



Supreme Court
New South Wales

Case Name: Richmond Valley Council v JLT Risk Solutions Pty Ltd

Medium Neutral Citation: [2021] NSWSC 383

Hearing Date(s): 5 and 19 March 2021

Decision Date: 16 April 2021

Jurisdiction: Equity - Commercial List

Before: Hammerschlag J

Decision: (1) the defendant's motion dated 9 December 2020 is dismissed
(2) order that certain questions are common to group members and are appropriate to go to trial

Catchwords: REPRESENTATIVE PROCEEDINGS – Civil Procedure Act 2005 (NSW) (the Act) pt 10 – motion for an order that the proceedings be declassified pursuant to s 161 of the Act – motion for a “Merck order” determining that certain questions are common for the purpose of the trial in accordance with s 175(1)(c) of the Act – plaintiff and group members are local councils in New South Wales which were parties with the defendant to a Deed establishing a scheme for the purposes of purchasing for the councils insurance for public liability (including personal injury, damage to property and product liability) and professional indemnity, and to provide for indemnity for them in respect of liability not covered by such insurance – the plaintiff claims that the defendant owed to it and the group members, and breached, duties at general law and in contract to recommend and arrange cover at the best premium rates that were reasonably available – the plaintiff claims that the defendant owed to it and to each group member, and breached, fiduciary duties to act in their best interests and not to prefer its own financial interests to theirs –

the plaintiff sought a Merck order and the defendant declassing orders – whether there is at least one substantial common question of law or fact to which the claims of the plaintiff and the group members give rise

HELD – that the declassing motion be dismissed – the proceedings are appropriate to continue as a class action – there are identifiable substantial common questions of law or fact – orders that certain questions contained in the Schedule are common to group members and are appropriate to go to trial

Legislation Cited: Civil Procedure Act 2005 (NSW)
Federal Court of Australia Act 1976 (Cth)
Local Government Act 1993 (NSW)

Cases Cited: Bright v Femcare Ltd (2002) 195 ALR 574
Ethicon Sàrl v Gill [2021] FCAFC 29
ISG Management Pty Ltd v Mutch (2020) 385 ALR 146
Merck Sharp & Dohme (Australia) Pty Ltd v Peterson (2009) 355 ALR 20
Timbercorp Finance Pty Ltd (in liq) v Collins;
Timbercorp Finance Pty Ltd (in liq) v Tomes (2016) 259 CLR 212
Wong v Silkfield Pty Ltd (1999) 199 CLR 255

Category: Procedural rulings

Parties: Richmond Valley Council – Plaintiff
JLT Risk Solutions Pty Ltd – Defendant

Representation: Counsel:
P. Crutchfield QC with R. Yezerski and C. Mitchell – Plaintiff
M.J. Darke SC with I.J.M. Ahmed and A.M. Hammond – Defendant

Solicitors:
Quinn Emanuel Urquhart & Sullivan – Plaintiff
Herbert Smith Freehills – Defendant

File Number(s): 2018/371447

JUDGMENT

INTRODUCTION

- 1 HIS HONOUR: On 3 December 2018, the plaintiff (or **Richmond**) started a representative proceeding (or class action) under Part 10¹ of the *Civil Procedure Act 2005* (NSW) (**the Act**) on its own behalf and on behalf of a group of twelve New South Wales local councils² against the defendant (**JLT**). JLT carries on business, amongst other things, as an insurance broker. Where it is not necessary to distinguish between Richmond and the group members, I shall refer to them collectively as **the group**. References to sections are references to the Act unless the context indicates otherwise.
- 2 The proceedings are fixed for their initial trial commencing on 11 October 2021 on an estimate (perhaps a little generous) of 25 days.
- 3 There are before the Court two motions, each dated 9 December 2020:
 - (a) one by Richmond for an order determining that certain questions are common for the purpose of the trial (**the questions motion**), often referred to as a Merck order after the decision in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2009) 355 ALR 20 (**Merck**); and
 - (b) one by JLT for an order that the proceedings no longer continue as a representative proceeding because Richmond has not identified a substantial common question of law or fact to which its and the claims of the group members give rise as is required by s 157(1)(c) (**the declassing motion**).
- 4 The principal thrust of the declassing motion is that Richmond has not identified a substantial common question of law or fact to which the claims of Richmond and the group members give rise, as is required by s 157(1)(c). Section 157(1)³ provides:

157 Commencement of representative proceedings

(1) Subject to this Part, where—

(a) 7 or more persons have claims against the same person, and

¹ Equivalent to Part IVA of the Federal Court of Australia Act 1976 (Cth) (FC Act).

