

From: colingd10@gmail.com <colingd10@gmail.com>
Sent: Wednesday, 14 September 2022 12:06 PM
To: ACTReg <actreg@fedcourt.gov.au>; Melanie.McKean@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL]

Dear Registrar and Ms McKean,

There are several uncertain and unresolved issues regarding the listing for interlocutory hearing on 20 and 21 September 2022.

This is to both advise you of these uncertainties and ask for advice on how this issue should be addressed.

The principal unresolved issue appears to be the following. There may well be others, depending on when Justice Burley delivers his decision, and what it contains.

My final submissions to Justice Burley are to be filed by 4pm tomorrow, 15 September 2022 – addressing “freezing orders” on the scope of any hearing on 20 and 21 September, and if the hearing does proceed, if a Judge other than Justice Wigney is to preside.

- Unresolved issue: Is another Justice available to hear the matter next week?

Because we are waiting for decisions on the unresolved application for leave to appeal and the appeal, my solicitor and barrister are unsure what to prepare for, and are not prepared yet for a hearing on 20 and 21 September 2021.

Please let me know by this afternoon or tomorrow morning so I can advise my solicitor and barrister if the matter is to proceed, and the name of the Judge who is to preside.

If the listing is to be vacated, a direction hearing on 20 September 2022 for about 30 minutes – via Internet – could be used to finalise a question that was left over from the previous case management hearing (see the attached file on this issue).

It may also be possible for orders to be made for relisting the matters for hearing – subject to Justice Burley delivering a decision, and me being able to provide dates when my legal representatives are available.

Yours faithfully,

Colin Dunstan
Applicant

From: Melanie.McKean@ashurst.com <Melanie.McKean@ashurst.com>
Sent: Friday, 16 September 2022 9:02 AM
To: colingd10@gmail.com
Cc: Rob.Andersen@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL] [ASH-AUS_ONPREM.FID30159972]

Dear Mr Dunstan

We refer to your email below to the ACT Registry.

As has been outlined in the submissions filed by the Respondents on 13 September 2022 in response to your leave to appeal application (at [19]), if leave to appeal is granted by the Court, the Respondents have agreed that the hearing dates on 20-21 September should be vacated.

In the event that your leave to appeal application is refused, there is no basis for the hearing to be adjourned, or otherwise reconfigured, as you have suggested. The Respondents will oppose any application you may make for an adjournment of the hearing commencing on 20 September 2022. Costs and resources have been incurred in the arrangements for counsel to appear in the ACT Registry and in preparation for each of the interlocutory applications that may be heard over 20-21 September 2022. The Respondents refer to the reasons outlined in their Reply for the Summary Judgment application filed on 13 September 2022 (at [65]-[66]), and do not otherwise agree that the hearing should be converted to a directions hearing to resolve only the discrete matter you have raised in your email.

Should you not attend the hearing scheduled to commence on 20 September, the Respondents will apply to have all of the interlocutory applications listed determined in your absence under r 17.04 of the *Federal Court Rules 2011* (Cth), with costs. Alternatively, if the Court adjourns the proceeding, the Respondents will seek an order for costs thrown away, including that the costs of, and incidental to, their legal representatives' preparation for the hearing commencing on 20 September be paid by you.

Regards

Melanie McKean

Partner

melanie.mckean@ashurst.com

Ashurst

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From: colingd10@gmail.com <colingd10@gmail.com>
Sent: Wednesday, 14 September 2022 4:22 PM
To: 'ACTReg' <actreg@fedcourt.gov.au>; Melanie.McKean@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL]

Dear Registrar,

The question of uncertainty is compounded, not reduced by the phrase in your email below: "At this stage, the matter remains listed for hearing before Wigney J ...".

Due to the urgency and short time available to Justice Burley (my letter of 5 September 2022 is attached), I have confined my submissions on the orders he made on 7 September 2022 (copied of those orders are attached) to my application for directions under rule 36.11 (2) (f) – a copy is attached - pending the determination of the appeal to preserve my rights.

The short time available has made it impractical to also make submissions on the application for leave to appeal from the belated decision published on 29 August 2022 by Wigney J - to not recuse himself from hearing the matters listed for 20 and 21 September 2022.

My legal rights to appeal this decision are nullified by the matter being listed "at this stage" to be heard by Wigney J.

This is unreasonable and a denial of natural justice.

Has any contingency been made for hearing the matter before another Judge?

Is it assumed that Burley J will decide:

- to reject my application for directions under rule 36.11 (2) (f), and
- dismiss my application for leave to appeal

even though it is clear my submissions pursuant to the orders Burley J made on 7 September 2022 address only rule 36.11 (2) (f) – due to the seriously curtailed time following Wigney J taking 3 weeks to deliver his reserved decision?

I need to speak with my solicitor and barrister. My barrister is busy this week in Sydney.

He told me he cannot be adequately ready for a hearing where there so much uncertainty so close to the hearing date – a situation that is quite unfair to me in being able to have professional representation where they are still preparing for what is a quite complex matter – made even more unfair by Wigney J having deferred all interlocutory matters to the same date, and allowing the Respondents to defy his request to give me an answer about the existence of documents.

I repeat this information from my email at noon today (below) – about the order that I am to file submissions by 4 pm tomorrow afternoon for Burley J.

- It is not clear when he will deliver his decision.
- I am unable to both prepare these submissions and work on material for my legal representatives for a hearing next week – that depends on a decision by Burley J – assuming he can publish his decision in such a short time.

I suggest it is unfair to continue with the hearing on 20 and 21 September 2022 in these unfair circumstances. My legal representatives will need time to consider more options regarding Wigney J's participation - depending on any decision by Burley J.

Yours faithfully,

Colin Dunstan
Applicant

From: ACTReg <actreg@fedcourt.gov.au>
Sent: Wednesday, 14 September 2022 2:56 PM
To: colingd10@gmail.com; Melanie.McKean@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL]

OFFICIAL

Dear parties

At this stage, the matter remains listed for hearing before Wigney J on 20 and 21 September 2022 in the ACT Registry of the Federal Court of Australia.

Kind Regards,

Henrietta | Client Services Officer | Court and Tribunal Services
Federal Court of Australia, Federal Circuit and Family Court of Australia, Corner Childers Street and University Avenue, Canberra ACT 2601
p. 1300 720 980 e. ACTreg@fedcourt.gov.au | www.fedcourt.gov.au, www.fcfta.gov.au

I acknowledge the Australian Aboriginal and Torres Strait Islander peoples as the first inhabitants of the nation and the traditional custodians of the lands where we live, learn and work.

From: colingd10@gmail.com <colingd10@gmail.com>
Sent: Wednesday, 14 September 2022 12:06 PM
To: ACTReg <actreg@fedcourt.gov.au>; Melanie.McKean@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL]

Dear Registrar and Ms McKean,

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This is to both advise you of these uncertainties and ask for advice on how this issue should be addressed.

The principal unresolved issue appears to be the following. There may well be others, depending on when Justice Burley delivers his decision, and what it contains.

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- Unresolved issue: Is another Justice available to hear the matter next week?

Because we are waiting for decisions on the unresolved application for leave to appeal and the appeal, my solicitor and barrister are unsure what to prepare for, and are not prepared yet for a hearing on 20 and 21 September 2021.

Please let me know by this afternoon or tomorrow morning so I can advise my solicitor and barrister if the matter is to proceed, and the name of the Judge who is to preside.

If the listing is to be vacated, a direction hearing on 20 September 2022 for about 30 minutes – via Internet – could be used to finalise a question that was left over from the previous case management hearing (see the attached file on this issue).

It may also be possible for orders to be made for relisting the matters for hearing – subject to Justice Burley delivering a decision, and me being able to provide dates when my legal representatives are available.

Yours faithfully,

Colin Dunstan
Applicant

From: ACTReg <actreg@fedcourt.gov.au>
Sent: Wednesday, 14 September 2022 9:27 AM
To: colingd10@gmail.com; Melanie.McKean@ashurst.com
Subject: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL]

OFFICIAL

Dear parties

Please be advised that this matter is listed for interlocutory hearing on **20 and 21 September 2022**. Please note that:

- The hearing day on 20 September 2022 will start at **11.00am**; and
- The hearing day on 21 September 2022 will start at **10.15am**.

The hearing will proceed **in person** in the ACT Registry of the Federal Court of Australia. A Microsoft Teams link has, however, been generated below for the viewing purposes of other legal representatives and the general public. All participants should have their microphones muted and cameras switched off unless they are required to speak or be seen.

All documents to be relied upon should be eLodged in the ordinary manner. Where this is not possible or appropriate, all documents to be relied upon, tendered or 'handed up' electronically during the case management hearing should be emailed to Chambers at least 30 minutes prior to the listing.

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Kind Regards,

Henrietta | Client Services Officer | Court and Tribunal Services

Federal Court of Australia, Federal Circuit and Family Court of Australia, Corner Childers Street and University Avenue, Canberra ACT 2601

p. 1300 720 980 e. ACTreg@fedcourt.gov.au | www.fedcourt.gov.au, www.fcfcoa.gov.au

I acknowledge the Australian Aboriginal and Torres Strait Islander peoples as the first inhabitants of the nation and the traditional custodians of the lands where we live, learn and work.

From: colingd10@gmail.com <colingd10@gmail.com>
Sent: Friday, 16 September 2022 12:51 PM
To: McKean, Melanie 64129 <Melanie.McKean@ashurst.com>
Cc: Andersen, Rob 64056 <Rob.Andersen@ashurst.com>
Subject: RE: ACD93/2021 Interlocutory Hearing [SEC=OFFICIAL] [ASH-AUS_ONPREM.FID30159972]

Dear Ms McKean,

Please note that since my email below on Wednesday, I noted in my submissions yesterday afternoon (Thursday) re ACD45/2022 that my barrister was unavailable due to his case where he is required to continue the hearing next Monday and Tuesday.

I only approached potential legal representatives after the Court insisted on hearing my recusal application even though I was required to isolate and was unwell with COVID19. This was after the time Ashurst and Justice Wigney agreed they were available for a hearing on 20 and 21 September.

It is not in the interest of the administration of justice to coerce me to conduct the hearing without professional legal representation.

AS you know, Justice Burley set the timetable requiring me to prepare and file submissions on the appeal application.

This has reduced the time available for the hearing next week.

Your email does not say what your attitude is if Justice Burley has not made any decision before, say, 11 am next Tuesday 20 September 2022.

Do you know something about this that I do not?

I believe that in these circumstances it is unfair and unreasonable for you not to consent to adjourning the hearing, and request that you please reconsider.

Yours faithfully,

Colin Dunstan
Applicant

From: Melanie.McKean@ashurst.com <Melanie.McKean@ashurst.com>
Sent: Monday, 19 September 2022 12:20 PM
To: colingd10@gmail.com
Cc: Rob.Andersen@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [ASH-AUS_ONPREM.FID30159972]

Dear Mr Dunstan

We refer to your emails of Friday 16 September 2022 (refer below).

We note that the Court dismissed your application for leave to appeal on Friday.

Our clients' confirm their previously stated position that the hearing scheduled to commence tomorrow, 20 September 2022, should proceed. We do not accept that the potential unavailability of any legal representative you wish to engage is an appropriate basis to adjourn the proceeding given the stage the proceedings are now up to. Tomorrow's hearing has been listed since 28 June 2022, and the additional hearing day on 21 September 2022 was listed at the interlocutory hearing on 2 August 2022, so you have had ample opportunity to engage legal representation available to appear for you. We otherwise refer to the orders that you agreed to by consent on 25 August 2022 which set out the timeframe for filing materials ahead of the hearing scheduled to commence tomorrow. We do not accept that your preparation of submissions concerning your now dismissed leave to appeal application should give rise to any basis to seek to adjourn the hearing scheduled to commence tomorrow.

We would be grateful if you could please notify us of the name of your legal representatives in response to our request of 14 September 2022, and have your solicitor file and serve a notice of address for service as a matter of urgency.

Yours faithfully

Rob Andersen

Senior Associate

rob.andersen@ashurst.com

Ashurst

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From: colingd10@gmail.com <colingd10@gmail.com>
Sent: Monday, 19 September 2022 4:23 PM
To: <Melanie.McKean@ashurst.com>; <Rob.Andersen@ashurst.com>
Subject: RE: ACD93/2021 Interlocutory Hearing [ASH-AUS_ONPREM.FID30159972]

Dear Ms McKean and Mr Andersen,

The Sydney Registry notified me by email at 3:45 am on Saturday morning that Justice Burley had rejected my application for leave to appeal Justice Wigney's decision to not recuse himself. This left little time for arranging for a hearing that might or might not proceed on 20 and 21 September, depending on that decision.

However, Ms McKean may have had earlier notification.

For instance, a day before I was notified of Justice Burley's decision, Ms McKean sent me an email claiming:

"Costs and resources have been incurred in the arrangements for counsel to appear in the ACT Registry and in preparation for each of the interlocutory applications that may be heard over 20-21 September 2022."

This seems rather premature if the decision was not known. And especially so if it was not known if Justice Burley might make any decision at all before Tuesday 20 September.

Justice Wigney asked Ashurst on the same day, 24 June 2022, as the hearing on 20 September 2022 was agreed between yourselves to tell me if a copy of the Molineux notes could be produced – if my application for production resulted in a direction that they be produced.

As I have noted in submissions, there was no need to waste the Court's and parties time on a theoretical argument about producing documents that did not exist.

Ms McKean did not answer Justice Wigney's question asked on 24 June until 9:30 am last Friday 16 September, sending a letter telling me that a copy of the Molineux notes was available.

This of course is also a little late to learn whether it was necessary to prepare for a hearing my interlocutory application next Tuesday.

My legal representatives are Brandon Bodel and Richard Thomas.

Mr Bodel notes that now that I have legal representation, this will assist to resolve issues, save the Court's time, and they can explore resolution with the other side.

If you insist on proceeding under threat of punitive cost orders, I have prepared my arguments to address my interlocutory application on production of the Molineux notes and on the inspection of the documents that are in the custody of the Court that were produced pursuant to an order of Justice Mansfield in 2007.

Justice Wigney did foreshadow on 24 June 2022 that I could apply for an adjournment after this interlocutory application was addressed – subject to documents being made available.

Is this a satisfactory compromise - that I deal with this application unrepresented, followed by an adjournment, with a date for hearing the remaining interlocutory applications being set for when my legal representatives can appear for me?

Colin Dunstan
Applicant

From: Melanie.McKean@ashurst.com <Melanie.McKean@ashurst.com>
Sent: Monday, 19 September 2022 6:27 PM
To: colingd10@gmail.com
Cc: Rob.Andersen@ashurst.com
Subject: RE: ACD93/2021 Interlocutory Hearing [ASH-AUS_ONPREM.FID30159972]

Dear Mr Dunstan

The Respondents were informed by the email from the Court of the orders of Burley J dated 16 September 2022 at the same time and in the same email as you were informed.

