Equity Division
Supreme Court
New South Wales

Case Name:	Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as “STC Sports Trading Club” (No 8)
Medium Neutral Citation:	[2019] NSWSC 1658
Hearing Date(s):	20 September 2019; further written submissions 27 September, 11 October, 1 and 22 November 2019
Date of Decision:	28 November 2019
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Judgment to be entered in favour of Mr Mackinnon against the fifth and twelfth defendants for the amount claimed
Catchwords:	CONSUMER LAW – misleading or deceptive conduct – loss and damage – representations found to be misleading and deceptive – whether loss claimed was “because of” the fifth defendant’s conduct CONSUMER LAW – apportionment – where apportionment not pleaded
Legislation Cited:	Australian Consumer Law Civil Liability Act 2002 (NSW) Civil Procedure Act 2005 (NSW) Corporations Act 2001 (Cth)
Cases Cited:	Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112; (1990) 94 ALR 719 Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3) [2013] FCA 984 Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 3) [2012] FCA 939 Australian Competition and Consumer Commission

v TPG Internet Pty Ltd (2013) 250 CLR 640; [2013] HCA 54
Chew v Amanatidis [2009] SASC 334
Gould v Vaggelas (1984) 157 CLR 215; [1984] HCA 68
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52
I & L Securities Pty Ltd v HTW Values (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41
In the matter of Kupang Resources Ltd (subject to Deed of Company Arrangement) [2018] NSWSC 1872
Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 7) [2019] NSWSC 103
Macquarie Generation v Peabody Resources [2000] NSWCA 361
McKernan v Fraser (1931) 46 CLR 343
Miletich v Murchie (2012) 297 ALR 566; [2012] FCA 1013
Permanent Custodians Ltd v King [2010] NSWSC 509
Polon v Dorian [2014] NSWSC 571
Reinhold v New South Wales Lotteries Corporation (No 2) (2008) 82 NSWLR 762; [2008] NSWSC 187
Sykes v Reserve Bank of Australia (1998) 88 FCR 511
Travel Compensation Fund v Tambree t/as R Tambree & Associates (2005) 224 CLR 627; [2005] HCA 69
Ucak v Avante Developments Pty Ltd [2007] NSWSC 367
Wieland v Texxcon Pty Ltd; Porz v Texxcon Pty Ltd; Nominexx Pty Ltd v Wieland (2014) 313 ALR 724; [2014] VSCA 199
Williams v Hursey (1959) 103 CLR 30; [1959] HCA 51

Category: Principal judgment

Parties: Ian Henry Mackinnon as plaintiff representative of 153 plaintiff group members (Plaintiff)
The partnership of Anne Patricia Larter, Alan Jones, Miraleste Pty Ltd trading as USG Partner and Leigh Johnson, trading as "STC Sports Trading Club" (First Defendant)
Anne Patricia Larter (Second Defendant)
Alan Jones (Third Defendant)

	Miraleste Pty Ltd trading as USG Partner (Fourth Defendant) Leigh Johnson (Fifth Defendant) Sports Trading Club Limited (a company incorporated in Hong Kong) (Sixth Defendant) Bella Development Limited (a company incorporated in Hong Kong) (Seventh Defendant) East Ocean Capital Limited (a company incorporated in Hong Kong) (Eighth Defendant) Arabella Racing Pty Ltd (Ninth Defendant) Banksia Holdings (Tenth Defendant) Arabella Louise Foster (Eleventh Defendant) Peter Foster (Twelfth Defendant)
Representation:	Counsel: T J Dixon (Plaintiff) Solicitors: Nelson McKinnon Lawyers (Plaintiff) P N Argy (Fifth Defendant)
File Number(s):	SC 2015/332497

JUDGMENT

1 I gave judgment in this matter on 18 February 2019: *Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 7)* [2019] NSWSC 103.

2 These reasons assume familiarity with that judgment. I shall use the same abbreviations here. I will refer to the paragraphs in the judgment thus: "J" followed by the number of the paragraph in question.

3 At J829-J839, I referred to a number of further matters requiring resolution. At J840, I said:

> "Once the parties have had an opportunity to consider these reasons, I will invite submissions as to the further steps that should now be taken in these proceedings."

4 On 4 March 2019, I made directions for the exchange of submissions in relation to the following questions:

(a) Whether Mr Foster instructed Ms Johnson to represent, and whether Ms Johnson did represent, that “Mark Hughes” was the National Sales Manager of STC as identified at J762.

(b) Whether it is necessary for Mr Mackinnon and the Group Members to obtain relief in relation to various other causes of action and, if so, to develop further submissions in relation to them as identified at J831.

(c) Whether Ms Johnson's failure to speak out has caused loss in circumstances where from 30 August 2013 Mr de Klerk knew Mr Foster was involved in STC and had been masquerading as “Mark Hughes” and yet did not make public what he knew as identified at J837.

(d) The question of precisely when Ms Johnson’s silence about Mr Foster's involvement should be held to have caused damage to Group Members as identified at J838.

(e) The issue of causation generally so far as concerns Ms Johnson.

(f) The question of what, if any, findings should be made about the involvement in STC of Mr Holmes and Prof Snyder as identified at J839.

5 I misstated question (a). The question that arose from J762 was whether Ms Johnson represented to anyone other than Mr de Klerk that “Mark Hughes” was the National Sales Manager of STC.

6 I received further submissions from Mr Dixon, for Mr Mackinnon, on 30 April 2019.

7 There was delay in provision of submissions on behalf of Ms Johnson. Ultimately, on 22 July 2019, Mr Argy served a document headed “Fifth

Defendant's Further Submissions re Causation and Damage". The document contains 995 paragraphs and comprises 152 closely typed pages.

8 In his covering email, Mr Argy said that the submissions had not been prepared by him. On their face, they purport to have been prepared by Ms Johnson herself.

9 To a very large extent that document was not responsive to my direction of 4 March 2019 and sought to reargue matters that I had determined in the main judgment.

10 Mr Dixon delivered written submissions in reply on 5 August 2019.

11 Mr Dixon and Mr Argy made oral submissions on 20 September 2019. During those submissions, Mr Argy directed me to those parts of the 22 July 2019 document that he contended to be relevant to the issues remaining for determination.

12 I have received written submissions since 20 September 2019, in response to particular questions I notified to the parties.

A class action

13 As I stated at J4, Mr Mackinnon brings these proceedings under Pt 10 of the *Civil Procedure Act 2005* (NSW) as representative of 153 named Group Members.

14 The findings I have made about the conduct of Mr Foster and Ms Johnson answer questions which are common to the Group Members. Those findings enure for their benefit as well as for Mr Mackinnon himself. I summarise those findings later in these reasons.

15 However, all Group Members will need to prove, at an appropriate time, that they have suffered damage as a result of the conduct I have found. In that regard, I am told that the Group Members have served some 184 affidavits.

They have not yet been read before me. That will take place at a later hearing.

16 These reasons are concerned with, amongst other things, whether Mr Mackinnon has suffered damage as a result of the conduct I have found.

Application to amend the Further Amended Commercial List Statement

17 In the Further Amended Commercial List Statement, Mr Mackinnon alleges that Mr Foster and Ms Johnson made the representations set out at J736 (being representations made by Mr Foster himself or by Ms Johnson on his instructions) and at J801 (being representations made in the Proposal). Together, these representations were defined in the List Statement as "the Representations".

18 Paragraph 23 of the List Statement is in these terms:

> "The Representations were false and or misleading or fraudulent in that:
>
> a. The person describing himself as 'Mark Hughes' to the plaintiff and the group members was, in fact, the twelfth defendant, Peter Foster, a fraudster who had been charged, convicted, or served sentences in respect of fraud related matters in Australia, the United Kingdom, the United States of America, and Vanuatu;
>
> b. The person describing himself as 'Tom Nolan', the National Sales Assistant of the Sports Trading Club was, in fact, Peter Thomas Nolan;
>
> c. The first and sixth defendants did not have trading offices in Sydney, Hong Kong or London but were operated at a residence at 14 Magnolia Place, Ewingsdale, Byron Bay, New South Wales;
>
> d. Dr Allan Snyder was not the scientific director of the Sports Trading Club and neither the first nor the sixth defendant had a team of analysts or traders with professional qualifications in quantitative disciplines such as science, accounting and mathematics;
>
> e. The first and sixth defendant [sic] were not operating a legitimate sports betting or trading business but a fraudulent scheme in which the loans from the plaintiff and the group members were:
>
> i. transferred off-shore to and for the benefit of the sixth to the tenth defendants, which were controlled by the eleventh and twelfth defendants or associates of them;

ii. transferred to and for the benefit of the eleventh and twelfth defendants; and or

iii. used as part of a 'ponzi' scheme in which the plaintiff and the group members were paid as purported profits on fictitious sports betting trades.