² Constituted under the Local Government Act 1993 (NSW). The Councils are: Burwood Council; Gunnedah Shire Council; Kiama Municipal Council; Kyogle Council; Lismore City Council; Mid-Western Regional Council; Orange City Council; Parkes Shire Council; Port Macquarie-Hastings Council; Shellharbour City Council; Willoughby City Council; and Yass Valley Council.

³ Equivalent to s 33C(1) FC Act.

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and

(c) the claims of all those persons give rise to a substantial common question of law or fact,

proceedings may be commenced by one or more of those persons as representing some or all of them.

- 5 As a secondary argument, JLT puts that an order should be made under s 166 that the proceedings no longer continue under Part 10 because it is in the interests of justice as envisaged by s 166(1)⁴, which provides:

166 Court may order discontinuance of proceedings in certain circumstances

(1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—

(a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or

(b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or

(c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or

(d) a representative party is not able to adequately represent the interests of the group members, or

(e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.

- 6 It argues that because there are no, or substantially no, common issues of law or fact to be determined, the maintenance of the proceedings as a class action can only delay and stymie the progression of the claims of group members because it makes it necessary to await the determination of Richmond's claim and the hearing of any appeals in relation to that determination, whereas if the proceedings are declassified now, the group members' claims could be efficiently progressed now.

- 7 The secondary argument can be disposed of briefly. It is premised on the absence of any substantial common issue of law or fact. If there is at least one such issue, the secondary argument fails. If there is no such issue, the declassing motion must succeed. It was not suggested that if there is at least one such issue it would be appropriate to declass the proceedings.

⁴ Equivalent to s 33N(1) FC Act.

- 8 The questions motion and the declassing motion are, of course, related. If JLT is correct that there is no substantial common question of law or fact to be determined at the trial, the questions motion falls away. If JLT is wrong, the question arises whether the Court should, at this point, make an order in accordance with the questions motion. JLT's position is that even if s 157(1)(c) is satisfied, the Court should decline at this stage to make any order identifying what issues will be determined in the trial.
- 9 For the reasons which follow, the declassing motion is to be dismissed.
- 10 I propose to make a Merck order. It is desirable and appropriate at an early stage to identify common questions to be determined at the trial without prejudice, of course, to any amendments, refinements, additions or subtractions which may emerge later to be appropriate.
- 11 At the outset the following observations are appropriate:
- (1) The subject matter of representative proceedings of the kind authorised by Part 10 of the Act is a claim which gives rise to common questions of law or fact, but it is not necessary that the representative proceedings resolve or are likely to resolve the claims of all group members: *Timbercorp Finance Pty Ltd (in liq) v Collins; Timbercorp Finance Pty Ltd (in liq) v Tomes* (2016) 259 CLR 212, 234-235 [47]-[49].
 - (2) The word "substantial" in s 157(1)(c) of the Act means that the common issue should not be merely trivial but of weight and significance. It does not indicate that which is large or of special significance or which may have a major impact on the litigation: *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266 [27] and following.
 - (3) The orderly conduct of a Part 10 proceeding requires that prior to an initial trial starting, there is specificity in what common questions are being determined: *Merck* at [6]; *Ethicon Sàrl v Gill* [2021] FCAFC 29 at [57].
 - (4) Although careful compliance with the requirements of s 157(1)(c) is important (see: *Bright v Femcare Ltd* (2002) 195 ALR 574), the gateway requirements to commencing a class action are deliberately undemanding. Whether a class action meets the requirement laid down in s 157(1)(c) requires a binary assessment and does not call for the exercise of any discretion. Having passed through the gateway, further common questions may become evident: *ISG Management Pty Ltd v Mutch* (2020) 385 ALR 146, 148 [4]-[12].
- 12 The efficient disposition of a trial of common issues will be assisted if the common questions are articulated in a manner that requires as little reference

to documents (including the pleadings) outside of the document in which the questions are set out as the circumstances will permit. The questions document should, as far as possible, be freestanding to avoid the reader having to have regard to documents to which she, he or it may not have ready access. This will also protect against the possibility that questions, which are framed by reference to the pleadings, change if the pleadings change, with potential unintended consequences. Some of the proposed questions articulated by Richmond are framed by reference to an affidavit served by JLT which obviously has not yet been read in the proceedings. This is an added reason why the questions should not be framed by reference to a paragraph in the affidavit. If there are uncontested facts and a question is asked based only upon those facts, they should be set out.

