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58 Paragraphs

CASS v KINGSTON CAPITAL LTD - BC201007500

Federal Magistrates Court
Lucev FM

PEG 29 of 2010

25 May, 8 October 2010

Cass v Kingston Capital Limited [2010] FMCA 762

PRACTICE AND PROCEDURE -- Summary dismissal of parts of application -- Whether no reasonable prospect of success -- Whether to strike out parts of application and pleadings where specific relief not sought under s 1325 of Corporations Act.

TRADE PRACTICES -- Alleged misleading and deceptive conduct -- Whether claim relates to financial services and products -- Whether exclusionary provisions of s 51AF of Trade Practices Act apply.

COURTS AND JUDGES -- Federal Magistrates Court -- Corporations Act jurisdiction -- Associated matter.

WORDS AND PHRASES -- "Court" -- "Court" -- "Financial product" -- "Financial service".

(CTH) Acts Interpretation Act 1901 s 15C

(CTH) Australian Securities and Investments Commission Act 2001 ss 12BAA, 12BAB

(CTH) Corporations Act 2001 ss 58AA, 764A, 766A, 766C, 769C, 1041H, 1041I, 1325, Pts 7.10, 9.7

(CTH) Federal Court of Australia Act 1976 s 31A

(CTH) Federal Magistrates Act 1999 ss 10, 14, 17A(2) and (3), 18

(CTH) Federal Magistrates Court Rules 2001 rr 13.07, 13.08, 13.10

(CTH) Trade Practices Act 1974 ss 4, 51A, 51AF, 52, 86(4), 87

Australian Securities & Investments Commission v Money For Living (Aust) Pty Ltd (admin apptd) (No 2) (2006) 155 FCR 349 ; [2006] FCA 1285; Avoca Consultants Pty Ltd v Millennium3 Financial Services Pty Ltd (2009) 179 FCR 46 ; [2009] FCA 883; Balding v Ten Talents Pty Ltd (2007) 162 IR 17 ; [2007] FMCA 145; Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd (2006) 70 IPR 146 ; [2006] FCA 1352; Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd (1986) 161 CLR 543; Clifford v Vegas Enterprises Pty Ltd (No 5) [2010] FCA 916; Dandaven v Harbeth Holdings Pty Ltd [2008] FCA 955; Dey v Victorian Railways Commissioners (1949) 78 CLR 62; General Steel Industries Inc v Cmr for Railways (NSW) (1964) 112 CLR 125; George v Fletcher (Trustee) [2010] FCAFC 53; Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd (2008) 167 FCR 372 ; [2008] FCAFC 60; Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (2000) 104 FCR 564 ; [2000] FCA 1572; Lawrenson Light Metal Die Casting Pty Ltd (in liq) v Cosmick Pty Ltd [2006] FCA 753; Mahoney v AGD Mining Ltd [2002]

FMCA 237; *MG Distribution Pty Ltd v Khan* (2006) 230 ALR 352 ; [2006] FMCA 666; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Rana v University of South Australia* (2004) 136 FCR 344 ; [2004] FCA 559; *Sent v Jet Corporation of Australia Proprietary Ltd* (1986) 160 CLR 540; *Taylor v CGU Insurance Ltd* (2005) 193 FLR 120 ; [2005] FMCA 1073; *Walker v Lifespan Financial Planning Pty Ltd* (2003) 176 FLR 166 ; [2003] FMCA 519; *Welsh v Allblend Holdings Pty Ltd* [2010] FMCA 281; *White Industries Australia Ltd v Cmr of Taxation* (2007) 160 FCR 298 ; [2007] FCA 511

RP Austin & AJ Black, *Austin & Black's Annotations to the Corporations Act* (Vol. 2), (Chatswood: LexisNexis Butterworths, 2010)

Lucev FM.

Introduction -- an application in a case

[1] This is an application in a case by the respondent, Kingston Capital Ltd¹ seeking:

- a) summary dismissal of that part of Ms Cass' application and statement of claim relating to the *Trade Practices Act 1974* (Cth);² and
- b) the striking out of references to s 1325 of the Corporations Act 2001 (Cth) made in the application and statement of claim.³

[2] Kingston Capital contends that the basis for the application in a case is that:

- a) Ms Cass has no reasonable prospect of successfully prosecuting her trade practices claim and it therefore should be dismissed under s 17A(2) of the Federal Magistrates Act 1999 (Cth),⁴ or rr 13.07, 13.08 and 13.10 of the Federal Magistrates Court Rules 2001 (Cth);⁵ and
- b) the court does not have original jurisdiction with respect to claims under s 1325 of the Corporations Act, but if the court is found to have associated jurisdiction with respect to claims under s 1325, then as Ms Cass' statement of claim does not seek any specific orders under s 1325 any reference to s 1325 should be struck out from the application and statement of claim.

[3] Kingston Capital argues that the remainder of Ms Cass' application can proceed in relation to that part of the application which is not disposed of by summary dismissal or strike out.⁶

Ms Cass' primary claims

[4] Ms Cass' primary claims are in relation to alleged conduct in contravention of s 52 of the TP Act.

[5] Ms Cass claims further and in the alternative in relation to alleged conduct in contravention of s 1041H of the Corporations Act.

Summary dismissal -- legislation and cases

[6] Section 17A(2) and (3) of the FM Act provides as follows:

- (2) The Federal Magistrates Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
 - (a) the first party is defending the proceeding or that part of the proceeding; and
 - (b) the court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
- (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
 - (a) hopeless; or
 - (b) bound to fail;
 for it to have no reasonable prospect of success.

[7] Rule 13.07 of the FMC Rules was relied upon, however it has no application in this case because there is, as yet, no "evidence of the facts on which the claim or part is based". Even if it did have application, it would not alter the conclusions arrived at by the court.

[8] Rules 13.10 and 13.08 of the FMC Rules provide as follows:

13.10 Disposal by summary dismissal

The court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if the court is satisfied that:

- (a) the party prosecuting the proceeding or claim for relief has no reasonable prospect of successfully prosecuting the proceeding or claim; ...

