Omni Bridgeway Limited
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omnibridgeway.com

12 August 2020

Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services

Dear Mr Hodder

Inquiry into Litigation Funding and the Regulation of the Class Action Industry: Evidence presented to public hearing

Dear Mr Hodder

I am writing further to the public hearing held by the Parliamentary Joint Committee on Corporations and Financial Services on 3 August 2020 as part of its ongoing inquiry into litigation funding and class actions. This included material presented by Mr Mark Morris and his spokesperson.

The paths of Omni Bridgeway and Mr Morris crossed on 22 July 2009 and have remained virtually in parallel since that day. Mr Morris has pursued his claims against Omni Bridgeway and its directors over a long period in numerous fora and upon multiple grounds.

Mr Morris's evidence to the Committee was highly inaccurate and contained a number of new allegations concerning the conduct of Omni Bridgeway. Mr Morris is fully aware of the reasons why his submission to the Committee is inaccurate, and the allegations he made are false. Mr Morris has been made aware of the inaccuracies in his various and oft-changing views on many occasions. The purpose of this letter is to again refute his claims against Omni Bridgeway in the strongest terms.

By way of background, Omni Bridgeway (then IMF Bentham) funded two proceedings on behalf of clients against Australian Stockbroking and Advisory Services Limited (**Asandas**), an entity related to Mr Morris, and others, but has never funded a claim against Mr Morris directly, notwithstanding his repeated comments to the contrary. One of those proceedings, a group action (not a class action), was settled prior to trial where the defendants made a payment to the plaintiffs. The second claim was unsuccessful against Asandas both at first instance and on appeal but was successful against three of the other defendants.

Mr Morris gave evidence to the Committee and made various unspecified allegations against Omni Bridgeway regarding what he referred to as fabricated evidence, fabricated claims, fabricated allegations and criminal activity. These allegations are categorically untrue and entirely refuted and rejected. Those allegations and Omni Bridgeway's very short responses are set out in Annexure A.

When Mr Morris first began making similar type allegations some years ago a full investigation was undertaken and presented to the Board of Omni Bridgeway. A decision was taken not to deliver the report to Mr Morris in light of his health problems. The report is however available to both the Committee and Mr Morris should delivery be thought appropriate.

As Mr Morris has advised Omni Bridgeway that he is again determined to issue further legal proceedings it may be thought that the publication of such a report would not be in Mr Morris' best interests. That, however, is a matter for Mr Morris and those who advise him. We would be happy to deliver the report in confidence.

It is disappointing that despite the Committee Chair's warning to Mr Morris on the use of parliamentary privilege he has continued to make false and unsubstantiated allegations concerning Omni Bridgeway.

We also note that many of the allegations made by Mr Morris against Omni Bridgeway in his evidence to this Inquiry were also made before the Federal Court in proceedings NSD 429 of 2017 *Morris v IMF Bentham Limited*.

In those proceedings, Mr Morris initially sought to establish the liability of Omni Bridgeway (formerly IMF Bentham) and a number of other related parties on both common law and various statutory grounds in relation to the matters he has now restated to the Inquiry. In response, Omni Bridgeway and its co-respondents sought, and were granted, orders that summarily dismissed Mr Morris' claims for the reasons set out in the judgment of Justice Wigney (attached). Mr Morris was ordered to pay the legal costs of Omni Bridgeway. For the Committee's information, Omni Bridgeway elected not to enforce the costs orders in consideration of the condition of Mr Morris' health.

Omni Bridgeway respectfully asks the Committee to accept and publish this letter on both the 'Public Hearings' and 'Additional Documents' pages of the inquiry website.

I trust this information is of assistance.

Yours sincerely,

Andrew Saker
Managing Director & CEO

Annexure A

Morris Allegation	Omni Bridgeway Response
Omni Bridgeway fabricated evidence	Omni Bridgeway did not fabricate evidence. A similar but not the same allegation was alluded to in Mr Morris' Federal Court claim and dismissed.
Asandas failed because Omni Bridgeway funded a claim against Asandas and made an announcement to the ASX	Asandas failed for a number of reasons including: • Mr King's fraud • ASIC had required brokers to increase their capital position from $300k to $5 million which Asandas could not do. • Optiver did not make capital contributions after August 2008 • A history of trading losses • GFC • The loss of 25% of its broker force arising out of the fraud by King Asandas did not fail because of either Omni Bridgeway's ASX announcement or the claims it funded.
Omni Bridgeway ignored a guarantee that was available to meet the claims against Asandas	Mr Morris never had a guarantee. The guarantee was never available for Stripe's clients to call upon. The guarantee was provided by Stripe to Asandas and only Asandas could call upon that guarantee. Asandas was aware of the claims that were made against Stripe and chose not to call upon that guarantee.
Omni Bridgeway caused the Deed of Company Arrangement (DOCA) for Asandas to fail	The DOCA was approved by creditors but failed as the condition precedent to the DOCA was that Optiver release its claims against Morris for $4.5 million, which it did not agree to do.
Omni Bridgeway fabricated claims that could have been resolved by cancelling trades and returning the stock	Mr Morris is aware that the trades that were made by Mr King, for which Asandas was liable by way of its statutory liability under the AFSL regime, could not be cancelled, and the stock returned. Those trades occurred in 2008, a year before the funding was provided by Omni Bridgeway.
Omni Bridgeway is responsible for Mr Morris' divorce, bankruptcy and ill health	Mr Morris and Mrs Morris separated two years before Omni Bridgeway provided funding for the claims against Asandas. Mr Morris is aware that his bankruptcy resulted from the debt he owed to Optiver. Whilst Omni Bridgeway is empathetic to Mr Morris' ill health, it does not accept responsibility for Mr Morris' stroke that occurred in 2015 after his bankruptcy expired and some six years after the agreement by Omni Bridgeway to fund litigation against Asandas.

FEDERAL COURT OF AUSTRALIA

Morris v IMF Bentham Limited [2018] FCA 1009

File number:	NSD 494 of 2017
Judge:	**WIGNEY J**
Date of judgment:	5 July 2018
Catchwords:	**PRACTICE AND PROCEDURE –** application for summary judgment pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) – whether applicant had reasonable prospects of successfully prosecuting claim based on tort of deceit – where applicant has no standing to prosecute proceedings – where causes of action remain vested in applicant's trustee in bankruptcy pursuant to s 58(1) of the *Bankruptcy Act 1966* (Cth) – where claim concerning personal reputational loss not severable and distinct from case of financial or property loss – where deregistered companies proper plaintiffs – where leave of the Court to bring proceedings in name of company not sought – where loss not suffered by applicant personally – where claims statute-barred – where claims based on tort of deceit have no prospects of success – summary dismissal entered in favour of respondents **PRACTICE AND PROCEDURE** – alternative application to strike out statement of claim pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) – where claim not adequately pleaded – where certain claims discontinued or withdrawn – where appropriate to strike out parts of claim if summary dismissal not ordered
Legislation:	*Australian Consumer Law* (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ss 18, 21, 236, 237 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12DA, 12GF, 12GM *Bankruptcy Act 1966* (Cth) ss 5, 58, 116, 152, 153 *Corporations Act 2001* (Cth) s 912A *Federal Court of Australia Act 1976* (Cth) s 31A *Trade Practices Act 1974* (Cth) (repealed) ss 51AC, 52, 82, 87 *Federal Court Rules 2011* (Cth) r 16.21, 26.01 *Limitation Act 1969* (NSW) Div 6, ss 14, 14B, 55
Cases cited:	*Australian Competition and Consumer Commission v*

FDRA Pty Ltd [2016] FCA 429

Ballard v Multiplex Ltd [2008] NSWSC 1019; 68 ACSR 208

Ballina Shire Council v Ringland (1994) 33 NSWLR 680

Blakeley v National Australia Bank [2017] FCA 835

Bradford Third Equitable Benefit Building Society v Borders (1941) 2 All ER 205

Bryant v Commonwealth Bank of Australia (1997) 75 FCR 545

Chen v Karandonis [2002] NSWCA 412

Cox v Journeaux (No 2) (1935) 52 CLR 713

Cummings v Claremont Petroleum NL (1996) 185 CLR 124

Daemar v Industrial Commission of New South Wales (1988) 12 NSWLR 45

Daemar v Industrial Commission of New South Wales (No 2) (1990) 22 NSWLR 178

Danthanarayana v Commonwealth of Australia [2016] FCAFC 114

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

Faulkner v Bluett (1981) 52 FLR 115

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125

Gould v Vaggaelas (1985) 157 CLR 215

Johnson v Gore Wood & Co (A Firm) [2002] 2 AC 1

Magill v Magill (2006) 226 CLR 551

Mannigel v Hewlett Phelps (unreported, Supreme Court of the New South Wales Court of Appeal, Kirby P, Meagher and Handley JJA, 12 June 1991)

Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632

Moss v Eaglestone (2011) 83 NSWLR 476

Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc (2002) 120 FCR 191

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204

Ratcliffe v Evans [1892] 2 QB 524

Samootin v Shea [2010] NSWCA 371

Schindler Lifts Australia Pty Ltd v Debelak (1989) 89 ALR 275

Spencer v The Commonwealth (2010) 241 CLR 118

Thomas v D'Arcy [2005] 1 Qd R 666

Trade Practices Commission v Pioneer Concrete (Qld) Pty

	Ltd (1994) 52 FCR 164 *Trkulja v Google LLC* [2018] HCA 25 *VPlus Holdings Pty Ltd v Bank of Western Australia Ltd* [2012] NSWSC 1327; 91 ACSR 545
Date of hearing:	23 November 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	135
Counsel for the Applicant:	The applicant appeared in person
Counsel for the First, Second, Third and Fifth Respondents:	Mr D Williams SC
Solicitor for the First, Second, Third and Fifth Respondents:	Johnson Winter & Slattery
Counsel for the Fourth Respondent:	Mr R Glover
Solicitor for the Fourth Respondent:	Gilchrist Connell

ORDERS

NSD 494 of 2017

BETWEEN:	**MARK EVANS MORRIS** Applicant
AND:	**IMF BENTHAM LIMITED (ABN 45 067 298 088)** First Respondent
	HUGH MCLERNON Second Respondent
	PAUL RAINFORD (and others named in the Schedule) Third Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **5 JULY 2018**

THE COURT ORDERS THAT:

1. Pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) and r 26.01 of the *Federal Court Rules 2011* (Cth), the proceeding as against the first, second, third, fourth and fifth respondents be summarily dismissed.
2. The applicant pay the costs of the first, second, third, fourth and fifth respondents.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1 On 22 July 2009, the litigation funder **IMF** Bentham Ltd issued an **Announcement** to the Australian Stock Exchange (**ASX**) that it had "agreed to fund claims by various former clients of Todd King" against Australian Stockbroking and Advisory Services Pty Ltd (**Asandas**). The proposed claims were said to stem from "a series of transactions that were in breach of a duty of care owed by King and [Asandas] to their clients". Mr Todd **King** was said to have been the authorised representative of Asandas. The Announcement indicated that a class action would be commenced in the Supreme Court of Western Australia. It invited claimants wishing to join the class action to return a signed funding agreement to IMF, and to request an information pack through IMF's website.

2 At the time of the Announcement, Mr Mark **Morris** was the Chief Executive Officer (**CEO**) of the **Minc Group** of companies which included, relevantly, Asandas. In the two years following the Announcement, it would seem that Asandas encountered financial difficulties. On or about 15 April 2011, Mr Morris placed Asandas into voluntary administration. Asandas went into liquidation in August 2011. It was eventually deregistered, as was, it would appear, the other companies in the Minc Group. Mr Morris became a bankrupt in July 2012. A class action against Mr King, Asandas and others was eventually filed in the Supreme Court of Western Australia in May 2012. Whether that class action precisely corresponded with the class action foreshadowed in the July 2009 Announcement is perhaps debatable.

3 On 4 April 2017, Mr Morris commenced these proceedings by filing an Originating **Application**, together with a lengthy affidavit. The Application sought declarations that IMF committed the tort of deceit, conspired to injure Asandas, and engaged in misleading and deceptive conduct and unconscionable conduct in breach of the ***Trade Practices Act*** *1974* (Cth) or the *Australian Consumer Law* (**ACL**) (being Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). Mr Morris also sought declarations that two senior officers of IMF, a partner of the law firm which had been retained to act for the plaintiff in the foreshadowed class action, and the person who was said to be the plaintiff in the class action (collectively, the **individual respondents**), aided, abetted, counselled or procured IMF's contraventions.

Mr Morris sought compensation under the Trade Practices Act, the ACL and the ASIC Act, and costs.

4 Mr Morris was, in due course, directed to file a Statement of Claim. He did so on 20 July 2017. His pleaded case was, in short summary, that: the Announcement contained representations or statements concerning the availability of claims against Asandas and the funding of a class action to litigate those claims; IMF and the individual respondents knew those statements to be false, or were at least reckless as to their truth; the sole or principal purpose in issuing the Announcement was to solicit clients for the prospective class action; IMF made similar false statements to the media concerning the class action at the time of the Announcement; the class action against Asandas referred to in the Announcement was never commenced, or at least was not commenced until May 2012, and even then, was materially different to the class action foreshadowed in the Announcement; companies in the Minc Group and Mr Morris suffered loss and damage by reason of the Announcement; in about May 2011, IMF made false statements to the administrators of Asandas and the other companies in the Minc Group concerning the foreshadowed class action; and companies in the Minc Group and Mr Morris suffered loss as a result of the false statements to the administrators because the false statements caused the companies' creditors to vote against a Deed of Company Arrangement. The Statement of Claim also contained a number of ancillary allegations and criticisms of IMF, which it is unnecessary to recite.

5 On 14 August 2017, IMF and the individual respondents filed interlocutory applications seeking orders that summary judgment be entered against Mr Morris or, in the alternative, that the Statement of Claim be struck out. They contended, in short, that summary judgment should be entered in their favour for a number of reasons including that: Mr Morris had no standing to pursue the claims because of his intervening bankruptcy; the causes of action alleged by Mr Morris are in fact causes of action for wrongs allegedly committed against the companies in the Minc Group, not Mr Morris personally; the claims are statute-barred; and the pleaded causes of action have no reasonable prospects of success. The pleading was also said to be deficient in numerous respects.

6 Mr Morris, who has at all times appeared unrepresented, opposed the summary dismissal or striking out of his action. He ultimately abandoned all of the pleaded claims other than those founded on the tort of deceit. He contended, amongst other things, that those claims were not

statute-barred; that he hoped to have his former trustee in bankruptcy assign those claims to him; and that the claims included claims that were personal to him.

7 The critical question is whether Mr Morris has no reasonable prospect of successfully prosecuting the proceeding.

MR MORRIS' PLEADED CLAIMS

8 Mr Morris' Statement of Claim is lengthy and detailed. The following summary of the pleaded facts and claims is drawn almost entirely from the Statement of Claim.

9 IMF and the individual respondents have not yet filed a defence. The summary judgment application must be approached on the basis that Mr Morris may, or will, ultimately be able to prove the facts pleaded in the Statement of Claim. IMF and the individual respondents did not contend otherwise. Their case for summary judgment was based on deficiencies or problems with Mr Morris' claims that do not directly relate to whether Mr Morris will ultimately be able to prove the factual allegations that provide the basis for his claims. IMF and the individual respondents did not adduce any evidence other than evidence concerning Mr Morris' bankruptcy and the current status of the Minc Group companies.

10 As has already been noted, Mr Morris' claims primarily concern the Announcement which IMF issued to the ASX on 22 July 2009. Before considering the terms of the Announcement, and the basis upon which Mr Morris contends that some of the statements made in it were false, it is necessary to summarise some of Mr Morris' allegations concerning the background to the Announcement.

Background to the Announcement

11 At all times relevant to his claims, Mr Morris was a director and CEO of both **Minc** Financial Services Holdings Pty Ltd and Minc Financial Services Pty Ltd (**MFS**). Mr Morris held 50% of the issued shares in Minc. By 31 December 2010, that shareholding had increased to 60%. The other major shareholder in Minc was **Optiver** Financial Services Holdings BV. Optiver was a large Dutch global trading house.

12 Minc owned all the issued shares in MFS. MFS provided stockbroking and financial services through contracted financial advisers and generated revenue through brokerage fees. It held an Australian Financial Services Licence.

