FEDERAL COURT OF AUSTRALIA

Oliver Hume South East Queensland Pty Ltd v Barclay [2020] FCA 857

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| File number(s): |  |
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| Judge(s): | **COLLIER J** |
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| Date of judgment: | 17 June 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application under r 30.11 of the *Federal Court Rules 2011* (Cth)for consolidation of proceedings – principles of consolidation – where proceedings are at different stages – where one proceeding has been substantially determined and the other is at case management stage – whether consolidation would be convenient – whether consolidation would avoid multiplicity of actions – whether consolidation would save time and expense – whether the respondents would be prejudiced by consolidation of the proceedings – distinction between matters being tried together and consolidation of matters  **PRACTICE AND PROCEDURE** – application under r 16.21 of the *Federal Court Rules 2011* (Cth) to strike out pleadings – principles of *Anshun* estoppel and abuse of process – s 37M of the *Federal Court of Australia Act 1976* (Cth) – where concession that cause of action estoppel applies to certain paragraphs of the second further amended statement of claim – whether claims could have been made in related earlier proceedings – forensic choices in earlier litigation – role of insurer in assuming conduct of litigation in earlier proceedings – whether all issues in dispute between parties ought be decided in single proceeding |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 16.02, 16.21, 30.11 *Federal Court of Australia Act 1976* (Cth) s 37M  *Corporations Act 2001* (Cth) s 1317H(2) *Jurisdiction of the Courts (Cross-Vesting) Act 1987* (Qld) s 5 |
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| Cases cited: | *Aristocrat Technologies Australia Pty Limited v Global Gaming Supplies Pty Limited* [2007] FCA 943  *ASIC v Lindberg (No 2)* (2010) 26 VR 355  *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25  *Buses + 4WD Hire Pty Limited v Oz Snow Adventures Pty Limited* [2016] NSWSC 1017  *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322; [2015] FCAFC 94  *Caason Investments Pty Ltd v Cao* [2014] FCA 1410  *Cameron v McBain* [1948] VLR 245  *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135  *Humphries v Newport Quays Stage 2A Pty Ltd* [2009] FCA 699  *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004  *Investa Properties Pty Ltd v Nankervis (No 8)* [2018] FCA 443  *Investa Properties Pty Ltd v Nankervis (No 9)* [2018] FCA 793  *Martech International Pty Ltd v Energy World Corporation Ltd* [2004] FCA 1470  *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141  *Re AWB Ltd; Australian Securities and Investments Commission v Lindberg (No 10)* (2009) 76 ACSR 181; [2009] VSC 566  *Re Ling; Ex parte Ling v Commonwealth of Australia* (1995) 58 FCR 129; [1995] FCA 1410  *Sheahan, in the matter of Atsikbasis Nominees Pty Ltd (in Liquidation) (No 2)* [2013] FCA 724  *Timbercorp Finance Pty Ltd (in liquidation) v Collins* (2016) 259 CLR 212;[2016] HCA 44  *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28  *Varasdi as Litigation Representative for Mimi Varasdi v State of Victoria (Department of Education and Training)* [2019] FCA 1785  *Walsh, Liquidator of D.R. Community Services Pty Ltd (Receivers and Managers Appointed) (In Liq) Commissioner of Taxation* [2018] FCA 1739 |
|  |  |
| Date of hearing: | 22 October 2019 |
|  |  |
| Date of last submissions: | 12 November 2019 |
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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 |
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| Number of paragraphs: | 104 |
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| Counsel for the Applicant: | Mr D Kelly QC with Mr D M Turner |
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| Counsel for the Respondents: | Mr G J Gibson QC with Ms B O’Brien |
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| Solicitor for the Respondents: | Warlow Scott Lawyers |

ORDERS

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|  | | QUD 438 of 2018 |
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| BETWEEN: | OLIVER HUME SOUTH EAST QUEENSLAND PTY LTD ACN 128 863 230  Applicant | |
| AND: | ADAM KIMBERLY BARCLAY  First Respondent  KYM LOUISE BARCLAY  Second Respondent  LOUVRE HOLDINGS PTY LTD ACN 159 133 481  Third Respondent | |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 17 june 2020 |

THE COURT ORDERS THAT:

1. The Interlocutory Application filed on 17 November 2018 for consolidation of QUD 231 of 2011 and QUD 438 of 2018 be dismissed.
2. Pursuant to Order 1, the application for leave to re-open consolidated proceedings be refused.
3. The following paragraphs of the Second Further Amended Statement of Claim in QUD 438 of 2018 be struck out: paragraphs 6, 7, 9, 10, 11, 12, 13, 15, 15A, 15B, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 27A, 69, 69A, 70, 101, 103A, 103B, 109, 109A, 109B, 110B(a), 110C(a), 110D, 1 and 1A on p 113, 1 on p 115, and 154.
4. Paragraphs 80, 110H and 110I of the Second Further Amended Statement of Claim in QUD 438 of 2018 be struck out to the extent that they refer to the First Respondent and Lot 170 or the lots into which Lot 170 was subdivided.
5. The proceeding as against the Third Respondent be dismissed.
6. Within 14 days of the date of this order, the parties provide to the Chambers of Justice Collier draft case management orders in respect of costs of and incidental to these proceedings.
7. Within 28 days of the date of this order, the Applicant file and serve a fresh Statement of Claim in these proceedings.
8. Within 28 days after the filing and service of the Statement of Claim referred to in Order 7 of these orders, the Respondents file and serve a Defence.
9. The proceedings be listed for case management at 9.30 am on 13 August 2020.

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

REASONS FOR JUDGMENT

COLLIER J:

1. The applications before me continue complex litigation in, and earlier multiple judgments of, the Federal Court. All relevant earlier litigation in the Federal Court was conducted in QUD 231 of 2011 – *Investa Properties Pty Ltd and Anor v Ashley Colin Nankervis and Ors*. Proceedings in QUD 231 of 2011 were commenced by Investa parties (**Investa**) on 24 August 2011 against Mr Ashley Nankervis, Mr Adam Barclay (**Mr Barclay**) and Oliver Hume South East Queensland Pty Ltd (**Oliver Hume**). In summary, Investa’s claims related to the sale of two parcels of land in the same area of south-east Queensland, which for convenience I will call Lot 170 and Lot 191.
2. There were multiple cross-claims in QUD 231 of 2011. Relevantly to the case before me, on 10 December 2012 Oliver Hume filed a cross-claim against Mr Barclay. An amended cross-claim was filed by Oliver Hume against Mr Barclay on 15 November 2013. It is this amended cross-claim which is relevant to the applications currently before the Court.
3. On 1 September 2017 the Full Court delivered judgment in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141, remitting the matter for further hearing in respect of certain matters.
4. On 5 December 2017 I ordered that QUD 231 of 2011 be listed for hearing on 17 and 18 April 2018 in respect of remitted matters, relevantly:

* Oliver Hume’s cross claim against Mr Barclay;
* Mr Barclay’s cross-claim against Oliver Hume; and
* Mr Barclay’s cross-claim against Vero Insurance Ltd.

1. On 4 April 2018 I ordered that the hearing of the three cross-claims in QUD 231 of 2011 be adjourned to a date to be fixed: *Investa Properties Pty Ltd v Nankervis (No 8)* [2018] FCA 443.
2. In *Investa Properties Pty Ltd v Nankervis (No 9)* [2018] FCA 793 I dismissed the application by Investa against, *inter alia*, Oliver Hume for equitable compensation in respect of Lot 170. Oliver Hume accepts that the consequence of this decision is that Oliver Hume’s cross-claim against Mr Barclay in QUD 231 of 2011 for indemnity in respect of Lot 170 no longer has utility (there being no liability in Oliver Hume to pay equitable compensation to Investa in that proceeding, relevant to which Oliver Hume had brought its cross-claim proceedings against Mr Barclay).
3. All proceedings in QUD 231 of 2011 were discontinued by notice of discontinuance filed on 20 February 2019, save for the amended cross-claim filed by Oliver Hume against Mr Barclay on 15 November 2013.
4. The proceedings currently before me stem from orders of 24 May 2018 of the Supreme Court of Queensland, transferring related proceedings referable to a second further amended statement of claim (**SFASOC**) filed on 1 December 2016 in proceeding 3016/16 in the Supreme Court, to the Federal Court of Australia pursuant to s 5 of the *Jurisdiction of the Courts (Cross-Vesting) Act 1987* (Qld). These transferred proceedings are now QUD 438 of 2018. The proceedings in QUD 438 of 2018 were originally brought in the Supreme Court by Oliver Hume against Mr Barclay, his wife Mrs Kym Louise Barclay, and a company controlled by Mrs Barclay, Louvre Holdings Pty Ltd (**Louvre Holdings**) (**the respondents**). These proceedings originally concerned Lot 170 and Lot 191, as well two other parcels of land in the same area of south-east Queensland, namely Lot 71 on SP231400 (**Lot 71**) and Lot 246 on SP231400 (**Lot 246**). I understand that Oliver Hume no longer presses its claim in respect of Lot 191.
5. The Transfer Order from the Supreme Court lodged on 18 June 2018 provided as follows:

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 5 of the *Jurisdiction of the Courts (Cross-Vesting) Act 1987* (Qld) that this proceeding be transferred to the Federal Court of Australia.

2. The question of the costs of the parties of, and incidental to, the application to transfer and to the application to strike out be reserved to the Federal Court judge who has the conduct of the transferred proceeding.

1. The first interlocutory application requiring determination by me was filed by Oliver Hume in this Court in QUD 438 of 2018 on 17 November 2018 (**the** **consolidation and re-opening application**). Pursuant to that interlocutory application, Oliver Hume seeks the following relief against the respondents:

1. Pursuant to rule 30.11 of the *Federal Court Rules 2011* (Cth), an order that this proceeding be consolidated with Federal Court of Australia proceeding QUD 231 of 2011.

2. An order that the applicant have leave to re-open in respect of its cross-claim in the consolidated proceedings.

3. An order that the applicant deliver an amended statement of claim in its cross-claim in the consolidated proceedings within 21 days of the date of determination of this application.

4. An order that the respondents deliver an amended defence in respect of the applicant's cross-claim in the consolidated proceedings within 28 days of the date of delivery of the amended statement of claim referred to in paragraph 3.

5. An order that the consolidated proceedings be listed for further case management on a date convenient to the Court.

6. An order that the respondents pay the applicant's costs of and incidental to this application.

1. The second interlocutory application requiring determination by me was filed by the respondents on 21 March 2018 in the Supreme Court of Queensland in the proceeding 3016/16 prior to transfer to the Federal Court (now being QUD 438 of 2018) (**the strike-out application**). Pursuant to that interlocutory application the respondents sought the following orders:

1. Pursuant to Rule 171 of the *Uniform Civil Procedure Rules 1999* (Qld), those paragraphs of the Second Further Amended Statement of Claim identified in Schedule 1 to this Application be struck out.

The Plaintiff pay the costs of the Defendants of the Application on an indemnity basis.

Alternatively, the Plaintiff pay the Defendants Application on the Standard basis.

4. Any other orders this Honorable [**sic**] Court deems meet.

…

**SCHEDULE 1**

The Defendants apply to strike out paragraphs 4, 6 to 27A, 69 to 70, 79B to 80, 101, 103A, 103B, 109 to 109B, 110B(a), 110C(a), 110D, 110H, 110I, 110J and 111 to 112A, 1, 1A, 5, 5A, 5B (on pages 113 and 114), 1 (on page 115) and 6A and 154 (on page 116) of the Second Further Amended Statement of Claim filed on 1 December 2016 in Supreme Court proceeding 3016/16.

(Tracked changes accepted.)

1. For convenience I will deal first with the consolidation and re-opening application.

# The consolidation and re-opening application

## The amended statement of cross-claim and the SFASOC

1. Oliver Hume’s amended statement of cross-claim filed in QUD 231 of 2011 on 15 November 2013 is in the following terms:

The fourth respondent relies on the following facts by way of cross claim against the second respondent:

1. The second respondent:

(a) Was a licensed real estate agent pursuant to the *Property Agent and Motor Dealers Act 2000* (**PAMDA**) for the following periods:

(i) 19 March 2004 to 19 March 2007 (as a real estate agent principal);

(ii) 19 March 2004 to 19 March 2010 (as a real estate agent employed);

(iii) 29 July 2011 to the commencement of these proceedings (as a real estate agent employed);

(b) Was employed by Oliver Hume (Australia) Pty Ltd from 15 March 2004 as Sales Manager;

(c) Became the General Manager Queensland Land and New Homes in September 2006;

(d) On 1 November 2006, signed an employment contract to become the General Manager of Oliver Hume (Australia) Pty Ltd - Queensland, Land and New Homes (**the Oliver Hume (Australia) Employment Contract**);

(e) Pursuant to the terms of the Oliver Hume (Australia) Employment Contract:

(i) Agreed that whilst he was employed by Oliver Hume (Australia) Pty Ltd he would not engage in any private business activities or provide any commercial or professional services to a person or organisation, without the prior written consent of Oliver Hume (Australia) Pty Ltd (paragraph 3.3.1);

(ii) Acknowledged having received from Oliver Hume (Australia) Pty Ltd all current policies and procedures regarding Oliver Hume (Australia) Pty Ltd's workplace which were applicable to all employees (paragraph 9.1);

(iii) Agreed that he would comply with and was bound by all policies, including new and updated policies, unless expressly inconsistent with any provision in his contract (paragraph 9.3).