13.08 Residue of proceeding

- (1) This rule applies if in a proceeding:
 - (a) a party applies for judgment or an order for stay or dismissal under this Division; and
 - (b) the proceeding is not wholly disposed of by judgment or dismissal or is not wholly stayed.
- (2) The proceeding may be continued in relation to any claim or part of a claim not disposed of by judgment or dismissal and not stayed.
- (3) The court may give directions for the further conduct of the proceeding.

[9] The Federal Court possesses a like power to that under s 17A(2) of the FM Act under s 31A(2) of the Federal Court of Australia Act 1976 (Cth).⁷ In relation to the power under s 31A(2) of the FC Act it has been observed that:

- a) a court must be satisfied that the applicant has no reasonable prospect of success;
- b) the court need not be satisfied that the proceeding is hopeless or bound to fail;
- c) the legislature's intention in introducing these provisions was to lower the bar for obtaining summary judgment (including summary dismissal) below the level that had been fixed by authorities like *Dey v Victorian Railways Commissioners*⁸ and *General Steel Industries Inc v Commissioner for Railways (NSW)*⁹ which required that the allegations be quite clearly so untenable that they could not possibly succeed;
- d) there was not an intention on the part of the legislature to remove the bar completely;
- e) the mere presence of a trifling, implausible, tenuous or tangentially relevant factual controversy is not a bar to the exercise of the summary dismissal power; and
- f) what is required is a prediction of the outcome of a trial on the merits but not an actual adjudication of those merits.¹⁰

[10] Section 31A of the FC Act and s 17A of the FM Act are equivalents,¹¹ and likewise r 13.10(a) of the *FMC Rules* which is in essentially the same terms as the abovementioned sections, and to which the same principles ought to apply.¹²

Trade practices claims

The conduct pleaded by Ms Cass

[11] Ms Cass pleads that:

- a) she told Kingston Capital that she was about to retire and that her objective was to obtain an income stream from investment to provide for her retirement;¹³.
- b) at a meeting on 30 June 2006 she was told by Kingston Capital that:
 - i) personalised service and expert financial planning advice delivering above average performance was provided to Kingston Capital's clients;
 - ii) Kingston Capital's management and staff were among the most experienced and respected in the industry;
 - iii) she would receive appropriate financial advice from Kingston Capital taking into account her objectives, financial situation and needs; and
 - iv) she was provided with Kingston Capital's corporate profile;¹⁴.
- c) at a meeting on or about 10 April 2007 with Kingston Capital Ms Cass was informed that:
 - i) only investments suitable for her objectives and financial situation would be recommended by Kingston Capital;
 - ii) information was needed from her concerning her financial situation, investment objectives and personal circumstances, and for that purpose Kingston Capital told Ms Cass that it needed her to complete a questionnaire concerning those matters so that it might draw up a detailed financial plan;¹⁵.
- d) Ms Cass was also supplied with a document entitled "Financial Services Guide" by Kingston Capital, which provided that:
 - i) when providing personal financial advice Kingston Capital took into account a client's current financial situation and future needs;
 - ii) only investments suitable to the client's individual investment objectives, financial situation and needs were recommended by Kingston Capital; and
 - iii) before making any recommended investment to the client Kingston Capital needed to find out the client's individual investment objectives, financial situation and needs and it was upon those matters that Kingston Capital would base any investment programme for her;¹⁶.
- e) at a further meeting on about 1 May 2007 Ms Cass was provided with a copy of a "Statement of Advice -- Financial Plan" dated 20 April 2007;¹⁷.
- f) Ms Cass told Kingston Capital during the 1 May 2007 meeting that she:
 - i) needed a portfolio and management plan geared specifically to a retiree;
 - ii) wanted a secure low-risk income stream;
 - iii) had a preference for blue chip stocks;
 - iv) wanted to enjoy retirement without worrying about security of money;
 - v) would not have any other income apart from a small amount from occasional book royalties; and
 - vi) did not intend to work in her clinical practice as a clinical psychologist in the future;¹⁸.
- g) at the 1 May 2007 meeting Kingston Capital represented that Ms Cass fitted Kingston Capital's growth profile and that it would choose investments in different asset classes suitable to her objectives and financial situation;¹⁹.
- h) at a meeting on or about 17 May 2007 Ms Cass executed various instruments, the Managed Discretionary Account Contract²⁰ and a Restricted Administration Authority,²¹ by reason of which Kingston Capital was given discretionary authority over certain accounts and funds belonging to Ms Cass;²².
- i) in June and July 2007 Ms Cass invested in excess of \$1.465m with Kingston Capital to be managed under the arrangements entered into;²³ and
- j) Kingston Capital managed the investments of Ms Cass from about June 2007 until 31 January 2009 when Ms Cass withdrew her investments from Kingston Capital's management, at which time the value of those investments was \$417,381.72.²⁴

[12] Ms Cass alleges that she relied on the representations made by Kingston Capital in giving it the various authorities and investing money with it, and, further, that the representations were representations as to

future matters for the purposes of s 51A of the TP Act and s 769C of the Corporations Act.²⁵

[13] Ms Cass alleges that the representations were false in that:

- a) Kingston Capital did not provide comprehensive investment advice beyond identifying Ms Cass as a growth profile investor;
- b) the investment advice was not based on Ms Cass' financial situation, investment objectives and personal circumstances, but rather the growth profile identified by Kingston Capital;
- c) Kingston Capital did not have an ongoing process of collecting information on Ms Cass' financial situation, investment objectives and personal circumstances;
- d) as a consequence, personal information held by Kingston Capital was not accurate, complete and up-to-date; and
- e) investments managed by Kingston Capital under its growth profile were not compatible with the financial situation of a retired person whose primary source of income was the investment managed by Kingston Capital.²⁶

[14] Ms Cass also alleges that certain matters were not disclosed to her, particularly that:

- a) Kingston Capital focused on small, little-known, companies considered to be undervalued with the potential for significant increases in stock price, not blue chip stocks; and
- b) once Ms Cass had been identified as a growth profile investor her investments would be managed without regard to her objectives, financial situation and needs,

and had she known of these matters she would not have granted Kingston Capital the authority that she did and would not have made the investments that she did.²⁷

[15] The above conduct is alleged to be misleading or deceptive conduct under s 52 of the TP Act, including as to future matters under s 51A of the TP Act,²⁸ and the cause of the loss or damage allegedly suffered by Ms Cass, namely, the difference between the value of Ms Cass' investments as at July 2007 and at 31 January 2009.²⁹

Kingston Capital's submissions

[16] Kingston Capital submits that:

- a) as provided by s 51AF, Part V of the TP Act (which includes s 52) does not apply to conduct in relation to the supply or possible supply of financial services;
- b) Ms Cass' allegations made under the TP Act concern conduct during the course of Kingston Capital's business as a provider of investment and planning advisory services;
- c) investment and planning advisory services fall within the definition of "financial services";³⁰
- d) Ms Cass' claim under s 52 of the TP Act in relation to the supply or possible supply of financial services has no prospect of success and ought be dismissed;³¹ and
- e) the claim alleging contravention of the TP Act should be dismissed.

Ms Cass' submissions

[17] Ms Cass submits that the correct approach to take to the application for summary dismissal is to:

- a) adopt a cautious approach and carefully consider the matter bearing in mind the primary obligation to permit the parties to be heard;³²
- b) if, as a consequence of there being contested evidence which might be believed one way or the other so as to enable one side or the other to succeed, then the court's discretion to summarily dismiss must be exercised cautiously, and is not enlivened unless only one conclusion can be said to be reasonable;³³ and
- c) the alleged conduct of Kingston Capital complained of is anterior to the provision of financial product advice, so properly conduct in respect of which the *TP Act* applies.³⁴

Legislation

[18] Section 52(1) of the TP Act provides:

52 Misleading or deceptive conduct

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[19] Section 51AF(1) and (2)(a) of the TP Act provides:

51AF Part does not apply to financial services

- (1) This Part does not apply to the supply, or possible supply, of services that are financial services.
- (2) Without limiting subsection (1):
 - (a) sections 52 and 55A do not apply to conduct engaged in in relation to financial services;

[20] Section 4 of the TP Act defines "financial service" as:

financial service has the same meaning as in Div 2 of Pt 2 of the Australian Securities and Investments Commission Act 2001.³⁵

[21] Section 12BAB in Div 2 of Pt 2 of the ASIC Act defines "financial service" which relevantly includes:

Meaning of financial service

When does a person provide a financial service ?

- (1) For the purposes of this Division, ... a person provides a financial service if they:
 - (a) provide financial product advice (see subsection (5)); or
 - (b) deal in a financial product (see subsection (7)); or
 - ...
 - (e) provide a custodial or depository service (see subsection (12)); or
 - ...
 - (g) provide a service that is otherwise supplied in relation to a financial product; or
 - ...

Meaning of financial product advice

- (5) For the purposes of this section, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:
 - (a) is intended to influence a person or persons in making a decision in relation to a particular

- financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence;
- but does not include anything in:
- (c) a document prepared in accordance with requirements of Ch 7 of the Corporations Act, other than a document of a kind prescribed by regulations made for the purposes of this paragraph; or
- ...

Meaning of dealing

- (7) For the purposes of this section, the following conduct constitutes dealing in a financial product:
- (a) applying for or acquiring a financial product;
- (b) issuing a financial product;
- (c) in relation to securities or managed investment interests -- underwriting the securities or interests;
- (d) varying a financial product;
- (e) disposing of a financial product.
- (8) Arranging for a person to engage in conduct referred to in subsection (7) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice.
- ...

Meaning of provide a custodial or depository service

- (12) For the purposes of this section, a person (the provider) provides a custodial or depository service to another person (the client) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.
- ...

[22] Section 12BAA of the ASIC Act defines "financial product" which relevantly includes:

Definition of financial product

General definition of financial product

- (1) Subject to subsection (8), for the purposes of this Division, a financial product is a facility through which, or through the acquisition of which, a person does one or more of the following:
- (a) makes a financial investment (see subsection (4));
- (b) manages financial risk (see subsection (5));
- (c) makes non-cash payments (see subsection (6)).
- (2) Subject to subsection (8), for the purposes of this Division, a particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a financial product even if that facility is acquired by a particular person for some other purpose.
- (3) A facility does not cease to be a financial product merely because:
- (a) the facility has been acquired by a person other than the person to whom it was originally issued; and
- (b) that person, in acquiring the product, was not making a financial investment or managing a financial risk.

Meaning of makes a financial investment

- (4) For the purposes of this section, a person (the investor) makes a financial investment if:
- (a) the investor gives money or money's worth (the contribution) to another person and any of the following apply:

- (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
 - (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor; and
- (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note 1: Examples of actions that constitute making a financial investment under this subsection are:

- (a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or
- (b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note 2: Examples of actions that do not constitute making a financial investment under this subsection are:

- (a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or
- (b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

...

Specific things that are financial products (subject to subsection (8))

- (7) Subject to subs (8), the following are financial products for the purposes of this Division:
 - (a) a security;

...

