



## Equity Division Supreme Court New South Wales

Case Name: Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 7)

Medium Neutral Citation: [2019] NSWSC 103

Hearing Date(s): 5 - 9 February, 14 March, 13 - 15 June, 12 - 13 and 26 - 27 July and 10 September 2018

Date of Decision: 18 February 2019

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Proceedings may not continue against second defendant.  
Misleading or deceptive conduct established in relation to fifth and twelfth defendants.

Catchwords: CONSUMER LAW – misleading or deceptive conduct – whether fifth and twelfth defendants made representations about scheme which were misleading or deceptive – whether those defendants liable to investors on that or other bases

BANKRUPTCY – jurisdiction and powers of court – no leave obtained under s 58(3)(b) of Bankruptcy Act 1966 – whether claims made in proceedings are for a provable debt

BANKRUPTCY – procedure – whether continued prosecution of proceedings involves taking a fresh step in the proceedings

PARTNERSHIP – generally – what constitutes partnership – whether partnership is limited when partnership agreement not registered

PARTNERSHIP – actions by and against partners – actions and proceedings against firms and individual partners – partnership conducting sports

trading business – scheme said to be fraudulent, masterminded by twelfth defendant – second and fifth defendants named as partners – investment of group members lost

Legislation Cited:

Australian Consumer Law  
Bankruptcy Act 1966 (Cth)  
Civil Procedure Act 2005 (NSW)  
Corporations Act 2001 (Cth)  
Partnership Act 1892 (NSW)  
Trade Practices Act 1974 (Cth)

Cases Cited:

Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3) [2013] FCA 984  
Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liq) [2003] FCA 180; (2003) 127 FCR 418  
Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liq) [2005] FCA 1212  
Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 6) [2013] FCA 1112; (2013) 223 FCR 426  
Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 3) [2012] FCA 939  
Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 5) [2014] FCA 340  
Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7) [2016] FCA 484  
Australian Competition and Consumer Commission v The Bio Enviro Plan Pty Ltd [2004] FCA 415  
Coventry v Charter Pacific Corporation Ltd (2005) 227 CLR 234; [2005] HCA 67  
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31  
Foster v Australian Competition and Consumer Commission [2006] FCAFC 21; (2006) 149 FCR 135  
Foster v Australian Competition and Consumer Commission [2012] FCA 953  
Gertig v Davies (2003) 85 SASR 226; [2003] SASC 86  
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16  
Jack v Kipping (1882) 9 QBD 113  
Kimberley NZI Finance Limited v Torero Pty Ltd (1989) ATPR (Digest) 46-054

Mackinnon as plaintiff representative of 153 plaintiff group members v The partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 3) [2018] NSWSC 86

Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 4) [2018] NSWSC 147

R v Foster [2008] QCA 90; (2008) 183 A Crim R 437

Rafferty v Madgwicks (2012) 203 FCR 1; [2012] FCAFC 37

Rose v Federal Commissioner of Taxation (1951) 84 CLR 118; [1951] HCA 68

Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd (1997) 69 SASR 288

Warner v Elders Rural Finance Ltd (1993) 41 FCR 399

Winterton Constructions Pty Ltd v Hambros Australia Ltd (1992) 39 FCR 97

Category: Principal judgment

Parties: Ian Henry Mackinnon as plaintiff representative of 153 plaintiff group members (Plaintiff)  
The partnership of Anne Patricia Larter, Alan Jones, Miraleste Pty Ltd trading as USG Partner and Leigh Johnson, trading as "STC Sports Trading Club" (First Defendant)  
Anne Patricia Larter (Second Defendant)  
Alan Jones (Third Defendant)  
Miraleste Pty Ltd trading as USG Partner (Fourth Defendant)  
Leigh Johnson (Fifth Defendant)  
Sports Trading Club Limited (a company incorporated in Hong Kong) (Sixth Defendant)  
Bella Development Limited (a company incorporated in Hong Kong) (Seventh Defendant)  
East Ocean Capital Limited (a company incorporated in Hong Kong) (Eighth Defendant)  
Arabella Racing Pty Ltd (Ninth Defendant)  
Banksia Holdings (Tenth Defendant)  
Arabella Louise Foster (Eleventh Defendant)  
Peter Foster (Twelfth Defendant)

Representation: Counsel:  
T J Dixon (Plaintiff)

Solicitors:  
Nelson McKinnon Lawyers (Plaintiff)  
P N Argy (Fifth Defendant)

File Number(s): SC 2015/332497

## TABLE OF CONTENTS

<b>Judgment</b> .....	<b>7</b>
Overall conclusions .....	9
The parties – only one active defendant .....	9
Mr Foster .....	11
The loan agreements .....	14
Two partnerships .....	16
Bankruptcy of Ms Larter and Mr Foster .....	18
<i>Mr Foster</i> .....	18
Fraudulent misrepresentation .....	19
Conspiracy .....	19
Conversion .....	19
Constructive trust .....	20
<i>Ms Larter</i> .....	20
The Further Amended Commercial List Statement .....	21
The involvement of Ms Johnson .....	26
<i>Ms Johnson’s affidavit</i> .....	26
<i>Ms Johnson’s introduction to STC</i> .....	27
<i>Ms Johnson’s “seed capital”</i> .....	33
<i>Ms Johnson’s understanding of the source of STC’s rights</i> .....	35
The scheme .....	37
<i>STC’s marketing campaign</i> .....	37
<i>The Proposal</i> .....	39
<i>The fraud</i> .....	44
The involvement of Pieter de Klerk .....	54
<i>Mr de Klerk’s decision to invest \$250,000 into STC as an Associate Member</i> .....	55
<i>Mr de Klerk’s possible acquisition of the “rights” to STC South Africa</i> .....	59
Meeting at STC Market Street office on 13 March 2013 .....	61
Meeting at the Catalina restaurant on 14 March 2013 .....	62
<i>Mr de Klerk’s affidavit accounts of the meeting</i> .....	63
<i>Apologies for “Mark Hughes’s” absence</i> .....	64
<i>Statements about “Mark’s” role</i> .....	66
<i>“Personal matters”</i> .....	69
<i>The Proposal</i> .....	72

<i>Questions about Ms Larter</i> .....	74
<i>“Howard Robin</i> .....	75
<i>Prof Snyder and the “savants”</i> .....	75
Mr de Klerk’s final tranche - clearing up “grey areas” .....	76
Further events in March 2013 .....	78
Mr de Klerk views the “trading room” .....	78
Pikes & Verekers’ letter of 5 April 2013 .....	80
Further negotiations with Mr de Klerk .....	84
<i>Mr de Klerk’s 30 May 2013 visit to Sydney</i> .....	86
<i>Mr de Klerk invests US\$1 million in “STC South Africa”</i> .....	95
Mr Foster’s email of 16 July 2013 .....	97
<i>Ms Johnson’s alleged assertions of dishonesty</i> .....	98
<i>Mr Foster’s assertion that the STC business was bona fide</i> .....	98
<i>Ms Johnson’s role at STC</i> .....	99
<i>Ms Johnson’s loan</i> .....	100
Ms Johnson’s response to Mr Foster’s 16 July 2013 email.....	101
Ms Johnson’s conversation with Mr Glen Radica .....	101
Ms Johnson’s 30 August 2013 conversation with Ms Larter and Mr Foster .....	102
Ms Johnson’s SMS messages to Mr de Klerk – Peter Foster revealed .....	105
Mr de Klerk’s response to the Peter Foster revelation .....	107
Mr Foster’s email of 1 September 2013.....	108
<i>Compliance with the 16 July 2013 “offer”</i> .....	109
<i>Ms Johnson’s alleged assertions of dishonesty</i> .....	109
<i>Mr McMullen’s resignation</i> .....	110
<i>Richard Holmes’s resignation</i> .....	110
<i>Mr Foster now doing all the trading</i> .....	111
<i>Mr Foster’s assertion that the STC business was bona fide</i> .....	111
Ms Johnson’s evidence about her dealings with Mr Holmes .....	111
Ms Johnson’s email of 10 September 2013 to Mr Foster and Ms Larter.....	113
<i>Ms Johnson’s understanding of the nature of the STC business</i> .....	115
<i>Mr Foster now in total control</i> .....	115
<i>Mr McMullen’s accusations and Ms Johnson’s “concerns”</i> .....	116
<i>Concern about denial of access to accounts and bank statements</i> .....	119
<i>Location of the Associate Member contracts</i> .....	119
<i>Money</i> .....	121
<i>Withdrawal of Ms Johnson’s consent to being involved in STC?</i> .....	121
Ms Johnson’s 23 September 2013 email to Ms Larter .....	122
Ms Johnson’s 23 September 2013 email to Mr Foster .....	123
Logan J’s judgment in <i>Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)</i> .....	123

Ms Johnson’s 28 September 2013 emails to Ms Larter .....	124
Ms Johnson’s 29 September 2013 email to Ms Larter .....	128
Pikes & Verekers’ letter to The Courier Mail .....	129
Ms Johnson’s dealings with The Courier Mail .....	130
More letters from Pikes & Verekers to The Courier Mail .....	138
Mr Mackinnon’s investment .....	139
The circumstances leading to Ms Johnson’s resignation as a partner .....	141
<i>Ms Johnson’s withdrawal of funds from STC’s bank account</i> .....	141
<i>Mr Foster’s email of 30 December 2013</i> .....	142
<i>Ms Johnson’s reply of 13 January 2014</i> .....	142
Ms Johnson’s resignation as partner of STC on 21 January 2014.....	143
Findings concerning Ms Johnson’s decision to resign as partner .....	144
A new partnership .....	146
Email exchanges with Mr Foster .....	147
Mr Seng correspondence.....	147
Ms Johnson’s 3 November 2014 telephone conversation with Mrs Mackinnon.....	148
Did Ms Johnson seek to alert any third parties of her concerns about the STC business? .....	149
The credit of Ms Johnson and Mr de Klerk .....	154
<i>Credit of Mr de Klerk</i> .....	154
<i>Credit of Ms Johnson</i> .....	156
The pleaded case .....	159
Representations by Mr Foster or persons employed or instructed by Mr Foster .....	160
<i>By Mr Foster</i> .....	161
<i>By persons “employed or instructed” by Mr Foster – Ms Johnson</i> .....	162
20(c) – that Mark Hughes was the National Sales Manager of STC .....	163
20(c)(i) – by silence or omission, that Mr Foster was not involved in STC .....	165
20(d) – that Tom Nolan was the National Sales Assistant of STC .....	170
20(e) – the loans by Mr Mackinnon and Group Members would be guaranteed and repayable at the end of a nominated period .....	170
20(f) – the “first defendant” had assets of \$10 million.....	171
Representations to Mr Mackinnon and Group Members in the Proposal.....	171
<i>By Mr Foster</i> .....	173
<i>By Ms Johnson</i> .....	174
Section 34 of the <i>Partnership Act</i> .....	175
Breach of contract.....	176
Other relief sought .....	177
Other issues .....	177
Conclusion .....	178

## JUDGMENT

- 1 Mr Peter Foster, the twelfth defendant in these proceedings, is a notorious confidence trickster.
- 2 Mr Foster has been found to have been involved in fraudulent schemes in the United Kingdom, the United States of America, in Australia and elsewhere over the past 30 years. He has been convicted, fined and imprisoned on many occasions here and abroad arising from these and other activities.
- 3 Mr Foster was instrumental in establishing and operating a purported “sports trading” scheme involving a partnership styled “The Sports Trading Club Partnership”. Mr Foster was not a member of that partnership. The partners were the second defendant, Ms Anne Larter, and a solicitor, the fifth defendant, Ms Leigh Johnson. Mr Foster acted as “National Sales Manager” using the name “Mark Hughes”.
- 4 Mr Ian Mackinnon brings these proceedings against Mr Foster, Ms Larter, Ms Johnson and others under Pt 10 of the *Civil Procedure Act 2005* (NSW) as a representative of 153 named Group Members, including Mr Mackinnon, each of whom made an investment by way of loans to that partnership.
- 5 Mr Mackinnon and his wife, Mrs Belinda Mackinnon, made their investment on 31 October 2013 and 4 November 2013, after they executed documents entitled “Loan & Profit Sharing Agreement” on 28 October 2013 and 4 November 2013. According to those documents, their investments were to be traded on sports and prediction markets.
- 6 Mr Mackinnon alleges that The Sports Trading Club Partnership was a fraudulent scheme masterminded by Mr Foster and that none of the funds invested was used for sports trading. Instead, he alleges the funds were misappropriated by Mr Foster and transferred to his associates and family members, as well as to offshore companies and bank accounts associated with him and his niece, the eleventh defendant, Ms Arabella Foster.

- 7 The total amount invested by Group Members was a little over \$12.3 million.
- 8 Other parties, who are not Group Members, invested a further \$17.3 million. The total amount paid into the Westpac Banking Corporation account operated by The Sports Trading Club Partnership, including by the Group Members, was in the order of \$29.6 million.
- 9 Some \$6.4 million of the \$12.3 million invested by Group Members has been recovered. The shortfall is some \$5.9 million. Mr Mackinnon, on behalf of the Group Members, seeks to recover that amount, plus interest and costs in these proceedings.
- 10 The course I propose to follow is to:
- (a) briefly outline my overall conclusions;
  - (b) describe the parties to the proceedings and the role they played at the hearing;
  - (c) describe Mr Foster's background;
  - (d) describe the relevant loan agreements;
  - (e) deal with issues which arise in relation to the bankruptcy of Mr Foster and Ms Larter, some partnership issues and the pleadings;
  - (f) make findings as to what happened leading up to the formation of The Sports Trading Club Partnership and during that partnership's operation from late 2012 to early 2014, and to determine the merits of Mr Mackinnon's principal claims against each of the relevant defendants; and
  - (g) invite submissions as to whether it is necessary to deal with Mr Mackinnon's remaining claims, as to some further matters where

I require assistance, and as what further steps are necessary to resolve the proceedings.

### **Overall conclusions**

- 11 The “Sports Trading Club” was a fraudulent scheme devised, masterminded and controlled by Mr Foster. The moneys advanced by the Group Members were misappropriated at Mr Foster’s instigation and direction.
- 12 The bankruptcy of Mr Foster and Ms Larter does not affect Mr Mackinnon’s ability to continue these proceedings against Mr Foster (because the claim against him is not for a provable debt) but does prevent Mr Mackinnon from proceeding against Ms Larter (because the claim against her is for a provable debt).
- 13 The Group Members are entitled to judgment against Mr Foster for the unrecovered balance of the amounts advanced.
- 14 Ms Johnson knew Mr Foster’s involvement in the Sports Trading Club could not be publicity revealed. She knew Mr Foster was using the alias “Mark Hughes”. She knew of the contents of the “Proposal” used to solicit investment in the venture and must have known it to contain false statements. By mid-2013 Ms Johnson knew Mr Foster was in control of the Sports Trading Club’s activities. By September 2013, she strongly suspected that investors’ funds were being misappropriated. She engaged in misleading or deceptive conduct by remaining silent, notwithstanding having those suspicions.
- 15 Whether Group Members are entitled to judgment or other relief against Ms Johnson will depend on matters in respect of which I will need further submissions.

### **The parties – only one active defendant**

- 16 The pleading at the commencement of the hearing was the Amended Commercial List Statement. It named a partnership as the first defendant.

- 17 That partnership was described as “The partnership of Anne Patricia Larter, Alan Jones [the third defendant], Miraleste Pty Limited trading as USG Partner [the fourth defendant] and Leigh Johnson [the fifth defendant], trading as ‘STC Sports Trading Club’”.
- 18 The nomination of a partnership as a defendant was inapt. A partnership is not a legal person: *Rose v Federal Commissioner of Taxation* (1951) 84 CLR 118; [1951] HCA 68 at 124.
- 19 Further, there was never a partnership with the membership alleged; and Ms Johnson was never a member of a partnership called “STC Sports Trading Club”.
- 20 Mr Dixon, who appeared for Mr Mackinnon, sought to deal with this difficulty by seeking to amend the claim on the second day of the proceedings. I return to this below.
- 21 Ms Larter, the second defendant, entered a submitting appearance.
- 22 Subject to the Court’s approval under s 173 of the *Civil Procedure Act*, Mr Mackinnon has settled the claim against the third and fourth defendants, Mr Alan Jones and Miraleste Pty Limited.
- 23 The sixth to eleventh defendants, to or through whom it is alleged that the investors’ funds passed, have either not appeared, consented to judgment, are the subject of default judgment, or have been deregistered. Mr Mackinnon sought no relief against those parties in the hearing before me.
- 24 Mr Foster, the twelfth defendant, was recently released from a custodial sentence imposed by Logan J in proceedings in the Federal Court of Australia. I will refer to these proceeding later in these reasons. He is awaiting trial for matters arising from events related to those the subject of these proceedings. He entered an appearance and participated in some interlocutory skirmishes. He did not, however, participate in the hearing.

Shortly before the hearing, through his solicitor, he stated he did not propose to appear nor seek an adjournment of these proceedings pending the outcome of the criminal charges against him.

25 Only the fifth defendant, Ms Johnson defended the proceedings.

26 The 17 hearing days of this matter were concerned almost entirely with the question of whether Ms Johnson is liable to Mr Mackinnon and the other Group Members for the loss they have suffered as a result of their investment in The Sports Trading Club Partnership.

### **Mr Foster**

27 Details of Mr Foster's history are set out in the judgment of Spender J in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liq)* [2003] FCA 180; (2003) 127 FCR 418 at [42] to [56]. In that case Spender J referred to Mr Foster's past conduct as "a sad and lengthy history of dishonesty, deception and evasion" including "direct involvement in marketing schemes which have resulted in the misappropriation of assets" (at [42] and [57]). A history of Mr Foster's criminal offending from 1987 until 2008 is detailed by McMurdo P in *R v Foster* [2008] QCA 90; (2008) 183 A Crim R 437 at [2]–[5].

28 The *Chaste Corporation* case involved the sale of distributorships in respect of a purported weight loss pill called "TRIMit".

29 On 2 September 2005 Lander J found Mr Foster and Chaste Corporation guilty of price fixing, misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth) in relation to the TRIMit product: *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liq)* [2005] FCA 1212. Lander J fined Mr Foster \$150,000 and made orders prohibiting him from being involved in any business relating to weight loss or to the cosmetic or health industries for a period of five years (at [303]). That prohibition was upheld by the Full Court of the Federal Court: *Foster v*

*Australian Competition and Consumer Commission* [2006] FCAFC 21; (2006) 149 FCR 135.

- 30 On 27 September 2013 Logan J found that Mr Foster to be in breach of those orders and thereby in contempt of Court by reason of his involvement in a company called SensaSlim Australia Pty Ltd which marketed a diet nasal spray: *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)* [2013] FCA 984.
- 31 Logan J's decision assumes significance in this case for the reasons that I set out below.
- 32 On 24 October 2013 Logan J ordered that Mr Foster be sentenced to three years imprisonment: *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 6)* [2013] FCA 1112; (2013) 223 FCR 426 at [58].
- 33 On sentencing Mr Foster, Logan J stated that it was difficult to "envisage a more flagrant and deliberate breach of injunctive orders" (at [40]) and that Mr Foster was "directly culpable and, further, utterly without remorse or contrition" (at [41]).
- 34 Mr Foster failed to surrender himself to the authorities. A warrant was issued for his arrest. He was arrested on 28 October 2014, having then been on the run for a year.
- 35 In the meantime, in September and October 2012, Yates J heard proceedings brought against SensaSlim Australia Pty Ltd by the Australian Competition and Consumer Commission. Yates J delivered judgment in 2014: *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq)* (No 5) [2014] FCA 340.

36 In a later judgment, *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484, Yates J made the following findings concerning Mr Foster’s conduct in relation to that matter:

- (a) “...it was essential that Mr Foster not be publicly associated with SensaSlim or its business. Mr Foster’s self-assessment was that his name was ‘mud’ and that he could not be seen to be connected to a weight loss product...” (at [73]);
- (b) “the mask” of Mr Foster’s involvement was provided by others, each of whom was no more than a “front man” for Mr Foster’s alter egos, who “only had...roles calculated to create a façade of respectability for that business” (at [42], [72], [76]-[77] and [79]);
- (c) “SensaSlim’s conduct was deliberate, covert and fraudulent to a high degree. It was clearly directed to obtaining money by deceit. Its objective was to conceal the activities of an avowed and notorious conman, Mr Foster” (at [79]);
- (d) “...fabricating and disseminating a report which had the appearance of a genuine scientific report...and engaging in deceptive correspondence using false identities when answering inquiries from prospective franchisees” (at [82]);
- (e) “...Mr Foster and, at his behest, members of his family, were the principal beneficiaries of the funds obtained from Area Managers in respect of their franchises” (at [102]); and
- (f) “[t]he level of deception” was “breathtaking” in that it involved the concoction of a worldwide clinical trial, fabrication and dissemination of a scientific report, the engagement of actors to make advertisements containing false claims, the fabrication of

a scientific report and engagement “in deceptive correspondence using false identities” (at [82]).

37 The facts of this case bear a striking resemblance to those of the case before Yates J.

### **The loan agreements**

38 Each Group Member executed a document in the same form as the Loan Agreement executed by Mr and Mrs Mackinnon.

39 The Loan Agreements recited that “The Sports Trading Club Partnership” was “a limited liability partnership”.

40 The Loan Agreements recorded that “the Lender shall forthwith lend to the Partnership and the Partnership shall borrow from the Lender” a specified sum and that:

(a) the loan would be “applied by the Partnership for trading on financial markets including but not limited to sports and prediction markets through The [sic] Sports Trading Club Limited [the sixth defendant] at its sole discretion”;

(b) “instead of interest being assessed, [the] Borrower agrees to repay this Loan in full and distribute all profits made as an Associate Member of the Sports Trading Club as outlined in the Sports Trading Club Associate Member Proposal”.

41 Sports Trading Club Limited, the sixth defendant, is a Hong Kong company. At the relevant time, its sole shareholder was Bella Development Limited (the seventh defendant), whose sole shareholder at the relevant time was Mr Foster’s niece, Ms Arabella Foster (the eleventh defendant).

42 The Loan Agreements provided that the principal amount would be repayable at the end of a fixed term; in the case of Mr and Mrs Mackinnon, three years

for the 28 October 2013 agreement and one year for the 4 November 2013 agreement.

43 The Loan Agreements further provided that statements made in the “Sports Trading Club Associate Member Proposal” (“the Proposal”) and the “Terms of Associate Membership” would apply as if incorporated into the Loan Agreements. I will return to the Proposal below. A copy of the Proposal was accessible through a website at *www.sportstradingclub.com*.

44 The “Terms of Associate Membership” incorporated into Mr and Mrs Mackinnon’s contract included that:

(a) the minimum amount that could be loaned was \$50,000 and the maximum was \$250,000;

(b) “profits” could be withdrawn on a monthly basis with the minimum withdrawal being \$1,000 and the maximum being “20% of that current month[’s] profits up to an annual...maximum of 100% of the value of your principal loan”; and

(c) each lender would be given a username and password “to the websites where an account is created specific to their loan”.

45 In the Loan Agreements, investors in STC were described as “Associate Members”. I shall use the same expression.

46 The distinction between the publically accessible website *www.sportstradingclub.com* and the “member website”, *www.stcmembers.com*, accessible only by username and password is significant for the reasons I discuss below.

47 I will refer to the website *www.sportstradingclub.com* as the “Public STC Website” and to the website *www.stcmembers.com* as the “Members’ STC Website”.

## Two partnerships

48 Two partnerships are referred to in the evidence. It is important to distinguish between the two.

49 On 30 December 2012 the second defendant, Ms Anne Larter, and the fifth defendant, Ms Leigh Johnson, executed a “Limited Partnership Agreement”.

50 The Limited Partnership Agreement recorded that:

- (a) Ms Larter and Ms Johnson wished to form a “limited” partnership for the purposes of the *Partnership Act 1892* (NSW);
- (b) the partnership was to be known as “The Sports Trading Club Partnership”;
- (c) Ms Larter was to be the General Partner and to have “unlimited liability for the obligations, debts and liabilities of the Partnership”; and
- (d) Ms Johnson was to be a Limited Partner, have liability “limited... to the amount of [her] invested capital” and would not:
  - (i) participate in the management of the Partnership;
  - (ii) execute any document binding the Partnership; nor
  - (iii) act in any way purporting to have authority in the business of the Partnership.

51 Section 50A of the *Partnership Act* provides that:

**“50A Limited partnership or incorporate limited partnership is formed on registration**

A limited partnership is formed by and on registration of the partnership under [Pt 3 of the Act] as limited partnership”.

52 Section 60 of the *Partnership Act* provides that the liability of a limited partner to contribute to the liabilities of the limited partnership is:

“...not to exceed the amount shown in relation to the limited partner in the Register as the extent to which the limited partner is liable to contribute”.

53 Ms Larter and Ms Johnson intended to register their “Limited Partnership Agreement” so that Ms Johnson’s liability would be as a “Limited Partner”.

54 However, evidently by oversight, the document was not registered. This fact emerged shortly before the commencement of the hearing as a result of enquiries made by Mr Argy, the solicitor who appeared for Ms Johnson.

55 Thus, contrary to Ms Johnson’s and Ms Larter’s intention, and to the statement made in the Limited Partnership Agreement, the partnership between Ms Larter and Ms Johnson was not a limited partnership. The late stage at which that fact emerged gave rise to a pleading issue to which I return below.

56 It is now common ground that Ms Johnson resigned as a partner of The Sports Trading Club Partnership on 21 January 2014.

57 At around that time, what is now accepted to be a new partnership, known as “STC Sports Trading Club”, was formed. An application to register that business name was made on 15 January 2014.

58 Ms Larter and others, but not Ms Johnson, became members of that partnership.

59 It is now common ground that Ms Johnson has no liability to Mr Mackinnon or any other Group Member *as a partner* after 21 January 2014.

60 For simplicity, I will refer to The Sports Trading Club Partnership, the partnership of which Ms Johnson and Ms Larter were members, as “the Partnership” or “STC”.

61 However, the existence of the two partnerships, with confusingly similar names, should be borne in mind.

### **Bankruptcy of Ms Larter and Mr Foster**

62 Both Ms Larter and Mr Foster have been declared bankrupt. Sequestration orders were made in respect of the estate of Mr Foster on 14 December 2017, shortly before the hearing before me commenced, and of Ms Larter on 6 March 2018, a month after the hearing commenced.

63 Section 58(3)(b) of the *Bankruptcy Act 1966* (Cth) provides that it is not competent for a creditor to “commence any legal proceedings in respect of provable debt or take any fresh step in such a proceeding” after a debtor has become a bankrupt, unless such creditor obtains “leave of the Court and on such terms as the Court thinks fit”.

64 The “Court” from whom such leave must be given is the Federal Court of Australia: *Bankruptcy Act*, s 27(1). No such leave has been sought.

65 “Provable debt” is defined in s 82 of the *Bankruptcy Act*. Section 82(2) provides:

**“82 Debts provable in bankruptcy**

(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy”.

66 Thus, Mr Mackinnon could not take “any fresh step” in these proceedings against Mr Foster or Ms Larter unless his claims, and those of the Group Members he represents, arose otherwise than by reason of contract.

### **Mr Foster**

67 Mr Mackinnon and the Group Members claim damages from Mr Foster in respect of misrepresentations which are said to constitute misleading or

deceptive conduct and deceit. Damages are also claimed for conversion and conspiracy.

### **Fraudulent misrepresentation**

68 Claims for unliquidated damages for a fraudulent misrepresentation that induced the party misled to make a contract with a third party (a “tripartite case”) are not provable in bankruptcy: *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234; [2005] HCA 67 at [5] and [48]. That is because such claims are said to arise “otherwise than by reason of a contract”. They are to be contrasted with a claim for unliquidated damages for fraudulent misrepresentation that induced the party misled to make a contract with the bankrupt (a “bilateral case”). The latter has been held to be a provable debt: *Jack v Kipping* (1882) 9 QBD 113 at 117 (Mathew and Cave JJ).

69 The claims against Mr Foster for misleading or deceptive conduct in this case is a tripartite case. His fraudulent misrepresentations are said to have induced the Group Members to enter into loan agreements with a third party: STC. Applying their Honours’ conclusions in *Coventry*, those claims arise otherwise than “by reason of a contract” and are not “provable debts” for which leave is required.

### **Conspiracy**

70 Mr Foster is alleged to have conspired with certain other defendants with the intention of causing damage to the Group Members by transferring their loan amounts under the fraudulent scheme. I am satisfied this claim for unliquidated damages also arises “otherwise than by reason of a contract, promise or breach of trust”.

### **Conversion**

71 By the conversion claim, Mr Foster is said to have taken possession and dealt with Group Members’ loan amounts when he had no entitlement to do so. I am satisfied that this claim (assuming it is maintainable: I doubt that a fungible such as money can be converted) arises “otherwise than by reason of a

contract, promise or breach of trust” such that it is not a “provable debt” for which leave is required.

### **Constructive trust**

72 The Further Amended Commercial List Statement also contains a claim that Mr Foster acted as constructive trustee and is liable to account for such amounts as he currently holds. The remedy sought for this is described simply as a “proprietary” remedy. That claim does seem to me to be for a provable debt. The point is moot, as there is no evidence that Mr Foster holds any of the funds he is said to have misappropriated.

73 Thus, relevantly to the manner in which I propose to resolve this claim against Mr Foster, it is competent for Mr Mackinnon to proceed against Mr Foster.

### ***Ms Larter***

74 Ms Larter became bankrupt after the hearing of these proceedings commenced.

75 One of the claims made against Ms Larter is in contract. She was a party to each of the Loan Agreements. Each of the other claims made against Ms Larter, damages for misleading or deceptive conduct, in deceit, for conversion and for conspiracy, arises by reason of Ms Larter being a party to that contract.

76 All of these claims are thus for “provable debts”.

77 Mr Dixon submitted that Mr Mackinnon, by continuing to prosecute the proceedings against Ms Larter after the date on which she became bankrupt was not taking a “fresh step” in the proceedings.

78 I do not agree.

79 The continued prosecution of the hearing the proceedings against Ms Larter after her bankruptcy does constitute taking “fresh steps” against Ms Larter in

the proceedings: *Gertig v Davies* (2003) 85 SASR 226; [2003] SASC 86 at [63]-[64] per Doyle CJ and Mullighan J; *Australian Competition and Consumer Commission v The Bio Enviro Plan Pty Ltd* [2004] FCA 415 at [7]-[9] (RD Nicholson J).

80 Therefore it was not competent for Mr Mackinnon to take such “fresh steps” against Ms Larter without leave of the Federal Court.

81 Accordingly it is not competent for me to deal with Mr Mackinnon’s claim against Ms Larter.

### **The Further Amended Commercial List Statement**

82 On the second day of the hearing, I granted Mr Mackinnon leave to file a Further Amended Commercial List Statement for the reasons I gave that day: *Mackinnon as plaintiff representative of 153 plaintiff group members v The partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 3)* [2018] NSWSC 86.

83 So far as concerns the allegation of partnership, the amendments did a number of things.

84 First, the allegation concerning the first defendant was amended to read (showing revision mode):

“At all material times, the first defendant, a partnership of Anne Patricia Larter, Alan Jones, Miraleste Pty Ltd (trading as USG Partner) and, until 21 January 2014, Leigh Johnson, trading as ‘The Sports Trading Club Partnership’ until on or about 21 January 2014 and thereafter as the ‘STC Sports Trading Club’...:

- a. was, and is a ~~limited~~ partnership as defined by the *Partnership Act 1892* (NSW) and liable to be sued in its own name and style; and
- b. held itself out as having a licence from the sixth defendant, Sports Trading Club Limited (Hong Kong) to run a sports betting business in Australia referred to as the ‘Sports Trading Club’.”

85 As can be seen, the allegation that the partnership was “limited” was altered to an allegation that the partnership was, in effect, unlimited.

86 I granted leave to make that amendment upon the basis that it did not permit Mr Mackinnon to:

- (a) advance a cause of action against Ms Johnson beyond those already pleaded;
- (b) allege, separately to the causes of action already pleaded, that Ms Johnson was jointly and severally liable for the debts of the Partnership by reason of her alleged status as a general or unlimited partner.

87 As can also be seen, the allegation made in this paragraph is that there was one partnership that traded as “The Sports Trading Club Partnership” until 21 January 2014, when Ms Johnson resigned, and thereafter as “STC Sports Trading Club”.

88 As I have mentioned, it is now common ground that there were two separate partnerships and that Ms Johnson was not a member of the second.

89 Second, in an attempt to overcome the infelicity of nominating a partnership as first defendant, the following allegation was added, omitting an irrelevant reference:

“References in these Contentions to the first defendant include *inter alios* the second defendant [Ms Larter]...and (until 21 January 2014) the fifth defendant [Ms Johnson]”.

90 This mechanism was a somewhat inelegant way of dealing with the incorrect nomination of a partnership as a party. However, I concluded that it made clear enough that the pleadings were to be read as if references to “the first defendant” were to be read as referring to Ms Larter and Ms Johnson, as members of the Partnership.

91 The key allegations in the Further Amended Commercial List Statement are that:

- (1) Ms Larter and Ms Johnson as “persons employed or directed by” Mr Foster, and Mr Foster himself, represented to Mr Mackinnon and the other Group Members that:
  - (a) STC was a legitimate sports betting business capable of generating significant profits on traded sports bets;
  - (b) Mr Mackinnon and the Group Members could invest in the business by making loans of between \$50,000 and \$250,000 to STC in exchange for which STC would pay 50% of any profits earned on sports betting trades up to the amount loaned;
  - (c) “Mark Hughes” (in reality, Mr Foster) was the National Sales Manager of STC;
  - (d) Mr Foster was not involved with STC (a representation said to have been made by silence or omission);
  - (e) the loans made by Mr Mackinnon and the Group Members would be guaranteed and repayable at the end of a nominated loan period; and
  - (f) STC had assets of \$10 million.
  
- (2) Mr Foster, Ms Larter and Ms Johnson represented that various statements in the Proposal were true, including statements that:
  - (a) STC offered members an alternative to the stock or property markets and traditional investment channels;
  - (b) the sports trading market was recession proof and offered unique tax free returns that could not be replicated in any mainstream investment product currently on offer;

- (c) STC was a sophisticated operation with trading desks in Sydney, Hong Kong and London;
- (d) trade decisions were made by “Account Managers”, under the supervision of a “Senior Analyst” and “Chief Investment Officer”;
- (e) each Account Manager had extensive experience in trading on sporting events and a track record of discipline and intelligent decision making;
- (f) Account Managers expertly analysed and traded on the betting markets;
- (g) Account Managers were a team of analysts with experience in sports and investment, and with professional qualifications in quantitative disciplines such as science, accounting and mathematics;
- (h) STC had created “the Insight Project, a world first with a study of savants in sports trading”;
- (i) the scientific director of STC was Prof Allan Snyder who, for some 20 years, had conducted ground breaking research on savants at both the Australian National University and the University of Sydney;
- (j) STC had the expertise and knowledge to trade on sporting events worldwide;
- (k) STC had obtained rights from Sports Trading Club Limited (Hong Kong) to operate the STC business in Australia;
- (l) STC was registered in NSW and had offices and a trading desk in Sydney;

- (m) STC had borrowed \$10 million to enable it to maximise the profits to be earned from sporting trades; and
  - (n) investors were always legally entitled to a return in full of the principal of their loan.
- (3) Those representations were false and or misleading or fraudulent because:
- (a) “Mark Hughes” was really Mr Foster who was a fraudster who had been charged, convicted or served sentences in respect of fraud related matters in Australia, the United Kingdom, the United States of America and Vanuatu;
  - (b) STC did not have trading offices but operated from a residence in Byron Bay;
  - (c) Prof Snyder was not a scientific director of STC;
  - (d) STC did not have a team of analysts or traders with professional qualifications in the disciplines alleged;
  - (e) STC was not a legitimate sports betting or trading business but a fraudulent scheme in which loans from Mr Mackinnon and Group Members were:
    - (i) transferred to the benefit of entities controlled by Mr Foster, his niece and his associates;
    - (ii) used as part of a Ponzi scheme under which Mr Mackinnon and the Group Members were being paid purported profits on fictitious sports betting trades.
- (4) Mr Foster, Ms Larter and Ms Johnson:

- (a) made the representations with “the knowledge that they were false or were reckless as to whether they were false or not” and “had no honest belief in the truth of what was represented”;
- (b) deliberately concealed the matters in [91(3)] with the knowledge that this would create a false impression, or with reckless disregard as to whether this would create a false impression;
- (c) intended that the representations would be relied on by Mr Mackinnon and Group Members;

thereby engaged in misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*; thereby acted fraudulently; and thereby intended to cause the Group Members harm by participating in the fraud and misapplying the loans.

92 Arising out of those matters, the Further Amended Commercial List Statement contains allegations of breach of contract, misleading or deceptive conduct, deceit, conversion and conspiracy. Mr Mackinnon on his own behalf and the Group Members claims damages, the imposition of a constructive trust, and restitution of the loan amounts.

93 I will return to these allegations after I have analysed what happened.

## **The involvement of Ms Johnson**

### ***Ms Johnson’s affidavit***

94 Ms Johnson swore an affidavit in the proceedings on 3 August 2017.

95 It is 466 pages long and contains almost 1,000 paragraphs. It was prepared at a time when Ms Johnson did not have legal representation. Ms Johnson said it was prepared with the assistance of her clerk, Mr Leo Wassercug. Mr Wassercug was present in Court throughout the hearing and appeared to play the role of clerk to or instructor of Mr Argy.

- 96 The affidavit purported to be comprehensive and precise.
- 97 In the affidavit Ms Johnson said she was admitted to practice as a solicitor in 1984 and has specialised in criminal law.
- 98 She said that her role as a limited partner in STC, between December 2012 and January 2014, was her “only foray into the business world”.
- 99 The length, and apparently comprehensive nature of the affidavit, suggests that it includes all that Ms Johnson then thought could be said in defence of the claims made against her.

