SUPREME COURT OF QUEENSLAND

CITATION:	*Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors (No 2)* [2021] QSC 265
PARTIES:	**DAMIEN BERNARD DUNLOP** (first respondent plaintiff) **ROSEMARY KNIGHTS** (second respondent plaintiff) **v** **BODY CORPORATE FOR PORT DOUGLAS QUEENSLANDER CTS 886** (first applicant defendant) **WAYNE PARRIS** (second applicant defendant) **SUE PARRIS** (third applicant defendant) **GAIL SEYMOUR** (fourth applicant defendant) **ROBERT ROMANIN** (fifth applicant defendant) **ROBERT JOHN HERD** (sixth applicant defendant)
FILE NO/S:	SC No 577 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 October 2021
DELIVERED AT:	Cairns
HEARING DATE:	6 August 2021
JUDGE:	Henry J
ORDERS:	**1. Paragraphs [1(d)(ii)], [1(d)(iii)], [23], [24], [25(c)], [25(e)] and [25(f)] of the Further Further Amended Statement of Claim are struck out.** **2. The plaintiffs may not file any further repleading of the statement of claim pending the Court's orders as to the future conduct of that part of the proceeding brought under the *Australian Consumer Law.*** **3. The parties will be heard at 9.15am Wednesday 27 October 2021 (out of town parties having leave to appear by telephone or video-link) as to:**

i. **what orders should be made as to the future conduct of that part of the proceeding brought under the *Australian Consumer Law*;**

ii. **what orders should be made in respect of the unresolved aspects of the application filed 7 December 2020;**

iii. **costs in respect of the applications filed 7 December 2020 and 9 June 2021.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – OTHERWISE AN ABUSE OF PROCESS – where the first respondent defendant was a body corporate which terminated letting and caretaking agreements with the first applicant plaintiff – where the body corporate's committee members and its solicitor were included as defendants – where the first plaintiff seeks damages for breach of contract as against the first defendant only – where both the first and second plaintiffs seek damages pursuant to s 236 *Australian Consumer Law (Schedule 2 Competition and Consumer Act)* 2010 (Cth) against all six defendants – where the contravening conduct is said to be the making of "representations" by the second to fifth defendants and giving of "advice" by the sixth defendant, respectively constituting misleading or deceptive conduct or false or misleading conduct contrary to ss 18(1) and 37(1) *Australian Consumer Law* – where the defendants advance an application to strike out paragraphs of the Further Further Amended Statement of Claim – whether the Further Further Amended Statement of Claim adequately pleads material facts in support of the allegation that the first to fifth defendants were acting trade or commerce – whether the parts of the Further Further Amended Statement of Claim which pleads the first to fifth defendants were acting in trade or commerce should be struck out pursuant to r 171(1)(a) and (e) *Uniform Civil Procedure Rules* 1999 (Qld) on the basis they disclose no reasonable cause of action or are otherwise an abuse of process

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – OTHERWISE AN ABUSE OF PROCESS – where the defendants advance an application to strike out paragraphs of the Further Further Amended Statement of Claim – whether the Further Further Amended Statement of Claim adequately pleads material facts as to how the conduct of the second to sixth defendants caused loss – whether the parts of the Further Further Amended Statement of Claim

which pleads the advice and representations were misleading, deceptive or false conduct and which pleads the causal consequences of that conduct should be struck out pursuant to r 171(1)(a) and (e) *Uniform Civil Procedure Rules* 1999 (Qld) on the basis they disclose no reasonable cause of action or are otherwise an abuse of process

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – OTHERWISE AN ABUSE OF PROCESS – where the defendants advance an application to strike out paragraphs of the Further Further Amended Statement of Claim – whether the Further Further Amended Statement of Claim adequately pleads material facts in support of the causation of damages for lost opportunity –whether the parts of the Further Further Amended Statement of Claim which plead the liability of all defendants to each plaintiff for damages under s 236 of the *Australian Consumer Law* as well as the second plaintiff's entitlement to interest should be struck out pursuant to r 171(1)(a) and (e) *Uniform Civil Procedure Rules* 1999 (Qld) on the basis they disclose no reasonable cause of action or are otherwise an abuse of process

Australian Consumer Law (*Schedule 2 Competition and Consumer Act*) 2010 (Cth), s 18(1), s 37(1), s 236
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 8, s 128(1)(c)
Body Corporate and Community Management Act 1997 (Qld), s 96, s 100(1)
Competition and Consumer Act 2010 (Cth), s 6
Property Occupations Act 2014 (Qld), s 60, s 77, s 100, s 102
Uniform Civil Procedure Rules 1999 (Qld), r 171(1)(a), r 171 (1)(e)

Australian Breeders Co-operative Society Ltd v Jones (1997) 150 ALR 488, cited
Australian Competition Commission v Hughes (2002) ATPR 41-863, applied
Braverus Maritime Inc v Port Kembla Coal Terminal Ltd (2005) 148 FCR 68, distinguished
Campbell v Backoffice Investments (2009) 238 CLR 304, cited
Chowder Bay Pty Ltd v Paganin [2018] FCAFC 25, cited
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, applied
Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors [2021] QSC 85, cited
Dunlop v Department of Justice and Attorney-General (Qld) [2020] QSC 160, cited

Flogineering Pty Ltd v Blu Logistics SA Pty Ltd (No 3) (2019) 138 ACSR 172, cited
Fraser v NRMA Holdings Ltd (1995) 55 FCR 452, cited
Graham & Linda Huddy Nominees Pty Ltd & Anor v Byrne & Ors [2016] QSC 221, applied
Houghton v Arms (2006) 225 CLR 553, distinguished
In the matter of Orix Australia Corporation Ltd [2020] NSWSC 1770, applied
Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526, cited
Lee v Abedian [2017] 1 Qd R 549, considered
Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd (1994) ATPR (Digest) 46-130, distinguished
New Cap Reinsurance Corporation Ltd v Daya (2008) 216 FLR 126, applied
Orison v Strategic Minerals (1987) 13 ACLR 314, distinguished
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7) [2019] QSC 241, considered
Seafolly Pty Ltd v Madden (2012) 297 ALR 337, applied
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, applied