Consideration

[23] The question for consideration in relation to Ms Cass' claims under s 52 of the TP Act is whether or not Kingston Capital provided financial services to Ms Cass. If not, then s 52 of the TP Act can apply to the conduct in question. If the giving of money to a financial services licensee to purchase shares for the person giving the money is not the making of a financial investment under s 12BAA(4) of the ASIC Act, as is suggested by Note 2(b) to that sub-section, then it would be incongruous if any act preceding the act of giving money was the making of a financial investment. The Note does not determine the meaning of the sub-section, that being a matter for the court having regard to the ordinary meaning of the words of the sub-section. Such an interpretation as is suggested by the Note is arguably, however, supported by the terms of s 12BAA(1)(a) and (4) of the ASIC Act which requires that the person "makes a financial investment". Objectively, that requires a positive act with the capacity to generate a financial return,³⁶ not merely the taking of steps preparatory to such an act, for example, discussions prior to giving the money to a financial services licensee, or the giving of the money itself. In *Australian Securities & Investments Commission v Money For Living (Aust) Pty Ltd (admins apptd) (No 2)*³⁷, the Federal Court dealt with the definition of "financial investment" in s 12BAA(4) of the ASIC Act and said as follows:

[20] The key elements of the first limb of this definition are: (1) handing over (the statutory word is "gives") an asset (money or money's worth) to another person; and (2) applying or intending to apply the asset to produce an advantage for the investor (the advantage being a "financial return" or some other "benefit"). At a superficial level it is clear what is intended; a financial investment is when a person lays out money or capital for the purpose of getting a return. This is what a businessperson would understand as a "financial investment". On this view, the mere sale or purchase of a home for its exchange value is not covered. This is because the simple conversion of an asset of one kind (for example land) into an equivalent asset of a different kind (for example cash) has no element of putting the asset to use to gain a return, at least not in a business sense.³⁸

[24] A representation made by Kingston Capital for the purpose of having Ms Cass enter into the MDAC and the RAA, and the entry into the MDAC and the RAA, are arguably not the making of a financial investment for the purposes of s 12BAA(1) or (4) of the ASIC Act, and therefore arguably not within the definition of "financial product". If so, the argument would follow that conduct up to the entry into the MDAC and the RAA was not a "financial service" under s 12BAB(1)(a) or (b) of the ASIC Act that was provided by Kingston Capital, because it was not the provision of, or dealing in, a "financial product".

[25] It is therefore arguable that the exclusionary provisions of s 51AF(1) and (2)(a) of the TP Act do not apply because the conduct complained of by Ms Cass is not a "financial service" and it is therefore also arguable that s 52 of the TP Act applies to that part of Kingston Capital's alleged conduct which led up to the entering into, and possibly also the entering into, of the MDAC and the RAA.

[26] In the court's view, the above rationale is supported by *Avoca Consultants*. In that case Millennium 3 Financial Services³⁹ was a corporation engaged in the business of providing financial services, and Avoca Consultants was an authorised representative of M3FS in relation to the provision of financial product advice, under a deed entered into between the parties. That deed was terminated by M3FS for alleged material breach under the terms of the deed. Avoca Consultants argued that there was no breach, and that M3FS's representation in the deed that it would not terminate the deed other than for material breach therefore amounted to misleading or deceptive conduct in contravention of s 52 of the TP Act. M3FS argued that a claim under s 52 of the TP Act could not be maintained because s 51AF of the TP Act excluded the operation of s 52 of the TP Act, and therefore any claim of misleading or deceptive conduct had to be brought under the ASIC Act. The Federal Court found that a representation conveyed in the agreement under which M3FS authorised Avoca Consultants to be M3FS's representative for the purpose of providing financial product advice was not an instance of M3FS engaging in conduct "in relation to" the provision of financial product advice for the purposes of s 51AF(2)(a) of the TP Act because M3FS's representations arose from conduct that was anterior to and separate from the actual provision of such advice.

[27] In *Avoca Consultants* the Federal Court observed as follows:

[229] In making the CARA,⁴⁰ that is to say, in M3FS authorising the applicants to act as its representatives in "providing financial product advice" -- any representations made by M3FS to the applicants were, on one view -- that pressed by M3FS -- necessarily made "in relation to" the provision of such advice and so must constitute an example of a person "engaging in conduct in relation to financial services".

[230] However, an issue arises whether the representations, if any, that arise from the making of the CARA are necessarily anterior to, and separate from, the conduct of "providing financial products advice", and for that reason do not constitute an example of a person engaging in conduct in relation to financial services. In other words, the representations in the CARA are sufficiently remote from the provision of financial products advice to be considered conduct "in relation to" such advice.

[231] The focus of s 12DA is to prevent a person engaging in conduct in relation to financial services that is misleading or deceptive. The question now raised is whether a representation conveyed in an agreement whereby one person authorises another person to be their representative for the purpose of providing financial product advice is an instance of the first person "engaging in conduct in relation to the providing of financial product advice". For my part, the answer is "No".

[232] In my view, if M3FS conveyed representations by the relevant deed, such as those pleaded, it is not accurate to describe M3FS's conduct in so doing as conduct engaged in, in relation to providing financial product advice. Rather, it is conduct engaged in, in relation to the authorisation of the applicants as representatives of M3FS, albeit the applicants were thereby authorised to act as the representative of M3FS for the purpose of providing such financial

product advice. Any representations arising from the deed thereby arise from conduct which is necessarily anterior to and separate from the provision of financial product advice and, for this reason, are not "in relation to" the provision of such advice. Such conduct is sufficiently remote from the provision of financial product advice not to be considered conduct "in relation to" such advice.

[233] This construction of s 51AF(2)(a) is also consistent with the primary focus of s 51AF(1) of the TPA Act, which is limited to the "supply or possible supply" of financial services. The appointment by M3FS of a representative is not an instance of "supply" of such services or "possible supply" of such services.⁴¹

[28] The circumstances of this case are factually different but not necessarily conceptually dissimilar to *Avoca Consultants*, with at least some of the representations complained of by Ms Cass having been conveyed in an effort to have Ms Cass enter into an agreement, in this case the MDAC, and therefore, for reasons explained above⁴² and explained in *Avoca Consultants*, are arguably:

- a) not representations which constitute the provision of a financial service; or
- b) sufficiently remote not to constitute the provision of a financial service.