13 Prior to December 2007, Asandas was a wholly owned subsidiary of **E*Trade** Securities Australia Ltd. Asandas conducted a stockbroking and advisory business similar to the business conducted by MFS. Importantly, it executed and cleared all its client transactions through the agency of E*Trade.

14 In mid-2007, Asandas agreed to appoint **Stripe** Capital Pty Ltd and its directors as its authorised representatives. Pursuant to its agreement with Asandas, Stripe agreed to place all trades on behalf of its clients through the E*Trade execution platform. Stripe and each of its directors agreed to guarantee the settlement of all Stripe's trades and to indemnify Asandas against any loss that Asandas may suffer as a result of the conduct of Stripe or its directors.

15 Mr King was one of Stripe's directors.

16 In December 2007, Mr Morris and Optiver entered into a joint venture agreement pursuant to which, amongst other things, they acquired Asandas through a wholly owned corporate subsidiary which held all the shares in Asandas. Asandas accordingly became part of the Minc Group. The acquisition included the arrangements and agreements that were already in place between Asandas and Stripe.

17 On 30 June 2008, Mr King ceased to be a director and shareholder of Stripe. That occurred as a result of a dispute which had arisen after some of Mr King's clients failed to settle a number of transactions. All but a few of Mr King's clients subsequently transferred their accounts from Stripe to a new company associated with Mr King.

18 It would appear that Mr King also ceased to be an authorised representative of Asandas from about this time.

19 One of Mr King's clients was Mr Edwin **Smith**. Mr Smith is the fifth respondent in this proceeding.

20 In November 2008, Asandas became aware of a dispute between Mr Smith and Mr King and Stripe. The dispute arose out of agreements between Mr King and Mr Smith that were entered into in 2007, at a time when Asandas was owned by E*Trade and when Mr King and Stripe were authorised representatives of Asandas. Mr Morris' Statement of Claim contains extensive details concerning the nature and origins of the dispute between Mr Smith and Mr King and Stripe. It is unnecessary for present purposes to rehearse that detail. Suffice it to say that it would appear from the pleading that Mr Morris disputes, or at least does not admit, the merits of Mr Smith's complaint, or at least material parts of it.

21 In late November 2008, Asandas notified its insurer of the dispute with Mr Smith and the complaints concerning the conduct of Mr King. Perhaps more importantly, Asandas also notified the Australian Securities and Investments Commission (**ASIC**) of a potential breach of s 912A of the *Corporations Act 2001* (Cth) by Mr King based on Mr Smith's complaint. Section 912A sets out the general obligations of a financial services licensee. Asandas also advised ASIC that it had become aware of complaints from a small number of other clients of Mr King.

22 On 8 July 2009, Mr Smith's lawyers advised Asandas that Mr Smith had "potential claims" against Asandas arising out of his dealings with Mr King in 2007.

IMF's Announcement

23 On 22 July 2009, IMF issued an Announcement to the ASX concerning its funding of claims against Asandas. The Announcement contained three representations, the substance of which were as follows.

24 First, IMF had agreed to fund claims against Asandas by various former clients of Mr King, who was an authorised representative of Asandas.

25 Second, the claims stemmed from a series of transactions which were in breach of the duty of care owed by Mr King and Asandas to their clients.

26 Third, claimants wishing to join the action could return a signed funding agreement to IMF.

27 Mr Morris alleges that the representations in the Announcement were false and that IMF knew them to be false, or was recklessly indifferent to their truth. He contends, amongst other things, that: IMF had not at that time agreed to fund claims by "various former clients" of Mr King; IMF did not know, and was not able to identify at that time, any "series of transactions" directly associated with services provided by Asandas that gave rise to any claims by "various former clients"; there were no claims arising from any breaches of the duty of care owed by Asandas to any of its clients; and the claims would not be a class action against Asandas.

28 Mr Morris also alleges that IMF issued the Announcement for the sole or principal purpose of soliciting clients for a class action against Asandas and Mr King, and not for any legitimate purpose associated with its regulatory or reporting obligations to the ASX.

29 Mr Morris initially contended that, in issuing the Announcement containing the allegedly false representations, IMF contravened ss 51AC and 52 of the Trade Practices Act and ss 12DA and 12CB of the ASIC Act. Those statutory claims are no longer pressed by Mr Morris.

30 Mr Morris also initially claimed that IMF issued the Announcement with the knowledge and consent of its managing director, Mr Hugh **McLernon**; its investment manager, Mr Paul **Rainford**; and its external lawyer, Mr Chris **Williams**. More significantly, Mr Morris also initially alleged that IMF issued the Announcement based on "false instructions" provided by Mr Smith and that each of Messrs McLernon, Rainford and Williams was recklessly indifferent as to the truth of those instructions. Those claims, however, are no longer pressed by Mr Morris. He agreed that they should be struck out. Messrs McLernon, Rainford and Williams are the second, third and fourth respondents to the proceedings.

31 Mr Morris also alleged that various statements that IMF made to the media at or around the time of the Announcement were also false and that IMF either knew them to be false, or was reckless as to their truth. The statements, which were reported in the West Australian newspaper and another publication called the WA Business Review, included that the claims referred to in the Announcement were in the "millions of dollars" or the "tens of millions of dollars".

32 In 2010 and 2011, Mr Morris met with representatives of IMF and advised them that the Announcement contained false statements and was continuing to cause loss and damage to the Minc Group. On 24 December 2010, Asandas demanded, through its lawyers, that IMF publicly retract the Announcement. IMF refused to do so.

Alleged loss and damage caused by the Announcement

33 Mr Morris claims that the Announcement and the threat of litigation it contained caused extensive loss and damage to the companies in the Minc Group, as well as to him personally. The loss and damage is said to have been compounded by the fact that the Announcement was issued during the aftermath of the so-called global financial crisis. The loss or damage suffered by the Minc Group companies and Mr Morris is alleged to include the following.

34 First, the increase in premiums payable for both Professional Indemnity and Director and Officer Insurance. The particulars included in the Statement of Claim indicate that this was a loss suffered by Asandas.

35 Second, the Announcement is alleged to have caused a loss of confidence on the part of shareholders in the Minc Group, including Optiver. The result of that loss in confidence is alleged to be that Optiver reduced its shareholding in Asandas and was unwilling to inject further capital into the venture. Mr Morris was accordingly required to "deploy all of his personal and available corporate financial resources from the Minc Group to try and save" Asandas.

36 Third, it is alleged that the business of Asandas suffered losses. There was a "loss in stability and confidence in the Asandas client base and generally across the Minc Group" and an inability to attract new advisors and clients to Asandas and MFS. Existing clients of Asandas and MFS took their business to competitors. As a result, Mr Morris suffered "a loss of income and salary base" and a "loss in the value of shares across the Minc Group" owned by him.

37 Fourth, Minc and Optiver lost the opportunity to fulfil their joint venture through Asandas and their opportunity to "embark on the planned global expansion of the Minc Group", which had been actively pursued prior to the Announcement.

38 Fifth, the Minc Group and Mr Morris suffered a loss of reputation.

39 Sixth, and finally, there was said to be a loss arising from the fact that an inordinate amount of time was spent by management and staff of the Minc Group dealing with ASIC and other regulatory investigations rather than on productive work.

Statements to the Asandas administrators

40 A second important aspect of Mr Morris' claims arises from statements made to the external administrators who Mr Morris caused to be appointed to the Minc Group companies.

41 On 15 April 2011, Mr Morris caused external administrators to be appointed to Asandas, Minc and MFS. On 20 April 2011, Mr Morris requested ASIC to cancel the Australian Financial Services Licences of Asandas and Minc. He also notified the authorised representatives of Asandas and Minc of the termination of those licences.

42 Mr Morris alleges that, following their appointment, IMF made false statements to the administrators concerning its funding of claims against Asandas. The false statements are alleged to be recorded or reproduced in the administrators' report to creditors dated 24 May 2011. They include that IMF was funding claims against Asandas on behalf of

Mr Smith for $5.5 million, as well as claims on behalf of 60 former clients of Mr King who had "collectively suffered $20 million in losses" due to the actions of Mr King and Stripe. Mr Morris asserts that IMF knew those statements to be false, or was reckless as to their truth.

