs 72, 73, 75 and 76.

1. These allegations differ from those discussed above in that they are concerned with the Bank’s conduct since the making of the Consent Orders rather than seeking to set aside the Consent Orders. In light of this difference, I prefer to approach these allegations from the perspective of whether the claim has a reasonable prospect of success rather than from the perspective of abuse of process. The same applies to the Mr Tresize’s other allegations, discussed below.
2. In my view, the claims based on these allegations have no reasonable prospect of success. First, insofar as Mr Tresize alleges that the Bank has refused to disclose the real amount of the debt owing to the Bank, this allegation appears to be based on the misconception that the Consent Orders are to be read separately from the Deed of Settlement. As discussed above, the Consent Orders are to be read together with the Deed of Settlement, which makes clear that the Bank agrees to release and forever discharge each of the debts in column 2 of Schedule 1 insofar as the Bank does not obtain satisfaction on realising the land referred to in column 3 of Schedule 1 (cl 12(b)). It follows that, regardless of the amounts realised from the sale of the properties, no debt is owing by the applicants (to the 1992 Proceeding) to the Bank. Further, in the email dated 3 April 2018, the Bank stated that it would not seek payment from Mr Tresize or his family in respect of any amount owing to the Bank. As indicated above, I take this statement to extend to Mr Tresize’s family company, Remea.
3. Secondly, there is no express obligation in the Deed of Settlement upon the Bank to provide details of the amounts realised upon sale of the properties. In any event, it appears that such details have already been provided. The materials before the Court include a copy of an affidavit of Alan Lloyd Copsey dated 27 February 2001, which was filed in the 1999 proceeding in the Supreme Court of Victoria. This affidavit provided details of the prices realised upon sale of the properties at paragraph 29 and Annexure A.
4. Thirdly, there is no express obligation in the Deed of Settlement upon the Bank to provide copies of the mortgage documents, and there does not appear to be any other basis for such an obligation.
5. In light of the conclusion that the claims have no reasonable prospects of success, it is unnecessary to consider whether these claims constitute an abuse of process. Had it been necessary to do so, I would have concluded that the claims based on these allegations constitute an abuse of process due to the lengthy period of time that has elapsed since entry into the Deed of Settlement and the sale of the properties. The considerations discussed in [89] above apply also to this allegation.

#### Paragraph (c)

1. Mr Tresize contends that the Bank has falsely claimed, and falsely claims, that the applicants (to the 1992 Proceeding) continue to owe money to the Bank. In particular, he contends that:

* from 1993 to the present, the Bank has falsely, recklessly and fraudulently claimed that the applicants owe $22,753,128.60 – SOC paragraph 11;
* the Bank has sold the properties referred to in the Deed of Settlement, but the debt owing, as stated in the Consent Orders, has remained the same – SOC paragraphs 13 and 29; and
* the Bank, as at 2018, was claiming that Mr Tresize and Remea still owed the debts listed in the Consent Orders – SOC paragraphs 21, 22, 23 and 28.

1. In my view, the claims based on these allegations have no reasonable prospect of success. First, insofar as Mr Tresize contends that the Bank has falsely, recklessly and fraudulently claimed that the applicants owed $22,753,128.60, there is no basis for this allegation. There is no material to suggest that the Bank has claimed that the applicants (to the 1992 Proceeding) owe this amount. It appears that Mr Tresize has proceeded on the basis that the Bank is claiming both the debts listed in Schedule 1 to the Deed of Settlement and the amounts specified in the Consent Orders. However, there is no suggestion that the Bank has ever claimed this and, in any event, the correct position is that they are the same amounts. Accordingly, the amount payable by Mr Tresize and Monica Tresize was $7,962,231.60 and the amount payable by Remea was $3,414,332.70.
2. Secondly, insofar as Mr Tresize contends that the Bank has sold the properties but the debt, as stated in the Consent Orders, has remained the same, this contention is misconceived. As discussed above, the Consent Orders are to be read together with the Deed of Settlement, which makes clear that the Bank agrees to release and forever discharge each of the debts in column 2 of Schedule 1 insofar as the Bank does not obtain satisfaction on realising the land referred to in column 3 of Schedule 1 (cl 12(b)).
3. Thirdly, there is no material to suggest that the Bank was, as at 2018, claiming that Mr Tresize and Remea owed the debts listed in the Consent Orders. In any event, at least as at 3 April 2018, the Bank was not making any such claim. By the email of that date (set out above), the Bank stated that it would not seek payment from Mr Tresize or his family in respect of any amounts owing to the Bank. As indicated above, I take this to extend to Mr Tresize’s family company, Remea.
4. I note that in Mr Tresize’s outline of submissions, for example at p 18, he submits that the debenture held by the Bank against Remea retained “a false amount of $4.95 million registered against the company until 2018”. The evidence regarding this debenture was rather scant. However, it appears from Mr Tresize’s outline of submissions (eg, at p 22) that this debenture was discharged in 2018. Thus nothing turns on the fact (if it be the fact) that the Bank held a debenture charge against Remea for an amount of up to $4.95 million in the period prior to 2018. As indicated above, I take the Bank’s email dated 3 April 2018 to amount to a statement that the Bank will not be seeking any payment from Remea in respect of any amount owing to the Bank.