[29] In *Mahoney v AGD Mining Ltd*⁴³ there was a claim of misleading and deceptive conduct under s 52 of the TP Act. The claim arose out of a presentation by the respondents in which it was alleged that representations and warranties were made concerning investment in the United States in a company, and notwithstanding that reference was made to litigation being a normal risk in business undertaken in the United States, there had been no disclosure that the company was then involved in litigation in the United States. It was alleged that the representations induced Mahoney to purchase shares in AGD Mining which was a major shareholder in the company about which the alleged representations and warranties had been made. Mahoney argued that had he known of the litigation he would not have purchased the shares in AGD Mining.⁴⁴

[30] In *Mahoney* the court dismissed an interlocutory application by AGD Mining for orders wholly staying or dismissing the application on the basis that the claim related to the provision of a financial service, and was thus not a claim which could be pursued under s 52 of the TP Act because of the provisions of s 51AF of the TP Act, and was therefore, at that time, a claim otherwise beyond the jurisdiction of this court. In *Mahoney* the court observed that:

- 39. In this matter the court is entitled to consider the pleadings as they appear in the Amended Statement of Claim. There is a specific reference in those pleadings to the representations and it is not for the court to make a final determination of the facts. In my view it is sufficient for the court to conclude that the pleadings as presently drawn appear to at least raise an allegation of a breach of s 52 of the TPA and in doing so has relied upon representations that were made which clearly relate to a company of which the First Respondent was a major shareholder namely IP. Although the pleadings in paragraph 10(b) relate to a breach of the Corporations Act and specifically refer to "dealings in securities", it is my view that that pleading is an alternative pleading designed to raise the possibility of misleading and deceptive conduct pursuant to the Corporations Act which as an alternative pleading may be acceptable provided the court is satisfied that it falls within its associated or accrued jurisdiction.
- 40. In the present case I do not need to consider in detail the associated or accrued jurisdiction as the pleading before me of the representation said to constitute misleading and deceptive conduct for the purposes of s 52 of the TPA are not sufficiently narrow to be confined to the meaning of financial services as defined in s 12BA of the Australian Securities and Investments Commission Act 1989 adopted by s 4 of the TPA. Whilst I am satisfied that the representations on a proper reading may be said to relate to the financial standing of IP in the context of AGD being a major shareholder of that overseas based company, I do not accept for the present purposes that the claim as pleaded is confined to the financial services including as it does "financial product" and of course what is commonly understood by the meaning of "security". In my view the Respondents' submissions would be more likely to succeed had the Applicant purchased shares in AGD at a presentation design to simply promote that company and the purchase of shares in that company rather than a presentation designed to promote and attract interest in the overseas based company IP of which AGD was a major shareholder.
- 41. It is important to note that the pleadings do not suggest that there was any presentation and/or representations made during the course of the presentation which could be said to be restricted to shareholdings or the issue of security in IP or indeed AGD. Of course the Applicant claims that as a

result of the representation he was induced to purchase shares in AGD but it is not pleaded that this was the purpose of the presentation but rather the consequence to this particular Applicant as alleged. It is important to stress that it is merely an allegation at this time but based upon the pleading which set out the allegation it is my view that that pleading is not a kind which would attract the operation of s 51AF of the TPA.

42. In my view the purpose of s 51AF is to ensure that where there is a misleading and deceptive conduct in relation to financial services which includes securities and obviously reliance upon those representations to the extent that misleading and deceptive conduct can be established then it is appropriate that the specific securities legislation and corporations law should apply rather than the TPA. I am not satisfied that the matter as presently pleaded should be necessarily confined in the manner submitted by Counsel for the Respondents as it seems to me that the purpose of s 51AF is to eliminate from the consideration of the Trade Practices legislation those matters which could clearly be regarded as the provision of financial services. This would include the issue of a prospectus and meetings designed to provide potential investors with a presentation that would encourage those investors to purchase shares in a particular company and/or otherwise take advantage of financial services then being offered in the context of those representations. At present I do not believe that the pleadings should be so restricted and accordingly I find the court does have jurisdiction to hear the claim.
43. I should further add that in the circumstance of the present case where representations were made of the kind alleged and that in reliance upon those representations the Applicant purchased shares the jurisdiction of the court is not to be taken as having arisen from the consequences of the misleading and deceptive conduct but rather the nature of that conduct which in this case involved general representations of a kind which I do not believe are subject to the operation of s 51AF of the TPA.⁴⁵

[31] *Mahoney* makes it clear that the court ought look, not at the consequences of the conduct to characterise the representations, but at the nature of the conduct at the time it was made. That distinction, applied to the circumstances of this case, as in *Mahoney*, means that it is at least arguable that the representations alleged to have been made by Kingston Capital to Ms Cass which preceded entry into the MDAC and the RAA, and possibly the entry into the MDAC and the RAA themselves, are representations not caught by the exclusionary provisions of s 51AF(1) and (2)(a) of the TP Act, and are therefore representations falling under s 52 of the TP Act.

[32] In *Walker v Lifespan Financial Planning Pty Ltd*,⁴⁶ Ms Walker had retained Lifespan Financial Planning to give her financial and investment advice. On advice, Ms Walker entered into a margin loan contract which she was unable to meet when a margin call was made, and in respect of which she ultimately exited suffering a loss exceeding \$180,000.⁴⁷ Ms Walker alleged that representations made to induce her to enter into the margin loan contract were in breach of s 52 of the TP Act. Lifespan Financial Planning argued that s 51AF of the TP Act meant that s 52 of the TP Act did not apply to services that are financial services, and therefore the court did not then have jurisdiction to deal with the matter. The court's conclusions were effectively summarised as follows:

[41] It is common ground that the margin loan contract could not properly be regarded as a financial product. It follows therefore that it could not be properly regarded in the circumstances as the provision of a financial service. To that extent, the representations alleged in relation to the margin loan contract referred to as the margin loan recommendation constitutes a discrete issue which would not be subject to jurisdictional restriction by the operation of s 51AF of the Trade Practices Act. It is clearly not a financial product and the definition of financial service would therefore not apply. I am further satisfied that the alleged representation and recommendation concerning the margin loan contract could not otherwise be regarded as falling within the meaning attributed to financial services under s 12BA(1)(b) of the ASIC Act; I am satisfied it could not be regarded as otherwise "supplied" in relation to a financial product. That being so, it follows that the court does have jurisdiction to hear and determine the application as pleaded.⁴⁸

[33] The reasoning in *Lifespan Financial Planning* supports the view of the court in the current matter that the representations alleged in relation to the MDAC and the RAA are arguably discrete and not subject to the exclusionary provisions of s 51AF of the TP Act, and also that something which is not a financial product is not within the definition of "financial service".