(f) On 27 August 2008, signed an employment contract dated 1 July 2008 with the fourth respondent to become the General Manager - Queensland Land and New Homes for the fourth respondent (**the OHSEQ Employment Contract**).

(g) Pursuant to the terms of the OHSEQ Employment Contract:

(i) Agreed that he would comply with all statutory and legal obligations applicable to the Position (paragraph 3.2.2);

(ii) Agreed that he would observe and comply with all lawful and reasonable directions, instructions, restrictions, policies, procedures, rules and regulations made or given by or on behalf of the fourth respondent (paragraph 3.2.4);

(iii) Agreed that he would faithfully serve the fourth respondent and use his best endeavours to promote the interests and public image of the fourth respondent (paragraph 3.2.5);

(iv) Agreed to advise the fourth respondent if a conflict or potential conflict arose between the second respondent's interests and the fourth respondent's interests (paragraph 3.2.6);

(v) Agreed that whilst he was employed by the fourth respondent he would not engage in any private business activities or provide any commercial or professional services to a person or organisation, without the prior written consent of the fourth respondent (paragraph 3.3.1);

(h) On 11 December 2007, became a director of the fourth respondent;

(i) From 11 December 2007 to 14 April 2011, was the only director of the fourth respondent resident in Queensland. On 1 July 2009, AKB QLD Pty Ltd (of which the second respondent was the sole shareholder and director), became a shareholder of the fourth respondent. That company was the only Queensland based shareholder of the fourth respondent at the material time;

(j) Was nominated as the officer in effective control of the fourth respondent's Corporate Licence from 2006;

(k) Had his employment with the fourth respondent terminated on 14 April 2011;

(l) Was removed as a director of the fourth respondent on 14 April 2011;

(m) From 11 December 2007 to 14 April 2011, was authorised by the fourth respondent to sign the following categories of documents on behalf of the fourth respondent as the only director of the fourth respondent based in Queensland:

(i) PAMDA Forms;

(ii) Lease Agreements with a second director;

(iii) Capital Expenditure up to $5,000;

(iv) Employment Agreements for Staff;

(v) Consultancy Agreements;

(vi) All other agreements together with a second director.

2. In their claim in this proceeding, the applicants allege:

(a) On or about 1 October 2008 the fourth respondent entered into an agreement with the second applicant called Appointment of Real Estate Agent – Sales and Purchases (Form 22a) pursuant to the *Property Agents and Motor Dealers Act 2000* (Qld);

(b) On or about 16 July 2009, the fourth respondent entered into a further agreement with the second applicant called Appointment of Real Estate Agent – Sales and Purchases (Form 22a) pursuant to the *Property Agents and Motor Dealers Act 2000* (Qld);

(c) The second respondent was at all material times:

(i) A director of the fourth respondent;

(ii) An employee of the fourth respondent;

(iii) An agent of the fourth respondent with the fourth respondent's actual or ostensible authority to act for it in relation to providing real estate agent services to the second applicant and in matters arising from or related to providing the real estate services to the second applicant;

(iv) A licensed real estate agent pursuant to the *Property Agents and Motor Dealers Act*;

(v) The signatory on behalf of the fourth respondent to the agreements referred to in sub-paragraphs (a) and (b) above;

(vi) The individual in charge of the fourth respondent's business pursuant to the *Property Agents and Motor Dealers Act*, and

(vii) The individual who dealt with, received instructions from, provided information, opinions, advice and reports to and generally provided services to the directors, officers and employees of the first applicant in relation to the marketing and sale of the Brentwood site;

(d) On or about 1 October 2008, the second respondent, on behalf of the fourth respondent, commenced providing real estate agent services to the second applicant pursuant to the agreement alleged in sub-paragraph (a) above, and from 16 July 2009, the second respondent, on behalf of the fourth respondent, continued to provide real estate agent services to the second applicant pursuant to the agreements alleged in sub-paragraphs (a) and (b) above;

(e) By reason of the agreements referred to in sub-paragraphs (a) and (b) above, the relationship of real estate agent and principal to which they gave rise between the fourth respondent and the second applicant, the fourth respondent had fiduciary and contractual obligations to the second applicant in respect of contracts of sale of and relating to:

(i) The Lot 170 Brentwood Site (as alleged in paragraphs 162A-196 of the statement of claim);

(ii) The Lot 191 Brentwood Site (as alleged in paragraphs 101-139 of the statement of claim);

(f) The second respondent engaged in the following conduct:

(i) In respect of Lot 170 of the Brentwood Site; conduct which was in breach of alleged fiduciary obligations owed to the applicants as alleged in paragraph 195 of the statement of claim;

(ii) In respect of Lot 191 of the Brentwood Site; conduct which was in breach of alleged fiduciary obligations owed to the applicants as alleged in paragraph 137 of the statement of claim;

(g) By engaging in the conduct as particularised in sub-paragraph (f) aforesaid, the second respondent was doing so as agent or on behalf of the fourth respondent for which the fourth respondent is liable as alleged in paragraphs 139 and 196 of the statement of claim;

(h) As a consequence of the matters pleaded, the applicants are entitled to claim against the fourth respondent:

(i) Damages;

(ii) an account of profits;

(iii) equitable compensation.

3. The fourth respondent says that, if it is liable to the applicants on the grounds alleged by the applicants (which is denied) then:

(a) the second respondent by his conduct purported to act as the agent of the fourth respondent;

(b) the second respondent by reason of his position as a director and employee or agent of the fourth respondent owed duties to the fourth respondent to conduct his activities with due skill and care and having regard to the interests of the fourth respondent;

(c) the second respondent whilst a director of the fourth respondent had an obligation to exercise his powers and discharge those duties in good faith in the best interests of the fourth respondent and for a proper purpose;

(d) the second respondent had a duty not to engage in conduct which was outside the scope of his authority as a director or employee or agent of the fourth respondent;

(e) if such conduct as alleged by the applicants has been engaged in by the second respondent then such conduct was:

(i) contrary to and in breach of the obligations which the second respondent owed to the fourth respondent; and

(ii) Undertaken without the knowledge or approval of the fourth respondent.

4. Further, as a consequence of the matters pleaded in paragraphs 2 and 3 aforesaid, if:

(a) The fourth respondent is found to be liable to the applicants in accordance with the matters alleged in the statement of claim, then;

(b) Such liability has been caused or contributed to by the conduct of the second respondent as particularised aforesaid;

(c) The second respondent has acted in breach of the duties which he owed to the fourth respondent;

(d) The second respondent has engaged in such activities for an improper purpose, namely for the benefit of the second respondent;

(e) In the premises, the second respondent is liable to indemnify or otherwise pay damages to the fourth respondent for any liability which the fourth respondent has to the applicants.

5. Further or in the alternative to the matters pleaded in paragraph 4 aforesaid, the fourth respondent:

(a) Has suffered loss and damage as a consequence of the conduct, breach of contract and/or breach of fiduciary duty of the second respondent as particularised aforesaid;

(b) The nature and extent of that loss is such amount as the fourth respondent shall be found to be liable to the applicants.

1. As I noted earlier in this judgment, Oliver Hume’s claims against the respondents in QUD 438 of 2018 now concern Lots 170, 71 and 246. In relation to Lot 170 Oliver Hume in the SFASOC claims as follows:
2. At all material times, the Plaintiff was a company duly incorporated, capable of suing and being sued.
3. At all material times, the First Defendant:-
4. was a natural person capable of suing and being sued;
5. was a licensed real estate agent pursuant to the *Property Agent and Motor Dealers Act 2000* (Qld) (**PAMDA**) for the following periods:
6. March 2004 to 19 March 2007 (as a real estate agent principal);
7. March 2004 to 19 March 2010 (as a real estate agent employed);
8. July 2011 to the commencement of these proceedings (as a real estate agent);
9. was employed by Oliver Hume (Australia) Pty Ltd ACN 068 318 712 (**OHA**) from 15 March 2004 as Sales Manager;
10. became the OHA General Manager Queensland Land and New Homes in September 2006;
11. signed an employment contract on 1 November 2006 to become the General Manager of Oliver Hume (Australia) Pty Ltd – Queensland, Land and New Homes (**the Oliver Hume (Australia) Employment Contract**);
12. pursuant to the terms of the Oliver Hume (Australia) Employment Contract:
13. agreed that whilst he was employed by Oliver Hume (Australia) Pty Ltd he would not engage in any private business activities or provide any commercial or professional services to a person or organisation, without the prior written consent of Oliver Hume (Australia) Pty Ltd (paragraph 3.3.1);
14. acknowledged having received from Oliver Hume (Australia) Pty Ltd all current policies and procedures regarding Oliver Hume (Australia) Pty Ltd’s workplace which were applicable to all employees (paragraph 9.1);
15. agreed that he would comply with and was bound by all policies, including new and updated policies, unless expressly inconsistent with any provision in his contract (paragraph 9.3).
16. on 27 August 2008 signed an employment contract dated 1 July 2008 with the Plaintiff to become the General Manager – Queensland Land and New Homes (**the OHSEQ Employment Contract**).
17. pursuant to the terms of the OHSEQ Employment Contract:
18. agreed that he would comply with all statutory and legal obligations applicable to the position (paragraph 3.2.2);
19. agreed that he would observe and comply with all lawful and reasonable directions, instructions, restrictions, policies, procedures, rules and regulations made or given by or on behalf of the Plaintiff (paragraph 3.2.4);
20. agreed that he would faithfully serve the Plaintiff and use his best endeavours to promote the interests and public image of the Plaintiff (paragraph 3.2.5);
21. agreed to advise the Plaintiff if a conflict or potential conflict arose between the First Defendant’s interests and the Plaintiff’s interests (paragraph 3.2.6);
22. agreed that whilst he was employed by the Plaintiff he would not engage in any private business activities or provide any commercial or professional services to a person or organisation, without the prior written consent of the Plaintiff (paragraph 3.3.1).
    * 1. was nominated as the officer in effective control of the Plaintiff’s Corporate Licence from 2006;
23. on 11 December 2007, became a director of the Plaintiff;
24. from 11 December 2007 to 14 April 2011, was the only director of the Plaintiff residing in Queensland;
25. from 11 December 2007 to 14 April 2011, was authorised by the Plaintiff to sign the following categories of documents on behalf of the Plaintiff as the only director of the Plaintiff based in Queensland:
26. PAMDA Forms;
27. Lease Agreements with a second director;
28. Capital Expenditure up to $5,000;
29. Employment Agreements for Staff;
30. Consultancy Agreements;
31. All other agreements together with a second director.
32. had his employment with the Plaintiff terminated on 14 April 2011;
33. was removed as a director of the Plaintiff on 14 April 2011;
34. was and remains the husband of the Second Defendant;
35. was an employee of the Plaintiff within the meaning of sections 182 and 183 of the *Corporations Act 2001* (Cth) (***the Corporations Act***).

pa. was obliged as a director of the Plaintiff to exercise his powers and discharge his duties in good faith in the best interests of the Plaintiff, and for a proper purpose;

1. owed obligations to the Plaintiff pursuant to:-
2. section 182 of the *Corporations Act* not to improperly use his position to gain advantage for himself or for someone else or cause detriment to the Plaintiff;
3. section 183 of the *Corporations Act* not to improperly use information obtained because of his employment to gain advantage for himself or for someone else or cause detriment to the Plaintiff.
4. on 27 August 2010 was appointed a director and became a shareholder of PP Projects Pty Ltd ACN 146 027 349 (**PP Projects**) upon its incorporation;
5. on 27 August 2010 purportedly ceased to be a director and shareholder of PP Projects, given effect by lodgement of an ASIC Change of Company details lodged on 10 November 2010.
6. The Second Defendant:-
   1. At all material times:-
7. was a natural person capable of suing and being sued;
8. was and remains the wife of the First Defendant;
   1. on 22 October 2009 was appointed the sole director and became a shareholder of Queensland Lifestyle Homes Pty Ltd ACN 139 035 671 (**Queensland Lifestyle Homes**);
   2. on 20 January 2016 purportedly ceased as the sole director and shareholder of Queensland Lifestyle Homes, given effect by lodgement of an ASIC Change of Company Details dated lodged on 10 November 2010;
   3. (ca) was on 22 October 2009 reappointed the director and sole shareholder of Queensland Lifestyle Homes, given effect by lodgement of an ASIC Change of Company Details lodged on 16 May 2012; Pursuant to a Deed of Trust for the PP Projects Trust was:-
      1. the appointer of the PP Projects’ Trust pursuant to clause 1.1 and the Second Schedule;
      2. the primary beneficiary of the PP Projects Trust pursuant to the Second Schedule.

da. on 27 August 2010, became a shareholder of PP Projects upon its registration;

db. on 27 August 2010 purportedly ceased to be a shareholder of PP Projects given effect by lodgement of an ASIC Change of Company Details lodged on 10 November 2010;

dc. was on 14 May 2012 appointed a director of PP Projects;

1. on 21 August 2012 was appointed a director of Gallery Homes Pty Ltd ACN 151 101 914 (**Gallery Homes**);

ia. on 21 June 2011 was appointed a director of Gallery Real Estate Group Pty Ltd ACN 151 611 559 (**Gallery Real Estate**) upon its incorporation on that date in the name of Barclay Residential Pty Ltd, and remains a director of Gallery Real Estate;

ib. has at all times material to this proceeding been the sole shareholder of Gallery Real Estate;

j. worked in the property industry in the occupation of creating and selling house and land packages for builders (**the Packages**);

k. assisted the First Defendant to complete sales as a real estate agent by introducing the Packages and the buyers of the Packages to the First Defendant;

l. was by virtue of her experience and her knowledge of the First Defendant’s activities as a real estate agent and employee and director of the Plaintiff:-

i. aware of the First Defendant’s obligations at law as a real estate agent; and

ii. of his role and obligations to the Plaintiff and clients of the Plaintiff.