COUNSEL: M Jonsson QC for the respondent plaintiffs
M McDermott for the applicant defendants

SOLICITORS: WGC Lawyers for the respondent plaintiffs
HerdLaw for the applicant defendants

[1] In April this year the defendants were successful in securing orders striking out paragraphs of the plaintiffs' Amended Statement of Claim which were critical to its case against the second to sixth defendants.[1] The determination of the balance of their application was then postponed until it became apparent whether the plaintiffs would file a Further Amended Statement of Claim and, if so, whether the amended pleading could survive a further existential challenge.

[2] The plaintiffs thereafter sought to further plead such a case, culminating in a Further Further Amended Statement of Claim (FFASOC). The defendants have responded with a second application to strike out paragraphs critical to the case against the second to sixth defendants. There is some similarity between the issues raised by the second application and those raised by the first, having the inevitable consequence that parts of the ensuing reasons will resemble parts of the reasons given in the first application.

Background

[3] The first plaintiff, Mr Dunlop, conducted a caretaking and letting business at an apartment complex in Port Douglas known as The Port Douglas Queenslander (the complex). He did so as the assignee of a letting agent authorisation agreement (the letting agreement) and a caretaking engagement agreement (the caretaking

1 *Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors* [2021] QSC 85.

agreement) with the first defendant, the body corporate of the complex, conditioned that he reside in unit 4 of the complex, owned by the second plaintiff, Ms Knights. He needed to and did hold a letting agent licence under the *Property Occupations Act* 2014 (Qld) to carry on his business and meet the conditions of the letting agreement and, consequentially, the caretaking agreement.

[4] As a result of Mr Dunlop's conviction for using a carriage service to menace, harass or cause offence, the Department of Justice and Attorney-General, through its officers of the Office of Fair Trading, arrived at the view that the conviction was of a serious offence. If correct, the department's view would have had the consequence, pursuant to s 77 *Property Occupations Act*, that Mr Dunlop's licence was "cancelled on the happening of" the conviction. That view was later found to be wrong in *Dunlop v Department of Justice and Attorney-General (Qld)*[2] and this Court declared that Mr Dunlop was "not convicted of a serious offence" and his resident letting agent licence "was not cancelled by operation of s 77".

[5] The department, wrongly believing it was correct and not having determined Mr Dunlop's application for licence renewal when it fell due in the normal course, eventually recorded on its website that Mr Dunlop's licence had expired on 24 September 2019. In fact, s 60 *Property Occupations Act* had the effect the expired licence would continue in force until the renewal application was determined, which it had not been by the time of the ensuing actions of the body corporate.

[6] The body corporate enquired about the website entry with the department, which confirmed – wrongly as it turns out – that Mr Dunlop was no longer the holder of a resident letting agent licence. Wrongly believing the department was correct, and after consulting a solicitor – the sixth defendant, Mr Herd – and forewarning Mr Dunlop by remedial notices, the body corporate gave notice of an extraordinary general meeting of the unit owners to consider motions terminating the caretaking agreement and letting agreement.

[7] The FFASOC alleges at [15A] that by letter dated 11 October 2019 Mr Dunlop's solicitors wrote to the body corporate's solicitor Mr Herd explaining the purported cancellation of Mr Dunlop's licence was disputed, because he had not been convicted of a "serious offence", and cautioning, given the dispute, that the proposed motions should not be considered at the proposed meeting. However, the meeting did proceed on 24 October 2019 and it was resolved the letting and caretaking agreements should be terminated. Termination notices were issued in November 2019.

[8] Mr Dunlop and Ms Knights consequently filed a claim alleging that Mr Dunlop lost the realisable value of the business of $1,027,277.20 and Ms Knights suffered loss to the value of $120,000, being the diminution in realisable value of her unit because of the lost opportunity to sell it as part of a business. The defendants filed a conditional notice of intention to defend.

[9] There are six defendants. The first defendant is the body corporate and the sixth defendant its solicitor Mr Herd. The second to fifth defendants were members of the body corporate's committee.

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2 [2020] QSC 160.

The plaintiff's pleaded case

[10] The pleaded case against the body corporate alleges it acted in breach of contract and in breach of the *Australian Consumer Law* (*Schedule 2 Competition and Consumer Act*) 2010 (Cth). It is unsurprising the body corporate is a defendant, for it was the legal entity which terminated the letting and caretaking agreements, thus occasioning the alleged losses. The attempt to also attribute liability for those losses to the body corporate's committee members and its solicitor is obviously more controversial.

[11] The first plaintiff alone, seeks damages for breach of contract as against the first defendant only. Additionally, both the first and second plaintiffs seeks damages, pursuant to s 236 of the *Australian Consumer Law* (*Schedule 2 Competition and Consumer Act*) 2010 (Cth) against all six defendants.

[12] Section 236 provides a person suffering loss or damage "because of the conduct of another", if that conduct contravened chapter 2 or 3 of the *Australian Consumer Law*, may recover the amount of the loss or damage "by action against that other person, or against any person involved in the contravention". The alleged contraventions relied upon by the plaintiffs as against the second to sixth defendants are pleaded as contraventions by the second to sixth defendants in their own right, as distinct from contraventions by the body corporate in which the second to sixth defendants were involved.[3] The body corporate is not alleged to have committed contraventions in its own right, indeed it is not even alleged to have been acting in trade or commerce. It is only alleged to be liable per the *Australian Consumer Law*, in a way discussed further below, by reason of the conduct of the second to fifth defendants.

