Supreme Court

New South Wales

Case Name:	Massalaski v The Owners SP 90255 & Ors.
Medium Neutral Citation:	[2023] NSWSC 23
Hearing Date(s):	3 November 2022; further submissions (all parties) filed 17 November 2022
Date of Orders:	1 February 2023
Decision Date:	1 February 2023
Jurisdiction:	Common Law
Before:	Chen J
Decision:	(1) Order, pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW), that the proceedings against the second and third defendants be dismissed. (2) Order that the plaintiff pay the second defendant's costs of, and incidental to, the notice of motion dated 27 July 2022. (3) Order that the plaintiff pay the third defendant's costs of, and incidental to, the notice of motion dated 26 July 2022. (4) Order that the plaintiff pay the second and third defendant's costs of the proceedings. (5) List the matter (so far as it involves the first defendant) before the Common Law Registrar on 8 February 2023. (6) Direct that the plaintiff file an affidavit of service or, if the statement of claim has not been served on the first defendant, an affidavit to that effect by 6 February 2023, 5 PM.
Catchwords:	CIVIL PROCEDURE – Summary disposal – Dismissal of proceedings – Frivolous or vexatious proceedings – Whether proceedings constituted collateral attack on prior judicial decision

Legislation Cited:	Civil Procedure Act 2005 (NSW) Community Land Development Act 1989 (NSW) Family Law Act 1975 (Cth) Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) Property and Stock Agents Act 2002 (NSW) Strata Schemes Development Act 2015 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Arthur J S Hall & Co v Simons (a firm) [2002] 1 AC 615 Community Association DP 270212 v Registrar General for the State of NSW (2004) 62 NSWLR 25; [2004] NSWSC 961 Gunns Ltd v Meagher [2005] VSC 251 Hunter v Chief Constable of the West Midlands Police [1982] AC 529 Johnson v Gore Wood & Co [2002] 2 AC 1 Massalski & Riley [2019] FamCA 1013 Massalski & Riley [2021] FamCAFC 116 Massalski & Riley [2022] FedCFamC1A 128 Massalski & Riley [2022] FedCFamC1F 36 McGuirk v The University of New South Wales [2009] NSWSC 1424 Simmons v NSW Trustee and Guardian [2014] NSWCA 405 Three Rivers District Council v Bank of England [No 3] [2003] 2 AC 1; [2001] UKHL 16 Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28 UBS AG v Tyne (2018) 265 CLR 77; [2018] HCA 45 Victorian Railways Commissioners (1949) 78 CLR 62; [1949] HCA 1 Young v Hones [2013] NSWSC 580
Category:	Principal judgment
Parties:	Zofia Massalaski (Plaintiff) (self-represented) The Owners Strata Plan No 90255 (First Defendant) Alan Riley (Second Defendant) Helen Hughes (Third Defendant)
Representation:	Counsel: Mr J-J Loofs SC and Mr L James (Second Defendant) Ms C Coventry (Third Defendant)

	Solicitors: Byrnes Legal (Second Defendant) Gilchrist Connell (Third Defendant)
File Number(s):	2022/98530
Publication Restriction:	Non-publication orders made

JUDGMENT

Introduction

1 These proceedings arise out of, or relate to, the former de facto marriage between the plaintiff and Mr Riley ('the second defendant'); SP 90255 – a strata development located at 29 Bangalow Street, Ettalong Beach, NSW; and a selling agent, Helen Hughes (the 'third defendant'), involved in the sale of one lot in that strata plan in late 2021.

2 Since the breakdown of the plaintiff's and second defendant's relationship, there has been an extraordinary amount of litigation involving them. That litigation has not been confined to the Family Court of Australia (where property settlement orders were initially sought), but has spilled into many other courts and tribunals. Most – if not all of it – has been commenced by the plaintiff. Sometimes it has involved others. Here it involves a selling agent. In other cases, it has involved the legal representatives who have acted for the second defendant.

3 The current proceedings represent the latest round of litigation.

4 The second and third defendants seek orders that the proceedings be summarily dismissed or, in the alternative, that the statement of claim be struck out.

5 In my view the primary orders sought by each of those defendants should be made.

Background

6 From around early 2009, the plaintiff and Mr Riley were in a de facto marriage. They have since separated, although they are at odds when this occurred: Mr Riley is of the view that the relationship ended in October 2012, whereas the

plaintiff is of the view that the relationship ended in October 2013. For present purposes, precisely when they separated does not matter.

7 Early in their relationship, they had purchased property, as tenants in common in equal shares, in Bangalow Street, Ettalong. The purchase price was $330,000. Each made financial contributions towards the purchase of the property. The plaintiff borrowed her share of the purchase price from Mr K. (To signpost: the basis of the plaintiff's claim in damages against both defendants is said to arise out of her inability to repay the funds advanced by Mr K for the construction of the property at 29 Bangalow Street: see [35], below).

8 Before sketching the facts in more detail, it is necessary – in view of the centrality of Mr K to the plaintiff's claim in damages – to set out some detail of the connection between him and the plaintiff.

9 In the proceedings in the Family Court commenced following the breakdown in the relationship between the plaintiff and the second defendant (those proceedings were commenced in 2015, but heard in 2019 by McClelland DCJ – see [11], below), the marital status of the plaintiff and Mr K was not in issue. However, McClelland DCJ noted (a) that plaintiff and Mr K were married in 1982; (b) the plaintiff acknowledged that she and Mr K "maintained a cordial relationship which had intermingled finances due to a long marriage"; and (c) Mr K gave evidence that he had "filed for the divorce" between himself and the plaintiff, and that "he anticipated that would take place in February 2019": [2019] FamCA 1013 at [8] and [9].

10 Returning to the narrative, following the purchase of the property, plans were submitted, and ultimately approved, for a strata subdivision. Two units were constructed on the land between May 2009 and May 2010. They are unit A (Lot 1) and unit B (Lot 2).

11 On 30 January 2015, following the breakdown of their relationship, the plaintiff commenced proceedings in the Family Court of Australia seeking property settlement orders.

12 Those proceedings were disposed of, by final orders, made by McClelland DCJ on 24 December 2019: [2019] FamCA 1013. The substance of relevant orders were:

(1) The parties were to "expeditiously do all acts and things and sign all documents required to complete the registration of the proposed strata plan and associated dealings of the Bangalow Street property": order 3.

(2) The plaintiff was to receive the title to Lot 1: order 7.

(3) The mortgage secured over Lot 1 was to be discharged, but secured over Lot 2: order 5(a).

(4) Mr Riley was to receive the title to Lot 2: order 9.

(5) The mortgage secured over Lot 1 was to be discharged, but secured over Lot 2: order 5(a).

(6) A number of other orders were also made to, if necessary, give effect to the substantive orders – including empowering the Registrar of the Family Court to be appointed to execute "all such documents in the name of the defaulting party and do all acts and things necessary to give validity an operation to such documents…": order 16.