43 Mr Morris claims that the false statements made to the administrators made it impossible for the Minc Group companies to trade out of administration. That was because "all support from staff and outside financiers for a Deed of Company Arrangement (DOCA) was destroyed by the inflated and false claims made by IMF to the Administrators". Mr Morris alleges that the administrators recommended that the companies in the Minc Group execute a Deed of Company Arrangement, but that the companies' creditors declined to enter into such a deed given the threat of litigation in respect of the claims referred to by IMF in the Announcement.

44 Mr Morris originally claimed that, in making the false statements to the administrators, IMF contravened ss 18 and 21 of the ACL and ss 12DA and 12CB of the ASIC Act. As was the case with the statutory claims arising from the Announcement, Mr Morris has now abandoned those statutory claims.

Proceedings against Mr King, Stripe and Asandas

45 It would appear that IMF did ultimately fund certain proceedings against Mr King, Stripe and Asandas.

46 The first proceeding was commenced in 2009 in the Supreme Court of Western Australia. Mr Smith was the plaintiff and Mr King, Mr King's mother, Stripe, Asandas and a margin lender, Leveraged Equities Ltd, were the defendants. Mr Morris contends, or at least appears to contend, that this proceeding was materially different to the proceeding referred to, or foreshadowed, in the Announcement. It was not a class action and only involved one set of transactions between Mr Smith and Mr King. It did not involve any other clients of Asandas. At the time of the filing of the Statement of Claim, the first proceeding had been heard and judgment had been reserved.

47 The second proceeding was commenced in 2012, also in the Supreme Court of Western Australia. It was a class action. Mr Smith was originally the lead plaintiff, however the claim was subsequently amended so as to make the trustee of Mr Smith's superannuation fund the lead plaintiff. Mr Morris does not expressly allege that this proceeding was

fundamentally different to the class action foreshadowed in the Announcement, though that assertion appears to be implicit. It also seems that Mr Morris contends that it was not properly commenced as a class action and, in any event, has no merit. He alleges that the claims referred to, or represented, in the Announcement and to the administrators have "never been substantiated".

Relief sought by Mr Morris

48 As has already been noted, Mr Morris originally sought declarations that IMF had contravened various provisions of the Trade Practices Act, the ACL and the ASIC Act. He also sought a declaration that Messrs McLernon, Rainford, Williams and Smith aided, abetted, counselled or procured the contraventions by IMF. He claimed that he was entitled to compensation in respect of those contraventions pursuant to ss 82 or 87 of the Trade Practices Act, ss 236 or 237 of the ACL and ss 12GF or 12GM of the ASIC Act. Those claims have now all been abandoned by Mr Morris.

49 The only relief sought by Mr Morris relates to, or arises from, a common law action in respect of the tort of deceit. In the Application, Mr Morris seeks declarations in the following terms (paragraphs 1 and 2 of the Application):

> 1. A declaration that the first respondent, IMF deceitfully and/or recklessly made false statements which were publicly released through the Australian Securities Exchange (ASX) and the media for the purpose of soliciting clients to commence a class action or other form of proceedings against Australian Stockbroking Services PTY LTD (ACN 094 106 751) ("ASANDAS") and by reason of which the applicant, Morris, has suffered loss.
>
> 2. A declaration that the first respondent, IMF, deceitfully and/or recklessly made false statements in relation to its client's true claims, to the administrator of ASANDAS, which was then reported in the administrator's report and released to the creditors of ASANDAS, the market regulators and the general public, and by reason of which the applicant, Morris, has suffered loss.

50 Mr Morris also seeks compensation, presumably arising from the false statements the subject of the two declarations (paragraph 7(a) of the Application). His initial claims for statutory compensation under the Trade Practices Act, the ACL and the ASIC Act have all been abandoned.

51 Mr Morris no longer seeks any relief against the individual respondents.

THE APPLICATION FOR SUMMARY JUDGMENT OR THE STRIKING OUT OF MR MORRIS' CLAIM

52 IMF and the individual respondents applied for summary judgment to be entered against Mr Morris pursuant to s 31A(2) of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) on the basis that Mr Morris has no reasonable prospect of successfully prosecuting the proceeding. Alternatively, they applied for an order that Mr Morris' Statement of Claim be struck out on the basis that it discloses no reasonable cause of action. They put forward a number of reasons why Mr Morris' claim has no reasonable prospects, or fails to disclose a reasonable cause of action.

53 First, IMF and the individual respondents contend that Mr Morris has no standing to pursue the claims against them. That is because Mr Morris was declared bankrupt on 23 July 2012. Upon being made bankrupt, any cause of action that Mr Morris may have had against them, other than a cause of action for personal injury or wrong, vested in his trustee in bankruptcy by reason of ss 58(1) and 116(2)(g)(i) of the ***Bankruptcy Act*** *1966* (Cth). The causes of action did not re-vest in Mr Morris upon his discharge from bankruptcy.

54 Second, IMF and the individual respondents contend that the causes of action alleged by Mr Morris are, upon analysis, causes of action properly prosecuted by Asandas and perhaps other companies in the Minc Group. Those companies are the proper plaintiffs or applicants, not Mr Morris. Any loss or damage suffered as a result of the allegedly false statements in the Announcement, or the allegedly false statements made to the administrators, was suffered by the corporate entities, not Mr Morris.

55 Third, IMF and the individual respondents submit that the causes of action founded on the tort of deceit that Mr Morris continues to pursue are statute-barred. They submit that the losses allegedly suffered by the Minc Group companies and Mr Morris as a result of the Announcement were suffered by no later than 2009. The limitation period in respect of a cause of action founded on the tort of deceit is six years from the date that the cause of action accrued. Mr Morris was accordingly required to commence the proceedings by 2015. He did not commence the proceedings until April 2017.

56 Fourth, IMF and the individual respondents contend the causes of action in deceit have no reasonable prospect of success. That is because the elements of a cause of action in deceit include that the defendant, the maker of the allegedly false statement, intended that the plaintiff would rely on the statement, that the plaintiff relied on the statement, and that the

plaintiff suffered damage as a result of that reliance. They point out in that context that Mr Morris does not allege either that IMF intended that he would rely on the false statements in the Announcement, or that he relied on those statements, or that he suffered damage as a result of that reliance. The same can be said of the cause of action in deceit based on the allegedly false statements made to the administrators.

57 Fifth, IMF and the individual respondents pointed to some material deficiencies in Mr Morris' pleading. In particular, in their submission, the Statement of Claim fails to plead the material facts and essential elements in respect of the deceit claim, and fails to plead the material facts that provide the basis for the allegation that IMF or any of the individual respondents knew that the statements in the Announcement were false, or were reckless as to their truth. They also contend that the Statement of Claim fails to properly identify or particularise the false statements that were allegedly made to the administrators.

58 IMF and the individual respondents advanced additional submissions in respect of the alleged statutory contraventions, including the claim that the individual respondents aided and abetted those contraventions. It is unnecessary to consider those submissions given that Mr Morris abandoned the statutory claims, and abandoned all the relief initially sought against the individual respondents.

RELEVANT STATUTORY PROVISIONS AND PRINCIPLES

59 Section 31A(2) of the Federal Court Act provides as follows:

> (2) The 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.

60 Importantly, s 31A(3) provides that a proceeding, or part of a proceeding, need not be hopeless or bound to fail for it to have no reasonable prospect of success.

61 Rule 26.01 of the *Federal Court* ***Rules*** *2011* (Cth) provides that a party may apply to the Court for an order that judgment be given against another party in certain circumstances. Those circumstances include, relevantly, where the applicant has no reasonable prospect of successfully prosecuting the proceeding or a part of the proceeding, or that no reasonable cause of action is disclosed.

62 Rule 16.21 of the Rules separately provides that a party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading, amongst other things, fails to disclose a reasonable cause of action or defence, or other case appropriate to the nature of the pleading.