1. At all material times the Third Defendant:-
2. was a company duly incorporated, capable of suing and being sued;
3. from 22 June 2012 to current had the Second Defendant as its sole director and shareholder.

**THE FEDERAL COURT PROCEEDINGS**

1. In Federal Court Proceedings, QUD 231 of 2011 (**the Federal Court Proceedings**), Investa Properties Pty Ltd ACN 084 407 241 (**Investa Properties**) and Investa Residential Group Pty Ltd ACN 098 527 390 (**Investa Residential**) alleged:-
2. Investa Properties was engaged in the development of a site at Cardena Drive (off Augusta Parkway) Augustine Heights, Ipswich, Queensland (**the Brentwood Site**);
3. On or about 1 October 2008 the Plaintiff entered into an agreement with Investa Residential called Appointment of Real Estate Agent – Sales and Purchases (Form 22a) pursuant to PAMDA in relation to the Brentwood Site.
4. On or about 16 July 2009, the Plaintiff entered into a further agreement with the Investa Residential called Appointment of Real Estate Agent – Sales and Purchases (Form 22a) pursuant to PAMDA in relation to the Brentwood Site.
5. On or about 1 October 2008, the First Defendant, on behalf of the Plaintiff, commenced providing real estate agent services to Investa Residential pursuant to the agreement particularised in sub-paragraph 5(b) above, and from 16 July 2009, the First Defendant, on behalf of the Plaintiff, continued to provide real estate agent services to Investa Residential pursuant to the agreements particularised in sub-paragraphs 5(b) and 5(c) above, in relation to the Brentwood Site.
6. By reason of the agreements particularised in sub-paragraphs 5(b) and (c) above, and the relationship of real estate agent and principal to which they gave rise between the Plaintiff and Investa Residential, the Plaintiff had fiduciary and contractual obligations to Investa Residential in respect of contracts of sale of and relating to:
7. Lot 170 on RP 904872, the Brentwood Site (**Lot 170**)
8. The First Defendant had engaged in the following conduct:-
9. In respect of Lot 170 of the Brentwood Site; conduct which was in breach of alleged fiduciary obligations owed to Investa Properties and Investa Residential;

**LOT 170**

1. By letter of 16 July 2008, Investa Residential offered the Plaintiff the commission for the *“en globo”* sale of Lot 170 (also known as the *“Fossil Site”* and *“Brittains Road”*).
2. Thereafter, the Plaintiff, by the First Defendant (in his position and capacity as a director and employee of the Plaintiff):
3. provided limited assistance in connection with the sale and marketing of Lot 170 notwithstanding that no formal appointment pursuant to the PAMDA provisions had been entered into; and
4. had ongoing dealings with Investa Residential Pty Ltd through Ashley Nankervis, and with David Tonuri, in respect of the potential sale of Lot 170.

**Particulars of Services in Connection With the Sale and Marketing of Lot 170**

1. Oliver Hume Real Estate Group- “Brentwood—Augusta Pkwy, Augustine Heights (Queensland) Market Analysis Report” dated 25 September 2008;
2. Email dated 25 November 2008 providing recommended pricing for the Brittains Road site;
3. Email dated 2 December 2008 from the First Defendant to Ashley Nankervis, Investa Properties, in relation to potential purchaser;
4. Email dated 2 December 2008 from the First Defendant to Mr Nankervis and Gavin Stubbs providing an activity update concerning the Fossil Site, including an update concerning discussions with potential purchasers;
5. Email dated 2 December 2008 from the First Defendant to a potential purchaser, David Tonuri, and Gavin Stubbs attaching various analyses, reports and valuations;
6. Email dated 2 December 2008 from the First Defendant confirming instructions from Mr Nankervis on behalf of Investa Properties and Investa Residential;
7. Email exchanges between the First Defendant, Mr Nankervis and Gavin Stubbs in relation to weekly reports provided by the First Defendant:-
8. 2 December 2008;
9. 8 December 2008 at 11:57 a.m.;
10. 8 December 2008 at 12:27 p.m.;
11. 8 December 2008 at 12:35 p.m.
12. 15 December 2008;
13. 8 January 2009;
14. 12 January 2009;
15. 19 January 2009;
16. 22 January 2009;
17. 23 January 2009;
18. 27 January 2009;
19. Email 12 December 2009 from Mr Nankervis to the First Defendant in relation to an adjoining site;
20. Email 16 December 2008 from Mr Nankervis to the First Defendant and Mr Tonuri in relation to Earthworks Quantity Differences;
21. Email 19 December 2008 from the First Defendant to Mr Tonuri, and Mr Nankervis attaching previous contract and other documents relating to Lot 170;
22. Email dated 20 January 2009 from the First Defendant to Mr Tonuri, attaching an Amended Slope Plan Analysis;
23. Email dated 3 February 2009 from the First Defendant to Mr Tonuri, and Mr Nankervis;
24. Email dated 12 February 2009 from the First Defendant to Mr Tonuri, attaching Contract of Sale, Special Conditions and Put and Call Option; and
25. Email dated 20 February 2009, from Mr Nankervis to the First Defendant in relation to Details for Contract of Sale to Two Eight Two Nine Pty Ltd.

9. By reason of the matters pleaded aforesaid, the First Defendant had fiduciary obligations to the Plaintiff while providing services in relation to Lot 170:-

b. not to allow his personal interests to conflict with his duty to the Plaintiff, and to avoid and to disclose to the Plaintiff all actual or perceived conflicts of interest and duty;

d. not to profit from his position, other than by receiving remuneration in the course of his employment, without full disclosure to the Plaintiff; and

e. not to assist:-

i. any person with whom he was associated; or

ii. any entity in which he, or a person with whom he was associated, had an interest; or

1. any person or entity from whom or from which he could expect a benefit,

to purchase Lot 170, without full disclosure to and the informed consent of the Plaintiff.

10. On or about 22 July 2008, Ipswich City Council (**ICC**) conditionally approved an application made on behalf of Investa Properties and Investa Residential to subdivid~~ed~~ Lot 170 from one lot into 77 lots and provided preliminary approval for Investa Properties and Investa Residential to carry out building works, subject to Investa Properties and Investa Residential obtaining further development permits in respect of any operational works before any such works were commenced.

11. On or about 11 August 2008, an application was made on behalf of Investa Properties and Investa Residential to the ICC to obtain further Development Permits in respect of operational road works.

**Particulars**

Letter from Hyder Consulting Pty. Ltd to Ipswich City Council dated 11 August 2008, subject ‘*Brentwood Estate (Stage 5) “Fossil Site”*

12. From about December 2008, Mr Nankervis was involved in submitting an amended Operational Roads Works Approval to the ICC which sought approval to level and retain Lot 170 to create flat lots.

**Particulars**

1. Letter from Ipswich City Council to Mr Nankervis dated 19 February 2009, subject “Re Request for a Minor Alteration Lot 170 Brittains Road, Bellbird Park, Council File No. 5371/2004/RAL”.
2. Letter from ICC to Conics (Brisbane) Pty Ltd dated 27 February 2009, subject ‘Re Request for a Minor Alteration Lot 170, Brittains Road, Bellbird Park, Council File No. 5371/2004/RAL.’
3. Email from Sonny Gorman to Mr Nankervis dated 3 March 2009, subject *‘Brentwood Fossil Site PDF DWGs.’*

13. At a time unknown to the Plaintiff but at some time on or before 20 January 2009, Mr Nankervis and the First Defendant entered into an agreement with Mr Tonuri, pursuant to which:-

a. There would be a sale of Lot 170 to a company controlled by Mr Tonuri or his nominee;

b. Each of Barclay and Nankervis would be secret directors of the company, and share equally with Mr Tonuri the profits derived from the company;

c. The company would subsequently develop Lot 170, with profits to be divided equally as between each of the First Defendant, Mr Nankervis and Mr Tonuri.

**Particulars**

The agreement is to be inferred from the following facts and matters:

1. the conduct of Mr Tonuri, the First Defendant and Mr Nankervis, pleaded above and below in connection with Lot 170;
2. conduct of Mr Tonuri, the First Defendant and Mr Nankervis whereby each continued to deal with one another on the basis of a partnership or quasi-partnership which would distribute profits from the acquisition of Lot 170 to each of the participants on an equal basis.
3. an email sent at 10.42 am on 24 May 2010 from Mr Tonuri to Mr Tony Hoffman, an accountant of Hoffman Kelly Accountants, copied to the First Defendant and Mr Nankervis.
4. an email sent at 11.11 am on 24 May 2010 from Mr Hoffman to Mr Tonuri.
5. an email sent at 11.36 am on 24 May 2010 from Mr Tonuri to Mr Hoffman, copied to the First Defendant and Mr Nankervis.

15. On or about 6 February 2009, Mr Nankervis with the knowledge of the First Defendant and Mr Tonuri prepared a Delegated Authority Approval proposing the sale price for Lot 170 in the amount of $1,454,545 exclusive of GST.

**Particulars**

Delegated Authority Approval Submission – Development of Brentwood – Fossil Site, Brittains Road, Investa Land – Residential Lot 170 on Registered Plan 904872 signed by Mr Nankervis on 6 February 2009.

15A. On or about 20 February 2009, Two Eight Two Nine Pty Ltd (in liquidation) (**2829**) was incorporated.

15B. 2829:

1. was incorporated pursuant to the agreement pleaded in paragraph 13 above;
2. was at all times material to this proceeding a company whose business was solely concerned with the acquisition and development of Lot 170; and
3. has at all times material to this proceeding had Mr Tonuri as one of its directors, its secretary and its sole shareholder.

16. On or about 20 February 2009, Investa Residential (formerly known as Clarendon Residential Group) and 2829 with the knowledge of the First Defendant and Mr Tonuri entered into a Put and Call Option Deed in respect of Lot 170 for the price that Mr Nankervis recommended, $1,454,545.

**Particulars**

Put and Call Option Deed dated 20 February 2009.

17. On a date unknown to the Plaintiff but prior to 4 March 2009, Mr Nankervis with the knowledge of the First Defendant commissioned Projex North to assess the design for the development of Lot 170.

**Particulars**

Letter from Projex North to Mr Nankervis dated 4 March 2009, subject *‘Brentwood Fossil Site – Design Report’*

18. On 6 March 2009, a Mr Walker emailed Mr Nankervis and the First Defendant:-

a. an Engineering Report for Lot 170 dated 12 January 2009 prepared by Morrison Geotechnic Pty. Ltd; and

b. slope analysis plans prepared by Hyder Consulting Pty. Ltd.

**Particulars**

1. email from Mr Walker to Mr Nankervis and the First Defendant dated 6 March 2009, subject *“Fossil Site – Engineering Report and Attachments”*
2. Email from Mr Walker to Mr Nankervis and the First Defendant dated 6 March 2009, subject *‘Fossil Site- Original and Amended Slope Analysis Plans’*.

19. On 25 June 2009, Investa Residential entered into a contract of sale of Lot 170 to 2829 with the knowledge and consent of the First Defendant and Mr Tonuri for $1,454,545.

**Particulars**

Lot 170 Contract for Commercial Land and Buildings dated 25 June 2009.

20. On 31 July 2009 with the knowledge and consent of the First Defendant and Mr Tonuri the contract for Lot 170 was completed.

21. From a date not later than August 2009 to a date unknown by the Plaintiff, Mr Nankervis and the First Defendant:-

a. were either engaged by or performed services for and on behalf of 2829 or Mr Tonuri or a person or persons associated with or involved in 2829;

b. provided information and assistance to 2829 or Mr Tonuri or a person or persons associated with or involved in 2829; or

c. performed duties for and on behalf of 2829 or Mr Tonuri or a person or persons associated with or involved in 2829 and/or prepared documents and other materials for 2829 or Mr Tonuri or a person or persons associated with or involved in 2829.

22. The services and assistance provided by Mr Nankervis and the First Defendant to 2829 or Mr Tonuri or a person or persons associated with or involved in 2829 included:-

a. Preparing financial and feasibility reports;

b. Project management including managing project negotiations;

c. Managing land sales, including tracking land sales on a periodic basis;

d. Managing project negotiations, preparing contracts and liaising with, and appointing contractors and planners; and

e. Approving and/or recommending sales prices for the 77 lots sold in the development and subdivision of Lot 170 as pleaded below.

24. Following the purchase of Lot 170 by 2829, 2829 caused Lot 170 to be developed and sub-divided into 77 separate lots.

25. All 77 lots created in the development of Lot 170 were sold by 2829 to subsequent purchasers.

[***Table omitted***]

26. On 23 April 2012, with the knowledge and consent of the First Defendant and the Second Defendant:-

a. real property situated at 40 Gordon Drive, one of the 77 subdivided lots created by the subdivision of Lot 170 (**40 Gordon Drive**), was sold to and purchased by Queensland Lifestyle Homes (a company controlled by the Second Defendant); and

b. real property situated at 3 Trevor Street, one of the 77 subdivided lots created in the development of Lot 170 (**3 Trevor Street**), was sold to and purchased by Queensland Lifestyle Homes.