As has been stated in our earlier correspondence with you, the Respondents' legal representatives have prepared, and are prepared, to argue **all** of the interlocutory applications that are listed at the hearing scheduled to commence on 20 September 2022 (the Respondents' Summary Judgment Application dated 16 May 2022, your production application dated 8 June 2022, and the balance of your recusal application (prayers 4-6) dated 20 July 2022). Senior and junior counsel for the Respondents have travelled to the ACT for the hearing.

In the event that the Court makes orders requiring production of the relevant documents the subject of your production application, the Court has indicated that it would give you time to inspect the documents and to consider your position as to the hearing of the Respondents' Summary Judgment application, including whether you wish to apply for an adjournment of the hearing of that application so as to give you more time to consider your position: *Dunstan v Orr* [2022] FCA 1006 at [46] (Wigney J). The Court also made it clear to you at the Case Management Hearing on 28 June 2022 that if you were unsuccessful in relation to your production application, you ought to be prepared to respond to the Respondents' Summary Judgment application at the hearing on 20 September (Transcript p 10, lines 8-24).

The Respondents reserve their rights as to any application you may choose to make for an adjournment of the Respondents' Summary Judgment application depending on what orders for production (if any) are made by the Court. The Respondents do not consent to any adjournment ahead of any such orders being made. We consider that you should attend the hearing tomorrow prepared to respond to the Respondents' Summary Judgment application.

We have not been served with a Notice of Acting by Mr Bodel.

Regards

Melanie McKean

Partner

melanie.mckean@ashurst.com

Ashurst

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Ordered by: Colin Dunstan

For: Colin Dunstan

Email: colingd10@gmail.com

TRANSCRIPT OF PROCEEDINGS

O/N H-1773050

FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY REGISTRY

WIGNEY J

No. ACD 93 of 2021

COLIN GEORGE DUNSTAN

and

ROBYN ORR and ANOTHER

CANBERRA

11.19 AM, TUESDAY, 20 SEPTEMBER 2022

MR C.G. DUNSTAN appears in person

MS J FIRKIN KC appears with MR McDERMOTT for respondents

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HIS HONOUR: Yes, appearances now, please.

MR C.G. DUNSTAN: Your Honour – sorry – I’m Colin Dunstan, I appear for myself.

5

HIS HONOUR: Thank you, Mr Dunstan.

MR DUNSTAN: Thank you.

10 MS J. FIRKIN KC: Good morning, your Honour. My name is J. Firkin KC. I appear with my learned junior, C. McDERMOTT, on behalf of all of the respondents.

15 HIS HONOUR: Thank you, Ms Firkin. Right. Now, Ms Firkin and Mr Dunstan, what I thought I would do firstly, subject to your thoughts, is simply to identify the relevant documents that are before me today. Then perhaps deal with the evidence generally, if there’s any objections to the affidavits and any other documentary material. And then we will move on, as foreshadowed previously, to Mr Dunstan’s production application firstly, and then we will take it from there afterwards. Is that
20 a convenient course?

MS FIRKIN: Certainly, your Honour.

25 HIS HONOUR: Yes.

MR DUNSTAN: As I – two matters first, your Honour, if I might.

HIS HONOUR: Yes.

30 MR DUNSTAN: If my wife could join me at the table to help me with my documents and - - -

HIS HONOUR: Yes, I - - -

35 MR DUNSTAN: - - - I thought - - -

HIS HONOUR: There’s no objection to that course? No. And I’m certainly content with that.

40 MR DUNSTAN: Okay. Thank you, your Honour.

HIS HONOUR: Yes, Mr Dunstan.

45 MR DUNSTAN: And also, I have an amended statement of claim to hand up.

HIS HONOUR: Yes, have you seen that, Ms Firkin?

MS FIRKIN: I have never seen it or been told about it, your Honour, and I do object to it being handed up at this point in time.

5 HIS HONOUR: Well, Mr Dunstan, why don't you just hand it up for the moment.
And in the course of the morning, you can perhaps explain what the proposed
amendments are and then we will deal with the objections to it. And Ms Firkin can
then have an opportunity during the course of the day to consider it, and so we don't
need to deal with that objection now. But if you hand it up and hand a copy to Ms
10 Firkin, we will – during the course of the day, no doubt, you will explain the nature
and significance of the proposed amendments and why they are important or relevant
to determine today, in the context of the issues that we otherwise have to deal with.

MR DUNSTAN: Yes. I – certainly. Some of the matters I foreshadowed in my
15 submissions, and the respondents have replied to in their submissions.

HIS HONOUR: Yes.

MR DUNSTAN: So to some extent, it's just putting into the pleadings - - -

20 HIS HONOUR: Yes.

MR DUNSTAN: - - - other matters that are – have been, sort of, foreshadowed in
the submissions, your Honour.

25 HIS HONOUR: Yes, very well. Well, we will deal with that in the course of the
day - - -

MR DUNSTAN: And it has been - - -

30 HIS HONOUR: - - - but just - - -

MR DUNSTAN: - - - it was lodged this morning.

35 HIS HONOUR: So now, I suppose, at this stage – I'm testing my recollection of the
rules – it may be that you are able to amend once before the close of pleadings in any
event. So you may not need leave, but I will check that and we can deal with it - - -

MR DUNSTAN: Yes, yes, I just - - -

40 HIS HONOUR: - - - in the course of the day. But importantly, Ms Firkin has got to
be given – and those instructing, have to be given an opportunity to give some
consideration to it during the course of the day.

MR DUNSTAN: Yes.

45 HIS HONOUR: But just make a note of that.

MR DUNSTAN: Thank you, your Honour.

HIS HONOUR: Yes?

5 MR DUNSTAN: Sorry.

HIS HONOUR: Yes, you had some other preliminary points, I think.

10 MR DUNSTAN: No, only two. One was my wife and the other - - -

HIS HONOUR: Of course, very well.

MR DUNSTAN: And that was the other preliminary point, your Honour.

15 HIS HONOUR: Excellent. Okay. Now - - -

MR DUNSTAN: Thank you.

20 HIS HONOUR: - - - so let's – there, I think, are – let's start with the relevant interlocutory applications. I think, in some respects, there are three that need to be addressed in one way, shape or form today. The first is the respondent's interlocutory application dated 16 May 2022, which is the summary dismissal, summary judgment or strikeout interlocutory application. So we will go through these, and if anyone has any comments or observations about them. The second is
25 Mr Dunstan's interlocutory application dated 8 June 2022, which we've referred to in summary as the production application. And the third is, I think, the interlocutory application that was referred to generally as Mr Dunstan's recusal interlocutory application, a copy of which I'm struggling to find at the moment. And I think it's only prayers 4 and 6 or - - -

30 MS FIRKIN: Your Honour, I believe it's 4, 5 and 6 that are remaining.

HIS HONOUR: Four, 5 and 6.

35 MS FIRKIN: And that's dated 20 July 2022.

40 HIS HONOUR: Four, 5 and 6. So, Mr Dunstan, that's the recusal application, as I'm sure you're aware by now, in my recusal – the orders that I made on the day of the hearing of the recusal application, I dealt with a number of the prayers for relief, and that interlocutory application was stood over to hearing – for hearing today. The recusal application was dealt with in my judgment and there were some other prayers for relief that were dismissed, essentially, to vacate today's hearing and the like. So that leaves prayers 4, 5 and 6. So then that then brings us to the slightly more difficulty question of the affidavit evidence - - -

45

MR DUNSTAN: Excuse me, your Honour, there was also the question of my request to review the claim for privilege over several documents that were already in the registry.

5 HIS HONOUR: I thought that was part of your recusal interlocutory – sorry, part of your production interlocutory application?

MR DUNSTAN: Sorry, it should have been, but I didn't think of that until after I had filed it. So if you like, if those - - -

10

HIS HONOUR: Well - - -

MR DUNSTAN: - - - those – that request was in the nature of an amendment, if you like, or an expansion of that production document.

15

HIS HONOUR: Well - - -

MR DUNSTAN: It's essentially the same issue, just two different documents.

20 HIS HONOUR: At the moment, we will just deal with the interlocutory – the documents. And that issue may conveniently be dealt with - - -

MR DUNSTAN: Yes.

25 HIS HONOUR: - - - in the context of your production application.

MR DUNSTAN: Yes.

HIS HONOUR: I think that's probably the best.

30

MR DUNSTAN: Yes, your Honour.

HIS HONOUR: I think you – that's something that is addressed in your submissions, I think. Is that right?

35

MR DUNSTAN: I think so, yes.

HIS HONOUR: Anyway, we will come - - -

40 MR DUNSTAN: I suspect I made submissions after the interlocutory application, so there might have been a second set of submissions that addressed those documents, your Honour.

HIS HONOUR: Anyway, we will come to that in due course. So - - -

45

MR DUNSTAN: Yes, thank you.

HIS HONOUR: - - - now, as I said, we will deal with the production application first. But let's just deal with the affidavits that are read in respect of the – or, propose to be read in respect of the various interlocutory applications. I will just identify the affidavits firstly, and then we can deal with any objections. So even
5 though when – we will deal with the production one first. I will deal with the affidavits in respect of the respondent's summary dismissal application first. So, Ms Firkin, which – what affidavits do you rely on in relation to that?

MS FIRKIN: There is an affidavit of Ms McKeane, dated 16 May 2022. And a
10 second affidavit by Ms McKeane, dated 13 September 2022.

HIS HONOUR: Very well. And, Mr Dunstan, just in relation to the summary dismissal application, what affidavits do you rely on in respect of that matter?

15 MR DUNSTAN: Yes. First, my affidavit of 28 February 2022.

HIS HONOUR: Sorry, 28 February?

MR DUNSTAN: February 2022.
20

HIS HONOUR: Yes.

MR DUNSTAN: My affidavit of 8 June 2022.

25 HIS HONOUR: Yes.

MR DUNSTAN: My affidavit of 22 June 2022.

HIS HONOUR: Yes.
30

MR DUNSTAN: My affidavit of 14 July 2022.

HIS HONOUR: Yes.

35 MR DUNSTAN: And my affidavit of 8 August 2022.

HIS HONOUR: Very well. Now, perhaps at this stage I will just see if there's an objections to any of that material. Mr Dunstan, do you object to any of Ms McKeane's affidavits, of 16 May and 13 September 2022?
40

MR DUNSTAN: No, they're fine, your Honour.

HIS HONOUR: Very well. Well, those affidavits may be taken as read. Ms Firkin, Mr Dunstan proposes to read five affidavits. Have you any objection to that
45 material?

MS FIRKIN: No, we don't - - -

HIS HONOUR: Yes.

MS FIRKIN: - - - seek to make any objection to it being read by your Honour. I should note, I think your Honour asked me for the affidavits in relation to the
5 summary judgment application.

HIS HONOUR: Yes.

MS FIRKIN: There is one further affidavit - - -
10

HIS HONOUR: Yes.

MS FIRKIN: - - - that relates to the production application.

15 HIS HONOUR: Yes, we will come back to that in a moment.

MS FIRKIN: Okay. Fine.

HIS HONOUR: I know there's probably a degree of overlap, but - - -
20

MS FIRKIN: Okay.

HIS HONOUR: - - - if there is any - - -

25 MS FIRKIN: Yes, okay. I believe Mr Dunstan's affidavits might relate to the other applications.

HIS HONOUR: Yes.

30 MS FIRKIN: But I don't – I think - - -

HIS HONOUR: No.

MS FIRKIN: - - - if they're all before you - - -
35

HIS HONOUR: Yes. Now, I should make it clear, I have – I'm generally familiar with the materials, though, that said, the affidavit material is very luminous, particularly in relation to the exhibits. I'm also at the moment working off electronic versions which doesn't always make it necessarily easy, but – so what I would ask is
40 that, in the course of your submissions, if there are important parts of the affidavits you want to take me to, to take me to them, and take it slowly, because I will have to pull them up on the screen.

Very well. So that's the material for the summary judgment application. Now, Mr
45 Dunstan, do you rely on any additional material in relation to what we've called the production – your production interlocutory application?

MR DUNSTAN: Yes, your Honour. I – in – sorry. With the amended statement of claims, they’re a different basis for dealing with production, hence my submission that they – there is a – on the basis of a strong prima facie of fraud by the respondents that they have lost their entitlement to legal privilege. And I have some
5 documents and – within the authorities – I’ve delivered in support of the amended statement of claim. I will address that, if I may, with some material to hand up.

Also – sorry. In terms of the electronic copies of the affidavits I’ve prepared, because I was rather unexpected – I wasn’t expecting to have to do this myself, and
10 my legal representatives were unavailable. What I’ve – as an emergency backup arrangement, I’ve taken copies of pages out of the electronic copies of the affidavits and attached them to a small bundle with a note on the fronts, so as that we can have a – sort of a hard copy in front of us with the notes on the front to reference - - -

15 HIS HONOUR: Very well. So long as it’s clear where – the source of the material. And that may be of some considerable assistance, but at the moment I’m just dealing with the documentary material: the affidavits or documents. Do I understand you to be saying that you now rely on some additional materials in relation to the production application, putting aside the proposed amended statement of claim?

20 MR DUNSTAN: Yes, although some of that material has been filed in the affidavits for the applicant – sorry, the respondents have filed affidavit material that I would be relying upon in the issue of production of documents now, your Honour.

25 HIS HONOUR: Sorry, that’s – so that’s material that’s already in the - - -

MR DUNSTAN: Yes, it’s already filed.

30 HIS HONOUR: - - - respondent’s affidavit material?

MR DUNSTAN: Yes.

HIS HONOUR: Very well.

35 MR DUNSTAN: Yes. So it will be - - -

HIS HONOUR: Well, let’s just deal with any additional material firstly. As I understand it, you’ve provided some bundles of documents; is that right?

40 MR DUNSTAN: Yes. Yes, I’ve said that was my backup arrangement in case I – it was my emergency procedure, where – I’m not very familiar with - - -

HIS HONOUR: So is this – these collections of documents that are already otherwise in the evidence or is it additional material?

45 MR DUNSTAN: Some of it’s additional, some of it’s from the authorities, and most of it is already in affidavit material, your Honour.

HIS HONOUR: Have you seen any of this, Ms Firkin?

MS FIRKIN: This is the first I've heard of this also, your Honour.

5 HIS HONOUR: Well, let's just have a look at firstly to see - - -

MR DUNSTAN: I – well – yes. I thought the idea would be sort of – I – in the way I've put down in my submissions: that I would give a bundle, talk about the significance of it - - -

10 HIS HONOUR: Well, it depends if it's evidence or submissions. That's the point I'm making. I want to make it abundantly clear exactly what is in evidence in respect of the applications first, and then we will move on to submissions. If they're documents that – if they're really collections of documents that conveniently bring
15 together - - -

MR DUNSTAN: A submission?

20 HIS HONOUR: - - - copies of materials that are already in evidence, then you can deal with that in the course of submissions, but if it's anything additional, then we really should deal with it now.

MR DUNSTAN: Okay. I'm sorry.