[34] It follows that, in the court's view, there is a real arguable issue to be decided as to the applicability of s 52 of the TP Act to the circumstances of Kingston Capital's conduct, particularly the conduct leading up to and including the signing by Ms Cass of the MDAC and the RAA. In summary, it cannot safely be said that there is only one conclusion reasonably available or that Ms Cass' claim enjoys no reasonable prospect of success.

[35] For these reasons, Kingston Capital's application in a case to strike out the trade practices claims made by Ms Cass in the substantive application must fail, and that part of the application in a case by Kingston Capital must be dismissed.

Corporations claims

The conduct pleaded by Ms Cass

[36] The same conduct is pleaded by Ms Cass in relation to the claims that the *Corporations Act* has been breached, the claim being further and in the alternative to the trade practices claims. Essentially, it is pleaded that the money given to, or "invested" with, or by Kingston Capital under the terms of the MDAC and the RAA were "financial products" under s 764A(1) of the Corporations Act, and that there was "dealing" for the purposes of s 766C(1) of the Corporations Act in a financial product for the purposes of s 766A(1) of the Corporations Act.⁴⁹ It is alleged that the non-disclosure referred to above,⁵⁰ was conduct by Kingston Capital which was misleading or deceptive or likely to mislead or deceive contrary to s 1041H of the Corporations Act, and was the cause of loss or damage suffered by Ms Cass for the purposes of ss 1041I and 1325 of the Corporations Act.

Kingston Capital's Submissions

[37] Kingston Capital submits that:

- a) this court does not have original jurisdiction with respect to claims under s 1325 of the Corporations Act;⁵¹
- b) this court has jurisdiction with respect to claims made under ss 1041H and 1041I of the Corporations Act;⁵²
- c) the jurisdiction of this court is limited to the cause of action in s 1041H of the Corporations Act alleging that Kingston Capital engaged in conduct, in relation to a financial product, that is misleading or deceptive or likely to mislead or deceive;⁵³
- d) this court has jurisdiction with respect to matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction is invoked;⁵⁴
- e) a matter is associated with another if the two matters arise out of substantially the same, or closely connected facts, or is not severable or separate, but may be disparate from each other;⁵⁵
- f) it could be argued that the relief claimed under s 1325 of the Corporations Act arises from the same set of facts as the causes of action under s 1041H and 1041I of the Corporations Act and is therefore an associated matter, and if such an argument is accepted then the court has jurisdiction to hear the s 1325 Corporations Act claim as it is an associated matter with the claims under ss 1041H and 1041I of the Corporations Act;⁵⁶ and
- g) unless Ms Cass can specify any relief sought under s 1325 of the Corporations Act, the reference to s 1325 of the Corporations Act should be removed from the application and statement of claim.

Jurisdiction under ss 1041H and 1041I of the Corporations Act

[38] There is no dispute that this court has jurisdiction to hear the claims made under ss 1041H and 1041I of the Corporations Act. Proceedings under the Corporations Act may "be brought in any court" unless "there is a clear expression of a contrary intention".⁵⁷ Relevantly, s 58AA(1) of the Corporations Act defines "court"

as meaning "any court". No clear contrary intention to have claims under ss 1041H and 1041I of the Corporations Act heard in a specific court, or a court other than this court, is expressed in the Corporations Act. Kingston Capital, quite properly, submitted and conceded that this court has jurisdiction to hear the claims under ss 1041H and 1041I of the Corporations Act.

Section 1325 of the Corporations Act

[39] Section 1325 of the Corporations Act provides for "a court" to be able to make various types of orders under s 1325. Section 1325(1), (2) and (5) provides as follows:

- (1) Where, in a proceeding instituted under, or for a contravention of, Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.
- (2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, or on the application of ASIC in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.
- (3) ... ;
- (4) ... ;
- (5) The orders referred to in subsections (1) and (2) are:
 - (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the court thinks fit, to have been void ab initio or at all times on and after a specified day before the order is made; and
 - (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made; and
 - (c) an order refusing to enforce any or all of the provisions of such a contract; and
 - (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage; and
 - (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage; and
 - (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

[40] Section 1325 of the Corporations Act is seemingly based on s 87 of the TP Act, and therefore, by analogy to s 87, it has been said that any order under s 1325 arguably requires that there be proceedings brought under some other section of the Corporations Act.⁵⁸ That is, however, probably evident from s 1325 of the Corporations Act itself which requires that there have been "a proceeding instituted under" or a "contravention of", relevantly, Pt 7.10 of the Corporations Act, in which ss 1041H and 1041I appear.

"Court" and "court" defined

[41] Before moving to consider the issues concerning s 1325 of the Corporations Act in these proceedings it is necessary to first deal with the definitions of "court" and "court" in s 58AA(1) of the Corporations Act.

[42] Section 58AA(1) defines "court" as follows:

"Court" means any of the following courts:

- (a) the Federal Court;
- (b) the Supreme Court of a State or Territory;
- (c) the Family Court of Australia;
- (d) a court to which section 41 of the Family Law Act 1975 applies because of a Proclamation made under subsection 41(2) of that Act.

[43] This court is not a "court" as defined in s 58AA(1) of the Corporations Act, but is a "court" as defined in s 58AA(1), where "court" is defined to mean "any court".

[44] Section 58AA(2) of the Corporations Act provides that, subject to Pt 9.7 of the Corporations Act, which is not presently relevant, proceedings under the Corporations Act may "be brought in any court", "[e]xcept where there is a clear expression of a contrary intention (for example, by use of the expression "the court")".

Possible constructions of s 1325 of the Corporations Act

[45] There are a number of possible constructions of s 1325 of the Corporations Act, which might determine whether this court can make the orders referred to therein. If this court cannot make orders under s 1325 then it follows that any reference to s 1325 should be struck out from the application and statement of claim.