63 In ***Spencer*** *v The Commonwealth* (2010) 241 CLR 118, Hayne, Crennan, Kiefel and Bell JJ said the following in relation to the meaning of the expression "reasonable prospects of success" at [56] and [58]-[60]:

> Because s 31A(3) provides that certainty of failure ("hopeless" or "bound to fail") need not be demonstrated in order to show that a plaintiff has no reasonable prospect of prosecuting an action, it is evident that s 31A is to be understood as requiring a different inquiry from that which had to be made under earlier procedural regimes. It follows, of course, that it is dangerous to seek to elucidate the meaning of the statutory expression "no reasonable prospect of successfully prosecuting the proceeding" by reference to what is said in those earlier cases.
>
> …
>
> How then should the expression "no reasonable prospect" be understood? No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is "no reasonable prospect". The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase like "no reasonable prospect" is to be avoided. Consideration of the difficulties that bedevilled the proviso to common form criminal appeal statutes, as a result of judicial glossing of the relevant statutory expression, provides the clearest example of the dangers that attend any such attempt.
>
> In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like "clearly", "manifestly" or "obviously") as "frivolous", "untenable", "groundless" or "faulty". But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word "reasonable", in the phrase "no reasonable prospect", be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a "frivolous", "untenable", "groundless" or "faulty" claim.
>
> Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect" of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to "no reasonable prospect" can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase "just and equitable" when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application is read as confined to cases of a kind which fell within earlier, different, procedural regimes.

(Footnote omitted.)

64 It is accordingly clear that the operation of s 31A is not confined to cases of a kind falling within the tests propounded in the earlier decisions in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125: see *Trkulja v Google LLC* [2018] HCA 25 at [21]-[23].

65 In *Spencer*, French CJ and Gummow J adopted a broadly similar approach to Hayne, Crennan, Kiefel and Bell JJ. Their Honours noted (at [24]-[25]) that s 31A(2) requires both the exercise of a practical judgment and the need for caution:

> The exercise of powers to summarily terminate proceedings must always be attended with caution …
>
> Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue …

66 Even though it is not necessary to show that a proceeding is hopeless or bound to fail in order to obtain summary judgment, a party who seeks summary judgment nevertheless bears a heavy onus: *Australian Competition and Consumer Commission v FDRA Pty Ltd* [2016] FCA 429 at [27]. That is because to summarily dismiss a proceeding, and thereby preclude a person from having their case determined on its merits at a final hearing, is a serious step that should only be taken with great care and only where it is possible to conclude with confidence that there is no reasonable prospect of success: *Danthanarayana v Commonwealth of Australia* [2016] FCAFC 114 at [4].

67 It is difficult to see why a different approach should be taken to the expression "reasonable cause of action" in r 16.21 of the Rules. Like the power to summarily dismiss a proceeding, the power to strike out pleadings or portions of pleadings should generally be employed sparingly, with caution, and only in a clear case "lest one deprive a party of a case which in justice it ought to be able to bring": *Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164 at 175.

DOES MR MORRIS HAVE NO REASONABLE PROSPECT OF SUCCESSFULLY PROSECUTING THE PROCEEDING?

68 The critical question is whether it can be concluded that Mr Morris has no reasonable prospect of successfully prosecuting the proceeding having regard to the principles considered in *Spencer*. Unfortunately for Mr Morris, the short answer to that question is "yes". Each of the propositions advanced by IMF and the individual respondents in support of summary judgment being entered in their favour against Mr Morris has merit. The problems that confront Mr Morris in the prosecution of his case as pleaded are such that it is possible to conclude with considerable confidence that his case is effectively doomed to fail for a number of reasons.

The causes of action are vested in Mr Morris' trustee in bankruptcy

69 The causes of action pleaded in the Statement of Claim on any view accrued before Mr Morris' bankruptcy on 23 July 2012. Section 58(1) of the Bankruptcy Act relevantly provides that the property of the bankrupt vests forthwith in the Official Trustee or the trustee of the estate of the bankrupt. The word "property" is defined very broadly in s 5 of the Bankruptcy Act as meaning "real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property". At the time he was declared bankrupt, Mr Morris' rights to sue IMF and the individual respondents in tort were undoubtedly intangible property rights in the nature of choses in action that fell within the broad definition of "property" in s 5 of the Bankruptcy Act.

70 Section 116(1) of the Bankruptcy Act relevantly provides that all the property that belonged to the bankrupt at the commencement of the bankruptcy is property divisible amongst the creditors of the bankrupt. Section 116(2)(g)(i) provides that s 116(1) does not apply to any right of the bankrupt to recover damages or compensation for personal injury or wrong done to the bankrupt.

71 The causes of action pleaded by Mr Morris, including the causes of action in deceit, do not fall within s 116(2)(g)(i). The test of whether a cause of action seeks damage or compensation "for personal injury or wrong" is "whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property": *Cox v Journeaux (No 2)* (1935) 52 CLR 713 at 721; ***Daemar*** *v Industrial Commission of New South Wales* (1988) 12

NSWLR 45 at 55-56; ***Bryant*** *v Commonwealth Bank of Australia* (1997) 75 FCR 545 at 562-563. In *Faulkner v Bluett* (1981) 52 FLR 115 at 119, Lockhart J said:

> The common thread running through these cases is that where the primary and substantial right of action is direct pecuniary loss to the property or estate of the bankrupt, the right to sue passes to the trustee notwithstanding that it may have produced personal inconvenience to the bankrupt … Where the essential cause of action is the personal injury done to the person or feelings of the bankrupt the right to sue remains with the bankrupt.

72 There could be little doubt that the primary and substantial rights of action pleaded by Mr Morris relate to direct pecuniary loss to his property or estate. Those rights accordingly vested in the trustee when Mr Morris was declared bankrupt. They comprised part of the property divisible amongst the creditors of Mr Morris in his bankruptcy.

73 As has already been noted, the particulars of the loss and damage claimed by Mr Morris also include "loss of reputation across the Minc Group and for Morris personally". An action for damages for loss of reputation, for example an action for defamation, would in the ordinary course be an action for personal injury and would accordingly fall within s 116(2)(g)(i) of the Bankruptcy Act. It is tolerably clear from the Statement of Claim, however, that the loss of reputation claimed by Mr Morris was a mere consequence or by-product of the alleged economic loss suffered by the Minc Group companies. A claim for damages in respect of personal injury which is merely "consequential upon the loss or damage … which is referable to the proprietary claims" does not fall within s 116(2)(g)(i) of the Bankruptcy Act and thus vests in the trustee: *Bryant* at 554 (Lockhart J) and 564 (O'Loughlin and Merkel JJ). The proper analysis of Mr Morris' claim is that he sues on an indivisible cause of action for economic loss founded on the tort of deceit. There is no separate cause of action to recover damages for personal injury. The alleged personal injury to Mr Morris' reputation cannot be severed from the financial or proprietary wrong complained of: *Mannigel v Hewlett Phelps* (unreported, Supreme Court of the New South Wales Court of Appeal, Kirby P, Meagher and Handley JJA, 12 June 1991); *Moss v Eaglestone* (2011) 83 NSWLR 476 at [73]-[75]; see also *Daemar* at 56; *Bryant* at 563-564. Upon Mr Morris being declared bankrupt, the whole chose in action vested in his trustee in bankruptcy.

74 The result is that Mr Morris has no standing to bring or prosecute these proceedings. In *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, Brennan CJ, Gaudron and McHugh JJ said (at 136):

> … a bankrupt has no right to bring or prosecute proceedings to protect, enhance or

> add to the property of which he has been divested on bankruptcy.

75 It is immaterial that Mr Morris has since been discharged from bankruptcy. Property of a bankrupt that vests in the trustee in bankruptcy, including a chose in action, does not re-vest in the bankrupt when he or she is discharged from bankruptcy: *Daemar v Industrial Commission of New South Wales (No 2)* (1990) 22 NSWLR 178 at 185; ***Samootin*** *v Shea* [2010] NSWCA 371 at [94]-[99]; *Blakeley v National Australia Bank* [2017] FCA 835 at [39]. In *Samootin*, after considering the effect of ss 152 and 153 of the Bankruptcy Act, which relate to the discharge of a bankrupt from bankruptcy, the court said (at [99]):

> An effect of this is that if an asset that the bankrupt had owned at the time of the bankruptcy has disappeared and only come to light after the bankrupt has been discharged, that asset remains vested in the Official Trustee. Therefore, it is for the Official Trustee to take any steps he deems appropriate to recover the asset, and, if it is recovered, it can be applied in payment of any provable debts that remain unpaid. Similarly, if an asset that the bankrupt owned at the time of the bankruptcy but that was thought to be worthless is shown, after the bankrupt has been discharged, to have some value, that asset remains vested in the Official Trustee, and if the Official Trustee is of the view that that value is worth realising, it is only the Official Trustee who has the power to realise that value.