25 HIS HONOUR: So why don't you take me to one of the bundles by way of example and you can – I think my associate is going to hand me something. Right. So I've just been handed, firstly, a copy of your amended – or proposed amended statement of claim, and then bundles of documents that have been marked set 2, set 4, set 5 and set 6. Was that how it goes?

30 MR DUNSTAN: No, they're sequential. I – there is a – they're sequential, 2, 3, 4, 5, 6 and 7, and number 1 was the amended statement of claim, if you like.

35 HIS HONOUR: Sorry, they're - - -

MR DUNSTAN: It doesn't have a number.

40 HIS HONOUR: It's – I'm sorry – the labelling. Two, 3 – there's no – 4, 5, 6 – yes. No, I have got them all. So we've got – there's no set 1, and I take it that's because the statement of claim is 1?

MR DUNSTAN: Yes. Well, there was a numbering problem as I went, so 1 became the amended statement of claim, your Honour.

45 HIS HONOUR: Right. So let's just – so we can – I and Ms Firkin can understand what we've got here - - -

MS FIRKIN: Still waiting on a copy of anything beyond set 1 – set 2.

HIS HONOUR: Okay. Well, let's just go through set 2, and we will see whether it's something that needs to be – so set 2 – I see. So you've got an indication of what the documents are. So set 2 has got emails of – in September, some orders made by Burley J. So I'm – suspect that none of this material is in evidence. So what's the relevance of all of this?

MR DUNSTAN: Sorry, your Honour. Sorry. These were the copies I had made for your Honour that I - - -

HIS HONOUR: And that's excellent, because I've got copies, so you can give them to Ms Firkin.

MR DUNSTAN: Okay.

MS FIRKIN: No. Thank you, your Honour. I now have a copy.

HIS HONOUR: Okay. Very well. Well, you just hold on to those for the moment. I've got some in a folder. So the first – the – set 2 documents handed up at the hearing seems to comprise a series of recent emails, plus orders made by Burley J. What's the relevance of that?

MR DUNSTAN: Yes, your Honour. My legal representatives had suggested that I seek an adjournment, that – now that I'm legally represented, but they aren't available, as we only learned quite recently is that this – today's hearing would proceed. The respondents have rejected my request to consider that. So this was just to explain – why I'm here and not my legal representatives is that - - -

HIS HONOUR: Okay.

MR DUNSTAN: - - - I feel – I feel somewhat pressured into being compelled to represent myself and I am sort of acceding to the respondent's pressure to do so, your Honour.

HIS HONOUR: Well, two things: one, if you want an application for an adjournment, you should do so now – this is the first I'm aware of it – and then I will deal with it. And if I refuse the application for an adjournment, then we can put set 2 aside because they're no longer relevant to the - - -

MR DUNSTAN: Yes.

HIS HONOUR: - - - actual application. So - - -

MR DUNSTAN: Okay.

HIS HONOUR: Do you propose to apply for an adjournment?

MR DUNSTAN: What I – my proposal – the final proposal I had made to the respondents – rejected – is that I recalled your Honour had foreshadowed the possibility of adjourning, depending upon the outcome of the production of documents.

5

HIS HONOUR: Yes. What I had foreshadowed was that if I determined that the documents that you seek production of should be produced, then they would be produced, and if you needed more time – or you suggested you needed more time to consider them, then I would give some consideration to a short adjournment, but that all very much depends on the – firstly, the outcome of the application and, secondly, what – if – what – if one looks at the documents, it may be you will be able to give consideration to them quickly. We don't know, but – anyway, that's what I had envisaged, so - - -

10

15 MR DUNSTAN: Yes, I understood that. What I was proposing is that as there was already an – a possibility of an adjournment at that stage, I had suggested that I would feel – not comfortable – or – so that there isn't a complete waste of effort in preparing, that I would conduct the hearing of the application related to production, but then seek an adjournment at that stage regardless of your Honour's decision so that we're sort of no further behind than we would have been, if I had been able to access those documents, your Honour. So it - - -

20

HIS HONOUR: Well - - -

25 MR DUNSTAN: - - - would be like a variation of what you're intending.

HIS HONOUR: Well, let's then put aside your adjournment application for the moment, because, as I understand it, you may apply for an adjournment depending on the outcome of the production application.

30

MR DUNSTAN: Yes, that's what my - - -

HIS HONOUR: Very well. Well, put - - -

35 MR DUNSTAN: - - - proposal was: that I do this, and then - - -

HIS HONOUR: Yes.

MR DUNSTAN: - - - ask an adjournment - - -

40

HIS HONOUR: Okay.

MR DUNSTAN: - - - regardless of your Honour's intention. If I may - - -

45 HIS HONOUR: Well, we will put that aside for the moment, and I will - - -

MR DUNSTAN: Yes.

HIS HONOUR: - - - therefore put set 2 aside for the moment. So that brings us to set 3, which seems to be extract from a case management handbook.

MR DUNSTAN: Yes. Those are copies of documents that are in my authorities,
5 your Honour.

HIS HONOUR: So I think they're really authorities, so we can - - -

MR DUNSTAN: So one is a reference, one is an authority - - -
10

HIS HONOUR: Yes. So we can put them aside, really, as opposed to evidence – they're really issues of authorities but that's – no criticism – but I'm just dealing with the evidence first then we will come to the submissions later.

MR DUNSTAN: Yes. Sorry. I was just explained – those were to be the explanation for why the following material – if you like, I had the reference material which related to the following set, your Honour.
15

HIS HONOUR: Yes. So – what's set 4?
20

MR DUNSTAN: This was the history of the documents that we've requested – this, I think – sorry – those precedents deal with the ability to access material and it include – actually, I think, all of this material is probably in evidence. Sorry, for example, there's an original request for a subpoena at the very beginning of the process and it is in one of my affidavits as well, I'm sorry, I didn't put cross-references to the affidavits for all of these matters, your Honour, sorry.
25

HIS HONOUR: So this – this again, this is – there's some, obviously, some correspondence and the subpoenas so you think most of this material is in your affidavit evidence in any event?
30

MR DUNSTAN: Yes. For example, on page 4 of set 4, that's the affidavit that I submitted requesting a subpoena, your Honour. So that has already – it has been filed in this proceeding. And there are some emails that I've received from the Federal Court regarding the request for the subpoena.
35

HIS HONOUR: Right.

MR DUNSTAN: Then – at the end is part of the decision that you made, your Honour, on the recusal application. And then there are parts of the transcripts that are also in evidence also. So there's probably – no, I think – sorry, it's probably fair to say that almost all of those documents are either just reference material, authorities or extracts from affidavits that are already in evidence, your Honour.
40

HIS HONOUR: Okay. So we don't need to tender that as a separate bundle, but you might – it might be a convenient place for you, when you're making your submissions to take me through the relevance of some of this material - - -
45

MR DUNSTAN: Yes - - -

HIS HONOUR: But you don't need to separately tender it.

5 MR DUNSTAN: Okay. I think that's correct.

HIS HONOUR: Yes.

10 MR DUNSTAN: And that was my intention just to have a hard copy in front of me without having to look off the electronic copies of the - - -

15 HIS HONOUR: No, that's - yes. Very well. So we will - so at the moment we will treat set 4 as, really, something that is a submission - part of your written submissions. But you have to understand that if there is anything that is not otherwise in evidence that is - I mean, you don't have to worry about things like judgments because that's not evidence but if there's anything in there that you want to rely on as evidence, you will have to separately tender it.

20 MR DUNSTAN: Yes.

HIS HONOUR: Sorry, Ms Firkin?

25 MS FIRKIN: Sorry, your Honour. I just wanted to clarify two things. The first is, I don't believe that this morning Mr Dunstan has asked to be read the first affidavit referred to in the first paragraph.

MR DUNSTAN: Yes. Sorry, that was an affidavit that was - you're right that's - - -

30 MS FIRKIN: And we don't have an objection to it, but my strong preference would be that we rely on the affidavits because - - -

HIS HONOUR: Yes.

35 MS FIRKIN: - - - I'm a bit concerned about things getting very confusing.

HIS HONOUR: Yes. That's why I'm going through the documents, precisely.

40 MS FIRKIN: Yes.

HIS HONOUR: So Mr Dunstan, if you want to read that affidavit, that - so this is an affidavit you swore in support of a subpoena; is that right?

45 MR DUNSTAN: Yes, your Honour.

HIS HONOUR: Very well. Well, so that's - I will add that to your list of affidavits. So that's the affidavit of 1 December 2021. So I will - that affidavit may also be

taken as read in the proceedings together with any annexures to it. Again, can I just emphasise, and I'm not being critical at all, Mr Dunstan, I appreciate you're not legally represented, but we're trying to – I'm trying to just now make absolutely certain that I'm aware of what is in evidence in relation to these applications as
5 opposed to matters of submission or – and the like. So out of bundle 4, you think that all the other material is already in evidence, that is in either your affidavits or Ms McKeane's affidavits, save for that affidavit of 1 December which we – may be taken as read. So you don't have to separately tender any of that additional other material.

10 MR DUNSTAN: I believe that's the case. So that's - - -

HIS HONOUR: Very well.

15 MR DUNSTAN: - - - just in support – I'm – to avoid referring to electronic copies.

HIS HONOUR: Yes. So set 5 - - -

20 MR DUNSTAN: That is all new material which is to set some context to the reason to the amendment to the statement of claim. So I feel like that is in support of why the statement of claim has been amended in the way it has.

HIS HONOUR: I'm struggling to understand the – and no, I'm not being critical – I'm just – so the first document, here, is a letter from Mr Herford to - - -

25 MR DUNSTAN: Yes. Sorry – there are - - -

HIS HONOUR: - - - Mr Thompson of 19 October 1983.

30 MR DUNSTAN: Yes. Sorry, your Honour. Each of these documents relates to the work that I have done and the – if you like – the reason that my analysis – I'm sorry. It helps to explain why we – just trying to think of a succinct way of putting it, your Honour. For instance, in the respondent's submissions in reply to mine, they mention that I had essentially had a guess that there was a book of notes prepared by
35 Dr Molineux.

HIS HONOUR: Yes.

40 MR DUNSTAN: And what I'm proposing to show here is that my work as a systems analyst involves close consultation with people who use computer systems and who have particular record keeping techniques and I'm usually adept at helping people by understanding, first of all, what they do and then working out what I can do to help them with their record keeping. And my submission is that Dr Molineux's record keeping technique is quite idiosyncratic and quite definite and it's reasonable
45 for me to have drawn a conclusion that there was a missing fourth book of his notes based on my analysis of what he has done with the first three books.

My submission is that it's a bit like having an Agatha Christie novel, we've got three parts of it and the last quarter of the episode is missing and I stand by my record as a systems analyst to have drawn that conclusion. It's not some wild speculation as proposed in the submissions by the alternate side. And the other point that I was
5 making in my submissions with the change is that I inadvertently used a term throughout my original statement of claim, I described something as a failure to disclose, and I realise that within each profession there's a particular set of jargon, sort of, profession-specific jargon for every particular job and within the legal profession, the term I should have used was fraudulent concealment, so it's really –
10 there are two different ways of describing the same thing.

My original statement of claim had a lay person as liable for that behaviour but in a legal context I should have used the word fraudulent concealment and, again, this is based on my – these documents just relate to my experience in being quite good at
15 analysing and developing systems for people who work in different professions.

HIS HONOUR: Well, that seems a little bit remote to me but Ms Firkin?

MS FIRKIN: Yes, your Honour. I object to the tender of this bundle. In relation to
20 the first submission, which is that they go to Mr Dunstan's expertise in systems analysis. Essentially, what it appears Mr Dunstan is attempting to do is set himself up as his own expert witness to give his opinion evidence about why he believes there might be a fourth notebook. Further, insofar as Mr Dunstan has indicated that he has specialist knowledge in relation to computer systems, it needs to be
25 remembered that what he is alleging is that an individual who created three handwritten notebooks, created a fourth handwritten notebook. There is nothing specifically to do with computer analysis that arises from his contention, nor is there anything, contrary to his submission, particularly idiosyncratic about keeping notes in a notebook.

30 It's improper, in our submission, for Mr Dunstan to try and advance his submission in this way. Of course, he can make any submissions that he wishes in support of the inference that he asks this court to draw. But this evidence, we submit, is inadmissible in support of that submission. In relation to the second point, your
35 Honour, I'm not entirely sure I follow. And that's partly because I haven't yet read the amended statement of claim and what amendments Mr Dunstan now seeks to make to the words of failure to disclose, insofar as he now wishes to call them fraudulent concealment. I think, perhaps, the most efficient way to deal with that is to take that on notice, your Honour, and address that in due course.

40

HIS HONOUR: Yes. Very well.

MS FIRKIN: Thank you, your Honour.

45 HIS HONOUR: Well, Mr Dunstan, I have to say I'm unable to see how – I understand that your submission, that – having looked at the documents now, I'm unable to see how they could be said to be relevant to any fact in issue, that is, how it

could rationally affect the assessment of the probability of the existence of any fact in issue in the proceeding. And you can make submissions in due course about what you say is an inference in terms of the availability of the fourth book of Molineux's. But I don't think that this material could be said to rationally affect the availability of that inference. So I reject the tender of the material as set out under the document headed Documents Handed Up By Applicant Appearing 20 September 2022 Set 5. I will have that bundle marked for identification, just for more abundant caution. So that will be MFI 1.

10

**MFI #1 DOCUMENT HEADED DOCUMENTS HANDED UP BY
APPLICANT APPEARING 20 SEPTEMBER 2022 SET 5**

15 HIS HONOUR: So I reject the tender of those documents. Yes.

MR DUNSTAN: Thank you, your Honour.

20 HIS HONOUR: So that brings us to set 6. Let me just have a brief look at these documents. Then you can explain to me what they are. So there you have, again, some recent emails.

25 MR DUNSTAN: Yes. Sorry, your Honour. The issue that we had been looking at prior to those recent emails was, as stated in correspondence and with submissions provided to Ashurst, that I didn't see much point having an academic argument about whether they should produce documents when they hadn't answered your question about whether they were actually able to divide them. And last Friday and this morning, they provided documents to me. Last Friday, 16 September, there's a letter from Ashurst. That's at page 5. And I had other – the other document arrived this morning. I haven't had time to incorporate that. Sorry, your Honour. It says that they now have found a second set of records of notes kept by Doctor Molineux. So, as I've said, I've only just become aware of those this morning. An email arrived this morning, that I haven't had time to - - -

35 HIS HONOUR: We'll put that aside for the moment. So there's a letter – I mean, again, I'm just – I, really, just want to deal with the documents that you want to tender in support of your production application. So this has something to do with the production of the - - -

40 MR DUNSTAN: The Molineuxs.

HIS HONOUR: - - - Molineuxs.

MR DUNSTAN: It's - - -

45

HIS HONOUR: Looking at the letter from Ashurst of 16 September which says:

Unable to provide a more legible copy of the document which appears at annexure MCM 21.