### ***Ms Johnson’s introduction to STC***

- 100 In her affidavit Ms Johnson said she met Mr Foster through Ms Larter in or around August 2012 while on a holiday to the Gold Coast. Ms Larter introduced her to Mr Foster’s sister who invited Ms Johnson to her home where she met Mr Foster.
- 101 In her affidavit Ms Johnson said Ms Larter told her:
- “He [Mr Foster] is a really nice person. He’s not what they say he is”.
- 102 Ms Johnson said that during her visit to Mr Foster’s sister’s home, Mr Foster mentioned the then pending *SensaSlim* matter and, on her return to Sydney, telephoned her “and persuaded me to act for him to seek an adjournment”.
- 103 The hearing of the *SensaSlim* matter was scheduled to commence before Yates J on 3 September 2012.
- 104 On 29 August 2012 Ms Johnson appeared for Mr Foster before Yates J to seek an adjournment. Yates J refused the adjournment (*Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq)* (No 3) [2012] FCA 939) and noted (at [1]) that:

“Ms Johnson, who appears for [Mr Foster] on this application, has made clear in both oral and written submissions (through her affidavit) that she appears only for [Mr Foster] for the purpose of making this application. She is not presently instructed to appear on behalf of [Mr Foster] at the principal hearing.”

105 Ms Johnson then appeared before Perram J, sitting as duty judge, on 2 September 2012 on an application for leave to appeal from Yates J’s decision. Perram J refused to grant leave (*Foster v Australian Competition and Consumer Commission* [2012] FCA 953).

106 Those proceedings were ultimately resolved by the judgment of Yates J to which I referred at [35] above.

107 Ms Johnson gave this evidence in her affidavit as to what occurred after the unsuccessful adjournment application:

“469. After the two interlocutory matters [in the *SensaSlim* litigation] Peter Foster asked me to contact him again.

470. Peter Foster told me about sports trading. He stressed that he wouldn’t involve himself in any more scams and said that he had wasted too much of his life getting into trouble and that the business would be a legitimate business.

471. We also talked about our mutual love of animals. I have been a passionate animal lover all my life. I had a long-term goal to help animals by establishing and running animal shelters.

472. Peter Foster proposed that I become the limited partner of the new business.

473. Although I have no interest in sport and do not gamble – the only gambling that I do is to occasionally buy a lottery ticket - I thought that the proposed business model of the new business sounded good and likely to be profitable. I had been charmed by Peter Foster and hence I agreed to become the limited partner of the new business for several reasons, all of which reassured me that everything would be above board:

(a) The fact that the proposed business had nothing to do with diets or the weight loss industry.

(b) My good friend Anne Larter was to be the limited partnership’s general partner and would manage and operate the business from day to day which was to include, as far as I was aware, doing all the banking and having control of all moneys... As to this, I confirm that, as far as I was aware, Anne Larter did all

the banking for the partnership. Peter Foster said he wouldn't allow his longstanding friend, Anne Larter, to be involved in anything improper. This made sense to me, particularly as I did not imagine that Anne Larter would engage in any improper or dishonest conduct or that she would betray a good friend like me.

- (c) I was to be the limited partnership's limited partner with no managerial responsibility and limited liability...allowing me to continue practising as a solicitor.
- (d) Peter Foster stressed that he would not be involved at all in the management or operation of the proposed new business but would only be involved in setting up and operating the business's website and similar technological aspects which were in any event beyond the capabilities of both Anne Larter or myself. ...
- (e) Richard Holmes who had been a professional sports trader for decades, would be doing [STC's] sports trading.
- (f) The clincher for me was that Peter Foster promised that once the new business was up and running [STC] would have a charitable arm running animal shelters and that I would run this charity". (Emphasis added.)

108 In cross-examination before me Ms Johnson gave this evidence about her knowledge of Mr Foster's history:

"Q. You weren't aware of what the allegations were against Mr Foster whatsoever?

A. Vaguely.

Q. Were you aware that in those proceedings that it was alleged that Mr Foster had assumed identities of other people involved?

A. No.

Q. Were you aware that Mr Foster was selling franchises to investors and taking their money and moving it overseas?

A. No.

Q. Were you aware that Mr Foster had assumed an identity by the name of Peter O'Brien in those proceedings?

A. No.

Q. Were you aware that Mr Foster was accused of having a long history of fraud and deception?

A. At the time that I applied for the adjournment?

Q. Yes?

A. I was aware that he had had another case before that case.

Q. Were you aware of his general notoriety as a confidence man, as a fraudster?

A. I was aware of some things that had been in the media. There was something about the UK, him doing something for Cherie Blair or something.

Q. Were you aware of his general reputation as someone who had committed frauds in the past?

A. I don't know that I can answer that that clearly. I mean, I had seen him get knocked out wearing a swimsuit in Fiji, but I wasn't really aware of what it was about."

109 A short time later Ms Johnson gave this evidence:

"Q. When you went into this venture did you understand that Foster had been accused of fraud?

A. That he had been accused of selling diet products that didn't work."

110 The passages in Ms Johnson's affidavit that I have emphasised at [107] reveal that she knew more about Mr Foster than she was prepared to accept in cross-examination.

111 In her affidavit, Ms Johnson said that Mr Foster stressed to her that he would not "involve himself in any more scams". That is, he accepted, and indeed had asserted to Ms Johnson, that he had been involved in "scams".

112 Ms Johnson said that Mr Foster told her that "he had wasted too much of his life getting into trouble" and the STC business "would be a legitimate business"; from which Ms Johnson must have understood Mr Foster to be accepting that he had "got into trouble" by reason of businesses that were not "legitimate".

113 Ms Johnson said that she was reassured by Mr Foster's statement that STC "had nothing to do with diets and the weight loss industry". Ms Johnson had, only a short time earlier, appeared for Mr Foster before Yates and Perram JJ unsuccessfully seeking an adjournment of the *SensaSlim* matter. The fact

that Ms Johnson was so reassured shows that she must have had a deeper understanding of the allegations made in the *SensaSlim* case, and the “case before that case” that she was prepared to accept in cross-examination (see [108]).

114 Further, Ms Johnson must have understood from the fact that Mr Foster assured her that he would not involve Ms Larter “in anything improper” that he was acknowledging that his earlier activities were, or had been alleged to have been, improper.

115 Ms Johnson’s evidence before me that she was only “vaguely” aware of Mr Foster’s antecedents, when compared to the detailed explanation in her affidavit of how it was that Mr Foster persuaded her to become partner in STC is an example of a persistent tendency in Ms Johnson’s evidence. That tendency was to assert the improbable, and deny the obvious on any occasion when she thought it might assist her deal with her perception of the problem posed by the question at hand. I will say more about this later in these reasons.

116 In cross-examination Ms Johnson gave this evidence as to why Mr Foster was not to be a partner in STC:

“Q. You then entered into the partnership agreement with Ms Larter. Is there any reason why Mr Foster wasn't on the partnership deed, given that it was his business proposal?

A. Well, it wasn't really his. He had the opportunity of getting the licence rights, of this trading, and he didn't want to do it anymore. So he was, Anne was going to do it, and they suggested that I would be, that I should be a partner in it.

Q. When you say, ‘he didn't want to do it anymore’, he'd only just got the licence rights, you said. So this would have been a new venture for him?

A. Well, I don't think he had the licence rights, but he had the opportunity of it, or he knew about the licence rights. Or he knew about the company where he could get the licence rights.

Q. So what was the reason given why he wasn't party to the partnership agreement at the time?

A. I think he was, I think he was going to go to gaol.

Q. What was that in respect of?

A. I don't know, a case in Brisbane. There was a case in Brisbane that he was involved in.

Q. So your evidence is that the reason why Mr Foster wasn't on the partnership agreement, was that he was about to go to gaol?

A. No, it's not my evidence. I don't know. I don't know, but he, I mean, he was sentenced, eventually, to go to gaol."

117 A matter that Ms Johnson emphasised in her evidence was Mr Foster's early insistence that he would not participate in the management or operation of the STC business but would only be involved in "setting up and operating the business's website and similar technological aspects".

118 In cross-examination Ms Johnson gave this evidence about that matter:

"Q. Given that Mr Foster brought the idea to you, did you insist on him being on the partnership agreement at any stage?

A. Actually, I would insist that he would not be.

Q. Why's that?

A. Well, I didn't want him, one of the things that I really liked about it was that there were two people in charge of the money. There was one who was Richard Holmes, who's a really experienced trader of over 40 years, I think – maybe even 45 years – who would have access to the money, and Anne. So, you know, I liked that idea.

Q. That meant that you wanted to keep Mr Foster away from the money?

A. I would not have been interested in doing something with Mr Foster having access to the money.

Q. I think your evidence is that you understood that Mr Foster would take a back seat role, but be involved in the initial set up of the business, do you recall that?

A. He was going to set up the website, or, you know, the computer side of it. I'm not really, like, tech savvy, so when I say, 'website' don't hold me to that, but all of the computer side of it. He was setting up, cause Anne's not really that tech savvy either."

119 Later Ms Johnson said:

“A. ...[Mr Foster] was setting up all of the online stuff. He had a company doing it, I couldn't have done it and Anne couldn't have done it and that's what he said. He said I'll set it up for you girls and, you know, it's your company, it's your business.”

120 As the following account reveals, it became clear to Ms Johnson at least by mid-2013 that Mr Foster was not confining his activities to setting up or operating the STC website but was involved in “posting” the “trades” allegedly conducted by STC and, ultimately, conducting the “trading activity” itself.

121 In any event, it appears that, at the outset, Ms Johnson was concerned about Mr Foster having any role in the business, including one confined to setting up the website.

122 Thus, at one point in her cross-examination, Ms Johnson said in an answer which was not responsive to the question:

“I understood him to be involved in setting up the internet side of things and managing the internet side of things. It was one of the things that I said to Anne [Larter], you know, ‘Get rid of him. I’ll help you. You’ve just got to – there’s got to be someone who can manage that internet side of things’...that was one of the things I said to her, ‘Look, he’s not indispensable. We can get somebody else to do that’.”

123 Thus Ms Johnson offered the inconsistent position of being comforted by Mr Foster’s assurance he would only be involved in setting up the STC website and performing technical functions, and yet was exhorting Ms Larter to “get somebody else” to perform those functions.

124 In cross-examination Ms Johnson said that she understood that the reason Mr Foster was not involved in STC was because he had been offered an opportunity to work in the purported “parent company” of STC. For reasons I will explain, I do not accept this evidence.

### ***Ms Johnson’s “seed capital”***

125 On 30 December 2012 Ms Johnson executed the Limited Partnership Agreement with Ms Larter.

126 At around this time Ms Johnson advanced \$182,500 in cash to the Partnership. Ms Johnson described this as her “seed money”.

127 Only Ms Johnson and the Associate Members (including Mr Mackinnon and the other Group Members) advanced money to the Partnership. Ms Larter advanced no funds. Mr Foster advanced no funds.

128 Ms Johnson said that:

- (1) she borrowed all of the \$182,500 in cash from “friends”;
- (2) the arrangement (with whom is not revealed in the evidence; it must have been with Ms Larter and or Mr Foster) was that she would be paid 100% interest on her advance;
- (3) the money would be repaid within months (in an email Ms Johnson sent Ms Larter and Mr Foster on 10 September 2013, Ms Johnson said the loan plus interest was to be repaid by February 2013); and
- (4) there was a document recording the arrangement but that she had been unable to locate it.

129 Ms Johnson said she undertook no due diligence before advancing funds to STC. She said she did not ask Ms Larter how Ms Larter secured the rights STC was supposed to have, nor their value. She said she made no enquiries as to “who would be doing what” in the business.

130 In her 10 September 2013 email to Mr Foster and Ms Larter, Ms Johnson said:

“The seed money loan was for \$182,500 to be repaid by end of Feb 2013 by payment of \$182,500 of principal plus \$182,500 as interest.

Without the \$182,500 loaned STC could not have got started. Neither of you was able to provide one cent of seed capital. Peter [Foster] had no objections to this loan at the time when he needed the money”.

- 131 I will return to this email. It has wide significance in the case. In the passage I have set out Ms Johnson asserted that Mr Foster “needed the money” to establish STC. Ms Johnson must have understood from this that from the outset that Mr Foster was to be closely involved in the establishment of STC.
- 132 Ms Johnson said she paid the \$182,500 in four tranches.
- 133 The first tranche was \$88,000. Ms Johnson paid that amount, in cash, to a Mr Bill Duffy, who she said was “a friend of Mr Foster’s”.
- 134 In her 10 September 2013 email Ms Johnson said that “\$100,000 of the \$182,500 seed capital was to be placed into STC’s trading account to be traded by Richard Holmes”. Mr Holmes was a “trader” engaged by STC. I will return to Mr Holmes but note at this stage that there is no suggestion that he was involved in any dishonest conduct.
- 135 However, in cross-examination Ms Johnson said she deposited the other three tranches (\$37,000, \$25,000 and \$32,500), in cash, into a bank account and that she did not know who controlled the bank account.
- 136 The Westpac account to which I referred at [8] was in the joint names of Ms Johnson and Ms Larter. It was opened on 28 December 2012. There is no record in the bank statements of that account of those deposits.
- 137 There is no other evidence of the identity of the account into which Ms Johnson’s funds were deposited. It must have been one associated with Ms Larter or Mr Foster.
- 138 The “loan” was unsecured. As I describe below, it was repaid with 100% interest by the time Ms Johnson retired from STC in January 2014.

***Ms Johnson’s understanding of the source of STC’s rights***

- 139 In cross-examination Ms Johnson said she understood from conversations she had with Ms Larter “that [Ms Larter] had secured the rights for Australia

and New Zealand” for STC and that she had acquired them because “she was tipped into them by Peter Foster”.

140 When asked to clarify what that meant, Ms Johnson said that Mr Foster “knew about” the rights, and later that he “had” them or “got” them; but that he did not want to “do them” and so he “gave them to [Ms Larter] to do”. Ms Johnson also said that she understood Mr Foster was “going to do it but then he decided not to” and then offered it “to [Ms Larter] – or to us”.

141 Ms Johnson said she did not know why Mr Foster did not want to “do” the rights in STC. She said that it was “because he was going to be involved...with the head company”. She later elaborated that Mr Foster “was working in the actual business” by “organising the different areas [of STC]...in the world for the business”, “that’s what I was told in the beginning, and that that’s why he wasn’t taking up the licence for Australia and New Zealand”. She said that Mr Foster “was involved with the parent company that was dealing with the licences. I knew that from the start because that’s what he said. That’s why he was giving [Ms Larter] the licence because he was going to do Australia but then he’d been approached by the parent company to work for them”.

142 Ms Johnson also said:

“My understanding, my first conversations about the setting up of the business in Australia was that the licence – was that Peter Foster was going to get the licence for Australia and New Zealand, but he had decided not to because he’d been offered a role to work with the parent company and, so he had offered that licence to Anne Larter, because she’d been through some tough times”.

143 As is the case with much of Ms Johnson’s evidence, it is difficult to reconcile the evidence I have just set out with her evidence that the reason Mr Foster could not be involved in the Australian business of STC was because he was “going to go to gaol” (see [116] below).

## The scheme

### *STC's marketing campaign*

144 In early 2013 STC commenced advertising in a number of major newspapers throughout Australia.

145 For example, the following advertisement was published in The Weekend West Australian on 9 February 2013:

**Over 50 - earning over \$5000 a week**

If you thought you couldn't earn over \$5000 a week from home, then you really need to think again in this new age economy.

Our business was voted "the rising star to follow in 2013" by one of the world's leading economists in the *Wall Street Journal*. This prompted *USA TODAY* to write "investors are scrambling to learn what all the fuss is about and join" whilst *CBS News* described ours as "the business to watch in 2013".

We are now available in Australia for the first time and you can join in our success. No selling involved.

You will require a minimum of a \$50,000 contribution which is fully secured and totally guaranteed. Age is no barrier, as it's never too late to find a livelihood you love, and you'll never work another day in your life. If you want to learn about rewards without the risk, and how to make your money work for you, not you work for money, **ACT NOW** and call **Mark Hughes today on 02 9098 0365.**

146 The advertisements invited potential investors to call "Mark Hughes": an alias used by Mr Foster.

147 Mr Foster obviously understood that his notoriety was such that he could not be seen to be associated with STC.

148 Someone (I would infer Mr Foster or someone at his direction) prepared a “Sales Script” containing instructions for persons who received telephone calls from potential investors.

149 Investors were to be told:

- (a) “we are financial traders...but we trade on a market that is absolutely totally transparent and substantially more profitable than the stock market, and that is the sports and prediction markets”;
- (b) “we are not gamblers”;
- (c) “we are traders with expert analysts from our team of scientists, statisticians, mathematicians and data analysts”;
- (d) “there is no risk and...your contribution is fully guaranteed”;
- (e) “your investment can’t go down because it is treated as a profit share loan which means that your investment is always returned to you in full”;
- (f) “you can’t lose money you can only make money”;
- (g) “if you go to our website and you click on our newspaper cuttings...there is a photo of our senior partner [i.e. Ms Johnson] with Julia Gillard (but don’t hold that against her) when she [i.e. Ms Johnson] announced that she obtained the rights of \$20 million”;
- (h) “there is a \$10 million cash bond security. That money is simply locked up and can’t be touched”; and
- (i) “it is an important point to understand that this is not a situation where you can lose money”.

- 150 Investors were directed to the Public STC Website.
- 151 The Public STC Website had a link to a media release showing Ms Johnson with former Prime Minister the Hon Julia Gillard AC. It stated that Ms Johnson was involved in a \$20 million partnership deal.
- 152 The photograph of Ms Johnson and Ms Gillard was taken in the context unrelated to STC. Contrary to the “sales script”, the photograph was not taken on an occasion where Ms Johnson made any announcement about obtaining any rights connected with STC.
- 153 There is an issue as to whether Ms Johnson accessed the Public STC Website. She was certainly aware of it. In her 10 September 2013 email, she demanded that “my name and all references to me be removed” from that website; which she named in terms. She agreed she saw the Public STC Website but denied clicking on the link to download the Proposal.
- 154 As I have mentioned, there was also a Members STC Website, accessible only by Associate Members using a username and password. At that website, Associate Members could see the state of their “account” with STC. Ms Johnson agrees she accessed this website. I will return to this below.

### ***The Proposal***

- 155 The key marketing document used to induce investors into loaning moneys to the STC partnership was the Proposal. It is an extravagant document.
- 156 A copy of that document is an attached to these reasons.
- 157 The Proposal was available through a hyperlink on the Public STC Website labelled “click to download proposal”.
- 158 Mr Kenneth Gamble, an investigator retained on behalf of the Group Members, said that:

“In fact what actually happens is people would fill out the proposal application to receive a proposal and they would then be emailed the proposal, that's my recollection, so it was something that was emailed to them when they displayed an interest in the site.”

- 159 The Proposal was also mailed to investors after the initial telephone call.
- 160 There is an issue whether Ms Johnson saw or knew of the contents of the Proposal. On her behalf, Mr Argy submitted that Ms Johnson “categorically” denied ever seeing the Proposal before a copy was adduced in evidence in these proceedings. I will return to this.
- 161 The Proposal included the Terms of Associate Membership to which I have referred.
- 162 On the front page of the Proposal, Ms Larter was described as being the “General Partner” and Ms Johnson described as the “Legal Partner” (rather than a “limited” partner, as Ms Johnson thought herself to be).
- 163 The Proposal included a photograph of Ms Johnson and Ms Larter and made the following statement concerning Ms Johnson:

“Leigh Johnson has carved out a distinguished career over 30 years as a lawyer representing clients from all walks of life, including prominent politicians, actors, physicians, members of law enforcement agencies, large corporations and Aussie battlers.

Her passion for justice and the Aussie ethos of everyone being given a ‘fair go’ is legendary.

Her opinion has been much sought after with countless television appearances on programs such as *A Current Affair*, *Today Tonight*, *Sunday*, as well is [sic] being a regular member of the panel on the highly successful *Beauty and the Beast*.

She brings to the Partnership unlimited enthusiasm, a fierce intelligence and belief that everyone should share equally in the financial rewards.”

- 164 Ms Johnson said that this was not an accurate summary of her career. Ms Johnson said she had never acted for “politicians”, “actors”, “physicians” or “large corporations”.

165 The Proposal contained the following statements (some of which are picked up as “representations” in the Further Amended Commercial List Statement):

- (a) STC had “secured the exclusive rights and been appointed the Club Member for Australia” from the Sports Trading Club Limited;
- (b) these “highly prized rights” allowed for \$20 million to be “traded on sporting events and prediction markets in Australia and overseas”;
- (c) STC sought to raise “\$10 million by way of a loan so as to maximise profits and fully utilise the \$20 million allocation”;
- (d) any loan made to STC would be “100% secured against the value of the Australia rights and by way of personal guarantee by” Ms Larter;
- (e) instead of paying interest on moneys advanced STC would share one half of the profits it made “as a Member” with “Associate Members”.
- (f) there were opportunities to make “successful trades” on sporting events by using “intelligence”;
- (g) the “intelligent trader” maximised profits and minimised losses “through the use of established financial risk management strategies such as stop loss, hedging and the equivalent of short selling” and that “these are just a few of the skills that are second nature to our highly trained Account Managers”;
- (h) the “actual trade decisions are made by our Account Managers, under the supervision of our Senior Analyst and Chief Investment Officer”;

- (i) each “Account Manager has extensive experience in trading on sporting events, and a track record of discipline and intelligent decision making”;
- (j) the Account Managers “expertly analyse and trade the betting markets, taking the emotion out of the betting game and putting quantitative analysis in its place”;
- (k) the Account Managers “are a team of analysts with experience on sports and investment, and with professional qualifications in quantitative disciplines such as science, accounting and mathematics”;
- (l) the Account Managers support the Chief Investment Officer “through undertaking extensive statistical and trending analysis coupled with rigorous background research and market intelligence” to “seek attractive risk-reward profile[s]” and “allocate assets” “using sports specific algorithms that are used to identify value at all markets”;
- (m) the Account Managers “have the invaluable access to information received from our Scientific Research Director, Dr Allan Snyder, from the Sports Trading Club Insight Project at the University of Sydney, harnessing the extraordinary talents of Savants”;
- (n) STC “has also created the ‘Insight Project’, a world first with the study of savants and sports trading”;
- (o) STC “have embraced the extraordinary skills of savants to give ourselves a unique advantage. Certain savants unmask patterns that others can’t see and are bewilderingly quick at performing calculations and recalling enormous amounts of data”;

- (p) those “savants are mysteriously gifted at setting odds and point spreads on games such as football and basketball with extraordinary accuracy”;
- (q) the “Sports Trading Club Limited has the expertise and knowledge to trade on sporting events worldwide” and “they only appoint one Club Member in each country”; and
- (r) “the amount of money to be traded in each country is calculated in accordance with the specific size of the country” and other like matters and that “in Australia it was determined that that sum was \$20 million and the Australian sole rights were obtained by Leigh Johnson and Anne Larter”.

166 The Proposal concluded:

“In simple terms, we are not for sale.

Leigh Johnson and Anne Larter do not want to sell any equity in The Sports Trading Club Partnership. They believe the rights are just too valuable, and only going to increase in worth in the years ahead.

They are however prepared to share with you, and other lenders, 50% of the profits for a specified period of time.

If you were investing money in a managed investment scheme or the stock market, the value of your investment can potentially increase or decrease. In some cases your investment can be completely wiped out. That’s why there are warnings on those type of investment schemes stating that your investment may go down as well as up.

However as a loan you are always legally entitled to the return in full of the principal of the loan. As it is a loan and not an investment the principal sum we borrowed must be repaid to you in full. The principal sum remains the unchanged.

This gives you security and peace of mind that you are not risking your principal. And you do get to share in the rewards, 50% of all profits made by the Member.

Reward without risk... it may sound too good to be true. It isn’t.

However where there is a plus there normally is a minus. In this this [sic] case, ‘all good things must come to an end’ and there is a time limit on the

term of the loan and the period that you will be able to be an Associate Member.

The term of the loan is for either one year, two years or a maximum of three years, depending upon what suits your personal circumstances.

At the end of the term your loan will be repaid to you in full. But you will have had up to three good years of reaping the rewards...without worrying about risking the principal.”

167 The Proposal attached the form of Loan Agreement to which I have referred: see [38].

168 Mr Mackinnon alleges that all the statements in the Proposal were false; that STC had not acquired any rights from Sports Trading Club Limited, or anyone else, to trade on sporting events or “prediction markets”; and that STC did not ever conduct any trading or betting activity of the kind described in the Proposal, or at all.

169 I will return to these allegations and the question of whether Ms Johnson knew of the contents of the Proposal later in these reasons.

### ***The fraud***

170 Over 400 “Associate Members”, including Mr Mackinnon invested in STC. As I have mentioned, Associate Members deposited \$29.6 million into STC’s Westpac account. The Group Members’ deposits comprised some \$12.3 million of that \$29.6 million.

171 On 30 October 2014 shortly after Mr Foster’s arrest, Ms Larter sent an email to all “STC Members” headed “STC Statement” as follows:

#### “STATEMENT

As a result of Channel 9 and the program A Current Affair, I am writing to our members to give them comfort in very muddled times.

There are going to be people who have seen that The Sports Trading Club have [sic] been most transparent in its activities, successful in its activities and now much maligned.

We have confidence in the integrity of our Company and therefore, offer termination. If you choose to arrange a refund, please email Terri with details of your request. support@stcmembers.com”.

- 172 Only 5 of the 152 Group Members received a partial refund offered by Ms Larter. The total amount refunded was \$138,905.
- 173 Otherwise no Group Member has been repaid the amount advanced to STC. It has all been lost.
- 174 The Westpac account was opened on 4 January 2013 with a deposit of \$50. The next deposit, \$150,000.00 was made on 19 February 2013 by a Mr Pieter de Klerk. Mr de Klerk’s evidence is of vital importance in this case. I return to it below.
- 175 Thereafter, regular deposits were credited to the Westpac account. There were two deposits for \$50,000 on 27 February 2013, a deposit of \$25,000 on 1 March 2013, deposits of \$50,000 on 6 and 8 March 2013, deposits of \$100,000 and \$50,000 on 11 March 2013, deposits of \$50,000, \$20,000 and \$50,000 on 14 March 2013 and so on. The Westpac statements identify named persons as having made many of these deposits. I infer those named persons were Associate Members. Other deposits do not identify the identity of the depositor but I infer they were from Associate Members. Mr Gamble has identified all of the Group Members’ deposits in the Westpac account.
- 176 Funds were withdrawn immediately after these deposits were made. The withdrawals are often in round numbers, suggesting that the funds were remitted to other unidentified accounts. For example: \$60,500 was withdrawn on 19 February 2013, \$6,000 on 19 February 2013, \$2,000 on 20 February 2013, \$40,000 on 21 February 2013, \$25,000 on 22 February 2013 and again on 28 February 2013 and so on.
- 177 There were also “debit card withdrawals” in odd amounts for apparently private purposes (Woolworths, Taste of Paradise restaurant, Telstra bill payment and the like).

- 178 All of the money paid into the Westpac account has been paid away.
- 179 I referred to Mr Gamble's evidence at [158]. As I have mentioned, Mr Gamble is the investigator retained on behalf of the Plaintiff Group Members. He accepted in cross-examination that he stands to gain from the successful prosecution of these proceedings as he, or an entity with which he is associated, will receive a percentage of any recovery. He thus has an interest in the outcome of these proceedings and is, to that extent, not an objective witness. The conclusions and opinions formed by Mr Gamble were challenged, and I have not accepted them as evidence of their truth. However, the fruits of his investigation as to matters of fact were not challenged. I accept his evidence concerning those findings. They are supported by documentary evidence (such as bank statements and contemporaneous records of the STC website).
- 180 Mr Gamble's investigations reveal that almost \$8.5 million of the funds paid into the STC Westpac account was transferred to an account with HSBC Bank in the name of the sixth defendant, Sports Trading Club Limited. Funds were then transferred from that account into bank accounts in Hong Kong and Vanuatu in the name of offshore companies associated with Ms Arabella Foster and Mr Duffy (the person to whom Ms Johnson handed cash in December 2012). Thereafter the funds were applied principally for the benefit of Mr Foster and his relatives and associates for purposes unrelated to those stated in the Proposal.
- 181 Mr Gamble's investigations have also shown that a further amount of some \$5 million was transferred from the STC Westpac account to accounts controlled by Mr Duffy and were then used by Mr Foster for personal expenditure and payments to his relatives and associates. Almost \$2 million was also paid directly to Mr Foster's associates and relatives.
- 182 Those transfers included:

- (a) some \$353,000 to Mr Foster's associate, Mr Robin Reichelt who used the alias "Howard Robin" for the purpose of the STC scheme (I refer to this below);
- (b) \$353,000 via Mr Duffy's ING account, and \$355,000 plus US\$125,126 directly, to Mr Foster's mother Ms Luigina Foster;
- (c) some \$132,000 to Mr Foster's associate, Mr Christian Slinn; and
- (d) \$109,000 via Mr Duffy's ING account, and \$126,000 directly, to Mr Foster's niece Ms Arabella Foster.
- (e) \$1 million used to purchase a luxury yacht known as "Next Adventure";
- (f) \$30,420 to Mr "Tom Nolan" (to whom I refer below);
- (g) More than \$975,000 withdrawn in cash from ATMs;
- (h) \$430,510 spent on gold bullion;
- (i) \$280,000 used to purchase a race horse;
- (j) some \$105,000 plus a further US\$25,000 spent on Mr Foster's lawyers in the *SensaSlim* case;
- (k) some \$260,000 expended on American Express and Western Union accounts.

183 Almost \$15 million of the money paid into the Westpac account has not been accounted for.

184 Mr Gamble has analysed the STC Westpac account statements and prepared the following summary. It shows that, for the period set out below, deposits and withdrawals were made from that account as follows:

<b>Date from</b>	<b>Date to</b>	<b>Credits / Deposits (AUD)</b>	<b>Debits / Withdrawals (AUD)</b>	<b>Closing Balance (AUD)</b>
31 December 2012	31 January 2013	\$50.00	\$0.00	\$50.00
31 January 2013	28 February 2013	\$250,001.00	\$192,269.03	\$57,781.97
28 February 2013	28 March 2013	\$1,239,967.36	\$686,414.34	\$611,334.99
28 March 2013	30 April 2013	\$360,091.70	\$967,083.19	\$4,343.50
30 April 2013	31 May 2013	\$395,000.41	\$395,921.75	\$3,422.16
31 May 2013	28 June 2013	\$336,199.55	\$285,786.87	\$53,834.84
28 June 2013	31 July 2013	\$796,033.74	\$806,481.86	\$43,386.72
31 July 2013	30 August 2013	\$1,070,011.87	\$1,040,211.69	\$73,186.90
30 August 2013	30 September 2013	\$720,012.03	\$791,808.19	\$1,390.74
30 September 2013	31 October 2013	\$925,035.60	\$850,519.91	\$75,906.43
31 October 2013	29 November 2013	\$422,033.79	\$445,373.05	\$52,567.17
29 November 2013	31 December 2013	\$1,848,750.18	\$1,860,764.85	\$40,552.50
31 December 2013	31 March 2014	\$1,727,030.12	\$1,741,670.63	\$25,911.99
31 March 2014	30 June 2014	\$4,863,178.15	\$4,373,641.15	\$515,448.99
30 June 2014	30 September 2014	\$10,037,790.00	\$9,927,894.31	\$625,344.71
30 September 2014	3 November 2014	\$3,932,025.38	\$3,137,684.79	\$1,419,685.30
03 November 2014 (Mr Foster was arrested and jailed on 28 Oct 2014)	31 December 2014	\$434,612.61	\$615,343.52	\$1,238,954.39
31 December 2014	31 March 2015	\$203,761.77	\$697,857.29	\$744,858.87
31 March 2015	30 June 2015	\$27,628.79	\$679,221.06	\$93,266.00
30 June 2015	30 September 2015	\$1.15	\$50,442.75	\$42,825.00

<b>Totals:</b>	<b>\$29,589,165.20</b>	<b>\$29,546,390.23</b>	
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185 As Mr Gamble observed, the closing balance in the STC Westpac bank account at the end of each month show that large amounts of money were transferred out of the account soon after being deposited.

186 I have mentioned that Mr Gamble has ascertained that almost \$8.5 million was transferred from the STC Westpac account to bank accounts in Hong Kong. Most of those transfers took place after the end of August 2013 as follows:

<b>Date of transfer</b>	<b>STC Westpac Account Transaction number</b>	<b>STC Westpac Account Description of transaction</b>	<b>Amount transferred AU\$</b>	<b>Transferred to</b>
26 February 2013	5559256	HK	\$1,496.79	Not known
19 April 2013	5704853	HK	\$652.29	Not known
30 August 2013	6060515	HK TRADE	\$101,300.00	Sports Trading Club Ltd
27 September 2013	6141408	HK	\$100,000.00	Bella Development Ltd
25 October 2013	6216025	STC HK	\$50,000.00	Sports Trading Club Ltd
19 December 2013	6364789	HK	\$50,000.00	Sports Trading Club Ltd
30 December 2013	6386422	HK	\$75,000.00	Sports Trading Club Ltd
12 February 2014	6491378	HK	\$58,105.75	Sports Trading Club Ltd
12 February 2014	6491383	HK AU	\$50,000.00	Sports Trading Club Ltd
17 February 2014	6499203	HK	\$50,000.00	Sports Trading Club Ltd
9 May 2014	6714226	HK	\$250,000.00	Sports Trading Club Ltd

16 May 2014	6729202	STC HK	\$250,000.00	Sports Trading Club Ltd
23 May 2014	6750637	HK	\$250,000.00	Sports Trading Club Ltd
28 May 2014	6758879	HK	\$190,000.00	Bella Development Ltd
2 July 2014	6848294	HK	\$250,000.00	Sports Trading Club Ltd
17 July 2014	6884481	HK	\$250,000.00	Sports Trading Club Ltd
22 July 2014	6892659	HK	\$250,000.00	Sports Trading Club Ltd
25 July 2014	6900485	HK	\$250,000.00	Sports Trading Club Ltd
25 July 2014	6902362	HK	\$1,070.91	Not known
28 July 2014	6906258	HK	\$250,000.00	Not known
31 July 2014	6913721	HK	\$250,000.00	Sports Trading Club Ltd
1 August 2014	6916374	HK	\$250,000.00	Sports Trading Club Ltd
5 August 2014	6921675	HK	\$250,000.00	Sports Trading Club Ltd
7 August 2014	6927582	HK	\$250,000.00	Sports Trading Club Ltd
8 August 2014	6930736	HK	\$250,000.00	Sports Trading Club Ltd
12 August 2014	6936268	HK	\$250,000.00	Sports Trading Club Ltd
15 August 2014	6941750	HK	\$250,000.00	Sports Trading Club Ltd
15 August 2014	6943117	HK	\$250,000.00	Sports Trading Club Ltd
18 August 2014	6946381	HK	\$250,000.00	Sports Trading Club Ltd
19 August 2014	6949334	HK	\$250,000.00	Sports Trading Club Ltd

20 August 2014	6951286	HK	\$250,000.00	Sports Trading Club Ltd
21 August 2014	6954363	HK	\$250,000.00	Sports Trading Club Ltd
25 August 2014	6958000	HK	\$250,000.00	Sports Trading Club Ltd
26 August 2014	6962563	HK	\$250,000.00	Sports Trading Club Ltd
29 August 2014	6970220	HK	\$250,000.00	Sports Trading Club Ltd
1 September 2014	6972608	HK	\$250,000.00	Sports Trading Club Ltd
10 September 2014	6988927	HK	\$250,000.00	Sports Trading Club Ltd
24 September 2014	4012152	HK	\$250,000.00	Sports Trading Club Ltd
26 September 2014	4017193	HK	\$250,000.00	Sports Trading Club Ltd
7 October 2014	4030636	HK	\$250,000.00	Sports Trading Club Ltd
10 October 2014	4037723	HK	\$250,000.00	Sports Trading Club Ltd
21 October 2014	4054569	HK	\$250,000.00	Sports Trading Club Ltd
21 October 2014	4055865	HK	\$250,000.00	Sports Trading Club Ltd
<b>Total:</b>			<b>\$8,477,625.74</b>	

187 There is no evidence that any of this money was spent for the purposes identified in the Proposal.

188 Mr Gamble said that his investigations reveal that:

- (a) there was no evidence that STC undertook any trading activity or betting activity of the kind asserted in the Proposal and elsewhere;

- (b) there was no evidence of Group Members' money being used for sports trading purposes in the manner claimed by STC; and
- (c) there was no evidence that any "profits" were made from sports trading as claimed or at all.

189 Mr de Klerk said that he accessed his Members STC Website and observed what appeared to be some kind of "sports trading". Mr de Klerk also visited a "trading room" in an apartment building on the Gold Coast where he witnessed what appeared to be "trading" activity. I detail this evidence below: at [214] to [219] and [304] to [311]. Ms Johnson also said that she viewed "trades" when she accessed the Members STC Website "for a day or two".

190 As I discuss below, it may be that Mr Foster choreographed some kind of "sports trading" activity, or the appearance of such activity, to lure investment.

191 Ms Johnson was one of the two persons authorised to operate the Westpac account (the other was Ms Larter).

192 There is however no suggestion that Ms Johnson authorised any payment out of the Westpac account or received any of the money deposited to that account, save for \$50,000 that she withdrew in December 2013 as final repayment of her advance of \$182,500 and interest. I return to this below.

193 I have mentioned Mr Holmes: see [134]. Mr Mackinnon makes no allegation of impropriety against Mr Holmes. Quite how he was involved without being exposed to the fraudulent scheme remains a mystery.

194 It also appears that a Prof Allan Snyder had some association with the STC enterprise. Ms Johnson said she met Prof Snyder. However Mr Gamble's evidence is that he made enquiries with Prof Snyder and satisfied himself that, although Prof Snyder had been "approached" "for a significantly large amount of money", he "never ended up getting involved".