THE CASE

- 13 By Deed made on 22 March 1994 (**the Deed**) between JLT and a number of councils (members), there was established a scheme, known as the NSW Local Government (Jardines) Liability Scheme (commonly referred to as **Statewide**), for the purposes of purchasing for the members of Statewide insurance for public liability (including personal injury, damage to property and product liability) and professional indemnity, and to provide for indemnity for them in respect of liability not covered by such insurance. On an annual basis, contributions are collected from the members out of which, for each year, an Annual Fund is established. This is used to provide the discretionary indemnity to claiming members who have suffered liability in that particular year.
- 14 Statewide arranges primary insurance for its members but also provides a discretionary indemnity cover out of the members' collective funds for loss or liability of members not covered by the primary insurance for liability (**liability cover**) and property damage (**property cover**).
- 15 The Deed provides for the establishment of a Board of Management and a Claims Committee.
- 16 Under the Deed, the members engage JLT to assist in the management of the scheme and to provide the most efficient way of organising their insurance requirements. Under the Deed, JLT is, relevantly, appointed to provide

representatives to the Board of Management and Claims Committee, advise members in relation to loss prevention and risk minimisation techniques, organise a budget for each Annual Fund for each year, advise in relation to the required contributions, advise on and effect primary insurance on the instructions of the Board of Management, and manage the handling of claims.

- 17 JLT is entitled to be paid fees and/or commission for its services.
- 18 The Statewide arrangements also facilitate group insurance purchasing for other lines of cover, such as motor vehicle cover and councillors & officers cover.
- 19 Statewide is not a legal persona. It is a contractual arrangement under which JLT holds, administers and manages funds (as a trustee) from which the discretionary cover is paid and other expenses are met.
- 20 Thus, strictly Statewide (or for that matter JLT) is not an insurer, but the arrangements may be thought to mimic insurance.
- 21 Although it will add to the length of this judgment, it is necessary to deal in some detail with the pleaded case and the pleaded defence.

The Claim

- 22 Richmond's claim is pleaded in its Second Further Amended Commercial List Statement (**CLS**) filed on 5 March 2020. It is that during the period 1 January 2009 to 3 December 2018 (**the Relevant Period**):
 - (a) JLT carried on business as an insurance broker. It held itself out to Richmond and each of the group members as one of the largest insurance brokers in Australia and the world, possessed of the expertise to deliver the most comprehensive range of insurance and risk solutions products and services available to local government authorities across Australia, and capable of ensuring that councils would receive a well-designed insurance programme at a competitive premium cost (CLS [7]). The particulars of this holding out are articulated as various specified Renewal Reports to Richmond and Renewal Reports issued by JLT to other group members;
 - (b) JLT had knowledge of the market for liability cover, property cover and professional indemnity insurance (which knowledge Richmond and group members lacked), including as to the terms and premium rates that were reasonably available from underwriters or insurance providers in that market, and it knew or

intended that Richmond and each of the group members would or were likely to act upon JLT's recommendations to place or arrange their property cover, public liability cover and professional indemnity insurance with Statewide (CLS [12]), which circumstances gave rise to a duty owed by JLT to Richmond and each group member under the general law to exercise reasonable care and skill in providing broking services and making recommendations (CLS [13]);

- (c) JLT subscribed to and held itself out to the group as being a subscriber to the Code of Practice of the National Insurance Brokers Association (CLS [8]);
- (d) JLT provided insurance broking services to Richmond and each of the group members by designing their annual insurance programmes, and advising them and recommending to them that they should obtain or renew public liability and/or property cover through Statewide (CLS [9]);
- (e) Richmond and each of the group members followed the advice and recommendations, and instructed or authorised JLT to place or arrange their liability cover, property cover and/or professional indemnity insurance with Statewide (CLS [11]);
- (f) additionally, JLT was party to a separate contract (**Broking Services Contract**) with Richmond and each group member pursuant to which it provided broking services and made recommendations to them, of which contracts it was an implied term that JLT would exercise reasonable care and skill in providing the broking services and making the recommendations. By an amendment to the particulars to CLS [14], the Broking Services Contracts are particularised as having been made by JLT's conduct in offering to obtain or renew contracts of insurance on behalf of Richmond and each group member by their acceptance of those offers, authorising or instructing JLT to do so. The further particulars say "the practice giving rise to the Broking Services Contract is described at paragraph 211 of the Affidavit of Leo Demer dated 18 June 2020". This is a reference to the Affidavit of Leo John Demer (**Demer**) served by JLT in the proceedings. Demer is a consultant to JLT. He was intimately involved in the establishment of Statewide. In paragraph [211] he deposes to JLT's practice in respect of its annual renewal process as follows:

In my experience and from my involvement in this process throughout the Relevant Period the practice is that the annual renewal process involves the following steps:

- a. In or about January or February, JLT will prepare Statewide budgets for the relevant covers, relevantly Liability Cover and Property Cover, for consideration by the Finance Committee.

b. In or about March, JLT will issue declarations to members. This document details all of the member's risk and insurance covers due for renewal or available to the member in the upcoming year. As stated in the declarations, the information collected from members is provided to insurers (for the purposes of reinsurance of the relevant Annual Fund) and to the "Scheme" (that is, Statewide to the extent that it self-insures a part of the Annual Fund), in order to understand the risks, the cover required, and costing, for cover in the upcoming period.

c. In or about late May or early June, JLT will issue a renewal report to members. This document details the proposed risk cover program for the council. This generally gives the council 21 days to accept the proposal, pose questions, or take any other action.

d. In or about mid-June, members will provide renewal authorisation (instructions) to JLT which confirms the cover that the member wishes to be placed.

e. In or about July, JLT will issue a summary of cover to members, which summarises the risks for which the council is covered.

CLS [14]-[15]

(g) JLT owed Richmond and each group member:

- (i) a fiduciary duty to refrain from pursuing or advancing its own interests in circumstances where there existed a conflict, or significant possibility of conflict, between its own interests and those of Richmond or the group members;
- (ii) a fiduciary duty to refrain from using its position or knowledge resulting from its position as an insurance broker so as to obtain a benefit for itself or a third party or to cause detriment to Richmond or a group member (as the case may be);

CLS [19]

(h) in breach of its duty or the implied term to exercise reasonable care and skill in providing broking services and making the recommendations, JLT:

- (i) failed to make any or reasonable efforts to obtain on behalf of Richmond and each group member suitable cover at the best premium rates that were reasonably available to each of them in the market;
- (ii) failed to recommend any alternative underwriter or to make any, or any reasonable, efforts to find alternative cover at lower premiums than those payable to Statwide; and

- (iii) failed to obtain a competitive quotation from any other underwriter or provider, or to advise Richmond and the group members that it had failed to do so;
CLS [17]
- (i) in breach of its fiduciary duties, JLT:
 - (i) pursued or advanced its own interests where there was a conflict or significant possibility of a conflict between its interests and those of Richmond and the group members because it had an interest in earning and continuing to earn fees from Statewide which was in conflict with its obligation to obtain suitable cover at the best premium rates that were reasonably available to Richmond and the group members; and
 - (ii) used its position or knowledge resulting from its position as their insurance broker for its own financial benefit and to the detriment of Richmond and each group member (CLS [22]-[24]);
- (j) the amounts that Richmond and each group member was required to pay to obtain those insurances through Statewide either exceeded the premium rates that were reasonably available from alternate underwriters or providers in the market or exceeded the contribution rates that were available from or could be negotiated by JLT with Statewide (CLS [16]);
- (k) by reason of JLT's conduct complained of Richmond and each of the group members suffered loss or damage.

The Response

- 23 JLT responds by way of its Further Amended Commercial List Response (**CLR**) filed on 10 September 2020.
- 24 Initially JLT did not admit Richmond's allegation (CLS [6]) that at all material times it carried on business as an insurance broker. Its answer (CLR [6]) was that from time to time it provided insurance broking services to some clients but otherwise did not admit the allegation. During the hearing of the motions, no doubt to remove from the playing field the obvious substantial common issue of whether JLT carried on business as an insurance broker, JLT unconditionally admitted the allegation. However, the admission does not extend to one that JLT acted as an insurance broker in its dealings with Richmond and the other group members, or that it had the duties to them which they assert.
- 25 JLT does not admit Richmond's allegation (CLS [7]) that it held itself out as one of the largest insurance brokers in Australia and the world, possessed of the

expertise to deliver the most comprehensive range of insurance and risk solutions products and services available to local government authorities across Australia, and capable of ensuring that councils would receive a well-designed insurance programme at a competitive premium cost (CLR [7]).