27. On 4 December 2012, with the knowledge and consent of the First Defendant and Second Defendant, real property situated at 56 Trevor Street, one of the 77 subdivided lots created by the development of Lot 170 (**56 Trevor Street**), was sold to the Third Defendant (a company controlled by the Second Defendant).

27A. In the events that happened as pleaded above in connection with Lot 170:

1. up until his employment was terminated by the Plaintiff on 14 April 2011, the First Defendant:
2. was employed by the Plaintiff and bound by the contractual employment obligations pleaded above pursuant to the OHSEQ Employment Contract;
3. was a director of the Plaintiff and bound by the statutory obligations pleaded above;
4. was the only director of the Plaintiff resident in Queensland;
5. was the officer in effective control of the Plaintiff’s corporate licence;
6. was authorised by the Plaintiff to sign various identified types of agreements;
7. the First Defendant was a fiduciary of the Plaintiff and bound by the fiduciary obligations pleaded above;
8. 2829:
9. had the First Defendant as one of its directors within the meaning of section 9 of the Corporations Act 2001 (Cth), as a person in accordance with whose wishes the other directors of 2829 (including Mr Tonuri) were accustomed to act;

**Particulars**

Pending the completion of disclosure in this proceeding, the fact of the other directors of 2829 being accustomed to act in accordance with the wishes of the First Defendant is to be inferred from:

1. the sale of 40 Gordon Drive by 2829 to Queensland Lifestyle Homes (a company controlled by the Second Defendant) on 23 April 2012;
2. the sale of 3 Trevor Street by 2829 to Queensland Lifestyle Homes on 23 April 2012;
3. the sale of 56 Trevor Street by 2829 to the Third Defendant (a company controlled by the Second Defendant) on 4 December 2012;
4. was the corporate vehicle of the First Defendant for the purpose of deriving profits from the acquisition and development of Lot 170;
5. alternatively, constituted an incorporated partnership or quasipartnership between the First Defendant, Mr Nankervis and Mr Tonuri, in which the First Defendant had an interest, for the purpose of deriving profits from the acquisition and development of Lot 170, pursuant to the agreement pleaded in paragraph 13 above.
6. In relation to Lot 71 and Lot 246 the SFASOC continues:

**LOT 71**

1. Lot 71 on SP 231400 (**Lot 71**) was part of the development of the Brentwood Site.
2. Lot 71:-
   1. was 735 m2 in size;
   2. was, in 2009, being marketed by the Plaintiff for sale;
   3. was, as at 29 November 2009, owned by Clarendon Residential (Investa Residential’s former name).
3. On 30 November 2009 without the knowledge and consent of the Plaintiff the registered title of Lot 71 was transferred by Clarendon Residential to the First Defendant, for consideration of $265,000.00.
4. The First Defendant purchased Lot 71 with the intention of eventually on selling the property at a profit;
5. On 1 July 2013 without the knowledge and consent of the Plaintiff the registered title of Lot 71 was transferred by First Defendant to Jill Layton, for consideration of $550,000.00, deriving a net profit for the First Defendant of approximately $250,000.00. The Plaintiff will provide further particulars once disclosure is completed.
6. Further the Plaintiff says that:-
   1. in the events that happened as pleaded above in connection with Lot 71, the First Defendant was in the same position as pleaded in subparagraphs 27A(a) and (b) above in connection with Lot 170;
   2. At no time did the First Defendant disclose to the Plaintiff that he was purchasing Lot 71.

**LOT 246**

1. Lot on 246 on SP 231400 (**Lot 246**) was part of the development of the Brentwood Site.
2. Lot 246:-
   1. was 1,041 m2 in size
   2. was, in 2009, being marketed by the Plaintiff for sale
   3. was, as at 10 November 2010, owned by Investa Residential.
3. The First Defendant, the Second Defendant and Mr Nankervis, without the knowledge and consent of the Plaintiff, were involved in the purchase and subsequent subdivision of Lot 246.

**Particulars**

* + 1. Email of 19 January 2011, from the Second Defendant to the First Defendant and Mr Nankervis.
    2. Email, of 19 January 2011, from Mr Nankervis to the First Defendant and the Second Defendant.
    3. Email, of 20 January 2011, from the First Defendant to the Second Defendant and Mr Nankervis.
    4. Email, of 20 January 2011, from the First Defendant to the Second Defendant and Mr Nankervis.
    5. Email of 20 January 2011, from the Second Defendant to the First Defendant and Mr Nankervis.
    6. Email of 22 November 2011, from Mr Nankervis to the First Defendant and the Second Defendant, advising that the approval for the subdivision of Lot 246 is imminent, and the decision will be received that week.
    7. Email of 22 November 2011, from the Second Defendant to the First Defendant and Mr Nankervis, advising “*Good stuff.*”

1. On 11 November 2010 the title to Lot 246 was transferred by Investa Residential to PP Projects, for consideration of $250,000.00.
2. Upon purchasing Lot 246 thereto PP Projects caused Lot 246 to be developed and subdivided into two separate lots.
3. At no time did the First Defendant disclose to the Plaintiff his and the Second Defendant’s interest with respect to Lot 246 through PP Projects.

**Particulars**

Pending the completion of disclosure in this proceeding, the interest of each of the First Defendant and Second Defendant with respect to Lot 246 through PP Projects is to be inferred from the facts and matters pleaded in paragraph 63B below.

1. The two lots created by the subdivision of Lot 246 were sold by PP Projects to subsequent purchasers.

**Particulars**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Street** | **Area** | **Purchaser** | **Sale Date** | **Sale Amount** |
| 13 Burns Circuit, Augustine Heights | 516m2 | Geoffrey Vass | 14 September 2011 | $225,000.00 |
| 11 Burns Circuit, Augustine Heights | 526m2 | Adam Daniel | 14 September 2011 | $225,000.00 |

1. Further particulars will be provided upon disclosure.

63A. In the events that happened above in connection with Lot 246, the First Defendant was in the same position as pleaded in subparagraphs 27A(a) and (b) above in connection with Lot 170.

63B. PP Projects:

1. as pleaded in paragraph 2(r) above, was incorporated on 27 August 2010 and had as at the date of its incorporation the First Defendant as its director and a shareholder, and the Second Defendant as a shareholder;
2. has at all times material to this proceeding been the trustee of the PP Projects Trust pleaded in subparagraph 3(d) above, in respect of which the Second Defendant is the primary beneficiary;
3. from on or about 14 May 2012 to 2 January 2013, had the Second Defendant as one of its directors;
4. pursuant to an ASIC Change of Company Details lodged on 10 November 2010, on and from 27 August 2010 purportedly had as its sole director and shareholder the Second Defendant’s daughter, Jaide Crosbie;
5. in the events that happened as pleaded above in connection with Lot 246, was the corporate vehicle of the First Defendant incorporated for the purpose of deriving profits from the acquisition and development of Lot 246; and
6. alternatively, was an entity in which each of the First Defendant and the Second Defendant had an interest for the purpose of deriving profits from the acquisition and development of Lot 246.

## Submissions of the parties

1. Oliver Hume seeks, *inter alia*, the following relief in QUD 438 of 2018:

* An account of profits from the respondents in relation to Lots 71, 170 and 246;
* In the alternative, damages pursuant to section 1317H(2) of the *Corporations Act 2001* (Cth);
* Equitable compensation payable by Mr Barclay for his breaches of fiduciary duty in connection with an additional claim for compensation by Oliver Hume being, an insurance deductible paid and increased insurance premiums arising from the Federal Court proceeding;
* Damages payable by Mr Barclay for breaches of his employment contract with Oliver Hume, being a loss of opportunity to earn commission on the sale of a development and increased staff costs, all said to be arising from Oliver Hume's termination of Mr Barclay's employment;
* Interest upon such pecuniary relief;
* A declaration that Mrs Barclay holds certain Hope Island Properties on constructive trust for Oliver Hume; and
* Costs.

1. In summary, the case of Oliver Hume for consolidation of QUD 438 of 2018 and QUD 231 of 2011, and leave to re-open those consolidated proceedings, is as follows:

* There are overlapping questions of fact and law as between QUD 231 of 2011 and QUD 438 of 2018, however the problem of parallel proceedings in the Supreme Court and the Federal Court has ceased;
* The claims of Oliver Hume in QUD 438 of 2018 are valuable, totalling $1,061,492, and if the Court refuses the interlocutory application there is a risk that Oliver Hume will lose the ability to pursue those claims;
* Oliver Hume did not know at the relevant time that it had valuable claims to pursue against Mrs Barclay and Louvre Holdings for an account of profits consequent on Mr Barclay’s breaches of fiduciary duty, nor was it in a position to know. This only became known to Oliver Hume upon receipt of the report of its expert Mr Jonathan Dooley (**Mr Dooley**) and following documents obtained in subpoena in the Supreme Court proceeding, including that a $90,000 deposit in respect of one of the Hope Island Properties acquired in Mrs Barclay’s name flowed directly from financial benefits received by Louvre Holdings in relation to Lot 170;
* The respondents cannot submit that Oliver Hume had full information as to the availability of valuable claims against the respondents for an account of profits in respect of Lot 170;
* It is evident there is a complex array of transactions under which money and benefits flowed to the Barclays and entities associated with them as a result of Mr Barclay’s breaches of fiduciary duty, such that Oliver Hume has a valuable right or redress;
* That the claims now in QUD 438 of 2018 were not pursued was due to inadvertence, rather than a deliberate decision on the part of Oliver Hume. Mr Grant Dearlove, non-executive director and Chairman of Oliver Hume, who was responsible for the management of the proceeding on behalf of Oliver Hume, never at any relevant time turned his mind to or considered the availability of an account of profits in relation to Mr Barclay’s wrongdoing;
* The commencement of the Supreme Court proceeding was not actuated by an improper purpose on the part of Oliver Hume – rather an error was made in respect of management of the proceeding;
* The claims in relation to Lot 71 and Lot 246 will proceed in any event;
* The claims Oliver Hume seeks to agitate now are new, and Oliver Hume relies on fresh evidence which was not reasonably discoverable earlier but has not become available;
* Oliver Hume is not seeking to re-litigate an issue it has lost, nor is it seeking to advance a case inconsistent with that advanced in QUD 231 of 2011;
* The question of consolidation is to be considered by reference to the current proceeding having been commenced on 22 March 2016;
* Dismissal of the cross-claim by Oliver Hume against Mr Barclay in QUD 231 of 2011 will give rise to a cause of action estoppel against Oliver Hume in respect of its claims on Lot 170 against Mr Barclay, but not against Mrs Barclay or Louvre Holdings;
* The only matter to be resolved in respect of QUD 231 of 2011 is costs;
* A consolidation order is desirable in order to ensure that Oliver Hume does not lose its valuable rights to pursue Mr Barclay for an account of profits in respect of the Lot 170 case in this proceeding;
* Oliver Hume seeks leave to re-open the cross-claim in QUD 231 of 2011 because the cross-claims were not remitted for re-trial, nor was the hearing of further evidence contemplated. If QUD 438 of 2018 is consolidated with QUD 231 of 2011, it is necessary for Oliver Hume to be granted leave to re-open in order to adduce further evidence in support of a claim to an account of profits as an alternative remedy on the Lot 170 case, as well as in support of the additional claims as to Lot 71 and Lot 246, and in support of the additional claims for compensation; and
* Although relevant events took place many years ago, the present proceeding is one that is very likely to be resolved on documents, primarily bank account records, in respect of real property transactions.

1. The respondents oppose the consolidation and leave to re-open application because, in summary:

* The trial in QUD 231 of 2011 has already been held and the matter determined following a 27 day trial, 3 day appeal hearing and a 1 day hearing as to remedies. It has advanced beyond a stage where it would be appropriate for it to be consolidated with QUD 438 of 2018;
* The pleadings in QUD 438 of 2018 are not yet finalised and Oliver Hume submits that it will need to amend them if the proceedings are consolidated with QUD 231 of 2011;
* QUD 231 of 2011 can be finalised promptly by the dismissal of Oliver Hume’s cross-claim;
* Mr Barclay will be significantly prejudiced if QUD 231 of 2011 is permitted to drag on in consequence of consolidation with QUD 438 of 2018;
* If the strike out application succeeded and all allegations regarding Lot 170 were struck out, the only remaining part of QUD 438 of 2018 capable of being consolidated would relate to Lot 71 and Lot 246, however those lots were not the subject of QUD 231 of 2011. No apparent time saving or efficiencies in respect of those lots would result from consolidation;
* The existence of common issues of fact and law regarding Lot 170 in QUD 231 of 2011 and QUD 438 of 2018 does not of itself justify consolidation;
* Oliver Hume has provided no satisfactory explanation as to the reasons for its conduct of the two sets of proceedings in parallel, why it did not apply to the Federal Court to re-open the cross-claim before now, or why it commenced QUD 438 of 2018 in the Supreme Court rather than in the Federal Court;
* Oliver Hume provided no satisfactory explanation as to why it had not earlier claimed an account of profits against Mr Barclay. At most, Mr Dearlove deposed that he had not turned his mind to the availability of an account of profits as a remedy against Mr Barclay. However, there was no evidence from Oliver Hume’s legal representatives that they, too, did not consider the availability of an account of profits;
* In relation to re-opening QUD 231 of 2011, as a general proposition, courts ought exercise the discretion to re-open litigation with great caution in view of the significant importance of the public interest in the finality of litigation; and
* The Court should not allow Oliver Hume to advance an expanded Lot 170 claim.