- 195 To some extent, the evidence that Mr Mackinnon and the Group Members have lost their funds by reason of a fraud is circumstantial.
- 196 What is clear is that their investment is lost, save for the small sums refunded shortly after Mr Foster's arrest in October 2014.
- 197 There is evidence as to where much of the money has gone; but much is unaccounted for.
- 198 Mr Foster's and Ms Larter's dealings with Ms Johnson during 2013 and early 2014 point strongly to the conclusion that they were in control of the STC enterprise. Ms Larter was the only other signatory of the STC Westpac account and must have authorised the transfer of the funds deposited to that account. Ms Johnson's account of her dealings with Mr Foster and Ms Larter from, at the latest, August 2013 points strongly to the conclusion that fraud was afoot, and that Mr Foster was directing it with the close assistance of Ms Larter. I will set out the detail of these matters later in these reasons.
- 199 Neither Mr Foster nor Ms Larter has given evidence. As I have said, Mr Foster entered an appearance, participated in the proceedings for some time but, through his solicitor, informed the Court that he would not appear to defend the case against him. Ms Larter entered a submitting appearance. They obviously could both have given evidence explaining exactly what happened to the Group Members' funds. I infer their evidence would not have assisted their case. Their failure to give evidence enables me to draw, with even greater confidence, the inference that I consider in any event arises strongly from the evidence, that they, with the involvement of others, have misappropriated the Group Members' funds: for example see *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16 at [303] (Heydon J).
- 200 As I have said, because of Ms Larter's bankruptcy, it is not competent for me to deal with Mr Mackinnon's claim against her. However, I do not consider that to be an impediment to making findings about her role at STC.

201 Mr Argy conducted Ms Johnson's case on the basis that Group Members' funds had been fraudulently misappropriated. Mr Argy emphasised, over and over again, what he described as the sophisticated nature of the fraud perpetrated by Mr Foster, with Ms Larter's assistance. Mr Argy went so far as to submit that Ms Johnson had also been defrauded by Mr Foster and Ms Larter. Mr Argy described Ms Johnson as "the classic Good Samaritan who went to the aid of a person she thought was in distress [evidently Ms Larter] and was mugged and robbed for her trouble".

202 For reasons I set out below, I do not accept this as a fair characterisation of Ms Johnson's role. However, for present purposes, the point is that throughout the hearing before me, there was no dispute but that Mr Mackinnon and the Group Members had been defrauded by Mr Foster and his associates.

### **The involvement of Pieter de Klerk**

203 Mr de Klerk is an important witness in these proceedings.

204 On or about 9 February 2013, Mr de Klerk, who is originally from South Africa but now lives in Perth, read the advertisement in The Weekend West Australian to which I have referred at [145] above. As I have mentioned, the advertisement invited interested persons to telephone "Mark Hughes".

205 Mr de Klerk telephoned the number on that advertisement and spoke to "Mark Hughes". They had this conversation:

"de Klerk: Tell me more about this investment.

Hughes: It is a sports trading scheme where we trade existing bets. Are you interested in sports?

de Klerk: I am still competing in sports but I am not a gambler.

Hughes: We don't gamble, we trade other people's bets. We trade on the sports so if you are a keen sportsman, this investment is for you. If you are interested I can send you a link which will take you to the full proposal.

de Klerk: Yes I am interested, please send me the link. My email address is XXX.

Hughes: I will send you a document, examine the information and if you are interested then get back to me.”

206 During February 2013 Mr de Klerk had several more telephone conversations with “Mark Hughes” during which “Mark Hughes” said words to the effect:

(a) “there is an opportunity to loan money to STC for a period of up to three years”;

(b) “the loan will be repaid in full after three years plus 50% of the profits made from betting trades”; and

(c) “the loan is risk free, and guaranteed by the STC directors”.

207 On 14 February 2013 Mr de Klerk received an email from “Mark Hughes” attaching a copy of the Proposal. In the email “Mark Hughes” described himself as “National Sales Manager” of “The Sports Trading Club Partnership”.

***Mr de Klerk’s decision to invest \$250,000 into STC as an Associate Member***

208 Mr de Klerk decided to loan moneys to STC. On 17 February 2013 he signed five loan agreements (each for \$50,000). On 18 February 2013 he transferred into STC’s bank account at Westpac \$150,000 of the \$250,000 referred to in those agreements. That amount was credited to STC’s Westpac account on 19 February 2013.

209 Mr de Klerk paid the further \$100,000 called for by the loan agreements on 21 March 2013. I will return to this.

210 The five loan agreements that Mr de Klerk signed were sent to him on 17 February 2013 in a letter signed by Ms Larter as General Partner.

211 The letter read:

“Thank you for your confirmation that you wish to proceed with five loans each of \$50,000 for a term of three years.

I wish to confirm and clarify that your principal, in this case \$250,000, is not subject to deduction by way of commission or any other fees. We earn from profitable trades, we do not deduct any commission/fees or any other costs from your principal at any time during the term. Your principal remains repayable to you in full in the sum of \$250,000.

I have pleasure in attaching five agreements which I have duly signed given that Mark Hughes has told me that you wish us to proceed without delay so we can commence trading. Mark has also advised me that you will be in a position to transfer \$150,000 on Monday for three loans and the other \$100,000 will follow within the next 7 days or so subject to you making arrangements in South Africa. I confirm this is acceptable to me, and I am pleased to welcome you to the Sports Trading Club as an Associate Member.

Please print out all five agreements, sign each and then either fax, scan or post a copy back to Mark Hughes.”

212 At around this time, Mr de Klerk said that he spoke to “Mark Hughes” at least once a day concerning the “trading” activity STC was purportedly engaging in on Mr de Klerk’s behalf.

213 Mr de Klerk said that within a week of trading “Mark Hughes” telephoned him and asked:

“What do you think of your investment so far? Are you happy with the performance?”

To which Mr de Klerk said:

“I am very happy. I am more involved with sport now, I’m very interested to watch.”

214 Mr de Klerk said that, accessing the Members STC Website, he was able to observe “trades” being conducted on his behalf “in real time”.

215 Mr de Klerk gave this evidence about those observations in answer to questions from me:

“Q. Can you describe to me what you would see? This was on your computer screen?

A. That's correct, yes, your Honour.

Q. You would log into your account and what information could you see?

A. You can see them - the trades they've done for the day. Normally it will update, like, every three or four hours.

Q. What could you see, you could see things being purchased, could you?

A. You can see money going out of your account, and what they are trading on. So, the sport and what they are trading on, that means it would give you specific information, like, say, tennis, they would trade on the one guy will beat the other guy within so many sets, or just beat the guy, and what they've actually traded on that specific tennis game, how much money they've actually traded.

Q. What did you understand was being traded?

A. Beg your pardon, your Honour?

Q. What did you understand was being traded?

A. Money.

Q. What, money - how? Did you understand that STC was wagering on the outcome of sports events?

A. That's correct. So the outcome of the sport event actually was either making the money or losing the money. See, they were, say for instance there was a game tomorrow and they would say player A would beat player B by so many sets or whatever, they'd put an amount of money on that, and if that is true it means you get a profit of this, the way they work it out in the betting game that there was an amount then won and then of course that 50% then of the profit share will be paid back into your account.

Q. With whom did you think STC was trading?

A. Look, they had a betting company that they've used that I can't remember that now, but there was a company they've actually used to trade through, and sometimes more than one company, because international company, or there was more than one company that they've trade through.

Q. On your screen you would see a dollar amount associated with a particular sporting event?

A. That's correct.

Q. As what, as money coming in and going out?

A. That's correct. So you would see they trade on say a specific say golf match, they will trade a player with some history and they will trade say so many dollars on that player to be the first three for instance, and then there's a rate as set by the betting company and the betting company would – that rates would change until the game sort of finished or stop[ped].

Q. Information was constantly changing --

A. All the time.

Q. -- before your eyes?

A. Before your eyes, and I've actually, because in the first week I couldn't believe the profits, it was, you know, that was actually accumulated. I --

Q. The screen would - did it show what profit you had made?

A. Exactly. Yeah.

Q. From moment to moment?

A. Yeah, I would say update every -- well, once an event was done it will immediately show you the profit into your account."

216 Mr de Klerk also said that he was able to see the "live trades" being made on his behalf on his mobile phone.

217 He gave this further evidence in response to questions from me:

"Q. You could see on your phone the same live trades you could see on the computer monitor?

A. Exactly. Exactly. What I even did was I went to an opposition company, because I was concerned about match fixing, because I've heard about the stuff and I really wanted to get to the bottom. So I've went onto the website of a total third party on the same -- like, tennis, for instance -- and see what the traders traded, and then found that it was legitimate, and then as the game goes on, you know, I monitored it from their side, sorry, and not from STC's side, from the time it was sent."

218 Mr de Klerk said that "one of the opposition companies" that he accessed was Betfair.

219 This evidence shows that an account had been created for Mr de Klerk which appeared to show some kind of trading concerning sporting events and the accumulation of a "profit" for Mr de Klerk.

220 Mr de Klerk also received a monthly "Statement of Account" from STC. The only one in evidence is that dated 31 August 2013. It set out details of the "loan amount", the "profit to date", the "account balance", the "current funds in trade", the "future funds in trade", the "available balance" and the "funds

available to withdraw”. A copy of that Statement of Account is attached to these reasons.

221 Evidently, all Associate Members were given an account name and password by which they could access the Members STC Website.

222 Ms Johnson said she viewed similar activity when she accessed the Members STC Website.

223 There is no evidence as to whether the “trading” activity and accumulating “profit” viewable via the Members STC Website was genuine.

224 It seems that Mr Foster was able to create the impression that genuine trading and profit accumulation was occurring. Somehow he created an online platform by which Group Members viewed their STC profiles and “trading activity”. It may be that, for some time, investors’ money was used for some kind of genuine “trading”.

225 The evident involvement of Mr Holmes, about whom no accusation of fraud is made, in this activity suggests that this may be so. As I discuss below, by August 2013 Mr Holmes was sufficiently concerned about the genuineness of the STC operation that he resigned.

226 It may be that Mr Foster alone, or with the assistance of others, thus created the illusion of “trading” online.

227 Either way, the existence and function of the Members STC Website reveals the extraordinary sophistication of the scheme that Mr Foster devised.

### ***Mr de Klerk’s possible acquisition of the “rights” to STC South Africa***

228 Later in the conversation to which I have referred at [205] Mr de Klerk had this conversation with “Mark Hughes”:

“Hughes: Do you know a prominent businessman in South Africa, Nico Botha?”

de Klerk: No.

Hughes: He is flying to London to STC head office to meet with Robin Howard to buy the licence for STC in South Africa. How do you think this business would go in South Africa?

de Klerk: Gambling is huge in South Africa, this would go very well. Is there any way I can get involved?

Hughes: As far as I am concerned I know you are an honourable man and have proven yourself and I think you would be a better person to represent STC in South Africa, we don't know Nico Botha.

de Klerk: I am interested but tell me what is involved?

Hughes: I will speak to Robin Howard and get back to you."

229 Although Mr de Klerk referred to "Robin Howard", it is likely that "Mark Hughes" referred to "Howard Robin". "Howard Robin" was in fact Robin Reichelt, an associate of Mr Foster.

230 "Mark Hughes's" reference to "Nico Botha" purchasing "the licence for STC in South Africa" ultimately led to Mr de Klerk paying US\$1 million to Bella Development Limited to purchase "the licence for STC in South Africa". There was no such licence and Mr de Klerk lost his US\$1 million. That loss is not the subject of these proceedings. As a Group Member, Mr de Klerk seeks to recover the loans he made to STC pursuant to the loan agreements to which I have referred.

231 On 6 March 2013 "Howard Robin" sent an email to Mr de Klerk stating:

"I have spoken to Mark Hughes in Australia about your interest in doing a joint venture in South Africa to introduce the Sports Trading Club.

... To establish operations in South Africa would normally require a licence fee of \$5 million, however we are so confident that the true profits are to be found in trading, that we would reduce this fee to a level that covers our establishment costs.

Therefore we would require a licence fee of only US\$1 million, and a further US\$1 million to be paid into a trading fund...

Our belief is that the \$1 million in the trading fund would return your \$1 million licence fee in a short period of time.

That's it. If that works for you then we can do a joint venture.

It may sound simple but we have been down this road before, recently in Australia and Vietnam, so we simply know what has to be done and how to do it.

I would ask that Mark Hughes be our liaison and handle negotiations due to the geographic advantage of him being in Australia, if this is of any interest to you.”

232 Shortly thereafter “Mark Hughes” telephoned Mr de Klerk and invited him to come to Sydney to discuss the South African “investment”.

### **Meeting at STC Market Street office on 13 March 2013**

233 Mr de Klerk travelled from Perth to Sydney and, on 13 March 2013, went to STC’s office in Market Street. He was expecting to meet “Mark Hughes” to discuss the proposed South African investment.

234 By now, Mr de Klerk had paid \$150,000 of the \$250,000 referred to in the five loan agreements he signed on 17 February 2013.

235 In his first affidavit Mr de Klerk said:

“On or about 13 March 2013, I went to meet the STC people in Sydney. I arrived at level 26/44 Market Street, Sydney around midday and spoke to a Kevin Joseph for a while about the South African deal and then I spoke to a Leigh Johnson, who said she was a legal partner in STC, for a minute or two.”

236 “Kevin Joseph” was an associate of Mr Foster in fact named Mr Kevin McMullen. Mr McMullen was a respondent in the *Chaste Corporation* case: *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)* [2013] FCA 984 at [43(pp)(iv)]. Why Mr McMullen passed himself off as “Kevin Joseph” is not explained in the evidence.

237 In his second affidavit Mr de Klerk said:

“On 13 March 2013 I attended the STC office. I was met by a man who introduced himself to me as Kevin Joseph. He took me to a small boardroom to wait for the others. A short time later Leigh Johnson arrived. We had a conversation to the following effect:

Johnson: I'm Leigh Johnson, I'm the legal partner of the Sports Trading Club.

de Klerk: I'm Pieter de Klerk. Where are Anne Larter and Mark Hughes?

Johnson: One of Anne's family is sick and she can't be here. And Mark is in Melbourne, he's not expected to return today, so he can't attend today's meeting. I'm sorry but we'll have to reschedule it for another day."

238 In cross-examination, Mr de Klerk accepted that he could not recall that Ms Johnson had said, in terms, that she was "the legal partner" of STC. Rather, Mr de Klerk recalled, she said something to the effect that she was in charge of legal affairs.

239 On Mr de Klerk's account of it, Ms Johnson had no difficulty responding to Mr de Klerk's enquiry as to where "Mark Hughes" was. She explained that "Mark Hughes" was in Melbourne.

240 Mr de Klerk said that later on 13 March 2013 either "Mark Hughes" or "Kevin Joseph" telephoned him and arranged for a meeting at Catalina restaurant at Rose Bay the following day.

### **Meeting at the Catalina restaurant on 14 March 2013**

241 The following day, 14 March 2013, Mr de Klerk met Ms Johnson and "Kevin Joseph" at the Catalina restaurant in Rose Bay.

242 Ms Johnson agreed that she attended the meeting at Mr Foster's request. She gave this evidence in cross-examination:

"Q. Now, Mr Foster around [sic: arranged] for you to meet Mr de Klerk at that point in time in March, did he not?

A. Yes. I thought that there was going to be two people from the STC office and myself and Anne [Larter] having lunch with Pieter de Klerk."

243 Ms Johnson's acceptance that it was Mr Foster who arranged for Ms Johnson to attend this meeting is significant. It must have indicated to her that Mr Foster was involved at a sufficiently high level at STC to be arranging

meetings with potential investors. This is inconsistent with Ms Johnson's stated understanding that Mr Foster's role was merely to set up the website and deal with "similar technological aspects".

244 Further, Ms Johnson's evidence was that she did not know Mr Foster was using the pseudonym "Mark Hughes". If that is the true position, and as Mr Foster was pretending to be "Mark Hughes" in his dealings with Mr de Klerk, Mr Foster was running a significant risk that his true identity might be revealed by Ms Johnson. That suggests (although I accept at this stage not conclusively) that Mr Foster was confident there would be no problem because, contrary to Ms Johnson's denial, she did know Mr Foster was passing himself off as "Mark Hughes".

245 Ms Johnson seemed to accept this was so. Thus, she gave this evidence:

Q. You knew that, at all times, that Mr Foster was supposed to attend that meeting, but would, as Mark Hughes?

A. If Mr Foster had attended that meeting, there's no way I would have addressed him as any other name than his name and that's probably why he didn't come. (Emphasis added.)

### ***Mr de Klerk's affidavit accounts of the meeting***

246 In his first affidavit Mr de Klerk gave this account of what happened at the restaurant:

"On or about 14 March 2013 at 12.30pm, I went to Catalina Restaurant at Rose Bay and met with Kevin Joseph and Leigh Johnson. They made an excuse for Mark Hughes not being there as he was stuck in Melbourne. We had lunch and discussed personal matters. I returned to Perth the next day."

247 In his second affidavit Mr de Klerk gave a more detailed account of what happened as follows:

"7. The following day 14 March 2013 I went directly to Catalina restaurant. I did not meet Leigh [Johnson] or Kevin ["Joseph"] at the STC office. We did not travel together to [Catalina]. I took a bus from my hotel in Kings Cross to Rose Bay. Kevin sent me a text message at 7.38am that morning giving me the address of [Catalina]. ...

8. When I arrived, Kevin was already there and Leigh entered a few minutes later. We had a conversation to the following effect:

Joseph: I'm sorry, but Mark can't be here today either.

de Klerk: I was expecting to meet him. I very much want to meet Mark and speak with him.

Johnson: He's stuck in Melbourne, he's negotiating with the University to buy a program that will help STC to trade, to work out games' results more accurately.

de Klerk: What about Anne Larter?

Johnson: Her family member is still sick and Anne can't attend. Anne is my best friend, if she could attend she would.

...

10. During lunch Leigh and I discussed various aspects of the STC business. Among the many matters we discussed we had a conversation to the following effect:

De Klerk: How long has the Sports Trading Club been trading in London?

Johnson: Six years. Anne and I have just acquired the license in Australia.

De Klerk: How long have you known Howard Robin?

Johnson: Anne Larter has more to do with him. But I have met Howard on a few occasions and I've had lunch with him, he's a lovely man.

De Klerk: I still want to meet Anne and Mark and I want to physically visit your trading floor.

Johnson: That's not a problem. It can be arranged. But Mark is in charge of the trading team, I'll speak with Mark and he will arrange the visit for you."

### ***Apologies for "Mark Hughes's" absence***

248 Ms Johnson's evidence is that she did not know "Mark Hughes". She said in cross-examination:

"He [Mr de Klerk] asked me about Mark Hughes. I said, 'I don't know Mark Hughes. He must be someone Anne [Larter] knows'."

249 However, according to Mr de Klerk's affidavit, on both 13 March 2013, at the Market Street office, and again on 14 March 2013, at Catalina, Ms Johnson apologised for "Mark's" absence because (on 13 March 2013) he was in Melbourne and "not expected to return today" and (on 14 March 2013) was still "stuck in Melbourne...negotiating with the University to buy a program that will help STC to trade, to work out games' results more accurately".

250 In evidence-in-chief, Mr de Klerk said:

"So what happened was we sat down, and obviously my first question was, you know, the other parties. She said that she just want[ed] to apologise for Mr Mark Hughes, he's still in Melbourne getting information on footy history and he would not be able to attend. She said Mark Hughes won't be able to attend our meeting today."

251 Mr Argy did not challenge this evidence. Indeed, the following exchange occurred in cross-examination:

"Q. I think you told his Honour, if my note is correct, that Ms Johnson told you that Mr Hughes was in Melbourne looking into footy sports?"

A. No, he was actually buying some history, or negotiating a history of so many years of footy results, et cetera. If I remember correctly, at the university. I don't know what part of the university.

Q. Thank you. Then you say you had lunch and discussed personal matters?"

A. That's correct".

252 Later in the cross-examination, Mr de Klerk said that it was on 13 March 2013, at Market Street, rather than on 14 March 2013 at Catalina, that Ms Johnson said that the reason "Mark Hughes" was absent was because he was "getting information on footy history".

253 The following exchange followed:

"ARGY

Q. It's very important so I just want to be very clear. The conversation about, 'I just want to apologise for Mark Hughes, he's still in Melbourne getting information on footy history and won't be able to attend' am I likely [sic: right] in saying that that occurred at Catalina?"

A. No, it occurred in - at the first meeting, the day before.

Q. So that --

A. The second - second time it was apologised, Mrs Leigh Johnson apologised again that he wasn't there because he had extended [his] stay, he couldn't finish what he did the day before. Or anticipated to be finishing and he couldn't or didn't and therefore it was important fact.

Q. I just want to be very clear, the statement that, 'We sat down' you say related to 13 March 2013 or 14 March 2013?

A. 13 March."

254 Mr Argy's point was, evidently, to establish an inconsistency in Mr de Klerk's evidence as to *when* Ms Johnson gave the explanation for "Mark Hughes's" absence; rather than to challenge that Ms Johnson had apologised for the absence of "Mark Hughes".

255 Mr Argy submitted that this inconsistency pointed to the unreliability of Mr de Klerk's evidence. I will return to the credibility of Mr de Klerk's evidence as well as that of Ms Johnson later in these reasons.

256 However, I record at this stage that (for reasons I explain in detail below) I accept Mr de Klerk as a reliable witness and do not accept Ms Johnson was a reliable witness. Where Ms Johnson gives evidence that contradicts Mr de Klerk's evidence, I have no hesitation in preferring Mr de Klerk's evidence. There are many instances where there is a conflict between the evidence of these two witnesses. I will from this point simply expose those conflicts without repeatedly stating my preference for the evidence of Mr de Klerk. Resolution of the conflicts in testimony turns on my conclusions as to their respective credit. Those conclusions appear below at [708] to [730].

### **Statements about "Mark's" role**

257 Mr de Klerk gave evidence that he asked Ms Johnson questions about "Mark Hughes". In re-examination he gave this evidence:

"A. ... Secondly, I've asked her about Mark Hughes.

Q. What did you ask?

A. I've asked her how does Mark Hughes – how does he – how did he come about – because I was curious to find out at that time and point of my investigation for my personal curiosity, you know, who was the actual brain behind the whole thing, because if that – in my view, if that person is like resigning or whatever, then my investment would be in the risk.

Q. And what was the answer to your question?

A. Answer was that he was the – she gave – put me through how they've met, how she met him.

Q. What did she say, just try to remember?

A. She said that Mark Hughes was their trading or head of trading of the trading part or the – the trading part of the STC business, so he's totally running or that's a division and the marketing side is under his portfolio if I can put it that way.

Q. And you mentioned how they met, was there an answer to that question?

A. Yes, apparently it was like she met Mark via through one of the like private functions, matters or with Anne Larter and then they started speaking about you know changing thoughts and stuff that had come about that he told them he's got this idea.

Q. Can you remember the exact question and words you used when you asked that question?

A. I've asked, how did she get involved with Mark Hughes.”

258 Further, according to Mr de Klerk's affidavit, Ms Johnson told him that “Mark” was in charge of the “trading team” and that she would speak to “Mark” to arrange a visit to the “trading room”.

259 Mr de Klerk gave similar evidence in cross-examination:

“Q. Can you recall anything else that you discussed?

A. Yeah, we also have discussed – I've actually – she was the one where I've asked her for the - to actually discuss before to view the control room, and then only I found out that it was not in Sydney where I thought it was, in the head office; it was actually mentioned to me that it was in [the] Gold Coast. She didn't give me --

Q. Ms Johnson told you that?

A. That's correct. But she said to me that Mark - she will arrange that Mark will ring me and arrange that specific meeting, or the visit of that.”

260 On 15 March 2013, Ms Johnson sent Mr de Klerk a text message:

“Sorry [Pieter] I’ve been in court all day. I’ll get someone to ring you. Regards Leigh”.

261 Mr de Klerk replied:

“Thanks Leigh, Mark did contact me this afternoon and is helping me with the matter!”

262 Mr Dixon asked Ms Johnson about her text message:

“Q. Now, when you said, ‘I’ll get someone to ring you’ --

A. Yeah.

Q. -- who did you get to ring him?

A. I can’t recall. I can’t recall if I sent an email. I guess if I don’t have it, I didn’t. I must have rung the office and asked someone to call him.

Q. The person you rang was Mr Foster, Ms Johnson?

A. I don’t recall, but not necessarily. It could have been either Tom, Kevin or Peter Foster.

Q. When you say not necessarily, you accept that you might well have rung Mr Foster in response to this request that Mr de Klerk left on your phone?

A. Very possibly.”

263 In this evidence, Ms Johnson accepted that she had “very possibly” contacted Mr Foster in relation to Mr de Klerk’s request to visit the “trading room”. She asserted that she may instead have spoken to “Tom” or “Kevin”.

264 But Ms Johnson knew from Mr de Klerk’s reply to her text message that “Mark”, and not “Tom, Kevin or Peter Foster”, had made contact with Mr de Klerk about this matter. The fact that Mr de Klerk referred simply to “Mark” without evidently eliciting any query from Ms Johnson is consistent with Mr de Klerk’s evidence that he and Ms Johnson had earlier discussed that she would arrange for “Mark” to call; and impossible to reconcile with Ms Johnson’s evidence that she did not know “Mark Hughes” and thought he “must be someone Anne knows” (see [248] above).

265 And the fact that Ms Johnson knew from Mr de Klerk's text message that "Mark" had contacted him suggests (albeit again not conclusively at this stage) that Ms Johnson knew that "Mark" and Mr Foster were one and the same. Later evidence puts the matter beyond doubt.

266 Later, Mr de Klerk travelled to the Gold Coast to see the "trading room". I return to this below.

***"Personal matters"***

267 In his first affidavit, Mr de Klerk said no more about the discussion at Catalina than that it was about "personal matters".

268 Mr Argy asked what "personal matters" were discussed and with whom. Mr de Klerk then elaborated on his discussions with Ms Johnson.

269 In his written submissions, Mr Argy criticised Mr de Klerk for offering this evidence.

270 Thus Mr Argy submitted:

"The conversation at the Catalina lunch on 14 March 2013 has assumed a pivotal role in the Plaintiff's case whereas it featured not at all in [Mr] de Klerk's first affidavit, being passed over as a discussion of 'personal matters' with the same perspective in initial cross examination. Indeed when he was asked to reveal the personal matters discussed the Court's initial impression was to enquire of Mr Argy 'of what possible relevance could that be?'. The personal matters discussed were [Ms Johnson's] and Mr de Klerk's common interest in charitable work and their shared Christian beliefs. That corroboration was all that the cross examination was expected to elicit. Mr Argy did not anticipate the wide excursus by Mr de Klerk in which he extensively elaborated his first affidavit's and police statement's explanation of the Catalina lunch to the point of contradicting those two earlier sworn documents of his."

271 This criticism of Mr de Klerk is unfair. It was Mr Argy's cross-examination that opened that question up. Those questions also led Mr de Klerk to give evidence about having discussed the Proposal at the Catalina meeting.

272 The following exchange took place. It shows that it was Mr Argy's insistence on seeking details of the "personal matters discussed", and Mr Argy's explanation as to why that question could be relevant, that led to the evidence of which Mr Argy now complains:

"Q. I think you told his Honour, if my note is correct, that Ms Johnson told you that Mr Hughes was in Melbourne looking into footy sports?

A. No, he was actually buying some history, or negotiating a history of so many years of footy results, et cetera. If I remember correctly, at the university. I don't know what part of the university.

Q. Thank you. Then you say you had lunch and discussed personal matters?

A. That's correct.

Q. Can you tell us what personal matters you discussed and with whom?

HIS HONOUR: Mr Argy, of what possible relevance could that be?

ARGY: Well, your Honour, I'm trying to understand whether it related to something to do with the Sports Trading Club partnership or whether Mr de Klerk regards the South African matters as personal matters or some third category of topic.

HIS HONOUR

Q. Did you discuss the South African investment or the investment in the partnership?

A. Yes.

Q. As personal matters?

A. Look, I mean, what I meant by personal matter, we start off – as I said, not knowing her well, we broke the ice, so what was my interest, what made me invest in STC, et cetera, et cetera.

HIS HONOUR: Mr Argy, I'm sorry, you go ahead. I withdraw my intervention.

ARGY: I appreciate that your Honour hasn't seen the method in my madness in some of what I'm doing, and I wish I could at some stage --

HIS HONOUR: Just proceed and ask the next question.

ARGY: Thank you, your Honour.

Q. Yes, can you outline to his Honour what the topics discussed were?

HIS HONOUR

Q. What was said? Can you remember what was said?

ARGY

Q. What was said and by whom?

A. Okay. First of all it came – when she asked me, obviously I said the main reason for STC was because of our involvement in charity in South Africa, because the profits I wanted to introduce in some charity work in South Africa. She obviously had similar – she worked charity – or had a heart for charity. So after that we went straight to business, we discussed the following topics of the South African trading, or the South African inquiry of the South African tradeship. We also discussed parts of the proposal that was given to me by Mark Hughes, that actually was meant for him, but because he wasn't there I've actually asked her the relevant questions on that.

HIS HONOUR

Q. So you asked questions of Ms Johnson about what was said in the proposal?

A. That's correct, what they meant, like, on certain aspects of the proposal.

Q. Did you have a copy of the proposal there with you?

A. I haven't had, but I had a couple of notes that I've made previous, you know, in the week before or whatever. That was actually meant for Mr Hughes, but because he wasn't there I felt – I mean, I have to propose to her.

Q. And you asked Ms Johnson questions about the proposal?

A. Yes, I did.

Q. About what was in the proposal?

A. Some of the stuff in the proposal, yeah.

Q. She gave you answers?

A. Yes, she did.

Q. Did she suggest to you that she didn't know anything about the proposal?

A. No, not at all.

Q. Did she say to you that she had never seen the proposal?

A. No, definitely not. She acted like she knew what was in the proposal but was not – it was more for Mr Hughes – for John Hughes, you know, on that specific spots, or specific questions I had.

Q. Mark Hughes, you mean?

A. Mark Hughes, that's correct.

Q. You said John Hughes. Mark Hughes?

A. Mark Hughes, sorry.”

### ***The Proposal***

273 The answers that Mr de Klerk gave, particularly to the questions I asked, suggested to me that Mr de Klerk was saying that he discussed the Proposal with Ms Johnson.

274 Mr Argy submitted that that was not clear, and that Mr de Klerk may have been referring to a “small p” proposal concerning the proposed South African investment.

275 However, evidence that Mr de Klerk later gave made clear that Mr de Klerk was referring to the Proposal; and that Mr Argy as the cross-examiner understood this.

276 Thus the following exchange took place:

“Q. I will put to you again, Mr de Klerk, that the purpose of the Catalina lunch was the South African deal?

A. Part of it, yes.

Q. You had already committed your \$250,000 to the Australian partnership?

A. I did.

Q. And there was no reason for you to have a discussion with Ms Johnson about the proposal?

A. There was.

Q. I think you said yesterday that you had the questions on a piece of paper?

A. That's correct. I had my own notes that was taken off the proposal.”

277 It is clear from this passage that, although the transcript records Mr Argy asking about the “proposal”, his question was directed to the Proposal. It is also clear that Mr de Klerk's response was directed to the Proposal.

278 That was confirmed in re-examination when Mr de Klerk gave this evidence:

“...I’ve asked [Ms Johnson] about the surety, you know who is responsible sureties, et cetera on the money part of it of what I’ve invested.

Q. What was the question exactly if you can --

A. The question was, who, they talk about the money is secure and I wanted to know how they --

Q. When you say they talk about, what do you mean by that?

A. In the actually [sic] proposal there was wording in the way of that the investment or the loan to STC is secured by the company. So my question was, I wanted to know how it was secured and she explained to me about the 20 million cost, 10 million they've - she and Larter put up and then that's why the 10 million balance would be needed from outside investors like us a limited amount of people that would have the benefit of borrowing them the money would give you 50% profit, until the end of the term the 10 million is full, then they can withdraw it any time. She gave me specific information of that and also that the surety, the 10 million that they've paid would be held as security on the 10 million they borrowed. So that was the next thing.”

And:

“Q. ... In answer to one of the questions put to you if you recall this, you said you took the notes there because you needed to get clarification on some areas of the proposal?

A. Exactly, what happened was the - my main aim was to clarify that that was what in the proposal was satisfied to my questions on to legitimate the proposal.

Q. Do you recall the question or questions that you asked in respect of the proposal itself?

A. Yes, I was asking for the proposal was if she was - if she was not aware of the proposal but if she - I assumed that she knew everything in it, it's just like I was clarifying that the proposal was - there was no rules outside the proposal because there was some areas that I thought of.

Q. Do you remember a question you asked in that respect, the words that you used?

A. Unfortunately I --

Q. Did you use the word proposal for example, when you spoke?

A. Yes, I did. Although I did not take the proposal out and show it, because I had the notes, because I assumed as a major partner of the she would know exactly and being the legal or the legal I would say the advisor, but partner of the company, that she would exactly know what is actually in the proposal.”

- 279 Mr de Klerk was thus clear that he had discussed the Proposal with Ms Johnson, evidently in some detail.
- 280 This is significant because, as I have mentioned, Ms Johnson denied ever seeing the Proposal.
- 281 Mr de Klerk said that he had reasons for discussing the Proposal with Ms Johnson at the meeting. In particular, he said he wanted to discuss the Proposal to confirm “who is responsible for what” given that “nobody was present”. Mr de Klerk said he felt pressure to “find a way to...go ahead” and “was trying to determine how solid this company was”; and that Ms Johnson answered his questions to his “satisfaction”.

### ***Questions about Ms Larter***

- 282 In re-examination Mr Dixon asked Mr de Klerk whether he asked “any other questions”. Mr de Klerk said that Ms Johnson said Ms Larter was:
- “...a sleeping partner but in a capacity she's not day to day basis, but she does her part in the decision making in the running of the company, although she will not be present like every day office type of thing, because of her family and background, you know the hardships or whatever.”
- 283 Mr Argy submitted that it was most unlikely that Ms Johnson would have referred to Ms Larter as “sleeping partner”. Mr Argy submitted that Ms Johnson knew Ms Larter was a “General Partner” and saw herself in contrast as a “Limited Partner”. Mr Argy submitted that Mr de Klerk’s assertion that Ms Johnson described Ms Larter as a “sleeping partner” reflected on his reliability and credit.
- 284 It may be that Ms Johnson did not use those words to describe Ms Larter’s then role. However it is likely that Ms Johnson said something to the effect that Ms Larter was not then fully engaged in the STC business, as that was the case. In July 2011 Ms Larter’s daughter had been killed by her then boyfriend. At the time of the Catalina lunch he was about to stand trial for her murder. The trial started in early April 2013. Ms Johnson said that Ms Larter

attended most if not all days of the trial and that she, Ms Johnson, regularly accompanied her to provide support.

285 In those circumstances, it is understandable that Mr de Klerk had the impression that Ms Larter was a “sleeping partner”.

### ***“Howard Robin”***

286 Mr de Klerk said he asked Ms Johnson about “Robin Howard” [sic: “Howard Robin”]. “Howard Robin” was, as I have mentioned, in fact Robin Reichelt.

287 Mr de Klerk said that Ms Johnson said that “she met Howard Robin a couple of times and had lunch with him and he was a really lovely man”.

288 In cross-examination Mr de Klerk was adamant that Ms Johnson had said this. Mr de Klerk presented as having a detailed recollection of these matters. However the evidence does not enable me to come to any conclusion as to whether Ms Johnson knew that “Howard Robin” was really Robin Reichelt.

### ***Prof Snyder and the “savants”***

289 Mr de Klerk also said that he asked about the “savants” referred to in the Proposal. Ms Johnson said that Prof Snyder, who was allegedly running the “savants program” was “one of Mark’s golf friends”.

290 Mr de Klerk gave this evidence in re-examination:

“Q. Can you remember the words that she used? Did she mention Mr [Snyder] and Mark?”

A. Yes, and she said that Mark and Mr [Snyder] has got some arrangement, or some – not arrangement, agreement – that they would work together to what do you call it – to enhance the profitability and the sports trading, trading part, because of their supernatural ways to recall stuff and, you know, remembering stuff and put stuff together; that him and Mark got on some agreement with STC. Now, at that time I've actually asked her, ‘Is he employed by STC, Mr [Snyder],’ and she said, ‘No, he’s like a’ – not a subcontractor, but because that’s his university – he’s employed by a university and that he is, like, working under Mark Hughes as a subcontractor. I won’t say she used the word subcontractor, but as an informant or whatever on the savants.”

291 Again, Mr de Klerk presented as having a detailed recollection of these matters. The answer was given in re-examination. But Mr Argy's cross-examination had opened the subject up. And Mr Argy did not object to the question posed in re-examination.

**Mr de Klerk's final tranche - clearing up "grey areas"**

292 Mr de Klerk paid \$100,000, the final tranche of the \$250,000, on 21 March 2013 (a week after the Catalina lunch).

293 In his first affidavit Mr de Klerk said:

"My decision to invest in any form with STC was based solely on information I was given by Mark Hughes. I believed Mark Hughes when he told me that my original investment with STC was for the purposes of trading sports bets, as discussed with Mark Hughes, and from all the material I read including the Proposal."

294 Initially, in cross-examination, Mr de Klerk agreed that payment of the final tranche of \$100,000 on 21 March 2013 was "simply honouring the previous commitment to put in that final \$100,000". He gave this evidence:

"Q. This is not the result of any decision made, for example, after you met Ms Johnson?

A. No, no, that was a decision made prior."

295 For some reason, Mr Argy later returned to the subject and the following occurred:

"Q. Now, am I right in saying at that stage you had already committed your \$250,000 in loans, so that was now in the past?