[13] The contravening conduct is said to be the making of "representations" by the second to fifth defendants and giving of "advice" by the sixth defendant, respectively constituting misleading or deceptive conduct or false or misleading conduct, contrary to ss 18(1) and 37(1) of the *Australian Consumer Law*.

[14] Sections 18 and 37 relevantly provide:

> "**18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. …"
>
> "**37 Misleading representations about certain business activities**
>
> (1) A person must not, in trade or commerce, make a representation that:
>
> (a) is false or misleading in a material particular; and
>
> (b) concerns the profitability, risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a

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[3] Section 2 of the *Australian Consumer Law* defines "involved" in a contravention in terms including aiding, counselling or being knowingly concerned in the contravention.

considerable extent, carried on at or from a person's place of residence."

[15] It is a requirement of those sections that the relevant conduct be engaged in, "in trade or commerce". The FFASOC alleges at [1] that both the committee and Mr Herd were acting in trade or commerce.

[16] Turning to the substance of the conduct, the FFASOC alleges the representations made by the second to fifth defendants were made within an explanatory schedule to the Notice of Extraordinary General Meeting distributed to the unit owners. Those representations, alleged at [16] of the FFASOC, are in summary that:

- Mr Dunlop's licence had expired; and
- in carrying on his business as a resident letting agent notwithstanding that he no longer held a valid and current licence he was acting contrary to law, in breach of s 100 *Property Occupations Act* 2014 (Qld); and
- that pursuant to clause 10.1.3 of the letting agreement and s 128(1)(c) *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) (the BCCM Regulation) the body corporate was entitled to terminate the letting and caretaking agreements; and
- that as Mr Dunlop's conduct was contrary to law the owners should vote "yes" to the relevant motions.

[17] It is pleaded at paragraph [17] of the ASOC that the committee members made the representations "in reliance upon advice to the effect summarised in" paragraph [16], given by Mr Herd. In other words, it is alleged Mr Herd's advice was to the same effect as the content of the representations. The FFASOC pleads at paragraph [17A] that the advice was distributed by post or email to the first, second, third, fourth and fifth defendants but is silent as to who distributed it and to whom it was addressed.

[18] The FFASOC pleads at [17B] and [17C] that the advice and representations were not subsequently qualified by communication of the matters explained and cautioned about in the letter dated 11 October 2019 from Mr Dunlop's solicitors to the body corporate's solicitor Mr Herd.

[19] The ASOC alleges at [18] that the owners present at the meeting resolved to terminate in a 9:0 vote, "[u]pon the <u>assurance</u> of the representations … being representations which were, in turn, <u>premised</u> upon the advice" of Mr Herd (emphasis added).

[20] The advice and representations are alleged at [23] of the FFASOC to be misleading or deceptive conduct or false or misleading conduct because Mr Dunlop's licence had not in law expired, he was not carrying on business without a licence, the Body Corporate was not entitled to terminate the letting and caretaking agreements and the second to sixth defendants had failed to make known the dispute and the uncertainty about those matters as cautioned of in the letter of 11 October 2019.

[21] The FFASOC pleads at [24] that because of the misleading, deceptive or false conduct a false supposition was induced in the voting owners, they resolved to terminate Mr Dunlop's authority as letting agent under the letting agreement and engagement as caretaking service provider under the caretaking agreement and, because of those and

other pleaded matters, including the first defendant's ensuing issuing of notices of termination, Mr Dunlop thereby lost the realisable value of his business and Ms Knights thereby suffered loss by diminution in the capital value of her lot 4.

The application

[22] The application seeks the striking out of certain paragraphs of the FFASOC, pursuant to r 171(1)(a) and (e) *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), on the basis they disclose no reasonable cause of action and are otherwise an abuse of the process of the Court. Those paragraphs and their subject matter are:

- [1(d)(ii) and (iii)] – which plead the second to fifth defendants were acting in trade or commerce;
- [23] – which pleads the advice and representations were misleading, deceptive or false conduct;
- [24] – which pleads the causal consequences of that conduct; and
- [25(c), (e) and (f)] – which plead the liability of all defendants to each plaintiff for damages under s 236 of the *Australian Consumer Law* as well as the second plaintiff's entitlement to interest.

[23] The substantive issues arising for determination in the application as argued are whether the FFASOC adequately pleads:

(1) material facts in support of the allegation that the first to fifth defendants were acting trade or commerce (the acting in trade or commerce issue);

(2) how the conduct of the second to sixth defendants caused loss (the causation issue);

(3) the causation of damages for lost opportunity (the damages issue).

The acting in trade or commerce issue

[24] The focus of the ensuing analysis of the acting in trade or commerce issue will be on the second to fifth defendants. The conclusions reached in that analysis will however have a direct consequence, explained later, for the pleaded position of the first defendant. The sixth defendant's position is not directly connected with the present issue, the defendants apparently accepting for present purposes that he was acting in trade or commerce in providing his advice.

[25] It is an essential element of proof of a breach of ss 18(1) and 37(1) *Australian Consumer Law* that the person who allegedly engaged in misleading, deceptive or false conduct did so in trade or commerce.

[26] The plaintiffs submitted to the contrary because the representations complained of involved the use of postal, telegraphic or telephonic services and s 6 *Competition and Consumer Act* 2010 (Cth) thus applied to extend the operation of ss 18 and 37 to conduct which did not occur in trade or commerce. That submission must be rejected. It is apparent the sub-section of s 6 relied upon, s 6(3), confers an extension of the reach of the provisions it refers to as if those provisions were expressly confined to conduct involving, inter alia, postal, telegraphic or telephonic services "and" as if references in Part XI of the Act included "reference to a person not being a

corporation". The extension is therefore not on point and in any event authorities such as *Australian Competition Commission v Hughes*[4] and *Seafolly Pty Ltd v Madden*[5] demonstrate such extensions do not remove the element of acting in trade or commerce.