76 Mr Morris made some efforts to obtain a transfer or assignment of the causes of action from his former trustee in bankruptcy. He was allowed a lengthy period of time to secure that transfer. It would appear that his trustee was prepared to assign the causes of action, however Mr Morris was ultimately unable or unwilling to agree to the trustee's terms for the assignment. There is no evidence to suggest that there has been any such assignment. The right to bring the proceeding accordingly still resides with the trustee.

77 Mr Morris' lack of capacity or standing to bring this proceeding would be sufficient reason to enter summary judgment against him.

78 It should perhaps be noted at this stage that if, contrary to what has just been found, it was reasonably arguable that the very small part of Mr Morris' case that concerns his personal reputational loss was severable and distinct from his case of financial or property loss, and accordingly fell within s 116(2)(g)(i) of the Bankruptcy Act and therefore did not vest in the trustee, it would nevertheless be appropriate to enter summary dismissal against him in respect of that aspect of his claim. The reasons for so concluding are addressed in more detail later.

The Minc Group companies are the proper plaintiffs

79 There is an additional reason why Mr Morris lacks capacity or standing to bring this proceeding. That reason is that Asandas, and perhaps the other Minc Group companies, are the proper plaintiffs in any action against IMF and the individual respondents arising from either the Announcement or the allegedly false statements made to the administrators.

80 It is clear from Mr Morris' Statement of Claim that the allegedly false statements in the Announcement relevantly related to Asandas. The Announcement did not refer to or concern Mr Morris. Any alleged wrong arising from the Announcement was accordingly a wrong committed against Asandas. Equally, the loss and damage that was allegedly caused by the statements in the Announcement was suffered by Asandas and possibly the other Minc Group companies.

81 Similarly, the statements allegedly made to the administrators concerned Asandas and possibly the other Minc Group companies. More significantly, the only loss or damage alleged to have been suffered as a result of those statements is that the Minc Group companies were unable to trade out of administration through a Deed of Company Arrangement. It is not alleged that Mr Morris personally suffered any loss or damage arising from the statements to the administrators.

82 Mr Morris has no standing to bring an action in respect of wrongs committed against the Minc Group companies, or to recover loss or damage suffered by the Minc Croup companies. A member or former member, or an officer or former officer, of a company may bring proceedings on behalf of the company, in the name of the company, with the leave of the Court: ss 236 and 237 of the Corporations Act. Section 237 of the Corporations Act sets out the criteria for the grant of leave. It is unnecessary to set out the criteria. It is sufficient to note that Mr Morris has not sought the Court's leave to bring this proceeding on behalf of Asandas or any of the other Minc Group companies. Nor is it commenced in the name of any of the Minc Group companies. Since Asandas has been deregistered, Mr Morris could not, in any event, now seek leave to commence proceedings on its behalf. Mr Morris has engaged in correspondence with ASIC about the circumstances in which Asandas was deregistered and the possibility of re-registering it. As matters currently stand, however, Asandas has not been re-registered.

83 It may be accepted that Mr Morris also seeks to recover loss and damage allegedly suffered by him personally. The loss or damage he claims that he suffered as a result of the

Announcement is said to be that he suffered "a loss of income and salary base … and loss in the value of shares across the Minc Group owned by [him]". It is also alleged that he suffered a loss of reputation. The question arises whether he has the capacity or standing to recover the losses he claims were personally suffered by him.

84 The short answer to that question is "no". The difficulty for Mr Morris is that he cannot recover damages which are merely a reflection of the loss suffered by the companies in which he relevantly had an interest. In ***Prudential Assurance*** *Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, the Court of Appeal held (at 222-223):

> But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.

85 The decision in *Prudential Assurance* was subsequently considered by the House of Lords in ***Johnson v Gore*** *Wood & Co (A Firm)* [2002] 2 AC 1. After referring to *Prudential Assurance* and other authorities, Lord Bingham of Cornhill said, relevantly (at 35):

> Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company.

86 Lord Millett explained the rationale of the principle in the following terms (at 62):

> If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.

87 Lord Millett described a shareholder's loss in these circumstances as "reflective loss" and noted (at 66) that reflective loss extends to the loss of dividends and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds.

88 The judgments in *Prudential Assurance* and *Johnson v Gore* were also referred to with approval by Beazley JA (with whom Heydon and Hodgson JJA relevantly agreed) in *Chen v Karandonis* [2002] NSWCA 412 at [34]-[53].

89 The principle that a shareholder or officer cannot recover reflective losses applies even when the company is in liquidation, or has been deregistered: *Ballard v Multiplex Ltd* [2008] NSWSC 1019; 68 ACSR 208 at [47]-[48]; *VPlus Holdings Pty Ltd v Bank of Western Australia Ltd* [2012] NSWSC 1327; 91 ACSR 545 at [33].

90 In *Gould v Vaggaelas* (1985) 157 CLR 215, Mr and Mrs Gould were induced by misrepresentations to purchase a property on behalf of a company which they formed, Gould Holdings Pty Ltd. They claimed damages for deceit. Gibbs CJ said (at 219-220):

> Any loss suffered by Gould Holdings as a consequence of the fraud can be recovered only by the company itself. Even if the company had not commenced an action within the limitation period, its failure to enforce its own rights would not have enhanced the rights of the Goulds: see *Prudential Assurance v. Newman Industries* [No 2]. However, although the Goulds cannot recover damages merely because Gould Holdings has suffered damage, and cannot recover damages which are merely a reflection of a loss suffered by the company, they may recover damages for the loss which they personally have suffered and which is separate and distinct from the loss suffered by the company. That this is so is clear in principle, but if authority is needed, the judgment in *Prudential Assurance v. Newman Industries* provides it.
>
> (Footnotes omitted.)

91 It was ultimately held that the Goulds could recover losses suffered by them because they were separate and distinct from the losses suffered by the company.

92 The critical question is whether the loss claimed by the individual shareholder or company officer in these circumstances is simply reflective of the company's loss, or whether it is separate and distinct from the loss suffered by the company. That is a question of substance, not form: *Thomas v D'Arcy* [2005] 1 Qd R 666 at [29]-[31].

93 It is quite clear that, with the possible exception of Mr Morris' claims concerning the damage to his personal reputation, the losses that Mr Morris claims that he suffered as a result of the allegedly false statements in the Announcement are entirely reflective of the losses suffered by the companies in the Minc Group. They comprise the loss in the value of the shares he held in the Minc Group companies and the salary that he earned from those companies. Those alleged losses are not separate and distinct from the losses suffered by the Minc Group companies.

94 It follows that, not only does Mr Morris have no standing to recover losses suffered by the companies in the Minc Group, he is also unable to recover the reflective losses he claims to have suffered as a result of the demise of those companies. He has, in those circumstances, no reasonable prospect of successfully prosecuting the proceeding. Summary judgment should be ordered against him in respect of those claims on that basis.

95 That would perhaps leave only Mr Morris' claim that he suffered personal reputational loss or damage. That aspect of Mr Morris' pleaded case is addressed later.

The deceit claim based on the Announcement is statute-barred

96 As has already been noted, Mr Morris abandoned all but his claims founded on the tort of deceit arising from the allegedly false statements made in the Announcement and to the administrators.

97 Section 14(1)(b) of the ***Limitation Act*** *1969* (NSW) relevantly provides that a cause of action founded on tort is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff. It is well-established that a cause of action founded on a tort, including the tort of deceit, accrues when damage from the alleged wrong is suffered.

98 The Announcement was issued on 22 July 2009. It is readily apparent from the Statement of Claim that Mr Morris claims to have suffered loss almost immediately as a result of the Announcement, or at least within a very short period of time. He certainly claims to have suffered loss or damage by 2010. The claimed losses include, to give but one example, increased insurance premiums. The particulars of that loss include a reference to an insurance renewal dated 6 January 2010. It follows that the cause of action founded on deceit arising from the Announcement accrued in at least 2010, with the result that the action is not maintainable if brought after 2016. The proceeding was not commenced until 4 April 2017.

99 Section 55 of the Limitation Act relevantly provides for a postponement of the bar in the case of a cause of action based on fraud or deceit, or a cause of action which is fraudulently concealed. It provides that the time which elapses after the limitation period fixed by the Limitation Act for the cause of action commences to run, and before the date on which a person having the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment, does not count in the reckoning of the limitation period.