A. That's correct.

Q. And that wasn't anticipated to be discussed on 13 March, was it?

A. No.

Q. [Mr Dixon] says that's not correct. I will be clear. When I say committed, you hadn't paid the final tranche, but you had signed the loan agreements committing you to pay them, so that by 13 March you owed the full 250 even though you only paid the first 150; is that fair?

A. That's correct. But I hold back on 100,000 for specific reasons”.

296 Mr Dixon took the last answer up in re-examination and asked “what considerations” Mr de Klerk took into account when making the final payment of \$100,000.

297 Mr de Klerk replied by saying that he saw “a lot of grey areas in the proposal” and that:

“A. ... Now, that reason was to get myself 100% because of that grey area. My philosophy at that time and point was I was forced to enter and pay moneys because Mark Hughes was putting pressure on me. First of all, he said that – and even Leigh said to me that there's only a limited amount of spaces available. So that was actually like a reserving of two more spaces that would have not been available at the time when I – or by the time we met in Catalina. So my philosophy, or my thought was, I can't lose anything, and I did bind myself by law – by verbally to do that. Even if I wasn't satisfied and I was, for instance, forced by law to pay it, I would have paid it, and I would have had a loss. But for me it was like I had to cut my losses if something was not crucial - I mean, right.

Q. Your evidence was that you held back the \$100,000 for specific reasons. Did those reasons still exist after your lunch [at Catalina]?

A. No, definitely not.

Q. And why is that?

A. Because, as I said again, that Mrs Leigh Johnson filled in all the grey areas – yes, that's it.”

298 Mr Argy submitted that the contrast between the evidence given by Mr de Klerk in response to Mr Argy's initial questions (to the effect that he had decided prior to the Catalina meeting to make the final \$100,000) and his later evidence (to the effect that he was withholding the last tranche pending clarification of matters in the Proposal) reflected badly on Mr de Klerk's credit.

299 However, Mr de Klerk only gave the further evidence because Mr Argy, having obtained the answers to which I have referred at [294], returned to the subject and asked questions which led Mr de Klerk to say that there were “specific reasons” for him holding back the final payment. As Mr Argy did not ask what those “specific reasons” were, Mr Dixon clarified the matter in re-examination. I accept that evidence.

### **Further events in March 2013**

300 On 20 March 2013 “Howard Robin” sent an email from “STC London” to Mr de Klerk saying:

“I am pleased to hear from Mark Hughes and Leigh Johnson that [your] meeting in Sydney went well and that in subsequent discussions you have had by telephone from Perth there appears to be the basis for us to move forward with some confidence [with the proposed investment in the purported STC enterprise in South Africa]...

I would invite you to continue negotiation and your discussions with Mark Hughes who has my total confidence in this matter.”

301 Although “Howard Robin” asserted in this email that he had heard from Ms Johnson about the “meeting in Sydney” (presumably a reference to the Catalina meeting) I am not prepared to find, based only on the email, that he had in fact had any communication with Ms Johnson about this.

302 Mr de Klerk said he continued to talk with “Mark Hughes” on a daily basis about “the South African deal”.

303 In the meantime, on 21 March 2013, as I have mentioned, Mr de Klerk arranged to transfer the balance of the \$250,000, the subject of the five loan agreements he executed on 17 February 2013.

### **Mr de Klerk views the “trading room”**

304 Following the text message exchange with Ms Johnson on 15 March 2013, and the telephone call from “Mark”, to which I have referred at [261] to [265], Mr de Klerk travelled to the Gold Coast to “see the trading in real time”. This occurred several weeks after the 14 March 2013 Catalina lunch. Mr de Klerk said that “Mark Hughes” told him there would be some delay “because they’re moving [the “trading room” to] the Gold Coast.

305 He met “Kevin Joseph” (really Kevin McMullen: see [236]) and the person that he understood to be “Mark Hughes’s head trader”, Mr Richard Holmes.

306 Mr de Klerk was shown a “huge room” in an apartment building. He said there were “about six or seven monitors” showing what appeared to be actual live sporting events including “football, golf, basketball, tennis”.

307 Mr de Klerk said Mr Holmes “was trading while I was sitting there” and that he asked Mr Holmes “how did he get access to the money” and questions about “all the technical stuff that I wanted to know”.

308 Mr de Klerk gave detailed evidence about what he saw. For example, he said:

“[Mr Holmes] actually showed me [a cricket game] and he walked me through trade where he would then transfer the money from STC account, or from his trading account, ...to the betting company, and he will give them the information they needed...on what limits and scores, et cetera – and they will log it in, and then when we came back [after dinner] and then he...the betting amount either less or more, depends on how the game actually continues, and then he changed and then things automatically – or my mobile phone immediately indicated that – what he had done – so I was happy with that.”

309 Mr de Klerk said that when he returned to his hotel that night he could see, using his mobile phone what “profits” had been “paid over”.

310 Mr de Klerk gave this evidence in answer to questions from me:

“Q. You told me that on these monitors were live sporting events, but when he was showing you how it worked vis a vis this cricket match, was there something on the monitor beyond the cricket match itself; you know, all the trades, were they appearing on the monitor?”

A. Just that when he – when he actually paid or released funds, they will acknowledge it. So there was some, I would say, acknowledgement of the funds transferred to that betting agency they were using.

Q. You could see that on one of those screens?

A. I could see it on his computer, yeah. And then, of course, sorry, one thing I would say, in minutes that would reflect onto my account, on my monitor, or at that time my mobile phone.”

311 Mr de Klerk had said that he was able to follow trading being made on his behalf “minute to minute” “on the TV screen or your phone”.

312 Mr Dixon submitted that I should infer the monitors set up in Mr Holmes's apartment was part of the elaborate ruse, and that the apartment had been set up to give the facade of legitimacy when in fact none existed.

313 As I had said earlier, it is hard to know what to make of what Mr de Klerk saw. It may be that some kind of trading was being effected to give investors such as Mr de Klerk comfort that the STC business was bona fide. The fact that Mr Holmes, about whom no suggestion of dishonesty is made, was involved in the way Mr de Klerk described suggests this may be so.

314 The evidence does not enable me to come to any conclusion about this.

#### **Pikes & Verekers' letter of 5 April 2013**

315 On 5 April 2013 Mr Robert Tassell, a partner of Pikes & Verekers Lawyers, wrote to Mr Neil Jenman and Mr Neville Baker (who I was informed were private investigators) as follows:

"We act for Ms Leigh Johnson and Ms Anne Larter who are in a partnership which is the proprietor of a business known as the 'Sports Trading Club'.

Our clients have provided us with copies of two emails sent to Dr Allan Snyder on 4 April 2013 at 10.06am and 2.13pm respectively, copies of which are attached.

The emails purport to have been sent by [one or both of you].

The Sports Trading Club is a new business in Australia and is particularly vulnerable to damage by injurious falsehoods published about it. Ms Johnson is a solicitor whose professional reputation is of paramount importance to her. Ms Larter is a prominent and experienced businesswoman, whose professional reputation is also of considerable importance to her.

The first email was sent to the email address 'XXX' as well as 'XXX'. Dr Snyder was certainly aware that each of our clients was a partner and proprietor of the Sports Trading Club and it is likely that other recipients of the email at Dr Snyder's Centre were also aware of that fact.

The first email has therefore conveyed imputations grossly defamatory of our clients including that:

- 1 They are attempting to defraud members of the public by emails of an investment scam.

2 They falsely claimed that Dr Snyder was the Scientific Research Director of the Sports Trading Club.

The second email conveys an imputation that our clients are operating the Sports Trading Club as a mere front for the notorious conman Peter Foster.

These are very serious allegations to make about persons of our clients' standing and are calculated to undermine their relationship with Dr Snyder and their business.

We are instructed that the imputations are quite without foundation.

In the circumstances our clients seek forthwith an unreserved apology and retraction to be supplied to them in writing under your hand and forwarded by you to the email address to which the first and second email were sent.

...

Please understand that our clients' professional reputations are very important to them and the presently successful business they are operating may have already suffered loss and damage as a result of the publication of your emails and they have instructed us that they will certainly commence proceedings if there are any further defamatory publications by you."

316 The emails sent by Mr Jenman and Mr Baker to Prof Snyder are not in evidence. Evidently they asserted that the STC venture was a dishonest scheme under the control of Mr Foster.

317 The letter purported to have been sent on the instructions of both Ms Johnson and Ms Larter. Ms Johnson agreed that she was with Ms Larter when instructions were given to Mr Tassell but said it was Ms Larter, and not her, that gave the instructions contained in that letter.

318 Ms Johnson also accepted that she was present when instructions were given to Mr Tassell to write this letter and that she saw it once it was written. Ms Johnson gave the following evidence, initially in response to questions from me:

"HIS HONOUR

Q. Is your evidence that you - that Ms Larter gave instructions to Pikes & Verekers to the effect that is set forth in this letter in a phone call that you were listening to. Is that what you said?

A. Yes, your Honour. I put her on the phone. I rang her [sic] and put her on the phone.

Q. Did you take any part in giving these instructions to the solicitors?

A. I went and saw the solicitors your Honour, but they insisted on speaking to Anne Larter because she was the general partner.

Q. So you gave Mr [Tassell] the instructions in this letter, did you?

A. No, she did.

Q. I thought you said you went to see the solicitor?

A. Your Honour, I went and saw them and they didn't want to take instructions from me. They took - they wanted to speak to her because she was the general partner.

DIXON: If I could your Honour, unless your Honour had other questions.

Q. Just on that, this is a letter written on behalf of both you and Ms Larter, correct?

A. Yes.

Q. And the reason why the lawyers wanted to speak to Ms Larter was because they wanted to take instructions from both of the people that were making the threats concerning defamation?

A. Probably.

Q. Yes and –

A. But in April – you see, this is right in the beginning of the business and that's right, he wasn't running it or not meant to be.

HIS HONOUR

Q. Did you understand Mr Foster to be a notorious conman as at 5 April 2013?

A. I certainly have – probably aware that people called him that, but I never saw any evidence for it.

Q. Did you give Mr Tassell [instructions] to write [the sentence asserting that the second email conveyed an imputation that Ms Larter and Ms Johnson were operating STC as a 'mere front for the notorious conman Peter Foster']?

A. 'The second email [conveys] an imputation'?

Q. Yes?

A. Well I went and saw the lawyers so – I mean I saw the letter so, I mean, I'm aware of it. I must have been aware of it."

319 Ms Johnson also said that on one occasion she attended on Mr Tassell alone. She gave this evidence:

“I remember the office. I remember the building. I remember finding the building. Anne asked me to go in there and see them because she was off on another trip somewhere. So I really – I did see that letter at some point and I was very uncomfortable with it.”

320 Ms Johnson agreed that she attended Pikes & Verekers in April 2013 to “try to shut down the attempt to make Mr Foster’s involvement public”. Ms Johnson elaborated that “he wasn’t supposed to be involved in it anymore”.

321 Ms Johnson’s evidence was that Ms Larter asked her to attend Pikes & Verekers because Ms Larter stood to lose everything because Mr Foster’s involvement would be exposed. Ms Johnson said that it would “affect her [Ms Larter’s] business” if it “was said that [STC] was [Mr Foster’s] business”.

322 Ms Johnson gave this evidence :

“A. You see...he wasn't meant to be running it. So he wasn't – my understanding was that he was setting stuff up and they're not going to run it. It just...instead of setting stuff up and then stepping away and not doing anything, he seemed to just do more and more and more. But it...was a progressive thing.”

323 Mr Dixon put to Ms Johnson that Ms Larter wanted Ms Johnson to suppress public knowledge of Mr Foster’s involvement at this time. Ms Johnson agreed that Ms Larter “certainly did not want that position to be made public because he wasn’t going to be involved”.

324 Mr Dixon then put to Ms Johnson that she knew “the entire business would collapse” the “second people knew that Mr Foster was involved”. Ms Johnson did not respond directly to that question but, when pressed, accepted that “it would not have been good, I suppose, for the business. It would have jeopardised the funds of anyone who had invested”.

325 Ms Johnson said she recalled that Ms Larter spoke to Mr Tassell and said “this is a fledging business and, you know, this will destroy my business”.

326 Ms Johnson accepted that the instructions were given to Pikes & Verekers to prevent Mr Foster's involvement in STC from being exposed.

327 Ms Johnson appeared also to accept that this was done at Mr Foster's bidding. Ms Johnson gave this evidence:

"Q. Throughout the course of your partnership you did Mr Foster's bidding by keeping his name from the public, including the potential investors?"

A. No. The only point that I did do that was when I first went to Pikes & Verekers and Anne told me, 'Just - he won't be involved with it very soon because somebody else is going to take over doing the postings.' That's what it was always meant to be from the start. He was getting going with the postings and somebody else, who was highly computer literate, would be able to do that." (Emphasis added.)

328 That answer also shows that Ms Johnson knew that by now Mr Foster was not merely setting up the website and attending to technological matters, but was also "getting going with the postings" and "doing the postings".

329 I am satisfied that Ms Johnson either gave Mr Tassell instructions to write the 5 April 2013 letter or did not demur when Ms Larter gave Mr Tassell those instructions.

330 I also find that Ms Johnson acted this way because Mr Foster had asked her (and Ms Larter) to keep his identity secret and because she knew, in any event, that STC's business would not attract investors if Mr Foster's involvement in the business was known.

#### **Further negotiations with Mr de Klerk**

331 During May 2013 Mr de Klerk continued to negotiate with "Mark Hughes" and "Howard Robin" concerning his proposed investment of US\$1 million for the South African "rights" to STC.

332 In early May Mr de Klerk travelled to London and met "Howard Robin" at STC's "offices" in Canary Wharf.

333 On 15 May 2013 “Mark Hughes” sent Mr de Klerk an email to which was attached a document purporting to have been prepared by “Jeremy Ingles”; said to be STC’s “Regulatory Affairs and Compliance Manager”. That document said that “the initial investment to buy the exclusive licence for South Africa is US\$1 million”. It also set out details of the company proposed to be called “The Sports Trading Club South Africa Limited” to be “100% owned by Pieter de Klerk”.

334 That document purported to have been copied to “Howard Robin”, Ms Johnson and “Mark Hughes”.

335 Mr de Klerk said he was sent an email on 20 May 2013 saying that the “profit” he had earned was then \$676,195.

336 At around this time “Mark Hughes” telephoned Mr de Klerk. Mr de Klerk said that during this telephone call “Mark Hughes” “pressured me to come up with \$1 million for the trading part of STC South Africa” and that he and “Mark Hughes” had a conversation to the following effect:

“Mark Hughes: This is D day, if you don’t come up with the balance, you’ll lose your licence fee and it’s over.

de Klerk: I want to use my balance with STC and that I can make up the \$2 million. There is plenty of money in there.

Mark Hughes: It’s ok with me, you have a lot of money available, let me ask Anne Larter, she has the final say.”

337 A few days later Mr de Klerk spoke to “Mark Hughes” as follows:

“de Klerk: I’ve got \$1.3 million available and I want to use my STC profit of around \$700,000 as my contribution to [the investment in STC South Africa]

Mark Hughes: That’s fine with me, we need to get it approved but that will work. We need to meet, I will confirm a date and let you know”.

338 On 28 May 2013 “Mark Hughes” sent Mr de Klerk an email as follows:

"I briefed Howard last night over the latest developments. I mentioned that you [had] said you had \$1.3 M available at the bank now. He asked what your balance was in the Australian account, and when I said \$700,000 approximately, he then put two and two together and assumes that you will be seeking to transfer the \$700,000 in your Australian account over to [the] new venture for South Africa to make up the \$2 million.

That requires Leigh's approval as the loan to the Australian partnership is over three years. Therefore Howard has suggested you and I talk today and I get a better understanding of what it is exactly that you want to achieve so it can be put to Leigh before Thursday's meeting.

A meeting has been scheduled at 10 a.m. on Thursday [30 May 2013] at Level 26, 44 Market Street. In attendance will be Leigh Johnson, Kevin Joseph, you and me. Howard will be available from London by Skype Conference call if required."

339 Although this email refers to the necessity to obtain "Leigh's approval" and to the proposal being "put to Leigh" before the proposed meeting on 30 May 2013, there was no evidence that Ms Johnson knew of any of these matters.

#### ***Mr de Klerk's 30 May 2013 visit to Sydney***

340 On 30 May 2013 Mr de Klerk travelled to Sydney. Based on "Mark Hughes's" 28 May 2013 email, he was expecting to meet Ms Johnson, "Kevin Joseph" (really Kevin McMullen: see [236]) and "Mark Hughes".

341 In her affidavit Ms Johnson said "I was never asked to attend the meeting on Thursday 30 May 2013". Initially, in cross-examination, Ms Johnson maintained that position. She said "no I wasn't asked to go to that at all".

342 However, Mr Dixon drew Ms Johnson's attention to a statement she made in her 10 September 2013 email to Mr Foster and Ms Larter:

"Peter has also lied to me. Peter asked me to pop into the Sydney meeting between Kevin [McMullen] and Pieter de Klerk and Kevin asked me to bring the STC coffee mugs. When I arrived with the mugs I became aware that de Klerk had deposited \$1M with Peter even though Peter had previously told me that de Klerk had not. The exposure of Peter's lie is what caused Peter's abuse of me at the de Klerk meeting...".

343 Having been reminded of that statement Ms Johnson agreed that "it must have been" the case that Mr Foster asked her to attend that meeting.

344 Later Mr Dixon put to Ms Johnson that she knew that Mr Foster was “heavily involved” in persuading Mr de Klerk invest in the South African venture. Ms Johnson responded:

“He did ask me to attend but ‘heavily involved’ – I mean, I knew that he was organising the sale of the South African rights because he told me”.

345 Although Ms Johnson could not say whether she knew that Mr Foster was “heavily involved” in the South African negotiation, she had no difficulty accepting, indeed asserting, that Mr Foster “did ask me to attend” the 30 May 2013 meeting.

346 Mr Foster must have expected that Ms Johnson would be present at the meeting. Only two days earlier, on 28 May 2013 he, as “Mark Hughes”, had told Mr de Klerk that Ms Johnson would be present. Mr Foster knew, of course, that he had been passing himself off to Mr de Klerk as “Mark Hughes”. As he expected Ms Johnson to be present, he must have had some reason to be confident that Ms Johnson would not call him “Peter Foster” or question any reference to him as “Mark” or “Mark Hughes” by Mr de Klerk. An obvious reason why Mr Foster would have no concerns about such a problem arising is that Ms Johnson knew Mr Foster was calling himself “Mark Hughes” and that Mr Foster knew that Ms Johnson knew that.

347 Mr de Klerk said that when he arrived at the Market Street STC office he was greeted by “Kevin Joseph” and that “Kevin Joseph” introduced him to “Tom Nolan”.

348 “Tom Nolan” was in fact Peter Nolan. His role at STC appears to have been as “National Sales Assistant”. Why Mr Nolan called himself “Tom” rather than “Peter” was not revealed on the evidence, although there is a suggestion that his full name was “Peter Thomas Nolan”.

349 Mr de Klerk said that “Kevin Joseph” told him “Tom Nolan” would “help [Mr de Klerk] set up the South African operation. He will help set up the marketing

and employee staff and get it all up and running. He has worked in South Africa before so he understands business there”.

350 Mr de Klerk asked “[w]here is Mark Hughes?”, and “Kevin Joseph” replied:

“He can’t make it today. Mark had to rush off to Hong Kong, but we can talk to him via Skype”.

351 Mr de Klerk was then taken to a conference room where he met Ms Johnson.

352 Ms Johnson disputed this. In her affidavit she said “I was not present at this meeting except for popping into the room for 2-3 minutes”.

353 In cross-examination Mr de Klerk said:

“First of all it was greetings and pep talk, and then [Ms Johnson] also said, sorry, she did not know that Mr Mark Hughes was not going to be attending, she’s very upset, and - but we would attend the, you know, the Skype meeting. Then she excused herself like she had a call and she excused herself because she was apparently busy in Court with the case, and they called her about the case, so she left. Me and Joseph stayed in the office. Then later she came back and the Skype call started...”.

354 And shortly later:

“...when Leigh [Johnson] came in she apologised for the fact that he, you know, without knowing that Joseph already spoke to me, so she firstly was – she apologised that he’s not going to be there, and in the words in the fact that she also wasn’t aware that he had to go but it was an emergency, that was how I understood at that time and point.”

355 “Mark Hughes” then appeared on a laptop computer as part of a Skype call.

356 In his first affidavit Mr de Klerk said:

“I went to a conference room and there was a laptop computer on the table. Kevin connected via Skype and I saw an image of a male about 50 years old, clean shaven, he was wearing metal framed glasses. He was overweight and his hair was combed back. I had not seen this man before but when he spoke I instantly recognised his voice as being that of Mark Hughes”.

357 In her affidavit Ms Johnson was adamant that the call she witnessed was not a Skype call. Ms Johnson asserted that she spoke to Mr de Klerk only once

on 30 May 2013 and that “that conversation took place during the call and not either before or after that call. That call was a phone call, not a Skype call”.

358 In her affidavit Ms Johnson said:

“The incident I recall is that I walked into a conference room with a board table where a phone call was taking place, not a Skype call. I certainly did not see any computer screen with an image of a man. Had I seen that image, I would have instantly recognised it as Peter Foster were it he, and he would have seen who was in the room. However, I only heard a voice which I did instantly recognise as Peter Foster’s.”

359 Despite that evidence, and presumably on instructions from Ms Johnson, Mr Argy cross-examined Mr de Klerk upon the basis that the call was a Skype call. Indeed Mr Argy put to Mr de Klerk that the computer screen upon which Peter Foster’s image appeared was placed further away from Mr de Klerk than Mr de Klerk had deposed and in a manner that would have made it difficult for Ms Johnson to see who was on the screen.

360 Ultimately Ms Johnson gave this evidence:

“Q. What I want to put to you is that a Skype call then happened in which Mr Foster’s face appeared on the laptop screen?

A. There was a call happening. They were talking when I walked into the room.

Q. It was a Skype call.

A. I don’t know what it was. I just heard a voice. I thought it was a loud speaker call but I don’t know.

Q. So you accept that it might have been coming from the laptop computer?

A. It very well could have been.”

361 However, Ms Johnson denied that she saw Mr Foster’s image on the computer.

362 Mr de Klerk was confident that Ms Johnson was able to see who was participating remotely on the Skype call. Mr de Klerk gave this evidence in response to questions from Mr Argy and from me:

“Q. Was Ms Johnson present, do you say, when the person on the screen introduced themselves as Mark Hughes?”

A. Look, he didn't introduce him because that was - remember, that was - I already knew who he was. He just, like, apologised straight away that he was not present, you know, at the meeting in life.

HIS HONOUR

Q. Ms Johnson was there when Mr Hughes first came onto the screen?

A. Initially, yes. But, as I said, within a minute or two she had a call and she left the room. I did not know, you know, with the call, or why it was. Only later - then she apologised and said she was busy with a court case somewhere else and she's representing a client that is in court or something like that, in that lines.

ARGY

Q. I have to put it to you, Mr de Klerk, your recollection is mistaken: Ms Johnson was not in the room and at no stage saw 'Mr Hughes' on the screen?

A. Well, I'm very confident that she was there right in the beginning, because when she had the call Mark Hughes was already on the screen.”

363 Mr Argy returned to the subject a short time later:

“Q. I want to make absolutely sure, Mr de Klerk, because you seem to be adamant about something that's directly challenged, and that is that Ms Johnson did not ever see the person on the screen?”

A. Look, I am 100% sure that she was there, as I said, not for the remainder of the conversation, but at least, as I said, three - could be three, four minutes since we sat down and he started operating the computer - and I'm talking about - 'he' - I'm talking about Joseph.

Q. Then you say she had a phone call and left?

A. That's correct.”

364 Everyone in the conference room was sitting around a table speaking to “Mark Hughes”. His image was on the computer screen. I think it highly improbable that Ms Johnson did not see whose image was displayed on the computer screen. She certainly recognised the voice as being that of Mr Foster.

365 Mr de Klerk did not say, in either of his affidavits, that he referred to Mr Foster as “Mark Hughes” during the Skype call.

366 Nonetheless Mr Argy raised the topic in cross-examination:

“Q. And during the Skype call, did you at any time refer to Mr Hughes by his name or because you knew each other, you just conversed?”

A. Of course, no, ‘Good morning Mark’ of course by on his first name, but not his – I won’t say direct on as Mark Hughes, but Mark, definitely as he would call me Pieter and greeted me on my name.

Q. And I put it to you that at least during the time Ms Johnson was in the room there was no mention of the word Mark?

A. Definitely, because that was when he – when we sat down and he came up, I greeted him as Mark and he didn’t say, look I’m not Mark, I’m Peter or John or whatever. So I definitely used the word Mark.

Q. I guess what I’m putting to you is whether that was in Ms Johnson’s presence?

A. Of course, yeah.

Q. You’re quite certain about that?

A. 100% sure. I even recall when she said to Mark, like, ‘Mark I’ve got no problem for Mr de Klerk using this funds.’ That type of conversation between him and her was definitely done.

Q. Mr de Klerk are you giving evidence that Ms Johnson referred to the person on the screen as Mark?

A. That’s correct, not Mark Hughes, but Mark.

Q. I put it to you very clearly, at no time during the conversation when Ms Johnson was in the room was the word Mark used and she certainly never referred to him as Mark?

A. Well that’s your version of it, I was attending it and I found it very unbelievable that a person that would speak to another person concerning matters like that would not use the name Mark. And I would state that she never said Mark Hughes, because it’s like, I don’t address you as my associate or my business partner as whatever your name and surname is, but on his call name, Mark.

Q. Did Ms Johnson ever give you to understand that she had met a person called Mark Hughes?

A. At that time and point not, but the fact that she made – she was initiating the fact to apologise for Mark Hughes not to be there, attending, et cetera, et cetera. I assumed, I mean, on paper I saw that in a proposal, I saw many there was conversations as I said and there was never dispute or another name was used in any way shape or form.

Q. So --

A. So I had no doubts let me put it that way.

Q. So you assumed that Ms Johnson had actually met a person called Mark Hughes?

A. I don't assume, I was confident that being partners in a company like that, there's no point, no way that that would have not been, you know even the proposals in everything it is from black and white."

367 Mr Argy submitted that the last few answers given by Mr de Klerk in this cross-examination show that he did not actually recall Mr Foster being referred to as "Mark" or "Mark Hughes" but, rather that he thought it only natural that, as they knew each other, they would refer to each other by name; and that giving his evidence he was doing more than assuming that this is what happened on 30 May 2013. That might be right in relation to words Ms Johnson used. But Mr de Klerk was adamant that he had addressed "Mark Hughes" as "Mark" in Ms Johnson's presence.

368 Mr de Klerk and Ms Johnson agree that they discussed Mr de Klerk's use of the "profits" allegedly generated by STC on Mr de Klerk's account to help pay for the South African licence.

369 In his second affidavit Mr de Klerk referred to the fact that, prior to 30 May 2013, "Mark Hughes" had agreed that Mr de Klerk "could use the profits from my loans in STC to make up the shortfall for the purchase of the South Africa rights".

370 However, Mr de Klerk said that, during the Skype call "Mark Hughes" contradicted this and said:

"You can't use your existing STC profits to make up the shortfall for the South Africa licence. You don't have enough profit in STC Australia to make up the difference. A lot of your profits are tied up in future trades so you can't access those profits".

371 Mr de Klerk replied by saying that he was not happy with that and that "if I can't use my existing profits, I'll pull out of the South African deal".

372 Mr de Klerk said that "Mark Hughes" responded by saying:

“In that case I’ll sue you and your company because you misled us. We are losing out”.

373 In her affidavit Ms Johnson said:

“When I walked into the room midway through the phone call conversation they were talking about whether Pieter de Klerk could use his Australian profits from his [STC] investment as part of the money he would pay for obtaining the [STC South African] rights. Peter Foster was saying that Anne Larter and Leigh Johnson wouldn’t agree to Pieter de Klerk using his Australian profits in this way. As I had just heard my name being mentioned as opposing this action, I spoke.

[Ms Johnson]: It’s fine by me if Pieter uses his profits here to pay for South Africa.

(There was a silence.)

Foster: Who’s that?

Tom [Nolan]: It’s Leigh. She’s just walked in.

Foster: How long’s she been there?

Tom and [Ms Johnson] simultaneously: A couple of minutes.

(The phone went dead as though Peter Foster had hung up.)”

374 Mr de Klerk agreed that, during the discussion about whether Mr de Klerk could use his “trading profits” as part payment for the South African venture, “Mark Hughes” said “Anne Larter and Leigh Johnson would never agree”. As Mr Argy pointed out, the use by Mr Foster of the third person in making this statement might suggest that he did not realise that Ms Johnson was present. In any event Mr de Klerk recalled referring to Mr Foster as “Mark” in Ms Johnson’s presence. This could have occurred whether or not Mr Foster realised Ms Johnson was present.

375 Mr de Klerk also agreed that, in response to Mr Foster’s words, Ms Johnson said something to the effect “it’s fine by me if Pieter uses his profits here to pay for South Africa”. Mr Argy submitted that this showed Ms Johnson was prepared to thwart Mr Foster’s activities if appropriate. I do not see how that follows. Ms Johnson was simply saying that she did not object to Mr de Klerk

using his “trading profits” despite Mr Foster’s alleged assumption that she would object.

376 Mr de Klerk did not agree that “Mark Hughes” then asked “[w]ho’s that?”, that Mr Nolan said “[i]t’s Leigh. She’s just walked in”, that Mr Foster said “[h]ow long’s she been there?” nor that Mr Foster then terminated the call.

377 Ms Johnson said that immediately after the Skype call she received an abusive telephone call from Mr Foster during which Mr Foster said to her:

“What...are you doing there? This has got nothing to do with you. This is the South African rights. What are you...doing there? Get...out of there”.

378 In his second affidavit Mr de Klerk said “Mark Hughes” ended the Skype call because he was angry Mr de Klerk had threatened to pull out of the South African deal. Mr de Klerk said he then told Ms Johnson that he had said “I’m pulling out of the South African deal because Mark now says I can’t use my STC Australia profits to make up the shortfall”, and Ms Johnson replied:

“Don’t worry I’ll speak to Mark and we’ll work it out. We’ll be in touch”.

379 Mr Argy challenged Mr de Klerk about this in cross-examination and the following exchange occurred:

“Q. I’m putting to you, Mr de Klerk, no such exchange occurred.

A. Well, I was there and I’m under oath and I’m --

Q. I know, and that’s why I have to put to you that your recollection is mistaken, no such exchange occurred.

A. It definitely occurred. It was a very serious part of our negotiation process and, I mean, it was crucial for me, because as I said, there was – for me there was no return, I couldn’t turn out of this thing, it had to be a success, and she was the one that offered at that time and point, and I’m very clear when I say that she was the one that said to me – not Kevin Joseph, Mr Joseph – she said to me, ‘Don’t worry, he’s upset and I will speak to him and I will make things right.’ Don’t worry, I’ll sort it out, in a nutshell.”

380 For the reasons I set out below concerning the competing credibility of Mr de Klerk and Ms Johnson, I accept that events occurred as Mr de Klerk said.

***Mr de Klerk invests US\$1 million in “STC South Africa”***

381 On 4 June 2013 “Howard Robin” sent an email to “Leigh and Mark” concerning Mr de Klerk’s proposed acquisition of “the rights to South Africa”. In the email “Howard Robin” purported to express impatience concerning Mr de Klerk’s failure to decide whether to invest in the South African venture.

382 The email included:

“Pieter de Klerk knows and you know that he is getting an absolute bargain being able to obtain the rights to South Africa for a fraction of the price we are obtaining the [licence] in other markets notwithstanding the demographics, population, disposable income et cetera. I am selling a joint-venture partnership too cheap, but I am a man of my word and will honour the offer”.

383 The email was addressed to leighjohnson.sydney@sportstradingclub.com.

384 Ms Johnson’s evidence was that she did not at any stage use or have access to that email address.

385 Ms Johnson also said that during her involvement with STC, she only used her private Hotmail email address (XXX@hotmail.com). That is not correct. The evidence reveals that Ms Johnson used four other email addresses over the period (not including the STC email purportedly in her name). Each address included her name or initials, as well as other words such as “law”, “lawyers” and “Australia”.

386 There is in evidence an email which purports to be from Ms Johnson forwarding “Howard Robin’s” 4 June 2013 email to Mr de Klerk with the note:

“See below.

Regards,

Leigh

PS please call Mark to discuss at your convenience”.

387 The email purported to have been sent to Mr de Klerk from the email address leighjohnson.sydney@sportstradingclub.com.

- 388 The email from “Howard Robin” purported to have been sent from London at 8.16 am on 4 June 2013. The email purportedly from Ms Johnson (in Sydney) purports to have been sent to Mr de Klerk at 8.02 am on 4 June 2013.
- 389 The time difference between Sydney and London makes clear that these emails could not have been sent in the order in which they purport to have been sent.
- 390 I am satisfied that both emails are a concoction. In final submissions Mr Dixon did not submit that Ms Johnson had sent the 4 June 2013 email to Mr de Klerk. He accepted that “it may well have been a Peter Foster ruse”.
- 391 Throughout June and July 2013 Mr de Klerk continued to have communications with “Mark Hughes” and “Howard Robin”. He travelled to London and met “Howard Robin” again. In London he had another Skype call with “Mark Hughes” who now said “we agree that you can apply the profit of about \$700,000 in your STC account to the trading amount for South Africa”.
- 392 Ultimately, on 1 and 8 July 2013, Mr de Klerk transferred the Australian dollar equivalent of US\$1 million to an account in the name of Bella Development Limited. “Mark Hughes” stressed that these funds be sent to Bella Development Limited “not the STC Westpac account”.
- 393 Ms Larter sent “Howard Robin’s” “wiring” instructions for that transfer to Mr de Klerk.
- 394 Mr de Klerk did not acquire any rights to any South African STC venture in exchange for these funds.
- 395 On 10 July 2013 Mr de Klerk made a further deposit to the STC Westpac account of \$200,000 thus increasing his loan to STC from \$250,000 to \$450,000. Mr de Klerk has not been able to recover any of these funds.
- 396 There is no evidence of any involvement by Ms Johnson in Mr de Klerk’s purported South African investment following the 30 May 2013 meeting.

397 However, on 26 June 2013 she sent Mr de Klerk an SMS stating:

“Hi [Pieter] how are you?”

398 Mr de Klerk replied:

“Hi Leigh, good to hear from you! Sorry, I was driving to the bank. Just a final meeting to release the money for STC South Africa. Exciting times and I just want to thank you for your help and input in this situation!

A [sic] opportunity that would have never been taken forward if it wasn't for your unselfish and helpful attitude. I will be for ever thankful!!!

Hopefully we will be able to catch up soon”.

399 Ms Johnson replied:

“I look forward to catching up and to doing some charity work together. All the best”.

### **Mr Foster's email of 16 July 2013**

400 On 16 July 2013 Mr Foster sent Ms Johnson a lengthy email from the address [teamleader@sportstradingclub.com](mailto:teamleader@sportstradingclub.com), headed “Offer”.

401 This is the first of three emails that Mr Foster sent Ms Johnson prior to her retirement as a partner of STC in January 2014. The others are dated 1 September and 29 December 2013. I will return to them.

402 Although the email does not name Mr Foster as the sender, Ms Johnson accepted that she understood it to be from Mr Foster. The email was sent to one of Ms Johnson's Hotmail email addresses.

403 Ms Johnson accepted that the expression “team leader” was, by July 2013, an accurate way to describe Mr Foster's role at STC. It was thus by now clear to Ms Johnson that Mr Foster was not merely taking care of “technological aspects” of STC's business or merely posting the results of trades. He was now the “team leader”.

404 Mr Foster's email addressed four topics, albeit in a manner more disjointed than the following account suggests.

***Ms Johnson's alleged assertions of dishonesty***

405 First, Mr Foster alleged Ms Johnson had made allegations about the bona fides of the STC business.

406 Mr Foster wrote:

"You sent a text to Kevin [McMullen] in an attempt to instil fear and to divide and conquer. Last week you spoke of everybody going to jail and you suggested that we were operating a Ponzi scheme...

Your behaviour is clearly irrational in so far as one day you are threatening everybody with jail for running a Ponzi scheme and the next you are saying that you want to work full time in STC...

You have admittedly gone and seen a defamation lawyer and sent legal letters to several people confirming that you are running a honest, legitimate business and that you have no business connections with the notorious conman".

407 The latter remark was evidently directed to Ms Johnson's involvement in instructing Pikes & Verekers to send the letter of 5 April 2013 to which I have referred.

***Mr Foster's assertion that the STC business was bona fide***

408 Second, Mr Foster denied anything was amiss. He said:

"Your comments to Kevin are unjustified, unjustifiable and inexcusable.

Every dollar has been accounted for...stringent financial records are kept in duplicate and were given to the Accountants only last week...so that they could prepare the reports for KPMG to sign off on for the period ending June 30. This business is being run absolutely to the letter of good business governance as it is our intention to use the Australian model and its financial records to obtain a listing on the UK Financial Market in 2014. To suggest millions of dollars are being stolen or misused is insidious and outrageous. It is beneath contempt."

### ***Ms Johnson's role at STC***

409 Third, Mr Foster asserted that Ms Johnson had “yesterday” sent an email in which she said:

“I am available from now on to work full time in STC and I want to. I can move to either Qld or northern NSW somewhere. I told Pieter [de Klerk] I would help in anyway necessary to get SA up and running. Also Asia is waiting!”

410 This email is evidently what led Mr Foster to say “that you want to work full time in STC” (see [406]).

411 Mr Foster asserted that, in his view, Ms Johnson was “incapable” of working full time at STC or of taking over the operation of the business.

412 He asserted that Ms Johnson had attended “three meetings with two associate members” and that in return for those meetings “and one or two meetings with the Australian lawyer” (presumably Pikes & Verekers) “you have been paid approximately \$70,000”.

413 That allegation was not explored in cross-examination.

414 Mr Foster made the following statements concerning Ms Johnson's role.

415 First he said:

“Your primary role was to seek start-up capital although you were never personally required to put up any form of collateral. The interest on the loan is exorbitant and can stretch a start-up business to almost breaking point”.