Particulars

Further particulars to be provided following receipt of documents the subject of Norwich Pharmacal orders, discovery and forensic expert reports.

f. The first defendant had no intention of repaying the loans by the plaintiff and the group members and has failed to repay them notwithstanding an agreement to do so."

19 As I set out at J16-J19, the List Statement inaptly named a partnership as "the first defendant". Mr Dixon sought to overcome the infelicity of that pleading as I set out at J89-J90. I concluded that the references in par 23 of the List Statement to "the first defendant" should be taken to include a reference to Ms Johnson (see J82-J90).

20 During argument on 20 September 2019, the question arose as to whether, on the proper construction of the pleading, par 23 amounted to an allegation that each of the statements made in the Proposal, as set out at par 21 of the List Statement and at J801, was false.

21 Against the possibility that that allegation was not clearly made by par 23 of the List Statement, Mr Dixon sought leave to amend the chapeau to that paragraph to add "*inter alia*" so that it read:

> "The Representations were false and or misleading or fraudulent *inter alia* in that:".

22 Mr Argy opposed that amendment and submitted that had he understood that the matters specified in sub-pars 23(a)-(f) were not a complete statement of the respects in which the Representations were said to be misleading, he would have conducted the case differently.

23 On reflection, my conclusion is that, on its proper construction, the effect of par 23 in its existing form is to allege that all of the Representations alleged in the List Statement were false, notwithstanding the fact par 23 does not list each of the Representations earlier alleged. In my opinion that is made clear by par 23(e) which alleges, as a matter of generality, but with sufficient clarity that there was no "legitimate sports betting or trading business" but rather a "fraudulent scheme" of the kind described. That is, in effect, what I found at J802-J803.

24 Accordingly, my conclusion is that the List Statement in its present form alleges that each of the pleaded representations arising from the Proposal was false. Thus it is not necessary that I grant Mr Mackinnon leave to amend.

Findings not made

25 I concluded that, because of her bankruptcy, it was not competent for me to deal with Mr Mackinnon's claims against Ms Larter (J81).

26 I also found that Mr Mackinnon's claims in contract could not succeed against any of Mr Foster, Ms Johnson or Ms Larter (J826-J828).

Findings made about Mr Foster

27 I made findings about the representations made by Mr Foster at J737-J740 and J804-J807.

28 In summary, I found that Mr Foster made each of the representations set out at J736 and that each of those representations was false and thus misleading or deceptive.

29 Mr Foster was the mastermind of the STC fraud and must have known that each of the representations that he made was false.

30 As I found at J835, I am satisfied that the representations made by Mr Foster have caused the loss of which Mr Mackinnon and the Group Members complain.

31 At J835, I said that:

> "Upon production of evidence to show what that current loss is, I will enter judgment against Mr Foster for that amount."

32 On reflection, I conclude that the appropriate course is that I enter judgment against Mr Foster in favour of Mr Mackinnon for the amount that Mr Mackinnon claims. I will consider what judgments ought to be entered in favour of the other Group Members once their evidence is read.

Findings made about Ms Johnson

33 I made findings as to the representations made by Ms Johnson at J750-J800 and J808-J819.

34 In relation to a number of those representations, to which I referred at J760-J762, J797-J798 and J799, I found that Ms Johnson had made such representations to Mr de Klerk. I invited submissions as to whether the evidence permitted a conclusion that Ms Johnson made those representations to anyone other than Mr de Klerk. Mr Dixon now accepts that there is no such evidence.

35 In those circumstances, my conclusions are that Ms Johnson made the following representations on the instructions of Mr Foster:

(1) on 14 March 2013 and 30 May 2013 to Mr de Klerk, that a person whose real name was "Mark Hughes" was the National Sales Manager of STC (J750-J761);

(2) on 14 March 2013 to Mr de Klerk, that monies invested by Associate Members to STC were secured (J796-J797);

(3) on 14 March 2013 to Mr de Klerk, that STC had assets of $10 million (J799);

(4) on 14 March 2013 and 30 May 2013 to Mr de Klerk, that Mr Foster was not involved in STC (J244; J265; J447-459; J750-761);

(5) from at least 30 September 2013 to all existing Associate Members of and all prospective investors in STC, that Mr Foster was not involved in STC (J766-J783);

(6) from 14 March 2013 to all existing Associate Members of and all prospective investors in STC, that the statements made in the Proposal were true (J808-J819).

36 I found that those representations were false as:

(1) there was no person whose real name was "Mark Hughes" who was the National Sales Manager of STC and that the person representing himself to Associate Members of and prospective investors in STC as "Mark Hughes" was Mr Foster;

(2) the monies invested by Associate Members in STC were not secured;

(3) STC did not have assets of $10 million;

(4) Mr Foster was involved in STC and, by July 2013, was in control of STC's operations; and

(5) the following statements in the Proposal were false:

(a) STC had "secured the exclusive rights and been appointed the Club Member for Australia" from Sports Trading Club Limited (a Hong Kong company);

(b) these “highly prized rights” allowed for $20 million to be “traded on sporting events and prediction markets in Australia and overseas”;

(c) STC sought to raise “$10 million by way of a loan so as to maximise profits and fully utilise the $20 million allocation”;

(d) any loan made to STC would be “100% secured against the value of the Australia rights and by way of personal guarantee by” Ms Larter;

(e) instead of paying interest on monies advanced STC would share one half of the profits it made “as a Member” with “Associate Members”;

(f) there were opportunities to make “successful trades” on sporting events by using “intelligence”;

(g) the “intelligent trader” maximised profits and minimised losses “through the use of established financial risk management strategies such as stop loss, hedging and the equivalent of short selling” and that “these are just a few of the skills that are second nature to our highly trained Account Managers”;

(h) the “actual trade decisions are made by our Account Managers, under the supervision of our Senior Analyst and Chief Investment Officer”;

(i) each “Account Manager has extensive experience in trading on sporting events, and a track record of discipline and intelligent decision making”;

(j) the Account Managers “expertly analyse and trade the betting markets, taking the emotion out of the betting game and putting quantitative analysis in its place”;

(k) the Account Managers "are a team of analysts with experience on sports and investment, and with professional qualifications in quantitative disciplines such as science, accounting and mathematics";

(l) the Account Managers support the Chief Investment Officer "through undertaking extensive statistical and trending analysis coupled with rigorous background research and market intelligence" to "seek attractive risk-reward profile[s]" and "allocate assets" "using sports specific algorithms that are used to identify value at all markets";

(m) the Account Managers "have the invaluable access to information received from our Scientific Research Director, Dr Allan Snyder, from the Sports Trading Club Insight Project at the University of Sydney, harnessing the extraordinary talents of Savants";

(n) STC "has also created the 'Insight Project', a world first with the study of savants and sports trading";

(o) STC "have embraced the extraordinary skills of savants to give ourselves a unique advantage. Certain savants unmask patterns that others can't see and are bewilderingly quick at performing calculations and recalling enormous amounts of data";

(p) those "savants are mysteriously gifted at setting odds and point spreads on games such as football and basketball with extraordinary accuracy";

(q) the "Sports Trading Club Limited has the expertise and knowledge to trade on sporting events worldwide" and "they only appoint one Club Member in each country"; and

(r) “the amount of money to be traded in each country is calculated in accordance with the specific size of the country” and other like matters and that “in Australia it was determined that that sum was $20 million and the Australian sole rights were obtained by Leigh Johnson and Anne Larter”.