#### Paragraph (d)

1. Mr Tresize contends that the Bank took possession of and sold the properties referred to in the Deed of Settlement, but failed to apply the proceeds of sale to the debt owed by the applicants – SOC paragraphs 14, 15, 16, 26, 31 and 72.
2. In my view, the claims based on this allegation have no reasonable prospect of success. There is no material to suggest that the Bank did not apply the proceeds of sale of the property to the debts owed by the applicants. In any event, as discussed above, by virtue of cl 12(b) of the Deed of Settlement, no debt is owed by the applicants (to the 1992 Proceeding) to the Bank. Further, the email dated 3 April 2018 states that the Bank will not seek payment from Mr Tresize or his family for any amount owing to the Bank. Accordingly, whether or not the Bank applied the proceeds of sale to the applicants’ debts (as a matter of the Bank’s internal process) the applicants have not suffered any loss and the claims have no reasonable prospect of success.

#### Paragraph (e)

1. Mr Tresize contends that the Bank has breached the Deed of Settlement, or otherwise engaged in improper conduct, in relation to Lot 2, Kenmure Park. In particular, he contends that:

* pursuant to the Deed of Settlement, the Bank is liable for debts (including rates) in respect of Lot 2, Kenmure Park for the period up to April 2018 (when the Bank released its mortgage in respect of the property); this is because the Bank was in possession of the property from the time of the Deed of Settlement and the Consent Orders – SOC paragraphs 41, 42, 43, 51, 52, 77, 78 and 84;
* the Bank has represented, falsely, that it did not take possession of Lot 2, Kenmure Park – SOC paragraphs 44 and 45;
* there was no agreement between the Bank and Mr Tresize or Remea to the effect that they would be liable for the rates and any other utilities in relation to Lot 2, Kenmure Park; the only agreement was for Monica Tresize to be able to reside in the property during her lifetime – SOC paragraphs 46, 48, 49, 50, 69 and 79;
* in breach of the Deed of Settlement, the Bank left Lot 2, Kenmure Park in the name of Remea, rather than transferring the property to the Bank’s own name – SOC paragraphs 47, 64, 65 and 66;
* the Bank has claimed, falsely, that Remea is responsible for the rates in relation to Lot 2, Kenmure Park – SOC paragraphs 50, 67 and 80;
* the Bank has claimed, falsely, that Mr Tresize, by executing the Deed of Settlement, agreed to be responsible for the rates – SOC paragraphs 53 and 54;
* as a result of the Bank’s breaches, Remea has suffered loss or damage, namely that the City of Casey claims that Remea is responsible for outstanding rates of approximately $51,637.74, and the costs associated with a broken water line – SOC paragraph 68; and
* the Bank applied an incorrect amount to the mortgage of Lot 2, Kenmure Park – SOC paragraphs 71 and 74.