- 26 JLT admits that it subscribed to the Code of Practice of the National Insurance Brokers Association and admits that it held itself out to Richmond as a subscriber to it (CLR [8]). JLT particularises its position by reference to its Financial Services Guides dated March 2014, December 2015, and December 2017. It otherwise does not admit Richmond's allegation. This entails a non-admission that it held these matters out to the other group members.
- 27 JLT denies that it provided insurance broking services to Richmond and the group members as alleged (CLR [9]). It pleads that its role and functions are defined and circumscribed by the provisions of the Deed and that these did not make it their insurance broker. It says that Statewide was not an insurer, and denies that it was the case or that it was possible for insurance to be arranged or placed with the Statewide scheme. It admits that from time to time it provided insurance broking services to Richmond, directly and individually, outside the Statewide scheme in relation to certain lines of insurance that did not include liability cover, professional indemnity or property cover, and otherwise denies CLS [9].
- 28 JLT admits that it had knowledge of the market for cover but does not admit that Richmond or group members lacked knowledge of the market. It says that in any event, the members of Statewide appointed the Board of Management to receive advice and issue instructions for the purchase of primary insurance (CLR [12]).
- 29 JLT's response to Richmond's allegation (CLS [11]) that it and each of the group members followed JLT's recommendations and instructed or authorised it to place or arrange their cover is that in accordance with its appointment under the Deed, it effected certain primary insurance for Richmond and the group members on the instructions of the Board of Management and otherwise denies Richmond's allegations (CLR [11]).

- 30 JLT's answer to Richmond's allegation of separate Broking Services Contracts is that its contractual relationship with Richmond and the group members in respect of the provision of insurance broking services was governed by the Deed and that there was no scope for any separate contract to be implied from conduct. It otherwise denies Richmond's allegations (CLR [14]). It denies the implied term pleaded by Richmond (CLR [15]).
- 31 It denies, for reasons which are pleaded but are not necessary to recount for present purposes save to state that they include the contention that cover under Statewide is not fairly comparable with conventional insurance, that Richmond and each group member overpaid for the insurances obtained through Statewide and that the rates exceed those which were reasonably available in the market or exceeded the contribution rates that were available from or could be negotiated by JLT with Statewide (CLR [16]).
- 32 It denies the existence of the fiduciary duties pleaded by Richmond. It pleads that the relationship between JLT and Richmond and the group members was governed and regulated by the terms of the Deed (CLR [21]).
- 33 It denies the existence of a conflict between JLT's financial interests and the interests of Richmond and the group members (CLR [22]) and it denies any breach of such a duty (CLR [23]). It pleads informed consent, which it says was given pursuant to the Deed (CLR [18]). It denies that by reason of its conduct Richmond or any of the group members suffered loss or damage (CLR [25]).

Summary

- 34 From the foregoing analysis, it will be seen that stripped to its bare essentials, the pleaded case is:
- (a) JLT acted as Richmond and each group member's insurance broker in recommending and arranging for them what was, or was in effect, insurance cover;
 - (b) JLT was obliged at general law, or under an implied term of its contract with each of them, to recommend and arrange cover at the best premium rates that were reasonably available from Statewide or in the market;
 - (c) additionally, JLT owed each of the group fiduciary duties to act in their best interests and not to prefer its own financial interests to theirs;

- (d) in breach of these obligations and duties, JLT arranged cover at less advantageous rates than were available and it earned commissions for what it did while in a position of conflict; and
- (e) by its conduct, each member of the group suffered loss and damage.

35 And stripped to its bare essentials, the substance of JLT's defence is:

- (a) JLT denies that it acted as an insurance broker in respect of the group and it denies that Statewide or it was an insurer. It denies the Broking Services Contracts alleged;
- (b) JLT says that its functions and obligations are determined by the terms of, and its appointment and functions under, the Deed which leave no room for the imposition on it of the duties alleged or for the implication of the term pleaded;
- (c) when fairly looked at, the cover which it arranged was not less advantageous than that which it could have negotiated through Statewide or what was available in the market; and
- (d) the group members suffered no loss or damage.

36 From the foregoing analysis of the pleadings and this brief (and perhaps oversimplified) summary, it will readily be appreciated that these proceedings are entirely appropriate to be brought as a class action.

37 JLT's business practices, in the context of Statewide, were the same with respect to Richmond as they were with respect to each member of the group. After all, it was operating in the context of the Deed, to which it and each of the group is a party. The operation of the Deed is at the heart of the case. JLT's position is that one of the effects of the Deed is to undermine the suggested existence of the duties or obligations it is said to have breached, including those under the implied term. Whether this is so, is on its own, a common question of significance. As well, JLT used the same type of instrument in its dealings with Richmond and the group.

38 The parties (in particular Richmond) appear to place importance on whether JLT is appropriately to be described as having been the group's "insurance broker" or having provided "broking services". In my view, the accuracy of these descriptors is not the real issue. What will be material is whether, having regard to the way JLT conducted itself (in respect of which there seems to be little dispute), the terms of the Broking Services Contracts (if established), and

the effect of the Deed, JLT owed to the group the obligations and duties which they assert.