13 On 12 February 2020, consent orders were made in the Family Court. Those orders envisage not only the registration of the strata plan (orders 3, 4 and 8), but also the potential sale of Lot 2: order 3.

14 By amended notice of appeal filed on 16 July 2020, the plaintiff appealed from the decision and orders of McClelland DCJ.

15 The plaintiff refused to sign all documentation that she had been ordered to sign to enable: (a) the strata plan to be registered: (b) the mortgage on the title of Lot 1 to be discharged; and (c) the transfer of the plaintiff's interest in Lot 2 to be transferred to Mr Riley. In light of that refusal, a Registrar of the Court executed the necessary documents.

16 The strata plan was registered on 16 April 2021. Following registration of the strata plan, Lot 1 became known as 29A Bangalow Street, and Lot 2 became known as 29B Bangalow Street.

17 On 29 May 2021 Lot 2 was transferred to Mr Riley (SOC, par 13). Skipping ahead slightly: Mr Riley appointed the third defendant to be the selling agent for Lot 2: SOC, par 7. He entered into a contract of sale with Jean-Francois Collard and Rosie Marie Collard ('the purchasers') on 24 September 2021, and

settlement occurred on 29 November 2021. The purchasers remain the registered owners of Lot 2: SOC, par 4(b).

18 It is convenient at this point to deal with the 'position' of Lot 1. The plaintiff alleges that pursuant "to the orders of the Family Court from 24 December 2019, the plaintiff has the right to transfer Riley's interest in Lot 1 to her name": SOC, par 14. It appears, however, that the plaintiff has declined to execute a transfer "in consideration of the liabilities created by Riley, that could be passed on to her, as the 'original owner'": SOC, par 15.

19 Returning once more to the narrative, by reasons delivered and orders made on 13 July 2021, the Appeal Division of the Family Court dismissed the plaintiff's appeal: [2021] FamCAFC 116.

20 On 10 August 2021 – that is, less than a month after her appeal was dismissed – the plaintiff made an application, to Harper J (in what became known as the Federal Circuit and Family Court of Australia (Division 1), "to vary final property adjustment orders": *Massalski & Riley* [2022] FedCFamC1F 36 at [1]. In that application, Mr K sought leave to intervene: FedCFamC1F 36 at [30]. Mr Riley, by way of response, sought summary dismissal of the plaintiff's application (amongst other orders), as well as dismissal of Mr K's application to intervene.

21 Further applications were also filed by the plaintiff and Mr K, but it is presently not necessary to refer to them, except as follows. On 12 October 2021, the plaintiff advised Harper J of the sale of Lot 2, and sought an order "preventing distribution of the proceeds of sale, pending further order": at [37]. To accommodate this further application, Harper J relisted the matter for the "hearing of further interim issues to 4 November 2021 in order to account for the proposed date of settlement, which was 5 November 2021": at [38]. Mr Riley undertook to the Court that "he would take no steps to settle the sale of 29B up to and including 12 pm on 5 November 2021, pending any further order".

22 The further hearing took place on 4 November 2021, and Harper J reserved judgment.

23 By reasons delivered on 4 February 2022, Harper J made a suite of orders dismissing the applications made by the plaintiff and Mr K: *Massalski & Riley* [2022] FedCFamC1F 36. None of the orders of McClelland DCJ were disturbed. In relation to the application to restrain the sale of Lot 2, Harper J noted that the plaintiff did *not* seek an extension of Mr Riley's undertaking "beyond 5 November 2021, nor did she seek injunctive relief beyond that date": at [39]. Notwithstanding, Harper J noted that he "would not have acceded to any application for further interlocutory relief concerning the sale of the Ettalong property, even if one had been made": at [39]. Harper J further noted that the settlement of the sale of Lot 2 took place on 29 November 2021, such that the "orders sought by the [plaintiff] seeking to restrain the sale have become otiose": at [40]. Later, Harper J confirmed that he would not have made the order in any event – that is even if Lot 2 had not been sold: at [107].

24 Whilst judgment remained reserved, on 3 December 2021, the plaintiff filed a further application that sought orders (inter alia) for "the termination of strata plan SP90225" and for the joinder of the purchasers of Lot 2 to the proceedings": at [41]. Mr K filed another application to intervene. Both applications were dismissed: at [151]-[152].

25 The plaintiff appealed this decision and it was initially stayed, but then dismissed due to the failure to provide security for costs. An application was made seeking to review this decision, but it was dismissed by Aldridge J on 15 August 2022: *Massalski & Riley* [2022] FedCFamC1A 128.

26 On 5 August 2022, Harper J made a number of further orders – including: dismissing "all extant applications" instituted by the plaintiff in the Federal Circuit and Family Court of Australia, pursuant to s 102 QB(2)(a) of the *Family Law Act 1975* (Cth) – order 1; prohibiting the plaintiff "from instituting proceedings in any court having jurisdiction" under the *Family Law Act* – order 2; appointing a receiver "of the income and property of the [plaintiff] to give effect to" a range of orders, including orders for the payment of costs by the plaintiff to Mr Riley – order 3; to empower the Receiver to sell any assets collected by him pursuant to the orders, "and after payment of the costs and expenses of sale and payment of registered encumbrances, is to apply the net

proceeds of such sale" to the payment of the Receiver's fees and costs orders made against the plaintiff in favour of Mr Riley – order 10; for the plaintiff to "deliver up to the receiver vacant possession" of Lot 1 – order 11; for the plaintiff to "do all things" to cause Lot 1 to be transferred into her name "consistent with the orders made by the Deputy Chief Justice McClelland on 24 December 2019 and thereafter to be conveyed to a purchaser of that property upon sale of that property by the receiver"– order 12; and in default of the plaintiff executing any document necessary to give effect to the orders made, authorising and directing a judicial registrar of the Court, to sign those documents – order 14.

27 Having set out those matters of background, I will next explain the plaintiff's claim against each defendant.

The nature of plaintiff's claims

The statement of claim: introduction

28 The statement of claim filed in this Court named three defendants: the owners of the strata plan are the first defendants; Mr Riley is the second defendant; and Helen Hughes is the third defendant. The strata plan was not involved in the current applications, and their involvement can be put to one side.

The allegations against Mr Riley

29 Rather than attempt to summarise the relief claimed, it is simpler to set out:

> "RELIEF CLAIMED
>
> (1) That pursuant to Section 135, of the Strata Schemes Development Act 2015, the Strata Plan SP 90255 be terminated.
>
> (2) That the Second Defendant and Third Defendant be ordered to refund the money that was paid by Jean-Francois Collard and Rosie Marie Collard for Lot 2, within the strata scheme SP 90255, to enable restoration of a Torrens title to the property.
>
> (3) That Second Defendant does all things necessary to register all documents required for the folio to be updated to reflect termination of the strata scheme and restoration of the Torrens title, to be registered in the name of [Ms Massalaski], and [Mr Riley], as tenants in common in a fee simple in equal shares.
>
> (4) Damages.
>
> (5) Costs.
>
> (6) Such other orders or relief as this honourable Court thinks fit".