37 It follows that Ms Johnson thereby engaged in misleading or deceptive conduct within the meaning of s 18 of the *Australian Consumer Law*.

38 Further, I found that Ms Johnson made representations referred to at [35(1), (4) and (5)] with knowledge that they were false.

39 Before further considering the consequences of my findings about Ms Johnson’s misleading or deceptive conduct, I will turn to the remaining causes of action agitated on behalf of Mr Mackinnon.

Further findings sought

Deceit

40 On 20 September 2019, Mr Dixon submitted that I should make findings of deceit against Ms Johnson.

41 To the extent that I have made the finding reiterated at [38], I have done so.

42 However, Mr Dixon accepted that such a finding does not take Mr Mackinnon’s case, so far as it concerns the relief to which he is entitled, any further.

Conspiracy

43 Mr Dixon submitted that, in addition to making the findings to which I have referred, I should also find there to have been a “conspiracy to defraud investors involv[ing] at least Mr Foster and Ms Johnson”.

44 The tort of conspiracy may take two forms.

45 These are:

(1) an agreement or combination between two or more persons to commit a lawful act with the predominant purpose of injuring or damaging a plaintiff, and the act is carried out and the purpose achieved: *McKernan v Fraser* (1931) 46 CLR 343 (see especially the judgment of Evatt J); or

(2) an agreement or combination between two or more persons to commit an unlawful act with an intention to injure a plaintiff, and the act is carried out and the intention achieved: *Williams v Hursey* (1959) 103 CLR 30; [1959] HCA 51 (Fullagar J at 78 with Dixon CJ and Kitto J agreeing, Taylor J at 108-109, Menzies J at 125).

46 It is evident from the form of par 39 in the List Statement that Mr Mackinnon alleges a conspiracy of the second kind.

47 It is necessary to pay careful attention to the precise manner in which Mr Mackinnon has pleaded his case in conspiracy.

48 The claim is contained in par 39 of the List Statement which is in the following terms:

> "In the alternative, the:
>
> a. first and the twelfth defendants; alternatively
>
> b. the first defendant and the sixth to the twelfth defendants,
>
> are liable in tort for conspiracy in that they had the intention (actual or constructive) of causing damage to the plaintiff and the group members by:
>
> c. knowingly participating in the fraudulent scheme referred to in paragraph 23(e) above; and
>
> d. transferring or assisting in the transfer of the loan amounts to and or for the benefit of the sixth to the twelfth defendants."

49 Paragraph 39(c) refers to par 23(e) in the List Statement which is in the following terms:

> "The first and sixth defendant [sic] were not operating a legitimate sports betting or trading business but a fraudulent scheme in which the loans from the plaintiff and the group members were:
>
> i. transferred off-shore to and for the benefit of the sixth to the tenth defendants, which were controlled by the eleventh and twelfth defendants or associates of them;
>
> ii. transferred to and for the benefit of the eleventh and twelfth defendants; and or
>
> iii. used as part of a 'ponzi' scheme in which the plaintiff and the group members were paid as purported profits on fictitious sports betting trades."

50 That is, what is pleaded is that, along with Mr Foster, Ms Johnson:

(a) intended to cause damage to Mr Mackinnon and Group Members;

(b) by knowingly participating in a fraudulent scheme whereby the loans from Mr Mackinnon and other Group Members were transferred off-shore to and for the benefit of entities controlled by Mr Foster and Ms Arabella Foster (the sixth to tenth defendants), and then for the benefit of Mr Foster and Ms Arabella Foster and used as part of a "Ponzi" scheme involving fictitious sports betting trades.

51 In order that Ms Johnson knowingly participate in such a fraudulent scheme, it would have to be shown that she knew such a scheme was afoot.

52 I see no basis in the evidence upon which I could conclude that Ms Johnson behaved in this fashion.

53 Mr Dixon said:

> "It is accepted there is no direct evidence that Ms Johnson had the intention of causing damage to the Group Members by transferring their loan amounts under the fraudulent scheme".

54 Not only is there no “direct evidence” that Ms Johnson had this intention, I do not feel able to infer from the evidence that she did.

55 Ms Johnson was a signatory on the STC Westpac account. However, as I found at J192, there is no suggestion that Ms Johnson authorised any payment out of that account or received any money deposited to the account, apart from the $50,000 she withdrew in December 2013 (see J646-J647).

56 Although Ms Johnson understood that it was necessary that Mr Foster’s involvement in STC be concealed, and took steps to ensure that occurred, and, by September 2013, developed strong suspicions about the use to which Mr Foster was putting Associate Members’ money, I see no basis on which I could conclude that Ms Johnson intended to cause damage to Group Members.

57 Mr Mackinnon has not made out this claim.

Other claims in the List Statement

58 Mr Dixon did not develop submissions in relation to the remaining claims in the List Statement: restitution (par 31), conversion (par 38), constructive trust (pars 41 to 43) and contravention of s 601ED(5) of the *Corporations Act 2001* (Cth).

59 I take those claims to have been abandoned.

Ms Johnson’s misleading or deceptive conduct

60 I return now to the consequences of my findings that Ms Johnson engaged in misleading or deceptive conduct.

61 I have found that Ms Johnson’s misleading or deceptive conduct arose from:

(1) her knowledge that the Proposal was made available to investors in STC; and

(2) her silence about Mr Foster's involvement in STC.

Ms Johnson's representations about the statements in the Proposal

62 I have found that:

(1) from 14 March 2013 Ms Johnson represented to Associate Members of and prospective investors in STC that the statements in the Proposal were true (see [35(6)] above);

(2) numerous statements in the Proposal were false (see [36] above); and

(3) Ms Johnson thereby engaged in misleading or deceptive conduct.

63 I have found that Ms Johnson knew of the Proposal, and was sufficiently familiar with it to discuss it in some detail with Mr de Klerk (see J818). As I said at J14, Ms Johnson must have known the Proposal to contain false statements. At the very least, she was recklessly indifferent to whether the statements were true or false.

64 Mr Mackinnon said in his affidavit that "[o]n the basis of the information in the Proposal…I decided to loan monies to STC".

65 Section 236 of the *Australian Consumer Law* relevantly provides:

> "(1) If:
>
> (a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3;
>
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention."

66 In *Gould v Vaggelas* (1984) 157 CLR 215 at 238; [1984] HCA 68, Wilson J observed:

> "Where a plaintiff shows that a defendant has made false statements to him, intending thereby to induce him to enter into a contract, and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth, or that the plaintiff, either by his words or conduct, disavowed any reliance on the fraudulent representations."

67 In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54, French CJ and Crennan, Bell and Keane JJ observed at [39]:

> "Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. That is to say there must be a sufficient causal link between the conduct and error on the part of persons exposed to it. It is in that sense that it can be said that the prohibitions in ss 52 and 18 were not enacted for the benefit of people who failed to take reasonable care of their own interests."

68 It is not necessary that reliance on misleading or deceptive conduct be "reasonable": see *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 517 (Heerey J, Sundberg J agreeing at 521).

69 Merely failing to check the accuracy of the defendant's representation is not sufficient to deny a claimant a remedy: *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52 at [128] (McHugh J).

70 In *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; (1990) 94 ALR 719, the claimant, a solicitor, failed to give adequate attention to a planning certificate attached to a contract of sale. Had the solicitor been more careful, he would have found that the representations made to him were false (at 134-135). Yet the Federal Court did not regard the solicitor's behaviour as denying him a remedy (at 138). That was because the relevant misrepresentation remained an operative factor in inducing the solicitor to act.

71 In *Travel Compensation Fund v Tambree t/as R Tambree & Associates* (2005) 224 CLR 627; [2005] HCA 69 at [32], Gleeson CJ observed that:

> "Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing parties to take that risk, if the misleading or deceptive conduct takes the form of providing or participating in the provision of false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct."

72 Notwithstanding these authorities, Mr Argy submitted that Mr Mackinnon's reliance on the claims made in the Proposal was, considering the extravagant nature of those claims, unreasonable. Mr Argy submitted that it followed that Mr Mackinnon had not relied on the statements in the Proposal in any relevant matter and thus Mr Mackinnon's loss could not be said to have been "because of" the misrepresentations made in the Proposal.