## Consideration

1. Rule 30.11 of the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**) provides:

**30.11 Consolidation of proceedings before trial**

If several proceedings are pending in the Court and the proceedings:

(a) involve some common question of law or fact; or

(b) are the subject of claims arising out of the same transaction or series of transactions;

any party to any of the proceedings may apply to the Court for an order that the proceedings be:

(c) consolidated; or

(d) heard together; or

(e) heard immediately after one another; or

(f) stayed until after the determination of any of the other proceedings.

1. Although the relevant sub-rule is not specified, in terms of r 30.11 it appears that Oliver Hume seeks an order only for ***consolidation*** of the proceedings in QUD 231 of 2011 and QUD 438 of 2018, presumably pursuant to r 30.11(c). Oliver Hume does not seek orders in the alternative, including that the different proceedings be heard together.
2. The leading Australian authority in respect of principles of consolidation appears to be the decision of Herring CJ in *Cameron v McBain* [1948] VLR 245 at 246. In that case a passenger in a motor vehicle which had been involved in an accident brought an action for damages for her injuries against the driver of the vehicle, the driver of the other vehicle, and the other driver’s employer. She brought a second action against the same defendants as executor of the will of her husband, who was killed in the same accident, claiming damages in respect of his death. One of the defendants sought an order for consolidation of the claims.
3. The Chief Justice explained at 246 that “consolidation in its proper sense” meant “combining actions so that they thereafter proceed as one.” His Honour explained the history in England whereby actions were permitted to be consolidated, noting that originally consolidation was only permitted on the application of defendants (including to protect them from oppression), and of the view taken by Courts in respect of consolidation. At 247 his Honour said:

The cases, however, lay down no principle upon which discretion of the Court in the matter is to be exercised. And so each case must be decided upon its own special circumstances. ***The question would seem to be whether in all the circumstances it is convenient that the actions be consolidated, and in deciding whether it is convenient, regard may be had to such matters as the desirability of avoiding multiplicity of actions, and the saving of time and expense. At the same time the interests of the parties should not be prejudiced by the making of an order***.

(Emphasis added.)

1. The Chief Justice observed that the case before him was one in which the Court had jurisdiction to make an order for consolidation, and the question was whether it was a suitable case for the exercise of the Court’s discretion. His Honour said at 247-248:

The issue of liability in each of the three actions depends upon a common set of facts; there is no question in any of them of contributory negligence. Nor is any other matter raised that could serve to differentiate the actions one from another, so far as this issue is concerned. The plaintiffs are all represented by the same solicitor and the same counsel. All considerations of convenience would seem in favor [sic] of the exercise of the Court's discretion.

1. The plaintiffs however submitted before his Honour that they would be prejudiced by consolidation, if the amount of damages was assessed by the same jury, and further that, although the ascertainment of damages each plaintiff could recover involved a separate issue, trial by the same jury would have a depressing effect upon the amount of damages each plaintiff hoped to achieve. The Chief Justice accepted this, noting at 248:

Where there are only two plaintiffs, the danger of prejudice on this score may be small, but as the number of plaintiffs increases the danger of prejudice would seem to be greatly magnified. And I think for this reason that this is not a proper case in which to make an order for consolidation.

1. His Honour decided the proceedings were a proper case for the singling out of one action and permitting it to proceed, whilst staying the other two until the single action had been tried.
2. Prior to the enactment of the Federal Court Rules, O 29 r 5 of the *Federal Court Rules 1979* (Cth) made similar provision for consolidation. In *Re Ling; Ex parte Ling v Commonwealth of Australia* (1995) 58 FCR 129; [1995] FCA 1410 a debtor had been the subject of a prior judgment against him in favour of the Commonwealth, which subsequently procured the issue of a bankruptcy notice against the debtor. The debtor filed an affidavit to the effect that he had a counter-claim, set-off or cross-demand equal to or exceeding the amount of the Commonwealth’s judgment debt which he could not have set up in the proceeding in which judgment was obtained, being a claim against the Commonwealth for negligent misstatement or alternatively for defamation. During the course of the proceedings the question arose whether the proceedings could have been consolidated. Justice Hill observed at 134:

Consolidation is provided for in the Federal Court Rules in O 29, r 5. As the terms of the rule make clear, an order for consolidation is not limited to the circumstances expressed in r 5(a) and (b). It suffices that it is desirable that an order for consolidation be made. The rule confers upon the Court a broad discretion to make orders for consolidation where it is in the interests of justice so to do. Relevant to the exercise of discretion would be the desirability of avoiding multiple actions, the saving of time and expense and whether the parties would be prejudiced by such a course: *Cameron v McBain* [1948] VLR 245 at 247. There is no reason to interpret the rule so that consolidation is to be confined to cases where there are several actions brought which could have been joined in the one writ, as the debtor submitted by reference to *Bolwell Fibreglass Pty Ltd v Foley* [1984] VR 97.

Whether an order for consolidation would have been made had such an order been sought, or whether the Court might have merely made an order that the two separate proceedings be heard together, is difficult to assess hypothetically. The matter would lie in the discretion of the Judge before whom such an application for consolidation was brought, in the light of the attitudes of the parties and all circumstances put before that Judge. It could certainly not be said in the present case that it would have been unlikely that such an order would have been made. On the contrary, it is likely that such an order would have been made if requested.

1. In *Aristocrat Technologies Australia Pty Limited v Global Gaming Supplies Pty Limited* [2007] FCA 943 in considering an application for consolidation of separate proceedings pursuant to O 29 r 5 of the (then) Federal Court Rules, Jacobson J took into account factors including:

* that there was an arguable case to go to trial on causes of action pleaded in the draft consolidated statement of claim if consolidation were permitted;
* the interests of justice, and whether prejudice would be occasioned by an order for consolidation;
* whether there were common questions of law or fact in the respective allegations;
* that there was no abuse of process by the applicant parties in the conduct of the proceedings;
* whether there would be any real delay in the hearing as a result of a consolidation order;
* factors referable to the specific proceedings, and prospects of success should the matters be consolidated;
* evidentiary difficulties in a consolidated action, compared to evidentiary difficulties in the original proceedings;
* time and costs savings in consolidation rather than the pursuit of separate actions; and
* the existence of different parties to the separate proceedings (which did not necessarily constitute a bar to the existence of a power to order consolidation).

1. His Honour ordered consolidation of the proceedings.
2. Similarly in *Caason Investments Pty Ltd v Cao* [2014] FCA 1410 (***Caason***) Justice Farrell heard an interlocutory application seeking consolidation of two separate proceedings relating to claims against company directors and auditors. Her Honour observed:

13. The right of the applicants to apply for an order consolidating the Proceedings and the power of the Court to do so under r 30.11 of the Rules is not in issue. The applicants properly point out that the Proceedings involve a common factual matrix, there are common issues of fact and law and witnesses in each Proceeding are likely to be witnesses in the other. The second to fourth respondents consent to consolidation but all other active respondents and the Auditors object.

14. The objections go to discretionary issues. The court’s discretion is broad. Considerations relevant to the exercise of the discretion are the desirability of avoiding multiple actions, saving time and expense, and whether any party would be prejudiced: *Cameron v McBain* [1948] VLR 245 at 247.

1. Her Honour also observed that there was benefit in consolidated pleadings in that case because, in circumstances where cases were managed together, parties to one proceeding could be heard on applications made in the other (at [16]). Her Honour further noted that the real substance to the opposition to the order was the concern that consolidated proceedings would be unfairly prejudicial, including that consolidation would enliven claims already statute barred in one of the proceedings. Her Honour formed the view that this prejudice could be addressed by a note in the order relating to the deemed date of commencement of proceedings (I note that the decision in *Caason* was reversed, but not on this point: *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322; [2015] FCAFC 94).
2. More recently in *Varasdi as Litigation Representative for Mimi Varasdi v State of Victoria (Department of Education and Training)* [2019] FCA 1785 (***Varasdi***) Justice Kerr considered an interlocutory application brought by the respondents for consolidation pursuant to r 30.11(c) or alternatively that the proceedings be heard together pursuant to r 30.11(d). The interlocutory application was opposed by the applicant. At [26] his Honour said:

26. I now turn to the principles that should guide the Court’s consideration of this matter. There appears to be no dispute as between the parties that the relevant considerations are those which were conveniently summarised in the judgment of Greenwood J in *Walsh, Liquidator of D.R. Community Services Pty Ltd (Receivers and Managers Appointed) (In Liq) v Commissioner of Taxation* [2018] FCA 1739 (*Walsh*) which draw on the reasoning of Besanko J in an earlier decision of *Humphries v Newport Quays Stage 2A Pty Ltd* [2009] FCA 699. At paragraph 18 of his judgment, Greenwood J summarised the nine factors that Besanko J had identified:

1. Are the proceedings broadly of a similar nature?

2. Are there issues of fact and law common to each proceeding?

3. Will witnesses (lay and expert) in one proceeding be witnesses in one or more of the other proceedings?

4. Has there been an alternative proposal put forward that there be a test case and have the parties agreed to abide the outcome, or, at least, the determination of common issues of fact and law?

5. Is there a prospect of multiple appeals with substantial delays if the proceedings are not tried at the same time?

6. Will there be a substantial saving of time if the proceedings are tried at the same time, compared with each proceeding being tried separately?

7. Will an order that the proceedings be tried at the same time create difficulties in terms of trial management, complexity of procedural issues and difficulties in determining cross-admissibility of evidence?

8. Is one proceeding further advanced in terms of preparation for trial than the others?

9. Are there parties to one or some only of the proceedings who will be inconvenienced if all of the proceedings are tried at the same time?

1. His Honour said:

40. I appreciate that for reasons I do not immediately apprehend, the Applicants have engaged different solicitors to pursue the second matter, and I have already accepted that compelling the formal consolidation of that application with the earlier consolidated applications before the Court might impose some significant cost detriments to the Applicants and further delay.

41. For that reason, while the Court is satisfied that the indicia that have been referred to by Greenwood J in *Walsh* point towards advantages that might be secured by consolidation, the Court should incline towards the less constraining means of addressing the issues that the Respondents raise: that is, confining the orders it makes to orders that the proceedings be heard and determined at the same time, with the evidence of one being the evidence of the other. While that distinction is not the subject of any judicial opinion to which I have been directed, I note that paragraph 30.11.15 of the Annotations to the Federal Court Rules states as follows:

There is often confusion between consolidation, on the one hand, and the hearing of two or more proceedings together on the other. In nearly all instances, the latter will be found to be the preferable procedure. Under it, the two or more proceedings retain their separate entities and pleadings.

42. Having regard to the powers that are available to the court under r 30.11 of the Federal Court Rules and the injunction to the Court regarding the overarching purposes of the civil procedure and practice provisions as set out in the *Federal Court Act 1976* (Cth) (**Federal Court Act**), I accept that the Respondents have made good their case that the just and fair conduct of these proceedings will not be prejudiced if the alternative orders sought are made.

1. In my view the list of nine factors identified at [26] in *Varasdi* should be viewed with caution in the context of a consolidation application such as that currently before me. This is because:

* In *Humphries v Newport Quays Stage 2A Pty Ltd* [2009] FCA 699 to which his Honour in *Varasdi* referred, the application before Besanko J was for an order that the proceedings be tried ***at the same time or in another sequence***, as directed by the Court. As Besanko J observed in that case:

8. … Secondly, the applicants have made it clear that ***they are not applying for an order that the proceedings be consolidated***….

(Emphasis added. )

* In *Walsh,* to which his Honour in *Varasdi* also referred, there was also no application for consolidation. Rather, as Greenwood J noted at [16], the Commissioner in that case sought an order that the relevant proceedings be heard together.

1. While there are some conceptual similarities between consolidation, and hearing proceedings together, there is a clear historical distinction between the two processes as well as orders which will follow from such processes. An order for consolidation should be approached with considerably more caution than an order that proceedings be heard together for the convenience of the Court and/or the parties, particularly where:

* proceedings are merged, and accordingly determined as one;
* statutory limitations on proceedings which would otherwise have arisen are potentially avoided; and
* substantive issues of estoppel or abuse of process are circumvented.

1. It follows that while some of the questions raised in these factors in *Varasdi* may be helpful to the Court in the exercise of its discretion under r 30.11(c), I consider those factors (or possibly some of those factors) as no more than potentially helpful in appropriate circumstances in an application pursuant to r 30.11(c), and I do not consider they are directly relevant to applications for consolidation. The more critical questions are fundamentally those identified in *Cameron v McBain*, namely:

* whether in all the circumstances it is convenient that the actions be consolidated,
* the desirability of avoiding multiplicity of actions,
* the saving of time and expense, and
* potential prejudice to the parties from the making of a consolidation order.