30 The matters set out in the SOC are wide ranging. The SOC makes complaints about the strata plans registered: "These plans are wrong" and that the "titles created in effect of registration of the strata scheme, were injured at the time of registration, because the plans of subdivision do not reflect the actual boundaries between the units": SOC, pars 10 and 11. It also makes complaints about the property having "building defects" – and, so far as it is understood, it is further alleged that the strata plan was "registered to pass Riley's liability for his failure to deal with building defects onto the owners corporation, where such repairs could have been done under a warranty": SOC, par 18.

31 The SOC also alleges that the plaintiff "became a casualty of abuse of powers of the Family Court, where the order to register the strata plan was obtained without intention to comply with the Strata Schemes Management Act 2015" and that the order by that Court "giving right to register the strata scheme, without [the] plaintiff's consent, was made without jurisdiction": SOC, pars 34 and 35.

32 Beyond these paragraphs, the SOC contains a considerable amount of extraneous material. Large portions of it are not easy to follow. I have, however, in my consideration of the claim against Mr Riley, summarised the four kinds of relief that the plaintiff seeks against him: see [74], below. It is unnecessary to do more.

The allegations against Helen Hughes

33 In connection with the claim against Hughes, the genesis of the complaint relates to her involvement in the sale of Lot 2 to the purchasers in late 2021. Skipping ahead – I will return to what is alleged shortly – the causes of action raised against Hughes are three: first, a fraudulent inducement claim; secondly, a claim for breach of s 63 of the *Property and Stock Agents Act 2002* (NSW); and, thirdly, a claim for breach of s 52 of the *Property and Stock Agents Act*.

34 The nub of the conduct giving rise to the underlying complaint, said to support these causes of action, are as follows:

(1) At the time when the sale of Lot 2 was settled, "there were pending proceedings in the Family Court where the plaintiff was seeking an order to stay such sale and subsequent order to terminate the strata scheme": SOC, par 19.

(2) The effect of transferring the property to the purchasers was that "the Family Court was prevented from dealing with such property and granting orders sought by the plaintiff": SOC, par 21.

(3) The purchasers were "subjected to fraud by having the property which is not realisable sold to them before all court proceedings related to such property could be determined, and before all problems affecting the strata scheme could be fully exposed": SOC, par 22.

(4) There "is no other solution now, but to terminate the strata scheme and to order the second and third defendant to refund the money they received from [the purchasers], so the title of the property could be restored to a Torrens title. The property will then be able to be returned to the Family Court to be dealt with according to law and equity": SOC, par 23.

(5) Hughes "acted fraudulently, commencing marketing of the property in March 2021, without [the] plaintiff's permission and without a contract for sale": SOC, par 38.

(6) The plaintiff "informed Hughes verbally and through emails, that there were court proceedings in relation to the property in the Supreme Court and in the Family Court, and that she should not be selling the property until all issues were resolved": SOC, par 48.

(7) Hughes "acted fraudulently, intentionally preventing all potential buyers from discovering the issues that affected the strata scheme…" – alleged to be "notices which informed the buyers that there was a problem with registration of the strata plan" and by Hughes removing "notices which was displayed … informing buyers about the issue with the boundaries": SOC, par 50.

(8) Hughes "deceitfully induced [the purchasers] into entering into a contract to buy lot 2 by failing to disclose the issues which would have been discovered by them, if Hughes did not remove such notices": SOC, par 51.

(9) Hughes acted fraudulently in "failing to disclose to the [purchasers] the information that was provided to her by the plaintiff in relation to problems with the registration of the strata scheme": SOC, par 52.

35 The plaintiff, in paragraphs 104-109 of the SOC, sets out the alleged loss and damage. In those paragraphs, the plaintiff does not seek to distinguish between the conduct of the defendants in connection with the loss and damage allegedly suffered. The essence of what is alleged in those paragraphs is as follows:

(1) By selling Lot 2, "Riley and Hughes jointly prevented the Family Court from granting orders to stay the sale of [Lot 2] to enable recovery of funds advanced for the construction of the property by Mr K": SOC, par 104.

(2) The Family Court, by orders made on 4 February 2022, summarily dismissed the plaintiff's application to stay the sale on the basis that the property had been sold, "therefore the application to stay such a sale had no prospect of success": SOC, par 105.

(3) The "effect of dismissal of the applications in the Family Court in consequence of selling the property" was that the plaintiff "was deprived of a legal title to the property"; she was unable to "recover the equity that she holds in the property"; and she was unable "to repay the funds advanced by Mr K for the construction of the property at 29 Bangalow Street": SOC, pars 106(a)-(c).

(4) The consequence of the orders made by the Family Court has the effect that "Riley and Hughes are jointly liable for depriving the plaintiff of her ability to repay the funds which [were] advanced by Mr K for the construction of the property at 29 Bangalow Street": SOC, par 107.

(5) In the result, the plaintiff claims damages "for not being able to access the equity that she holds in the property at 29 Bangalow Street, so she could repay the funds advanced by Mr K for the construction of the property at 29 Bangalow Street, together with interest rates for the sum of $400,000": SOC, par 108.

Summary relief: principles

Rule 13.4 of the Uniform Civil Procedure Rules 2005 (NSW)

36 The power to grant summary relief is contained in r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW) (the 'UCPR'). It provides:

> (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings—
>
> (a) the proceedings are frivolous or vexatious, or
>
> (b) no reasonable cause of action is disclosed, or
>
> (c) the proceedings are an abuse of the process of the court,
>
> the court may order that the proceedings be dismissed generally or in relation to that claim.
>
> (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

37 A purpose of r 13.4 is to "save the defendant from the cost, delay and vexation in having to defend clearly untenable proceedings" and to protect "the interests of the public in not having scarce judicial resources wasted in dealing with frivolous applications": *Ugur v Attorney-General for NSW* [2019] NSWCA 86 at [70] (White JA, Meagher and Brereton JJA agreeing).

38 The relevant principles that govern summary relief are well-established*: Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 84-85; [1949] HCA 1*;*

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, 128-129; [1964] HCA 69 ('*General Steel*'). In *General Steel*, Barwick CJ put the matter thus (at 129):

> The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
>
> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.