5 And it just sets out the author's understanding of some of the documentation. But how is this relevant to your production application?

MR DUNSTAN: Well, previously, if they didn't have a copy at all, then I wouldn't be pressing for them to – it would be a waste of everyone's time to have a hypothetical discussion on - - -

10 HIS HONOUR: The - - -

MR DUNSTAN: - - - whether they should produce something that they are incapable of producing.

15 HIS HONOUR: But I think that the issue in relation to Doctor Molineux's notes is not just – as I recall, not just a more legible copy. But as I understand it, you were pressing for an unredacted copy of the notes.

20 MR DUNSTAN: Yes. I had two levels and I've – in my submissions there I'm asking that – it seems that from the two letters I've now received it looks like they could produced a replica of what I've already received but hopefully more legible than the original scanned copy they gave me. Even - - -

25 HIS HONOUR: Well, so there's no – if that's so, then there's no issue about it. That's fine.

MR DUNSTAN: They could be ordered to provided that directly to me, simply a replica of what I've already received without the need to produce it at all. So the question of whether to produce an unredacted copy versus the lesser level which would be just that they provide me with a clean copy of the documents that they've now been able to locate. But I didn't know about those until sort of Friday afternoon and this morning.

35 HIS HONOUR: And let me just check that with Ms Firkin.

MS FIRKIN: Your Honour, overnight we did receive from former solicitors an unredacted version and we were simply seeking to clarify that, if ordered to - - -

40 HIS HONOUR: I see.

MS FIRKIN: - - - we have an unredacted version. I have myself reviewed the unredacted version as my learned junior is dealing with the production application. But I am informed that is no – unfortunately, no better in terms of legibility.

45 HIS HONOUR: Yes.

MS FIRKIN: So whilst there wouldn't necessarily be an issue in trying to replicate, subject to the history of this matter which it does cause me a bit of concern, further versions of documents. I'm not sure that it would achieve what Mr Dustan is hoping to achieve, your Honour.

5

HIS HONOUR: Yes. But in terms of – but if ordered to produce an unredacted version, you would be able to do that.

MS FIRKIN: Yes.

10

HIS HONOUR: Whether they're more legible or not remains to be seen.

MS FIRKIN: That's correct, your Honour. We will be able to produce the version that was provided to his Honour Burns J - - -

15

HIS HONOUR: Yes.

MS FIRKIN: - - - in the ACT Supreme Court who satisfied himself as to those redactions.

20

HIS HONOUR: Yes, yes. So, Dr Molineux – really, the only issue in relation to the Molineux notes at the moment is whether the respondents ought be required to – ordered to produce an unredacted version of the notes. Whether they're more legible or not remains to be seen. That Mr – Dr Molineux's handwriting is not particularly great, not that I can say anything about handwriting, but it may not help you anyway. But, anyway, that so the main issue in relation to the Molineux notes is whether the respondent should be required to produce an unredacted version, in particular, given that Burns J determined that the redactions were properly made on grounds of privilege and relevance as long ago as 2010.

30

MR DUNSTAN: There may be another issue because the letter this morning referred to having – locating a copy of the exact Molineux notes that were produced in 2013 for Burns J which I believe, at that time, were provided from the original booklets – books kept by Dr Molineux. The letter on Friday seems to refer to another one and, in his evidence, Dr Molineux did say he provided a copy to the Tax Office in 1997. So the first letter written on the 16th of – last Friday, it may refer to a different copy that was in the possession of the Australian Taxation Office in 1997, in which case, there would be a problem of it failing to disclose them in a provided discovery in 2007, your Honour.

40

HIS HONOUR: Well, let's just cross – the first bridge we have to cross is whether the Commonwealth should be required to produce anything beyond the redacted version that you've already got and you've had since 2010 or thereabouts. And as to whether there's a more legible copy or not then we will deal with that at that time. But I think that the question of principle that's involved is whether you – whether the respondents should be required to produce the document at – an unredacted version

45

of the document at this stage of the proceeding, given that it was the privilege claims and the relevance claims were dealt with as long ago as 2010, I think, by Burns J - - -

MR DUNSTAN: Yes, your Honour.

5

HIS HONOUR: - - - and were not the subject of appeal.

MR DUNSTAN: Yes. And from page 7 to 13 - - -

10 HIS HONOUR: So I think - - -

MR DUNSTAN: I'm sorry, yes, yes.

HIS HONOUR: I'm sorry, no, you go on.

15

MR DUNSTAN: Yes, sorry. Yes. So that's the matter of, yes.

HIS HONOUR: So 7 to 13 seems to be - - -

20 MR DUNSTAN: Right. Okay. Yes.

HIS HONOUR: - - - a printout from Ashurst's webpage or some publication about legal professional privilege and I'm sure it's - - -

25 MR DUNSTAN: Yes, yes.

HIS HONOUR: - - - well, it's an analysis of some aspect of it. But what has that got to do with it as a matter of - it may be something you want to make submissions about.

30

MR DUNSTAN: Yes.

HIS HONOUR: But what has that got to do with - - -

35 MR DUNSTAN: Yes. Sorry, your Honour. The remainder of the materials are reference material that would be about submissions. So at this stage, we're not looking at evidence. It's just that most recent letter last Friday to say that there is a copy of the Molineux notes and then there's another letter I received this morning that I haven't tendered that said that there's a different copy of the Molineux notes
40 that has been located.

HIS HONOUR: Very well. Okay. Well, I think we've got to the stage where we don't need to - you don't need to separately tender any of the material in set 6 either because it's either simply material you rely on in your submissions as a submission.
45 So that brings us to set 7. So what have we got here? This seems to contain some additional material.

MR DUNSTAN: Yes, yes. This is the evidence in support of my expanded amended statement of claim to deal – that addresses whether there has been – whether there is established a fraud exception whereby the respondents aren’t entitled to retain any privilege over the – or whether they are allowed to claim
5 privilege over the documents that they’ve provided. If I go back - - -

HIS HONOUR: Well, what is it?

MR DUNSTAN: Sorry, yes.
10

HIS HONOUR: So there’s - - -

MR DUNSTAN: I mention in my submissions that I had asked the Tax Commissioner and their solicitors – as soon as the Tax Commissioner filed an appearance, I wrote a – I sent a copy of the information, the request, to Ashurst, saying, here’s my analysis of what I think. There’s evidence that the final report was
15 written in 2007 for the purpose of deceiving Besanko J and had not been written in 1997 when John Higham, the second respondent, claimed to have written it. And I said – in those two letters I said this is my reasoning for why I think that document is
20 a forgery or a fraudulent letter used in evidence improperly and do you think there’s anything wrong with my reasoning and do you have any evidence to show that the letter did exist in 1997. And I – my letter was – my letters were inquisitive, not – I wasn’t accusing. I was saying had I got this wrong and I never got an answer.

25 And then when the respondent said they did not want to file – they didn’t want to be compelled to file evidence, they then filed 600 pages of evidence which they weren’t compelled to do. And I found out that in there they didn’t have any evidence to show the document was created in 1997, but they had supplied some of the evidence that shows that it was not created in 1997 which I thought was a strange thing to do.
30 So here, just in answer to my submission that they have – that the respondents are guilty of – or they fit within the legal definition of “fraud,” a fraud exception for privilege, that there’s a strong prima facie case that they have committed fraud on the court and they’ve – and their claims of privilege should be swept aside.

35 HIS HONOUR: Well, I’m not sure I entirely follow that but let’s - - -

MR DUNSTAN: Sorry, if I could just - - -

HIS HONOUR: - - - go through the document.
40

MR DUNSTAN: Yes. And – yes.

HIS HONOUR: So - - -

45 MR DUNSTAN: I can summarise the evidence, your Honour. The – yes. Pages – page 4 is a cover of the disciplinary matter that was used in 1997 and following that, I’ve been ordered to locate folio numbers from 82 down to folio – hang on - - -

HIS HONOUR: Well, hang on. So what's the relevance of the cover file?

MR DUNSTAN: Okay. This shows that – well, the evidence from the second respondent that he had given previously was that he had completed his final report,
5 gave that and the signed charging documents to personnel to file and distribute. The problem is that, when you assemble the file in numerical sequence, there is no gap for a final report to have existed. It – on this evidence, it never existed. It was never stored by the personnel area and never placed on an official file. The second set of documents - - -

10 HIS HONOUR: Well, anyway, I mean - - -

MR DUNSTAN: Sorry, this is evidence - - -

15 HIS HONOUR: - - - Mr Dunstan, it's just a photocopy of a cover file which is possibly undated and it simply says, "Discipline matter, Dunstan," and it bears some handwriting. It - - -

MR DUNSTAN: Sorry, your Honour. It's actually – that bundle goes down to folio
20 – page 18 of 37.

HIS HONOUR: So – okay. So I will look at that. Just bear with me. So this is four through to 18.

25 MR DUNSTAN: Yes, your Honour.

HIS HONOUR: So these are the contents of that file. So there's a - - -

MR DUNSTAN: Yes. And if I - - -

30 HIS HONOUR: - - - document lodgement form. There's a notice of cessation of payment of salary. There's a appointment of – I mean, some of this material may be in evidence, the appointment of an officer to conduct an inquiry under subsection (62). Another document lodgement. A notice of charge. So they're the charges.

35 MR DUNSTAN: Yes. In fact, I think all - - -

HIS HONOUR: Sorry, just bear with me while I go through it, so I can follow. So they're the charges. They may be in evidence, but – then, there's a – that's a
40 schedule. This is the draft report, of 11 July. So do you say all of these things are on the – were on the file?

MR DUNSTAN: Yes.

45 HIS HONOUR: These are part of that file.

MR DUNSTAN: Sorry, all of these documents - - -

HIS HONOUR: And then 18 is “note to file”.

MR DUNSTAN: I can please. All of these documents were provided at different stages of discovery. These are in in this appeal tribunal, and this one is for
5 a summons, or in affidavits of other witnesses - - -

HIS HONOUR: Right.

MR DUNSTAN: - - - in the Besanko case, or in the discovery process, perhaps, in
10 the Supreme Court, and it was necessary to look for copies with folio numbers on them, to be able to reassemble the file, to see what it looked like when it was all intact, and there is no file report, which was the first – the first – well, it was a very laborious, tedious process, to try to work out what had gone wrong.

15 MS FIRKIN: Your Honour, can I ask, for my own clarification, whilst I flick through what seems to be a random selection of documents with different facts headers, understand how Mr Dunstan asserts that there are – this is somehow by reference to folio numbers. Where are the folio numbers found?

20 HIS HONOUR: I think it’s the top right-hand corner. There’s a handwritten – there’s a hand – there seems to be a handwritten notation – not always legible, on each page, and it goes, in the finest traditions of the public service, backwards, from 82, 81 and backwards, to the last note to file, which doesn’t actually have a folio on it. But Mr Dunstan, what this is – I just don’t understand what this proves. You say
25 this is somehow relevant to your allegation that the draft report is a fraudulent document?

MR DUNSTAN: That the final report was not - - -

30 HIS HONOUR: The final report is - - -

MR DUNSTAN: The final report did not exist - - -

HIS HONOUR: Because it wasn’t in the file.
35

MR DUNSTAN: There are four independent sets of evidence to point to that.

HIS HONOUR: Well, no, no – well, just tell me about this piece of evidence.

40 MR DUNSTAN: Yes, that – yes. Yes, that was the first piece of evidence - - -

HIS HONOUR: Well, how does this prove that the final report is a fraudulent document? In what sense do you say it’s fraudulent?

45 MR DUNSTAN: This is actually the key to this entire case, your Honour - - -

HIS HONOUR: No, no – just - - -

MR DUNSTAN: - - - which is what I tried to - - -

HIS HONOUR: Just tell me why you say it's fraudulent.

5 MR DUNSTAN: Yes. Okay. There are several things, your Honour, that – if I could just cover a couple of the minor points that are made in submissions about it. I believe the submissions in the other side was that all of these documents were available to me from some particular time in the past.

10 HIS HONOUR: Well, don't worry about - - -

MR DUNSTAN: Yes. Okay, okay.

HIS HONOUR: - - - the respondent's submissions, at the moment.

15 MR DUNSTAN: Yes, sir. Okay.

HIS HONOUR: You just tell me why you say – firstly, why you say the final report, of Mr Higham, was fraudulent, and second, how these pages bear on that question.

20 MR DUNSTAN: It's – your Honour hit the nail on the head when you said that in the tradition of the public service. My first job was in the personnel area, and I knew that every document that arrived from the personnel area went on an official file, and out of a force of habit, everyone put - - -

HIS HONOUR: Well, well - - -

30 MR DUNSTAN: Sequential folio numbers went on them, okay? What I'm saying is that if the final report existed in 1997, you would expect to find a copy of it on here. The next set, in 1999, is a list of documents provided - - -

HIS HONOUR: No, no. Well, so you say - - -

35 MR DUNSTAN: But there were multiple sets of documents - - -

HIS HONOUR: You say you rely on this bundle of documents, simply on the basis that the final report is not in there.

40 MR DUNSTAN: That's one of the pieces of evidence. Yes. It's then corroborated by other pieces of evidence, to show that it should have existed, but it does not.

HIS HONOUR: Well - - -

45 MR DUNSTAN: And in particular, your Honour, within any affidavit that the respondent has filed, they included a list of documents provided by the tax office personnel area in 2007.

HIS HONOUR: Well, let's just deal with one issue at a time, because it's getting far too complex already.

MR DUNSTAN: Sorry, your Honour.

5

HIS HONOUR: Ms Firkin, the tender of – there's a tender of a bundle of documents, said to be a file, with folio numbers, that don't contain the document relevant to prove of – relevant to Mr Dunstan's allegation that the final Higham report was fraudulent. Do you object to the tender on that basis?

10

MS FIRKIN: I have a concern, and, again, I'm saying this off the top of my head, so I'm happy to be corrected, but the numbers seem to be backwards.

HIS HONOUR: I think – there's no evidence about this, but I think - - -

15

MS FIRKIN: And so it's really – if the numbers are going backwards, it doesn't make sense if they were, according to the theory, numbered as they were put onto the personal file. If these documents go forwards in chronology, and then – but are counting down in terms of numbers, I'm having trouble following the system.

20

HIS HONOUR: And, see, this, ultimately is the problem, Mr Dunstan. It seems to me that the documents, simply as a documentary tender, don't get you very far. You would have to have evidence of either the actual complication of the file, or at least the documents – the evidence as to the system of file-keeping way back in 1997, for this document to have any probative value, and as a standalone document, in the absence of any document – in the absence of any evidence about the file-keeping systems, it just goes nowhere. That's my view, and that's my – you will have to seek to persuade me otherwise, but at this stage, I'm not persuaded that there's any probative value, or the document is relevant for the purpose you assert. Is there anything you want to put to me in relation to that regard?

30

MR DUNSTAN: Yes, your Honour. I believe – regardless of the probative value of any one set of evidence about the existence of the final report in 1997, I say that there are four - - -

35

HIS HONOUR: I'm just dealing with the relevance of this material at the moment.