416 And:

“The only role I can see for you is as a figurehead to wheel out to the occasional meeting and to be used, to turn a phrase ‘in case of emergency break glass’ in the event of media enquiries.

That would not require you to work on a daily basis...

...your role is there in case of emergency for you to swing into action and put out any fires”.

417 In that regard Mr Foster offered to pay Ms Johnson \$12,500 per month “for your role as partner”. This was said to be the same amount paid to Ms Larter “for her role as General Partner”.

***Ms Johnson’s loan***

418 Mr Foster referred to “your email of 16 March”. That email is not in evidence, but evidently concerned the \$182,500 “seed capital” to which I have referred (see [125] to [138] above).

419 Mr Foster said that he understood that the \$182,500 had been repaid to Ms Johnson “and all that remains to be paid is the interest” of 100% on that advance.

420 Mr Foster asserted:

“The partnership is not in a position to repay the interest in one lump sum. This is because of the issue I raised with you previously and the need to protect our cash reserves in the event of there being an overwhelming demand from associate members to withdraw their funds and also because the South African contract with Pieter de Klerk has not been finalised”.

421 Mr Foster offered to pay “\$50,000 today towards the interest on the loan” and said “you’ll receive a further \$10,000 per week until the loan interest is paid in full”.

422 Mr Foster concluded:

“Other than that you can sit back and relax and enjoy the money and allow me to run the business into a money making machine that will allow us to take a good profit share after the first year of operations.

That’s it, I have nothing further to say”.

423 In her 10 September 2013 email Ms Johnson agreed she “accepted” the “offer” made by Mr Foster on 16 July 2013. However, she said she received only one payment of \$12,500.

### **Ms Johnson's response to Mr Foster's 16 July 2013 email**

424 Mr Foster sent Ms Johnson another email on 1 September 2013. He attached his 16 July 2013 email to that later email. Ms Johnson responded to both emails in her email of 10 September 2013, to which I have already referred. I discuss this below.

### **Ms Johnson's conversation with Mr Glen Radica**

425 In his 16 July 2013 email Mr Foster said to Ms Johnson:

“Only yesterday Glen Radica has asked for the \$100,000 he put in to be returned to him because he's heard of adverse publicity on the internet. He is the man who rang you last week in Sydney and enquired if it was a scam”.

426 Glen Radica was an Associate Member of STC.

427 Mr Dixon asked Ms Johnson questions about that conversation:

“Q. Do you see in the third paragraph there there's a reference to a Mr Radica. Do you recall --

A. Yes.

Q. Do you recall that man?

A. I mean, I'm reading it.

Q. Yes. He rang you in or about early July 2013; do you recall that?

A. I vaguely recall speaking to someone called Glen, yes.

Q. And he inquired if STC was a scam. Do you recall having a conversation of that nature?

A. I don't recall.

Q. I put it to you that Mr Radica called you and made that inquiry, as to whether STC was a scam or not; do you accept that that was possible?

A. I recall talking to someone who wanted their money back and I think he got his money back. I don't know.

Q. Do you accept that, in respect of Mr Radica, you did not ever tell him that Mr Foster was involved in the business?

A. No, I didn't.

Q. You didn't ever tell him that?

A. No, I didn't. And I was hoping that it would end. You see, I kept thinking, Foster's going to be gaoled."

428 Thus, although Ms Johnson initially said that she did not recall whether Mr Radica enquired whether STC "was a scam", she accepted that she did not tell Mr Radica that Mr Foster was involved with STC.

429 Ms Johnson gave this explanation for not doing so:

"A. ... It was really obvious, especially after I got that bullet in the head phone call with Anne, that that was - I kept trying to encourage her to step up, which I thought she always was going to, and then he would step out, but instead it went the other way. So I wanted to take over and he would be out. I wanted to move in with her and run it and he would get out, because it was a good business, it was making money --

Q. How do you know that?

A. -- and it was legitimate. Because of Richard Holmes, because of the trades.

Q. How do you know it was making money?

A. Because I spoke to Richard Holmes and he was doing the trades and they were good trades. Some of them lost, but a lot of them won."

430 The "bullet in the head phone call" to which Ms Johnson referred occurred on 30 August 2013. I deal with it below. I will also deal later with Ms Johnson's contention that she wanted to encourage Ms Larter to "step up" and run the STC business with her.

### **Ms Johnson's 30 August 2013 conversation with Ms Larter and Mr Foster**

431 On 30 August 2013 Ms Larter rang Ms Johnson.

432 According to Ms Johnson's email of 10 September 2013, Ms Larter rang "pretending that she was concerned" about whether Ms Johnson's \$182,500 seed capital "was being repaid".

433 In her 10 September 2013 email Ms Johnson said that in response to that she made three points to Ms Larter during the 30 August 2013 telephone conversation.

434 The first was that she was concerned about how STC was being run because if it had been properly managed, her seed capital plus interest would have already been repaid. Instead she said it was being paid in “dribs and drabs” accompanied by “constant excuses for delay” and threats.

435 Second, Ms Johnson referred to what she said Kevin McMullen had told her about Mr Foster misusing investors’ money and operating as a giant Ponzi scheme.

436 In her 10 September 2013 email Ms Johnson summarised what she said on 30 August 2013 as follows:

“Kevin McMullen, Peter’s best friend and involved in STC on a daily basis as its Sales Manager, had told me that:

- Peter had a gambling problem
- Peter was improperly using the [Associate Members’] money to place large bets on sporting events for himself and was losing a lot of money
- Peter was operating STC as a giant Ponzi scheme using new money from [Associate Members’] to make up for his losses of previous money from [Associate Members’]

These are Kevin’s words, not mine.”

437 Third, Ms Johnson reiterated that she “could not understand why it was a problem” to repay the loan plus interest given that Mr Holmes had successfully traded to earn a profit “in excess of \$750,000”. Importantly she said that figure was “per what’s shown on the STC website”.

438 Ms Johnson said that “after I made these points to [Ms Larter], [Mr Foster] revealed his presence on the phone” and started “screaming and wouldn’t let me speak”.

439 Ms Johnson then described the highly offensive language Mr Foster then used to describe Ms Johnson. Ms Johnson said that Mr Foster said that:

- (a) “not another cent of the seed capital loan will be repaid”;
- (b) he “sleeps with a sawn off shotgun” under his pillow; and
- (c) he would “put a bullet in your head”.

440 In cross-examination Ms Johnson described the telephone call as follows:

“A. ... Anne rang, and it started like this, ‘Look, what is your problem with this business?’ and so I started saying, you know, my concerns, and she said, ‘This business is totally above board. None of your concerns are founded. I have looked at everything. Everything is above board and you're paranoid, you're stupid. Everybody is happy with this. Everyone is happy, the associate members are happy, they're making money, you're the only one with a problem.’ And then I started saying something else and then Peter Foster came in and –

Q. Came onto the phone call, do you mean?

A. Yes. Clearly I was on loudspeaker and clearly he was there. I thought that I was speaking to her in Western Australia, because that's where I thought she was, and I was sort of – well, I was shocked because he was really abusive, but I was also shocked at that betrayal, because I thought that I was speaking to her. And he said, you know, ‘You're a [C\*\*\*] and I'm going to put a bullet in your head’, and just, you know, the most horrific abuse.”

441 Ms Johnson later told Mr Gamble that the threat that Mr Foster had made on 30 August 2013 to “put a bullet” in Ms Johnson’s head “if I told anyone he was involved”.

442 Ms Johnson was well aware that Mr Foster was “involved” in STC. Mr Foster now made quite clear that his position was that his name was not to be associated with the business.

443 Ms Johnson gave this evidence:

“Q. There was an understanding at the outset, was there not, that you could never use Mr Foster's name in connection with the STC business publically, wasn't there?

A. The understanding at the outset that he was not to be involved in the business. He was to be running, he was setting up only the computer side of it.

Q. Did you understand Mr Foster to be paid by the business?

A. Everyone was paid by the business.

Q. So Mr Foster was at least an employee of the business?

A. That's a good question, I don't know.

Q. Did you understand Mr Foster would draw profits from the business?

A. I don't know that either.

Q. My question was, there was an understanding at the outset, that notwithstanding the scope of his role, his name was never to be associated with the business, that's correct, isn't it?

A. He was not to be associated with the business."

444 Ms Johnson said that by now, she had formed the view that Ms Larter and Mr Foster were "interchangeable".

445 Ms Johnson was shaken by this call.

446 It led her, almost immediately, to contact Mr de Klerk by SMS.

### **Ms Johnson's SMS messages to Mr de Klerk – Peter Foster revealed**

447 On 30 August 2013, very shortly after her telephone conversation with Ms Larter and Mr Foster, Ms Johnson sent Mr de Klerk SMS messages stating that:

- (a) she was "no longer associated" with STC;
- (b) she was "worried" about Mr de Klerk;
- (c) Ms Larter was "not to be trusted";
- (d) Ms Johnson believed Ms Larter was "in with" Peter Foster.

448 The full SMS exchange was as follows:

Ms Johnson: “[Pieter] I am no longer associated [with] STC”

Mr de Klerk: “A bit shocked to hear that, any reason I should be concerned about my future with STC? Don’t worry this will stay between us!..”

Ms Johnson: “I’m very upset. I don’t know where to start but I am worried about [you]. Anne Larter is not be trusted.

I believe she’s in [with] Peter Foster”.

Mr de Klerk: “May I give you call?”

Ms Johnson: “Yes but can we talk tomorrow. I’m very fragile, I’ve been threatened [with] a bullet to the head if I say anything”.

Mr de Klerk: “So sorry, what time is convenient to you tomorrow?”

449 This was the first time that Ms Johnson had mentioned the name “Peter Foster” to Mr de Klerk.

450 She gave this evidence in cross-examination:

“Q. You knew that Mr de Klerk had no knowledge whatsoever of Peter Foster's involvement in STC up until that stage, that's why you wrote the text message?

A. I certainly had not mentioned it to him, but I don't know what he knew.”

451 In her affidavit, Ms Johnson described her SMS messages as a “warning” to Mr de Klerk.

452 She said:

“I note that Pieter de Klerk used my warning to good effect by investigating who ‘Peter Foster’ was and then following up on that”.

453 Ms Johnson was referring to the evidence given by Mr de Klerk in his first affidavit of what he did following receipt of Ms Johnson’s SMS messages. I set that evidence out below.

454 The fact that Ms Johnson thought that her “warning” enabled Mr de Klerk to investigate who “Peter Foster” “was” shows that Ms Johnson believed, until then, that Mr de Klerk did not know who Mr Foster “was”; and that the mere mention of his name was a sufficient warning.

455 Later in her affidavit, Ms Johnson said that on 30 August 2013:

“...I told [Mr de Klerk] by text that I had resigned and mentioned to him that Peter Foster was involved in [STC]”.

456 Ms Johnson thus saw her SMS “I believe she’s in [with] Peter Foster” as a warning to Mr de Klerk that Mr Foster was “involved” in STC. She must therefore have understood, as was the fact, that Mr de Klerk had not previously heard of “Peter Foster”; and that he did not until then know that a person called “Peter Foster” was “involved” in STC.

457 Ms Johnson knew it was Mr Foster to whom Mr de Klerk was speaking over Skype on 30 May 2013. Ms Johnson knew that Mr de Klerk did not then know that he was dealing with “Peter Foster”. It must follow that she knew Mr de Klerk did not know that the real name of the person with whom he was dealing was Peter Foster.

458 Mr de Klerk’s evidence, which I accept, was that on 30 May 2013, and in Ms Johnson’s presence, he actually used at least the first name of the alias that Mr Foster adopted: “Mark”.

459 My conclusion in these circumstances is that Ms Johnson did know Mr Foster was using that alias.

### **Mr de Klerk’s response to the Peter Foster revelation**

460 In his first affidavit, Mr de Klerk described what he did after receiving Ms Johnson’s “I believe she’s in [with] Peter Foster” SMS:

“I did not know who Peter Foster was so I asked a friend of mine to help me do some research. I located information on the internet about Peter Foster the Australian conman and saw a video of Peter Foster. I immediately

recognised Peter Foster as being the person I know as Mark Hughes. I instantly recognised his voice, his way of speaking and the sound of his voice as that of Mark Hughes.”

461 Mr de Klerk then said that he saw newspaper and other media references to Mr Foster as a “conman” and “white collar criminal”.

462 Very shortly after receiving Ms Johnson’s SMS messages, Mr de Klerk received a telephone call from a journalist from a television channel (Mr de Klerk mentioned both Channel 7 and Channel 9). The journalist told Mr de Klerk that he had spoken to Ms Johnson and that Ms Johnson had mentioned Mr de Klerk’s name. The journalist said that he was investigating Mr Foster and informed Mr de Klerk that Ms Johnson and Mr Foster “knew each other from before”.

463 Mr de Klerk said that this information caused him to wonder whether he could trust Ms Johnson.

464 Although Mr de Klerk said he contacted the police about STC in early September 2013, he later said he later decided not to “spill the beans” because he understood there was an “ongoing investigation”, and because he was fearful “for my life and my family’s life” and that he “would have lost everything”. Mr de Klerk also said he was “scared” because Mr Foster “knew my address”. I infer that this was so because of Ms Johnson’s SMS telling Mr de Klerk that Mr Foster had threatened her with a “bullet to the head”.

465 Mr Argy suggested that these matters meant that I “should be slow to infer” that any failure of Ms Johnson was the “cause of a lack of public awareness” of Mr Foster’s involvement in STC.

466 I will return to this below.

### **Mr Foster’s email of 1 September 2013**

467 Two days later, on 1 September 2013, Mr Foster sent a lengthy and abusive email to Ms Johnson, this time from the email address stcdesk@outlook.com.

### ***Compliance with the 16 July 2013 “offer”***

468 Mr Foster asserted that he had complied with the “offer” made in his 16 July 2013 email by paying to Ms Johnson \$50,000 interest immediately, a further \$10,000 towards the outstanding interest per week thereafter, and the \$12,500 per month stipend to which I have referred.

469 He further asserted:

“You are getting \$12,500 a month but yet you are on a daily basis using the [company credit] card at Coles, health food stores, beauty salons, pet supply companies and even the jailhouse pizza place. Your [sic] averaging upwards of \$750-\$1000 every week. One bill alone for \$554 at a health food place. If that’s not theft then I don’t know what is. What right do you think you have to take your \$12,500 a month plus these additional charges[?] It is you Leigh Johnson that has no accountability for the money and your actions. But don’t worry they will be deducted and will come out of money paid to you”.

470 In cross-examination Ms Johnson accepted that she was using an STC credit card on this basis. In her 10 September 2013 email she said she understood the benefit she thereby obtained “is to be deducted from my share of STC’s profits”.

471 As I have mentioned, in her 10 September 2013 email Ms Johnson denied she was receiving \$12,500 a month. She said she had received only one such payment.

### ***Ms Johnson’s alleged assertions of dishonesty***

472 Mr Foster referred to what he described as:

“...putrid allegations that you raise with Annie [Larter] that millions and millions and millions and millions of dollars are being made and that they’re all being stolen...

...little wonder why I get angry and call you every evil filthy word I can think of when you accuse me of stealing money and using it badly. Then you sent Annie [Larter] an email and suggest should you go to A Current Affair or should I go to the fraud squad, you ponder”.

473 Mr Foster was evidently referring to an email that Ms Johnson had sent Ms Larter. If that email was ever sent, it was not in evidence before me.

474 Mr Foster continued:

“And you have continued in your bad behaviour with Annie [Larter] in trying to put a wedge between her and me by again alleging Ponzi scheme, or going to jail, money being misappropriated”.

### ***Mr McMullen’s resignation***

475 Mr Foster complained that Kevin McMullen resigned as a result of Ms Johnson’s behaviour. As I have already mentioned, Kevin McMullen was an associate of Mr Foster’s, who was known as “Kevin Joseph” to the Associate Members of STC (see [236] to [237] and [347] to [350]).

476 Mr Foster wrote:

“First of all Kevin [McMullen] quit. Why would he quit you say? How would you react when a criminal lawyer says [that] we are all going to jail and that you aren’t going to escape Kevin [McMullen] because what we are running is a Ponzi scheme and millions and millions of dollars are being stolen.

Our Kevin [McMullen] is a nervous man at the best of times and not in the best of health and his nerves can’t stand that type of battering that you may be used to giving criminal clients in cross examination...but Kevin [McMullen] is not a criminal and he is not made for that type of fear. So thank you very much, you managed to get rid of my sales manager”.

### ***Richard Holmes’s resignation***

477 Mr Foster continued:

“But it gets even better because of course Kevin [McMullen] consulted with Richard [Holmes] and said Leigh says that millions and millions of dollars are going missing and we are all going to jail and Richard [Holmes] is even more timid than Kevin [McMullen]. Richard [Holmes] is a type of guy who pays a parking ticket the day he gets it if he’s ever had one in his life. Now of course I assured him that everything is being done correctly...but he said to me why would a partner in the business who obviously has access to the company bank accounts say they are being drained of that millions and millions of dollars and being misused if it isn’t true...

...the damage is done and Richard [Holmes] left. So what were you going to do than say to your friends you borrowed the money from and say,...sorry in a fit of rage and insanity I sent a text to Kevin [McMullen] that has now resulted in the business being brought to its knees because we’ve lost our trader and we lost our sales manager and now I can’t pay you back the loan?”

### ***Mr Foster now doing all the trading***

478 Mr Foster continued:

“...since then I have been working 18 hours a day seven days a week running the sales team and doing all the trading myself. And yes the trading is successful even better than when Richard [Holmes] was doing it”.

### ***Mr Foster’s assertion that the STC business was bona fide***

479 As in his 16 July 2013 email Mr Foster continued to assert that the business was bona fide.

480 Thus he said:

“In fact next Tuesday at 2.30pm all the accounts are being finalised in a meeting with the accountants and then KPMG will be preparing a financial audit up until June 30 which will show that every single cent has been accounted for, not one dollar has been used wrongly...”

While Annie [Larter] has been here for several days and she has been shown everything in regard to how the business runs and she has also been given full access to any financial information required. She and you will both be provided a copy of the KPMG audit report which I expect will be available within the next 2 to 3 weeks”.

### ***Ms Johnson’s evidence about her dealings with Mr Holmes***

481 By now, Mr Holmes had resigned, evidently because of his concerns about what Ms Johnson was saying about the business. Ms Johnson said she understood Mr Holmes had resigned by August 2013. The fact that Mr Foster asserted he was now doing “all the trading” makes clear that whatever belief Ms Johnson may have had earlier in the year as to Mr Foster’s role at STC, by now she must have known that Mr Foster was exercising complete dominion over STC.

482 I have mentioned Ms Johnson’s evidence that she had spoken to Mr Holmes and that “he was doing the trades and they were good trades” (see [429] above).

483 Later, however, Ms Johnson gave evidence that she was not able to speak to Mr Holmes, despite endeavouring to do so. She gave this evidence:

“Q. Did you ever ring Richard Holmes and ask for the trading accounts?”

A. I did go and see Richard Holmes.

Q. When was that?

A. It was after he'd left.

Q. My question was did you ever ask Richard Holmes for the trading accounts that you considered to be very important?

A. At the time, no – well, no. At the time, no. I was told – I kept wanting to meet Richard Holmes. I kept trying to organise a meeting up with him and Anne told me, ‘Richard hates you,’ and for some reason a lot of people hate me. There has been a lot of vicious gossip about me and it's amazing the intelligent people who understand evidence that believe that vicious gossip, and I was - I was told that he hated me. So, she said, ‘Look, don't talk to him because, you know, then we might lose him because he hates you.’ When I went and saw him after – because I wanted to talk to him to see if he'd come back and do the trading, but I was very anxious about talking to him because I was told that he hated me, he said that he'd been trying to organise a meeting with me all the way through and kept being told that I was too busy to meet up with him. So we were deliberately kept apart. It was – it was already over. So the trading accounts – he showed me some trading accounts, yes, but they were trading accounts that were from the past.

Q. Now, the fact that you felt you were able to go and see Richard Holmes, despite the circumstances you described, that, nevertheless, didn't - that, nevertheless, you say, prevented you from speaking to him whilst he was employed by STC?

A. The fact that he hated me?

Q. Yes?

A. Yes.

Q. You couldn't send him an email and ask him about the matters that you wanted to know about?

A. I've already told you, I – I knew that this business depended on an experienced trader like him, an honest, experienced trader, so I certainly did not want to jeopardise that.”

484 Thus, despite having earlier said that she had spoken to Mr Holmes about the trades and was comforted that “they were good trades”, Ms Johnson now said that “we were deliberately kept apart”.

485 Her evidence was that, on the one hand, Mr Holmes told her he was told Ms Johnson was “too busy” to see him. On the other hand, Ms Johnson said she was told by Ms Larter that Mr Holmes “hated” her and that her speaking to him might cause STC to “lose him”; and that she did not contact him because she thought he was an experienced trader and “did not want to jeopardise that”.

486 This is an example of Ms Johnson’s propensity not only to contradict herself, but to make improbable and far-fetched assertions to try to justify her position.

### **Ms Johnson’s email of 10 September 2013 to Mr Foster and Ms Larter**

487 Several days later Ms Johnson sent Mr Foster and Ms Larter the 10 September 2013 email to which I have referred.

488 The email comprises over 12 pages of closely typed text.

489 In cross-examination Ms Johnson asserted, for the first time, that she had not actually composed this email.

490 She asserted that Mr Wassercug (to whom I have referred at [95]) prepared it. She said:

“I went through and told him things and then he typed it up”.

And:

“I told Leo things and he dealt with it. I sent it though. I can’t resile from it. It’s very wordy. I’m just not this wordy.”

491 I asked Ms Johnson whether she read the email before it was sent “to make sure it was what you wanted to say”. Ms Johnson replied:

“I can’t recall. Probably not.”

492 I do not accept this evidence.

- 493 Mr Wassercug was present throughout the hearing. As I have mentioned, he appeared to be instructing Mr Argy. If Mr Wassercug did prepare this email based upon “things” Ms Johnson told him, he was available to give that evidence. I infer that Mr Wassercug was not able to give evidence that would assist Ms Johnson’s case.
- 494 That is not itself proof that he did not prepare this email. But his failure to corroborate Ms Johnson’s evidence, combined with the form and detail of the email, makes me confident in drawing the inference that it was Ms Johnson’s work (see *HML v The Queen* at [303] (Heydon J)).
- 495 Ms Johnson said that “when I was writing to these people, I was trying to...stick bombs under them to make them actually operate and do something...I was trying to get information”.
- 496 Mr Argy went further and submitted that the email was “deliberately overstated” and intended as “an outrageously exaggerated and provocative communication” designed to cajole Ms Larter into exercising her responsibility as a general partner. He submitted that Ms Johnson felt constrained from seizing control because of her understanding of s 67 of the *Partnership Act*, namely that she (as a limited partner, which she believed she was) must not take part in the management of the business.
- 497 That is not how I read the email. It is certainly, at times, written in passionate language. It includes exhortations to Ms Larter to exercise her obligations as general partner and demands that she and Mr Foster give Ms Johnson access to the financial records of STC.
- 498 But I see no reason to conclude that the email does not accurately reflect the concerns Ms Johnson then had as to the integrity of the STC business.
- 499 As Mr Argy accepted, following Ms Johnson’s telephone call with Mr Foster and Ms Larter on 30 August 2013, Ms Johnson was on “high alert” about the

propriety of the STC business, the security of investors' funds, and also the security of her financial position.

500 The email was expressed to be a response to Mr Foster's emails of 16 July and 1 September 2013.

501 Its length and detail points strongly to the conclusion that it represents Ms Johnson's complete response to those emails.

***Ms Johnson's understanding of the nature of the STC business***

502 At the outset of the email Ms Johnson recited what appears to be her understanding of the nature of the STC business:

- “● STC was established as a NSW limited partnership pursuant to a 30/12/13 partnership agreement ('the STC agreement');
- Pursuant to the STC agreement, Anne is STC's general partner and bears unlimited liability and has management duties while I am a limited partner with limited liability with no management duties.
- STC's business is to place money into sports trading transactions on behalf of STC's associate members ('AMs') who lend their money to STC for sports trading placement.
- STC is generating large sums of money both from the loans received from the AMs and from the sports trading taking place on behalf of the AMs and using their loan moneys.
- Richard Holmes, STC's chief trader, places the money on behalf of STC.
- The seed money to establish STC was borrowed by me. Both of you provided no seed capital whatsoever.”

***Mr Foster now in total control***

503 The email contains a clear acknowledgment by Ms Johnson that Mr Foster was in total control of STC's operations.

504 Thus she said:

“Here we have a partnership whose entire business consists of getting money in (via the sales force) and trading it in sports markets and which loses its sales manager and it[s] senior trader and which two roles are replaced by one person, you.”

***Mr McMullen’s accusations and Ms Johnson’s “concerns”***

505 In his email of 1 September 2013, Mr Foster had accused Ms Johnson of causing Mr McMullen to resign by telling him that “millions and millions of dollars are going missing and we are all going to jail”.

506 In her 10 September 2013 email Ms Johnson vigorously asserted that it was Mr McMullen who had expressed concerns about Mr Foster’s activities.

507 Thus, as I have already set out at [436], she said:

“Kevin McMullen, Peter’s best friend and involved in STC on a daily basis as its Sales Manager, had told me that:

- Peter had a gambling problem
- Peter was improperly using the [Associate Members’] money to place large bets on sporting events for himself and was losing a lot of money
- Peter was operating STC as a giant Ponzi scheme using new money from [Associate Members’] to make up for his losses of previous money from [Associate Members’]

These are Kevin’s words, not mine.”

508 Ms Johnson continued:

“I am very concerned about the whereabouts, the management and the security of the large sums of money being generated by STC.”

509 Later she said:

“It would seem to me that the more you are both wrongly and improperly managing and operating STC, the more aggressive your responses have become to my expressing my concerns about the management and operation of STC, and to my making legitimate requests both for information about STC and for payment to me of my profit share. The behaviour of both of you leading up to and including our 30/8/13 phone call, and as followed up by Peter in his 1/9/13 email, heightens my concerns that fraud may be being committed by STC and that the moneys of the [Associate Members’] may both be in danger and may be being improperly used.”

510 In closing submissions, Mr Argy submitted that Ms Johnson was concerned as at 10 September 2013 that Mr Foster may have been gambling with partnership funds but that she hoped that the position could be remedied if Mr

Foster could be expelled from the business and Mr Holmes persuaded to return as STC's trader.

511 But the passage I have just set out shows that Ms Johnson's concerns were deeper than this. She was concerned that STC was committing fraud. She said the moneys of the Associate Members might be "in danger" and "being improperly used".

512 This was no doubt because of Mr McMullen's statement that Mr Foster was operating STC as a Ponzi scheme and "using new money from [Associate Members] to make up for his losses of previous money from Associate Members".

513 Ms Johnson summarised her concerns as follows:

"In view of the above, I am extremely concerned that:

- STC is being improperly managed and operated.
- STC may be being operated as a Ponzi scheme by Peter and hence is being illegally and fraudulently managed and operated.
- The [Associate Members'] accounts and records may be being falsified.
- The [Associate Members'] moneys may be at risk and are not being properly accounted for."

514 In the email, Ms Johnson also gave this account of a comment that Ms Larter had made to her:

"Anne has played a double-dealing role playing both Peter and me against each other. Anne, who after all has known Peter for some 25 years, told me that we needed to get as much money out of STC as we can as she's seen Peter's behaviour before and that he'll spend every cent that comes into STC. He was a huge spender and she said that we'd (Anne and Leigh) both end up with nothing."

515 Later in the email Ms Johnson said:

"Anne should reflect deeply on her personal liability as the sole general partner of STC. She would be ruined for life were STC to collapse in a welter of fraud and misappropriation and could end up in gaol as could you, Peter".

516 At another point in the email Ms Johnson said:

"I am not alleging either that 'millions and millions and millions of dollars are being made' nor that 'they're all being stolen'.

I have no evidence for that at this stage. I am simply asking that both of you keep me properly and adequately informed about the affairs of STC so that I can properly carry out my obligations and duties as a limited partner of STC."

517 I do not see this passage as being inconsistent with those to which I have earlier referred. Here Ms Johnson was saying no more than that, despite her strong suspicions, she did not actually know whether money was being stolen.

518 Ms Johnson gave this evidence about this in cross-examination:

"Q. So you had formed the view at that stage, or you were extremely concerned that STC was being improperly managed and operated as at 10 September 2013?

A. Yes.

Q. That AM records and accounts were being falsified, or may be being falsified?

A. That's what I said.

Q. And that money was at risk, and not being properly accounted for?

A. Yes.

Q. That there might have been a Ponzi scheme in operation?

A. Yes, I wanted to, I wanted to put everything on the record. I wanted her to step up and take charge. I wanted, I really thought, the more I can scare her, the more she's going to take charge."

519 On the other hand, in her affidavit Ms Johnson said that when she left STC:

"I thought I had a governance problem but had no inkling there might be a fraud problem".

520 That evidence cannot be right. It is irreconcilable with what Ms Johnson wrote in her 10 September 2013 email. She was obviously concerned that Mr Foster was causing the investments of Associate Members to be stolen.

***Concern about denial of access to accounts and bank statements***

521 In her 10 September 2013 email Ms Johnson made repeated demands for access to STC's accounts and bank statements.

522 But Ms Johnson was one of the signatories on the Westpac account. She could have obtained copies of the bank statements from Westpac at any time.

***Location of the Associate Member contracts***

523 In the 10 September 2013 email Ms Johnson recorded that Ms Larter had instructed her to go to STC's office in Market Street "to collect all the contracts of the [Associate Members] so that [Ms Larter] could determine how much money had been received by STC from the [Associate Members]."

524 Ms Johnson continued:

"I had to remind Anne that this was impossible as the Sydney office is nothing more than an empty serviced office serving as STC's registered NSW office. STC is in fact operated from Peter's Gold Coast home where Peter holds all the [Associate Members'] contracts. This is the very place from which you both rang me on 30/8/13 and means that Anne had immediate access not only to all the contracts and accounts of the [Associate Members] but also all of STC's business records".

525 Mr Dixon asked Ms Johnson about this passage. She made the extraordinary assertion that:

"It's certainly what I said, but I actually didn't know and, to be honest, I believed that a woman called Terri who was the manager of the office and who was also on the Gold Coast, from my understanding, held all of the contracts".

526 It was in this context that Ms Johnson asserted that she was "trying to stick bombs under them to make them actually operate and do something". It was also in this context that Ms Johnson gave evidence that she did not compose the email.

527 That evidence was given in the context of my enquiry of Ms Johnson as to why she made the statement in her email set out at [524] if she did not know it to be true. The full passage from the transcript is as follows:

“HIS HONOUR

Q. Why did you say it then? Why did you say it, if you didn't know it?

A. Probably, your Honour, to get them to say where they were or - or - I don't know why I said it, to tell you the truth. They're not really my words.

Q. You're recounting here a conversation you said you had had with Ms Larter, aren't you?

A. Yeah.

Q. Why would you say something about a conversation with her in a letter to her that wasn't what you actually recalled of the conversation?

A. I would have to read this whole letter, but I'm trying to - I'm trying to get some movement from any of them, trying to get something - it sort of goes on forever.

Q. Did you type up this email?

A. No.

Q. How was it created then? Did you dictate it to somebody?

A. I did it in conjunction with Leo.

Q. What do you mean by that? That you sat down with him and he typed while you dictated?

A. No, I went through and told him things and then he typed it up.

Q. Did you read it through before it was sent to make sure it was what you wanted to say?

A. I can't recall. Probably not.”

528 I do not accept this evidence. I do not accept that what Ms Johnson wrote in her 10 September 2013 email was “not really my words” or that she made this statement as to what she had “reminded” Ms Larter of in order to “get them to say where [the Associate Members’ contracts] were”.

529 The strong impression I had was that Ms Johnson was saying the first thing that came into her head in order to distance herself from the words she had written and her understanding, sitting in the witness box, of their significance.

530 I do not accept Ms Johnson's evidence that she did not actually know the matters that she asserted in this passage of the email. I find it impossible to accept that Ms Johnson would make such a detailed allegation in an email sent to people who would know the true position, unless she also understood it to be true.

### ***Money***

531 As well as expressing concern about the propriety of the STC business, Ms Johnson insisted in the email that she be able to ensure that "the lenders have been repaid the seed capital loan" and that "I am paid the amounts owed to me by STC".

532 Ms Johnson agreed that she had accepted the offer made by Mr Foster in his 16 July 2013 email to be paid the stipend of \$12,500 per month and "an instalment repayment plan to repay the \$182,500 seed capital loan".

533 She complained that, despite accepting this offer, she had only been paid one amount of \$12,500 and that "to date the ONLY benefit I have had is the use of the STC credit card".

534 Ms Johnson thus accompanied her statements of concern about the propriety of the STC business with a strident demand that she be paid all that was due to her under her arrangements with STC, and a vigorous assertion of her entitlement to use the STC credit card as she saw fit.

### ***Withdrawal of Ms Johnson's consent to being involved in STC?***

535 In cross-examination Ms Johnson said that, by sending this email:

"I was withdrawing my consent to be involved in any way until everything had been sorted out, until there was proper accounting done".

536 However, the manner in which Ms Johnson concluded the email is more likely accurately to set out the position she then maintained. The demands she prioritised in the email included the removal of her name and references from the Public STC Website (which she nominated in terms: www.sportstradingclub.com), ceasing the use of her name and image generally, and payment to her of her share of “profits”, her seed capital and interest.

537 Thus the 10 September 2013 email concluded:

“My name and image has been used by STC for promotion of its business. In the light of my above concerns that STC’s business is being improperly and illegally managed and operated, your refusal to address my concerns, and particularly in the light of our phone call on 30/8/13..., I hereby request and insist that as a matter of urgency that:

- The STC partners be provided with a written confirmation by STC that the moneys and accounts of all [Associate Members] is secure, properly accounted for and properly audited.
- The STC partners be provided with a written confirmation by STC that Peter [Foster] has not been improperly, illegally or fraudulently using either STC’s money or the [Associate Members’] moneys for purposes other than the legitimate business purposes of STC.
- STC instruct KPMG or another firm of chartered accountants to conduct a complete independent audit of STC.
  - I be provided with copies of the documents I have requested above.
- My name and all references to me be removed from STC’s website at www.sportstradingclub.com, and all of STC’s marketing literature in whatsoever format.
- STC is to cease forthwith from using my name or image in any way whatsoever in whatsoever media or formats until all these matters have been clarified to my satisfaction and I have been supplied with all the above information that I have requested and to which I am entitled.
- Subject to a proper accounting for STC’s operations and profits, STC forthwith pay me my share of STC’s profits plus finalise the repayment of the seed capital loan plus interest.”

### **Ms Johnson’s 23 September 2013 email to Ms Larter**

538 On 23 September 2013 Ms Johnson sent Ms Larter an email in which she said that she was “very worried about STC”.

539 She said:

“Having been made aware of the STC situation, the very serious allegations (Kevin [McMullen’s] not mine) and the risks, you cannot now ignore it and plead ignorance. If you do, you’ll not only be civilly liable without limitation but also criminally liable if you have participated or turned a blind eye to fraud, if there is any.”

540 Ms Johnson said:

“We must monitor, and you as general partner must manage, STC’s business and performance regularly and consistently.

We must do the right thing, Anne. The alternative doesn’t bear thinking about.”

### **Ms Johnson’s 23 September 2013 email to Mr Foster**

541 On the same day, Ms Johnson wrote an email to Mr Foster reiterating “my strong concerns about the management and operations of STC”.

542 Evidently, Mr Foster had asserted that a report from KPMG on STC’s financial position would shortly be available.

543 Ms Johnson said she looked forward to receiving that report but:

“...it is no substitute for the documents for which I have asked. I do not exercise my responsibilities as an STC limited partner with a once a year report. I must monitor STC’s business and performance regularly and consistently.”

544 There is no evidence that, prior to September 2013, Ms Johnson had sought to monitor STC’s business in any way; let alone “regularly and consistently”.

### **Logan J’s judgment in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)***

545 On 27 September 2013 Logan J published his judgment in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3)* [2013] FCA 984.

546 As I have mentioned, Logan J found Mr Foster guilty of two charges of contempt of court, arising out of a breach by Mr Foster of orders made by

Lander J on 2 September 2005 in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liq)* [2005] FCA 1212.

547 Lander J had made findings about Mr Foster's involvement in marketing the TRIMit weight loss pill and orders prohibiting Mr Foster from being involved in any business relating to weight loss or to the cosmetic or health industries for a period of five years.

548 Logan J found Mr Foster's later involvement in the SensaSlim business constituted a breach of Lander J's orders.

549 Mr Foster's conduct in relation to the SensaSlim product was to become the subject of the judgment of Yates J to which I have referred: *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 5)* [2014] FCA 340.

550 Logan J fixed 24 October 2013 for the hearing of submissions as to penalty.

551 Logan J ordered that Mr Foster be detained in custody pending sentence. When Mr Foster failed to appear Logan J ordered that a warrant be issued for his arrest unless Mr Foster surrendered to authorities by 5 pm on 27 September 2013. Mr Foster did not surrender. A warrant was issued. Mr Foster remained on the run until his arrest 12 months later on 28 October 2014.

### **Ms Johnson's 28 September 2013 emails to Ms Larter**

552 Ms Johnson was aware of the warrant issued for Mr Foster's arrest.

553 Thus, on 28 September 2013 (or perhaps 29 September 2013; copies with both dates appear in the Court Book), Ms Johnson sent an email to Ms Larter:

"I wrote to you twice recently on 10 and 23 September 2013 expressing my deep concerns about STC. You did not reply even though, as my partner in STC, you were legally obliged to liaise and co-operate with me, and even though, as STC's general partner, you bear unlimited liability for STC's business. You were with Peter Foster at his Gold Coast home in August

2013 and participated in the phone conversation in which he refused to provide me with the information and reports about STC that I had legitimately requested and in which he threatened my life. You have also failed to provide me with the information and reports.