39 The Court of Appeal summarised the relevant principles in *Simmons v NSW Trustee and Guardian* [2014] NSWCA 405 at [196]-[200] (per Gleeson JA, Beazley P and Barrett JA agreeing):

> [196] It is not in dispute that 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his cause by the appointed tribunal': General Steel Industries Inc v Commissioner for Railways (NSW) (General Steel) [1964] HCA 69; 112 CLR 125 at 130 (Barwick CJ).
>
> [197] More recently in Agar v Hyde [2000] HCA 41; 201 CLR 552, Gaudron, McHugh, Gummow and Hayne JJ said at [57]:
>
> > 'Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'
>
> [198] Subsequent authorities have reaffirmed that formulation: see Batistatos v Roads and Traffic Authority (NSW) [2006] HCA 27; 226 CLR 256 at [46]; Spencer v Commonwealth at [24].
>
> [199] In Shaw v New South Wales [2012] NSWCA 102, Barrett JA (with whom Beazley, McColl, Macfarlan JJA, and McClellan CJ at CL agreed) expressed the test for summary dismissal as follows at [32]:
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> > 'The question is … whether the claims in question are so obviously untenable or groundless that there is 'a high degree of certainty' that they will fail if allowed to go to trial; and whether this is one of the 'clearest of cases' in which the court may accordingly intervene to prevent the claims being litigated.'
>
> [200] Further, that assessment is to be made taking the plaintiff's case at its highest. The party applying for summary dismissal must accept the truth of all allegations in the statement of claim, and the ranges of meaning which the

> assertions of fact in the statement of claim are capable of bearing: Penthouse Publications Ltd v McWilliam (Court of Appeal (NSW), Priestley and Meagher JJA and Wardell AJA, 15 March 1991, unrep); Agius v New South Wales [2001] NSWCA 371 at [24].

Rule 14.28 of the Uniform Civil Procedure Rules 2005 (NSW)

40 The power to strike out a pleading, in whole or part, is contained in r 14.28 of the UCPR. It provides:

> (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading—
>
> > (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
> >
> > (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
> >
> > (c) is otherwise an abuse of the process of the court.
>
> (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

41 Where a deficiency in a pleaded claim is curable by amendment, the Court may strike out the proceeding.

42 In those circumstances, the appropriate rule is 14.28(1)(b). A pleading "has a tendency to cause prejudice, embarrassment or delay in the proceedings" if it "unintelligible, ambiguous, vague or too general": *Gunns Ltd v Meagher* [2005] VSC 251 at [57] ('*Gunns*'). Pleadings that do not comply with the general or specific principles of pleading (see [44]-[47], below) may also be within this rule.

Some principles of pleading

43 The relevant legal principles – either the general or specific ones – that apply to pleadings are well-established.

44 In an application under rr 14.28(1)(a)-(c) of the UCPR, it is generally appropriate to consider at least three of them.

45 The first are the general principles that inform the nature and function of a pleading. In *Young v Hones* [2013] NSWSC 580 at [79]-[80], Garling J succinctly summarised them in these terms:

> [79] The function of pleadings is to state with sufficient clarity the case that must be met by a defendant. In this way, pleadings serve to define the issues for decision and ensure the basic requirements of procedural fairness, namely

> that a party should have the opportunity to meet a case against him or her: *Banque Commerciale SA v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 at 286, 296, 302-3. As well, the issues defined in the pleadings provide the basis upon which evidence may be ruled admissible or inadmissible at trial upon the ground of relevance: *Dare v Pulham* [1982] HCA 70; (1982)148 CLR 658 at 664.
>
> [80] Proper pleading is of fundamental importance in assisting courts to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s 56 *Civil Procedure Act 2005*; *McGuirk v The University of NSW* [2009] NSWSC 1424 at [24] per Johnson J.

46 A number of these principles are reflected in the UCPR: see rr 14.6-14.20.

47 The second are more specific principles that apply to particular claims. For example, certain matters must be specifically pleaded "that, if not pleaded, may take the defendant by surprise": r 14.14 of the UCPR.

48 The third relates to the function of the Court. It is *not* the role of the Court to assist parties in drafting pleadings which comply with the UCPR: *Gunns* at [57]; *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [35]. Rather, as noted in *Gunns* at [57], the Court is concerned with ensuring

> that pleadings are within the rules and fulfil the functions for which they exist. In particular, it must ensure that one party is not placed at a disadvantage by the failure of another to provide a proper, coherent and intelligible statement of its case …

49 It is unnecessary to consider whether to strike out the plaintiff's claim in light of the fundamental deficiencies in the way in which it has been pleaded because the second and third defendants are, in my view, entitled to the primary relief – summary dismissal – they seek. I deal first with the application by Ms Hughes, and thereafter Mr Riley.

The claim against Helen Hughes

Introduction: the argument for summary dismissal

50 The third defendant seeks an order that the proceedings against her be dismissed on the basis that the proceedings are "an abuse of process and/or do not disclose a reasonable cause of action". These submissions specifically seek to engage rr 13.4(1)(b) and (c) of the UCPR.

51 In relation to abuse of process, it was (in essence) argued, relying upon the decision in *UBS AG v Tyne* (2018) 265 CLR 77; [2018] HCA 45 (*'UBS*'), that to

allow this claim to proceed would be to permit a 'collateral attack' on the orders made by McClelland DCJ and Harper J.

52 In relation to the failure to disclose a reasonable cause of action, it was argued that this conclusion should be reached because the allegations of loss and damage (which are directed to the claims advanced against *both* defendants) – *viz*., that she suffered loss and damage when Lot 2 was sold and, further, in consequence of the Family Court being prevented from staying the sale of Lot 2 because it *was* sold – are fundamentally flawed because: (a) Mr Riley had the *right* to sell that property pursuant to the orders made by McClelland DCJ on 24 December 2019; and (b) Harper J did *not* summarily dismiss the plaintiff's claim for a stay of the sale to the purchasers on the basis that it had been sold, or was about to be. The *correct* position, as set out in [23], above, is that Harper J noted that the plaintiff did not in fact pursue her application to restrain the sale of Lot 2 and, further, Harper J held that even if such application had been pressed, that application would have been dismissed. Put another way, it was argued that the orders of McClelland DCJ and Harper J – when viewed simply as 'facts' – precluded a subsequent court from making the findings that were essential to the pleaded cause of action.

53 For the reasons that follow, I accept these submissions.

Abuse of process: some principles

54 There was no significant debate before me about the legal principles; rather the submissions were principally directed to whether the substance of the proceedings admit to the conclusion that they amount to an abuse of process. Nevertheless, I will identify the relevant principles, which are as follows:

(1) The "varied circumstances in which the use of the courts processes will amount to an abuse … do not lend themselves to exhaustive statement" or being "susceptible of formulation which would confine it to closed categories": *UBS* at [1] and [72].

(2) An abuse of process will occur where either of two conditions are met: "where the use of the court procedures occasions unjustifiable oppression to a party, or where the use serves to bring the administration of justice into disrepute": *UBS* at [1]; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 at [25] ('*Tomlinson*').

(3) There is no inflexible rule that a party is precluded from relitigating issues determined in an earlier proceeding, but it *might* do so: *Tomlinson* at [26]. The question will be whether, in doing so, it would be unjustifiably oppressive upon the other party or would bring the administration of justice into disrepute – issues that involve a "broad merits based judgment which takes account of the public and private interests and all the circumstances of the case: *UBS* at [7], citing *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31.

(4) Whether the circumstances constitute an abuse of process is to be assessed in light of, and must take into account, "the procedural law administered by the court whose processes are engaged": *UBS* at [34] and [72].