73 In support of that proposition, Mr Argy cited the observations of Gray J in *Chew v Amanatidis* [2009] SASC 334 at [42] as follows:

> "In the present proceeding, it is evident from the Judge's findings that this was at the very least a most unusual transaction. It was not an ordinary business transaction. It is difficult to characterise the transaction as having a serious business purpose when regard is had to the Judge's findings about the ludicrous nature of the returns. A moment's thought by a person experienced in business or, for that matter, anybody with a modicum of commonsense would lead to the inevitable conclusion that the proposed investment was a preposterous proposal. A person proceeding with such a transaction would, it might be expected, have been propelled by greed. Having regard to its lack of any commerciality, the transaction could scarcely be described as a business transaction. Having regard to Mr Amanatidis' years of business experience, this was not an occasion on which one could reach a conclusion that there had been reasonable reliance. Despite Mr Amanatidis' assertion that he trusted Mr Chew, any suggested reliance that may have followed was not reasonable in the circumstances. To repeat the trial Judge's conclusion, it is impossible that any legitimate scheme could have yielded such fabulous returns. The circumstances did not give rise to a special relationship and the claim in tort should be dismissed."

74 I do not see Gray J's observations as being relevant to the case before me. His Honour was considering the law of negligent misstatement and the question of whether or not a duty of care had arisen by the party in question in relation to the relevant statements.

75 The inherent improbability of a representation made under the *Australian Consumer Law* may be relevant to the question of whether the statement is "of such a nature as would be likely to provide…inducement" (to adopt the words of Wilson J in *Gould v Vaggelas*) to the representee in question. But in a case where, as here, the extravagant representations were, as I find, made for the precise purpose of inducing gullible investors to part with their money, the Court would be slow indeed to reject the evidence of persons such as Mr Mackinnon to whom the representations were directed.

76 In any event, in this case, Mr Argy did not challenge Mr Mackinnon's evidence that he did rely upon what was said in the Proposal to make his investment.

77 As I have said at [64], Mr Mackinnon's evidence in his affidavit was:

> "On the basis of the information in the Proposal and my telephone calls with Tom Nolen [sic] from STC…I decided to loan monies to STC."

78 Mr Argy did ask Mr Mackinnon questions about his response to the advertisement published by STC, a copy of which I set out at J145.

79 That part of the cross-examination read:

> "Q. It's effectively offering you an income of $260,000 a year with no selling, no risk and no leaving home?
>
> A. Yes.
>
> Q. And that was your understanding of it?
>
> A. Yes.
>
> Q. And as a time when I think, as you told his Honour yesterday, you were on the pension, that's a pretty attractive proposition?
>
> A. Yes."

80 That cross-examination fell far short of putting to Mr Mackinnon that he did not rely upon the statements made in the Proposal.

81 In the absence of such a challenge to Mr Mackinnon's evidence, I am not prepared to reject it.

82 Mr Mackinnon gave this evidence in response to a question from me:

> "Q. You [understood] that this trading was to take place by reference to particular sporting events?
>
> A. No, to any sporting events, your Honour, which involved teams. All sorts of sporting events we know about; tennis, soccer, for example, which was the biggest one, they had a six months forward position on Germany winning the World Cup. Now, that amount of money was put out from anyone's account, in total in fact, was proven to be a successful trade because they did win, and the return shown on our account was so astronomical, it was almost unbelievable. Now, that's very different from saying they're going to win, we'll put this money on to win."

83 It is true that in this evidence Mr Mackinnon said that he thought the return shown on "our account" to be "so astronomical" that it was "almost unbelievable". But these are observations made after Mr Mackinnon had executed the loan agreement and advanced his funds.

84 It may be that Mr Mackinnon was gullible to accept the extravagant claims made in the Proposal. A more sophisticated or sceptical person in Mr Mackinnon's position may have not been persuaded by the claims made in the Proposal to invest in STC.

85 However, I am satisfied that the matters stated in the Proposal were, in fact, matters which caused Mr Mackinnon to make his investment and, to return to Wilson J's words, were "of such a nature as would be likely to provide such inducement".

86 I am therefore satisfied that Mr Mackinnon invested in STC "because of" the statements in the Proposal and thus "because of" Ms Johnson's misleading or deceptive representation that the statements in the Proposal were true.

87 It follows that Mr Mackinnon is entitled to recover his loss from Ms Johnson.

Ms Johnson's representation that Mr Foster was not involved in STC

From what date did Ms Johnson represent by silence that Mr Foster was not involved in STC?

88 In finding the representation at [35(5)], I accepted Mr Mackinnon's case that on Mr Foster's instruction and "by silence or omission" Ms Johnson represented to Mr Mackinnon and Associate Members including the Group Members that Mr Foster "was not involved in STC" (as alleged at List Statement par 20(c)(i)).

89 At J765, I referred to authority to the effect that if circumstances give rise to a reasonable expectation that, if a fact existed, it would be disclosed, then the failure to disclose that fact might give rise to an inference that it did not exist; and that failure to disclose the existence of the fact in those circumstances might constitute misleading or deceptive conduct.

90 At J782-J783, I concluded that, by the end of September 2013, Associate Members of STC and prospective investors in STC were entitled reasonably to expect that if, as I found was the fact, Ms Johnson, as a partner in STC:

(a) knew of matters which suggested that investment in STC was unsafe;

(b) knew that funds invested in STC may be in danger and may be being improperly used;

(c) was extremely concerned that STC was being improperly managed and operated;

(d) was extremely concerned that STC may be being operated as a Ponzi scheme by Mr Foster and was being illegally and fraudulently managed and operated;

(e) was extremely concerned that Associate Members' accounts and records may be being falsified; and

(f) was extremely concerned that Associate Members' monies may be at risk and not being properly accounted for,

then those matters would be disclosed to them.

91 Ms Johnson's email of 10 September 2013 shows that Ms Johnson knew of, and was concerned about, each of these matters (J509 and J513).

92 Although Ms Johnson claims she took the steps set out at J687-J705, she did not disclose the matters at [90] to Associate Members of and prospective investors in STC.

93 I found that, in those circumstances, by the end of September 2013, Ms Johnson represented to Associate Members and to prospective investors in STC that Mr Foster was not involved in STC (J791-J792).

94 Mr Dixon submitted that I should go further, and find that from a point much earlier than the end of September 2013, Associate Members of and prospective investors in STC were reasonably entitled to expect that if Ms Johnson knew that Mr Foster was in any way involved in STC, she would disclose that fact to them.

95 That case is, I find, open on the pleadings as:

(a) at par 20(c)(i) of the Further Amended Commercial List Statement, it is alleged that, by silence or omission, Ms Johnson represented that Mr Foster was not involved in STC;

(b) at par 35(b), it is alleged that Ms Johnson concealed the information in par 23, including that "Mark Hughes" was in fact Mr Foster, with the knowledge that this would create a false impression or with reckless disregard as to whether this would create a false impression;

(c) it is a necessary inference from that allegation that Mr Foster was in fact involved in STC; and

(d) at par 37(b), it is alleged that Ms Johnson "deliberately concealed" that information "knowing that [Mr Mackinnon] and the group members would not invest in [STC] had they been aware" of that information.

96 I have found that Ms Johnson knew from the outset that Mr Foster was involved in STC (J131 and J766). I have found Ms Johnson took active steps to conceal Mr Foster's involvement from Mr de Klerk and from Mr Jenman and Mr Baker, the investigators to whom Pikes & Verekers Lawyers wrote in April 2013 (J315-J330).