- 39 In this context, it is not suggested that there is any relevant difference between JLT's position vis-à-vis Richmond and its position vis-à-vis any other member of the group.

SUGGESTED COMMON QUESTIONS

- 40 Initially, Richmond proposed a series of common questions which were not sufficiently precisely articulated or targeted to be of utility. It requested a further opportunity to articulate common questions. It provided these on the second occasion.

- 41 I will deal with the proposed questions in groups (where appropriate) in turn.

Question (1) At all material times during the Relevant Period, did JLT have a practice of issuing insurance declarations to Richmond and group members in a template or common form?

Question (2) At all material times during the Relevant Period, did JLT have a practice of issuing Renewal Reports to Richmond and group members in a template or common form?

Question (3) If the answer to 1 and/or 2 is "yes", were those template or common forms used by JLT in carrying out the practice described in paragraph [211] of the Affidavit of Demer dated 18 June 2020?

- 42 JLT argues that these are not questions common to the claims of the group because Richmond does not plead any such practice. The submission overlooks the particulars now given of the Broking Services Contracts.

- 43 During the hearing of the motions, JLT made the following admissions in respect of these questions:

- (1) at all material times during the Relevant Period, JLT had a practice of issuing "Insurance Declarations" to Richmond and group members in a template or common form within a particular year;
- (2) at all material times during the Relevant Period, JLT had a practice of issuing "Renewal Reports" to Richmond and group members in a template or common form within a particular year; and

- (3) the template or common form documents referred to in the two preceding subparagraphs were used by JLT in carrying out the practice described in paragraph [211] of the Affidavit of Demer, dated 18 January 2020.
- 44 The admissions in respect of questions 1 and 2 were qualified in the respect that the template or common form documents in question, varied in respect of the terms of the coverage to be taken up by the group. The documents circulated by JLT were in common form within particular years. Of course, precise coverage would vary from council to council but that does not affect the commonality of the questions. However, in the light of JLT's admissions they are not appropriate to be the subject of a Merck order.
- 45 The substantial question which remains, however, is whether JLT's practices, which were common to JLT's method of doing business across the group, gave rise to the Broking Services Contracts between JLT and each group member with whom JLT did the relevant business, as Richmond alleges in CLS [14].
- 46 This question is a common one, not least of all because the documents said to give rise to the Broking Services Contract in each case are relevantly indistinguishable. The question is covered by question 9 (set out below) which is appropriate to go to trial as a common one subject to redrafting so as to make it freestanding.

Question (4) During the Relevant Period, did JLT hold itself out in the Renewal Reports that it issued to Richmond and group members as:

- (a) being one of the largest insurance brokers in Australia and the world;**
 - (b) possessed of the expertise to deliver the most comprehensive range of insurance and risk solution products and services available to local government authorities across Australia; and/or**
 - (c) capable of ensuring that local councils receive a well-designed insurance programme at a competitive premium cost?**
- 47 This question (which contains three sub-questions) is common, not least of all because it calls for an assessment of the import of the same words used in JLT

documents distributed across the group. Given JLT's non-admission of the holding out, it is appropriate to go to trial as a common question.

Question (5) If the answer to Question 2 is “yes”, did JLT hold itself out in the Renewal Reports and Financial Services Guides that it issued to Richmond and group members as being a subscriber to the Code of Practice of the National Insurance Brokers Association at all material times during the Relevant Period?

- 48 This question is common. It calls for an assessment of the import of the same words used in JLT publications distributed to the group. The holding out is admitted by JLT but with respect only to Richmond. In the absence of an admission by JLT with respect to the other group members, it is appropriate to go to trial.

Question (6) Did the practice described in paragraph [211] of the Affidavit of Demer dated 18 June 2020 constitute or involve the provision by JLT of broking services as alleged in CLS [9]?

Question (7) Did the practice described in paragraph [211] of the Affidavit of Demer dated 18 June 2020 constitute or involve the provision by JLT of recommendations as alleged in CLS [10]?

- 49 These questions are circular, lack utility and are not appropriate to go to trial as common ones. In effect, each question asks whether the practice described by Demer falls within the definitions of broking services and recommendations, which definitions are creatures of the CLS itself.

Question (8) Was the effect of one or more terms of the Deed that JLT could not, or did not, provide broking services to local councils of the kind alleged in CLS [9]?

50 This question is circular, lacks utility and is not appropriate to go trial as a common one. It relies on acceptance of a definition created by the CLS itself and asks whether the Deed displaces the defined matter.

Question (9) Did the practice described in paragraph [211] of the Affidavit of Demer dated 18 June 2020 give rise to a Broking Services Contract between JLT and the corresponding local council as alleged in CLS [14]?