MR DUNSTAN: Yes. I understand. You would like to deal with them one by one. My understanding is that the probative value of each one of the pieces of evidence may be relatively low, but the unanimity of – the thing that is common between all of the sets is that everywhere you would expect to see that document, it does not exist. There is no evidence that it did exist, and there may be sort of a low value to the evidence of each of these pieces, but when they're taken together, the consistency of each of the pieces of evidence is, I believe – presents a strong prima facie case that the document did not exist in 1997.

45

HIS HONOUR: Okay - - -

MR DUNSTAN: Everywhere you would expect to find it, it does not exist. I wrote to the of taxation.

HIS HONOUR: Just - - -

5

MR DUNSTAN: I said, “Do you have evidence of it existing in 1997?” I got no answer. I wrote to his solicitors and said, “Do you have any evidence that it existed in 1997?” I got no answer – except they did file an affidavit that contained a third set of evidence that the document did not exist in 1997 - - -

10

HIS HONOUR: Well, if you want to - - -

MR DUNSTAN: - - - which wasn’t very helpful to my ends - - -

15

HIS HONOUR: If you want to rely on all of that other material, then so be it. But is there anything else in this bundle of documents that needs to be considered along with that file, firstly?

MR DUNSTAN: Yes.

20

HIS HONOUR: Well, what is it?

MR DUNSTAN: I would also point out that there has been no denial that the document was not forged.

25

HIS HONOUR: Well - - -

MR DUNSTAN: And in the absence of a denial, the evidence is the only thing that we have to go on, your Honour.

30

HIS HONOUR: Very well. Well, I reject the tender of pages 4 through to 18 of the seven. I will mark seven documents as MFI 2, in the event that this matter goes somewhere else, so that the tender in the – the rejection of the tender may be understood.

35

MFI #2 PAGES 4 THROUGH TO 18 OF BUNDLE OF DOCUMENTS

40

HIS HONOUR: So pages 4 through to 37 – sorry, 4 through to 18, I reject the tender. So what’s document 19?

4

MR DUNSTAN: Yes. Document 19 to the end – there was an order by Mansfield J in the Besanko proceedings. This was an order made on 22 June 1999, where the respondents were ordered to provide a draft list of documents and a copy of those documents that they tendered, so this is the document that was delivered to me on 6

45

August 1999 by the solicitor who was representing the respondents at that time, and that's page 19.

HIS HONOUR: And what's the relevance of that?

5

MR DUNSTAN: There's a list of documents that runs from 1996 through to 1998, that are the respondent's proposed bundle of material to be dealt with, that address the issues within the Federal Court.

10 HIS HONOUR: But this is just – this is – (a) it's said to be a draft index to a proposed agreed bundle of documents, and then it says you're to provide documents. What's the possible relevance of this material?

15 MR DUNSTAN: Yes, in – there are two aspects that are relevant, specifically relevant. There are no documents prepared by – well, sorry, this is their – this is a proposal from the respondents.

HIS HONOUR: But this is an agreed bundle to be relied on in some proceedings before Mansfield J that I have read about obliquely, but - - -
20

MR DUNSTAN: Sorry, your Honour - - -

HIS HONOUR: - - - but - - -

25 MR DUNSTAN: - - - no - - -

HIS HONOUR: - - - this is not a discovery list or anything, it's just possible – in the absence of knowing precisely what the – the document alone just is – the absence or presence of any document on that list means nothing, in the circumstances where it's
30 (a) it's a draft; (b) it's an agreed bundle, presumably in respect of some issue that was to be determined by Mansfield J. So what does it matter whether there's something on or not on that list? I just cannot see the possible relevance of it.

MR DUNSTAN: Yes, well - - -
35

HIS HONOUR: I mean, you can try and persuade me otherwise, but at the moment - - -

MR DUNSTAN: Yes.
40

HIS HONOUR: - - - I really cannot see the relevance.

MR DUNSTAN: Yes, your Honour. Yes. The bundle was in relation to the hearings that eventually took place before Besanko J in 2007.
45

HIS HONOUR: Right. So Mansfield J was doing some case management of the proceeding?

MR DUNSTAN: Yes, he was – in fact, Mansfield J was looking at – he – in 2007, he was still presiding over the case.

5 HIS HONOUR: Right. So he was presiding at that stage, doing some case management - - -

MR DUNSTAN: Yes, he - - -

10 HIS HONOUR: - - - and at some stage there was a proposal by the parties to prepare an agreed bundle of documents, and this is a draft index.

MR DUNSTAN: Yes.

15 HIS HONOUR: And?

MR DUNSTAN: And there are two aspects to this. At that stage, they weren't proposing to include any of the documents that were prepared by John Higham in July, other - - -

20 HIS HONOUR: But so what?

MR DUNSTAN: Because, your Honour – well, okay.

25 HIS HONOUR: You see, the nature of the proceedings before Besanko J were a judicial review challenge by you to various decisions or asserted decisions made by officers, and this is – perhaps represents a draft list of documents that the respondents to those proceedings considered were relevant to the issues to be determined. But the fact that documents weren't included on it doesn't necessarily suggest some nefarious purpose for not including them. It may simply mean that the person who
30 prepared this draft didn't believe the documents were relevant. They may be right; they may be wrong about that. But so what?

MR DUNSTAN: Well, if one remains sceptical about what deductions can be made from a set of evidence, then the conclusion is already reached.
35

HIS HONOUR: But it's just a draft index and they invite you to insert what you thought was relevant.

40 MR DUNSTAN: Yes. I couldn't insert things that I didn't know of.

HIS HONOUR: No, I accept that.

MR DUNSTAN: Yes. There is one document on page 23, if I could take you to the document that has got page number 155 on the right-hand side.
45

HIS HONOUR: Yes.

MR DUNSTAN: It's a document called Note for File by John Growder.

HIS HONOUR: Yes.

5 MR DUNSTAN: And there is mention inside that document of legal advice that he has obtained.

HIS HONOUR: But I'm just dealing with the document at the moment.

10 MR DUNSTAN: Yes.

HIS HONOUR: This document. So what's the significant of that?

15 MR DUNSTAN: The significance of this is that the notes to file that were made on 12 June 1997 that were – there's – sorry. Let me start again. There are notes for file over which the respondents claimed privilege in 2007, that contains a legal advice that is described in that letter of 18 June 1997.

20 HIS HONOUR: So this goes to your evidence about waiver?

MR DUNSTAN: Yes, the waiver.

HIS HONOUR: Okay.

25 MR DUNSTAN: That it was - - -

HIS HONOUR: Accepting that for the moment, how does the fact that – how does this document assist your argument?

30 MR DUNSTAN: Well, it's – in terms of the application for waiver of documents, of those documents in the court, your Honour, that – the provision of that unredacted document there amounted to waiver of the claim of privilege that was later made in 2007 over the documents written on 12 June 1997 that are currently before the court.

35 HIS HONOUR: Well, all this is is a list of documents, proposed draft list of documents, and it says, next to the note, "NA", whatever that may mean. Now - - -

40 MR DUNSTAN: Sorry, most of the documents, where they could, they extracted them from affidavits that I had filed, and "NA" means that those are documents that the Tax Office had in its possession and that it was going to make available later. That's at the end, on page 24, they've identified what the code is there.

HIS HONOUR: Very well. Is there anything else you want to put to me in relation to this document? Well, I should ask - - -

45 MR DUNSTAN: No, sorry

HIS HONOUR: - - - Ms Firkin, do you - - -

MS FIRKIN: No, look, I suggest, if it's necessary, this can be dealt with by my learned junior - - -

5 HIS HONOUR: I'm sorry - - -

MS FIRKIN: - - - in the course of the – in the course of the production - - -

10 HIS HONOUR: Well - - -

MS FIRKIN: - - - application, if it needs to go in. Do you want to – I will ask my learned friend if he would like to say anything now.

15 HIS HONOUR: Yes.

MR McDERMOTT: Your Honour, I apologise.

HIS HONOUR: No, no.

20 MR McDERMOTT: The document that may or may not align with what is number 155 - - -

HIS HONOUR: Yes.

25 MR McDERMOTT: - - - that is, 18 June 1997.

HIS HONOUR: Yes.

30 MR McDERMOTT: Mr Dunstan has already, as I understand it, put forward the actual document - - -

HIS HONOUR: Yes.

35 MR McDERMOTT: - - - the file note, before the court.

HIS HONOUR: Yes.

40 MR McDERMOTT: In a different affidavit. So I assume that this particular draft agreed proposed bundle only goes to underscoring that point, that there was access to that document back in whatever the date of this document.

HIS HONOUR: Right. Is that all it goes to, Mr Dunstan? And so it seems to be common ground that you were given access to the note for file by Mr Growder of 18

45 June 1997, at some point in time in 1999 or 2000. And you say that the fact that that document was produced amounts to a waiver of the advice given by Mr - - -

MR DUNSTAN: Yes, that's the purpose of this document.

HIS HONOUR: Well, I don't think it's necessary for you to tender the document, because I don't think there's any issue - - -

5

MR McDERMOTT: When I said – I don't think I said common ground, your Honour. It may be the same document. So I'm not in a position to confirm if it is or it isn't, but the dates do align, in my respectful submission.

10 MS FIRKIN: There's no issue. We don't take any issue about that. We have

MR McDERMOTT: No, no, we don't take an issue that he had the document at some point. But the exact date of that, I am unclear of, on the face of this or otherwise.

15

HIS HONOUR: Does the exact date make any difference?

MR McDERMOTT: No, it does not, your Honour.

20 HIS HONOUR: If it was around about this time, then it - - -

MR McDERMOTT: The court pleases.

25 HIS HONOUR: I'm just trying to avoid – I mean, there's already a huge amount of material, Mr Dunstan, the relevance of some of which I'm grappling with. So I don't want to unnecessarily add to what is already greatly complex. Now, it seems to me that it is common ground, at least, that at some stage during the course of the proceedings before, initially, Mansfield J and then Besanko J, you – that the note for file by John Growder of 18 June 1997 was produced. You say that amounts to a
30 waiver. That's the issue of substance?

MR DUNSTAN: That's – yes, your Honour.

35 HIS HONOUR: So if that's essentially common ground, we can get to what is the real issue, as to whether that amounts to waiver without you necessarily tendering this document.

40 MR DUNSTAN: But I would tender it in that I note that by – it was possible to – sorry. There was no need to claim privilege over the notes of 12 June because they were not considered relevant and they're not in the list. In which case, that document was provided to me in unredacted form, because there was nothing obvious in the list
- - -

45 HIS HONOUR: Well, that's another issue again but - - -

MR DUNSTAN: Yes, okay. Sorry. Okay.

HIS HONOUR: - - - look, in the circumstances, as I said – in those circumstances, I reject the tender of the pages 19 through to 24, again on the basis that I am unable to see the relevance of it, given that it is common ground that that note was produced at some stage during the course of the proceedings before – that were ultimately heard
5 by Besanko J. So whether that amounts to a waiver or not is another issue. That's the question of substance that we will come to shortly. So that then brings us to – well, we've got a couple more documents in this - - -

10 MR DUNSTAN: Sorry, the following documents are the first and the last groups of documents that are referred to in the index, just to show that all of those were produced.

HIS HONOUR: I see. Very well.

15 MR DUNSTAN: And - - -

HIS HONOUR: Okay. So they're really part of that material. So very well - - -

20 MR DUNSTAN: And I – sorry, I think – sorry, I think - - -

HIS HONOUR: I think that deals with set 7 then.

MR DUNSTAN: Sorry. Pardon, your Honour?

25 HIS HONOUR: Sorry, I think that – is that all of - - -

MR DUNSTAN: No.

30 HIS HONOUR: Okay. What else is in set 7 that is - - -

MR DUNSTAN: Down to page 35 of 37, the top of the page number is 188. That's the last page of the bundle that was provided to me. And the previous pages are pages 31, 32, 33 and 34. That was the second last document in the bundle that was provided to me. That's a letter from the Government Solicitor, dated 28 July. And it
35 repeats the contents copied out of the draft report and/or the final report. It was alleged by John Higham – sorry. It was – yes. John Higham alleged that this material – no. Sorry. He didn't – I don't – not sure he actually said that in his evidence, that - - -

40 MS FIRKIN: I believe this is already in an affidavit.

MR DUNSTAN: Yes. I see it's annexed to the affidavit of Mr Burrs and on which, I think, might be in the material somewhere. No?

45 MS FIRKIN: This is actually in Ms McKeane's first affidavit.

MR DUNSTAN: Okay. So - - -

MS FIRKIN: So we don't need to have another one.

HIS HONOUR: Very well.

5 MR DUNSTAN: Okay.

HIS HONOUR: Excellent.

10 MR DUNSTAN: Thank you.

HIS HONOUR: So that takes us then – sorry. You took me to 188. What's the – what is – what's the relevance of that?

15 MR DUNSTAN: Sorry. It was just to indicate that the contents is not relevant. That was just to show that - - -

HIS HONOUR: Very well

20 MR DUNSTAN: That was all – that was the last page of that bundle of 188 documents.

HIS HONOUR: I see.

25 MR DUNSTAN: Yes.

HIS HONOUR: I follow

MR DUNSTAN: Sorry.

30 HIS HONOUR: So then the last document then is read out from you to Ms McKeane at Ashurst.

35 MR DUNSTAN: Yes. I believe this is an affidavit. So I'm not going to refer to it here.

HIS HONOUR: Excellent. So that then does add this to set 7. So we don't need to deal with anything further there.

40 MR DUNSTAN: Yes. Yes, that was just for reference, without having to look up an electronic copy, your Honour.

HIS HONOUR: Yes. Thank you.

45 MR DUNSTAN: So - - -

HIS HONOUR: Mr Dunstan - - -

MR DUNSTAN: Thank you.

5 HIS HONOUR: So I think then that – so you’re relying on the one, two, three, four, five – there’s six affidavits that you’ve already identified in the context of the summary judgment application. And then that’s your evidence in relation to the production application.

MR DUNSTAN: Yes. Thank you very much.

10 HIS HONOUR: Yes. And Ms Firkin – sorry. Yes. Well, Mr McDermott, the evidence in relation to the production application by the respondents - - -

15 MR McDERMOTT: Sorry, your Honour. There is one further affidavit for Ms McKeane, of 24 June. The only purpose for that affidavit is to put before the court the transcript of the case management hearing on 1 March. So we also rely on that affidavit for that.

HIS HONOUR: Sorry. What’s that – what was the date of that?

20 MR McDERMOTT: 24 June.

HIS HONOUR: 22.

25 MR McDERMOTT: And, specifically – I think I will take your Honour to that in due course.

HIS HONOUR: Okay. So that’s the only additional affidavit - - -

30 MR McDERMOTT: Yes, your Honour.

HIS HONOUR: - - - you rely on. Yes. Very well. Now, that then – I think it’s the recusal applications, paragraphs 4, 5 and – or paragraphs 4, 5 and 6. I’m not sure there’s any additional material in relation to that. Is that right, Mr Dunstan?