1. With these principles and relevant authorities in mind, I do not consider that an order for consolidation of QUD 438 of 2018 and QUD 231 of 2011 should be made in the exercise of my discretion. I have formed this view for the following reasons.
2. First, r 30.11 of the Federal Court Rules is not specifically limited in its language to multiple sets of proceedings pre-trial, nonetheless in its terms the rule anticipates consolidation of *pending* proceedings. In no way can QUD 231 of 2011, or the cross-claim of Oliver Hume in QUD 231 of 2011, be considered to be “pending” proceedings. I have a serious doubt as to whether it would be appropriate for the Court to make an order pursuant to r 30.11 in respect the proceedings before me.
3. Second, and following on from this point, it is very clear that QUD 438 of 2018 and QUD 231 of 2011 are at completely different stages in their trial processes. QUD 438 of 2018 is currently at case management stage. The same cannot be said in any respect of QUD 231 of 2011. Indeed final judgments have not only been delivered in QUD 231 of 2011, they were delivered several years ago, following a 27 day trial, a 3 day appeal hearing, and a one day hearing as to remedies.
4. Third, insofar as concerns Oliver Hume’s cross-claim against Mr Barclay in QUD 231 of 2011, that cross-claim was specifically referable to any liability of Oliver Hume to Investa in relation to Lot 170. In *Investa Properties Pty Ltd v Nankervis (No 9)* [2018] FCA 793, I found in Oliver Hume’s favour that no equitable compensation was payable by Oliver Hume to Investa. To that extent, there is no commonality between the proceedings in QUD 231 of 2011 (where I have found that the basis for the cross-claim by Oliver Hume against Mr Barclay in relation to Lot 170 has fallen away) and QUD 438 of 2018 (where Oliver Hume makes new claims against Mr Barclay and additional respondents).
5. Fourth, the key plank of Oliver Hume’s case for consolidation is that it did not earlier seek an account of profits from Mr Barclay in relation to Lot 170 because it did not and could not have known of the circumstances by which Mr Barclay profited in relation to Lot 170 during the course of the proceedings in QUD 231 of 2011.
6. For reasons that follow, I find that I am not satisfied that this is the case.
7. In summary, Oliver Hume contends:

* it became aware of the prospect of such a claim following production of documents by Mr Barclay on subpoena in the Supreme Court proceedings;
* those documents were referred to in the report of Oliver Hume’s expert Mr Dooley;
* those documents demonstrated that Mrs Barclay and entities associated with the Barclays had profited from Mr Barclay’s wrongdoing; and
* it was for this reason that Mr Dearlove “never at any relevant time considered the availability of an account of profits in consequence of Mr Barclay’s wrongdoing” (submissions of Oliver Hume filed 16 November 2018 p 13).

1. The inference Oliver Hume invites me to draw from these submissions is that:

* Mr Barclay gave false evidence in the Federal Court in QUD 231 of 2011 in respect of profits made by him and/or associated entities referable to Lot 170; and
* There was no way that Oliver Hume could have known of the falsity of that evidence during the proceedings in QUD 231 of 2011.

1. The prospect that a respondent to proceedings in this Court gave false evidence is extremely concerning. However, ultimately, I am not persuaded that this possibility supports an order for consolidation as sought by Oliver Hume.
2. At all times in QUD 231 of 2011, Oliver Hume was represented by experienced solicitors and Counsel. Oliver Hume, through its lawyers, pressed all points it considered appropriate during the course of those proceedings in relation to Lot 170. This is apparent from both Oliver Hume’s defence in those proceedings filed on 15 November 2013, and (relevantly to the present proceedings) Oliver Hume’s amended cross-claim against Mr Barclay which was specifically referable to any liability Oliver Hume would have to Investa.
3. In QUD 231 of 2011, Investa claimed that Mr Barclay was a defaulting fiduciary to it in respect of (relevantly) Lot 170, and sought that he account for any profits he or any associated entity made or derived from the sale of Lot 170, or from the development or resale of Lot 170, or alternatively that he give equitable compensation for the sale of Lot 170 at an undervalue. In particular, Investa claimed against Mr Barclay in respect of Lot 170:

At the election of Investa Properties, or Investa Residential, or both of them, Mr Barclay must account as a defaulting fiduciary to Investa Properties or Investa Residential or both of them for either:

* any profit he or any entity that was associated with him or that he controlled, made or derived from the sale of Lot 170 to Two Eight Two Nine, or from the development or resale of Lot 170; or
* the value of Lot 170 at the time of sale. The value of the property was $3,000,000, but Investa Residential received only $1,454,545.

Alternatively, Mr Barclay must give equitable compensation, in such form and in such amount as the Court in its discretion considers just, to Investa Properties or Investa Residential, or both of them for the sale of Lot 170 at an undervalue.

1. Further, in QUD 231 of 2011, Investa claimed that Oliver Hume – of which Mr Barclay was at material times, director and general manager – was a defaulting fiduciary to Investa in respect of Lot 170.
2. In *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 the Full Court found that both Mr Barclay and Oliver Hume were in a fiduciary relationship with Investa.
3. Before me in QUD 231 of 2011, at the conclusion of evidence, Investa elected to claim an order for equitable compensation rather than seek an account of profits for claimed losses concerning the relevant Lots. In respect of Lot 170, Investa sought:

* The sum of $1,303,361 (being the value of Lot 170 at 20 February 2009 of $2,757,906, less the purchase price of $1,454,545); and
* Interest on that amount, calculated on a simple basis.

1. In the primary judgment in Investa (being *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004), I found at [373] that Lot 170 was not sold at an undervalue, but rather the sale price of $1,454,545 was the market value of the property as at 20 February 2009, being the date of sale. Subsequently, Investa claimed that the Court should reconsider the value of Lot 170, and that the true value of Lot 170 as at 20 February 2009 was $2,757,906. In *Investa Properties Pty Ltd v Nankervis (No 9)* [2018] FCA 793 at [23], I found that there was no room to reconsider aspects of my findings relating to the value of Lot 170 as at 20 February 2009. I also found that Investa had suffered no loss in respect of Lot 170 which could have been the subject of equitable compensation, and their application for equitable compensation for breach of duty by the respondents in respect of Lot 170 should be dismissed (at [35]).
2. These findings were made following litigation featuring extremely detailed case management over several years, detailed evidence (including expert evidence) given during the hearing, extensive cross-examination of witnesses (including Mr Barclay, who was in the witness box in QUD 231 of 2011 for two and a half days in total) and applications for document production by various parties.
3. Front and centre in QUD 231 of 2011 was the question whether Mr Nankervis and/or Mr Barclay (and/or entities associated with them) had profited from events relating to the development and sale of Lot 170. This question was a focus of Investa’s litigation against them and Oliver Hume, for several years, until the close of evidence in the primary proceedings, when Investa elected to pursue equitable compensation.
4. At the same time, in QUD 231 of 2011, the clear focus of Oliver Hume was meeting the claims of Investa against ***it***. During the course of the litigation in QUD 231 of 2011, Oliver Hume chose to leave primary pursuit of Mr Barclay to Investa in respect of Lot 170, and instituted a cross-claim against Mr Barclay as – essentially – a defensive strategy in the event that Oliver Hume was found liable to Investa in the primary proceedings.
5. At any time during those proceedings, Oliver Hume could have initiated substantive proceedings against Mr Barclay in respect of any claimed breach of fiduciary duty by him to Oliver Hume relating to Lot 170. Oliver Hume chose not to, notwithstanding that extensive litigation in QUD 231 of 2011 was occurring in relation to events concerning Lot 170, and also in relation to Mr Barclay’s conduct vis-à-vis Lot 170. Oliver Hume has not explained why it chose not to commence such substantive proceedings against Mr Barclay.
6. Oliver Hume has provided no logical explanation as to why it commenced new proceedings against Mr Barclay in relation to Lot 170 in the Supreme Court of Queensland in March 2016, rather than in the Federal Court of Australia where all relevant litigation in respect of events concerning Lot 170 had taken place. This is particularly curious in circumstances where the Supreme Court proceedings have now been transferred to the Federal Court of Australia following application by Oliver Hume. Oliver Hume’s submission that it did so because the trial of QUD 231 of 2011 had been determined and the appeal heard and reserved is, in my view, unpersuasive. Rather, this submission reinforces my view that Oliver Hume had made the decision to deal with the Investa litigation in the Federal Court, notwithstanding the fact that it could have brought substantive claims against Mr Barclay simultaneously (but chose not to).
7. The expert reports of Mr Dooley upon which Oliver Hume relies are dated 15 May 2017 and 18 June 2017. Oliver Hume submits that these reports were procured after it obtained further material on subpoena from Ms Kym Barclay in the Supreme Court of Queensland in the proceedings in that Court. It is unclear to me why, if Oliver Hume had concerns in relation to profits derived by Mr Barclay or related persons in breach of Mr Barclay’s fiduciary obligations to it, it did not seek the issue of relevant subpoenas against Mrs Barclay or others prior to or during the trial in QUD 231 of 2011. Certainly, persons and entities related to Mr Barclay were the subject of pleadings and submissions during those proceedings, as well as findings in, for example, *Investa Properties Pty Ltd v Nankervis (No 9)* [2018] FCA 793.
8. I also place little weight on the evidence of Mr Dearlove that he had not considered the availability to Oliver Hume of an account of profits by Mr Barclay during the course of the litigation in QUD 231 of 2011. It is not in dispute that Mr Dearlove is legally qualified. He would have been in a position to perfectly comprehend the legal ramifications of decisions made by Oliver Hume during the course of litigation in QUD 231 of 2011, and engage in a meaningful way on behalf of Oliver Hume with its legal representatives. It appears that Oliver Hume was primarily interested in its potential liability to ***Investa***, and conducted its litigation strategy referable to Lot 170 accordingly. Oliver Hume submits that this decision on the part of Mr Dearlove was the product of error rather than motivated by an improper purpose. So far as I can ascertain from the material before me, there was no “error” on the part of Mr Dearlove or Oliver Hume. There was no impediment at any time to Oliver Hume commencing substantive proceedings against Mr Barclay for breach of fiduciary duty in relation to Lot 170, or considering available remedies against him.
9. In summary – Oliver Hume has provided no real explanation for its apparently belated decision to substantively pursue Mr Barclay in respect of Lot 170 and the steps it has more recently taken outside the scope of the litigation in QUD 231 of 2011, when it has had ample opportunity since 2011 to commence substantive proceedings against him and be heard in the context of the QUD 231 of 2011 proceedings.
10. Fifth, I am satisfied that permitting consolidation of these proceedings would cause significant prejudice to Mr Barclay, who has already endured extensive litigation in respect of Lot 170. While Oliver Hume submits that this is not a relevant consideration in the context of alleged wrongdoing by Mr Barclay, I consider it is relevant in circumstances where Mr Barclay has already been the subject of both claims and cross-claims in relation to that property over the last decade.
11. Sixth, to the extent that QUD 438 of 2018 is concerned not only with Lot 170 and Mr Barclay, but also Lots 71 and 246 and additional respondents, there is a considerable divergence in the claims of Oliver Hume in QUD 231 of 2011, and the claims of Oliver Hume in QUD 438 of 2018. The divergence is such that the claims referable to those additional lots would, in my view, more properly be the subject of separate hearing in QUD 438 of 2018. Oliver Hume submits that the claims in respect of Lots 71 and 246 will continue to go forward irrespective of the outcome of the consolidation application – I consider that it is appropriate that they do so within the framework of Oliver Hume’s transferred proceedings in QUD 438 of 2018.
12. Seventh, Oliver Hume submits that its claims against Mr Barclay in respect of Lot 170 are “valuable”, and that his conduct constitutes “serious wrongdoing”. As I have repeatedly said, issues relevant to events originating in 2008, Mr Barclay’s fiduciary obligations, and potential liabilities in relation to Lot 170, were the subject of extensive litigation in QUD 231 of 2011. I do not accept that it is reasonable that the actions be consolidated to allow Oliver Hume to run a case it could have run in QUD 231 of 2011, had it turned its mind to it. The question of Mr Barclay having breached his fiduciary obligations to Oliver Hume, of which he was at material times a director, was clearly an issue which Oliver Hume could have pursued in light of events the subject of litigation in QUD 231 of 2011. I am not satisfied that time and expense would be saved by the Court, or anyone, by consolidation of the two sets of proceedings – rather it appears the opposite.
13. Ultimately, I am satisfied that permitting consolidation of these proceedings would be inefficient, time wasting and a significant waste of Federal Court resources in circumstances where Oliver Hume has, at all times, been represented by experienced lawyers; and where QUD 231 of 2011 has already consumed extensive Court time. I also note that relevant events referable to QUD 231 of 2011 took place more than 12 years ago. As McHugh J observed in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25, the longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose. This is almost certainly the case in the present situation.
14. Oliver Hume’s application for consolidation should be refused.
15. Oliver Hume concedes that, in the event that its application for consolidation is refused, its application for leave to re-open its cross-claim in the consolidated proceedings would not be appropriate as it would re-enliven the problem of parallel proceedings (written submissions in reply filed 15 February 2019). I agree.