[27] The meaning of acting "in trade or commerce" was explained by the High Court in the observations of the plurality in *Concrete Constructions (NSW) Pty Ltd v Nelson*:[6]

> "What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character." (emphasis added)

[32] That decision was concerned with s 52 *Trade Practices Act* 1974 (Cth), a predecessor provision to those of present interest in the *Australian Consumer Law*. While the former provision was directed at corporations and the latter legislation also applies to individuals, that difference would not logically alter the principle inherent in the above observation. Adjusted to the present context it requires that in making their representations the committee members were engaged in activities or transactions which, of their nature, bore a trading or commercial character.

[33] The second to fifth defendants were allegedly members of the committee of the body corporate. There is nothing about the general nature of the body corporate committee to suggest it goes without saying that it has a trading or commercial role. It exists as a requirement of s 8 *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) (BCCM Regulation). Moreover, it exists in support of a legal entity which is itself precluded from carrying on a business by s 96 *Body Corporate and Community Management Act* 1997 (Qld) (BCCMA).

[34] Admittedly s 96 does not preclude the body corporate from engaging in isolated activities or transactions which, of their nature, bear a trading or commercial character. Let it be accepted for present purposes that the body corporate's contractual relationship with Mr Dunlop could be said to have a trading or commercial character. Even if that were so, the fact remains that in that relationship it would have been the body corporate and Mr Dunlop who were the actors in trade or commerce.

[35] The pleaded circumstances of the alleged representations of the second to fifth defendants trend strongly against a conclusion that in making the representations the second to fifth defendants were acting in trade or commerce. Those circumstances include:

- the representations were representations about proposed resolutions for the determination of the body corporate,
- made to members of the body corporate,
- without apparent reward,

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4 (2002) ATPR 41-863, [22].
5 (2012) 297 ALR 337, [78] – [80].
6 (1990) 169 CLR 594, 604.

- in apparent performance of the committee members' role as committee members serving the administration of the body corporate,[7]
- in aid, merely by "assurances",
- of decision-making, by secret ballot,[8] internal to the body corporate,
- a body which is statutorily prohibited from and is not alleged to have been conducting a business.

[36] Notwithstanding these circumstances the FFASOC purports to plead commerciality at [17F] as follows:

> "17F. The making of the representations occurred in dealings or arrangements having an essentially commercial character because the representatives (sic) were contained within an Explanatory Schedule purportedly distributed to assist the owners of the lots that comprise Port Douglas Queenslander to decide whether or not to continue or, alternatively, to bring to an end the commercial arrangements effectuated by each of the Caretaking Agreement and the Letting Agreement for the benefit of the lot owners that comprise Port Douglas Queenslander."

[37] Paragraph [17F] evidently introduces the descriptor "commercial arrangements" to try and cast a commercial quality over events preceding the decision to terminate the agreements. The agreements which allegedly "effectuated" the so-called commercial arrangements are in evidence. The lot owners were not parties to the agreement. It may be accepted the body corporate's statutory role involves acting for the benefit of lot owners[9] and that the agreements carried some benefits, albeit indirectly, for the lot owners. The caretaking agreement at clause 5.6.1 excludes the need to provide caretaking services to any lots other than the common property, so its indirect benefit for lot owners was that the common property to which they had access would be maintained.[10] The letting agreement authorises the letting agent to provide letting services at the complex for the lot owners, so its indirect benefit or opportunity for lot owners was that the services of an on-site letting agent would be available to them to engage, if they elected to do so.[11]

[38] Paragraph [17F] reasons from vaguely characterising those indirect benefits or opportunities as the product of commercial arrangements effectuated by the agreements, to try and cast a commercial character over the representations, by asserting they were distributed to assist the lot owners to decide whether to continue the alleged commercial arrangements. In effect the plaintiffs would have it that the lot owners were to vote on a motion which could result in the body corporate terminating the agreements and thus, because the lot owners to whom the representations were made could potentially enjoy benefits or opportunities because of the existence of the agreements, the representations were made in trade or commerce. This drift to the edges in the hunt for a faint whiff of commerciality

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7 See, eg, s 71 *BCCM Regulation.*
8 Per s 128(2)(b) *BCCM Regulation.*
9 *BCCMA* eg ss 94, 158.
10 Affidavit of Christine Kolenc, Court doc 6 Exs p 31.
11 Affidavit of Christine Kolenc, Court doc 6 Exs pp 65-67.

overlooks the central requirement that the making of the representations has to have been conduct which of its nature bore a trading or commercial character.

[39] When the focus returns to that elementary requirement one can see it is a formidable difficulty for the plaintiffs' case that the alleged representations of the second to fifth defendants involved activity internal to the decision-making process of the body corporate, anterior to its decision to terminate. It is difficult to see how such conduct, involving no representations to the parties claiming loss, was conduct in trade or commerce.

[40] The point is well illustrated by reference to authority. In *Houghton v Arms*[12] employees of a company engaged to advise on website development made representations to the corporation's client which were misleading or deceptive and they were held to be personally liable pursuant to a like statutory provision to s 18 *Australian Consumer Law.* However, there is an obvious difference between *Houghton* and the present case. There the representations were not only made in a commercial setting, beyond the internal operations of the company, they were made to the party which suffered loss in reliance on them. Here the representations were internal to the operations of the body corporate and not made to an external party.