100 The difficulty for Mr Morris, however, is that he does not claim either that the action was fraudulently concealed, or that he did not immediately discover the alleged deceit when the Announcement was issued, or within a short period of time. Section 55 accordingly has no relevant operation in the circumstances of this case.

101 It follows that Mr Morris commenced the proceeding in respect of the tort of deceit based on the Announcement outside the relevant limitation period. It is accordingly not maintainable.

102 The position in relation to the cause of action based on the allegedly false statements made to the administrators is not so clear. The administrators were not appointed until 15 April 2011. It follows that any false statements made to them concerning the nature of IMF's claims, and any loss or damage caused as a result of those statements, must have been made after that time. It would appear, therefore, that the claim founded on deceit arising from the statements made to the administrators was commenced within six years of the accrual of the cause of action.

The prospects of success of the deceit claims

103 In ***Magill*** *v Magill* (2006) 226 CLR 551, Gummow, Kirby and Crennan JJ identified the essential elements of the cause of action of deceit in the following terms (at [114]):

> The modern tort of deceit will be established where a plaintiff can show five elements: first, that the defendant made a false representation; secondly, that the defendant made the representation with the knowledge that it was false, or that the defendant was reckless or careless as to whether the representation was false or not; thirdly, that the defendant made the representation with the intention that it be relied upon by the plaintiff; fourthly, that the plaintiff acted in reliance on the false representation; and fifthly, that the plaintiff suffered damage which was caused by reliance on the false representation. Generally, the elements of the tort have been found to exist in cases which concern pecuniary loss flowing from a false inducement and the need to satisfy each element has always been strictly enforced, because fraud is such a serious allegation.
>
> (Footnotes omitted.)

104 Gleeson CJ (at [37]) referred to and approved a passage from the judgment of Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders* (1941) 2 All ER 205 at 211 to like effect.

105 It is readily apparent that when close consideration is given to the five essential elements of the tort of deceit, Mr Morris' case as pleaded in the Statement of Claim does not plead all of the essential elements of the cause of action.

106 Mr Morris' claims founded on the law of deceit are not well pleaded.

107 The claim based on the Announcement appears to amount to little more than that the Announcement contained statements that were either known by IMF to be false, or in respect of which IMF was reckless as to their truth: see paragraphs [53] and [54] of the Statement of Claim. The terms of the declaration sought by Mr Morris would suggest that he also claims that the false statements were made "for the purpose of soliciting clients to commence a class action or other form of proceedings against" Asandas. Significantly, it is not alleged that the statements were made with the intention that they would be relied on by Mr Morris or, for that matter, any of the Minc Group companies. The suggestion appears to be that IMF intended that the statements would be relied on by prospective litigants against Asandas. Nor is it alleged that Mr Morris, or any of the Minc Group companies, relied on the false statements, or suffered loss or damage by reason of their reliance.

108 The claim based on the statements to the administrators also appears to amount to little more than that IMF made statements to the administrators concerning the claims that it was funding which were known to be false, or in respect of which IMF was reckless as to their truth: see paragraph [81] of the Statement of Claim. It is again not alleged that the statements were made with the intention that they would be relied on by Mr Morris or any of the Minc Group companies, or that Mr Morris or any of the Minc Group companies relied on the false statements, or suffered loss or damage by reason of their reliance. The claim appears to be that creditors relied on the allegedly false statements when they voted against the Deed of Company Arrangement: see paragraph [86] of the Statement of Claim.

109 The failure by Mr Morris to plead all the essential elements of the cause of action founded on deceit as articulated in *Magill* supports the conclusion that he does not have reasonable prospects of successfully prosecuting that cause of action. Mr Morris submitted, in effect, that the tort of deceit is not limited to cases involving reliance, as stated in *Magill*. There is no merit in that submission and the Court is, in any event, bound by *Magill*.

110 It does not necessarily follow that it would be appropriate to enter judgment against Mr Morris on that basis alone. That is because, despite the way Mr Morris framed his pleading and submissions, it may be possible to characterise his case as pleaded as being founded on the tort of injurious falsehood, rather than the tort of deceit.

111 The tort of injurious falsehood requires proof of three elements. First, there must be a publication of false statements concerning the plaintiff's property, products or business; second, the false statements must have been published with "malice"; and third, the publication must cause actual economic loss or damage: see generally *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 639; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692, 711; ***Orion Pet Products*** *Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc* (2002) 120 FCR 191 at [195]-[202]; *Ratcliffe v Evans* [1892] 2 QB 524 at 527-532. The element of malice may be established, or at least inferred, if it is proved that the person who made or published the statement knew it to be false, or was reckless as to its truth or falsity: *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 291; *Orion Pet Products* at [199]-[200].

112 In *Orion Pet Products*, Weinberg J described the tort of injurious falsehood in the following terms (at [198]):

> In some respects, this tort bears a marked resemblance to defamation. Both involve a false and harmful imputation concerning the plaintiff which is made to a third party. They differ, however, in that the law of defamation protects interests in personal reputation while injurious falsehood protects interests in the disposability of a person's property, products or business. Defamation is generally actionable without proof of damage. Falsehood is presumed and liability is strict. In an action for injurious falsehood, the plaintiff must prove that he sustained actual economic loss, that the offending statement was false, and that it was made with intent to cause injury without lawful justification. The requisite state of mind is often described as malice.

113 While neither the Statement of Claim nor Mr Morris' submissions refer to the tort of injurious falsehood, and his pleaded case lacks some clarity, it would appear to be at least arguable that the pleading addresses each of the elements of that tort, at least in respect of the case based on the Announcement. The Announcement was undoubtedly a publication which contained statements concerning the business of Asandas. Mr Morris alleges that the statements were false and that IMF knew them to be false, or was at least reckless as to whether they were true or false. That may be sufficient to establish malice on the part of IMF. Mr Morris also alleges that he and the Minc Group companies suffered actual economic loss by reason of the false statements in the Announcement.

114 The position is somewhat more uncertain in relation to the case based on the making of the allegedly false statements to the administrators. That is because the damage that is alleged to have been caused by the allegedly false statements made to the administrators is not the sort of economic loss envisaged by the tort of injurious falsehood. The tort is generally concerned

with false statements about a plaintiff's property, goods or services that cause other persons not to deal with the plaintiff. The economic loss is generally the loss resulting from the reduced business or trade. The damage allegedly caused by the false statements made to the administrators was not that sort of loss or damage. The pleaded damage was that the creditors refused to support a Deed of Company Arrangement.

115 In any event, even if Mr Morris' case can be characterised as a case founded on the tort of injurious falsehood, it is nevertheless abundantly clear that the only proper plaintiff in respect of any such case would be Asandas. That is because the allegedly false published statements only concerned the business of Asandas. There is nothing in the pleadings to suggest that the statements referred to or even mentioned Mr Morris. Nor is there anything to suggest that Mr Morris suffered any economic loss of the sort envisaged by the tort of injurious falsehood. The tort is not concerned with reputational damage of the sort protected by the law of defamation. Nor could Mr Morris properly claim reflective losses, including loss of salary and the diminution of the value of the shares he held in Asandas, caused by allegedly false statements concerning Asandas.

116 Finally, it should also be noted that even if Mr Morris' case could be characterised as being founded on the tort of injurious falsehood, as opposed to the tort of deceit, that does not alter the conclusion that he does not have the capacity or standing to prosecute the action because of his intervening bankruptcy, or the conclusion that any action in tort founded on allegedly false statements in the Announcement is clearly statute-barred.

Mr Morris' claimed personal and reputational loss or damage

117 It remains to make a few brief points concerning Mr Morris' claims that he suffered damage to his reputation. That aspect of Mr Morris' case was addressed earlier in the context of both the finding that Mr Morris' claims were and are vested in his trustee in bankruptcy, and the finding that Asandas, and possibly the other Minc Group companies, were the proper plaintiffs.