35 MR DUNSTAN: No. That’s correct., your Honour.

HIS HONOUR: Yes. Very well. Excellent. So I think – is that all of the documentary material and affidavits?

40 MR DUNSTAN: That’s all I have, your Honour.

45 HIS HONOUR: Excellent. I’m not asking for more. I don’t – very well. So, Mr Dunstan, that means it’s over to you for your submissions in relation to the production application which, as I said, we were going to deal with firstly.

MR DUNSTAN: Yes. That may be different to what we envisaged because of the amendments to the statement of claim. Would it be convenient – I’m not sure when

your Honour normally going to take a break. But that may be – the respondents may need to read through the statement of claim, the amended version, so that, rather than objecting to my submissions being so out of - - -

5 HIS HONOUR: Well, we might do it - - -

MR DUNSTAN: While they actually relate - - -

HIS HONOUR: We may do that - - -

10

MR DUNSTAN: To this sort of thing.

HIS HONOUR: - - - over lunch. I think, today, I will sit through to 1 o'clock since we got a late start.

15

MR DUNSTAN: Okay. Thank you. So why don't you defer talking about the amended statement of claim until after lunch, so Ms Firkin and Mr McDermott have an opportunity to give some consideration to it. So let's just deal then with your production application. And as I understand it – to do this in a coherent way, why don't you just deal firstly with your contention that the respondents should be ordered to provide a copy of the unredacted version of the Molineux notes. So the issues in that regard include – and are not necessarily negative to (1) the fact that respondents made privileged claims and claims in respect of relevance in respect of the production of those notes before Burns J.

25

Burns J dealt with those and upheld those claims. So the question is why should I revisit that issue? Second, what is, in any event, the relevance of – do you say, of the unredacted notes to the strike out or summary dismissal application? And (3) the respondents also indicate that none of the rules that you rely on in respect of production are properly engaged in this matter. Now, that's a very general list of the issues that you might want to address. But let's just start with the Molineux notes. So why should an unredacted version of those notes be produced?

30

MR DUNSTAN: If the first part of your Honour's question was why is it something to have been examined by Burns J. In the Burns proceeding, there was no allegation of fraud. And so the examination of the claims of privilege were not considered in the context of an allegation of fraud. So - - -

35

HIS HONOUR: Well, I'm not so sure about that. From my reading of the judgment of Burns J and the submissions that were made on appeal in relation to that, there was claims of missed fees. And it's in public office – claims that the – relevantly, the respondents who were respondents in those proceedings had lied and were dishonest and had concealed materials, in general terms. It seems to me that you were raising very similar arguments in those proceedings to those that you seek to raise in these proceedings. And so you might have to – you can take it from me that I have read Burns J's judgment. So you may have to persuade me that what you've just said is actually right.

45

MR DUNSTAN: Yes. We should go to one of the authorities, recent – sorry. Jumped a head a little bit there. Yes. So I will just express the substance of the precedent that I – or the authority or rather. It was never suspected that the final report had been fabricated. It simply did not occur to anyone that John Higham
5 could have done something like creating a document in 2007 and then give up a false affidavit to Besanko J and then to Burns J, saying that he had written a document in 1997 and that he had actually written it in 2007. That was never put.

HIS HONOUR: So we're dealing with the Molineux notes at the moment, Mr
10 Dunstan, so – sorry. Just to pick up on the point I just made, where you said that there was no allegation of fraud - - -

MR DUNSTAN: There was no allegation of fraud.

15 HIS HONOUR: You relied on allegations of fraud and concealment to defeat the Limitation Act defence in the proceedings before Burns J.

MR DUNSTAN: That was on the adduced concealment of a document dated 29 July 1997. We learned of the existence of the contact of that from the Administrative
20 Appeal Tribunal, when it was delivered to the Administrative Appeal Tribunal in 2009, and that was the issue that was before Burns J, your Honour.

HIS HONOUR: You go on. As I said, we're just trying to deal with the why you should be given access to the unredacted Molineux notes, and I think you're
25 addressing why I should revisit that issue, given that Burns J determined that very point in the redactions in the Burns proceedings, and there was no application for leave to appeal and it wasn't a ground of appeal from Burns J's judgment, as I read it.

30 MR DUNSTAN: Yes.

HIS HONOUR: So why should I revisit it?

MR DUNSTAN: Because there are now new allegations of fraud that were not put
35 before and that have not been addressed previously. One is that the document said to have been written, but John Higham said he wrote in 2007, there is no – sorry – he said he wrote it in 1997, there is no evidence that he wrote it in 1997, and that was not an allegation that was being considered by Burns J. This is a fresh fact that has not been put before a court before.

40 HIS HONOUR: This is the draft report, is it? Or is it some other document?

MR DUNSTAN: What he calls his final report, his evidence was that he wrote that when he came back from overseas when he decided to charge me, and the evidence
45 available is that – and it has never been put before, so is that an allegation that that document was written in – actually written in 2007.

HIS HONOUR: So you – okay. You – so he says he wrote it in September 1997 when he came back from overseas. You say, in fact, he wrote it in 2007?

MR DUNSTAN: Yes, your Honour.

5

HIS HONOUR: And the basis of that allegation is - - -

MR DUNSTAN: A collection of facts that lead to that conclusion.

10 HIS HONOUR: Right. And what has that got to do with the Molineux notes?

MR DUNSTAN: They come into it into a separate place as well - - -

15 HIS HONOUR: Anyway, well, I don't want to take you off your – so the new allegations of fraud, that's number 1.

MR DUNSTAN: Yes.

HIS HONOUR: What's number 2?

20

MR DUNSTAN: Okay. There is another allegation of fraud, and that is that John Higham said that he had come to the conclusion that it was reasonable to charge me with misconduct rather than simply counsel me by the time he had come back from overseas.

25

HIS HONOUR: Yes.

MR DUNSTAN: And the Molineux notes that were produced late in the proceeding in Burns J, it shows that he was thinking of – that he had persisted with a view that he should counsel me and not charge me at all up until the end of the notes in the third book of notes, the last page of the notes that have been made available in September. He has returned from overseas and he says he doesn't want to charge me, he still thinks he should counsel me. So the allegation, his evidence, that he hadn't come to a conclusion to charge me at the end of September when he had come back overseas is controverted or it's rebutted by the contemporaneous notes that Dr Molineux was keeping rigorously.

30

35

40 HIS HONOUR: Well, just – it just might be a convenient point because we probably have to go to it at some point. You show me where that's – the particular reference is in the Molineux notes that you rely on are going.

MR DUNSTAN: Okay. Yes. That was another thing – sorry – it's in the affidavit that the respondents filed in answer to – with their strikeout notion, your Honour.

45 HIS HONOUR: That's Ms McKeane's affidavit of 16 May?

MR DUNSTAN: Yes, your Honour.

HIS HONOUR: What page?

MR DUNSTAN: Your Honour, if it's of assistance, the exhibit number 21 of the Molineux - - -

5

HIS HONOUR: Yes.

MR DUNSTAN: - - - notes is MCM21 page 498 through to 530.

10 HIS HONOUR: Yes.

MR DUNSTAN: That's the documents

15 HIS HONOUR: So, Mr Dunstan, grappling as we have to with the legibility of this document, can you tell me what part of this document you rely on in support of your allegation that supports your claim that Mr Higham's evidence that he formed the view that you should be charged when you came back from overseas in September 1997 whether it was false evidence.

20 MR DUNSTAN: In that affidavit - - -

HIS HONOUR: Yes.

25 MR DUNSTAN: - - - at page 530 is the last page of MCM21.

HIS HONOUR: 530. Yes.

30 MR DUNSTAN: So this is the book at the end of September. The first line reads Robyn, as in Robin underlined, which suggests that Dr Molineux has been talking to or have a conversation that involved Robyn or the first respondent, and it reads:

35 *John Higham at sixes and sevens, inclination to formally counsel, Tony Burslem not helpful, John White to talk to him. Monday to meet with Colin and inform him on voluntary redundancy*

And then the next note below is the written relevant part is a note seemingly with John.

40 HIS HONOUR: Yes.

MR DUNSTAN: He's talking about the upcoming meeting with me and my legal representative:

45 *CD -*

Colin Dunstan -

wants legal representation, put off the meeting for two weeks, formal counselling instead?

HIS HONOUR: Yes.

5

MR DUNSTAN: So at that stage, even John White is may be they are going in the direction of formally counselling me and offering me voluntary redundancy instead of charging me.

10 HIS HONOUR: Right.

MR DUNSTAN: So that's the position they reached at the end of October.

HIS HONOUR: Okay. So you - - -

15

MR DUNSTAN: Sorry. That's the end of September.

HIS HONOUR: You had this document in the proceeding before Burns J.

20 MR DUNSTAN: Yes. That was provided at that time.

HIS HONOUR: All right. Okay.

MR DUNSTAN: And the other document - - -

25

HIS HONOUR: So what has changed since then?

MR DUNSTAN: What has changed since then is that I noticed that that was a discrepancy with what's in the affidavit of John Higham.

30

HIS HONOUR: Well, you were able to notice that back in the proceeding before Burns J, won't you?

35 MR DUNSTAN: No. I wasn't. There was a huge volume of documents that had been filed.

HIS HONOUR: I any event, that's not new material, that's you having another thought about it.

40 MR DUNSTAN: Yes. That's an interesting problem with fraud, I'm not supposed to have – sorry – if I could take you to - - -

HIS HONOUR: Anyway, I understand. Sorry. Again - - -

45 MR DUNSTAN: So – no. No.

HIS HONOUR: I'm taking you off your course.

MR DUNSTAN: No. I'm quite happy to deal with that now, your Honour.

HIS HONOUR: No. No. It's - - -

5 MR DUNSTAN: If I had a look at that. No. No. I should deal with that question
now because it does come up again and again. You might say that I was negligent or
not having due diligence in noticing all these different pieces of paper and putting
them all side by side and finding all of the discrepancies between what was in John
Higham's affidavit versus what was in legible document that we received after he
10 had given evidence and were rushing to do other things, and our claim was about a
document dated 29 July 1997 and had been concealed in the Besanko proceedings.
So this wasn't a matter that we were looking at, it certainly wasn't in our statement
of claim to address this.

15 I wasn't looking for this, I was working on the statement of claim that we had before
Burns J. Now, it might have been apparent to someone who looked at this, one
person that it should have been apparent to was John Higham's legal representative.
It was certainly in front of them. They had the unredacted version before I saw it, so
if it was possible for me to have seen it, then it was certainly possible for the legal
20 representatives of John Higham to have noticed that they filed an affidavit that
apparently contained a false statement. And there is an obligation on the legal
representatives of John Higham to do something about that. I'm excused as a victim
of fraud to not have to be diligent in able to find every possible skerrick of
contradiction in thousands of pages of evidence, so that's my submission - - -

25 HIS HONOUR: Yes.

MR DUNSTAN: - - - on the legal principle of the factor but I didn't see it.

30 HIS HONOUR: Yes. Now, you were telling me what were the new allegations of
fraud, and number two was this. You say that John Higham gave false evidence
about when he formed the view about charging you.

MR DUNSTAN: Yes.
35

HIS HONOUR: So that's number 2; are there any other new allegations of fraud?

MR DUNSTAN: I think what I covered was fraudulent concealment. The
precedence of the authorities that I've read recently make sense that if someone's
40 trying to defraud shareholders or something, if you issue a false statement which is
fraudulent, it's not much good issuing the valid financial position at the same time,
so a fraud would be normally accompanied by a fraudulent concealment in order to
prevent the fraud being unmasked. So that's why I've added the - changed the word
to - "concealing documents" to "fraudulent concealment" because I put it, now, that
45 having discovered the fraud, I can now see that these other documents weren't just
left out by mistake or by convenience, that they were actually necessary - that it was
necessary to fraudulently conceal evidence to prevent unmasking the fraud that was

being perpetrated on Besanko J and then on Burns J and then on the appeal court in the ACT Court of Appeal, your Honour.

5 HIS HONOUR: Yes. So are there any other new allegations of fraud, when I say new, I mean - - -

MR DUNSTAN: New in terms of that - - -

10 HIS HONOUR: - - - since - - -

MR DUNSTAN: - - - fraud concealment – concealment fraud that I now see – I’ve now recognised that it was necessary for the concealment fraud in order to allow the other fraud to take place and this – sorry – and I’ve also alleged that a fourth book of notes by Dr Molineux is missing based on the fact that this is the last page that has
15 been made available. John Higham, for some reason that – anyway – for whatever reason, John Higham gave false evidence in his affidavit, saying:

I decided to charge Colin with misconduct before I came back from overseas.

20 The final page, at the end of September, is that that’s not true at all. He was still thinking of – still preferring to do what he had thought of since mid-July, when he first saw Tony Burslem. He thought, from mid-July until the end of September, his view was consistent that he should not charge me with misconduct at all, that it would be appropriate, in the circumstances, to counsel me. Something happened
25 between the end of September when John Molineux has completed book number 3 – and you can tell he has completed a book because his habit is to write the start date of the book on the front cover, and it makes sense – he would only fill in the end date on the cover of the book when he came – when he had filled the book up. And he filled in the date on the end of book 3 as being “end of September”. Now, all the
30 interesting things that happened, and that we don’t know about – happened after the end of September because I was charged with misconduct in a document dated 13 October.

35 So we – and it seems – given that – given Dr Molineux’s central role, he was the adviser, the human resources expert on everything that was happening, it seems inconceivable that he would not have been involved in – with how they went from the end of September when John Higham’s still persisting in his desire to counsel to me and not to charge me with misconduct and something happened between the end of September and 13 October when he signed the documents that charged me. And it
40 just seems inconceivable to me that John Molineux would not have been involved and would not have made notes after he had filled up the book at the end of September. And we know he filled up book number 3 because he has filled in the end date on the front cover of that book.

45 HIS HONOUR: Yes?

MR DUNSTAN: I'm sorry, your Honour. I just – if I can just catch my breath for a minute. I'm sorry.

5 HIS HONOUR: No. That's all right. You take your time. So it's still dealing with the production of the unredacted version of the Molineux notes?

MR DUNSTAN: Yes. What I had requested in my most recent letter to the respondents is that, at the minimum, there may be parts that have been marked as irrelevant or privileged, that may contain just the dates on which meetings or
10 discussions took place, and they may be able to reveal that to me without the need to produce it to the court, if they have no objection to at least uncovering dates so I can have a better idea of what's going on. And it appears that John Higham is being pressured to do it – to make a decision that he did not want to make from his meeting – he – I'm sorry, if you have the Molineux notes there, your Honour, if we go back –
15 here, yes, page number 520 of the affidavit, your Honour. The second part is the – the first is a note with John Growder on 10 July?

HIS HONOUR: Sorry, just bear with me.

20 MR DUNSTAN: That doesn't matter too much – he was in court, he was in court, actually, in an action that I had taken in the small claims court, your Honour. I remember it well.