However, in view of recent dramatic events (events which you have witnessed at close hand as you were again with Peter on the Gold Coast since Wednesday 25 September 2013), now is not the time for recriminations.

As I understand it, the following happened yesterday:

- 1 Justice Logan of the Federal Court handed down his judgment in the Chaste Corporation case and found against Peter holding that Peter was an unreliable witness and was in contempt of court for being involved in the SensaSlim weight loss scam thus breaching 2005 court orders.
- 2 Justice Logan adjourned the matter till 24 October 2013 for the hearing of submissions regarding penalties against Peter which were likely to include a gaol term. He ordered that Peter be held in prison until 24 October 2013.
- 3 Peter failed to appear in court for the judgment.
- 4 Justice Logan ordered that a warrant for the arrest of Peter be issued if Peter did not turn himself in to police by 5pm yesterday.
- 5 Peter did not do so thus the warrant was issued.
- 6 A manhunt has begun for Peter...

As Peter breached the 2005 court orders while on parole, and because he was on bail pending Justice Logan's judgment, his gaol sentence will be increased. The media is speculating he'll get 6 months to 3 years.

I have read the entire lengthy 254 paragraph judgment in Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 3) [2013] FCA 984. As I did so I came to the shocked and sickening realisation of a striking similarity of methods, techniques and facts to those which Justice Logan found Peter had used in the SensaSlim scam.

I warned you in my emails that STC could ruin your life if things went wrong. Rather than recriminations, now is the time for us, as the STC partners, to take urgent action. Peter has absconded and we have to act together to take stock of the current state of STC's business and ensure that all is well and under control. We have to ensure that the STC moneys are secure and properly accounted for." (Emphasis added.)

554 In this email, Ms Johnson stated that she had read the "entire lengthy 254 paragraph" judgment of Logan J.

555 She swore in her affidavit that she had read the judgment. She said: "I was unaware of the details and characteristics of Peter Foster's modus operandi until I read Logan J's judgment" in the *Chaste Corporation* matter.

556 But before me, in cross-examination, for the first time, she asserted that this was not true. She gave this evidence:

"Q. When you read the judgment, you say that you came to the shocking and sickening realisation of a striking similarity of methods, techniques and facts to those which Justice Logan found appeared to have used in the SensaSlim scam, do you see that?

A. I see that, but I didn't actually read the judgment.

Q. So you didn't read the judgment, but you wrote an email saying that you were shocked and sickened at the striking similarity of methods, techniques and facts, so you just made that up?

A. I didn't make it up, I was trying to get her to act, and give me what I wanted.

Q. I put it to you, Ms Johnson, that what you wrote here was accurate at the time, that you did read that judgment and you did come to that realisation?

A. Well, whatever, I didn't read the judgment, but I was told, I was told what was in it, but I didn't read it.

Q. Who told you that?

A. Leo."

557 Again, Mr Wassercug was available to corroborate that evidence if it were true. But he did not.

558 Whatever the truth may be about this, it reflects badly on Ms Johnson's credit. Either she falsely asserted to Ms Larter and swore in her affidavit that she read the judgment; or she falsely swore before me that she did not.

559 What is clear is that Ms Johnson understood precisely the import of Logan J's findings and their significance so far as concerned STC.

560 In her email, Ms Johnson said she came to the “shocked and sickening realisation of a striking similarity of methods, techniques and facts to those which Justice Logan found Peter has used in the SensaSlim scam”.

561 Mr Argy submitted that what Ms Johnson was “shocked and sicken[ed]” about was the evident similarity between the findings Logan J made about Mr Foster’s involvement with the SensaSlim product and the findings made by Lander J concerning the TRIMit product in the *Chaste* proceedings.

562 However, that is not something Ms Johnson asserted. She did not say that in her affidavit. Her response in cross-examination was simply to say that she had not read the judgment: see [556].

563 Further Mr Argy only developed this argument in final submissions.

564 The context in which Ms Johnson said that she was “shocked and sicken[ed]” by the “striking similarity of methods, techniques and facts” makes clear to me that Ms Johnson was comparing Logan J’s findings about Mr Foster’s modus operandi in the *SensaSlim* case to that which she understood he was using at STC.

565 Her email opens with repetition of her “deep concerns about STC”. She reminded Ms Larter that Ms Larter bore “unlimited liability for STC’s business”.

566 Immediately following her observation about the “striking similarity” she said “I warned you in my emails that STC could ruin your life if things went wrong”.

567 Mr Argy’s submission cannot stand with the words that Ms Johnson used when seen in the context of the email as a whole.

568 Even if the correct conclusion is as Mr Argy submitted, and that Ms Johnson’s email bespeaks a realisation by her that Mr Foster had employed “methods” and “techniques” in the SensaSlim business which were “strikingly similar” to those he deployed in the TRIMit business, Ms Johnson must have been deeply concerned to come to that realisation. She had expressed in her 10

September 2013 email grave concerns as to the propriety of the STC business. Those concerns must have been heightened by whatever she drew from Logan J's judgment.

### **Ms Johnson's 29 September 2013 email to Ms Larter**

569 On 29 September 2013 Ms Johnson wrote a further email to Ms Larter:

"To my great surprise, you informed me yesterday, Sat 28 September 2013, that you were leaving for Hong Kong tomorrow, Mon 30 September 2013.

Such a trip at this time is highly inappropriate and inadvisable. Whatever you thought last Thursday was the STC situation, everything has changed now with Peter Foster's abscondment and pending arrest and gaoling. STC is in crisis and you go overseas to celebrate your son's birthday?!? As I explained in detail in my email to you yesterday, it is our legal duty as STC partners to ensure that:

- 1 everything at STC is in order and that all STC funds are secure and properly accounted for; and
- 2 the day-to-day business of STC continues despite Peter's sudden absence (which includes speaking to the STC team and ensuring they don't panic or leave due to Peter's pending arrest).

You are STC's general partner. As such, I remind you again that you bear full responsibility for managing STC's business and you also have unlimited liability for STC. It's your head that's on the chopping block. Now is definitely not the time to take an overseas holiday. I sincerely hope you are not moving, or helping to move, any STC funds offshore. This would incriminate you horrendously. Your situation is already dire, Anne. Please don't make it worse. Please assure me that you will fulfil your legal obligation as STC's general partner and give your full attention to STC now. We as STC's partners urgently need to take stock, ensure continuity, and check everything at STC is in order.

I would remind you that pursuant to the STC Limited Partnership Agreement, STC's annual audited accounts must be prepared and presented by 30 September each year, which falls tomorrow, Monday. I expect you to provide me with copies of those audited accounts from KPMG tomorrow as well as copies of all the accounts and records I requested on 10 September 2013."

570 Ms Larter's departure to Hong Kong must have put Ms Johnson on high alert that something was seriously awry in the STC business.

571 The general partner that she been exhorting to "step up" and assume responsibility in the business had left the country. And Mr Foster, who by

then Ms Johnson well understood was in total control of the STC business, had disappeared and was on the run after a warrant had been issued for his arrest.

### **Pikes & Verekers' letter to The Courier Mail**

572 Less than a week later, on 3 October 2013, Pikes & Verekers wrote a letter to Mr David Murray, the Crime and Courts Editor of The Courier Mail newspaper. Again the letter was written by Mr Tassell, a partner at Pikes & Verekers.

573 Evidently, Mr Murray had enquired about Mr Foster following the events I have described.

574 The letter read, relevantly:

“We act for Ms Leigh Johnson and Ms Anne Larter who are in a partnership which is the proprietor of a business known as the ‘Sports Trading Club’.

Our clients have advised us of Mr Murray’s inquiry and have asked us to respond to your inquiry on their behalf.

Your enquiry referred to Mr Peter Foster. Our clients [are] aware of some email and internet postings which are grossly defamatory of them and which have suggested that their business is in some way related to Mr Peter Foster. We are instructed that that is not the case and that Mr Foster had absolutely no connection to the business.

Another media outlet made a similar enquiry earlier this year and was advised of the true position and did not run any story.

We are instructed to advise you that any publication containing any such allegations would be grossly defamatory of our clients and would be met with appropriate action for damages and other relief.

That said, if you wish to provide written questions to our clients via this office they will provide answers.”

575 In cross-examination Ms Johnson said that she did not know whether she gave Mr Tassell the instructions in this letter. She said “I don’t remember this letter to be honest”.

576 It was obviously quite untrue to say, as Mr Tassell was instructed to say, that “Mr Foster has absolutely no connection” to the STC business. Mr Foster was

intimately involved in, and in total control of the business. Later events show that he remained actively involved in the business until his arrest in October 2014.

577 Mr Tassell's letter concluded with an invitation to answer "written questions to our clients via this office".

578 Mr Murray did not take up that offer. Rather he spoke directly to Ms Johnson.

### **Ms Johnson's dealings with The Courier Mail**

579 That occurred on or about 4 October 2013.

580 Ms Johnson said she had a clear memory of this. At one point she said that she called Mr Murray. Later in her evidence she said that Mr Murray had called her. She agreed that Mr Murray asked her questions about STC. Ms Johnson said she then asked Mr Murray to put his questions in writing.

581 Accordingly, on 4 October 2013 Mr Murray sent an email addressed to Ms Johnson at sydney@sportstradingclub.com.

582 Ms Johnson said that she did not use and did not have access to the email address sydney@sportstradingclub.com. But Ms Johnson must have given this email address to Mr Murray. How else would he know of it? At one point Ms Johnson said that she had given Mr Murray one of her private email addresses and said "I think he emailed me to my personal email". I had the distinct impression that Ms Johnson made that evidence up on the run. In any event, any email that Mr Murray sent to Ms Johnson's personal email address is not in evidence.

583 Ms Johnson agreed that she saw the questions set out at in Mr Murray's email. She said "I certainly received an email with a whole lot of questions and I accept that these were the questions", having twice previously said that she could not remember "if it was these questions".

584 Ms Johnson was not clear as to how she came to see Mr Murray's questions. At one point she conjectured "it must have been forwarded from STC to me". I think it more likely that she saw the email that Mr Murray had addressed to sydney@sportstradingclub.com. Even if someone at STC forwarded Mr Murray's 4 October 2013 email to Ms Johnson, she must have seen that Mr Murray had addressed his questions to that email address.

585 Ms Johnson gave this evidence in cross-examination:

"Q. So you had a conversation with David Murray?

A. I did.

Q. And the subject matter of that conversation was Peter Foster?

A. The subject matter was STC, the Sports Trading Club.

Q. Well, the issue of Peter Foster was raised, because he says that you indicated that you were willing to answer any questions that he had about Peter Foster. That's what the subject matter of your conversation was; correct?

A. Well, I don't recall what the conversation was. He certainly wanted to do an article on STC.

Q. And you then arranged to answer some questions for him; correct?

A. I'm sorry, I believe that he was saying, you know, I'm inquiring as to whether STC is just bogus.

Q. You then accepted an invitation to answer certain questions that he had?

A. I said I'd answer any questions he sent.

Q. You then provided him with an email address, in which to send the questions, correct?

A. That's right.

Q. The email address you provided is the one listed there at point 7, sydney@sportstradingclub.com?

A. To be honest, I think I sent, I think he emailed me to my personal email, which is [the Hotmail address]. I think I gave him [the Hotmail address]. And then I answered the questions, I know this looks like it's gone to STC, but maybe it went to STC as well. But my memory, and it may not be right, is that I answered the questions, and I sent them to STC."

586 Mr Murray's email was headed "Questions for Leigh Johnson – response requested by 4pm today, Friday 4 October".

587 The email read:

"Thank you for your phone message. I appreciate your comments that you are willing to answer any questions I might have about Peter Foster."

588 There followed 10 questions including:

"What connection does Peter Foster have with the Sports Trading Club?"

And:

"How would you describe your relationship with Peter Foster?"

589 These questions must have been amongst those Mr Murray asked of Ms Johnson in their conversation. Logan J's orders, the issue of a warrant for Mr Foster's arrest and his disappearance had received significant publicity. It was obviously the reason for the enquiry Mr Murray made that led to Pikes & Verekers' 3 October 2013 letter.

590 Ms Johnson could easily have told Mr Murray the true position: that Mr Foster's connection to the STC business was that he was in control of it; he was "running the sales team and doing all the trading".

591 Ms Johnson could have offered to give information to Mr Murray on condition of anonymity. Or she could have sent him the information anonymously. As I discuss below, Ms Johnson contends that around this time she did seek to provide information anonymously to various parties. On her account of those matters, she did feel the need to speak out.

592 Instead, Ms Johnson invited Mr Murray to put his questions in writing by email.

593 Someone called "Leo" replied by email from sydney@sportstradingclub.com to Mr Murray's email on 4 October 2013.

“Your letter has been given to Leigh Johnson who will reply later this afternoon.

A letter was sent to you yesterday from our lawyers which you must not have received. Another copy is attached herewith for your information”.

594 That letter “from our lawyers” was the Pikes & Verekers letter of 3 October 2013.

595 Ms Johnson said that she did not know who the “Leo” was that sent this email. She denied it was Mr Wassercug. Ms Johnson said “it’s a classic Foster trick that I realise now from a very clever psychopath”.

596 As I have said, Ms Johnson agreed that the questions that she received, whether directly from Mr Murray, or from “Leo” or someone else at STC, were those set out in Mr Murray’s 4 October 2013 email.

597 Ms Johnson said that she prepared answers to those questions but sent her response to STC, rather than directly to Mr Murray. She said she “sent it to the desk”. In her affidavit Ms Johnson said that she knew Mr Foster used the email address stcdesk@outlook.com. By sending her draft “to the desk” Ms Johnson must have understood it would be seen by Mr Foster.

598 The following day, 5 October 2013, a reply purportedly authorised by Ms Johnson was sent to Mr Murray from the email address stcdesk@outlook.com responding to Mr Murray’s questions.

599 That email replied to the question “what connection does Peter Foster have with the Sports Trading Club?” as follows:

“None. Peter Foster has no involvement whatsoever with STC, never has, never will”.

600 In response to the question “how would you describe your relationship with Peter Foster?” the reply said:

“I have no relationship with Peter Foster”.

601 The email stated, later:

“In closing, let me just state the obvious. If you allege either that this business is in any way questionable, our performance results are inaccurate or inflated...or we have any association whatsoever with the infamous Peter Foster, I will sue you and your newspaper...

Even the mention of our name and Foster’s in the same article is unpalatable to me and most likely defamatory...

Whilst you are chasing ghosts, you fail to see what is right in front of your eyes. Me. Leigh Johnson. I am a Solicitor in Good Standing of the Supreme Court of New South Wales and the High Court of Australia. I have been a lawyer for 30 years and I am telling you that Peter Foster is NOT involved in this partnership and that STC is an honest ethical business that does no wrong”.

602 Ms Johnson denied that she composed these answers. The email purports to be signed off by “Leigh Johnson Legal Partner”.

603 Ms Johnson denied that she ever described herself as the “Legal Partner” of STC.

604 Ms Johnson gave this evidence in cross-examination:

“Q. Is it your evidence that you had no knowledge of those answers?

A. These are not my answers. 100%, not my answers. I answered more, I answered exactly what I'm telling you, that he was involved in setting up the internet side of it. And that he wasn't, he wasn't running it. I did not give these answers.

Q. Where are the answers that you gave?

A. I know, that's, I tried to find them. I couldn't find them.” (Emphasis added.)

605 Thus, at this point of her evidence, Ms Johnson said that the answers she drafted to Mr Murray’s questions included the assertion that Mr Foster was involved in setting up the “internet” but that he “wasn’t running it”.

606 But by now Ms Johnson well knew that Mr Foster was “running” STC. She had received emails from Mr Foster in which he described himself as “STC Team Leader”. In his 1 September 2013 email he asserted, and Ms Johnson in her 10 September 2013 email accepted, that he was “doing all the trading

myself” and that he was working “18 hours a day 7 days a week running the sales team”.

607 In her email to Mr Foster and Ms Larter of 10 September 2013 she had recorded that the roles of sales manager and senior trader had been “replaced by one person, you” and that “STC is in fact operated from Peter’s Gold Coast home where Peter holds all the [Associate Members’] contracts”. Ms Johnson knew Mr Foster was “running it”.

608 Thus what Ms Johnson claimed at this point of her evidence to have been her actual draft answer, albeit one intercepted and edited by (presumably) Mr Foster, was to her knowledge false.

609 But later Ms Johnson gave this evidence, in answer to questions from me:

“Q. In your draft to STC, what did you say in the part of the question, ‘What connection does Peter Foster have with Sports Trading Club?’?”

A. Your Honour, every question that was asked of me - and I can't remember if these were the questions that were sent to me or not - but every question that was asked of me I answered accurately and I would have said that he was managing the posting of the trades, I imagine. I wish I could find my email, because it was not this.” (Emphasis added.)

610 Thus, having earlier asserted that her draft included the allegation that Mr Foster “wasn’t running it”, Ms Johnson now conjectured that her answer would have said “he was managing the posting of the trades”.

611 Ms Johnson appeared oblivious to the inconsistency of her responses.

612 It may be that Ms Johnson did not compose the answers that were actually sent to Mr Murray.

613 However, it must have occurred to Ms Johnson that the course she adopted of sending her draft answers to Mr Murray’s questions to STC left open the near certainty that her answers would be changed. Ms Johnson knew how fiercely determined Mr Foster was not to have his involvement in STC revealed. Ms Johnson must have thought it likely, if not certain, that Mr

Foster would intervene to ensure that the answers given to Mr Murray falsely represented that Mr Foster had no involvement with STC.

614 A further email, again purporting to be from Ms Johnson as “Legal Partner” was sent to Mr Murray on 9 October 2013 from stcdesk@outlook.com. It concluded:

“Finally, I again reiterate that whilst I understand you are focused on a story on Peter Foster, the Sports Trading Club is a legitimate business whose bona fides are beyond question and we have absolutely no association with Mr Foster past, present or future. Whatever he may be doing in the shadows, has no influence, interest or input on this business”.

615 I think it likely that that email was composed and sent by Mr Foster.

616 Mr Murray’s article was ultimately published in The Courier Mail on 28 October 2013.

617 The article asserted that:

“The club has an Australian presence through the Sports Trading Club Partnership – a business part-owned by high profile Sydney lawyer Leigh Johnson”.

618 The article did not mention Mr Foster but attributed to Ms Johnson various detailed comments about “Howard Robin”. Those comments were taken from the 5 October 2013 email.

619 On Ms Johnson’s account of it, the article thereby attributed to her comments about “Howard Robin” that she had not made.

620 Nonetheless, when she read the article she remained silent and confined her complaints to Ms Larter.

621 Thus she gave this evidence:

“Q. So you're saying you never wrote this?”

A. No, I never wrote it. No. That's exactly what I said. I told you that last time.

Q. Yes.

A. I don't think you asked me about this but the article in the newspaper - nothing is what I said.

Q. When you say the article in the newspaper, you mean that the Courier Mail then published an article including the answers that were provided by STC? Is that what you mean?

A. There is an article in a Brisbane newspaper – if you say it's the Courier Mail then I accept that but someone showed me that at some point and none of it is what I said.

Q. Did you contact the Courier Mail and indicate that something had gone horribly wrong?

A. I contacted Anne and said, 'What's going on here?'

Q. Did you ever ring back Mr Murray and say whatever he published was not what you had answered?

A. No, I didn't.

Q. You didn't do that because you understood that you couldn't at that stage have exposed Mr Foster?

A. Is the article here, the newspaper article?

Q. I'm asking you, you didn't contact Mr Murray because you were not going to expose Mr Foster as being involved in STC?

A. I'm not sure when I saw the article, but certainly when I saw it, I went, 'This is not – I did not say any of this,' and I raised it with Anne – I know I was angry about it, but, no, I did not contact Mr Murray. Mr Murray was very antagonistic towards me, even when I spoke to him, that's why I asked him to put his questions to writing, so that there wouldn't be any misunderstanding, but – but I'm telling you categorically, I did not write this."

622 It is extraordinary that, having spoken to Mr Murray on 4 October 2013, and having at his invitation prepared and sent to STC answers to his questions, Ms Johnson would not complain to Mr Murray that his article contradicted what she had said.

623 And even if, as she said, Ms Johnson confined her remonstrations to Ms Larter, she must have been deeply alarmed that something was seriously wrong at STC. After all, on Ms Johnson's account of it, someone had falsely

represented to Mr Murray that she had made comments about “Howard Robin”. Ms Johnson must have thought Mr Foster or Ms Larter was responsible.

### **More letters from Pikes & Verekers to The Courier Mail**

624 Between 10 and 18 October 2013 Mr Tassell, from Pikes & Verekers, wrote four letters to Mr Murray at The Courier Mail. Each stated that it was sent on the instructions of Ms Johnson and Ms Larter.

625 I have already mentioned the letter of 3 October 2013: see [572] to [574].

626 On 10 October 2013 Mr Tassell wrote to Mr Murray stating that he had received instructions about communications between Mr Murray and Ms Johnson concerning Mr Murray’s enquiries about STC.

627 Mr Tassell said:

“We refer to our letter of 3 October 2013 and note that we are instructed that despite there having been communications between Mr Murray and Ms Johnson about a co-operative approach to enquiries as to our clients’ business you have indicated that, despite Ms Johnson’s communications to yo [sic], you intend to publish an article about Mr Peter Foster and the Sports Trading Club.

In light of the previous communications it is clear that you intend to publish an article that imputes that our clients and their business:

1. have some association with Mr Peter Foster; or are
2. in some way not conducting a legitimate business.

We are instructed that any such imputations are utterly false and, if published, will cause irreparable damage to our clients’ reputations and the goodwill of the business.”

628 Ms Johnson said that she “didn’t instruct them anything in this letter. I don’t even know how this letter came about”.

629 On 11 October 2013 Mr Tassell sent a further letter to Mr Murray which included:

“You have informed our clients (that is Leigh Johnson and Anne Larter trading as the The [sic] Sports Trading Club Partnership, a business name registered in NSW, ABN...) that you intend to publish an article on the weekend in The Courier Mail and/or the Sunday Mail, associating Mr Peter Foster (‘Mr Foster’) with our clients and/or imputing that our client’s business is a ‘sham’ or disreputable business.

Your asserted intention to publish such an article is particularly alarming given that you are on notice that Mr Foster is not associated with our clients at all and in circumstances where you have rejected, without explanation, our clients’ offer to demonstrate first hand the bona fides of the business and how it operates in practice.”

630 On 15 October 2013 Mr Murray sent a further email to the email address stcdesk@outlook.com with further questions including what connection STC had with “Peter Foster’s niece, Arabella Foster” or what connection STC had with “Peter Foster’s associate, Robin Howard Reichelt” and what contact Ms Larter had with “Peter Foster, his sister or anyone else in the Foster family”.

631 On 18 October 2013 Mr Tassell wrote a further letter to Mr Murray referring to Mr Murray’s 15 October 2013 email stating that “our clients” have “resolved in good faith to answer your further enquiries” but that:

“Ms Johnson and Ms Larter wish to make it clear that they will not continue to do so if you continue to disregard the answers they provide.”

632 Mr Tassell wrote:

“...Ms Johnson made an offer for you to access to the Sports Trading Club Partnership website as a Member for...a period of 14 days on certain terms. Ms Johnson and Ms Larter will permit you access to the subject website on the following terms...”.

633 Mr Tassell clearly understood that he had instructions from both Ms Johnson and Ms Larter to write these letters. Ms Johnson denied that she had involvement in those instructions. The instructions must have come from Ms Larter.

### **Mr Mackinnon’s investment**

634 It was after the occurrence of all these events that Mr and Mrs Mackinnon made their investment.

635 In October 2013 Mr Mackinnon saw an advertisement in the Sydney Morning Herald which was to the same effect as that set out at [145] above.

636 Mr Mackinnon spoke to a person who introduced himself as “Tom Nolan” (actually Peter Nolan) who said words to the effect:

- “there is an opportunity to loan money to STC for a period of up to three years”;
- “the loan will be repaid in full after three years plus 50 per cent of the profits made from betting trades”;
- “the loan will be guaranteed by the directors of Sports Trading Club”;
- “the loan is ‘risk free’”; and
- “if you are interested, a proposal will be sent with further details in it”.

637 Mr Mackinnon also spoke by telephone with “Mark Hughes”, who spoke of his experience in “foreign exchange trading with Barclays Bank in London”.

638 On 28 October 2013 Mr Mackinnon received an email from “Mark Hughes”, who described himself as National Sales Manager of STC, attaching a letter from Ms Larter and inviting Mr Mackinnon to telephone him on a nominated telephone number “if I can be of assistance”. Thus, although Mr Foster was on the run, emails were being sent out from “Mark Hughes”. Mr Foster was maintaining control of the STC business.

639 The letter from Ms Larter to Mr Mackinnon thanked Mr Mackinnon for his confirmation that he wished to “proceed with a loan of \$100,000 for a term of three years”, attached a Loan Agreement, invited Mr Mackinnon to print out the agreement, sign it and return it to “Mark Hughes” and to deposit \$100,000 to the STC bank account at Westpac.

640 Mr and Mrs Mackinnon executed a Loan Agreement in respect of the \$100,000 on the same day, 28 October 2013.

641 Mr Mackinnon's deposit of \$100,000 is shown as a credit entry in the STC Westpac account on 31 October 2013.

642 On 4 November 2013 Mr and Mrs Mackinnon signed a second Loan Agreement and, on 7 November 2013 transferred a further \$100,000 to the STC Westpac account.

643 Mr and Mrs Mackinnon's first loan was repayable on 28 October 2016. The second loan was repayable on 4 November 2014. The loans have not been repaid.

644 In his affidavit, Mr Mackinnon said:

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

645 Mr Argy submitted that it is not credible that the mere mention of Mr Foster's involvement would have deterred Mr and Mrs Mackinnon's investment. However, Mr Argy did not challenge Mr Mackinnon in relation to this evidence. In those circumstances, I am not prepared to reject it.

### **The circumstances leading to Ms Johnson's resignation as a partner**

#### ***Ms Johnson's withdrawal of funds from STC's bank account***

646 In late December 2013 Ms Johnson withdrew \$50,000 from the STC Westpac account.

647 In her affidavit she said that “the money was owing to me and I used it to repay what I had borrowed to provide [STC] with its start-up money”.

648 Ms Johnson was evidently unconcerned about the provenance of the money she withdrew. It must have occurred to her that the money represented investments made by Associate Members. A glance at the Westpac bank

statements, access to which she (as one of the account holders) was entitled, would have revealed this. Over the days prior to 19 December 2013 there were numerous deposits to the account, all in round numbers, and many identifying the names of the Associate Members making the deposits.

***Mr Foster's email of 30 December 2013***

649 On 30 December 2013 Mr Foster sent Ms Johnson an email from the email address [teamleader@sportstradingclub.com](mailto:teamleader@sportstradingclub.com). Thus, although a warrant had been issued from the Federal Court for his arrest, and he was on the run and being sought by Police, he had access to STC's email server. He was obviously still running the show.

650 Mr Foster wrote:

"Well now we know you are nothing but a thief. You had agreed to \$12,500 a month remuneration.

Yesterday you unlawfully stole \$50,000 out of the business bank account...you transferred \$40,000 to your bank account and spent the other \$10,000 on the business credit card. That on top of the \$42,500 you had previously spent on the business credit card."

651 Mr Foster accused Ms Johnson of having spent \$42,500 on STC's business credit card "all for your own personal use", that she would receive \$12,500 on the first of each month "and not a penny more" and that:

"If it doesn't suit you, then I suggest you resign NOW. Otherwise be bloody grateful and think how much harder your life will be without the \$3,125 a week...and STOP USING THE CREDIT CARD...IT IS NOT YOUR MONEY TO SPEND". (Emphasis in original.)

***Ms Johnson's reply of 13 January 2014***

652 Ms Johnson replied on 13 January 2014 repeating her demand for financial statements and records and saying, amongst other things:

"The longer you and Anne ignore my legitimate inquiries about STC, fail to provide answers to my straightforward questions, and fail to provide me with copies of documents to which I am entitled, the greater my suspicions grow

that something improper and untoward is taking place at STC and being done behind my back. I have not and will not fail to perform my legal duties”.

653 Ms Johnson also said:

“I would contribute a hell of a lot more to STC were I allowed to. You have relied on my good name from the beginning of STC yet have deliberately excluded me from further participation in, or information about, STC. I was so committed to STC that I was prepared to move to the Gold Coast to work for STC full-time, an offer you rejected.”

654 This statement shows that Ms Johnson maintained an interest in participating in STC and that that interest did not depend upon Mr Foster ceasing his involvement.

655 Thus she said:

“Please advise when I can expect to receive both the financial statements, records and information which I requested and also the payments due to me”.

656 It is not clear what payments Ms Johnson was referring to as being “due to me”. By now she had withdrawn \$50,000 from the account.

657 The point, for present purposes, is that Ms Johnson coupled her stated interest in obtaining more information about the financial state of STC with her demand for funds.

658 Ms Johnson did not enquire as to Mr Foster’s whereabouts, mention the fact that he was on the run from the Police, or advise that he turn himself in. Nor did she express any surprise at having heard from Mr Foster or about receiving an email from the teamleader@sportstradingclub.com email address. Mr Foster’s communication by that email address must have made perfectly clear to Ms Johnson that Mr Foster was still actively involved in the STC business.

#### **Ms Johnson’s resignation as partner of STC on 21 January 2014**

659 On 21 January 2014 Ms Johnson resigned as a partner of STC.

660 On that day she sent an email to Ms Larter:

“[I] refer to my previous correspondence to you regarding our partnership, The Sports Trading Club Limited Partnership (“STC”). You have ignored those communications and refused to provide me with the reports and financial statements to which, as your (limited) partner, I am entitled. You have deliberately prevented me from fulfilling my legal obligations as STC’s limited partner and have utterly failed in performing your own duties as the general partner of STC for which you bear sole and full personal and unlimited liability.

I can only conclude that your refusal to keep and prepare, and provide me with, proper financial records and accounts, and have them audited indicates that you have something to hide. I cannot remain associated with a business operated in this manner.

Accordingly, I have no option but to resign as the limited partner of The Sports Trading Club Limited Partnership (STC) with immediate effect. I have today also frozen STC’s bank accounts at Westpac so my name and signature are no longer associated with STC. I am returning my STC debit card by mail.”

661 Ms Johnson’s email reveals she had no difficulty instructing Westpac to freeze STC’s bank accounts. As I have mentioned, Ms Johnson and Ms Larter were each authorised to operate that account and, as the events of 21 January 2014 reveal, freeze it. Ms Johnson could have taken that step at any time prior to 21 January 2014.

### **Findings concerning Ms Johnson’s decision to resign as partner**

662 As far as concerns Ms Johnson’s knowledge of the fraud at the time of her resignation, Mr Argy submitted:

“Even up until the time of her withdrawal of participation in [The Sports Trading Club Partnership] due to not being furnished with the financial records and Associate Member information that she sought, [Ms Johnson] thought she could persuade [Ms Larter] to re-engage Richard Holmes to resume trading and that his successes would recoup any of [Mr Foster’s] gambling losses before lenders’ funds were due for repayment. After she came to the view that [Ms Larter] was under the undue influence of [Mr Foster], [Ms Johnson] thought once he was arrested and incarcerated, which she believed in September 2013 was imminent given that Justice Logan had issued a warrant for [Mr Foster’s] arrest, she would be able to persuade [Ms Larter] to follow her recommended course of action. There was a never a stage before [Mr Foster’s] arrest where [Ms Johnson] was aware of the nature, scope or sophistication of any fraud that [Mr Foster] had masterminded. She remains ignorant of the details even today...”

663 That submission is reflected this evidence of Ms Johnson:

“Q. And it was apparent to you at that stage that you had absolutely no way of controlling the business that had your name on it from Mr Foster's dealings?

A. I kept trying. I tell you, I thought if I could take over I could trade out of any losses he had made and I really didn't want anyone to lose their money, and my name was on it, you're right. But I truly believed he's going to be – his influence on Anne will be gone soon because he will be gone and then we can trade out of any of the losses that he has made.

Q. On what basis do you say he would be gone? What was put in place to ensure that Mr Foster's exit would be ensured?

A. He was – well, gaol. He was going to gaol. I believed so anyway.

Q. So your plan to see Foster out of the business was to wait for the authorities to catch up with him and send him to gaol?

A. Wait for the authorities? No, no he had been to a Court case. I mean the dates are all – I haven't got the dates in my head but he had been to a Court case in Brisbane. Was that Justice Logan?

Q. Yes?

A. So he had been to a Court case in Brisbane and he was – he was clearly going to be sentenced on it. So I was hoping – I mean, I wanted Anne to step up and get rid of him and, you know, take over the running of it straight away and we could trade out of any losses that he had made.”

664 Similarly she said, later in her cross-examination:

“I always thought that if that could happen then the business could continue on or a new business could operate getting the proper trader Richard Holmes back in and having Anne have control of the business.”

665 Ms Johnson said she approached Mr Holmes and sought to persuade him to return to STC. Thus she said in cross-examination:

“So when I went to see Richard Holmes it was to say, ‘[I]ook, would you please come back and I'm sorry if I've offended you in any way,’ and he said, ‘I've got no problem with you at all. It was Peter Foster that I had a falling out with,’ and he said he would consider coming back if Peter Foster was gone and I said, ‘I'm trying to get rid of him,’ so everyone would have been okay.”

666 I do not accept this evidence.

667 There is no hint in Ms Johnson's lengthy 10 September 2013 email, nor in her affidavit, of any of these matters. These matters arose for the first time in cross-examination.

668 Moreover, the evidence is inconsistent with Ms Johnson's statement to Mr Foster in her 13 January 2014 email that she "would contribute a hell of a lot more to STC were I allowed to": extracted at [653]. It is also inconsistent with her accusation in that email that Mr Foster and Ms Larter had "relied on [her] good name" and "deliberately excluded [her] from further participation in, or information about, STC": also extracted at [653].

669 Nor is there any suggestion in Ms Johnson's evidence that after "Peter Foster was gone" (in that he was on the run from September 2013) Ms Johnson sought further contact with Mr Holmes.

670 There is no evidence (apart from Ms Johnson's oral evidence in cross-examination) of Ms Johnson seeking to persuade Ms Larter to sever any connection with Mr Foster.

671 Following Ms Johnson's communications with Mr Murray from The Courier Mail in October 2013, there is no evidence (including in Ms Johnson's lengthy affidavit) of her playing any further role in STC (apart from withdrawing the \$50,000 from the STC Westpac account in December 2013).

### **A new partnership**

672 During the hearing my attention was drawn to various applications made to the Australian Securities and Investments Commission concerning the existing "The Sports Trading Club Partnership" and the new "STC Sports Trading Club" partnership.

673 As it is now common ground that a new partnership of which Ms Johnson was not a member was thereby created, and that Ms Johnson has no liability as a partner after the date of her resignation (see [48] to [59] above), I do not need to deal with the detail of that evidence.

## **Email exchanges with Mr Foster**

674 On 14 March 2014 Mr Foster sent an email to Ms Johnson from teamleader@sportstradingclub.com:

“Leigh all reference to you has been removed from the website. It was done weeks ago.

Will send you in the next email a pdf of the front page of the proposal where [you] will see your name has been removed, as well as your accountant’s name.

Also the front page where it used to have your photo and Anne’s with the headline ‘Meet the Partners’...that has also been changed”.

675 Ms Johnson replied the following day by simply saying:

“Thank you”.

676 On 29 April 2014 Mr Foster sent a further email to Ms Johnson:

“Further to your text to Tom [Nolan] yesterday, let me repeat we are not currently using your name, image or likeness in any promotion. All reference to you has been removed from the proposal.”

677 I will return to this email exchange when considering the question of Ms Johnson’s knowledge of the contents of the Proposal.

## **Mr Seng correspondence**

678 On 23 March 2014 Mr Paul Seng, a prospective investor in STC, sent an email to Ms Johnson:

“I’m looking to invest in the sports betting club in Sydney, they say you are the owner...is that correct? Is my capital secured?”

679 Ms Johnson replied on 23 April 2014:

“We have spoken on the phone but just to confirm. I am not involved with the [Sports Trading Club].

I am taking legal action to force them to cease fraudulently using my name”.

680 On 30 April 2014 Mr Seng sent a further email to Ms Johnson:

“I just had a follow up call from Mark Hughes – International sales Manager.

He claims you were involved in the business and you sold out financially in January of this year”.

681 Ms Johnson replied the same day:

“I left the business yes. I have told you I do NOT recommend anyone become involved in this.

I hope I’ve made myself clear.”

682 Although Ms Johnson’s reply constitutes a warning to Mr Seng not to invest in STC, Ms Johnson did not take advantage of this opportunity to tell Mr Seng that Mr Foster was involved in STC and, indeed, that he was using the alias “Mark Hughes”.

### **Ms Johnson’s 3 November 2014 telephone conversation with Mrs Mackinnon**

683 On 3 November 2014, shortly after Mr Foster’s arrest, and after receipt of Ms Larter’s email of 30 October 2014 offering Associate Members “a refund” (extracted at [171]), Mr Mackinnon rang Ms Johnson on her mobile telephone. She was not available but rang back a few hours later and spoke to Mrs Mackinnon.

684 Mr Mackinnon gave this evidence:

“She said she was appalled at what had gone on with STC. She seemed to be very honest with her answers and her attitude. She said she hadn’t been involved with STC in any shape or form for at least 12 months, and we put it to her that her name was on the proposal when we signed it on 30 October 2013 and she was genuinely - or seemed to be genuinely very surprised. She said she had asked Ms Larter to take her name off the proposal and she would be following up.”

685 This evidence, which I accept, has implications concerning the question of whether Ms Johnson was aware of the Proposal. It also constitutes an occasion on which Ms Johnson spoke to an Associate Member without disclosing Mr Foster’s involvement in STC.