(5) It is unnecessary, in order to establish abuse of process, that subsequent proceedings involve the same parties as the first one, or their privies: *Tomlinson* at [26]; *UBS* at [63]. It is also unnecessary to show a superadded element – such as collateral attack or dishonesty – albeit that the presence of such an element may demonstrate, or assist in doing so: *UBS* at [67].

55 As I have noted, the submission made by the third defendant was that the allegations of loss and damage were a 'collateral attack' on the orders of McClelland DCJ and Harper J.

56 A collateral attack occurs where a party seeks to challenge or impugn the result of the previous judgment, not through an appeal, but through subsequent litigation. That is, a party invites a court, in those later proceedings involving that party, to "arrive at a decision inconsistent with that arrived at" in that earlier case: *Arthur J S Hall & Co v Simons (a firm)* [2002] 1 AC 615, 743. In the end, the concept describes *inconsistency*, albeit of a fundamental and impermissible kind. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 541 it was said that it *was* an abuse of process to initiate

> proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

57 In light of the principles to which reference has been made, it is important, therefore, to look carefully at: (a) what was decided in the earlier proceedings; and (b) compare that to what is alleged in the current ones: it is only then that a determination can be made about whether what is alleged in the later claim,

and what is sought to be proved, is apt to bring the administration of justice into disrepute, or whether it can be justified.

Consideration

Abuse of process

58 In my view the allegations of loss and damage made by the plaintiff amount to an impermissible collateral attack on the orders and reasons of McClelland DCJ dated 24 December 2019, as well as the orders and findings of Harper J dated 4 February 2022. I will explain why I consider that to be so.

59 I regard it as beyond argument that the effect of the current proceedings is to call into question the orders of McClelland DCJ and Harper J, and invite inconsistent findings and conclusions such that it constitutes a collateral attack and an abuse of process. That is because the allegations made by the plaintiff, and the findings she seeks to make good those allegations in any trial, necessarily would conflict with what had been determined in the family law proceedings.

60 In my view, although the third defendant argued that the allegations of loss and damage were a 'collateral attack' on the *orders* of McClelland DCJ, it is clear that the inconsistency here extends not merely to the orders of McClelland DCJ, but *beyond* it. That is because the orders reflect the essential reasoning of McClelland DCJ, in at least the following respects – being: first, the overarching question for McClelland DCJ was the just and equitable alteration of the property interests of the parties: [2019] FamCA 1013 at [326]; secondly, in connection with that question, McClelland DCJ was "satisfied that it is necessary to make orders for there to be a severance of the parties' financial relationship. That can only occur if orders are made: (a) requiring [the plaintiff] to withdraw the caveats that she has placed on…the Bangalow Street property which prevents the [second defendant] from dealing with [that property], and (b) requiring the [plaintiff] to cooperate in causing the units at the Bangalow Street property to be placed under separate titles by way of strata": [2019] FamCA 1013 at [590], [593]-[594]; thirdly, McClelland DCJ made orders, relevantly, giving effect to these findings: [2019] FamCA 1013 at [591] and orders (1)-(18).

61 On what is alleged by the plaintiff, she would invite this Court, at a trial of her action, to make findings that there *was* an 'impediment' to Mr Riley (and, in the way the case is put by the plaintiff, the third defendant) selling Lot 2 to the purchasers, when the effect of what had been earlier determined by McClelland DCJ and Harper J was to the contrary effect. Further, she would invite this Court, at a trial of her action, to make findings that Harper J *was* 'prevented' from restraining the sale of Lot 2 because Mr Riley (and, again, in the way the case is put by the plaintiff, the third defendant) had sold the property to the purchasers which had the effect of denying the plaintiff that relief, when Harper J had made precise findings to the opposite effect. That is, Harper J noted that the plaintiff did *no*t ultimately press for an order restraining the sale and, in any event, held that if such an order had been sought, it would not have been made: see [23], above.

62 In my view, therefore, the advancement of the plaintiff's claims for loss and damage is incompatible with what had earlier been found and determined. To permit this to occur would bring the administration of justice into disrepute. No explanation, or justification, has been advanced that might permit this to occur. In my view none exist, or could possibly exist.

63 It follows, therefore, that I regard the claim that is sought to be advanced for damages by the plaintiff against the third defendant as an abuse of process. It should be summarily dismissed for that reason, and I propose to so order.

No reasonable cause of action disclosed

64 The third defendant also argued, as I earlier noted, that no loss or damage could properly be proved because the undeniable fact is that Mr Riley was entitled to sell the property as the owner. Put another way, the "facts" foreclose the plaintiff succeeding in the case sought to be advanced. Accordingly, so it was argued, there was a fatal flaw in the claim for loss and damage advanced by the plaintiff.

65 It will be seen, from the structure of the pleading in relation to the loss and damage suffered (see [35], above), that the claim hinges on what is contained in pars 104 and 105. Those paragraphs provide the basis for what is thereafter alleged – the plaintiff was deprived of title to property (being Lot 2) and to

realise it in order to repay Mr K: pars 106-108. It is, therefore, useful to restate – and thereafter examine – what is alleged by the plaintiff in the SOC, pars 104 and 105:

(1) paragraph 104: the allegation is essentially that selling Lot 2 prevented the "Family Court" from restraining the sale of Lot 2 to enable the plaintiff to recover the funds advanced by Mr K.

(2) paragraph 105: the allegation is Harper J summarily dismissed the plaintiff's application to restrain the sale on the basis that Lot 2 had been sold, with the consequence that any application to restrain the sale had no prospect of success.

66 In relation to paragraph 104, the allegation *assumes* that there was some impediment to Mr Riley – and by extension the third defendant – disposing of Lot 2, and *assumes* that the plaintiff had some right to restrain it. In my view that allegation (and what it *assumes*) is misconceived. By order 9 dated 24 December 2019, the title to Lot 2 was to be transferred to Mr Riley, and in fact was transferred to Mr Riley on 29 May 2021. Thus, on what had been determined by McClelland DCJ, and what in fact occurred in consequence, Mr Riley was able to deal with that property as he saw fit.

67 That conclusion inevitably follows from the fact that: (a) the orders of McClelland DCJ granted Mr Riley ownership of Lot 2 – necessarily carrying with it the concomitant right to hold or dispose of that property; (b) the plaintiff appealed to the Appeal Division of the Family Court against the orders made, but that appeal was dismissed; (c) the plaintiff made an application to vary the orders made by McClelland DCJ, but that application was dismissed by Harper J by reasons and orders dated 4 February 2022.

68 No basis has been alleged, nor otherwise advanced, to identify why the property was not able to be sold. There was no reason – legal or otherwise – to prevent him from disposing of that property. In my view, to allege otherwise, as the plaintiff does in these proceedings is, as the third defendant submitted, fatally and fundamentally flawed.