[41] The distinction is illustrated by *New Cap Reinsurance Corporation Ltd v Daya*.[13] There, the second defendant, Mr Williams, a former director of the plaintiff company, cross-claimed against three other former directors and the company's former chief financial officer alleging they had made misleading or deceptive representations to him during a company board meeting. This allegedly caused Mr Williams to fail to prevent the incurring of the company debts the subject of the main claim. After referring to the principle discussed in *Concrete Constructions (NSW) Pty Ltd v Nelson*, Barrett J rejected the viability of Mr Williams' crossclaim. His Honour found the representations occurred within a decision-making process which was internal to the company and which was anterior to and did not take place "in" trade or commerce.[14]

[42] The plaintiffs submitted, citing *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd*,[15] that the conduct of a person or entity providing services "as an intermediary for the benefit of another" might be characterised by reference to the nature of the ultimate objectives or purposes of the principal beneficiary for whom the services were undertaken or provided. The submission does not gel with the present facts. The conduct complained of was not towards the third party, Mr Dunlop, towards whom the plaintiffs submit the body corporate was acting as the owners' intermediary. Rather it was towards those involved in the internal processes of body corporate decision making.

[43] In *Braverus*, because the Port Kembla Port Corporation, which charged significant fees for its pilotage service, was regarded by the Court as being engaged in trade or commerce, it was concluded the corporation's maritime pilot, whose conduct in piloting a ship was an issue in the proceedings, was carrying out the pilotage in trade or commerce. Additional reasons for that conclusion were that the ship being

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12 (2006) 225 CLR 553.
13 (2008) 216 FLR 126.
14 (2008) 216 FLR 126, 136.
15 (2005) 148 FCR 68, 107-108.

piloted was itself engaged in trade or commerce, as was the Port Kembla Coal Terminal. Thus, the Court considered any conduct of the pilot, if misleading or deceptive, was in the trade or commerce of the corporation and provided in trade or commence.

[44] An obvious contrast between that case and the present is that the conduct of the corporation's pilot was, on the corporation's behalf, providing a service in trade or commerce to third parties whereas in the present case the solicitor and the executive committee members merely served the body corporate in its internal decision-making processes, and did not act as its agent in trade or commerce in servicing third parties. *Braverus* does not assist the plaintiffs.

[45] It will be recalled that the alleged contraventions relied upon by the plaintiffs as against the second to sixth defendants are pleaded as contraventions by the second to sixth defendants in their own right (as distinct from contraventions by the body corporate in which the second to sixth defendants were "involved" within the meaning of s 236 *Australian Consumer Law*). However, the plaintiffs submitted that to qualify as occurring in trade or commerce, the relevant conduct need not be in connection with the actor's own business but might instead be sufficiently connected with the business of some other person or corporation. In this context they cited *Fasold v Roberts*[16] relying upon *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd*[17] as authority for the proposition that public statements by a person not engaged in trade or commerce may be made in trade or commerce if designed to encourage others to invest or continue investments in a particular trading corporation. The claims in *Meadow Gem* were based on public statements by Ministers of the Victorian Government and the Registrar of Building Societies representing that investments in a building society, which later failed, were secure and without risk. *Meadow Gem* is an example of how conduct which is directed to third parties can attract liability because of its connection in support of or on behalf of the entity engaging in trade or commerce. But the relevant conduct was not directed to third parties here. The representations were internal to the body corporate's affairs.

[46] A case in which conduct within a company's internal decision-making process was held to be in trade or commerce is *Orison v Strategic Minerals*.[18] Orison, a corporate shareholder of Strategic, complained the passage of a resolution, at an extraordinary general meeting, authorising Strategic's acquisition of the shares of another company, was procured by misleading representations in an explanatory memorandum circulated by Strategic about the asset backing of those shares. French J found the forwarding of the memorandum with the notice to shareholders of the meeting was conduct in trade or commerce because it was a communication closely related and necessary to the acquisition of a significant asset.[19] That decision preceded *Concrete Constructions (NSW) Pty Ltd v Nelson* but in any event it differs from the present case. In *Orison* the party claiming loss was a member of

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16 (1997) 70 FCR 489, 530-531. (The circumstances in *Fasold* were not of themselves pertinent, rather it appears to have been cited because of its citation of the principle identified in *Meadow Gem*.)

17 (1994) ATPR (Digest) 46-130at 53,631- 53,632.

18 (1987) 13 ACLR 314.

19 (1987) 13 ACLR 314, 329. The reasoning has some parallels to that in *Cleary v Australian Co-operative Foods (No 2)* (1999) 32 ACSR 701, [114] and *NRMA Ltd & Anor v Yates* (2000) 18 ACLC 45, 52 [32].

the corporation, involved in an inherently commercial decision-making process which risked direct potential commercial advantage or disadvantage to its members. While that process was internal to the company's processes, it bore a commercial character as between the internal players affected by it. In contrast, the present decision terminated agreements with a party external to the body corporate and the internal process of reaching that decision had no inherently commercial character.

[47] As Black J observed in *In the matter of Orix Australia Corporation Ltd*,[20] when discussing the cases in this field, "the determination as to whether conduct is in trade or commerce is sensitive to the particular facts". However, it is tolerably clear the cases do not support a conclusion that conduct which is both internal to the decision-making machinations of a body corporate and involves no representation to the parties claiming loss is conduct in trade or commerce.

[48] It is unnecessary to speculate whether there could ever be a viable case of misleading, deceptive or false conduct in trade or commerce in such circumstances. It is sufficient to conclude that, as all of the above reasons expose, the FFASOC discloses no reasonable cause of action against the second to fifth defendants because it does not plead facts capable of supporting the allegation they were acting in trade or commerce.[21] Further, the paragraphs which purport to do so can fairly be described as an abuse of process, the plaintiffs having been on notice of the deficiency and failed to resolve it.