[46] First, it can be argued that the use of the phrase "the court" in s 1325(1), (2) and (5) of the Corporations Act means that this court is not a "court" for the purposes of s 1325, and therefore does not have power to make orders under s 1325 of the Corporations Act. That argument is, on its face entirely plausible, and consistent with a literal interpretation of the words of s 1325. However, it may have the curious, and arguably unforeseen and unintended consequence, that if assessment of loss or damage under s 1041I of the Corporations Act was difficult or impossible, no remedy under the Corporations Act might then be available to a party who had suffered loss or damage as a consequence of a contravention of s 1041H of the Corporations Act.⁵⁹

[47] Second, it can be argued that whilst this court has not been made a "court" in which an application can be brought for an order under s 1325 of the Corporations Act in express terms, there is no exclusive jurisdiction barrier under the Corporations Act placed in the path of reliance upon this court's associated jurisdiction.⁶⁰

[48] Third, it can be argued that the claim for relief under s 1325 of the Corporations Act is seemingly based upon the same transactions and a common set of facts as the claims under ss 1041H and 1041I of the Corporations Act, and is therefore arguably within the associated jurisdiction of this court.⁶¹ If correct, that means that this court can exercise associated jurisdiction to determine an application for an order or orders under s 1325 of the Corporations Act because it is within the court's associated jurisdiction by reason of it being based on transactions and a substratum of facts common to the federal claim within jurisdiction, that is the claim under ss 1041H and 1041I of the Corporations Act.

[49] Fourth, it might be argued that because this court has jurisdiction to hear the claims under ss 1041H and 1041I of the Corporations Act, it follows that the court has the power to make orders under s 1325 of the Corporations Act as a matter of course where the other conditions under s 1325 have been satisfied, namely:

- a) a proceeding instituted under, or contravention of, Pt 7.10 (and specifically here s 1041H) of the Corporations Act has been found; and

- b) a person party to the proceedings, or another person has suffered, or is likely to suffer, loss or damage.

[50] Each of the above arguments runs into the difficulty raised by s 58AA(2) of the Corporations Act: namely that "by use of the expression 'the court'" in s 58AA(2) it is arguable that "a clear expression of a contrary intention" is evinced, and orders under s 1325 of the Corporations Act cannot be made by this court. However, each of the contentions set out above raises an interpretation which is legitimately arguable. Even on Kingston Capital's submissions, the possibility of these matters being in this court's associated jurisdiction is raised as arguable. It therefore follows that references to s 1325 of the Corporations Act in the application and the statement of claim ought not be struck out or removed at this stage of the proceedings.

The specification of relief, or orders sought, under s 1325 of the Corporations Act

[51] The question remains whether or not the references to s 1325 of the Corporations Act in the application and the statement of claim ought to be struck out because no relief sought under s 1325 of the Corporations Act is specified in either the application or the statement of claim.

[52] Given that the court can make orders under s 1325 of the Corporations Act as it sees appropriate, there is arguably no need for Ms Cass to specify the orders she is seeking under s 1325. Simply seeking orders under s 1325 of the Corporations Act is enough to put Kingston Capital on notice of the possibility of such orders as the court thinks appropriate being made in the circumstances. As presently pleaded, it will be possible for the court to make such orders as it deems appropriate, and there is therefore no need to remove the references to s 1325 of the Corporations Act in the application or statement of claim. However, if Ms Cass does seek particular orders under s 1325 of the Corporations Act those orders ought to be specified.

Conclusion -- s 1325 of the Corporations Act

[53] Given that the foregoing consideration of s 1325 of the Corporations Act reveals that:

- a) there are a number of possible arguments as to whether or not this court may make orders under s 1325; and
- b) it is arguable that, if this court can make orders under s 1325, those orders may be made by the court and not specified by Ms Cass,

the court will therefore:

- c) dismiss that part of Kingston Capital's application in a case which seeks to strike out the references to s 1325 of the Corporations Act in the application and statement of claim; and
- d) grant leave to Ms Cass to amend the application and statement of claim with respect to any orders she specifically seeks under s 1325 of the Corporations Act, because if Ms Cass seeks particular orders they ought to be specified.

A miscellaneous issue

[54] The court also observes that references in various paragraphs of the statement of claim to other paragraphs of the statement of claim appear to be wrong or mis-numbered. Merely by way of example: para 34.1 refers to paras 24.3, 25.3 and 30.3, but there are no paras 24.3 or 30.3, and the references should probably be to paras 25.3, 26.3 and 31.3.

[55] The grant of leave to amend the application and statement of claim will also include a grant of leave to amend any references to paragraphs which are in error in the statement of claim.

Conclusion and orders

[56] The court has concluded that:

- a) that part of Kingston Capital's application in a case seeking to:
 - i) have Ms Cass' trade practices claim summarily dismissed; and
 - ii) have the references in Ms Cass' corporations claim to s 1325 of the Corporations Act struck out or removed,is to be dismissed, but that if Ms Cass does seek specific orders under s 1325 (as opposed to having the court making such orders as it thinks fit in the exercise of its discretion) then those orders ought to be specified, and leave is to be granted to amend the application and statement of claim for that purpose by 22 October 2010; and
- b) leave will be granted to amend the statement of claim with respect to errors in references to paragraph numbers within certain paragraphs of the statement of claim.

There will be orders accordingly.

[57] There will also be an order that the matter be adjourned to a further directions hearing at 9.00am on 29 October 2010. The parties should confer as to appropriate orders for that directions hearing, and endeavour to ensure that any orders make provision for:

- a) the filing of a Defence and a Reply by no later than the end of November 2010;
- b) any further interlocutory issues to be dealt with as soon as possible;
- c) the filing of affidavits by each party;
- d) mediation by a Registrar of this court; and
- e) if mediation is unsuccessful, a final hearing in the latter half of March or early April 2011.

[58] The court will hear the parties as to costs.