Question (10) Did one or more terms of the Statewide Deed operate to preclude the creation of any Broking Services Contract between JLT and any Statewide member of the kind alleged in CLS [14]?

Question (11) If the answer to Question 9 is “yes”, did the Broking Services Contract contain the implied term alleged in CLS [15]?

51 Question 9 on its own lacks utility. However, taken together with questions 10 and 11 the following substantial common question, which is appropriate to go to trial, can be articulated:

Was there entered into between JLT on the one hand and Richmond and each other group member on the other a contract, an implied term of which was that JLT would exercise reasonable care and skill in:

(a) designing and providing advice with respect to its annual insurance programme and placing or arranging its property and/or public liability and professional indemnity insurance through Statewide; and

(b) advising or recommending that it obtain or renew their property and/or public liability and professional indemnity insurance through Statewide?

52 If this question is intended to be answered on the footing of a set of uncontested facts (which appears to be the intention behind its original framing), those facts should be set out and it made clear that the question is asked with respect to them.

53 The question accommodates JLT's contention (which raises the common issue) that the Deed undermines the existence of any such contract or implied term.

Question (12) During the Relevant Period, was there any provider of insurance other than Statewide offering, quoting or underwriting property and/or public liability and professional indemnity insurance in respect of Australian local councils?

Question (13) If the answer to Question 12 is "yes", were those providers unwilling to offer, quote or underwrite property and/or public liability and professional indemnity insurance to NSW local councils during the Relevant Period?

54 These questions, as framed, are not appropriate to go to trial as common ones.

55 The real issue here is whether (as pleaded in CLS [16]) the amounts that the group were required to pay to obtain their insurance through Statewide either exceeded the premium rates that were reasonably available from alternative underwriters or providers in the market, or exceeded the contribution rates that were reasonably available from or could be negotiated by JLT with Statewide. Determination of what was available to Australian local councils or NSW local councils in general will not answer these questions. It may be possible to articulate precise questions that have utility but these are not them.

Question (14) If the answer to Questions 12 and 13 is "yes", would an insurance broker exercising reasonable care and skill in the provision of broking services to one or more NSW local councils in the Relevant Period:

(a) make efforts to identify such alternative providers;

(b) make efforts to obtain a quotation for insurance, or offer or proposed terms of insurance, from those alternative providers for the NSW local councils to whom it provided broking services;

(c) advise the NSW local councils to whom it provided broking services if it had not requested or solicited a quotation, offer or terms of insurance from such alternative providers?

56 As framed this question has difficulties which make it inappropriate in its current form to go to trial as a common one. Leaving aside that it is premised on answers to Questions 12 and 13, it too relies on the broking services definition. I consider it possible to articulate an appropriate question directed to what a person in the position of JLT would have done.

Question (15) If the answer to Questions 6 and 7 is "yes", did JLT owe the fiduciary duties alleged in CLS [19] to those NSW local councils for whom it provided broking services?

Question (16) If the answer to Question 15 is "yes", did the services that JLT was appointed to perform for Statewide place it in a position of conflict as alleged in CLS [22]?

Question (17) If the answers to Questions 6, 7 and 16 is "yes", in making the recommendations and in placing or renewing Richmond and group members' property and/or public liability and professional indemnity insurance with Statewide, did JLT:

(a) pursue or advance its own interests in earning and continuing to earn fees and commissions; and

(b) use its position or knowledge resulting from its position as Richmond and group members' insurance broker for its own financial benefit?

Question (18) If the answers to Questions 15, 16 and 17 is "yes", did JLT breach the fiduciary duties alleged in CLS [19]?

57 This series of questions is directed to the common issues of whether JLT had fiduciary duties and breached them. These issues comprehend the effect of the Deed for which JLT contends.

58 They are unsatisfactory in this form. They depend on answers to earlier questions and are not specifically related to the group members. They rely on the definitions of broking services and recommendations.

59 It is possible to articulate, with precision, questions which ask whether JLT owed the fiduciary duties pleaded and breached them, along the following lines:

In providing the services and making the recommendations [the uncontested facts of which need to be set out], did JLT owe Richmond and each of the group members a fiduciary duty:

(a) to refrain from pursuing or advancing its own interests in circumstances where there existed a conflict, or significant possibility of conflict, between its own interests and those of Richmond or the group members;

(b) to refrain from using its position or knowledge resulting from its position as an insurance broker so as to obtain a benefit for itself or a third party or to cause detriment to Richmond or a group member (as the case may be)?