[49] It follows paragraphs [1(d)(ii)] and [1(d)(iii)] and, as they relate to the second to fifth defendants, paragraphs [23], [24], 25(c), 25(e) and 25(f) of the FFASOC should be struck out (the striking out of the latter paragraphs in this context flows from the failure to disclose a reasonable cause of action against the second to fifth defendants).

[50] Turning to the pleading of the acting in trade or commerce issue as against the first defendant body corporate, it will be recalled the case against the body corporate alleges liability for damages both for breach of contract and pursuant to the *Australian Consumer Law*. The pathway to the alleged breach of the *Australian Consumer Law* by the body corporate had not been addressed in the pleadings at the time of my April reasons when I observed:

> "It is also not apparent from the ASOC how the body corporate is said to be liable for the plaintiffs' loss or damage because of conduct contravening ss 18 and 37. Paragraph [25] pleads it to be so, "[i]n the premises", yet the conduct alleged to have breached ss 18 and 37 is alleged by paragraph [23] to be the representations and advice referred to paragraphs [16] and [17]. They are pleaded as the representations of the committee members and the advice of Mr

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20 [2020] NSWSC 1770, [32].

21 In light of this conclusion it is unnecessary to consider submissions of the defendants:

(a) based on reasoning in *Macks v Viscariello* (2017) 130 SASR 1, [233] – [234], that the fact the committee were fulfilling a statutory role would preclude a finding they were acting in trade or commerce; and

(b) based on the availability of statutory dispute resolution per s 238 *BCCMA*, including an adjudication application for an order declaring a resolution void, if made within time as per s 242.

> Herd. There is seemingly no pleading to the effect the representations were the representations of the body corporate. The closest is the allegation in [16] that the representations of the committee members were made "in their role as capacity as members of" the committee of the body corporate. This feature was not the subject of argument in the present application either but, again, in the event there is to be a further pleading, it would be prudent to address the apparent deficit."[22]

[51] The FFSOC purported to address that deficit by paragraph [17D] which pleads:

> "17D. The Plaintiffs invoke and rely upon s 100(1) of the *Body Corporate and Community Management Act* 1997 and say that the decision of the Second, Third, Fourth and Fifth Defendants to provide the Explanatory Memorandum in the terms it contained, and thereby to make the representations to the effect and in the circumstances referred to in paragraphs 16, 16A, 17 and 17C of the within pleading is thereby deemed also to have been the conduct of the First Defendant."

[52] The FFASOC does not otherwise identify a pathway for the body corporate's liability under the *Australian Consumer Law*. For instance, it does not plead that the body corporate was itself acting in trade or commerce in terminating the agreements. This option is so obvious – having been pleaded against all other defendants – that it must have been considered and rejected. Perhaps that was because, even if the termination was erroneous, it was not misleading, deceptive or dishonest towards Mr Dunlop. The decision was evidently taken to pursue the body corporate for the *Australian Consumer Law* component of the case only by piggybacking upon the conduct of the second to fifth defendants in deciding to make the representations.

[53] That attempt relies upon s 100(1) of the *BCCMA*, which provides:

> "(1) A decision of the committee is a decision of the body corporate."

This pathway to liability logically stands or falls upon whether the second to fifth defendants' decision to make the representations was a decision made in trade or commerce.

[54] The reasons given above as to why the FFASOC fails to adequately plead the representations were made in trade or commerce mean the same inadequacy applies to the decision to make the representations. Because the FFASOC does not plead facts capable of supporting the allegation the second to fifth defendants were acting in trade or commerce in deciding to make their representations, it discloses no reasonable cause of action via s 100(1) against the first defendant under the *Australian Consumer Law*.

[55] It follows that the various iterations of liability for damages pursuant to the *Australian Consumer Law* as they relate to the first defendant in paragraphs [25(c)], [25(e)] and [25(f)] of the FFASOC should be struck out.

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22 [2021] QSC 85, [25].

[56] Again, the plaintiffs having been put on notice by my previous reasons, the paragraphs which persisted with the still inadequately pleaded cause of action against the first defendant under the *Australian Consumer Law* can fairly be described as an abuse of process.

The causation issue

[57] The defendants submit the FFASOC remains deficient in its pleading of causation in respect of all of the defendants.

[58] Their complaint generally is that the FFASOC does not comply with what was described by Bond J, as his Honour then was, as a trite proposition of law in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7)*,[23] namely that:

> "[D]efendants are entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered, and which identification at least arguably establishes that link."

[59] His Honour made a similar point in *Lee v Abedian,*[24] observing:

> "The pleading device of merely cross-referencing back to events alleged to have happened is unlikely to be a satisfactory way of addressing a proper plea of causation. There must be a direct and unambiguous identification of the material facts relied on to establish the causal link which the law requires. And it must be something which makes narrative sense. The defendants should not be required to cherry pick through the pleading to work out what the case is that they have to meet in this regard."

[60] The defendants complain in respect of the second to sixth defendants that the FFASOC is deficient in relation to whether and how it is alleged those defendants' conduct "caused" the matters complained of.

[61] Proof of the statutory cause of action pursuant to s 236 *Australian Consumer Law* requires that the loss or damage is "because of" the contravening conduct. This expresses the common law notion of causation.[25] It is permissible for such causation to be established indirectly on a "but for" basis, via a chain of causation.[26] The FFASOC obviously purports to plead a chain of causation.

[62] Paragraph [18] of the FFASOC pleads:

> "18. Upon the assurance of the representations, being representations which were, in turn, premised upon the advice, the owners of lots in Port Douglas Queenslander present at the extraordinary general meeting of the First Defendant held on 24 October, 2019 and entitled to vote at that meeting resolved at that meeting (by a vote of 9:4, and zero against) to:

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23 [2019] QSC 241, [17].
24 [2017] 1 Qd R 549, 572.
25 *Flogineering Pty Ltd v Blu Logistics SA Pty Ltd (No 3)* (2019) 138 ACSR 172, [27], [28].
26 *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25, [61].