**Did Ms Johnson seek to alert any third parties of her concerns about the STC business?**

686 Ms Johnson gave inconsistent evidence as to whether and how she sought to draw attention to the involvement of Mr Foster in STC.

687 In her affidavit Ms Johnson said she “tried to anonymously tip off some people about my concerns. I was also concerned that I would be sued for defamation if I publicised unsubstantiated allegations of wrong doing”.

688 She continued:

“I know from my experience as a criminal lawyer that it is not as easy as people think to get the police to act. This is not a criticism but an acknowledgment that the police had their methods, standards and protocols”.

689 In cross-examination Ms Johnson insisted she tried “to have him arrested” by providing “secretly, whatever information I could. I sent, or I caused to be sent, anonymous emails to the lawyers for ASIC and...Justice Logan's associate”.

690 She gave this evidence in response to questions from me:

Q. When did you do that?

A. After he absconded.

Q. Have you ever mentioned that before?

A. I don't know, did I put it in my affidavit? Is that in my affidavit? I don't have copies of the, I don't have copies of them, because they were sent anonymously, from my, I was terrified of course.

Q. Did you just make up that evidence you gave?

A. Absolutely not, your Honour. Absolutely not. Check with the, check with the judges' associates. I sent it to two judges' associates. And to ASIC. And I said, because I assumed that Tom Nolan knew where he was, and I met with Tom. I met with Tom Nolan a number of times, and he, he continually reassured me as well.”

691 My question “did you just make up that evidence you gave?” was amongst the reasons that Mr Argy, on 12 February 2018, applied for an order that I recuse

myself from the further hearing of the proceedings. I rejected that application for the reasons I gave in *Mackinnon as plaintiff representative of 153 plaintiff group members v Partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 4)* [2018] NSWSC 147.

692 As I have said in that judgment (at [116]) I did find it strange that Ms Johnson did not know whether she had, in her affidavit, mentioned sending anonymous emails to “the lawyers for ASIC” and to Logan J’s Associate.

693 However, as I have set out, Ms Johnson’s affidavit does refer to her anonymously tipping off “some people” about Ms Johnson’s “concerns”, although she made no mention there of contacting Logan J’s Associate or ASIC.

694 Mr Gamble gave unchallenged evidence of a telephone conversation he had with Ms Johnson on the day Mr Foster was arrested in October 2014 in which she said she had written “anonymous letters to the police, to the media, newspapers”.

695 Again, Ms Johnson did not assert to Mr Gamble that she had tried to contact Logan J’s Associate or ASIC. Although Ms Johnson told Mr Gamble she had sent anonymous letters to, “the media, newspapers” she made no mention of doing so in the course of her evidence about her dealings with Mr Murray.

696 But if, as she asserts, Ms Johnson did behave in this way, it bespeaks a realisation by her that she should disclose her “concerns” about Mr Foster’s involvement in STC (as well as information that might have led to his apprehension).

697 Mr Argy sought to adduce evidence of two draft paragraphs of Ms Johnson’s affidavit. He took the matter up with Ms Johnson in re-examination as follows:

“Q. Then you were asked, ‘You never sent an email to the police about Mr Foster, did you?’ and you said, ‘I’m not, if I did, I’m not sure.’ Can I just show

you a piece of paper and can you tell his Honour if you know where that text came from.

A. This is a couple of paragraphs that were a part of the draft for the affidavit, of my affidavit in these proceedings.

Q. Are they paragraphs that didn't make it into the final in that form?

A. Obviously, yes.

Q. Did you want to explain why that was, why that level of detail didn't make it into the affidavit?

A. Look, I can't be totally sure. I was certainly concerned that I was going to have to be serving Peter Foster with my affidavit and I didn't – I was very anxious to even put that in at all, but I note that there's two separate paragraphs. I did go through and try to cull down the affidavit so maybe I took both of them out by accident when I meant to leave one in but I also know that I felt very uncomfortable giving that much detail because I knew that it was Peter Foster was going to see it and I just didn't feel comfortable doing it. So it's probably a bit of a mixture of both but I think I probably meant to leave one of them in and just accidentally took two of them out.”

698 The two paragraphs said to have been accidentally omitted from Ms Johnson's affidavit were in the following form:

“502. **Because I tried to tip the authorities off anonymously about how Peter Foster could be found:** ‘I tried. Well, I wrote anonymous letters to the police, to the media, to newspapers, but nothing happened’. As to this I say that, using a program which anonymised emails, in **2014** (I do not recall the exact dates but it was several months before **Peter Foster's** arrest) I sent emails (of which I did not keep a copy) from a King Street, Newtown internet café to (so far as I can recall.) the associates of Yates and Logan JJ (at XXX and XXX); Richard Flitcroft of Corrs Chambers (at XXX) who had acted for the ACCC in my two interlocutory matters acting for **Peter Foster**, the New South Wales Police (c/- of its Media Unit); and A Current Affair (C/- Julian Armsden). I had no idea where **Peter Foster** was hiding during his 13 months on the run. However, despite my emails nothing happened and it was in fact **Kenneth Gamble** who tracked **Peter Foster** down and got him arrested months later.

788. (b) **Because I tried to tip the authorities off anonymously:** ‘I tried. Well, I wrote anonymous letters to the police, to the media, to newspapers, but nothing happened’. As to this I say that, using a program which anonymised emails, in **2014** (I do not recall the exact dates but it was several months before **Peter Foster's** arrest) I sent emails (of which I did not keep a copy ) from a King Street, Newtown internet café to (so far as I can recall.) the associates of Yates and Logan JJ, Richard Flitcroft of Corrs Chambers who acted for the ACCC in my two interlocutory matters acting for Peter Foster, the New South Wales Police (c/- of its Media Unit), and ACA (C/- Julian Armsden). I had no idea where Peter Foster was hiding during his 13 months on the run. However, I provided all the information I had in order to assist. I knew that Tom Nolen [sic: Nolan] was with **Peter Foster** so I anonymously

emailed the above people with the number plate of the car of Tom Nolan's [sic: Nolan's] wife (a number I no longer recall) advising them to trace that number plate and it would lead them to Peter Foster. However, despite my emails nothing happened and it was in fact Kenneth Gamble who tracked **Peter Foster** down and got him arrested." (Emphasis in original.)

699 I allowed this material as evidence relevant to any suggestion that might be made of recent invention by Ms Johnson. According to those paragraphs, Ms Johnson did send anonymous letters to the police, the media, the Associates of Yates and Logan JJ, and the ACCC.

700 However, according to this material, those emails were not sent until 2014, and only a matter of months before Mr Foster's arrest on 28 October 2014.

701 According to this material one piece of information Ms Johnson provided was the registration number of Mr Nolan's wife's car, in the hope that someone might follow that car and thereby be led to Mr Foster.

702 In that regard, Ms Johnson had said earlier in her evidence that when Mr Foster was on the run, she was "having meetings with Tom Nolan" and trying to get "records". In response to my question "just remind me who Tom Nolan is", Ms Johnson said Mr Nolan was "the other person who was running the business for [Ms Larter]". Ms Johnson then volunteered without any further question being asked:

"...I flew to the Gold Coast several times trying to get this information, and then he would – he would come, but he would never have his car there, so I had to have somebody else come and then follow him when he walked out to the car and get the registration number and that was the information that I gave...

...I didn't know where Foster was, but I was pretty sure that Nolan did and so I had to get somebody else to come and wait till he went out, follow him, get his number plate and I agonised over it".

703 Thus Ms Johnson was saying that because Mr Nolan did not "have his car" (evidently it was in fact his wife's car) at the places where Ms Johnson met him, and because she thought Mr Nolan knew where Mr Foster was located, she arranged for "somebody else" to wait until Mr Nolan left their meeting, and for that "somebody else" to follow Mr Nolan and make a note of the number

plate of the car in which Mr Nolan drove away. That number plate number was, according to the draft paragraphs omitted from her affidavit, the intelligence she anonymously passed on to Logan J's Associate, Mr Flitcroft and others.

704 Curiously, in her affidavit, Ms Johnson made one reference to having sent an email to the Associate of Yates J. However, that was in the context of stating that following her appearance before Yates and Perram JJ in August 2012 (see [104] and [105]) she had "requested all parties in the Court to delete me from their mailing lists in regard to the SensaSlim trial". She said that "despite this I remained on the Court's and Corrs' mailing list for several years afterwards despite again pointing out to them I was not and had not acted for Peter Foster in the substantive proceedings". Ms Johnson annexed to her affidavit a number of documents "with regards to this" including a document she described as:

"27 March 2014: email from Leigh Johnson to Associate of Yates J and parties".

705 For some reason that email was not included in the Court Book. Assuming however that it was directed to the subject matter to which Ms Johnson referred, it reveals the very peculiar circumstance of Ms Johnson communicating to the Associate to Yates J in relation to an essentially administrative matter at a time when, she says, she was so concerned about Mr Foster's behaviour that she wished anonymously to draw his conduct and possible location to the attention of various parties.

706 I find it hard to know what to make of this evidence. I find it hard to accept that Ms Johnson actually took all the steps she claims to have taken and, if she did, that she could possibly have thought that they would be of any practical assistance to persons proposing to invest in STC or in tracking Mr Foster down.

707 The most obvious persons who could claim to have a reasonable expectation that those “concerns” be disclosed to them were the persons who were continuing to invest in STC.

### **The credit of Ms Johnson and Mr de Klerk**

#### ***Credit of Mr de Klerk***

708 In critical respects, the evidence given by Mr de Klerk is irreconcilable with that of Ms Johnson.

709 In recognition of this, Mr Argy made extensive submissions about Mr de Klerk’s credit.

710 As Mr Argy accepted, Mr de Klerk gave his evidence in a firm and confident manner. Evidently, English is not Mr de Klerk’s first language. He made a number of references to “my English”. However, I did not detect that Mr de Klerk had any difficulty understanding the questions put to him, or formulating his responses to those questions.

711 Nonetheless, Mr Argy submitted, Mr de Klerk’s evidence was “unreliable, inconsistent, often implausible, and often based on assumptions or hypotheses that resulted from being pre conditioned by what he had been told by [Mr Foster] about [Ms Johnson’s] role”.

712 Mr Argy pointed to a number of aspects of Mr de Klerk’s evidence.

713 First, Mr Argy pointed to Mr de Klerk’s evidence concerning the apologies offered for the absence of “Mark Hughes” on 13 and 14 March 2013 (see [248] to [254]). I see no inconsistency in the evidence given by Mr de Klerk. In his affidavit evidence he said that Ms Johnson apologised for the absence of “Mark Hughes” on both 13 March 2013 (at STC’s Market Street office) and again on 14 March 2013 (at the Catalina restaurant). In the passage from the transcript that I have set out at [253] above, Mr de Klerk did agree that the “we sat down” conversation took place on 13 March 2013, and not 14 March 2013. But in the same passage of evidence Mr de Klerk made clear that his

recollection was that Ms Johnson had apologised twice for the absence of “Mark Hughes”.

714 Next Mr Argy submitted that Mr de Klerk had given inconsistent accounts of his reasons for withholding the last \$100,000 of the \$250,000 called for by the loan agreements Mr de Klerk executed on 21 February 2013. As I have set out above at [294], initially, Mr de Klerk agreed that his decision to make the payment of \$100,000 was “simply honouring the previous commitment” and not the result of a decision made after he met Ms Johnson. Later Mr de Klerk said that he held back the last payment because a number of “grey areas” that Ms Johnson “filled in”. Those answers are not consistent. But they arose from the fact that Mr Argy, having obtained the initial response to which I have referred, returned to the topic and elicited Mr de Klerk’s answer “but I hold back \$100,000 for specific reasons”; which response Mr Dixon took up in re-examination (see [292] to [299]). I do not see how that course of events casts doubt on Mr de Klerk’s credit.

715 I have already mentioned Mr Argy’s criticisms of Mr de Klerk’s evidence about the “personal matters” discussed at the Catalina lunch (see [267] to [272]). As I said, that criticism is unwarranted as it was Mr Argy’s cross-examination that opened that question up.

716 Mr Argy further submitted that Mr de Klerk’s evidence that Ms Johnson described Ms Larter as a “sleeping partner” showed that his evidence was not reliable because, Mr Argy submitted, Ms Johnson is unlikely to have described Ms Larter that way. However, as I have discussed, it is understandable in the circumstance that Mr de Klerk gained the impression that Ms Larter was a “sleeping partner” (see [282] to [285]). Even if Ms Johnson did not use those words to describe Ms Larter’s role, Mr de Klerk’s recollection that Ms Johnson said something to that effect is understandable. It certainly does not reflect on his credit.

717 Mr Argy also pointed to the fact that Mr de Klerk is not a disinterested witness. He is one of the Group Members and has invested a total of \$450,000 into

STC. He also has lost the US\$1 million that he paid to Bella Development Limited for an interest in the STC South African business. I accept that that is a factor to be taken into account when assessing Mr de Klerk's evidence.

718 However, overall, the confidence and clarity with which Mr de Klerk gave his evidence, and the detail he was able to recall as to his dealings with Ms Johnson and others (much of which is not in contest in these proceedings) persuades me that Mr de Klerk is a witness of truth whose evidence I can, with confidence, accept.

### ***Credit of Ms Johnson***

719 On the other hand, I found Ms Johnson to be an unreliable witness.

720 She seemed to be unable to face up to the catastrophic situation in which she found herself and equally unable to accept the significance of her actions and inaction while at STC.

721 I found it impossible to tell what Ms Johnson holds to be true. She gave inconsistent evidence. She was prepared to assert the improbable and to deny the obvious.

722 There are many examples.

723 The most obvious are her assertions, made for the first time in cross-examination, that she did not write her lengthy 10 September 2013 email (see [489] to [491]) and did not read Logan J's 27 September 2013 judgment (see [554] to [556]).

724 Further, in relation to her 10 September 2013 email, I find incredible Ms Johnson's assertion that she did not know whether Mr Foster held the Associate Members' contracts at his Gold Coast home (see [523] to [527]).

725 An insight into Ms Johnson's preparedness to embroider her evidence arose during Mr Dixon's cross-examination about her SMS exchanges with Mr de Klerk on 30 August 2013.

726 Mr Dixon asked Ms Johnson whether she had kept SMS messages sent at this time. Ms Johnson replied:

"I did keep them, but my phone fell into the dish washing water with - and because of the liquid, the washing liquid, they weren't able to recover any data. I took it to the phone shop and they weren't able to fix it. So I've got a new phone. I've lost all my data."

727 Implicit in Ms Johnson's answer was the proposition that not only was her mobile phone unable to be fixed following being dropped into the dish washing water but that some attempt had been made to retrieve data from the phone. It may be true that Ms Johnson "lost all her data" following her phone's immersion in the sink; but it strains credulity to think that a failed data retrieval exercise followed.

728 Other evidence that Ms Johnson gave which persuades me that she is an extremely unreliable witness is:

(a) her contention that she did not take note of the identity of the account into which she deposited, in three tranches, \$94,500 in cash (see [135]);

(b) her insistence in her affidavit evidence that the 30 May 2013 call was a telephone call, and not a Skype call, in circumstances where Mr Argy, presumably on Ms Johnson's instructions, cross-examined Mr de Klerk on the basis that the call was a Skype call and where Ms Johnson ultimately accepted in cross-examination that it was a Skype call (see [357] to [360]);

(c) Ms Johnson's preparedness to deny that Mr Foster asked her to attend the 30 May 2013 meeting and later preparedness, when shown what she had said in her 10 September 2013 email, to

accept that Mr Foster had asked her to attend that meeting (see [341] to [343] and [345]);

- (d) her assertion that she had spoken to Mr Holmes about the trades and her later evidence that she had not been able to speak to Mr Holmes whilst he was employed at STC (because, she said she was told by Ms Larter, Mr Holmes “hated” her) (see [481] to [486]);
- (e) her inconsistent evidence about what she asserted to be the content of the answers that she gave to Mr Murray from The Courier Mail in response to his 4 October 2013 email (see [597] to [610]);
- (f) her assertion that she had given Mr Murray her private email address (see [582] to [584]);
- (g) her suggestion, again made for the first time in cross-examination, that she had advised Ms Larter to “get rid of” Mr Foster and to “get somebody else” to set up the STC website in circumstances where she had earlier said that, in effect, she drew comfort from the fact that Mr Foster’s role was to be confined to technological matters (see [107], [117] and [121] to [122]);
- (h) her affidavit evidence that she thought that there was only a “governance problem” at STC and that she had “no inkling of fraud” (see [519]); which evidence cannot be reconciled with the concern she expressed in her 10 September 2013 email (see, for example, [507]);
- (i) her preparedness unilaterally to withdraw \$50,000 from the STC Westpac account when she must have known that it contained either Associate Members’ investments or the proceeds of

“trades” made for the benefit of Associate Members (see [646] and [650]); and

- (j) her assertion that she did not know of the truth of the statement she made in her 10 September 2013 email of what she then claimed to have said to Ms Larter concerning the Sydney office of STC being an “empty serviced office” (see [524] to [527]);
- (k) her preparedness to assert that she aspired to take over the business once Mr Foster was in gaol (see, for example, [429] and [663] to [664]); and
- (l) her preparedness to assert that while at STC she only used one email address; when the evidence reveals she used five (see [384] to [385]).

729 Overall, I cannot accept Ms Johnson as a witness of truth. She exhibited a tendency to eschew responsibility for the actions that her own correspondence showed she had engaged in, and to be unable to face up to the consequences of the manner in which she conducted herself while a partner in STC. In my opinion she was prepared to assert, on her oath, whatever she thought was necessary to repel the express or implicit burdens, as she perceived them, of questions put to her in cross-examination or of other difficulties she perceived to be facing her.

730 I have no hesitation in preferring Mr de Klerk’s evidence to that of Ms Johnson at each point where that evidence is in conflict.

### **The pleaded case**

731 Various causes of action are pleaded in the Further Amended Commercial List Statement. However, at the heart of the case advanced by Mr Mackinnon is the proposition that Mr Foster, Ms Larter and Ms Johnson made a series of representations about STC that were misleading or deceptive and, indeed, false.

732 As Mr Mackinnon does not have leave from the Federal Court under s 58(3)(b) of the *Bankruptcy Act* to proceed against Ms Larter, it is not competent for me to deal with Mr Mackinnon's claim against her. I have outlined this above at [62] to [66] and [74] to [81]. I shall therefore not discuss whether Mr Mackinnon's claims against Ms Larter would otherwise have been made out.

733 So far as concerns Mr Foster and Ms Johnson, two series of representations are alleged to have been made to Mr Mackinnon and the other Group Members.

734 The first are said to have been made between February 2013 and October 2014 by Mr Foster or by "persons employed or instructed by" Mr Foster, including Ms Johnson.

735 The second are said to have been made by Mr Foster and Ms Johnson in the Proposal.

### **Representations by Mr Foster or persons employed or instructed by Mr Foster**

736 The following representations are alleged:

"20 Between about February 2013 and about October 2014 the following representations were made to the plaintiff and or the group members by [Mr Foster] or persons employed or instructed by [Mr Foster] including [Ms Johnson]:

- a. The Sports Trading Club was a legitimate sports betting business capable of generating significant profits on traded sports bets;
- b. The plaintiff and the group members could invest in the business by making loans of between A\$50,000 and A\$250,000 to the Sports Trading Club in exchange for which the Sports Trading Club would pay 50% of any profits earned on sports betting trades up to the amount loaned;
- c. Mark Hughes was the National Sales Manager of the Sports Trading Club;
- c(i). By silence or omissions, that [Mr Foster] was not involved in the Sports Trading Club.

- d. Tom Nolan was the National Sales Assistant of the Sports Trading Club;
- e. The loans by the plaintiff and the members would be guaranteed and repayable at the end of a nominated loan period;
- f. The first defendant had assets of A\$10m;
- g. The Sports Trading Club had seven traders in its registered Sydney head office and had trading offices in London and Hong Kong;
- h. The traders working for the Sports Trading Club are the best paid in the business. Their junior trader is on \$250,000 a year and their senior traders are on \$450,000 a year;
- i. The Sports Trading Club was audited by KPMG; and
- j. If members wished to invest in the Sports Trading Club they needed to act quickly as the offer was about to close.”

***By Mr Foster***

737 There are numerous examples in the evidence of correspondence sent by “Mark Hughes”, describing “Mark Hughes” as the National Sales Manager of STC. One example is the email from “Mark Hughes” to Mr de Klerk of 14 February 2013 (see [207] above). Another is the email that “Mark Hughes” sent Mr and Mrs Mackinnon on 28 October 2013 (see [638] above).

738 I am satisfied that Mr Foster wrote these emails.

739 He also represented himself to Mr Mackinnon (see [637] to [639]) and Mr de Klerk (see [204] to [207]) as being “Mark Hughes”.

740 It is also clear beyond any argument that Mr Foster, by silence and by adopting an alias, represented that he himself was not involved in STC.

741 Otherwise the representations that Mr Foster made were those set forth in the Proposal to which I will return.

***By persons “employed or instructed” by Mr Foster – Ms Johnson***

- 742 Ms Johnson was not “employed” by Mr Foster.
- 743 The question is whether she was “instructed” by Mr Foster.
- 744 The further question is whether, on its proper construction, the allegation is that Mr Foster “instructed” Ms Johnson to make the representations; or whether the allegation is that Ms Johnson made the representations while “instructed” by Mr Foster in a general sense, albeit not necessarily to make the representations.
- 745 On one reading of this clause, the words “employed or instructed” are merely adjectival and simply describe the class of persons who made the representations. On another reading, those words convey what the persons were “employed or instructed” to do; make the representations. The use of the word “employed” as well as “instructed” points, albeit not strongly, to the former construction. It is hard to contemplate a person being “employed” to make representations; as opposed to being “instructed” to make representations. But this is not clear. And if the pleading is merely an allegation that Ms Johnson was “instructed” in some way, and in that circumstance made the representations, what nature and frequency of “instruction” is alleged? To attend one meeting? Or two meetings? Or to act generally in a particular way? And if so, what way?
- 746 This is a further example of the infelicity of the pleading. A pleading should be clear. A party, especially one facing allegations as serious as those directed to Ms Johnson, should not be left in any doubt about the case brought and should not have to parse and analyse a pleading to divine its true meaning.
- 747 Ms Johnson is entitled to the benefit of the doubt. Resolution of the doubt in Ms Johnson’s favour means that the pleading should be construed as imposing on Mr Mackinnon the burden of showing that Ms Johnson was “instructed” by Mr Foster to make the representations in question.

748 In closing submissions, Mr Dixon confined this aspect of the case against Ms Johnson to the representations alleged in subpars 20(c), (c)(i), (d), (e) and (f) of the Further Amended Commercial List Statement.

749 I shall deal with them in turn.

**20(c) – that Mark Hughes was the National Sales Manager of STC**

750 A central claim in the Further Amended Commercial List Statement is that “Mark Hughes” was an alias adopted by Mr Foster. This allegation should be understood as an allegation that a person whose real name was “Mark Hughes” held that position.

751 The question is whether Mr Foster instructed Ms Johnson to represent, and whether Ms Johnson did represent, that “Mark Hughes” was the National Sales Manager of STC. Further, the question is whether Ms Johnson knew that there was no person at STC whose real name was “Mark Hughes” and that Mr Foster was using that name as an alias.

752 For the reasons I have set out above (see especially [447] to [459]) my conclusion is that Ms Johnson did know that Mr Foster was using the alias “Mark Hughes”.

753 Ms Johnson twice apologised for the absence of “Mark Hughes” at the 13 and 14 March 2013 meetings at the Market Street office and at the Catalina restaurant (see [237] and [248] to [254] respectively).

754 Mr de Klerk also asked Ms Johnson about the role of “Mark Hughes” and that Ms Johnson replied he was the “head of trading”, that the “marketing side is under his portfolio” and that STC was his “idea”.

755 Ms Johnson also knew that it was “Mark” who had contacted Mr de Klerk on 15 March 2013 to arrange a visit to the “trading room” (see [258] above). She arranged that contact (see [260] to [262]).

- 756 The fact that Mr Foster asked Ms Johnson to attend the 14 March 2013 and 30 May 2013 meetings with Mr de Klerk, knowing that Mr de Klerk knew him as “Mark Hughes”, is consistent with and indeed confirmatory of the conclusion that Ms Johnson knew the truth about this matter.
- 757 Ms Johnson agreed that Mr de Klerk had asked her about “Mark Hughes”. She claims that she said to Mr de Klerk that she did not know “Mark Hughes” and that “he must be someone Anne knows” (see [248] above).
- 758 I do not accept that evidence. I accept Mr de Klerk’s evidence that he addressed Mr Foster as “Mark” at the 30 May 2013 meeting in Ms Johnson’s presence.
- 759 Ms Johnson thus did know “Mark Hughes”. She knew that “Mark Hughes” was Mr Foster.
- 760 There is no evidence that Ms Johnson represented to Mr de Klerk that “Mark Hughes” held the precise position of “National Sales Manager”. But Ms Johnson expressly represented to Mr de Klerk that “Mark Hughes” (that is, a person whose real name was “Mark Hughes”) was the “head of trading” at STC and was running the “marketing side” of STC. That representation is to the same effect.
- 761 There is no direct evidence that Ms Johnson did this on Mr Foster’s instructions. But the inference is overwhelming that she did. There is no other rational reason for Ms Johnson to have behaved this way.
- 762 My attention has not been directed to any evidence that Ms Johnson expressly represented that “Mark Hughes” was the National Sales Manager of STC to any other Associate Member or Group Member.
- 763 I will invite submissions as to the significance of this fact after delivery of these reasons.

**20(c)(i) – by silence or omission, that Mr Foster was not involved in STC**

764 Silence can amount to misleading or deceptive conduct. In *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32 Black CJ said:

“Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.”

765 Silence may constitute misleading or deceptive conduct if there is a reasonable expectation that the silence would be broken. This was the analysis in *Rafferty v Madgwicks* (2012) 203 FCR 1; [2012] FCAFC 37, where the Full Court of the Federal Court said:

“The authorities recognise that the circumstances in which silence may support a finding of misleading or deceptive conduct are not properly subject to any unifying principle. Nonetheless, the authorities also acknowledge that, if the circumstances of a particular case would give rise to a reasonable expectation that, if a fact existed, it would be disclosed, then the failure to disclose that fact may give rise to an inference that the fact does not exist. In this situation (i.e., where there is such a reasonable expectation), a failure to disclose the existence of that fact could constitute misleading and deceptive conduct. See, e.g., *Kimberley NZI Finance Limited v Torero Pty Ltd* (1989) ATPR (Digest) 46-054 at 53,195; *Demagogue v Ramensky* at 32, 41; *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 at 114; *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399 at 405; and *Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd* (1997) 69 SASR 288 at 296-298.

Inherent in this analysis is the proposition that the existence of a reasonable expectation depends on all the relevant circumstances of the case, including the relationships between the participants in the relevant conduct.” (At [278] and [279] (Kenny, Stone and Logan JJ).)

766 Ms Johnson knew from the outset that Mr Foster was involved in STC. Ms Johnson also knew that it was vital for the sake of STC’s “business” that Mr Foster’s involvement remained concealed.

767 Her involvement in instructing Mr Tassell to send the Pikes & Verekers letters of 5 April 2013 bespeaks her active representation to the recipients of Mr Tassell’s letter Mr Foster was not involved in STC. This was contrary to what she knew to be the fact.

- 768 Mr Radica asked Ms Johnson whether “STC was a scam”. Notwithstanding the fact that in July 2013 Ms Johnson was concerned that Mr Foster was operating a Ponzi scheme, she did not reveal Mr Foster’s involvement in STC to Mr Radica at that time.
- 769 On 30 August 2013 Mr Foster threatened to put a bullet in Ms Johnson’s head if she revealed his involvement in STC. But Ms Johnson was aware well before his threat that his involvement was to remain a secret.
- 770 As Mr Argy accepted, from 30 August 2013 Ms Johnson was on “high alert” about the state of affairs at STC. She knew that Mr Foster was controlling STC’s activities.
- 771 Ms Johnson made her concerns clear in her 10 September 2013 email. As I have discussed, that email shows that Ms Johnson was concerned that Associate Members’ funds were at risk (see [513]).
- 772 When she read Logan J’s judgment in the *Chaste Corporation* case she was “shocked and sicken[ed]” by the similarity between what she read about Mr Foster’s “methods” and “techniques” in the *SensaSlim* case and those used in STC.
- 773 On 4 October 2013 Mr Murray, from The Courier Mail, asked Ms Johnson directly whether Mr Foster had any connection with STC. As I have discussed, Ms Johnson gave inconsistent evidence as to the answers she gave to Mr Murray’s emailed questions. She could have easily told Mr Murray the truth. Instead, on her account of it, she relayed her draft answers (at least one of which was to her knowledge false: see [605] to [606]) to STC in circumstances where, as I have found, she must have known they would be intercepted and, to the extent necessary, changed by Mr Foster to exclude any reference to him.
- 774 Nonetheless, apart from the steps that Ms Johnson claims she took anonymously (see [686] to [705]), Ms Johnson took no steps to alert existing

Associate Members (apart from Mr de Klerk) and prospective investors in STC of Mr Foster's involvement in STC and of Ms Johnson's serious misgivings as to the implications for investors of that involvement.

775 The only person to whom Ms Johnson revealed Mr Foster's involvement was Mr de Klerk on 30 August 2013.

776 And yet Ms Johnson was conscious of the need to speak.

777 That is revealed by the steps she claims to have taken anonymously.

778 It is also revealed by this passage of evidence:

“Q. It is the truth, isn't it, that you did just that, you did shut up about Mr Foster throughout this whole time?

A. I was trying to get this business, which was a great business, onto the right track, all the way through, and even when I resigned, I resigned to try to get it onto the right track. And had I gotten access to all of those associate members, I'm telling you, I would have rung every single one of them and asked them to authorise me to take over. So he was right, when he said I was trying to take over the business, I was. I would have asked every one of them to authorise me to take over and be in charge, and then it would have traded successfully, and no one would have lost anything.

Q. Ms Johnson, in respect of the shutting up, as you put it, it was your understanding, was it not, that all of the investors in Australia would have wanted to know whether or not Mr Foster was involved in STC?

A. I don't know.

Q. Do you consider that the involvement of Mr Foster, who was a convicted fraudster, was material information for people looking to loan from between \$50,000 and \$250,000 in STC?

A. I would have told every one of them, had I had their information. That's why I wanted their information.

Q. Well the people that you did have the information, did you tell?

A. I did.

Q. You told them immediately that Mr Foster was involved?

A. I told [Pieter] de Klerk.”

- 779 I do not accept Ms Johnson's evidence that she did not know whether investors in STC would want to know whether Mr Foster was involved. It must have been obvious to Ms Johnson that Mr Foster's involvement would be a matter of acute interest to all existing and prospective STC investors.
- 780 Ms Johnson's evidence that had she "would have told every one of them" about Mr Foster shows that Ms Johnson was acutely aware of the need for her to speak up about Mr Foster's involvement in STC.
- 781 The evidence of Ms Johnson's communications with Mr Foster and Ms Larter in September 2013 does show that she was trying to obtain some information about Associate Members. But there was no evidence that she persisted to seek this information after September 2013. And otherwise than anonymously, she took no other step to alert Associate Members of what she must have understood to have been the parlous state of their investment.
- 782 By the end of September 2013 any persons who had already invested in STC and persons, such as Mr and Mrs Mackinnon, were then contemplating investing in STC were entitled reasonably to expect that if Ms Johnson, as a partner in STC, knew of matters which suggested that investment in STC was unsafe, or that funds invested in STC may be "in danger and may be being improperly used" (Ms Johnson's words in her 10 September 2013 email: excerpted at [509]), those matters should be disclosed to them, or to a person or a body that would cause them to become aware of those matters.
- 783 Further, such persons were entitled reasonably to expect that if, as Ms Johnson said in her 10 September 2013 email, she was "extremely concerned" that "STC is being improperly managed and operated", "STC may be being operated as a Ponzi scheme by [Mr Foster] and hence is being illegally and fraudulently managed and operated", that the Associate Members' "accounts and records may be being falsified" and that the "Associate Members' moneys may be at risk and are not being properly accounted for", those matters would be disclosed to them, or to a person or body that would cause them to become aware of those matters.

- 784 Ms Johnson disclosed Mr Foster's involvement to Mr de Klerk.
- 785 Ms Johnson claims that she made the "anonymous" disclosures to which I have referred (at [686] to [705]).
- 786 But Ms Johnson did not take any steps to disclose those matters to those most directly affected: the Associate Members.
- 787 She also did not disclose these matters to Mr Murray from The Courier Mail. She must have known that if she had made those matters known to Mr Murray, Mr Murray would have caused them to be publicised and that Associate Members and prospective investors in STC may very well have become aware of that publicity.
- 788 Ms Johnson knew that the ACCC was acutely interested in Mr Foster's activities. She had appeared for Mr Foster on an application to adjourn the ACCC proceedings before Yates J and had read Logan J's judgment of 24 September 2013. She continued to receive emails in relation to the Federal Court proceedings until at least 27 March 2014.
- 789 Ms Johnson could have approached the ACCC. It is impossible to imagine that the ACCC would have ignored the detailed intelligence that Ms Johnson would have been able to give them about her concerns about Mr Foster's involvement in STC.
- 790 Instead, Ms Johnson remained silent; or effectively silent. She remained a partner of STC until 14 January 2014. She helped herself to the \$50,000 that she contended was due to her, notwithstanding that she must have understood it was likely to represent the funds of Associate Members. She took no steps to bring about a cessation of Mr Foster's role in STC despite the fact that, as his 29 December 2013 email made clear, he remained actively involved in, if not in charge of STC's activities.

791 I find that, in all these circumstances, by her silence, Ms Johnson represented to Associate Members, and to prospective investors in STC, that Mr Foster was not involved in STC.

792 I also find that she did so in accordance with Mr Foster's instructions. Mr Foster's 30 August 2013 threat makes this clear. He then directly instructed Ms Johnson not to reveal his involvement. But Ms Johnson's active concealment of Mr Foster's role started (a least) in April 2013 by her involvement in the instructions given to Mr Tassell. There is no direct evidence that Mr Foster instructed Ms Johnson to join with Ms Larter in giving these instructions. But I find the inference that he did to be overwhelming. Mr Foster certainly asked Ms Johnson to attend the 14 March 2013 and 30 May 2013 meetings, at which Mr Foster's involvement was not revealed and indeed concealed.

**20(d) – that Tom Nolan was the National Sales Assistant of STC**

793 A representation that "Tom Nolan" was the National Sales Assistant of STC is said to be false because the person describing himself as "Tom Nolan" was in fact Peter Thomas Nolan.

794 Mr Dixon did not develop submissions as to how it was that Ms Johnson represented to Group Members that "Tom Nolan" (rather than Peter Nolan) was the National Sales Assistant of STC, nor as to what difference this would have made to any Group Member.

795 I do not think this allegation takes matters any further.

**20(e) – the loans by Mr Mackinnon and Group Members would be guaranteed and repayable at the end of a nominated period**

796 I accept Mr de Klerk's evidence that he asked Ms Johnson the identity of the "responsible sureties" at the 14 March 2013 meeting at the Catalina restaurant (excerpted at [278]). Mr de Klerk said he wanted to know how investment in STC "was secured". Mr de Klerk said, and I accept, that Ms Johnson told him that she and Ms Larter had invested \$10 million in STC of

which some “would be held as security”. This answer was given in the context of Mr de Klerk’s questions as to how his investment was “secured”.

797 This evidence satisfies me that Ms Johnson did represent to Mr de Klerk that his loan was secure. There is no direct evidence that she did this on Mr Foster’s instruction. But I find the inference to be overwhelming that this was so.

798 My attention has not been drawn to any other evidence, apart from the content of the Proposal, that Ms Johnson made this representation to any other Group Member.

**20(f) – the “first defendant” had assets of \$10 million**

799 For the same reasons, I am satisfied that Ms Johnson represented to Mr de Klerk that STC had assets of \$10 million and that she did so on Mr Foster’s instruction.

800 Again, apart from what is said in the Proposal, there is no evidence that Ms Johnson made that representation to any other Group Member.

**Representations to Mr Mackinnon and Group Members in the Proposal**

801 Mr Mackinnon alleges that the following representations were made in the Proposal:

- (a) STC “offered Members an alternative to the stock and property markets and typically traditional investment channels”;
- (b) “The sports trading market is literally recession proof and offers unique tax free returns that cannot be replicated in any of the mainstream investment products currently being offered”;
- (c) “Trade decisions are made by Account Managers, under the supervision of a Senior Analyst and Chief Investment Officer”;

- (d) “Each Account Manager has extensive experience in trading on sporting events and a track record of discipline and intelligent decision making”;
- (e) “The Account Managers expertly analyse and trade the betting markets”;
- (f) “The Account Managers are a team of analysts with experience in sports and investment, and with professional qualifications in quantitative disciplines such as science, accounting and mathematics”;
- (g) STC “had created The Insight Project, a world first with the study of savants and sports trading”;
- (h) “The scientific director of [STC] is Dr Allan Snyder who, for some 20 years, has conducted ground breaking research on savants at both the Australian National University and the University of Sydney”;
- (i) STC “has the expertise and knowledge to trade on sporting events worldwide”;
- (j) “The first defendant had obtained rights from the sixth defendant, Sports Trading Club Limited (Hong Kong), to operate the Sports Trading Club business in Australia”;
- (k) “The first defendant was registered in New South Wales and had offices and a trading desk in Sydney”;
- (l) “The first defendant had borrowed A\$10m to be able to maximise the profits to be earned from sporting trades”; and
- (m) “The plaintiff and group members are always legally entitled to the return in full of the principal of the loan”.