HIS HONOUR: Yes. I have that now.
25

MR DUNSTAN: The note below, then, the important one is John White having a – so John Molineux's recording a discussion with the personnel manager who has been helping John Higham with the process of doing an investigation as an authorised officer and he's talking about how he must have been in court the same day on 10
30 July, I gather, and it's said they were "confident of an outcome next Tuesday", and I suspect that's an outcome – possibly a decision – a reserve decision by the judge in the small claims court. Then he said, he expects John Higham to interview me on perhaps Tuesday, that never took place, they decided they could do without the interview.
35

And it says, and then we will take JH, that's John White's to take JH – John Higham – to the Australian Government solicitor and talk to Tony Burslem to confirm the charges and then I will do the inquiry notice and notice of cessation of salary. So that was – I think that meeting took place on 17 July. So everything was going
40 according to plan, the draft report dated 11 July 1997, that contained the evidence that would justify charging me with misconduct, they were happy – confident that when they took John Higham to see the government solicitor, which I think was 14 or 17 July, that he would then confirm that everything was okay to charge me, but, instead, they came away from that meeting with the advice from the government
45 solicitor that they had no legal basis on which to charge me and that – and that was when John Higham, I think, had a change of heart on what he thought he should do.

And on 29 July, when he received the written confirmation from John – from Tony Burslem, that’s when he wrote the minute that became the subject of the Burns proceeding. It seemed to be a decision to say, “Look, I’ve decided that Colin should be counselled, he needs to come back to work immediately. Here’s the notice – I am
5 sending this notice to John White...” – who would be responsible for recalling me to duty. “...I’m sending a copy of this...” with advice that had been issued to all public servants in the tax office while I was on sick leave for a long time – with a copy of that to John Growder, saying this is the intimation on which he wanted me to be counselled on recall to duty. And the day after that on 30 July, Geoff Seymour, who
10 was the division head who I had also taken legal action against, he wrote a document saying, “On the basis of our legal advice, Colin will have to be recalled to duty, I’m not happy about this, I propose that we make him redundant”.

So everything was going according to plan until the meeting with the government solicitor, that document there, the note by John – by Dr Molineux, shows where things began to go wrong, and everything else, from there until the end of September, we see that John Higham has maintained his position and hasn’t altered it at all, till the last date – the last entry in the last book that has been provided. And all of the things that happened in between were the efforts of the respondents in this matter to
20 try to convince him to change his mind. And I suggest that all of that behaviour, all of those notes, in terms of the pressure that they were applying to John Higham to change his mind, all of that should not be privileged, all of that is central to the issue that is before the court today about why – what were they doing to John Higham to force him to change his mind? And how was it that they – in October – they
25 managed to be successful. That evidence is missing, and all of this is not subject – they are not entitled to legal privilege over matters that are really part of an alleged serious offense.

HIS HONOUR: What’s the serious offence?
30

MR DUNSTAN: To have a public servant charged with misconduct in retaliation for me commencing legal proceedings in the Federal Court against John Growder and his immediate supervisor, Geoff Seymour.

HIS HONOUR: Wasn’t that, essentially, the case, that you were running before Burns J?
35

MR DUNSTAN: The case that we - - -

HIS HONOUR: In essence.
40

MR DUNSTAN: No. Some things can be similar but in law some things are very precise, and in this case what’s very precise is that I did not know or guess that John Higham had created his final report in 2007 in order to cover up that he had done any
45 work at all in June and July. His position was that he hadn’t made a decision, he hadn’t drafted a report, he hadn’t seen the Government Solicitor. Nothing in his affidavit before Besanko J indicated that he had done any work at all in 1997 – sorry,

in July. That was to remain a secret. And it was only when we found out the document dated 29 July '97, the contents of it, in 2009, that we said, "Hang on. He didn't do nothing, as he said, and he wasn't preparing to go overseas and he was considering what to do with the letter that he got from the Government Solicitor on 29 July. He had actually made up his mind to not charge me and that I was supposed to be recalled to duty".

And that was the entire basis of the case before Burns J, your Honour, that the argument was that the 29 July 1997 minute that had been concealed from Besanko J was in fact a final decision by an authorised officer and he was not authorised to then go on and charge me, make an alternate decision, a different decision in October 1997. And Burns J decided that, given the findings by Besanko J, that he did not want to go behind, because he had found them to be credible witnesses, Burns J was pressured – or, faced with submissions saying, "Look, Besanko J looked at the evidence from these people and believed everything that they said". And so when John Higham went to the – in Burns J – in his submission – his evidence was that he didn't mean to make a decision on 29 July 1997, that he wasn't in fact preparing to go overseas and was thinking about taking documents with him, that it was actually just an advisory note that he had written for the illumination of John White and John Growder. That was the only issue that Burns J focused on.

HIS HONOUR: So let me understand this. You say that the privileged – that the portions of the document that are said to be privileged are not legally the subject of legal professional privilege and not privileged because they were, you say, in pursuance of a fraud?

MR DUNSTAN: Yes, pursuance of a fraud.

HIS HONOUR: Yes, I understand your submission.

MR DUNSTAN: Yes, your Honour.

HIS HONOUR: Yes.

MR DUNSTAN: I'm not sure I can say much more on that.

HIS HONOUR: Very well.

MR DUNSTAN: I could – the only other part – as I said, I alleged that – I think, I believe that there was a fourth Molineux book. It seems inconceivable that we don't know the end of the story, where the story – what we have is three-quarters of the story, where we've got John Higham still persisting with the position he had held all the way from his meeting with the Government Solicitor in July. I mean, something happened during October and it seems inconceivable to me that there isn't a contemporaneous record of what really was the reason - - -

HIS HONOUR: Yes.

MR DUNSTAN: - - - for that change.

HIS HONOUR: No, I understand that. Very well. So now, that essentially deals with the – I’m just turning up your interlocutory application.

5

MR DUNSTAN: There was one other comment I could make, if I could, on the two documents in the custody of the court, the file notes dated 12 June ’97.

10 HIS HONOUR: Yes, no, they’re not strictly – they don’t strictly form part of your interlocutory application.

MR DUNSTAN: No, those were things that I thought of afterwards and I made submissions and I had received advice from the court that they would be matters that I would be addressed today, your Honour.

15

HIS HONOUR: Very well. So - - -

MR DUNSTAN: They’re relatively minor.

20 HIS HONOUR: Very well. Well, let’s just deal with them briefly then, hopefully before lunch. So - - -

MR DUNSTAN: Yes, sorry.

25 HIS HONOUR: What material do you want to take me to in relation to those? These are the documents that you say were the subject of a privilege claim that has been waived because the substance of the legal advice was otherwise disclosed?

30 MR DUNSTAN: Yes, I received a copy of the unredacted note - - -

HIS HONOUR: Okay.

MR DUNSTAN: - - - from John Higham in 19 – John Growder - - -

35 HIS HONOUR: So can you just take me to the relevant material in that regard, would probably be an appropriate way to start, and then we can continue after lunch.

MR DUNSTAN: Okay. Good question.

40 HIS HONOUR: So the starting point would be, I suppose, the document that you say – so Mr Growder’s note that you say discloses the legal advice.

MR DUNSTAN: Yes.

45 HIS HONOUR: And then what – I’m a little bit unclear about I confirm is – I confess, is that the leap from the fact that that – well, you will have to take me to that

document first, but why that necessarily interacts with the two documents that you say - - -

MR DUNSTAN: Yes.

5

HIS HONOUR: - - - the privilege claim relates to that advice. But anyway, Mr - - -

MR McDERMOTT: Your Honour, if it assists, I might be able to fast track the identification of the document for Mr Dunstan.

10

HIS HONOUR: Yes.

MR DUNSTAN: Thank you.

15 MR McDERMOTT: So as I understand it, your Honour, there was a document called annexure U, which was part of Mr Dunstan's trial affidavit in the Burns proceeding. That appears, as I understand it, at CGD8 to the affidavit of 22 June, at pages 25 and 26, and then page 27.

20 HIS HONOUR: Sorry, you've just lost me then. I was just making notes. So which – next to which affidavit?

MR McDERMOTT: It's Mr Dunstan's affidavit of 22 June.

25 HIS HONOUR: Yes.

MR McDERMOTT: CGD8 is the annexure.

HIS HONOUR: And what page is that?

30

MR McDERMOTT: And I'm sorry, the page numbers, where the document to the actual file note of 18 June, is pages 23 and 24.

HIS HONOUR: Excellent.

35

MR McDERMOTT: I think I took you to the wrong pages before, your Honour.

HIS HONOUR: Yes, CGD8. So this is a document headed Staff in Confidence, Note for File, Mr Dunstan Mainframe Assess Security Investigation; is that the one?

40

MR DUNSTAN: Yes, that's - - -

HIS HONOUR: Yes. Okay.

45 MR DUNSTAN: Yes, that is – that is the one, with the unredacted version that was provided in 1998.

HIS HONOUR: Right.

MR McDERMOTT: And, your Honour, just to complete it, the last paragraph – sorry, the third paragraph and the last sentence, which commences:

5

Given the current litigation –

is, I believe, what Mr Dunstan is referring to.

10 HIS HONOUR: So, Mr Dunstan, just give me one moment to – let me just – sorry, let me. So let me just read this quickly. Okay. So is that right, Mr Dunstan, that's the key part of the document is the sentence:

15 *Given the current litigation in progress involving a number of senior staff and Mr Dunstan –*

And then most importantly:

20 *...legal advice recommended that the second officer should be someone from outside the IT services group.*

MR DUNSTAN: Yes, your Honour.

25 HIS HONOUR: And you say that the – that legal – that's the substance of the legal advice that is contained in the two documents that you now seek access to in respect of which privilege was previously – privilege claims was previously upheld?

MR DUNSTAN: Yes.

30 HIS HONOUR: Is that in a nutshell?

MR DUNSTAN: The following document expresses why we've made the claim. This was the – there's a letter from my solicitor on 9 November - - -

35 HIS HONOUR: Yes.

MR DUNSTAN: - - - Ron Clapham. That's the following page in that annexure, I believe.

40 HIS HONOUR: I see. So this is your contemporaneous claim of waiver?

MR DUNSTAN: This was a claim in 2011 - - -

45 HIS HONOUR: Yes.

MR DUNSTAN: - - - when we realised that what we had from – yes. Yes, those three lines were redacted in 2007, but we didn't immediately recognise that there was

a copy of the same document with those lines not redacted that had been provided previously. And so we wrote to the respondent's solicitors and - - -

5 HIS HONOUR: So what part of the letter is of particular importance?

MR DUNSTAN: Sorry. It's on page 2, so this is the then legal – sorry, your Honour, it's the second paragraph on page 2 of the letter - - -

10 HIS HONOUR: Yes.

MR DUNSTAN: - - - from Mr Clapham.

HIS HONOUR: So that refers to that passage that we've just looked at.

15 MR DUNSTAN: Yes. Which – and I don't know whether we mentioned that - - -

HIS HONOUR: Okay. So then there's the claim of waiver in the following paragraph.

20 MR DUNSTAN: Yes, and what we're - - -

HIS HONOUR: But that still leaves open a question: why do you say that that – putting aside the legal issue of waiver, why do you say that the two documents that you now seek access to, in respect of which privilege claims were upheld, contain that legal advice?

MR DUNSTAN: There were two aspects to it. I – sorry. Yes. The two notes are made by the same person in the tax office personnel area. One is that they've – on the same date, 12 June, six days before this document was written, they've – the description of the first note is that they've spoken to Tony Burslem at the Australian Government Solicitor's office to get legal advice, and then later the same day, he has a conversation with John Growder, talking about legal advice that he has obtained from the Government Solicitor's office.

35 HIS HONOUR: So where are you – what's the document? Where are you getting that information from?

MR DUNSTAN: That's in the list of documents – of privilege documents in the affidavit filed by the respondents by Ms McKeane in May this year.

40 HIS HONOUR: All right. I think Mr McDermott is just about to give me a reference to that.

MR DUNSTAN: It's list of documents - - -

45 MR McDERMOTT: Yes, it is – sorry, Mr Dunstan. It's annexure MCM6, page 225.

HIS HONOUR: Of Ms McKeane's - - -

MR McDERMOTT: First affidavit.

5 HIS HONOUR: First affidavit.

MR McDERMOTT: 16 May. I do apologise, your Honour.

10 HIS HONOUR: No, that's all right. What page again, sorry?

MR McDERMOTT: So page 225. The page numbers are at the top of the page.

MR DUNSTAN: Sorry. If you pass – briefly pass page 202 on the way there, you find the redacted version of the same minute that we were just talking about earlier.

15 HIS HONOUR: Excellent. Okay. Sorry. So 202 – yes. Right. So that was initially redacted in regard to – all right. So I've got the list of documents.

20 MR McDERMOTT: I think it's numbers 40 and 41 - - -

HIS HONOUR: Excellent. Thank you.

MR McDERMOTT: - - - on page 227 and 228.

25 HIS HONOUR: All right. So why do you say that that necessarily relates to the legal advice in - - -

MR DUNSTAN: I – I would say – to be absolutely certain, I think it would require your Honour to inspect them to make sure it does, but I suspect - - -

30 HIS HONOUR: So the - - -

MR DUNSTAN: Sorry, your Honour.

35 HIS HONOUR: So Mr Growder's note is 18 June. So that's about - - -

MR DUNSTAN: Six days later.

40 HIS HONOUR: - - - six days later. Right.

MR DUNSTAN: I - - -

45 HIS HONOUR: But what – can I just ask this: what has all of this got to do with the present case? So assume for present – the legal – what's being disclosed about that legal advice in Mr Growder's note is that the legal advice was someone outside the – someone independent should look at this. So you know what the legal advice is. So what? How does that relate to your – specifically at the moment, how does

that relate to your defence of the summary dismissal application? It seems to me to be a sensible piece of legal advice, but putting that aside, what has that got to do with it?

5 MR DUNSTAN: It – well, there are two answers to that question. The first is in relation to my current claim, that I had commenced legal proceedings against John Growder, who was the person who obtained that legal advice, and also against his supervisor, Geoff Seymour. Those were allegations of victimisation in employment under the Sex Discrimination Act, which they were – to say that they were unhappy about was not - - -

HIS HONOUR: What has that got to do with your current case?

15 MR DUNSTAN: That that evidence was to tell them how to go about victimising me, but not put themselves in a position where they were simply committing one more offence, that they had to pressure someone else, such as John Higham, to lay the charge on their behalf, in order to victimise me in the ways that they wanted to.

20 HIS HONOUR: Sorry. I'm not sure that I follow that. The legal advice here is simply – it's - - -

MR DUNSTAN: Well, I don't know. I haven't seen it, your Honour.

25 HIS HONOUR: Well – I know. Well - - -

MR DUNSTAN: I - - -

HIS HONOUR: You say that it's weighed because the substance of it's disclosed in the Growder note. The Growder - - -

MR DUNSTAN: Yes.