97 I have found that, far from taking steps to reveal Mr Foster's involvement in STC, Ms Johnson actively concealed it.

98 I have made the following findings relevant to Ms Johnson's knowledge and perception of the significance of Mr Foster's role at STC:

(a) at some time after Ms Johnson appeared for Mr Foster to seek an adjournment of the proceedings before Yates J (see J104) (*Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 3)* [2012] FCA 939), Mr Foster proposed that Ms Johnson become a limited partner in STC and "stressed that he wouldn't involve himself in any more scams" and that "the business would be a legitimate business" (J107);

(b) Ms Johnson knew Mr Foster "had been accused of selling diet products that didn't work" (J109);

(c) Ms Johnson knew that Mr Foster had hitherto been involved in "scams", had "got into trouble" with businesses that were not

"legitimate" (J111-J112), and had been involved in "improper" activities (J114);

(d) the reason Mr Foster was not to be a partner of STC was because "he was going to go to gaol" in relation to "a case in Brisbane" in which he was involved (see J116): evidently a reference to the proceedings heard by Logan J between 12 June and 5 October 2012 and which led to his Honour's decision of 27 September 2013 in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)* [2013] FCA 984, to which I referred at J545;

(e) from the outset, Mr Foster "was not to be associated with the business" (J443);

(f) at the outset, Mr Foster insisted he would not participate in the management or operation of STC but would only be involved in "setting up and operating the business's website and similar technological aspects" (J117);

(g) at the outset, Ms Johnson was concerned about Mr Foster having any role in the business, including one confined to setting up the website (J121);

(h) Ms Johnson implored Ms Larter to "[g]et rid of him" and argued that "there's got to be someone who can manage that [sic] internet side of things" and that Mr Foster was "not indispensable" (J122);

(i) Ms Johnson "would not have been interested in doing something with Mr Foster having access to the money" (J118);

(j) Ms Johnson attended the meeting at the Catalina restaurant with Mr de Klerk on 14 March 2013 at Mr Foster's request

(J242), apologised for the absence of “Mark Hughes” (J249) and explained his role as being “head of trading” (J257) knowing that “Mark Hughes” was in fact Mr Foster (J244 and J459);

(k) Ms Johnson must have been aware at this time that Mr Foster was involved at a sufficiently high level at STC to be arranging meetings with potential investors (J243);

(l) Ms Johnson attended on Pikes & Verekers in April 2013 at Mr Foster’s bidding and was present when Ms Larter gave Mr Tassell instructions to write to two private investigators, Mr Jenman and Mr Baker, on behalf of herself and Ms Larter denying that STC was “a mere front for the notorious conman Peter Foster” (J315-J318);

(m) Ms Johnson accepted that these instructions were given to Pikes & Verekers to prevent Mr Foster’s involvement in STC from being exposed (J326);

(n) Ms Johnson knew by then that Mr Foster was not merely setting up the website and attending to technological matters, but was also “getting going with the postings” and “doing the postings” (J328);

(o) Ms Johnson attended on Pikes & Verekers to “try to shut down the attempt to make Mr Foster’s involvement public” because “he wasn’t supposed to be involved in it anymore” (J320);

(p) in April 2013, Mr Foster “wasn’t meant to be running it” but “he seemed to just do more and more” (J322);

(q) Ms Larter asked Ms Johnson to attend at Pikes & Verekers because Ms Larter stood to lose everything if Mr Foster’s involvement was exposed (J321);

(r) Ms Johnson accepted that it would not have been good for the STC business were Mr Foster's involvement to be revealed and such revelation would have "jeopardised the funds of anyone who had invested" (J324);

(s) Ms Johnson heard Ms Larter tell Mr Tassell at Pikes & Verekers that revelation of Mr Foster's involvement in STC "will destroy my business" (J325);

(t) Ms Johnson was involved in this way in the sending of the Pikes & Verekers letter because Mr Foster had asked her to keep his identity secret and because she knew that the STC business would not attract investors if Mr Foster's involvement was known (J330);

(u) Mr Foster asked Ms Johnson to attend the 30 May 2013 meeting with Mr de Klerk and knew that during the Skype call Mr Foster was passing himself off to Mr de Klerk as "Mark Hughes" (J340-J377 and J451-J459);

(v) immediately after the 30 May 2013 meeting, Ms Johnson told Mr de Klerk that she would speak to "Mark" about Mr de Klerk's prospective investment in the purported STC South Africa venture, knowing that "Mark" was Mr Foster (J378);

(w) by July 2013, Ms Johnson understood that Mr Foster was acting as STC's "team leader" (J403);

(x) on or about 16 July 2013, Ms Johnson sent an SMS to Mr McMullen speaking of "everybody going to jail" and suggesting that "we were operating Ponzi scheme" (J406);

(y) on around 16 July 2013, when an Associate Member, Mr Glen Radica made an enquiry of Ms Johnson about the return of the

money he had loaned STC, Ms Johnson did not reveal Mr Foster's involvement because, she said, she was "hoping it would end" and was thinking "Foster's going to be gaoled" (J427) and, she said, because she was trying to encourage Ms Larter to "step up" and that Mr Foster "would be out" (J429);

(z) on 30 August 2013, Ms Johnson told Ms Larter that Mr McMullen had told her that Mr Foster had a gambling problem, was improperly using the money of Associate Members to place large bets on sporting events for himself and was operating STC "as a giant Ponzi scheme" (J435-J436);

(aa) in the same conversation, Mr Foster told Ms Johnson that he would "put a bullet" in her head if she "told anyone" that he was "involved" (J441);

(bb) thus, by 30 August 2013, Ms Johnson not only knew that Mr Foster was "involved" in STC but had made it clear that his name was not to be associated with STC (J442);

(cc) by 30 August 2013, Ms Larter was "in with" Mr Foster (J447);

(dd) on around 1 September 2013, according to Mr Foster's 1 September 2013 email, which Ms Johnson did not dispute in her 10 September 2013 reply, Ms Johnson told Ms Larter that she believed that "millions of dollars are being made and that they're all being stolen" (J472 and see also J516);

(ee) by 1 September 2013, Mr Foster was doing "all the trading" (J478 and J481);

(ff) by 10 September 2013, Ms Johnson understood that Mr Foster was in total control of STC's operations (J503-J504);

(gg) the matters set out at [90] above; and

(hh) there was a “striking similarity of methods, techniques and facts” between those found by Logan J in relation to the SensaSlim business and Mr Foster’s modus operandi at STC (*Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)*) (J564-J567).

99 In light of those findings, I am persuaded that Mr Dixon is correct to submit that Associate Members of and prospective investors in STC were reasonably entitled to expect that Ms Johnson would disclose what she knew to be fact by 14 March 2013, that being the date of the meeting at the Catalina restaurant.

100 On 14 March 2013, Ms Johnson participated in the charade of apologising for the absence of “Mark Hughes” (J249), who she knew to be Mr Foster (J244 and J459), and explained his role at STC as being “head of trading” (J257).

101 By 14 March 2013, Ms Johnson knew that:

(a) Mr Foster was involved in STC more significantly than “setting up and operating the business’s website and similar technological aspects” (J117);

(b) Mr Foster was instead involved at a sufficiently high level to be arranging meetings with potential investors (J243);

(c) Mr Foster was so acutely aware that his involvement in STC must remain concealed that he was passing himself off to Associate Members of and prospective investors in STC as “Mark Hughes” (J244-J264 and J459).

102 By not disclosing these matters, Ms Johnson remained silent when Associate Members of and prospective investors in STC were reasonably entitled to expect that she, as one of the two partners in STC, would disclose what she knew to be the true state of affairs, either to them or to a person or body that would cause them to be made aware of those matters.

103 For these reasons my conclusion is that Ms Johnson engaged in misleading or deceptive conduct on and from 14 March 2013.

104 This is especially so in circumstances where, at the outset:

(a) Mr Foster insisted he would not participate in the management or operation of STC but would only be involved in "setting up and operating the business's website and similar technological aspects" (J117);

(b) Ms Johnson "would not have been interested in doing something with Mr Foster having access to the money" (J118); and

(c) Ms Johnson was concerned about Mr Foster having any role in the business, including one confined to setting up the website (J121).

The proper characterisation of Mr Mackinnon's evidence about reliance

105 As I recorded at J644, in his affidavit Mr Mackinnon said:

> "On 30 October 2014, I heard news reports that Peter Foster was involved in STC. If I had known this, I would not have loaned any monies to STC."

106 I recorded at J645 that Mr Argy did not challenge this evidence and that I was not prepared to reject it.

107 Mr Argy submitted that Mr Mackinnon's evidence should be read as meaning that had Mr Mackinnon known that Mr Foster was involved in STC as described in the "news reports" to which he referred, he would not have invested in STC. That is, Mr Argy submitted that the "this" to which Mr Mackinnon referred to in the phrase "if I had known this" was not the mere fact of Mr Foster's involvement in STC, but such involvement as described in the news reports.