69 In my view, once it is recognised that the plaintiff's claim against the third defendant is founded on a claim that the sale of Lot 2 was the cause of her loss and damage, then in my view, as the third defendant argued, the case cannot possibly succeed. That is because, the title to that property having passed to

Mr Riley by reason of the orders of McClelland DCJ, there was no impediment to the sale to the purchasers. Further, the plaintiff has *no* interest in that property, nor to the proceeds of any sale of it.

70 I return to the SOC, to illustrate the above. In the SOC, the plaintiff alleges: (a) that Mr Riley and the third defendant "prevented" the Family Court from restraining the sale of the property (SOC, par 104); and (b) that the sale to the purchasers meant that the plaintiff's application to restrain the sale "had no prospects of success" resulting in its dismissal (SOC, par 105) – following which the plaintiff alleges that the "effect of dismissal of the applications … in consequence of selling the property" resulted in the plaintiff being, inter alia, "deprived of a legal title to the property" and denying the plaintiff an ability to "recover the equity that she holds in the property" (SOC, pars 106 (a) and (b)). These allegations ignore the plain effect of what had been determined in the family law proceedings – *viz*., the plaintiff had *no* title to, or interest of any kind in, Lot 2.

71 In my view it also follows that the plaintiff's cause of action alleging loss and damage by being deprived of "legal title" to Lot 2 and, thus, her inability to recover the equity in that property, is patently contrary to the true position: she did not hold title to that property, in consequence of the orders of McClelland DCJ, from the time it was transferred to Mr Riley on 29 May 2021 – indeed that *precise* fact is alleged by the plaintiff: SOC, par 13. It is therefore untenable for the plaintiff to allege, and seek to prove (contrary to the undeniable fact), that she had "legal title" to Lot 2, and that its disposition resulted in the loss and damage which she alleges.

The claim against Mr Riley

Introduction

72 The claims made against Mr Riley, and the relief sought against him, are wider than that involving the third defendant and, further, there are important factual differences.

73 I will first identify the relevant factual differences. They are:

(1) Mr Riley still has an 'interest' in Lot 1. This has occurred due to the plaintiff's refusal to effect that transfer in line with what was, by the

orders of McClelland DCJ dated 24 December 2019, to occur. To recap (this issue was dealt with earlier: see [18], above): (a) the title to Lot 2 was transferred, in line with the orders of McClelland DCJ, to Mr Riley on 29 May 2021, and he has sold the property to the purchasers; (b) although the orders of McClelland DCJ dated 24 December 2019 required both the plaintiff and Mr Riley to take all necessary steps to transfer Mr Riley's interest in Lot 1 to the plaintiff, the plaintiff has declined to execute a transfer to enable this to occur: see SOC, pars 14-15.

(2) By the orders made by Harper J dated 4 August 2022, a Receiver was appointed over the plaintiff's property – including her interest in Lot 1. The key orders, so far as they relate to Lot 1 are:

(a) The Receiver was "appointed to receive" Lot 1: order 4(a).

(b) "Pursuant to r 11.49(3) of the Rules, the Receiver is authorised to do (in the Receiver's name or otherwise) anything the [plaintiff] may do": order 5. (The rules referred to are the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)).

(c) "Pursuant to r 11.49(4) of the Rules, the Receiver's powers operate to the exclusion of the powers of the wife during the receivership in relation to compliance with the orders": order 6.

(d) The plaintiff is to "deliver up to the Receiver vacant possession of [Lot 1] including all fixtures and fittings currently upon that property in good order and repair and to deliver up to the Receiver and/or make available for collection by the Receiver all keys, remote control units, and other security devices for [Lot 1] in good order and repair upon such date and at such time as the said Receiver shall advise her in writing": order 11.

(e) The plaintiff is to "do all things, provide all documents and authorities, and execute all documents as may be requested by, and comply with any other reasonable request made by the Receiver to cause [Lot 1] to be transferred into the sole name of the [plaintiff], consistent with the orders made by Deputy Chief Justice McClelland on 24 December 2019 and thereafter to be conveyed to a purchaser of that property upon sale of that property by the Receiver": order 12.

74 The relief sought against Mr Riley involves four claims. The first involves the plaintiff seeking an order that the strata plan be terminated pursuant to s 135 of the *Strata Schemes Development Act 2015* (NSW) ('*SSD Act*') (relief claimed, par 1). The second involves the plaintiff seeking an order requiring the "refund" of money paid by the purchasers – it thus follows from the primary relief sought (relief claimed, par 2). The third involves the plaintiff seeking an order requiring Mr Riley to do "all things necessary" to "reflect termination of the strata scheme" – relief that also follows from the primary relief sought (relief claimed,

par 3). The fourth is the claim for "Damages" – a claim that seeks damages arising out of Mr Riley, and the third defendant, selling Lot 2 to the purchasers. This claim is picked up by those parts of the statement of claim that I have dealt with in connection with the third defendant's application: SOC, pars 104-108.

The arguments for summary dismissal

75 The second defendant raised four arguments to support summary relief. They were:

(1) First, that the claim seeking to terminate the strata scheme constitutes an abuse of process or otherwise fails to disclose a triable issue. Put simply, the argument was that the advancement of that claim was: (a) in conflict with what had been ordered by McClelland DCJ and with the appointment of the Receiver (and the Receiver's powers); and, separately, (b) any claim for its termination inevitably must fail because there is no basis for relief.

(2) Secondly, it was argued that as the plaintiff had previously pursued proceedings in this Court – involving alleged building defects in the 'property', and the plaintiff makes a similar complaint in these proceedings – the Court should determine that, consistent with the earlier decision, hold that the "Family Court alone ought determine any actionable element of the claim".

(3) Thirdly, it was argued that, in substance, what the plaintiff is seeking to do is to revisit the determination of McClelland DCJ – with the consequence that the exclusive jurisdiction to determine that "matter" resides in the Federal Circuit and Family Court of Australia (Division 2).

(4) Fourthly, in relation to the claim for damages (remembering that what is alleged by the plaintiff is said to involve conduct *jointly* involving the second and third defendants), the second defendant adopted the submissions made by the third defendant.

76 In relation to the fourth argument, I have already concluded that the pleaded claim in damages is misconceived, and an abuse of process: see [58]-[71], above. That conclusion applies equally to the plaintiff's claim against Mr Riley, and it is therefore unnecessary to say anything further about it.

77 In what follows I will deal with the arguments that the claim seeking termination of the strata plan amounts to an abuse of process.

Consideration

Inconsistency in the plaintiff seeking termination of the strata plan

78 In relation to the submission that the proceedings constitute an abuse of process, Mr Loofs SC advanced two separate arguments: in essence, there was an abuse of process because the plaintiff was attempting – by seeking the termination of the strata plan – to mount a collateral challenge to the orders of McClelland DCJ requiring the *creation* of the strata plan and to the orders of Harper J appointing a Receiver in connection with Lot 1; and, in any event, any application to terminate the strata plan had no sensible prospect of success, such that it should be summarily terminated.