1. In my view, the claims based on these allegations have no reasonable prospect of success. First, insofar as Mr Tresize contends that the Bank was in possession of Lot 2, Kenmure Park, there is no evidence to support this proposition. To the contrary, the Deed of Settlement provided that Monica Tresize was entitled to use and occupy Lot 2, Kenmure Park for her life (cl 8(a)). It appears that that is what occurred. Thus, it appears that Monica Tresize had possession of the property until she died in August 2011. Further, it appears that Mr Tresize has used and occupied, and thus had possession of, the property since then: see Ms Kinsey’s first affidavit, paragraph 6(c). I note also that the address on Mr Tresize’s affidavits correlates with Lot 2, Kenmure Park.
2. If and to the extent that Mr Tresize relies on cl 2(a) of the Deed of Settlement, which grants the Bank possession of the land referred to in column 3 of Schedule 1 (which includes Lot 2, Kenmure Park) and paragraph 1(l) of the Consent Orders (which is to the same effect), these are to be read together with, and subject to, cl 8 of the Deed of Settlement. That clause provides at paragraph (b) that during the subsistence of Monica Tresize’s rights under cl 8, the Bank “shall not enforce the order for possession” of Lot 2, Kenmure Park.
3. Further, to the extent that Mr Tresize relies on cl 8(c) of the Deed of Settlement, which provides that the Bank shall be entitled upon reasonable notice and at reasonable times to enter Lot 2, Kenmure Park to carry out works from time to time, this is not to be equated with taking possession of the property.
4. Secondly, insofar as Mr Tresize contends that the Bank, in breach of the Deed of Settlement, left Lot 2, Kenmure Park in the name of Remea rather than transferring the property to the Bank’s own name, this allegation is misconceived. There was no obligation under the Deed of Settlement for the Bank to transfer Lot 2, Kenmure Park to its own name; the Bank was entitled to leave the property in the name of Remea. Upon Monica Tresize’s death, the Bank was entitled to take possession of the property and deal with the land in its absolute discretion. However, it was not under any obligation to do so.
5. Thirdly, insofar as Mr Tresize contends that the Bank is responsible for the rates in relation to Lot 2, Kenmure Park and the costs associated with a broken water line, there is no merit to these contentions. For the reasons given above, the Bank did not take possession of the property, and the Bank was no under any obligation to transfer the property to its own name. Further, cl 8(a) of the Deed of Settlement provides that Monica Tresize’s right to use and occupy Lot 2, Kenmure Park was conditional upon Monica paying “the expenses and other outgoings attributable” to the property and upon Monica maintaining the property (including the residence thereon and all fences, fixtures and fittings) in good and substantial repair and order. In light of these matters, the contention that the Bank is liable for the rates and the expenses relating to the water line has no merit.
6. Fourthly, insofar as Mr Tresize contends that the Bank has claimed that *Mr Tresize*, by executing the Deed of Settlement, agreed to be responsible for the rates, there is no merit to this contention. If this was claimed by the Bank, it was incorrect, but it has no bearing on the liability for the rates and other expenses and was not productive of any loss. The correct position is that, under the Deed of Settlement, Monica Tresize was entitled to use and occupy the property on the condition that *she* paid the expenses and other outgoings attributable to the property and maintained the property in good and substantial repair and order.
7. Fifthly, insofar as Mr Tresize contends that there was no agreement between the Bank and Mr Tresize or Remea that they would be liable for the rates and any other utilities in relation to Lot 2, Kenmure Park, this may be accepted. However, this does not give rise to any claim. To the extent that the Deed of Settlement provided that Monica Tresize was responsible for expenses, this was a condition on her use and occupation of the property, and applied as between her and the Bank. To the extent that Remea as registered proprietor is responsible for expenses such as rates, this was not altered by the Deed of Settlement. The Bank did not assume responsibility for such expenses.
8. Further, insofar as Mr Tresize alleges that the Bank applied an incorrect amount to the mortgage of Lot 2, Kenmure Park, this allegation appears to relate to the period before the Deed of Settlement was entered into and to involve a challenge to the Deed of Settlement and the Consent Orders. I consider this claim to be an abuse of process for substantially the same reasons as set out in [85]-[90] above.
9. If and to the extent that Mr Tresize contends that the Bank should have discharged the mortgage it held in respect of Lot 2, Kenmure Park during the period when Monica Tresize was entitled to use and occupy the property pursuant to the Deed of Settlement, if the Bank was under any obligation to do so (which is unclear), it has now discharged the mortgage (as evidenced by the email dated 3 April 2018). Accordingly, this allegation, if made, has no merit.

#### Paragraph (f)

1. Mr Tresize contends that the Consent Orders no longer reflect the intention of the Court, or are misleading, and therefore should be set aside – SOC paragraph 58. In particular, he contends that:

* the Consent Orders present a false and misleading picture, namely that substantial debts are owed by the applicants to the Bank, in circumstances where the Bank has sold the applicants’ properties in lieu of those debts – SOC paragraphs 55, 56, 58, 59, 60 and 85;
* if the debts remain in the Consent Orders, it would mean that the Bank has stolen the applicants’ land – SOC paragraph 81; and
* Lot 2, Kenmure Park should be removed from the Consent Orders in circumstances where the Bank has released its mortgage – SOC paragraphs 34, 82 and 83.

1. In my view, the claims based on these contentions have no reasonable prospect of success. First, as discussed above, the Consent Orders are to be read together with the Deed of Settlement to obtain a complete picture of the legal position as between the parties. Once that is done, it is clear that the applicants (to the 1992 Proceeding) do not owe substantial debts to the Bank. Clause 12(b) of the Deed of Settlement makes clear that the Bank agrees to release and forever discharge the debts in column 2 of Schedule 1 insofar as the Bank does not obtain satisfaction on realising the land referred to in column 3 of Schedule 1.
2. Secondly, for the same reasons, the contention that if the debts remain in the Consent Orders it would mean that the Bank has stolen the applicant’s land, is misconceived.
3. Thirdly, no basis is shown to vary the Consent Orders so as to remove Lot 2, Kenmure Park. Although the Bank has now indicated (by the email dated 3 April 2018) that it has released its mortgage over the property, and so has relinquished any claim to the property, the Consent Orders (taken together with the Deed of Settlement) were correct when made. It has not been demonstrated that there is any proper basis to vary the Consent Orders.