108 I do not accept that submission. The natural reading of Mr Mackinnon's evidence is that, had he known Mr Foster "was involved in STC", that is "involved" at all, he would not have invested.

109 In any event, such "news reports" from this time as are in evidence did not describe the nature of Mr Foster's involvement in STC other than to quote a "Gold Coast man" who said that he lost the $500,000 that he invested with STC and that Mr Foster "had been in contact with him chasing money for the ponzi-style scheme". Otherwise, the articles said the Australian Federal Police had "confirmed it was not investigating [Mr] Foster over any new dealings" and that "there was no ongoing case relating to [Mr] Foster's links to [the] Sports Trading Club".

110 Mr Argy submitted that it was not necessary for him to challenge Mr Mackinnon in cross-examination about his statement as I have set out at [105] because of Mr Dixon's statements in opening oral submissions that "there was notoriety that if people had have known that [Mr] Foster was doing the same thing as he was doing in those cases" and that "there is a number of press reports that we rely upon to show that [Mr] Foster's name was associated with those types of scams". I do not accept that submission. Mr Dixon was merely explaining why he submitted that earlier decisions about Mr Foster, including those to which I referred at J27-J36, were relevant. Mr Dixon's statements had no relevance to what Mr Mackinnon said about his own position, and provided no justification for Mr Argy's failure to challenge Mr Mackinnon about his evidence.

The de Klerk question – a break in the chain of causation?

111 Mr Argy submitted that the revelation by Ms Johnson to Mr de Klerk on 30 August 2013 (see J447ff) that Ms Larter was "in [with] Peter Foster", Mr de Klerk's subsequent realisation that "Mark Hughes" was in fact Mr Foster and his communications thereafter with a television journalist and the police (see J460-J465) was a "novus actus interveniens" which broke the "chain of causation" between any representation made by Ms Johnson that Mr Foster

was not involved in STC and the loss suffered by Mr Mackinnon and other investors.

112 Mr Argy put it this way:

> "…in my submission that's equivalent to a novus actus in terms of breaking the causal link because there was nothing [Ms] Johnson could have told the police that was more potent or powerful than what she knew Mr de Klerk would tell them or the media. He was a case study that epitomised what Mr Foster was up to."

113 This submission requires me to give more detailed consideration to this aspect of Mr de Klerk's conduct than is set out at J460-J465.

114 On 30 August 2013, Ms Johnson sent Mr de Klerk an SMS saying that Ms Larter was "in [with] Peter Foster" (J448).

115 This was the first time Ms Johnson had mentioned the name "Peter Foster" to Mr de Klerk (see J449).

116 Mr de Klerk gave this evidence in his affidavit of 27 October 2016:

> "I did not know who Peter Foster was so I asked a friend of mine to help me do some research. I located information on the internet about Peter Foster the Australian conman and saw a video of Peter Foster. I immediately recognised Peter Foster as being the person I know as Mark Hughes. I instantly recognised his voice, his way of speaking and the sound of his voice as that of Mark Hughes."

117 This was doubtless very alarming from Mr de Klerk's point of view. Not only was he an Associate Member of STC, having loaned $250,000 pursuant to the agreements he signed on 17 February 2013 (see J208) and the further $200,000 on 10 July 2013 (see J395), he had paid the Australian dollar equivalent of US$1 million to Bella Development Limited for the rights to the alleged South African STC venture (see J381ff) in return for which he received nothing (see J394).

118 Very shortly after receiving the SMS from Ms Johnson, Mr de Klerk received a telephone call from Mr Cameron Williams from Channel 9. Mr de Klerk said this was "just after" he received Ms Johnson's SMS or "maybe the next day".

119 Mr de Klerk said in cross-examination:

> "He rang me up and said if I am Pieter de Klerk, I said, yes. He says, are you involved with STC - trading company, I said, yes. He says, so sorry I want to give you the bad news, but do you know that Peter Foster's been - I said, look, I just recently find out. He said, 'From whom'. I said, no, from one of the partners, Leigh Johnson. He said, okay, in - and he said to me that I don't have to believe him, but that she and Peter Foster - was there was some bikie - look, I didn't even - I can't - I don't want to put the wrong words here, but they were involved or they were - they knew each other long before this scenario. That was what it came to."

And:

> "Q. Did he explain to you how he knew about you or why he was ringing you?
>
> A. He said that my name came up. He actually contacted Leigh Johnson and my name came up in the conversation, because he wanted a - how he got to Leigh Johnson I am not aware of, or how Leigh Johnson got to him. I'm not sure how this thing tumbled at that point, but all I know is that he contacted and my name was given to him by [Ms Johnson] as an entrusted person for STC trading or - a trader. Or associate, if I - if that's the right way."

120 Mr de Klerk gave this evidence in a somewhat compressed fashion. However, I understand Mr de Klerk's evidence to be that:

(a) Mr Williams asked Mr de Klerk whether he was involved with STC and that Mr de Klerk said that he was;

(b) Mr Williams said that he some "bad news", namely that Mr Foster was involved with STC;

(c) Mr Williams asked Mr de Klerk whether he knew of Mr Foster's involvement to which Mr de Klerk replied that he had just found out;

(d) Mr Williams asked Mr de Klerk from whom he had obtained that information to which Mr de Klerk replied that he had received the information from "one of the partners Leigh Johnson";

(e) Mr Williams replied by saying that Ms Johnson and Mr Foster "knew each other long before this scenario";

(f) the reason Mr Williams gave as to why he had telephoned Mr de Klerk was that he had previously contacted Ms Johnson and that Mr de Klerk's name came up during Mr Williams's conversation with Ms Johnson and that Ms Johnson gave Mr Williams Mr de Klerk's name as "an entrusted person" for STC or as a "trader" or "associate" of STC.

121 On the question of the previous connection of Ms Johnson to Mr Foster, Mr de Klerk said that he found out later ("not like immediately") from sources in South Africa that Ms Johnson had represented Mr Foster "in some cases".

122 Mr Argy submitted that this showed that Ms Johnson's "solution" was "to put the media on to Mr de Klerk and have them go to the police" and to "put the media on to a person who could give more detail and more factual material of a kind which was more likely to be publicised than if all she had done was taken them her suspicions". I will return to this.

123 Mr de Klerk said that he flew from Perth to Sydney and met Mr Williams at Sydney Airport and that Mr Williams "gave me some information" at the airport.

124 Part of that information was, evidently, that the 60 Minutes team from Channel 9 was doing "their own investigation" of certain cases including Mr Foster.

125 Thus Mr de Klerk said:

> "But then when Ken [sic: Cam] Williams called me and he gave me some facts, that was obtained by their investigators and he was willing to put that on

air, if I had that day agreed I would have been the one that would have been on 60 Minutes that second day and put the whole thing out there, my story."

126 Thus it appears that Mr de Klerk had an opportunity to appear on 60 Minutes to speak about his experience at STC.

127 It appears that at around this time Mr de Klerk was minded to take steps to "stop STC". Thus he gave this evidence:

> "Q. So you knew that as at September 2013 people were still being invited to make loans to STC?
>
> A. Yes. And that was one of the problems I had, and I decided to step up to stop STC because they were drawing innocent people and people that are not even aware of what's behind the scenes and that was my main - not my main aim, but one of my thought patterns was if it can happen to me, it can happen to anybody, and I didn't want anybody to - you know, any further - what do you call?"

128 When pressed by Mr Argy to describe what steps he took in this regard Mr de Klerk said:

> "Okay. Steps that I take - because I knew there was people much more capable than I am investigating and kept me up to date with information as they're progressing, that this would come in to the public via media. So that was the reason."

129 Consistently, with a desire to "step up to stop STC" Mr de Klerk also said that, about a week or 10 days after receiving the 30 August 2013 SMS from Ms Johnson, he went to the police.