118 Mr Morris' written and oral submissions in opposition to the application for summary judgment tended to emphasise his claims concerning the damage to his reputation. That is despite the fact that, on just about any view, that is an extremely small part of his pleaded case. In his oral submissions, Mr Morris also referred to damage that he suffered to his health and wellbeing. He claimed that his ill-health was attributable to the actions of IMF. It may be that Mr Morris emphasised these aspects of his case in an attempt to meet IMF's

submission that he did not have the capacity or standing to bring this proceeding because of his intervening bankruptcy and because he was not the proper plaintiff.

119 It is highly doubtful that Mr Morris' claim could properly be characterised as an action for the recovery of compensation for damage to his reputation and health. His case is plainly not so limited. Even if it was, however, it would nonetheless be appropriate to order summary judgment against Mr Morris. That is because any such action would unquestionably be statute-barred.

120 If Mr Morris wanted to sue to recover compensation for damage to his reputation, the appropriate cause of action would be an action for defamation. The limitation period for an action in defamation is one year running from the date of the publication of the matter complained of: s 14B of the Limitation Act. It follows that if Mr Morris wanted to sue in respect of the damage to his reputation caused by either the statements in the Announcement, or the statements made to the administrators, he was required to bring that action by either 22 July 2010, in the case of the Announcement, or 24 May 2012, in the case of the statements made to the administrators. It should also be noted in this regard that the Statement of Claim does not properly or adequately plead a case for defamation.

121 If Mr Morris' case was limited to recovering damages arising from his ill-health, the limitation period for a cause of action for damages that relate to personal injury to a person is, relevantly, three years running from the date on which the cause of action was discoverable by the plaintiff, or 12 years running from the time of the act or omission alleged to have resulted in the injury, whichever period is the first to expire: see generally Division 6 of the Limitation Act. It would appear from the oral submissions made by Mr Morris at the hearing that his health issues began to manifest at around the time that administrators were appointed to the Minc Group companies in May 2011, or shortly thereafter. There is little doubt that any cause of action against IMF relating to personal injury suffered by Mr Morris was discoverable by Mr Morris by that time. Accordingly, any cause of action relating to personal injury to Mr Morris arising from the Announcement or the statements to the administrators was statute-barred by about mid-2014, or in any event well before the proceedings were commenced. It should also be noted that any claim concerning personal injury to Mr Morris has not been properly or adequately pleaded or particularised.

A final note concerning Mr Morris' submissions

122 Mr Morris filed written submissions in accordance with the Court's directions. Those submissions broadly addressed the issues arising from the application for summary dismissal. Mr Morris also relied on two affidavits sworn by him. Those affidavits were really in the nature of submissions and were read on that basis. Consideration has been given to all the material arguments and submissions advanced in Mr Morris' written and oral submissions. His submissions have been taken into account in arriving at the findings and conclusions concerning the merits of his claim.

123 Following the conclusion of the hearing, Mr Morris repeatedly sent correspondence to the Court concerning his case and the summary dismissal application. Some of the correspondence attached further documents that Mr Morris wanted to be included in the evidence. Some of those documents were admitted into evidence by consent. Some of the correspondence contained what could possibly be characterised as further written submissions. Some contained statements or assertions of fact which may or may not have been contentious but which, in any event, were not in evidence. The most recent correspondence covered a broad range of matters, including the Australian Law Reform Commission inquiry into litigation funding, developments in the IMF funded proceedings in the Supreme Court of Western Australia, the deregistration of Asandas and apparent attempts to have it re-registered.

124 By the time of the hearing, Mr Morris had been given a more than an ample opportunity to provide the Court with all the documents and submissions he wanted the Court to have regard to. Mr Morris was not given leave to file further written submissions or further evidence after the hearing. Mr Morris was specifically told at the hearing that the Court would not receive any further submissions. Mr Morris did not always seek the consent of IMF and the individual respondents before sending the further correspondence and submissions to the Court. Even taking into account the fact that Mr Morris was not legally represented, his actions in continuing to send unsolicited correspondence to the Court was both unacceptable and unhelpful.

125 In the circumstances, no attempt has been made to specifically address all of the matters covered in Mr Morris' post-hearing correspondence. Suffice it to say that the contents of the much of the correspondence were for the most part irrelevant or immaterial to the real issues that arose in relation to the summary dismissal application. To the extent that the

correspondence contained submissions that were relevant to the issues, consideration has been given to those submissions and they have been taken into account.

Conclusion in relation to summary judgment

126 Summary judgment should be entered against Mr Morris and in favour of IMF and the individual respondents. Mr Morris has no reasonable prospect of successfully prosecuting the proceeding. That is the case for at least four reasons: first, he does not have the capacity or standing to maintain the action given his intervening bankruptcy; second, he is not the proper plaintiff in respect of the alleged wrongs to the Minc Group companies; third, his claims are statute-barred; and fourth, the causes of action alleged by him are not maintainable on the pleadings.

127 It may be accepted that this is a harsh and unfortunate outcome for Mr Morris. The result is that Mr Morris will be denied the opportunity to have his case determined on its merits at a final hearing. That is, of course, a serious step and not one that the Court takes lightly. The reality is, however, that Mr Morris' case faces multiple and fundamental problems and deficiencies. Those problems and deficiencies are such that the conclusion that Mr Morris has no reasonable prospect of successfully prosecuting any element of his claim is inescapable.

SHOULD THE STATEMENT OF CLAIM OR ANY PARTS OF IT BE STRUCK OUT?

128 It is unnecessary to address this question. IMF and the individual respondents put their case on the basis that summary judgment was the primary relief sought. The striking out of the Statement of Claim, or parts of it, was only put in the alternative. For the reasons already given, summary judgment should be entered against Mr Morris.

129 It should be noted, however, that if summary judgment was not ordered, it would undoubtedly have been appropriate to strike out large parts of the claim. As has already been outlined, Mr Morris abandoned many of his claims, including all the statutory claims based on contraventions of the Trade Practices Act, Australian Consumer Law and ASIC Act, all the accessorial claims against the individual respondents, and the claim that IMF and the individual respondents conspired or entered into a contract, arrangement or understanding to injure Asandas. It would follow that, at a minimum, it would have been appropriate to strike out paragraphs [56], [57], [58], [59], [61], [82], [83] and [85] of the Statement of Claim and paragraphs [3], [4], [5], [6] and [7(b)] to [7(d)] of the Application.

130 If Mr Morris' claims were required to be limited to his personal claims based on the damage to his reputation, even more parts of the Statement of Claim would need to be struck out. Indeed, very little of the Statement of Claim would remain.

131 There are also material difficulties and deficiencies with other critical parts of the Statement of Claim. Paragraphs [54] and [57] of the Statement of Claim, for example, relevantly allege that IMF knew that statements in the Announcement were false, or was reckless as to their truth. That allegation appears to be based on the allegation that Mr Smith provided "false instructions". No particulars are provide in relation to those false instructions. Nor does it appear that the material facts or circumstances which provide a basis for the allegation of knowledge or falsity or recklessness have been properly pleaded.

132 Similarly, the allegations concerning the false statements that IMF was said to have made to the administrators are not properly or adequately pleaded. Paragraph [80] of the Statement of Claim refers to statements made in the administrators' report to creditors. Mr Morris' case appears to proceed on the basis that the statements made in that report repeated or replicated statements that IMF had made to the administrators. There is, however, no pleading or particularisation of exactly who on behalf of IMF made the statements to the administrators, when those statements were made, or what the substance of those statements was.

133 These are all issues that would have had to be addressed if Mr Morris' claim was not to be summarily dismissed.

CONCLUSION AND DISPOSITION

134 Summary judgment pursuant to s 31A(2) of the Federal Court Act should be entered for IMF and each of the individual respondents against Mr Morris on the basis that Mr Morris has no reasonable prospect of successfully prosecuting the proceeding.

135 Mr Morris submitted that he should not be ordered to pay the costs of IMF and the individual respondents if summary judgment is given. The basis of his opposition appeared to be that he has limited financial resources, whereas IMF has substantial resources. That is not a proper basis to depart from the ordinary rule that the unsuccessful party pay the costs of the successful party. Accordingly, Mr Morris should be ordered to pay the costs of IMF and each of the individual respondents. Whether the costs order is enforced in the circumstances is entirely a matter for the respondents.

I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 5 July 2018

SCHEDULE OF PARTIES

NSD 494 of 2017

Respondents

Fourth Respondent:	CHRIS WILLIAMS
Fifth Respondent:	EDWIN SMITH