# The Strike-out application

1. The **SFASOC** is, unfortunately, very difficult to read because of the heavy amendments to it, and the resultant curious and inconsistent manner of numbering of paragraphs.
2. Schedule 1 to the strike-out application identified the following paragraphs of the SFASOC as those the respondents sought to be struck out: paragraphs 4, 6 to 27A, 69 to 70, **79B to 80**, 101, **103A, 103B,** 109 to 109B, 110B(a), 110C(a), 110D, 110H, 110I, 110J and 111 to 112A, 1, 1A, 5, 5A, 5B (on pp 113 and 114), 1 (on p 115) and 6A and 154 (on p 116) of the SFASOC.
3. Turning to those paragraphs, in summary:

* Para 4 pleads the status of Louvre Holdings as a company, of which Mrs Barclay was the sole director and shareholder;
* Paras 6, 7, 10, 11, 12, 13, 15, 15A, 15B, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26 and 27 plead background to the sale and marketing of Lot 170 by Oliver Hume on behalf of Investa in 2008, including conduct of Mr Barclay in that regard;
* Paras 9 and 27A plead the fiduciary obligations owed by Mr Barclay to Oliver Hume in relation to Lot 170;
* Paras 69, 69A and 70 plead breaches of fiduciary obligations by Mr Barclay to Oliver Hume in relation to Lot 170, and his liability for those breaches;
* Paras 79B to 79H plead Mr Barclay’s liability for Oliver Hume’s lost opportunity to earn commission from its agreement with a client (Washington Land Pty Ltd), following the termination by the client of that agreement after the termination of Mr Barclay’s employment contract with Oliver Hume;
* Paras 79I and 79J plead Mr Barclay’s liability for Oliver Hume’s increased staff costs, in consequence of the termination of Mr Barclay’s employment contract with Oliver Hume and Oliver Hume hiring two staff members to replace him;
* Para 80 pleads that the conduct of Mr Barclay in breach of his fiduciary obligations to Oliver Hume constituted fraudulent and dishonest designs on the part of Mr Barclay;
* Para 101 pleads conduct of Mrs Barclay in assisting Mr Barclay in relation to his breaches of fiduciary duty concerning Lot 170;
* Paras 103A and 103B plead further to para 101 that Mrs Barclay derived profits from the development and subdivision of Lot 170 as a result (*inter alia*) of her relationship with Mr Barclay, and that she was personally liable to account to Oliver Hume for such profits derived by her in consequence of breaches of fiduciary obligation by Mr Barclay as assisted by Mrs Barclay;
* Paras 109, 109A and 109B plead conduct of Louvre Holdings in assisting Mr Barclay in the furtherance of his breaches of fiduciary duty concerning Lot 170;
* Para 110B(a) and 110C(a) plead the sale by 2829 Pty Ltd of lots created in the development of Lot 170;
* Para 110D pleads that conduct of 2829 Pty Ltd in respect of Lot 170 was as the corporate vehicle of Mr Barclay, as the fiduciary of Oliver Hume;
* Para 110H pleads that following the sale of Lot 170 (or the 77 separate lots into which Lot 170 was subdivided) and Lot 246, all of the moneys derived on the sales became subject to the control of Mr Barclay and/or Mrs Barclay;
* Para 110I pleads that Mrs Barclay acquired her interest as registered proprietor of each of the Hope Island Properties with the use of moneys derived from the sale of Lot 170 (or the 77 separate lots into which Lot 170 was subdivided) and Lot 246, under the control of Mr Barclay or Mrs Barclay;
* Para 110J pleads that Mrs Barclay holds each of the Hope Island Properties on constructive trust for Oliver Hume;
* Paras 111, 112 and 112A plead that Mr Barclay is liable to Oliver Hume in relation to the adverse effect on Oliver Hume’s insurance premiums with its insurer Vero Insurance and excess payable in relation to Oliver Hume’s insurance claim, arising from Mr Barclay’s breaches of contractual, statutory and fiduciary duties;
* Para 1 on p 113 pleads a claim by Oliver Hume for an account of profits by Mr Barclay in relation to the acquisition, development and sale of Lot 170;
* Para 1A on p 113 pleads, alternatively, a claim by Oliver Hume for damages pursuant to s 1317H(2) of the *Corporations Act 2001* (Cth) in relation to the profits derived by Mr Barclay in relation the acquisition, development and sale of Lot 170;
* Para 5 on p 114 pleads a claim by Oliver Hume for equitable compensation for Mr Barclay’s breaches of fiduciary duty in connection with Oliver Hume’s insurance claims;
* Para 5A on p 114 pleads a claim by Oliver Hume for damages, for Mr Barclay’s breaches of his employment contract;
* Para 1 on p 115 pleads a claim by Oliver Hume for an account of profits by Mrs Barclay in relation to the acquisition, development and sale of Lot 170;
* Para 6A on p 116 pleads a claim by Oliver Hume for a declaration that Mrs Barclay holds each of the Hope Island Properties on constructive trust for Oliver Hume;
* Para 154 on p 116 pleads a claim by Oliver Hume for an account of profits by Louvre Holdings in relation to the acquisition, development and sale of Lot 170.

## Submissions of the parties

1. In summary, in relation to their strike-out application, the respondents submit:

* As a general proposition, all parts of the SFASOC in relation to Lot 170 ought be struck out on the basis of an estoppel or an abuse of process. Oliver Hume either did raise, or could and ought to have raised in its cross claim against Mr Barclay in QUD 231 of 2011, the causes of action and relief now raised in QUD 438 of 2018.
* In relation to causes of action against Mr Barclay concerning Lot 170, cause of action estoppel, *Anshun* estoppel and abuse of process are relevant.
* In relation to causes of action against Mrs Barclay and Louvre Holdings concerning Lot 170, *Anshun* estoppel and abuse of process are relevant.

1. In summary Oliver Hume submits:

* The respondents bear a heavy onus.
* As against all the respondents, the case involves not only two new parties but also different independent causes of action and new allegations as to accessorial and recipient liability, and requires an investigation to enable the flow of monies to be traced or followed.
* Irrespective of the outcome of the consolidation proceedings, cause of action estoppel does not apply in respect of Mrs Barclay and Louvre Holdings.
* Factors weighing against an *Anshun* estoppel are that:
  1. QUD 438 of 2018 does not involve a collateral challenge to QUD 231 of 2011;
  2. Oliver Hume was not in control of the cross-claim in QUD 231 of 2011 – rather Vero Insurance was in control of it by right of subrogation; and
  3. It would have been costly and inconvenient for Oliver Hume’s claims in QUD 438 of 2018 to be brought into QUD 231 of 2011.
* The proceeding in QUD 438 of 2018 is not an abuse of process by re-litigation because Oliver Hume is not seeking to win on an issue it lost in QUD 231 of 2011. Similarly, Oliver Hume’s claims in QUD 438 of 2018 are not an abuse of process because it did not have control over the proceedings in QUD 231 of 2011.

## Consideration

1. The respondents’ strike-out application is based on claims of *Anshun* estoppel and abuse of process. The respondents have the onus to establish an *Anshun* estoppel and/or abuse of process: see *ASIC v Lindberg (No 2)* (2010) 26 VR 355 at p 366.
2. Relevantly, the Court has the power to strike out pleadings in accordance with r 16.21 of the Federal Court Rules, which provides as follows:

**Application to strike out pleadings**

(1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

(a) contains scandalous material; or

(b) contains frivolous or vexatious material; or

(c) is evasive or ambiguous; or

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

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

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

(2) A party may apply for an order that the pleading be removed from the Court file if the pleading contains material of a kind mentioned in paragraph (1)(a), (b) or (c) or is otherwise an abuse of the process of the Court.

1. Rule 16.21 must be interpreted and applied in the context of s 37M of the *Federal Court of Australia Act 1976* (Cth), which states that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.
2. The power to strike out pleadings is discretionary, and should be used sparingly: *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135.
3. In *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 the High Court examined forms of estoppel, and related abuse of process principles, in Australian law. French CJ, Bell, Gageler and Keane JJ observed:

20. An exercise of judicial power, it has been held, involves “as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons”. The rendering of a final judgment in that way “quells” the controversy between those persons. The rights and obligations in controversy, as between those persons, cease to have an independent existence: they “merge” in that final judgment. That merger has long been treated in Australia as equating to “res judicata” in the strict sense.

21. ***Estoppel in relation to judicial determinations is of a different nature. It is a common law doctrine informed, in its relevant application, by similar considerations of finality and fairness.*** Yet its operation is not confined to an exercise of judicial power; it also operates in the context of a final judgment having been rendered in other adversarial proceedings. It operates in such a context as estoppel operates in other contexts: as a rule of law, to preclude the assertion of a right or obligation or the raising of an issue of fact or law.

22. Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as “***cause of action estoppel***”. Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where *res judicata* in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as “***issue estoppel***”. Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a “judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies”. 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.

23. The present significance of the recognition of those three forms of estoppel is that each has the potential to preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding or their privies. Absent a principled basis for distinction — and none has been suggested — one principle must govern the identification of privies for the purpose of all forms of estoppel which result from the rendering of a final judgment in an adversarial proceeding.

24. To explain contemporary adherence to the comparatively narrow principle in *Ramsay v Pigram*, it is appropriate also to explain the relationship between the doctrine of estoppel and the doctrine of abuse of process as it has since come to be recognised and applied in Australia. ***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.

27. The final element of the legal context relevant to explaining continuing adherence to the comparatively narrow principle in *Ramsay v Pigram* is the continuing existence of the distinct rule, equitable in origin, which prevents a person from actually recovering more than once for a given loss that results from breach of a given obligation. The rule applies irrespective of the part, if any, which the person might have played in a proceeding which would otherwise facilitate the double recovery against which it guards. Its distinct operation was noted more than two centuries ago in the seminal explanation of issue estoppel. There it was explained that “a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession” and that “it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel”. The explanation continued:

The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.

(Emphasis added; citations omitted.)

1. The High Court in *Timbercorp Finance Pty Ltd (in liquidation) v Collins* (2016) 259 CLR 212; [2016] HCA 44 cited *Tomlinson* with approval. The majority in *Timbercorp* noted at [43]:

… the State has an interest in preventing re-litigation of common issues of fact and law so far as it can be done consistently with the requirement of justice to all parties.

1. In *Re AWB Ltd; Australian Securities and Investments Commission v Lindberg (No 10)* (2009) 76 ACSR 181; [2009] VSC 566, Robson J relevantly discussed principles relating to *Anshun* estoppel at [263] as follows:

(1) The *Anshun* principle gives rise to an estoppel distinct from abuse of process principles: *Anshun*.

(2) A second proceeding may be estopped under the *Anshun* principle where the cause of action raised is one which could have been raised in a previous proceeding where the same or substantially the same facts will arise for consideration in the second proceeding as in the first proceeding: *Anshun; Gibbs v Kinna* and *Zavodnyik v Alex Constructions Pty Ltd*.

(3) Such a proceeding will only be estopped, however, if it was unreasonable to defer reliance upon the cause of action: *Anshun; Gibbs v Kinna*.

(4) *Anshun* estoppel is not limited to circumstances where there may be conflicting judgments, although the risk of conflicting judgments would generally speaking satisfy the criterion of unreasonableness: *Gibbs v Kinna; Zavodnyik v Alex Constructions Pty Ltd.*

(5) In considering whether it was unreasonable for a plaintiff not to have relied on the cause of action raised in the second proceeding, the court should consider all the relevant facts, including the character of the previous proceeding, the scope of any pleadings, the length and complexity of the trial, any real or perceived difficulties in raising the relevant claim earlier and any other explanation for the failure to raise the claim previously: *Gibbs v Kinna*.

(6) The greater the extent of the overlap between the facts underlying each claim, the easier it is to argue that it was unreasonable not to raise the matter in the first proceeding: *Zavodnyik v Alex Constructions Pty Ltd*.

(7) In considering whether a proposed amendment to a statement of claim is necessary to avoid multiple proceedings, the court may be able consider whether the proposed claim could be brought by another proceeding and in doing so consider whether that proceeding would be met by an *Anshun* estoppel or an abuse of process claim: *Aon*.

(8) Where the first proceeding has been determined, the second proceeding has usually been challenged on the *Anshun* principle. Where the two proceedings are on foot at the same time, the second proceeding has normally been challenged on an abuse of process basis and it is doubtful that the *Anshun* principle applies.

(Emphasis added; citations omitted.)

1. In relation to abuse of process principles, Robson J in *Re AWB Ltd; Australian Securities and Investments Commission v Lindberg (No 10)* (2009) 76 ACSR 181; [2009] VSC 566 at [264] summarised as follows:

…

(8) The rationale underlying the principle against double jeopardy, in that an individual should not be vexed twice for the same cause, is a factor properly to be taken into account in the weighing exercise: *Walton v Gardiner*.

(9) It is prima facie vexatious to bring two extant civil actions where one will lie: *Moore v Inglis*; *Thirteenth Corporation Pty Ltd v State*.

(10) This prima facie rule applies whether or not the two proceedings are in separate courts or one: *Branir Pty Ltd v Wallco Pastoral Co Pty Ltd*.

(11) The prima facie rule applies where the issues overlap or significantly overlap or there is a similarity of subject matters of the proceedings.

(12) The fact that the parties may not be identical, or the relief different, does not necessarily disentitle relief under this principle: *Moore v Inglis*.

(13) In considering whether the rule should apply, the court should consider whether there was no reasonable justification for the second proceeding based on legitimate considerations of convenience, cost or the like: *Thirteenth Corporation Pty Ltd v State*.

(Citations omitted.)

1. Applying these principles, I am satisfied that:

* Given Oliver Hume’s concessions concerning cause of action estoppel and Mr Barclay – paras 6, 7, 9, 10, 11, 12, 13, 15, 15A, 15B, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 27A, 69, 69A, 70, 110B(a), 110C(a), 110D, paras 1 and 1A on p 113 – should be struck out of the SFASOC.
* Even if cause of action estoppel did not require the strike out of these paragraphs in relation to Mr Barclay – these paragraphs of the SFASOC should be struck out on the basis of either *Anshun* estoppel or abuse of process.
* Paras 101, 103A, 103B and para 1 on p 115 (in respect of Mrs Barclay) and paras 109, 109A, 109B and para 154 on p 116 (in respect of Louvre Holdings) should be struck out of the SFASOC on the basis of either *Anshun* estoppel or abuse of process.
* Paragraphs 80, 110H and 110I of the SFASOC should be struck out to the extent that they refer to Mr Barclay and Lot 170 or the lots into which Lot 170 was subdivided.