130 Mr de Klerk did not say, and Mr Argy did not ask what information Mr de Klerk then gave to the police.

131 However, Mr de Klerk had second thoughts.

132 Thus he said:

> "I had two options. I could spill the beans, immediately go, and I would have lost everything that I - that I've earned or that I ever had on my name. That was the first option, and then stop a lot of people to - to get hurt, or I had the option to trust people that - our investigation that are busy with the system,

> and there was a lot of negotiation going forwards and backwards of investigators et cetera that was trying to get investors together so that they would be able to get the maximum financial benefit out of this scenario."

133 Mr de Klerk agreed that the "investigation" and "negotiation going forwards and backwards" to which he referred did not occur in September 2013 but occurred after Mr Foster's arrest in October 2014.

134 Thus he gave this evidence in response to Mr Argy's questions:

> "Q. What I'm putting to you is what you've just described happened after Mr Foster's arrest.
>
> A. That's correct.
>
> Q. Which was 14 months after Ms Johnson told you what she learned?
>
> A. That's correct.
>
> Q. And to use your language, you didn't spill the beans –
>
> A. That's correct.
>
> Q. -- for 14 months?
>
> A. I did not".

135 Mr de Klerk gave this explanation for not "spilling the beans" for 14 months:

> "I did not because remember one thing I had very or very sensitive information what the capability was of Mr Peter Foster and he knew my address, he knew everything he said he wouldn't do actually was I mean he sent people to my address if you know there's so many things that scared me that I was not in a way shape or form going to approach or, or you know be the person that is going to exploit the whole situation because I knew there was ongoing investigation of people working on it every day to exploit STC at that time."

136 For the same reasons, Mr de Klerk declined to appear on 60 Minutes. He explained:

> "It [appearing on 60 Minutes] didn't happen because I was fearful for my life and my family's life, because money is nothing, family and relationships means much more to me than it, that's why I'm sitting here today."

137 Ultimately, on 10 February 2016, some 15 months after Mr Foster's arrest in October 2014, Mr de Klerk gave a formal statement to the police which was, in substance, to the same effect as his affidavit of 27 October 2016 in these proceedings.

138 This evidence does establish that Mr de Klerk had the opportunity, in around September 2013, to publicise Mr Foster's involvement at STC.

139 It also establishes that Mr de Klerk consulted the police at around that time. I am not able to come to any conclusion as to what Mr de Klerk then said to the police. That subject was not explored by Mr Argy in cross-examination.

140 For the reasons he explained, Mr de Klerk decided not the take matters further until after Mr Foster's arrest in October 2014.

141 Had Mr de Klerk agreed to appear on 60 Minutes in September or October 2013, it may well be that Mr Foster's involvement in STC would have come to the attention of Mr Mackinnon and other Associate Members and may have led to the collapse of the STC scheme or otherwise deterred them from advancing funds to STC.

142 But it does not follow from these facts that Mr Mackinnon's loss, nor the loss of other Group Members, was not "because of" Ms Johnson's conduct; namely her representation by silence that Mr Foster was not involved in STC.

143 To show that his loss was "because of" Ms Johnson's conduct, Mr Mackinnon does not have to show that the sole cause of his loss was Ms Johnson's conduct. It is sufficient for Mr Mackinnon to show that Ms Johnson's conduct was "a" cause of his loss.

144 For example, Beazley JA stated in *Macquarie Generation v Peabody Resources* [2000] NSWCA 361 at [81]:

> "The representation does not have to be the only inducing cause of the contract. Nor does it have to be the decisive or a necessary factor in the

> decision taken by the representee… Rather, the inducement will be proved if it is established that the representation was one of the factors which contributed to the decision which was made… If the representation does not affect the decision making process, that is, does not play a part in the decision which is made, there will be no inducement…". (Citations omitted.)

145 Further, in *I & L Securities Pty Ltd v HTW Values (Brisbane) Pty Ltd* (2002) 210 CLR 109; [2002] HCA 41, Gaudron, Gummow and Hayne JJ said:

> "In light of these considerations, it is hardly surprising that it is now well established that the question presented by s 82 of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was a cause of the loss or damage sustained." (At [57].)

And:

> "As was recognised in *Henville v Walker*, there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was a cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further, it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being 'independent' of the contravention." (At [62].)

146 Nor do I accept that what Ms Johnson could have said about Mr Foster's involvement was less "potent" or "powerful" than anything Mr de Klerk could have said. She was a partner in STC. She believed investors' money "may both be in danger and may be being improperly used" (J509), that STC may be "being illegally and fraudulently managed" (J513) and that there was a "striking similarity" between the conduct identified by Logan J in relation to the SensaSlim business and that at STC (J553-J568).

147 Whether Ms Johnson's conduct, remaining silent from 14 March 2013 concerning Mr Foster's involvement, caused Mr Mackinnon's loss is a question to which I will next turn.

Has Mr Mackinnon suffered loss "because of" Ms Johnson's misleading or deceptive silence about Mr Foster's involvement in STC?

148 I have found that from 14 March 2013, by her silence, Ms Johnson represented to Associate Members and to prospective investors that Mr Foster was not involved in STC.

149 Mr Mackinnon made his two investments, each of $100,000, in STC on 31 October 2013 and 4 November 2013 (J641-J642).

150 The question is whether Mr Mackinnon made his investments "because of" Ms Johnson's misleading or deceptive conduct; that is "because of" her remaining silent from 14 March 2013 about Mr Foster's involvement in STC.

151 Mr Mackinnon's evidence, which I have accepted, is that had he known Mr Foster was involved in STC, he would not have invested in STC.

152 What could, and should, Ms Johnson have done to reveal Mr Foster's involvement in STC?

153 There are numerous steps Ms Johnson could have taken.

154 First, she could have told Mr de Klerk that the person who was passing himself off as "Mark Hughes" was in fact Mr Foster.

155 It is probable that, had Ms Johnson taken this step, Mr de Klerk would have acted as he did in September 2013 after Ms Johnson told him that Ms Larter was "in with Peter Foster" and "located information on the internet" identifying Mr Foster as a notorious conman (see [116] above and J460ff).

156 Mr Dixon submitted that although, as discussed at [129] to [137] above, in September 2013 Mr de Klerk decided not to "spill the beans", he would not have hesitated to do so in March 2013 because, at that time, his investment in STC was much less than it was in September 2013.

157 Thus Mr Dixon submitted:

"The Court should find that Mr de Klerk would have taken steps to expose Mr Foster's involvement in STC, including through the media, and by making a full account to the police if he had been informed of Mr Foster's involvement at that time between the Catalinas [sic] lunch when Mr de Klerk had only invested $150,000 and until July 2013 when he had invested over $1.5 million.

Once informed of Mr Foster's association with Ms Larter on 30 August 2013, Mr de Klerk's evidence was that he became concerned about other people losing their money… Mr de Klerk then considered 'spilling the beans' by going public…

However, all Mr de Klerk knew about Mr Foster from Ms Johnson was that Ms Larter was 'in with' Mr Foster… Ms Johnson did not give Mr de Klerk any information about:

(a) her suspicions from as early as July 2013 that STC was operating as a Ponzi scheme…; or

(b) Mr Foster using the alias 'Mark Hughes'…; or

(c) Mr Foster's significant involvement in running or controlling STC's operations…

Ultimately Mr de Klerk decided not to 'spill the beans' as he was plainly also concerned about losing all of his own money. By July 2013, he had invested over $1.5 million…

However, as at March 2013 or May 2013, Mr de Klerk had invested only a fraction of that amount being $250,000 (namely $150,000 on or about 19 February 2013…and $100,000 on 21 March 2013…).

Thus, Mr de Klerk was not risking '*everything that I – that I've earned or that I ever had on my name*' in the period of March to early July 2013. That was the reason given as to why he did not 'spill the beans' in September 2013. Instead he took the option of negotiating to '*get the maximum financial benefit out of this scenario*'.

The Court should find that, properly informed by Ms Johnson of material matters that she was aware of in the period March to May 2013, Mr de Klerk would have been in a very different position to the one he found himself after 30 August 2013. That is, he would have acted on his concerns and '*decided to step up to stop STC because they were drawing innocent people*' in…

If Mr de Klerk had done so in the period March to July 2013 (ie, before he invested over a million dollars), the Court should find that Mr Foster's involvement in STC would have been exposed in the ensuing weeks and months. He would also have been exposed as having used an alias to pass himself off as a legitimate businessperson." (Emphasis in original.)