(a) Terminate the First Plaintiff's authority as letting agent under the Letting Agreement; and

(b) Terminate the First Plaintiff's engagement as caretaking service provider under the Caretaking Agreement;

(c) And to do so in each case upon the false supposition and assumption that the First Plaintiff was carrying on a business involving the supply of services to owners of lots in Port Douglas Queenslander contrary to law." (emphasis added)

[63] In my reasons delivered in April I observed:

> "The critical pleaded causal links, so far as the liability of Mr Herd is concerned are that the resolution to terminate occurred upon the assurance of the committee members' representations which were, in turn, "premised" upon the advice of Mr Herd. Curiously, in respect of that critical chain of causation the ASOC does not plead the resolution, which was a product of votes cast without voters having to give reasons for their vote, was "a result of" or "caused by" the representations or the advice, and at the highest puts what are presumably intended to be causal links as, respectively, an assurance and premise."[27]

[64] That observation appears to have prompted the inclusion of subparagraphs (aa) and (ab) to paragraph [24] of the FFSOC which now relevantly provides:

> "24. Because of the false and misleading and further, or alternatively, deceptive conduct referred to in the last preceding paragraph of the within pleading:
>
> (aa) A false supposition was induced in the owners of lots in Port Douglas Queenslander present at the Extraordinary General Meeting of the first Defendant held on 24 October, 2019 and entitled to vote at that meeting that or to the effect that the First Plaintiff was carrying on a business involving the supply of services to owners of lots in Port Douglas Queenslander contrary to law.
>
> (ab) The owners of lots in Port Douglas Queenslander present at the Extraordinary General Meeting of the first Defendant held on 24 October, 2019 and entitled to vote at that meeting resolved at that meeting as set out in paragraph 18 of the within pleading.
>
> …"

[65] The defendants submit this additional pleading fails to give rise to a sufficiently direct and unambiguous identification of the material facts relied upon to establish the causal link. I reject that submission to the extent it relates to the causal link involving the representations of the second to fifth defendants. It is now clear from the state of the pleaded case that the plaintiffs allege the owners of the lots voted as they did at the extraordinary general meeting because of the allegedly false,

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27 [2021] QSC 85, [23].

misleading or deceptive representations, including what they left unsaid,[28] and the false supposition which those representations induced in the owners. The same cannot be said of the clarity of the pleaded causal link involving the advice of the sixth defendant.

[66] While it may be accepted the sixth defendant, Mr Herd, was acting in trade and commerce in the sense that he was likely engaged on a commercial basis to provide legal advice, it is difficult to apprehend from the pleading how he is responsible for the causative consequences of such advice other than to the client or clients to whom he provided it, they being the only persons to whom he owed his professional duty.[29] If Mr Herd's client or others acted on that advice and thus caused detriment to a third party then it is prima facie their conduct which caused the detriment.

[67] It is well established from a line of authorities dealing with valuations for distribution to a broader audience than the party commissioning them, that direct reliance is not a pre-requisite for proof of causation.[30] But there is not even an allegation in the pleading as to who procured the advice of Mr Herd, let alone an allegation it was obtained for distribution to a broader audience. As earlier mentioned, the pleading mentions the advice was distributed to the first, second, third, fourth and fifth defendants but is silent as to who distributed it and to whom it was addressed. It does not follow that the conduct of Mr Herd in giving the advice equates to it being he who was the person who distributed that advice to the second to fifth defendants. Moreover, it is not pleaded that the advice was published to the voting owners. Nor is it pleaded how Mr Herd, not having made the representations which were made by the second to fifth defendants to the voting owners, induced the alleged false supposition and caused the owners of the lots to vote as they did.

[68] Even accepting the conduct of Mr Herd in providing the advice occurred in trade or commerce and that the representations of the second to fifth defendants were premised upon the content of the advice, it remains on the pleaded case that the conduct in making the representations was not conduct of Mr Herd. Nor, for reasons explained above, was that conduct of the second to fifth defendants adequately pleaded to have been in trade or commerce. Both of those features appear to constitute breaks in the chain of causation which are not surmounted by the pleading of the FFASOC.

[69] Paragraph [23] does not make the issue any clearer because, as the defendants correctly complain, it alleges matters broadly against all defendants indiscriminately, without separating matters relating to the representations and matters relating to the advice. Of itself, this would not be problematic because of what appears to be the allegedly common content of both the representations and advice. However, paragraph [24], in pleading causation, refers to the causal effect of the "conduct referred to in the last preceding paragraph". Because that preceding paragraph conflates the advice of the sixth defendant with the representations of the second to fifth defendants, the pleading obscures rather than exposes the causal

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28 As to the potentially misleading nature of omissions, see for example *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452. The plaintiffs' counsel referred to an array of other cases related to this point but they need not be recited for this is not a controversial point in the present context.

29 *Hill v Van Erp* (1997) 188 CLR 159, 167.

30 *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *Campbell v Backoffice Investments* (2009) 238 CLR 304, 351.

contribution of the advice – a causal contribution which is not made any clearer by the other paragraphs of the FFASOC.

[70] In my conclusion the FFASOC discloses no reasonable cause of action against the sixth defendant because it does not plead facts capable of supporting the allegation that the sixth defendant's advice caused the decision to terminate the agreements. Further, the paragraphs which collectively purport to do so can fairly be described as an abuse of process, the plaintiffs having been on notice of the deficiency and failed to resolve it.

[71] It follows that as they relate to the sixth defendant, paragraphs 23, 24, 25(c), 25(e) and 25(f) should be struck out.