#### Paragraph (g)

1. Mr Tresize contends that, in August 1993, the Bank improperly sold a property at Nyora, Victoria (which is not included in the Deed of Settlement) pursuant to a mortgage given by the Tresizes to Mr Kollias and has failed to account for the proceeds – SOC paragraphs 70 and 71; January 2020 Affidavit, paragraphs 221-241. See also, Mr Tresize’s speaking notes, pp 54-56.
2. Mr Tresize also contends that the assignment of the mortgage from Mr Kollias to the Bank was not disclosed to the applicants in the course of the 1992 Proceeding – see, eg, Mr Tresize’s outline of submissions, p 26; Mr Tresize’s speaking notes, p 54.
3. In my view, the claims based on these contentions constitute an abuse of process given the substantial period of time that has elapsed since the relevant events. The considerations discussed at [89] above are equally applicable. Insofar as Mr Tresize’s contentions seek to challenge the Deed of Settlement and Consent Orders on the basis of non-disclosure, the contentions also constitute an abuse of process for the reasons given in [85]-[88] above.

#### Paragraph (h)

1. Mr Tresize contends that the Bank has failed to discharge its mortgages with respect to two properties formerly owned by Mr Tresize, namely McDonalds Track, Lang Lang and Westernport Road, Lang Lang – January 2020 Affidavit, paragraph 216.
2. In my view, the claims based on this contention have no reasonable prospect of success. The contention relates to two certificates of title that have been cancelled because the land has been subdivided. The land is now owned by other parties and is the subject of new certificates of title. The existence of the mortgages on the cancelled certificates of title is a matter of historical record only and does not give rise to any rights.
3. Further, and in any event, by the email dated 3 April 2018, the Bank notified Mr Tresize that it would not seek any payment from him or his family in respect of any amount owing to the Bank. As a result, if there were any mortgage on land owned by Mr Tresize, it would be of no effect as it would not support any debt.
4. I note for completeness that in the January 2020 Affidavit at paragraph 215, Mr Tresize refers an issue concerning the date of the mortgage of McDonald’s Track, Lang Lang. However, that issue was resolved prior to the hearing of the present matter. Although the Bank’s affidavit for discovery in the 2018 Proceeding gave the year of the document as “1989”, it was common ground by the time of the hearing of the present matter that the year stated on the document is in fact “1988”: see the extract from the transcript of a case management hearing set out at pp 96-97 of the January 2020 Affidavit.

#### The June 2020 affidavit

1. As noted at [67] above, in my view, even if the material in the June 2020 affidavit were taken into account, it would not assist Mr Tresize. In broad terms, the affidavit seeks to establish that the Bank overcharged interest to the applicants (to the 1992 Proceeding) in the period before the Deed of Settlement was entered into. The affidavit also contains allegations that the Bank fraudulently misrepresented the amounts owing by the applicants (to the 1992 Proceeding) in the period before the Deed of Settlement. Although the June 2020 affidavit provides a considerable amount of further detail, the thrust of the allegations is substantially the same as those summarised in [55(a)(i)] above. Accordingly, for the same reasons as set out in [85]-[90] above, the making of these allegations constitutes an abuse of process.

#### Conclusion in relation to the Bank’s interlocutory application

1. For the reasons set out above, each of the claims in the 2018 Proceeding constitutes an abuse of process or has no reasonable prospect of success, or both. In these circumstances, the appropriate relief is to dismiss the proceeding pursuant to s 31A of the *Federal Court of Australia Act* and r 26.01 of the *Federal Court Rules*. I do not consider it necessary or appropriate to make the additional order sought in paragraph 5 of the Bank’s interlocutory application, relating, as does, to hypothetical future proceedings.

## Conclusion

1. It follows from the above conclusion that Mr Tresize’s interlocutory application provided to the Court in December 2018 (seeking orders in default or for the filing of a defence) should be dismissed. It also follows that his interlocutory application in the 1992 Proceeding should be dismissed. As indicated at the hearing, I will give the parties the opportunity to make submissions on costs. I will provide a short period of time for the parties to file written submissions on costs. I propose to deal with the issue of costs on the papers.

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| I certify that the preceding one hundred and thirty-eight (138) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 26 June 2020

SCHEDULE OF PARTIES

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| Applicants |  |
| Fourth Applicant: | MARTIN SAXON BROWN AND MARY KATHLEEN TRESIZE-BROWN |
| Fifth Applicant: | KEVIN ALLAN ADRIELLE TRESIZE AND MARIE LORRAINE TRESIZE |