158 The difficulty with this submission is that Mr de Klerk gave no evidence about what he would have done had Mr Foster's involvement in STC been revealed to him in March 2013. Acceptance of Mr Dixon's submission would involve a

high degree of speculation on my part as to how Mr de Klerk would have acted. I do not consider I can draw the conclusions Mr Dixon invited me to make.

159 But, Ms Johnson could certainly have behaved differently in regard to her involvement with Pikes & Verekers in April 2013.

160 Ms Johnson could have refused to be involved in giving instructions to Pikes & Verekers. It may be that, had she behaved that way, Ms Larter would nonetheless have instructed Pikes & Verekers to have written to the private investigators, Messrs Jenman and Baker, denying that Mr Foster was involved in STC.

161 But Ms Johnson could have contacted Messrs Jenman and Baker directly, perhaps under conditions of anonymity, and disclosed to them the true position. As those men were evidently investigating whether Mr Foster was in fact involved in STC, it seems likely that they would have taken heed of anything Ms Johnson said to them about Mr Foster's involvement; particularly if Pikes & Verekers had, in the meantime, sent them a letter denying Mr Foster's involvement.

162 Further, as I said at J788-J789, Ms Johnson knew that the ACCC was acutely interested in Mr Foster's activities. She had appeared for Mr Foster on an application to adjourn the ACCC proceedings before Yates J.

163 Ms Johnson could have approached the ACCC. It is impossible to imagine that the ACCC would have ignored the detailed intelligence that Ms Johnson would have been able to give them about Mr Foster's involvement in STC and, in particular, from March 2013, that he was passing himself off as "Mark Hughes".

164 Ms Johnson could have also approached the police about these matters.

165 Ms Johnson must also have been able to ascertain the identity of existing Associate Members. Had Ms Johnson revealed to one or more of those Associate Members that Mr Foster was involved in STC and was passing himself off as "Mark Hughes", it seems likely that one or more of them would have caused publication of Mr Foster's involvement. This is especially so when the person with whom most, if not all, investors were initially involved was "Mark Hughes". Revelation to those persons that there was no person involved in STC whose real name was "Mark Hughes" and that the person that they thought was "Mark Hughes" was in fact Mr Foster would surely have caused one or more of them to take steps to let other Associate Members know the true position.

166 By the end of September 2013, Ms Johnson had even more reason to speak out.

167 That is because by then Ms Johnson:

(a) knew that Mr Foster's involvement could not be revealed to prospective investors (J131, J243-J244, J320-J321, J324, J326, J330 and J441-J442);

(b) knew Mr Foster was in total control of STC (for example J503-J504);

(c) was concerned that a "fraud may be being committed by STC and that the moneys of the [Associate Members'] may both be in danger and may be being improperly used" (J509);

(d) was "extremely concerned" that STC be being operated as a Ponzi scheme by Mr Foster and that the monies of the Associate Members' "may be at risk" (J513);

(e) had noticed, and was "shocked and sicken[ed]" about the "striking similarity" between Mr Foster's activities in the

SensaSlim matter as revealed in the judgment of Logan J of 27 September 2013 (*Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)*) (J564); and

(f) Associate Members and prospective investors were reasonably entitled to expect that Ms Johnson would disclose those matters (J782-J783 and J791).

168 Mr Argy submitted:

> "The only way that information about [Mr] Foster could be conveyed to the Mackinnons was through the media, so a public exposure of what Mr Foster was up to was in reality the only way that what Mr Foster was doing could come to the notice of people contemplating an investment because there was no other way of identifying them. It would have to be a public advertisement or a public notice of some sort."

169 One obvious way in which Ms Johnson could have conveyed information about Mr Foster through the media was by responding honestly to the enquiries made of her by Mr Murray from The Courier Mail in early October 2013 (J579-J623).

170 I said at J787 that Ms Johnson must have known that if she had told Mr Murray the true position in relation to Mr Foster's involvement, Mr Murray would have caused that to be publicised and that Associate Members and prospective investors may very well have become aware of that publicity.

171 Mr Murray asked Ms Johnson the direct question: "[w]hat connection does Peter Foster have with the Sports Trading Club?" (J588). Ms Johnson said she answered that question by saying Mr Foster was involved "in setting up the internet side of it" but that "he wasn't running it" (J604). Ms Johnson must have known that was a false answer: she knew full well by then that Mr Foster was in complete control of STC's operations (J606).

172 Evidently Ms Johnson's proposed answer was not relayed to Mr Murray but was intercepted, presumably by Mr Foster, and substituted by a denial that Mr Foster had any involvement with STC (J599).

173 Ms Johnson actually spoke to Mr Murray (J580). She could easily have told him, perhaps anonymously, that Mr Foster was then in total control of STC. It is likely, if not near certain, that if she had done this Mr Murray would have caused this to be publicised.

174 As it was, Mr Murray caused an article about STC to be published in The Courier Mail on 28 October 2013 (J616-J618). That article did not mention Mr Foster. Had Ms Johnson told Mr Murray the true position as she knew it to be, it is probable if not certain that Mr Murray's article would have mentioned Mr Foster's involvement.

175 And had Mr Murray had access to an insider such as Ms Johnson from early October 2013, who was able to give him chapter and verse concerning Mr Foster's then total control of the STC business, it seems likely that Mr Murray would have caused an article to be published well before 28 October 2013.

176 In that event, it is likely that STC would have collapsed almost immediately just as it did in October 2014, following Mr Foster's arrest and the attendant publicity.

177 Overall, I think it more likely than not that had Ms Johnson taken steps from March 2013 to cause Mr Foster's involvement in STC to be revealed, one way or the other, such involvement would have become publically known and thus was likely to become known to Mr Mackinnon before the dates on which he made his investment.

178 This conclusion provides a further reason why Mr Mackinnon is entitled to judgment against Ms Johnson.

Apportionment

179 On 20 September 2019, Mr Argy submitted, for the first time, that Mr Mackinnon's claim was an "apportionable claim" for the purposes of s 34(1) of the *Civil Liability Act 2002* (NSW) and that accordingly, by reason of s 35(1)(b)

of that Act I am not empowered to give judgment against Ms Johnson for more than an amount:

> "…reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of [Ms Johnson's] responsibility for the damage or loss".

180 Ms Johnson did not plead that Mr Mackinnon's claim was an apportionable claim. Mr Argy made no such submission amongst the extensive submissions he made prior to my judgment of 18 February 2019. The question of apportionment was mentioned in passing in two paragraphs in Ms Johnson's 152 page submission of 22 July 2019. As I have said, Mr Argy first mentioned the matter on 20 September 2019.

181 Notwithstanding the language of s 35(1)(b) of the *Civil Liability Act*, there are numerous authorities in this and other courts to the effect if that a party wishes to invoke the relevant provisions of the *Civil Liability Act* or its analogues, the matter must be pleaded: *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41] (Hammerschlag J); *Reinhold v New South Wales Lotteries Corporation (No 2)* (2008) 82 NSWLR 762; [2008] NSWSC 187 at [32] (Barrett J); *Permanent Custodians Ltd v King* [2010] NSWSC 509 at [31] (Schmidt J); *Miletich v Murchie* (2012) 297 ALR 566; [2012] FCA 1013 at [116] (Gray J); *Polon v Dorian* [2014] NSWSC 571 at [812] (Hall J); *Wieland v Texxcon Pty Ltd; Porz v Texxcon Pty Ltd; Nominexx Pty Ltd v Wieland* (2014) 313 ALR 724; [2014] VSCA 199 at [97] (Nettle, Hansen and Beach JJA); and *In the matter of Kupang Resources Ltd (subject to Deed of Company Arrangement)* [2018] NSWSC 1872 at [41] (Rees J).

182 The matter not having been pleaded or even mentioned prior to 20 September, I am not prepared to entertain it.

Prof Snyder and Mr Holmes

183 It is common ground that that I should make no adverse findings about these individuals.

Conclusion

184 The parties should bring in short minutes to give effect to these reasons and to provide for the future conduct of the matter.

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