79 It is not, as I have earlier noted (see [54(3)], above), an abuse of process merely for a party to challenge in later proceedings a determination made in an earlier one. Whether it does require a "broad merits based judgment which takes account of the public and private interests and all the circumstances of the case": *UBS* at [7]. Here, that assessment requires careful evaluation of what is sought to be established by the current proceedings, as well as a comparison to what occurred in (and what was determined by) the 'family law' proceedings.

80 In the SOC, the plaintiff's primary relief seeks an order that the strata scheme (SP 90255) be terminated under s 135 of the *SSD Act*. It is necessary to briefly outline that claim, and to mention ss 135 and 136 of the *SSD Act*. In doing so it should be noted that the second defendant accepted that the section could (in theory) apply to the plaintiff and the present case, so I will proceed upon the assumption that it does.

81 These sections – the case does *not* require a fine-grained analysis of their meaning and reach – permit certain persons, including "an owner of a lot in the scheme", to apply to the Supreme Court to terminate a strata scheme: ss 129 and 135(1)(a) of the *SSD Act*. (I add: it was *not* argued that the plaintiff did not meet this description, albeit it was submitted that inevitably that would change as the Receiver would be selling Lot 1). Once an application is made under s 135, the "court may…make an order terminating a strata scheme (a *termination order*)": s 136(1) of the *SSD Act*.

82 In relation to the construction of s 136, my attention was drawn to the decision of the *Community Association DP 270212 v Registrar General for the State of NSW* (2004) 62 NSWLR 25; [2004] NSWSC 961 – a decision which dealt with a similar provision, being s 70 of the *Community Land Development Act 1989* (NSW). It is unnecessary to refer to the detail of that decision, other than to note that it reinforced what was clear on the face of the text of s 136 of the *SSD Act* – namely, that the power to terminate is exercisable as a matter of discretion, and whether an order of that kind would be made would give rise to many and varied considerations including whether the interests of anyone might be prejudiced by its termination: at [32]-[33].

83 In my view, considered in isolation, there is no necessary inconsistency between an application of this kind being made by the plaintiff (as the assumed owner entitled to bring such an application under s 135(1)(a) of the *SSD Act*) and the order of McClelland DCJ requiring its creation; nor is there necessary inconsistency between any ultimate order that the strata scheme be terminated and the order of McClelland DCJ requiring its creation. The *prima facie* absence of "necessary inconsistency" follows because, in a given case, there *may* be a proper basis to seek relief under s 136 of the *SSD Act*.

84 The critical question then is: what is the plaintiff's reason for seeking that relief?

85 In my view the answer to this question can be identified by reference to what is alleged by the plaintiff in the SOC. As will become apparent in what follows, some of the matters alleged by the plaintiff throw *some* light on this question; but one paragraph of the SOC directly *answers* it.

86 I will, in what follows, first set out the relevant parts of the SOC that suggest a purpose for the plaintiff seeking the relief, and thereafter set out the one that expressly pleads it:

(1) The plans of the subdivision registered were "wrong": SOC, par 10.

(2) The titles created following the "registration of the strata scheme, were injured at the time of registration, because the plans of subdivision do not reflect the actual boundaries between the units": SOC, par 11.

(3) The strata scheme "can't function, and which was registered to pass Riley's liability for his failure to deal with building defects onto the

owners corporation, where such repairs could have been done under a warranty": SOC, par 18.

(4) At the time unit 2 was sold "there were pending proceedings in the family Court, where the plaintiff was seeking an order to stay such sale and subsequent order to terminate the strata scheme": SOC, par 19.

87 These paragraphs, in my view, strongly tend to suggest that the reason for seeking the termination of the strata plan lies in the plaintiff's dissatisfaction with the orders that were made by McClelland DCJ. This is particularly so in relation to SOC, par 19. Some other paragraphs point the same way. For example SOC, par 34 records an allegation that the plaintiff "became a casualty of abuse of powers of the Family Court". It is, however, unnecessary to dwell further upon what is alleged in these paragraphs because a *clear* statement of intent lies in what the plaintiff has specifically alleged in SOC, par 23:

> [23] There is no other solution now, but to terminate the strata scheme and to order the second and third defendant to refund the money that they received… so the title of the property could be restored to a Torrens title. The property will then be able to be returned to the Family Court to be dealt with according to law and equity. (Underlining added).

88 This paragraph expressly identifies the *purpose* of the plaintiff in pursuing this claim – to have the matter "returned" to the Family Court for further determination, and I find that is the purpose of the claim. In making that finding, the following should be noted. First, the SOC was *verified* by the plaintiff; it is thus the plaintiff's evidence. Secondly, no other reason was advanced in submissions by the plaintiff that might provide support for a different, and proper, purpose for the commencement of the proceedings seeking termination of the strata scheme. Thirdly, consideration of the overall relief sought by the plaintiff points the same way: it seeks to "undo" what has been decided by McClelland DCJ, and what occurred in compliance with the orders made dated 24 December 2019 – *viz*., the creation of the strata scheme.

89 In my view, having regard to the plaintiff's *purpose* in seeking the relief that she does, it would bring the administration of justice into disrepute to allow the plaintiff to do this: the express purpose for the claim for relief under s 135 of the *SSD Act* by her is *not* based upon a bona fide reason, but to use it as a means to ventilate grievances – that she has aired in other proceedings – about the

subdivision plans and concerns about building defects so as to have the matter "returned" to the Family Court for further determination. It follows that I consider commencement of the proceedings seeking the relief to constitute an abuse of process. It should not be allowed to continue.

90 The second defendant next argued that the plaintiff's claim seeking to terminate the strata plan also had the effect of mounting a collateral challenge to the orders of Harper J appointing, inter alia, a receiver. As developed during oral submissions, Mr Loofs SC argued (in substance) that the Receiver was appointed to sell Lot 1 and that the plaintiff, by seeking to terminate the strata plan, seeks to undermine that. In light of the finding that I have made about the plaintiff's purpose in the commencement of these proceedings, there is considerable force in this submission. Further, there is considerable force in the submission even without it.

91 It is necessary to make some further reference to the findings made by Harper J that supported the order ultimately made. Harper J made three findings that should be noted. The first was that there was a "complete failure [by the plaintiff] to satisfy existing orders, coupled with her clear refusal to accept that such orders must be complied with": [2022] FedCFamC1F 562 at [73]. The second was that Harper J was "persuaded that the [plaintiff] has no intention of making any payment to the [second defendant], despite the court's orders": at [75]. The third was that "a sufficient case for the appointment of a receiver has been made out. An enforcement procedure is necessary. Without enforcement, there is no realistic prospect that the orders of the Court for payment of money will be satisfied or that the [second defendant] will receive his entitlement. I am satisfied a receiver is the appropriate method and is proportional to the difficulty of recovery and the size of the amounts owing. A receiver with the necessary powers can undertake the process to realise property of the [plaintiff] to satisfy her payment obligations …": at [79].