802 The Further Amended Commercial List Statement does not allege that, in terms, each of these representations was false but alleges that:

- (a) neither STC or Sports Trading Club Limited had trading offices in Sydney, Hong Kong or London but were operated from a residence in Byron Bay;
- (b) Prof Snyder was not the scientific director of STC;
- (c) neither STC nor Sports Trading Club Limited was operating a legitimate sports betting or trading business but was rather a fraudulent scheme in which loans from Mr Mackinnon and other Group Members were misappropriated;
- (d) neither STC nor Sports Trading Club Limited had a team of analysts or traders with professional qualifications in quantitative disciplines; and
- (e) STC had no intention of repaying the loans by the Group Members and has failed to repay them notwithstanding an agreement to do so.

803 I am satisfied that STC was a fraudulent scheme and that, in substance, each of the representations in the Proposal was false.

***By Mr Foster***

804 There is no direct evidence of who composed the Proposal. But it must have been Mr Foster or someone acting at his direction. He must have been instrumental in its composition and circulation.

805 Mr Foster must have known that, in substance, there was no truth to the representations made in the Proposal. The representations were fabricated by Mr Foster to attract investment to STC.

806 The representations set out above were made in the Proposal.

807 I am satisfied that Mr Foster, by causing the Proposal be published to prospective investors, made those representations.

***By Ms Johnson***

808 Mr Argy did not seek to justify the representations made in the Proposal. Indeed, Mr Argy conducted Ms Johnson's case upon the basis that STC was a fraudulent scheme and thus the representations in the Proposal about the scheme were also false.

809 Mr Argy's case was that although the Proposal contained numerous false and indeed absurd claims, Ms Johnson did not know this as she had never seen or read the Proposal during her time at STC.

810 Ms Johnson was adamant that she had not seen the Proposal until after the commencement of these proceedings.

811 Ms Johnson knew her name and references to her appeared on the Public STC Website. In her 10 September 2013 email Ms Johnson made specific reference to the Public STC Website (which she correctly identified as being [www.sportstradingclub.com](http://www.sportstradingclub.com)) and demanded that "my name and all references to me be removed". Ms Johnson told Mrs Mackinnon in November 2014 that she had "asked Ms Larter to take her name off the proposal".

812 Ms Johnson's email exchange with Mr Foster on 14 March 2014, and Mr Foster's further email of 29 April 2014, shows that Ms Johnson then remained concerned about being named in the Proposal.

813 In his 14 March 2014 email (referred to at [674]) Mr Foster said all references to Ms Johnson had been removed from the website and that he would forward "in the next email" a copy of the front page of the Proposal showing that her name "as well as your accountant's name" had been removed. Mr Foster's "next email" is not in evidence.

814 Mr Foster also referred to “the front page where it used to have your photo and Anne’s with the headline ‘Meet the Partners’”. Mr Foster’s email reads as if he thought Ms Johnson was familiar with the form of the Proposal. Ms Johnson simply responded “thank you”. Ms Johnson expressed no surprise at Mr Foster’s assertion that the Proposal had included these details.

815 These matters suggest, albeit not decisively, that Ms Johnson was familiar with the form of the Proposal.

816 The matter is however put beyond doubt by Mr de Klerk’s evidence about his discussion with Ms Johnson at the Catalina restaurant on 14 March 2013 about the Proposal (see [273] to [281] above), which evidence I accept. Mr de Klerk’s evidence shows that Ms Johnson’s denial cannot be correct.

817 Mr de Klerk was clear that he asked Ms Johnson detailed questions about various aspects of the Proposal and that Ms Johnson was able to “clarify” the matters of concern to Mr de Klerk (see [278] above).

818 I am satisfied that Ms Johnson knew the contents of the Proposal and that she was sufficiently familiar with it to discuss it in some detail with Mr de Klerk.

819 Ms Johnson must have also known the Proposal was made available to all prospective investors in STC. As one of the partners in STC she must therefore be taken to have represented to investors that its contents were true. The contents of the Proposal were false.

### **Section 34 of the *Partnership Act***

820 Mr Argy submitted that, at some point during 2013, the STC Partnership was dissolved by operation of s 34 of the *Partnership Act*. That section reads:

#### **“34 Dissolution by illegality of partnership**

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.”

821 By an amendment made to her Commercial List Response pursuant to leave I granted on 13 February 2018, Ms Johnson pleaded:

“Further or in the alternative [Ms Johnson] says that, if any of the plaintiff’s allegations against any other defendant herein are found proven and constitute an event which made it unlawful for the business of a partnership of which [Ms Johnson] is found to have been a member to be carried on, or for the members of that firm to carry it on in partnership, that firm was automatically dissolved by force of s 34 of the *Partnership Act*...”.

822 Mr Argy did not develop a submission as to whether, and if so when, an event had occurred which made it “unlawful” for the STC business to be carried on.

823 However, assuming that it was “unlawful” for a fraudulent scheme to be carried on, and assuming that STC partnership of which Ms Johnson was a member was, at some point during 2013 dissolved by operation of s 34 of the *Partnership Act*, I do not see how it could affect Ms Johnson’s liability on the bases that I have found.

824 My conclusion that Ms Johnson made the representations to which I have referred does not depend upon whether a partnership in fact existed.

825 I find the point to be irrelevant.

### **Breach of contract**

826 Mr Mackinnon’s claim in contract is directed primarily to Ms Larter. As Mr Mackinnon does not have leave under s 58(3)(b) of the *Bankruptcy Act* to proceed against Ms Larter, it is not competent for me to deal with this claim.

827 A claim in contract is not available against Mr Foster. He was not a party to any contract with Mr Mackinnon or the Group Members.

828 The claim in contract is also not available against Ms Johnson because of the terms upon which I granted Mr Mackinnon leave to file the Further Amended Commercial List Statement (see [86]).

### **Other relief sought**

829 Mr Mackinnon also seeks relief against Mr Foster and Ms Johnson on the grounds of deceit, conversion, conspiracy, in equity and on the basis of an allegation that STC was a managed investment scheme for the purposes of Ch 5C of the *Corporations Act 2001* (Cth).

830 Mr Dixon developed some submissions in relation to these matters.

831 However, now that I have made findings as to what occurred, I propose to invite Mr Dixon to consider whether it is necessary for Mr Mackinnon and the Group Members to obtain relief in relation to these various other causes of action and, if so, to develop further submissions in relation to them.

### **Other issues**

832 There are a number of issues that remain to be resolved and in respect of which I will require further assistance.

833 One of them is the question of causation.

834 I have found that Mr Foster and Ms Johnson have made representations which were not true. Those representations were thus misleading or deceptive.

835 So far as concerns Mr Foster, I am comfortably satisfied that the representations he made have caused all of the loss which Mr Mackinnon and the Group Members complain. Upon production of evidence to show what that current loss is, I will enter judgment against Mr Foster for that amount.

836 Other questions arise in relation to Ms Johnson.

837 One is the issue Mr Argy has raised as to whether Ms Johnson's failure to speak out has caused loss in circumstances where from 30 August 2013 Mr de Klerk knew Mr Foster was involved in STC and had been masquerading as "Mark Hughes" and yet did not make public what he knew.

838 There is also the question of precisely when Ms Johnson's silence about Mr Foster's involvement should be held to have caused damage to Group Members.

839 Finally, there is the question of what, if any, findings I should make about the involvement in STC of Mr Holmes and Prof Snyder.

### **Conclusion**

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

\*\*\*\*\*



# Sports Trading Club

## Statement of Account

Account Name:	Pieter De Klerk
Member Since:	20-02-13
Date as at:	31-08-13
Loan Amount	\$450,000.00
Profit to Date	\$1,444,743.50
Account Balance	\$1,894,743.50
Current Funds in Trade	\$56,321.38
Future Funds in Trade	\$1,066,454.12
Available Balance	\$771,968.00
Previous Funds Withdrawn	NIL
Funds Available to Withdraw	\$321,968.00

### Understanding the Statement

1. "Loan Amount" is the Principle Sum loaned for the term as specified in the Loan Agreement.
2. "Profit to Date" is the profit generated since the date of the loan agreement after commission.
3. "Account Balance" is the sum of the Loan Amount plus the Profit to Date.
4. "Current Funds in Trade" are funds traded on sporting events and prediction markets that will be finalised normally same day and no later than 7 days.
5. "Future Funds in Trade" are funds committed to sporting events and prediction markets that are not short term. These may not be finalised for several weeks or even months.
6. "Available Balance" is Account Balance, less the combined sum of Current and Future trades.
7. "Previous Funds Withdrawn" is monies previously paid to you.
8. "Funds Available to Withdraw" is Available Balance less the Principal Amount. The Principal Amount must always remain loaned during the term and cannot be drawn against. Funds Available to Withdraw also is determined by the amount that has previously been withdrawn and the annual and monthly withdrawal limitations imposed pursuant to the agreement.



**SPORTS TRADING CLUB  
ASSOCIATE MEMBER PROPOSAL**

<b>PARTNERSHIP:</b>	The Sports Trading Club Partnership ABN 92914683823
<b>ADDRESS:</b>	Level 26 44 Market Street Sydney, NSW 2000 AUSTRALIA
<b>TELEPHONE:</b>	(02) 9089 8628
<b>FACSIMILE:</b>	(02) 9089 8989
<b>E-MAIL:</b>	<a href="mailto:sydney@sportstradingclub.com">sydney@sportstradingclub.com</a>
<b>WEB SITE:</b>	<a href="http://www.sportstradingclub.com">www.sportstradingclub.com</a>
<b>GENERAL PARTNER:</b>	Anne P. Larter
<b>LEGAL PARTNER:</b>	Leigh Johnson
<b>ACCOUNTANTS:</b>	Byron Ortiz-Felton & Co
<b>SOLICITORS:</b>	Pikes & Verekers Lawyers
<b>BANKERS:</b>	Westpac Bank

## MEET THE PARTNERS



**Leigh Johnson**  
Legal Partner

Leigh Johnson has carved out a distinguished career over 30 years as a lawyer representing clients from all walks of life, including prominent politicians, actors, physicians, members of law enforcement agencies, large corporations and Aussie battlers.

Her passion for justice and the Aussie ethos of everyone being given a 'fair go' is legendary.

Her opinion has been much sought after with countless television appearances on programs such as *A Current Affair*, *Today Tonight*, *Sunday*, as well as being a regular member of the panel on the highly successful *Beauty and the Beast*.

She brings to the Partnership unlimited enthusiasm, a fierce intelligence and belief that everyone should share equally in the financial rewards.



**Anne Larter**  
General Partner

Anne has international experience in manufacturing and marketing where she excelled for 20 years.

Having built an extremely successful national retail brand, in seeing the rapid expansion of the Internet she saw an opportunity to diversify.

In recent years she has delivered security services to the mining industry, where her reputation is second to none.

She prides herself on her work ethic, honesty and the relationships she has built with people over a number of years.

Together with long-time friend Leigh Johnson, they have secured the exclusive rights to own and operate the Sports Trading Club system in Australia.

Now is your chance to join them and share in their success.

## **LOAN AND PROFIT SHARE ASSOCIATE MEMBER**

---

The Sports Trading Club Partnership is registered in Sydney and has secured the exclusive rights and been appointed the Club Member for Australia, by Sports Trading Club Limited.

These highly prized rights allocated to The Sports Trading Club Partnership allows for \$20 million to be traded on sporting events and prediction markets in Australia and overseas.

The Sports Trading Club Partnership seeks to raise \$10 million by way of a loan so as to maximise profits and fully utilize the \$20 million allocation.

### **LOAN SECURITY AND GUARANTEE**

The loan is 100% secured against the value of the Australian rights and by way of personal guarantee by the General Partner.

The Sports Trading Club Partnership will only borrow up to a maximum of 50% of the value of the rights, ensuring the lender's investment is never greater than the commitment of The Sports Trading Club Partnership.

### **PROFIT SHARE**

Those individuals who make a loan to The Sports Trading Club Partnership will share in the financial rewards by becoming an Associate Member.

Instead of interest being assessed, The Sports Trading Club Partnership will share one half (50%) of all profits made as a Member, with the Associate Members.

Profits are available to be withdrawn on a monthly basis, which provides a return to the lender on the loan in line with normal lending principles.

Up until now, unless you were a multi-national corporation, or had vast financial resources, it was not possible for you to participate in the lucrative sports trading industry.

However as an Associate Member of The Sports Trading Club Partnership, you can share in our success by becoming a lender from as little as \$50,000.

It is the way of the future, in the fastest growing business of the future...and it's not too late for you to participate.

As you are about to read, there has never been a better time than now.

## SPORT - LIFE DISTILLED TO ITS PUREST FORM

# Sport & fun

While away the hours exploring every kind of pleasure

Chief Justice Earl Warren, of the U.S. Supreme Court, 1953-69 once famously said:

"I always turn to the sports pages first, which records people's accomplishments. The front page has nothing but man's failures."

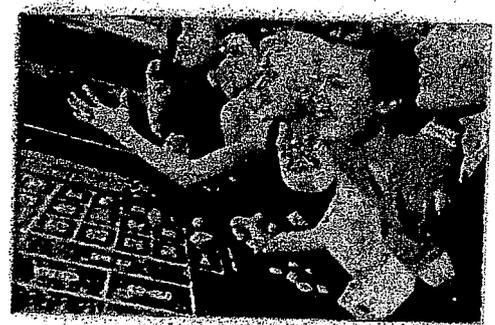
Out of necessity, most people spend a major part of their lives in work. Work is potentially creative, but for most people it is monotonous, stressful, exhausting and damaging to body, mind and spirit. Sport provides people with moments of excitement, drama and passion that are largely denied them in their daily lives.

Sport involves "real" people in "real" time and is therefore much more unpredictable than any soap opera or Hollywood movie. This increases the drama and suspense.

Watching sport on television is now one of the most popular forms of leisure and recreational activities.

Sport is an essential part of life...distilled to its purest form.

## WHY DO PEOPLE GAMBLE ?



The popularity of gambling globally suggests that the motivation is positive, that people enjoy gambling and it is usually a harmless diversion.

Because people enjoy it they continue to gamble in spite of often losing. Any discussion of the motivation of gambling usually starts with the natural comparison to life.

Life is a gamble. Every day, people are faced with situations which involve risk and chance.

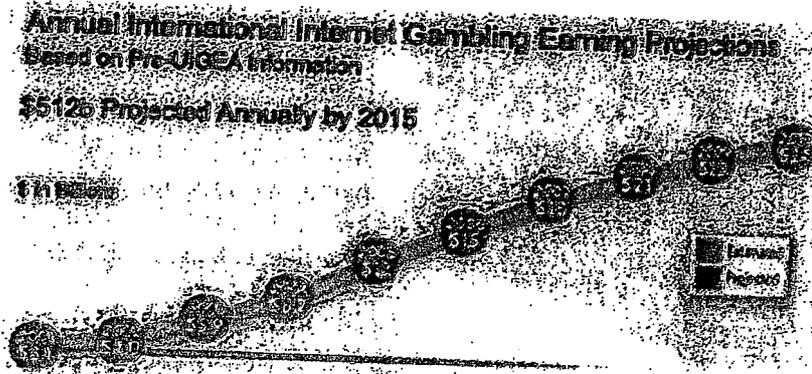
Gambling activities are extensions of the risk and chance in life. The activity of gambling becomes play, it becomes a game. Gambling allows the person the choice of engaging in the activity, the amount of risk and, in many cases, the stakes. The stakes are a necessary element for many people. It turns the bet into not just an opinion but a commitment.



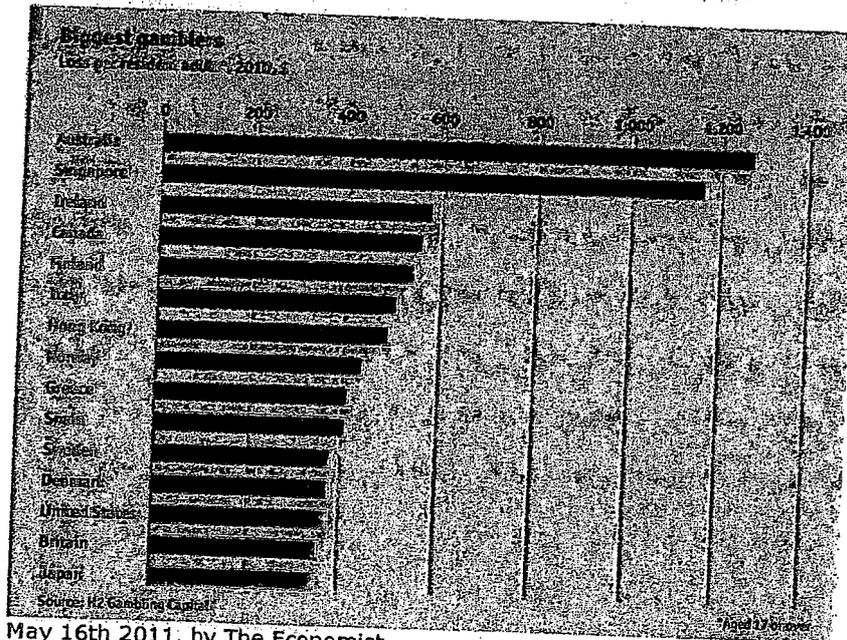
# INTERNET GAMBLING - THE GROWTH INDUSTRY

A study released by global giant Merrill Lynch, one of the world's premier providers of wealth management, securities trading, corporate finance and investment banking services has reported that the Internet gambling industry is still in its infancy, with a projected peek to hit around the year 2015.

At that time Merrill Lynch predicts that the market will bring in more than **\$528 billion** annually worldwide. It will become the most profitable Internet revenue stream...far surpassing every other industry.



Australians are also the largest gamblers in the world, according to the business journal, *The Economist*.



## THE MONEY MAKING MARKET OF THE FUTURE

The Sports Trading Club offers Members an alternative to the stock and property markets and typically traditional investment channels.

The sports trading market is literally recession proof and offers unique tax free returns that cannot be replicated in any of the mainstream investment products currently being offered.

## HOUSE PRICES TO FALL FURTHER IN 2013



Globally the housing market has been stuck in the doldrums since 2008, despite record low interest rates.

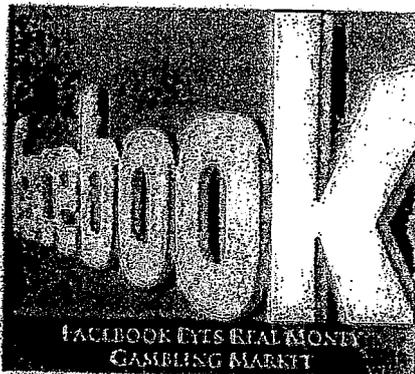
Australian capital city home prices have ended in the red for the second year in a row, and predicted to fall further in 2013.

## SUPERANNUATION IN DECLINE



The 27 per cent drop that super funds suffered in the financial crisis from late October 2007 to the end of February 2009 requires a gain of 37 per cent to get back to where they started.

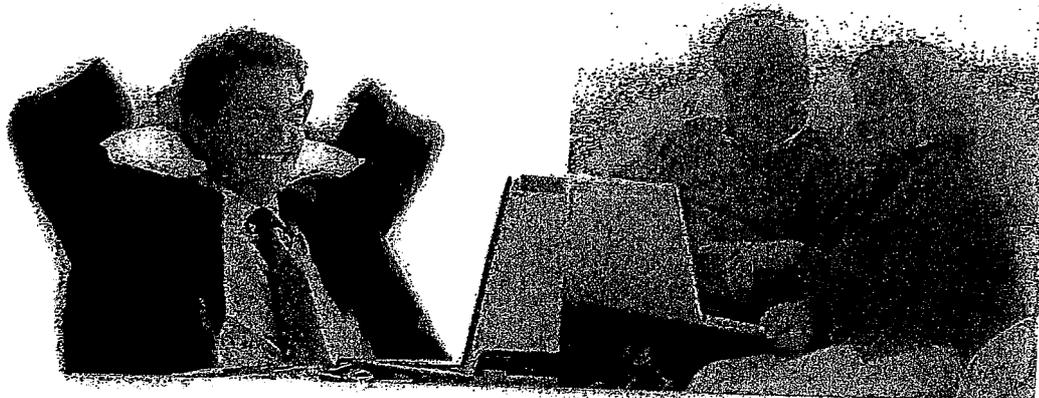
Even with a 41.5 percent gain since February 2009, after 5 years the funds are only 3% above where they started in 2007.



With over one billion active users, the fact that online gambling is even out growing Facebook by more than 50% per annum is a significant factor that illustrates the growth of the industry.

The decision by the \$100 billion Facebook company to expand into on-line gambling speaks volumes about the acceptability of gambling as a recreational pastime, and the serious profits that are available in this booming industry.

## THE SPORTS TRADING CLUB SUCCESS



Every day there are tens of millions of dollars gambled on numerous sporting events, much of which industry experts call "silly money". This gives rise to opportunities to make successful trades by using "intelligence".

The one trait that most amateur gamblers lack, and for that matter amateur stock market speculators, is discipline.

They can be swept up in the euphoria of the event and get carried away. We hear it often. A person has a few early wins only to give it all back plus their original stake. They then take it personally, see it as their individual failing and often chase their losses...throwing good money after bad.

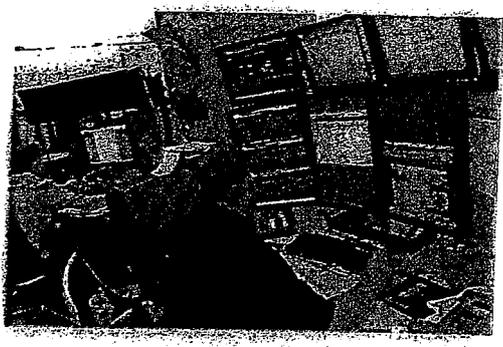
The average person makes ill-informed decisions on misleading or irrelevant data or considerations. They also lack all the information required to be able to fully assess sporting events and make an informed decision as to where there is an advantage and opportunity to trade.

The amateur trader may also not appreciate that investing on sporting events is no longer purely a win or lose trade. The astute trader can take the position of backing a position to win, or laying it to lose, and subject to variables and fluctuations, can sell the position for a profit (whilst the event is still in play and not be concerned with the ultimate outcome), or alternatively sell the position and minimise the loss.

The intelligent trader maximises profits and minimises losses through the use of established financial risk management strategies such as stop loss, hedging and the equivalent of short selling.

These are just a few of the skills that are second nature to our highly trained Account Managers.

## THE ACCOUNT MANAGER



Our Account Managers do what the average person does not do, they take gambling seriously... they don't take it personally.

The actual trade decisions are made by our Account Managers, under the supervision of our Senior Analyst and Chief Investment Officer.

Each Account Manager has extensive experience in trading on sporting events, and a track record of discipline and intelligent decision making.

The Account Managers expertly analyse and trade the betting markets, taking the emotion out of the betting game and putting quantitative analysis in its place. The sports market has less inefficiencies than the stock market which opens the way for astute trades.

They are a team of analysts with experience on sports and investment, and with professional qualifications in quantitative disciplines such as science, accounting and mathematics.

They support the CIO through undertaking extensive statistical and trending analysis coupled with the rigorous background research and market intelligence.

They seek attractive risk - reward profile and allocate assets accordingly, using sports specific algorithms that are used to identify value at all markets. The process is very clinical, which is our edge.

They also rely upon information available from our senior analyst's contacts around the world to provided inside information not readily available to the general public.

They also have the invaluable access to information received from our Scientific Research Director, Dr. Allan Snyder from the Sports Trading Club Insight Project at the University of Sydney, harnessing the extraordinary talents of Savants.

Our Account Managers have the ability to see things, not just look at them...and this starts with the ability to research.



## ANALYSIS OF RESEARCH



Research plays a large role in the preparation undertaken by our Account Managers.

We not only have access to a global network of people with inside information with regard to the fitness of athletes, and analysis of their performances, we also ensure our Account Managers study the psychology behind market factors.

Our Account Managers consider numerous economic and financial issues related to each sector. These include questions relating to the efficiency of these markets and heterogeneity in risk attitudes among economic agents.

The extent to which price biases may exist in these markets, and more generally their ability to forecast a range of outcomes, has been addressed and tested across a range of published outputs in academic literature (e.g. *Smith et al. 2006; Borghesi 2007*).<sup>1</sup>

## EXPLOITING ESTABLISHED BIASES

When analysing the efficiency of betting markets, there exists established biases across a range of these, perhaps the most famous of which is the 'favourite-longshot bias', i.e. the tendency for wagers placed at shorter odds to yield higher expected returns, than wagers placed at longer odds.

The explanation for this bias, and why it persists in most arenas, but not all (sometimes it is reversed), has long been the topic of academic scrutiny. The papers by *Peel and Law*<sup>2</sup> provides a more general non-expected utility model that is capable of explaining what appears to be risk-seeking behaviour in gambling, and risk-averse behaviour in other contexts such as insurance.

Our Account Managers realise the existence of heterogeneity in risk attitudes and individual probability distortions. Allowing for such heterogeneity enables a single model to encompass a range of observed outcomes. The insight that risk attitudes may differ in systematic ways

<sup>1</sup> *Smith, M., Paton, D. and Vaughan Williams, L. (2006). Market efficiency in person-to-person betting exchanges. Economica, 73 (292), 673-89.*

<sup>2</sup> *Cain, Michael, Law, David A. and Peel, David A., The Favourite-Longshot Bias, Bookmaker Margins and Insider Trading in a Variety of Betting Markets. Bulletin of Economic Research, Vol. 55, pp. 263-273, July 2003. Available at SSRN: <http://ssrn.com/abstract=418822>*

associated with cultural or institutional factors is of considerable benefit to our Account Managers in understanding why, for example, we find a standard favourite-longshot bias in some betting markets such as the UK (see, for example, *Vaughan Williams and Paton 1997*)<sup>3</sup> but a reverse bias in others.

### **Bruce, Johnson, Peirson and Yu**

The theme of differences in underlying characteristics of bettors as a way of explaining why we observe varying levels of the favourite-longshot bias in different contexts is also considered in the paper by Alistair Bruce, Johnnie Johnson, John Peirson and Jiejun Yu.<sup>4</sup>

They introduce a theoretical model in which bettors differ according to (i) the level of information they possess, (ii) their motivations for gambling and (iii) the level of transactions cost.

The authors test their model using a dataset covering betting activity on the same outcomes by three distinct groups—bettors at the racetrack, off-track bettors at licensed bookmaking premises and off-track bettors using the telephone. In this data, they find significant differences in the extent of the favourite-longshot bias that are generally consistent with their theoretical model.

### **FORECASTING TOOLS**

The value of betting markets as a forecasting tool is also of considerable interest to our Account Managers, and a number of recent papers have addressed this from various angles, including the aggregation of information from different markets (*Paton and Vaughan Williams 2005*), the influence of market ecology (*Sung and Johnson 2007*)<sup>5</sup> and optimal design (e.g. *Servan-Schreiber et al. 2004*)<sup>6</sup>.

The key questions are whether these markets are able to add value to traditional forecasting methodologies, and if so to what extent and with what caveats. A significant amount of this research effort has to date focused on the value of these markets in predicting the outcomes of political elections (see, for example, *Strumpf and Rhode 2004*)<sup>7</sup>. There is also growing interest in the value of contingent markets ('If event X occurs, how will this affect outcome Y?').

Understanding the "herd mentality" and what motivates people in their decision making process gives us an edge to be able to recognise where there are false favourites, bias and opportunity.

<sup>3</sup> *Vaughan Williams, L. and Paton, D. (1997). Why is there a favourite-longshot bias in British racetrack betting markets? Economic Journal, 107, 150-8.*

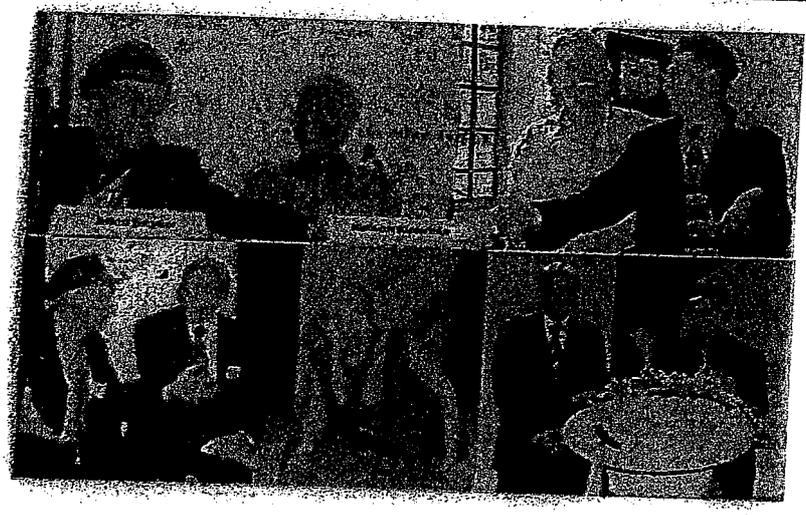
<sup>4</sup> *Bruce, Alistair, Johnson, Johnnie E.V., Peirson, John and Yu, Jiejun, An Examination of the Determinants of Biased Behaviour in a Market for State Contingent Claims. Economica, Vol. 76, No. 302, pp. 282-303, April 2009. Available at SSRN: <http://ssrn.com/abstract>*

<sup>5</sup> *Sung, M. and Johnson, J. E. V. (2007). The influence of market ecology on market efficiency: evidence from a speculative financial market. Journal of Gambling Business and Economics, 1 (3), 185-98.*

<sup>6</sup> *Servan-Schreiber, E., Wolfers, J., Pennock, D. and Galebach, B. (2004). Prediction markets: does money matter? Electronic Markets, 14 (3), 1-11.*

<sup>7</sup> *Strumpf, K. S. and Rhode, P. W. (2004). Historical presidential betting markets. Journal of Economic Perspectives, 18 (2), 127-41.*

### THE INSIGHT PROJECT



Dr Allan Snyder, Scientific Research Director of the Sports Trading Club Insight Project has shared the world stage with global leaders.

Top left:  
Nelson Mandela

Top right:  
Richard Branson

Bottom left:  
The Dali Lama

Bottom right:  
British PM Tony Blair

The Sports Trading Club has also created The Insight Project, a world first with the study of savants and sports trading.

Our scientific director is Dr. Allan Snyder, FRS who, for some 20 years, has conducted ground breaking research on savants at both the Australian National University and the University of Sydney.

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

This is of great advantage in trading on numerous sports, including Baseball, described as the only thing besides the paper clip that hasn't changed in over 100 years. Unlike tennis, where previous stats can't be relied upon due to the changes from slow wooden rackets to super-fast titanium, with baseball the equipment remains as it did a century ago, and historical data and the study of human behavior through time can play a significant role in predicting future results.

Savants are also mysteriously gifted at setting odds and point spreads on games such as football and basketball, with extraordinary accuracy.

Dr. Snyder, himself a living genius and brilliant learned scholar, believes that certain savants have an distinct advantage in sports trading, which gives us a diagnostic edge that no one else can achieve.

Dr. Snyder provides to the Sports Trading Club the exclusive access to these very gifted and talented savants with a view to factoring in unrivalled intelligent insight for our Account Managers.



## RELAX WHILST YOUR MONEY WORKS



The good news is you don't have to understand the science of sport or the psychology of gamblers to be able to watch your loan make money whilst you're sitting at home.

You don't need a medical degree to trust your doctor.

You don't need a legal degree to trust your lawyer.

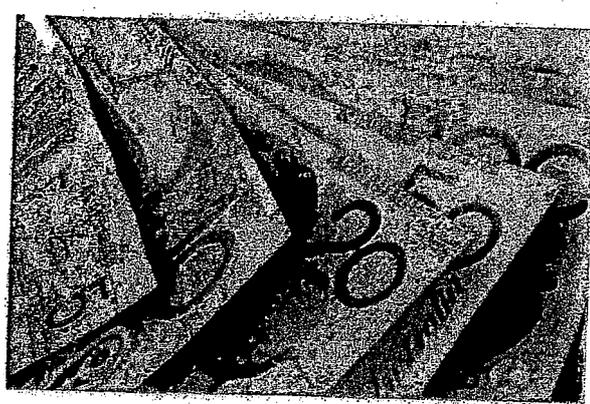
You just need to trust in sport.

As an Associate Member of The Sports Trading Club you will be able to experience the thrills of the sporting events in real time through transparency and communication informing you of trades in-play.

You will be alerted by text messages, twitters or emails as to what trades we are involved with, so you can enjoy watching the action and excitement of the event.

You will also have access through the member's website to your own loan account which will have up-to-the-minute information, as to events and financial statements.

## WITHDRAWING YOUR PROFITS IS EASY



You are able to withdraw your profits on a monthly basis, (up to a maximum of 100% of the value of your principal loan per annum) ensuring your loan is providing you a regular financial return.

Or you can let profits accumulate, and build upon your loan, giving you the opportunity to increase your return and make even more money...the decision is yours.



## THE RELATIONSHIP IN SIMPLE TERMS



**What is the relationship between Sports Trading Club Limited and The Sports Trading Club Partnership and the lender?**

Sports Trading Club Limited has the expertise and knowledge to trade on sporting events worldwide. They only appoint one Club Member in each country.

Through unparalleled investment intelligence, funds management expertise and the use of technology they trade for that Member on sporting events in that particular country and around the world.

The amount of money to be traded in each country is calculated in accordance with the specific size of each country, population, the value of sports investing in that market, with consideration to ensure potential member returns are not compromised and are realistic, in respect to the amount of money the market can trade.

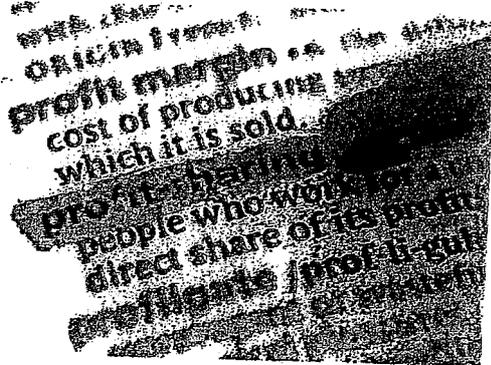
in Australia it was determined that that sum was \$20 million and the Australian sole rights were obtained by Leigh Johnson and Anne Larter who then formed The Sports Trading Club Partnership, registered in New South Wales and with its offices in Sydney.

The Partnership has elected to borrow \$10 million so as to be able to maximise the profits to be earned from sporting trades.

To be able to keep the lender fully informed, they have received permission to allow lenders to become Associate Members under the umbrella of their Membership, and accordingly to be afforded access to the club members website, so as to be able to witness all trades in real time.

The legal relationship the lender has is in a loan and profit-sharing agreement between the lender and The Sports Trading Club Partnership. The lender does not have a direct relationship with Sports Trading Club Limited.

## PROFIT-SHARE LOAN EXPLAINED



### Why is it a loan... and why can't I become an investor in The Sports Trading Club Partnership?

In simple terms, we are not for sale.

Leigh Johnson and Anne Larter do not want to sell any equity in The Sports Trading Club Partnership. They believe the rights are just too valuable, and only going to increase in worth in the years ahead.

They are however prepared to share with you, and other lenders, 50% of the profits for a specified period of time.

If you were investing money in a managed investment scheme or the stock market, the value of your investment can potentially increase or decrease. In some cases your investment can be completely wiped out. That's why there are warnings on those type of investment schemes stating that your investment may go down as well as up.

However as a loan you are always legally entitled to the return in full of the principal of the loan. As it is a loan and not an investment the principal sum we borrowed must be repaid to you in full. The principal sum remains the unchanged.

This gives you security and peace of mind that you are not risking your principal. And you do get to share in the rewards, 50% of all profits made by the Member.

Reward without risk... it may sound too good to be true. It isn't.

However where there is a plus there normally is a minus. In this this case, "all good things must come to an end", and there is a time limit on the term of the loan and the period that you will be able to be an Associate Member.

The term of the loan is for either one year, two years or a maximum of three years, depending upon what suits your personal circumstances.

At the end of the term your loan will be repaid to you in full. But you will have had up to three good years of reaping the rewards...without worrying about risking the principal.

## **TERMS OF ASSOCIATE MEMBERSHIP**

### **1. Amount of loan**

The minimum amount that can be loaned is \$50,000. The maximum amount that can be loaned is \$250,000.

### **2. Duration of loan**

The term of the loan is for either one year, two years or a maximum of three years unless it is agreed by mutual consent to extend the term or to alternatively end it early.

### **3. Withdrawing profits**

Profits are able to be withdrawn on a monthly basis. The minimum withdrawal is \$1000. The maximum you can withdraw in any one month is 20% of that current month profits up to an annual (365 day period) maximum of 100% of the value of your principal loan. There is no fee charged for withdrawing profits.

What you need to send us:

- a) A completed withdrawal request downloaded from our website.
- b) This request must be received either electronically, by email, fax or post no later than 3 PM on the 28<sup>th</sup> day of the month for the funds to be paid to you within three working days.

### **4. Additional Fees and commission**

There are no hidden fees or commissions. STC charges a 5% management commission calculated on a monthly basis against the balance of each account, and a 5% commission on all profitable trades, calculated daily on an event by event basis.

### **5. Access to members website**

Each lender is given a username and password to the websites where an account is created specific to their loan.

### **6. Financial reporting**

This loan account of each Associate Member will keep daily balances, specifically outlining the worth of the account, and the amounts in play so that at any time the lender is fully aware of the amount of money he has received in lieu of interest on the loan.

## MAKING A LOAN IS SIMPLE

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The ability to make a loan is available to anyone aged 18 years and over.

We recommend that you seek independent legal advice relevant to your current taxation, foreign exchange or legislation in your particular jurisdiction.

What you need to send us:

1. A completed and signed loan and profit sharing agreement.
2. The amounts specified in the loan by telegraphic transfer to our nominated bank account.
3. Once funds are received, your account will be established and operational within 24 hours.

## WORK SMARTER, NOT HARDER

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To paraphrase Chinese philosopher Confucius, if you choose a job you love, you will never have to work a day in your life. Isn't it time you made your money work for you, instead of you working for money, by becoming an Associate Member of the Sports Trading Club Partnership?