Order

- (1) That the respondent's application in a case be dismissed.
- (2) That the applicant have leave to file and serve on or before 22 October 2010:
 - (a) any amended Application and Statement of Claim specifying any orders sought by the applicant under s 1325 of the Corporations Act; and
 - (b) any amended Statement of Claim correcting any errors with respect to paragraph numbers within the Statement of Claim.
- (3) That the matter be adjourned to a further directions hearing at 9.00am on 29 October 2010.

Counsel for the applicant: *Mr A Rumsley*

Counsel for the respondent: *Ms D M Templeman*

Solicitors for the applicant: *Alan Rumsley, Commercial Disputes Lawyer*

Solicitors for the respondent: *Minter Ellison*

- 1. "Kingston Capital".
- 2. "TP Act".
- 3. "Corporations Act".
- 4. "FM Act".
- 5. "FMC Rules".

6. FMC Rules, r 13.08.
7. "FC Act".
8. (1949) 78 CLR 62 at 91-92 per Dixon J.
9. (1964) 112 CLR 125 at 129-130 per Barwick CJ.
10. *George v Fletcher (Trustee)* [2010] FCAFC 53 at para 75 per Ryan and Logan JJ (*George*) citing *White Industries Australia Ltd v Cmr of Taxation* (2007) 160 FCR 298 at 310 per Lindgren J; [2007] FCA 511 at paras 50-54 per Lindgren J; and paras 99-105 per Marshall J, and in particular para 102 citing *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372 at 387-388 per Rares J; [2008] FCAFC 60 at para 45 per Rares J; *Lawrenson Light Metal Die Casting Pty Ltd (in liq) v Cosmick Pty Ltd* [2006] FCA 753 at para 15 per Heerey J; *Dandaven v Harbeth Holdings Pty Ltd* [2008] FCA 955.
11. *George* at para 75 per Ryan and Logan JJ.
12. *Balding v Ten Talents Pty Ltd* (2007) 162 IR 17 at 24 per Lucev FM; [2007] FMCA 145 at paras 15-18 per Lucev FM.
13. Statement of Claim, para 5.2.
14. Statement of Claim, paras 5.3 and 5.4.
15. Statement of Claim, para 7.1.
16. Statement of Claim, paras 7.2 and 8.
17. "Financial Plan".
18. Statement of Claim, para 12.
19. Statement of Claim, para 13.
20. "MDAC".
21. "RAA".
22. Statement of Claim, paras 17-19.
23. Statement of Claim, paras 20-22.
24. Statement of Claim, paras 20-24.
25. Statement of Claim, paras 25-27.
26. Statement of Claim, para 28.
27. Statement of Claim, paras 29-31.
28. Statement of Claim, para 32.
29. Statement of Claim, para 33.
30. TP Act, s 4.
31. FMC Rules, r 13.10.
32. *MG Distribution Pty Ltd v Khan* (2006) 230 ALR 352 at 363 per McInnis FM; [2006] FMCA 666 at para 49 per McInnis FM (*MG Distribution*); *Rana v University of South Australia* (2004) 136 FCR 344 at 355 per Lander J; [2004] FCA 559 at para 75 per Lander J (*Rana*).
33. *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* (2006) 70 IPR 146 at 157-158 per Rares J; [2006] FCA 1352 at paras 45 and 47 per Rares J (*Boston Commercial*).
34. Citing *Avoca Consultants Pty Ltd v Millennium 3 Financial Services Pty Ltd* (2009) 179 FCR 46 at 87-89 per Barker J; [2009] FCA 883 at paras 231-238 per Barker J (*Avoca Consultants*).

35. "ASIC Act".
36. ASIC Act, s 12BAA(4)(a).
37. (2006) 155 FCR 349; [2006] FCA 1285 (*Money for Living (No 2)*).
38. *Money for Living (No 2)* FCR at 354 per Finkelstein J; FCA at para 20 per Finkelstein J.
39. "M3FS".
40. The CARA is a reference to the Corporate Authorised Representative Agreement under which Avoca Consultants became an authorised representative of M3FS: see *Avoca Consultants* FCR at 47 per Barker J; FCA at para 3 per Barker J.
41. *Avoca Consultants* FCR at 87-88 per Barker J; FCA at paras 229-233 per Barker J.
42. See paras 24-25 above.
43. [2002] FMCA 237 (*Mahoney*).
44. *Mahoney* at paras 2 and 4 per McInnis FM.
45. *Mahoney* at paras 39-43 per McInnis FM.
46. (2003) 176 FLR 166 ; [2003] FMCA 519 (*Lifespan Financial Planning*).
47. *Lifespan Financial Planning* FLR at 167-169 per McInnis FM; FMCA at paras 4-10 per McInnis FM.
48. *Lifespan Financial Planning* FLR at 176 per McInnis FM; FMCA at para 41 per McInnis FM.
49. Statement of Claim, para 34.
50. See para 14 above.
51. Citing FM Act, s 10; Corporations Act, ss 58AA and 1325.
52. Citing FM Act, s 10; Acts Interpretation Act 1901 (Cth), s 15C; Corporations Act, ss 58AA(2), 1041H and 1041I.
53. Citing Statement of Claim, paras 4-13, 16-23 and 34.2.
54. Citing FM Act, s 18.
55. Citing *Philip Morris Inc & Anor v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.
56. Citing FM Act, s 18.
57. Corporations Act, s 58AA(2).
58. RP Austin & AJ Black, *Austin & Black's Annotations to the Corporations Act* (Vol 2), (Chatswood: LexisNexis Butterworths, 2010), para 9.1325, citing *Sent v Jet Corporation of Australia Proprietary Ltd* (1986) 160 CLR 540.
59. The remedy is available to a "court" in these circumstances: *Clifford v Vegas Enterprises Pty Ltd (No 5)* [2010] FCA 916 at para 442 per Barker J.
60. Contrast, for example, TP Act, s 86(4).
61. FM Act, s 18; *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543 at 553 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 598 per French J; [2000] FCA 1572 at para 87 per French J; *Taylor v CGU Insurance Ltd* (2005) 193 FLR 120 ; [2005] FMCA 1073; *Welsh v Allblend Holdings Pty Ltd* [2010] FMCA 281 at para 13 per Lucev FM.