92 I have earlier set out the relevant orders made by Harper J: see [26], above. Two should be mentioned. The first is order 11 – which requires the plaintiff to "deliver up to the receiver vacant possession" of Lot 1. The second is order 12 – an order that requires the plaintiff to take all steps to cause Lot 1 to be

transferred into her name "consistent with the orders made by the Deputy Chief Justice McClelland on 24 December 2019 and thereafter to be conveyed to a purchaser of that property upon sale of that property by the receiver".

93 In my view, the commencement of proceedings seeking an order for the termination of the strata scheme is incompatible with these orders. In the relief that the plaintiff seeks, the effect of a termination of the strata scheme would be for the title of the property to be in the *joint* names of the plaintiff and second defendant as tenants in common in equal shares: see [7], above. Against that, the orders of Harper J unambiguously require the plaintiff to take all steps to cause *Lot 1* to be transferred into her name, to deliver up vacant possession of *Lot 1* – both being steps to facilitate its realisation by the Receiver. It is, therefore, quite apparent that the relief that the plaintiff seeks in these proceedings cuts across what Harper J has ordered. In my view, to allow that to occur would be scandalous, and to bring the administration of justice into disrepute. It cannot occur. It is an abuse of process.

94 The second defendant also argued that the plaintiff is *precluded* by those orders (specifically orders 5 and 6) from commencing these proceedings. These orders have earlier been set out: see [73(2)], above.

95 Relevantly, those orders authorise the Receiver to "do…anything the [plaintiff] may do" (order 5) and, further, the Receiver's powers operate to the exclusion of the powers of [the plaintiff]" (order 6). It was said that, the "power" not being defined, the only limitation was the order itself – in particular, the words a "receiver with the necessary powers can undertake the process to realise property of the wife to satisfy her payment obligations…" or the scope of the orders more generally. In this last respect it is to be noted that the subject matter of the orders is "the income and property" of the plaintiff, and that clearly extends to Lot 1. Thus, as the second defendant further argued, it would be within the power of the Receiver to himself make an application, under s 135 of the *SSD Act*, if appropriate to do so, to comply with what had been ordered – with the consequence that order 6 precluded the plaintiff from taking that step.

96 In my view, as the second defendant argued, I consider the position to be that the effect of the orders of Harper J is such that plaintiff does *not* have the

power to take steps to commence the proceedings. That is because the effect of the orders, including order 10(e) – an order that provides that the plaintiff is entitled to proceeds following discharge of other liabilities – is to vest in the Receiver (for example, requiring the plaintiff to deliver up Lot 1 to the Receiver, to do all things to cause the unit to be transferred into her name, and conveyed to a purchaser of the property), to the exclusion of the plaintiff, the power to deal with the property. Put another way, the plaintiff has an entitlement to the proceeds of sale (subject to other orders), but no entitlement to deal with the property itself.

97 Finally, in relation to the submission that any application by the plaintiff to terminate the strata plan had no sensible prospect of success, the second defendant's argument "in a nutshell", and as put in submissions by Mr Loofs, was that the grounds identified could not possibly support the order sought and, having regard to the "overwhelming inference" that the purpose of seeking "the termination of the scheme is to frustrate the family court orders" none possibly could. I agree.

98 It is difficult to accept that the matters raised by the plaintiff could justify the making of an order that the strata scheme be terminated once it is recognised (as I have found) that the proceedings are driven by an improper purpose – namely, the return of the matter to the Federal Circuit and Family Court of Australia (Division 1). Thus, I consider, as the second defendant argued, that the factual basis for the claim is entirely without substance: it was "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance": *Ugur* at [117] citing *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1; [2001] UKHL 16 at [95].

Jurisdictional contentions

99 The second defendant also argued that there was an absence of jurisdiction in this Court to deal with what was argued to be part of the 'family law' dispute.

100 In light of the conclusions that I have reached, the jurisdictional arguments do not arise. Nevertheless, the following three matters should be noted.

101 First, accepting that the primary claim for relief was under ss 135 and 136 of the *SSD Act*, then in my view this Court would be seized of jurisdiction: see ss 129 and 136 of the *SSD Act*.

102 Secondly, although it is true, as the second defendant submitted, that Davies J declined to give the plaintiff leave to amend an earlier claim brought in this Court (citation omitted), that was because the complaints arose out of the litigation before the Family Court and was "governed by the orders of that Court" and, furthermore, that the proper characterisation of those claims related to "compliance with orders made by the Family Court": at [16] and [21]. Thus, Davies J held that, given the "Family Court obviously has jurisdiction to deal with matters, even if this Court had its own jurisdiction, it would necessarily refuse to exercise that jurisdiction in light of the Family Court orders": at [22]. Clearly there is some similarity between what was sought to be agitated before Davies J and what is raised in the current proceedings – the suggestion that there are building defects – but fundamentally Davies J was dealing with a different claim to the one that is before me. I add, by way of emphasis, that I am dealing with this question entirely in the abstract: that is, I have considered the matter on an assumption that there was a proper and legitimate basis to seek the termination of the strata scheme. That, of course, is *not* this case.

103 Thirdly, it is not in doubt that *if* – in substance – what the plaintiff was seeking to do was to revisit determinations of McClelland DCJ, then that would undeniably be a matter for McClelland DCJ or the Federal Circuit and Family Court of Australia (Division 2), as the second defendant submitted. Nevertheless, I do not consider, for the reasons that I have given, that that is the proper characterisation of what the plaintiff is seeking to do, although I do acknowledge that significant parts of what is pleaded give the very strong impression the plaintiff seeks to do this: see, for example, SOC, pars 34, 35 and 37.

The plaintiff is declared a bankrupt

104 On 6 December 2022, the solicitor for Mr Riley sent an email to my Chambers (copying in the other parties) advising that the plaintiff was declared a bankrupt

by orders made on 1 December 2022, and that a request had been made to the Trustee in Bankruptcy (Mr Barnden) "to make an election as to whether or not he wishes to continue with such action".

105 By email sent to my Chambers dated 22 December 2022 (copying in the other parties), the Trustee in Bankruptcy advised that "in accordance with section 60(2) of the *Bankruptcy Act 1966* (Cth) the Trustee has elected to allow the Bankrupt, Ms Zofia Massalaski to proceed with these proceedings".

106 There is, therefore, no impediment to me determining the matter and making the orders proposed.

Orders

107 For the above reasons, I make the following orders:

(1) Order, pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW), that the proceedings against the second and third defendants be dismissed.

(2) Order that the plaintiff pay the second defendant's costs of, and incidental to, the notice of motion dated 27 July 2022.

(3) Order that the plaintiff pay the third defendant's costs of, and incidental to, the notice of motion dated 26 July 2022.

(4) Order that the plaintiff pay the second and third defendant's costs of the proceedings.

(5) List the matter (so far as it involves the first defendant) before the Common Law Registrar on 8 February 2023.

(6) Direct that the plaintiff file an affidavit of service or, if the statement of claim has not been served on the first defendant, an affidavit to that effect by 6 February 2023, 5 PM.

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