The damages issue

[72] The pleading of loss in paragraph [24] of the FFASOC alleges for the first plaintiff a loss of the realisable value of his caretaking and management rights business and for the second plaintiff the diminution in value of her lot 4 because of the lost opportunity to realise that lot as part of a package including sale of the business. The pleading of those matters at [24(a)] and [24(b)] is pleaded as a basis for calculation of damages.

[73] The defendants complain that the material facts giving rise to those two allegations are not pleaded, nor is any allegation of what would have been done but for the alleged breach as part of those complaints. It is also highlighted that the lost realisable value of the business and the diminution in the capital value of lot 4 are each calculated on an assumption of sale of the business and lot 4 as part of a package "during the period ending 14 July 2020". The FFASOC pleads at [13] that the application for renewal of Mr Dunlop's licence was not determined by the department until that date but it is not apparent from the pleading how that date is relevant to the pleaded loss.

[74] It is significant to the present argument that the pleading of loss of each plaintiff is premised upon the sale of the business and unit as part of a package. It is thus a pleading of a loss of commercial opportunity.

[75] In the High Court in *Sellars v Adelaide Petroleum NL*[31] the plurality observed:

> "[D]amages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued."[32]

[76] Explaining the significance of the reasoning in *Sellars* to the pleading of a loss of commercial opportunity, Jackson J said in *Graham & Linda Huddy Nominees Pty Ltd & Anor v Byrne & Ors:*[33]

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31 (1994) 179 CLR 332.
32 (1994) 179 CLR 332, 355.
33 [2016] QSC 221.

> "First, it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity. Second, it is also necessary that the plaintiff pleads what it would have done, where what the plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation. Third, it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required. Fourth, where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained the hoped for or expected benefit under a transaction which did not occur, it is to be expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved."[34]

[77] In the present case none of those matters are so obvious as to go without saying. As much is demonstrated by the messy contextual overlay of the department's involvement in limiting what the plaintiffs would have done. After all, whether Mr Dunlop disputed it or not, the department had purported to cancel Mr Dunlop's licence. It is unnecessary to determine whether, as the defendants submitted by reference to ss 100(1) and 102(3) *Property Occupations Act* 2014 (Qld), this would have legally impeded Mr Dunlop's ability to assign the agreements. Nor is it necessary to determine whether doubts attending the continuity of the force of Mr Dunlop's licence and thus his respective appointments may have impaired the ease and commerciality of the sale of the business and unit as part of a package. The point for present purposes is that the department's actions so complicate the case that the claimed loss of opportunity is not readily apparent in the absence of adequate pleadings.

[78] In the present case the lost opportunity is identified only generally. For instance, there is no explanation of whether the sale of the business would have been accompanied by assignments of any agreements with unit owners by which the letting component of the business may have made much of the profit claimed to have been lost. Further, the counter factual – what the plaintiffs would have done if there had not been a contravention of the *Australian Consumer Law* – is not pleaded. It also appears the plaintiffs are relying upon a loss of a 100 per cent possibility yet the facts by which that certain outcome would have been achieved are not pleaded.

[79] Because those deficiencies would tend to prejudice the fair trial of the proceeding, paragraph [24] of the FFASOC should be struck out. I concluded above that [24] should be struck out because of the failure to properly plead a cause of action. But for the overlay of that more concerning problem I may have been persuaded that the provision of further and better particulars of paragraph [24] was an adequate remedy in preference to a strike out.

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[34] [2016] QSC 221, [50].

Conclusion

[80] The defendants' second application has been wholly successful. I have concluded paragraphs [1(d)(ii)], [1(d)(iii)], [23], [24], [25(c)], [25(e)] and [25(f)] of the FFASOC should be struck out and will so order.

[81] It remains to determine whether the plaintiffs should be permitted to replead or whether there ought be orders bringing some finality to the attempt to pursue the defendants for damages under the *Australian Consumer Law*.

[82] If the deficiencies just discussed in respect of the pleading of loss in [24] were the only pleading deficiencies it would be uncontroversial that the plaintiffs should have leave to re-plead that paragraph, for the history of the matter does not suggest they would be unable to adequately plead that aspect. The same cannot be said of the pleading of liability under the *Australian Consumer Law*.

[83] As these reasons have exposed, the plaintiffs seemingly cannot adequately plead facts capable of establishing a cause of action against the defendants under the *Australian Consumer Law*. They fail at the element of acting in trade or commerce in respect of the first to fifth defendants and they fail at the element of causation in respect of the sixth defendant.

[84] My tentative view is that the history and substance of the matter trends against the plaintiffs being given yet another opportunity to re-plead their case under the *Australian Consumer Law* and in favour of orders being made to bring finality to that aspect of the proceeding. However, as was the consensus in the course of argument, it is appropriate that the parties, once apprised of my reasons, should each have an opportunity to be heard as to what consequential orders should be made. There should not in the meantime be any purported re-pleading.

[85] It will also be necessary to hear the parties further as to what orders should be made in respect of the unresolved aspects of the first application and as to costs.

Orders

[86] My orders are:

1. Paragraphs [1(d)(ii)], [1(d)(iii)], [23], [24], [25(c)], [25(e)] and [25(f)] of the Further Further Amended Statement of Claim are struck out.

2. The plaintiffs may not file any further repleading of the statement of claim pending the Court's orders as to the future conduct of that part of the proceeding brought under the *Australian Consumer Law.*

3. The parties will be heard at 9.15am Wednesday 27 October 2021 (out of town parties having leave to appear by telephone or video-link) as to:

    i. what orders should be made as to the future conduct of that part of the proceeding brought under the *Australian Consumer Law*;

ii. what orders should be made in respect of the unresolved aspects of the application filed 7 December 2020;

iii. costs in respect of the applications filed 7 December 2020 and 9 June 2021.