1. Paras 4, 79B, 79C, 79D, 79E, 79F, 79G, 79H, 79I, 79J, 110J, 111, 112 and 112A, para 5 on p 114, para 6A on p 116 of the SFASOC do not offend principles of estoppel or abuse of process to which I have referred.
2. I have formed these views for the following reasons.
3. First, in relation to Mr Barclay and Oliver Hume’s claims in its SFASOC concerning Lot 170 and breach of fiduciary obligation: Oliver Hume clearly anticipated (in their written reply submissions at para 4(c)(i) dated 15 February 2019) that, should I refuse an order for consolidation of the two sets of proceedings, I would dismiss Oliver Hume’s cross-claim against Mr Barclay in QUD 231 of 2011 for want of proof of loss on the part of Oliver Hume. This anticipation is well-founded. Indeed, although I have not yet made a formal order to that effect (and will need to list QUD 231 of 2011 to finally deal with the cross-claim and associated costs), I consider at this stage that the dismissal of Oliver Hume’s cross-claim is almost inevitable.
4. Oliver Hume conceded that a dismissal of Oliver Hume’s cross-claim in QUD 231 of 2011 for want of proof of loss on the part of Oliver Hume would give rise to a cause of action estoppel in relation to the Lot 170 claims against Mr Barclay, and that the respondents’ strike-out application as to Lot 170 claims against Mr Barclay would succeed (see transcript p 43 ll 40-41). I consider that this is a proper concession. The paragraphs to which I have referred in the SFASOC relating to claims of Mr Barclay’s breach of fiduciary obligation and Lot 170 – namely paras 6, 7, 9, 10, 11, 12, 13, 15, 15A, 15B, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 27A, 69, 69A, 70, 110B(a), 110C(a), 110D, paras 1 and 1A on p 113 – should be struck out on this basis.
5. However secondly, even if these paragraphs were not struck out on the basis of cause of action estoppel, I consider they should be struck out:

* by reference to principles of *Anshun* estoppel, because Oliver Hume’s claims of breach of fiduciary obligation to it by Mr Barclay in relation to Lot 170 were so connected with the subject matter of QUD 231 of 2011, as to have made it unreasonable in the context of that proceeding for Oliver Hume’s current claims concerning Lot 170 not to have been made in that proceeding; or
* as an abuse of process, as claims Oliver Hume could have made in QUD 231 of 2011, and which ought reasonably have been made in those proceedings.

1. Oliver Hume submitted that a factor weighing against a finding of *Anshun* estoppel or abuse of process in this respect was that Oliver Hume was not in control of conduct of litigation in QUD 231 of 2011 referable to potential liabilities and losses of Oliver Hume. Rather, Oliver Hume submitted that its insurer, Vero Insurance, had assumed that control.
2. There is evidence before the Court that Vero Insurance agreed to indemnify Oliver Hume in QUD 231 of 2011 in respect of the Investa claim, and that the same law firm and Counsel acted on behalf of both Oliver Hume and Vero Insurance in QUD 231 of 2011 in respect of Oliver Hume’s defence, Oliver Hume’s cross-claim against Mr Barclay, and Mr Barclay’s cross-claim against Vero Insurance: affidavit of Patrick John O’Shea sworn 1 December 2016.
3. I accept that Oliver Hume relinquished its conduct of the litigation in QUD 231 of 2011 to its insurer. Indeed in the Professional Indemnity Insurance Policy between Vero Insurance and Oliver Hume, the General Conditions include:

**Claims Conduct**

The Insurer shall be entitled to take over and conduct in the name of the Insured the defence or settlement of any Claim and shall have full discretion in the conduct of any proceedings and in the settlement of any Claim.

1. “Claim” is defined in the Vero Insurance policy as:

… any demand made by a third party upon the Insured for compensation, however conveyed, including a writ, statement of claim, application or other legal or arbitral process.

1. As I observed earlier in this judgment, the litigation strategy of Oliver Hume in QUD 231 of 2011 appeared primarily concerned with defending itself against the claims of Investa. This is not surprising in circumstances where Oliver Hume was insured for claims against it, such as that commenced by Investa. In its submissions in the current proceedings, Oliver Hume submits that the commercial interest of Vero Insurance in QUD 231 of 2011 was in defeating Investa’s claim, or alternatively making out a claim against Mr Barclay for compensation by way of indemnity against any liability of Oliver Hume to Investa. Indeed, Oliver Hume further submits that Vero Insurance was not interested in pursuing restitutionary remedies against Mr Barclay or his associates for, *inter alia*, an account of profits. This is consistent with the terms of the insurance policy I have set out, which are referable to defensive conduct in respect of claims brought against Oliver Hume as an insured.
2. I do not consider it surprising that Oliver Hume would have been content to leave its conduct of what developed into lengthy, complex and no doubt expensive litigation to Vero Insurance. However, this was a forensic choice on the part of Oliver Hume. There is no material before me to warrant a finding that Oliver Hume was ***prevented*** – by Vero Insurance or anyone else, or for any other reason – from commencing separate proceedings against Mr Barclay (or his associates) for claimed breaches of fiduciary obligation by Mr Barclay to Oliver Hume.
3. As Adamson J observed in *Buses + 4WD Hire Pty Limited v Oz Snow Adventures Pty Limited* [2016] NSWSC 1017:

33. There are several situations in which a party might seek two sets of representation. The issues that can arise between an insurer and an insured in an action brought in the latter’s name for the benefit of the former include the following:

(1) The insurer does not insure a loss which its insured wishes to claim against a third party.

(2) The insured brings a cross-claim on a different issue unrelated to the subrogated claim.

(3) The insurer and its representatives (which have conduct of the proceedings on behalf of the named insured) are faced with a conflict of interest as between the rights of the insured and the rights of the insurer.

34. In situation (1), the position is relatively clear. The insurer is obliged to include the claim which the insured wishes to bring in its pleading against the third party (which includes the subrogated claim). The reason for this is that otherwise the insured would be prejudiced in that the insured could be subject to an issue estoppel or *Anshun* estoppel in respect of the insured’s own claim. This situation is not regarded as creating any conflict of interest between an insured and an insurer (although their interests do not coincide) and does not give rise to any need for separate representation.

35. Situation (2) is also relatively clear in that the obligation of the solicitors instructed by the insurer on the subrogated claim is to act in good faith and in the interests of the insured. In this situation, the cross-claim could be brought and, since it is on a separate issue, the interests of the insurer and the insured would be unlikely to conflict.

1. As his Honour continued, and of particular relevance in circumstances where Oliver Hume and Vero Insurance were represented by one firm of lawyers:

37. The obligations of a solicitor instructed by an insurer in proceedings where the insured is the named party were summarised in *Conducting an Action on Behalf of the Insurer in the Name of the Insured (A Case for Schizophrenia)* (1991) 4 Insurance Law Journal 83 at 87 as follows:

(1) The insurer may not act arbitrarily in deciding tactics or the conduct of the action. It must act *bona fide* in the best interests of both insurer and insured.

(2) The insurer is not entitled to pursue some advantage outside the litigation in question.

(3) The solicitor nominated by the insurer must act reasonably in the interests of both insurer and insured.

(4) As the insured is the litigant, the solicitor is his solicitor and owes him duties as such.

(5) The solicitor is also solicitor for the insurer and owes it corresponding duties.

(6) The insured is deprived of his right to control the action to the extent that the insurer is entitled to give instructions to the solicitor pursuant to the policy.

(7) However, to the extent that the insurer requires the solicitor to do something not empowered under the policy, the solicitor cannot do so without the insured’s consent.

1. There is no evidence before me that the lawyers acting for both Oliver Hume and Vero did not act in the interests of both of these parties in QUD 231 of 2011.
2. The principle that all issues in dispute between the parties ought be decided in a single proceeding is well-settled. For example, in *Sheahan, in the matter of Atsikbasis Nominees Pty Ltd (in Liquidation) (No 2)* [2013] FCA 724 Besanko J observed:

5. It is desirable where there are common issues of fact in relation to a claim and a cross-claim that ***all parties be bound by one determination in relation to those facts***. The possibility of there being inconsistent findings of fact is to be avoided (*Barclays Bank v Tom* [1923] 1 KB 221 at 224 per Scrutton LJ).

1. Similarly, in *Martech International Pty Ltd v Energy World Corporation Ltd* [2004] FCA 1470, French J (as his Honour then was) noted:

29. The objective of the requirement that a cross-claim involving a non-party cross-respondent be related to, or connected with, the subject matter of the proceedings is to allow, so far as possible, ***all aspects of a matter or controversy before the Court to be resolved***. …

1. In QUD 231 of 2011, the issue of breach of fiduciary obligations by Mr Barclay in respect of his conduct concerning Lot 170 was squarely before the Court. A claim to that effect was brought against Mr Barclay by Investa. Oliver Hume brought a cross-claim against Mr Barclay. I can only infer on the material before me that, in QUD 231 of 2011, it was Oliver Hume’s choice not to pursue such an obviously available claim as that of breach of fiduciary obligations owed by Mr Barclay to it.
2. I reject Oliver Hume’s submission that the role of Vero Insurance in conducting the litigation concerning potential liabilities of Oliver Hume in QUD 231 of 2011 was a factor militating against findings of *Anshun* estoppel or abuse of process in the current proceedings.
3. Third, in relation to para 101 and para 1 on p 115 (in respect of Mrs Barclay) and paras 109, 109A, 109B and 154 on p 116 (in respect of Louvre Holdings), I am satisfied that these paragraphs should be struck out of the SFASOC as an abuse of process, on the basis that:

* Oliver Hume’s claims against Mrs Barclay and Louvre Holdings in these paragraphs concern Lot 170;
* The claims are reliant on Mr Barclay’s alleged breaches of fiduciary duty to Oliver Hume in relation to Lot 170;
* The claims also rely on identical factual issues to those in dispute in QUD 231 of 2011, relating to conduct of Mr Barclay in respect of the sale and/or development of Lot 170;
* Determination of these claims against Mrs Barclay and/or Louvre Holdings would require determination of the question whether Mr Barclay had breached his fiduciary obligations to Oliver Hume in respect of the sale and/or development of Lot 170. As I have already observed, Oliver Hume concedes there is a cause of action estoppel once the cross-claim against Mr Barclay is dismissed, or alternatively I consider (for reasons I have given) that this issue would be the subject of an *Anshun* estoppel or would be an abuse of process; and
* Similarly, claims against Mrs Barclay and/or Louvre Holdings, relating to assistance to Mr Barclay in respect of his alleged breaches of fiduciary duty to Oliver Hume concerning Lot 170 or benefit from those breaches, ought reasonably to have been made or raised for determination in QUD 231 of 2011 when conduct of Mr Barclay in respect of Lot 170 was squarely in proceedings before the Court, and Oliver Hume had in fact brought a cross-claim against Mr Barclay in respect of that very same conduct.

1. I consider the same reasoning applies to paras 80, 110H and 110I of the SFASOC to the extent that these paragraphs plead facts referable to Lot 170. I also note, however, that paras 80, 110H and 110I of the SFASOC also plead facts potentially beyond the scope of Lot 170, and in that respect should not be struck out.
2. Finally, I am satisfied that paras 4, 79B, 79C, 79D, 79E, 79F, 79G, 79H, 79I, 79J, 110J, 111, 112 and 112A, para 5 on p 114, and para 6A on p 116 of the SFASOC do not offend principles of estoppel or abuse of process. This is because:

* While pleadings referable to Louvre Holdings, its relationship with Mr Barclay and Lot 170 should be struck out, para 4 simply pleads the legal status of Louvre Holdings and its relationship with Mrs Barclay;
* Paras 79B to 79J plead claims by Oliver Hume against Mr Barclay for economic loss, by reference to the loss of a contract with a former client of Oliver Hume and costs incurred by Oliver Hume in hiring staff to replace Mr Barclay following the termination of his employment contract. These paragraphs are not exclusively referable to Lot 170;
* Oliver Hume pleads generally in para 110J that Mrs Barclay holds each of the Hope Island Properties on constructive trust for Oliver Hume. This alleged relationship is also potentially referable on the pleadings to Lot 246 (see para 110B(c)) and Lot 71 (see paragraph 110C(b)) both of which were outside the scope of the claims in QUD 231 of 2011. The same reasoning applies to paragraph 6A on p 116 of the SFASOC;
* Similarly, paras 111, 112 and 112A, and para 5 on p 114 are referable to Mr Barclay’s alleged conduct concerning Lots 246 and 71 which were outside the scope of the claims in QUD 231 of 2011.

# CONCLUSION

1. In summary, I refuse Oliver Hume’s application for consolidation of QUD 231 of 2011 and QUD 438 of 2018. It follows that Oliver Hume’s application for leave to re-open the cross-claim in the consolidated proceedings is also refused.
2. As I noted earlier in this judgment, the cross-claim in QUD 231 of 2011 remains open, although in light of my orders refusing consolidation and the re-opening of the cross-claim, it remains for final dispositive orders to be made in respect of the cross-claim, including in respect of costs in that cross-claim. I will ask the parties to provide separate draft case management orders in file QUD 231 of 2011 to that effect.
3. In relation to the strike-out application of the respondents, I have set out in detail my views and make orders accordingly. I also note that Oliver Hume’s other claims against the respondents, including in respect of Lots 71 and 246, remain to be determined.
4. Relevantly I have ordered that all paragraphs of the SFASOC pleading the alleged liability of Louvre Holdings to Oliver Hume be struck out. In such circumstances, I accept the submission of the respondents that the claims of Oliver Hume against Louvre Holdings should be dismissed.
5. I will also direct the parties to provide draft case management orders in respect of costs in this proceeding.

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| I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 17 June 2020