Did a conflict exist between JLT's own financial interests in earning and continuing to earn fees and commissions, for or in connection with, services it provided to Richmond and each group member in obtaining suitable property cover and/or liability cover and professional indemnity insurance at the best premium rates that were reasonably available to each of them in the market?

In providing the services, making the recommendations and in placing or renewing Richmond and each group member's property cover and/or liability cover and professional indemnity insurance, did JLT in breach of its fiduciary duties:

(a) pursue or advance its own interests in earning or continuing to earn fees or commissions;

(b) use its position or knowledge resulting from its position as their insurance broker for its own financial benefit and to the detriment of Richmond and each group member?

60 The final question is:

Question (19) What fees and commissions were received by JLT and its related entities in consideration for performing services for Statewide, and for placing insurance or reinsurance in respect of Statewide?

61 This question is not satisfactorily framed. It does not distinguish between commissions and consideration received by JLT generally in respect of its functions under the Deed and individual commissions received for arranging policies for individual members of the group. What is the amount of individual commissions received by JLT is not a common question.

CONCLUSION

62 The declassing motion is dismissed.

63 To enable the parties to have a degree of certainty at an early stage, I will make a Merck order in respect of questions which these reasons contemplate would, subject to refinement, be presently appropriate to go to trial. For convenience, a preliminary Schedule of questions is attached.

64 Within 21 days of delivery of these reasons, Richmond is to circulate the proposed final form of the questions which these reasons contemplate are appropriate, if properly formulated, to go to trial. Within 14 days after receiving Richmond's proposals, JLT is to provide its response with respect to the formulations.

65 I provisionally order that JLT is to pay Richmond's costs of the declassing motion (reflecting Richmond's success) and that the costs of the questions motion will be costs in the cause of the proceedings (reflecting that each side was partially successful and partially unsuccessful). If either party seeks some other order, it is to notify the other party and my Associate within 21 days as to what other order is sought and briefly state why. If some other order is sought, the relevant provisional order will not take effect and I will give directions with respect to the resolution of the issue.

- 66 I will stand the matter over for directions to 28 May 2021 (or to some other mutually convenient date if the parties notify my Associate of it) to be dealt with, initially, in accordance with the COVID protocol earlier sent to the parties.
- 67 I propose to reserve to the trial judge (if indeed that is necessary) the final determination of the questions that are to go to trial.

SCHEDULE

Question: During the Relevant Period, did JLT hold itself out in the Renewal Reports that it issued to Richmond and group members as:

- (a) being one of the largest insurance brokers in Australia and the world;
- (b) possessed of the expertise to deliver the most comprehensive range of insurance and risk solution products and services available to local government authorities across Australia; and/or
- (c) capable of ensuring that local councils receive a well-designed insurance programme at a competitive premium cost?

Question: Did JLT hold itself out in the Renewal Reports and Financial Services Guides that it issued to Richmond and the group members as being a subscriber to the Code of Practice of the National Insurance Brokers Association at all material times during the Relevant Period?

Question: Was there entered into between JLT on the one hand and Richmond and each other group member on the other a contract, an implied term of which was that JLT would exercise reasonable care and skill in:

- (a) designing and providing advice with respect to its annual insurance programme and placing or arranging its property and/or public liability and professional indemnity insurance through Statewide; and
- (b) advising or recommending that it obtain or renew their property and/or public liability and professional indemnity insurance through Statewide?

Question: In providing the services and making the recommendations [the uncontested facts of which need to be set out], did JLT owe Richmond and each of the group members a fiduciary duty:

(a) to refrain from pursuing or advancing its own interests in circumstances where there existed a conflict, or significant possibility of conflict, between its own interests and those of Richmond or the group members;

(b) to refrain from using its position or knowledge resulting from its position as an insurance broker so as to obtain a benefit for itself or a third party or to cause detriment to Richmond or a group member (as the case may be)?

Question: Did a conflict exist between JLT's own financial interests in earning and continuing to earn fees and commissions, for or in connection with, services it provided to Richmond and each group member in obtaining suitable property cover and/or liability cover and professional indemnity insurance at the best premium rates that were reasonably available to each of them in the market?

Question: In providing the services, making the recommendations and in placing or renewing Richmond and each group member's property cover and/or liability cover and professional indemnity insurance, did JLT in breach of its fiduciary duties:

(a) pursue or advance its own interests in earning or continuing to earn fees or commissions;

(b) use its position or knowledge resulting from its position as their insurance broker for its own financial benefit and to the detriment of Richmond and each group member?

Amendments

16 April 2021 - incorrect jurisdiction

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.