5

HIS HONOUR: - - - note says the legal advice was someone outside. Forget this.

MR DUNSTAN: Yes.

10 HIS HONOUR: You now know what the legal advice is. What has that got to do with your case now?

MR DUNSTAN: The details of that advice might have been or were used by John Growder in furtherance of his intention to victimise me, and that was part of the
15 pressure that was being put on John Higham.

HIS HONOUR: How could that possibly be so?

MR DUNSTAN: He was – well – sorry.
20

HIS HONOUR: It was – the legal advice was to get someone else to do it. It was to keep him away from it, or to keep anyone that was – that had been involved in that litigation – get someone from outside. That – that's – how could that be in furtherance of your victimisation?

25

MR DUNSTAN: Because he did not want to be involved in doing it. The legal advice was, "Get somebody else to charge Colin with misconduct, do not do it yourself. Please stop doing the investigation you have been carrying out since you suspended him from work. You must not continue on the path you're taking. Stop
30 what you're doing and get someone else to do what you're trying to do to do Colin."

HIS HONOUR: Very well.

MR DUNSTAN: And – sorry. Just to finish off, it's understandable that that
35 redaction and the claim of privilege that Mansfield J looked at – both of those were done in 2007, so it's – I think it's reasonable to assume that that was done mistakenly: that the person who – the people doing the redaction would have had the documents dated 12 June with them, they had the document dated 18 June. They said, "Okay, if we redact that, then we can make a claim of privilege over this." And
40 at that stage, it was reasonable that they weren't aware that those three paragraphs had already been disclosed to me by the previous solicitors eight or nine years earlier.

But when we – when my solicitor wrote to the barrister for their – to their solicitor in
45 2011 and said, "Look, it looks like this claim for privilege has been waived," because we already had the unredacted version of that document, the answer came back saying, "We've done a search and we can't find any written documents of it at all,"

which is clearly not true. There were written documents. So instead of saying, “Yes, you’re correct, we’ve waived privilege,” the answer – “and here are the documents,” they said, “Yes, it waived privilege, but we” – that they’re only documents.

5 And I’m saying that was wrong: there were documents and they did not disclose them.

HIS HONOUR: You’re just - - -

10 MR DUNSTAN: Privilege – they accepted that privilege was waived.

HIS HONOUR: You’re talking about the response - - -

MR DUNSTAN: Yes, your Honour.

15 HIS HONOUR: - - - of the 14th of – or – sorry, 29 November?

MR DUNSTAN: Yes, that’s the one, your Honour. Yes.

20 HIS HONOUR: And where – what - - -

MR DUNSTAN: It’s paragraph 3 of that letter, your Honour, on - - -

MR McDERMOTT: Page 27 of - - -
25

HIS HONOUR: Which suggests that the advice is “unremarkable”?

MR DUNSTAN: Yes. And in any case, there is no written record of it, and I believe that is false. And it should have been known to the solicitor - - -
30

HIS HONOUR: But hang on, that’s a completely different point.

MR DUNSTAN: Yes.

35 HIS HONOUR: We’re talking about the production of those two privilege documents of 12 June 1997 – well, what’s this – what’s the relevance of – what – a very serious claim you’re making against a solicitor?

MR DUNSTAN: In 2007, it was easy to have made the mistake of not being aware of it, but now - - -
40

HIS HONOUR:

45 *Searches conducted ... that there is no written document recording the legal –*
though that’s a different point, that is, whether the legal advice had been reduced to writing, as opposed to - - -

MR DUNSTAN: Yes. Yes, and I believe this solicitor had the written documents, had filed them in 2007, and was now saying – is that they don't exist.

HIS HONOUR: What written documents filed in 2007?

5

MR DUNSTAN: The 12 June 1997 documents in the lists that that solicitor - - -

HIS HONOUR: No, no. But – sorry, let me just - - -

10 MR DUNSTAN: It's Robert Cutler's list in 2007 that we were looking at earlier, your Honour.

HIS HONOUR: But see, that's a response to a letter from your legal advisor that says – it refers to Mr Growder's note. It says:

15

The advice has been ... accordingly, please let us have a copy of these advices.

That is, effectively, you know, the – a letter of advice. That's not – it's not specifically asking or engaging with the waiver privilege in respect of those file
20 notes. It's asking for something quite different.

MR DUNSTAN: We didn't know – we - - -

25 HIS HONOUR: No, no. I - - -

MR DUNSTAN: Yes. Yes, I - - -

HIS HONOUR: You may not have known - - -

30 MR DUNSTAN: Yes. Yes.

HIS HONOUR: - - - but that's not - - -

35 MR DUNSTAN: Yes. We - - -

HIS HONOUR: The point is - - -

MR DUNSTAN: Yes. We didn't know that those documents - - -

40 HIS HONOUR: The point is that - - -

MR DUNSTAN: Yes.

45 HIS HONOUR: - - - the allegation you've made against the solicitor is really, on the basis of this material, quite unfounded, because - - -

MR DUNSTAN: Yes.

HIS HONOUR: - - - he's responding to that letter and he says there are no advices, and you cannot – that's something quite different to the file notes. They're not advices. They may be something, perhaps, that records the advice, but they're not the advices that you asked for. Anyway, I'm going to adjourn now until - - -

5

MR DUNSTAN: Sorry, your Honour. We didn't know what – yes. Sorry, your Honour. Yes.

10 HIS HONOUR: I'm going to adjourn until 2 o'clock. Well, in fact, I will adjourn until 2.15.

MR DUNSTAN: Thank you, your Honour.

15 **ADJOURNED** **[1.15 pm]**

RESUMED **[2.19 pm]**

20

HIS HONOUR: Yes. Mr Dunstan, I understood you had more or less finished your submission in relation to the deduction.

MR DUNSTAN: Not quite, but almost.

25

HIS HONOUR: Yes, very well.

MR DUNSTAN: Sorry, your Honour. Sorry, your Honour. Perhaps, if you would remind me – I think where we were up to, sorry, was on the privilege about the two –
30 the documents - - -

HIS HONOUR: Yes. Yes. So you had taken me to the - - -

MR DUNSTAN: Yes. Yes, sorry.
35

HIS HONOUR: - - - document that you say gives rise to the way the reference to those documents in the lists – list of documents.

MR DUNSTAN: Yes. Yes, yes.
40

HIS HONOUR: So I think I understand your position in relation to them.

MR DUNSTAN: And I think – yes, it was probably – I had accidentally, if you like – I had inadvertently combined two problems or two issues together, that your
45 Honour was pointing out to me, that it's - - -

HIS HONOUR: Right.

MR DUNSTAN: The answer that we got from the other solicitor was, well, what you've asked for isn't something we found, but from our perspective and what I – sort of, the essential part was that the privilege over those documents had been waived. The fact that there was some misunderstanding, which was probably
5 understandable, given that, you know, the disclosure that I think caused the waiver was from – sorry, 1999, and from 2007 onwards, the solicitor for the respondents understood that the waiver had been – the privilege had been maintained by redacting those notes in the second copy of the same document.

10 So my submission would be that it may not have been anyone's fault, and it would have been hard for anyone to detect it, because of the – you know, there was one list, it said, had a document dated 12 July, and another set of documents were dated 18 July – sorry, June, not July.

15 HIS HONOUR: Yes.

MR DUNSTAN: And so there was – it could easily have been an misunderstanding, but my submission would be that the privilege had been waived, and that we didn't precisely identify the documents that were the subject of the claim. So the privilege
20 had been waived over those documents from the – from the disclosure in the first version of John Higham – John Growder's note for file, your Honour, and to attach a fault to anyone, as your Honour pointed out, would be inappropriate and not necessary - - -

25 HIS HONOUR: Yes.

MR DUNSTAN: - - - and also, it would be my submission that it's – that apart from inappropriate, it's also not necessary for the question of the waiver having taken
30 place - - -

HIS HONOUR: Yes.

MR DUNSTAN: - - - if that's - - -

35 HIS HONOUR: Yes, I follow.

MR DUNSTAN: I'm sorry. Sorry I combined the two things together - - -

HIS HONOUR: No, no. That's okay.

40 MR DUNSTAN: - - - but I understand the point is quite important.

HIS HONOUR: Yes. Very well.

45 MR DUNSTAN: And – sorry, there was some information in the sets of documents that I had handed up, that contained references to why waiver should not be available, where there's a serious allegation of fraud. I will find the right sets, sorry.

This was – sorry, just to touch on matters that your Honour had asked me about previously, about these documents having been before me at the Burns proceeding, when they were supplied to me. In set 3 - - -

5 HIS HONOUR: Yes.

MR DUNSTAN: - - - at page 5, there's a part here that I've put in – paragraph 6 and 7. It's one of the authorities that are in the folder I provided your Honour.

10 HIS HONOUR: Sorry, which set is that again?

MR DUNSTAN: That's set number 3, your Honour.

HIS HONOUR: Three – pages 5 and 6.

15

MR DUNSTAN: Yes, your Honour.

HIS HONOUR: Yes. Yes, I've got it.

20 MR DUNSTAN: The point – when your Honour asked me about having seen the Molineux notes or being – the Molineux notes were made available to me – I think it was at 2013. And I replied that they had also been available to the solicitors for the respondents even before they had sent them to me. And it should have been obvious, if you like, that if they had seen the affidavit that they had put on in evidence and
25 they compared that affidavit to what they had just learned from the Molineux notes, they were in a position of doing exactly what was done in this case, of informing the court that they had become aware that they had filed an affidavit that contained a false statement. My excuse was that I was focusing on other problems at the time with a different statement of claim. I didn't notice it. And that I - - -

30

HIS HONOUR: You say that the false statement, being Mr Higham's evidence that he - - -

MR DUNSTAN: Had decided when he got overseas - - -

35

HIS HONOUR: Yes.

MR DUNSTAN: Yes. And that was contradicted by the contemporaneous notes of Doctor Molineux when they became available to the Government Solicitor. And I,
40 certainly, didn't notice that, you know, we were fighting a different battle about the minute. From 29 July 1997, we were trying to match up every piece of – every page of every document we received with every other page of evidence. We were focused on the statement of claim that was before the court at that time. And perhaps with greater diligence, I might have noticed it. But also, with greater diligence, solicitors
45 for the respondent would have and, perhaps, should have known it. And whereas law requires them to have an obligation to the court to deal with such problems, there is some leeway for people who are the victims of fraud not to be – well, anyway, in that

– the precedents of fraud – I thought it was unfortunate that I didn’t notice it, if you like. But I didn’t. That’s the simple fact.

HIS HONOUR: Yes. Very well.

5 MR DUNSTAN: One of the submissions in reply was that the documents were before me, which was true. But the precedents on fraud deal with fresh facts. The idea that the document is the same document is not quite the same as having a fact recognising that there’s a discrepancy. And a recent British case dealt with a
10 signature on a piece of paper that – it wasn’t recognised at the time – was a fraudulent signature. And that person was given the right to argue that there had been fraud by using a document with – her signature had been forged. Certainly, it was the same document. But the fresh fact was recognising that the signature was forged. So the fact that I had seen the documents before is not a response to – a
15 document – it’s the same document.

But the fresh fact is the recognition of the fraud, your Honour. My submission is – on set 4, on the front page, your Honour – yes. In relation to the evidence that was just removed, that you said was not relevant, about the file and so on – in my
20 statement of claim, I’ve mentioned that I became suspicious after the – I noticed – sorry. I never suspected the possibility of fraud with that final report until after the decision by the ACT Court of Appeal. But it still never occurred to me, even when I looked through the evidence. And those things that you say aren’t admissible in evidence – they certainly persuaded me that this didn’t look right. I was – if you
25 like, my inquisitive mindset – “This doesn’t look right.”

But I still couldn’t think of a motive for doing it. It seemed a very strange thing for me to do. I just couldn’t imagine why someone would fabricate a report. And it was only quite recently, when I looked through the things again, that it, sort of – it was
30 like a blood bomb. I said, “You need something then – if you’re going to hide the – if you’re going to hide all the work that was done in July, including the minute at the end of July to say that Colin should be recalled to duty – if that’s all to be kept hidden, then you have to come up with a reason how Tony Burslem was able to include those reasons in the letter he wrote the following year.” And so it was only
35 when realising that there was a purpose, that it struck me as, “That would explain why that document was brought into existence.” And - - -

HIS HONOUR: Now, remember, Mr Dunstan, we’re just dealing with the production application. And I think you’re, sort of, straying more into the nature of
40 your broader case.

MR DUNSTAN: With respect, your Honour, I’m straying into the area of the loss of legal privilege as a result of – into the fraud exception principle of privilege, as the reason why no privilege should be accorded to the respondents on the basis of there’s
45 a prima facie case that they have engaged in fraud, your Honour.

HIS HONOUR: Yes. The relevant principle in relation to privilege and fraud is that, where the document – or the material over which privilege is claimed was in further evidence of a fraud, it - - -

5 MR DUNSTAN: Yes, your Honour.

HIS HONOUR: Protection is lost. But I don't think the principle is as broad as you are suggesting. That is, if there is an – or, you say, a prima facie case on fraud, generally, that – therefore, all privilege is lost. That seems to be the way you're
10 putting it. I don't think the principle is that broad. But, anyway, I understand your submission.

MR DUNSTAN: Yes. And in my submission, the Molineux notes are the only evidence of what was taking place. Sorry. We have the contemporaneous records.
15 And we have a series of statements that have been found to be false. For example, the second respondent, John Highman, has given a number of reasons for why he did or did not do what he did. And the final reason we heard from him was that he made a decision while he was overseas. And the contemporaneous record says that that was not the case. What we don't know at the moment is what it was that caused him
20 to change his mind. So there's material evidence – sorry. I'm not sure. That's false. Sorry, your Honour. It's just I'm confusing my – sorry. Confusing myself. Okay.

HIS HONOUR: Very well. I think, Mr Dustan, we should move on. I think I understand the nature – you've provided detailed written submissions which I have,
25 of course, read. And I understand the nature of your submissions. And I think you're straying a little bit into the broader aspects of your case. I think I might now just ask Mr McDermott to briefly address me in relation to the production - - -

MR DUNSTAN: I just - - -
30

HIS HONOUR: - - - issue.

MR DUNSTAN: If I could just make one other point – sorry. Yes. It's in 7, the final two pages. This document is in evidence.
35

HIS HONOUR: The last two pages, I think.

MR DUNSTAN: Page 36 and 37. This is in an affidavit. And the subparagraph (1) on page 1, says:
40

It may be the respondents have evidence relevant to a crucial issue, the creation date of the undated report.

That is, if there's evidence of it being created in 1997, please provide a copy. So I
45 was not accusing – so I was – it's my nature to be inquisitive. This is a puzzle and this doesn't make any sense to me. And I never got an answer, except that we're here today with a fairly large submission on why the case should not be allowed to

proceed. Sorry, all of the arguments about not providing evidence, it says, well, you know, if you've got some evidence of this then I can drop the case completely, because the foundation on which it was based is invalid. And the response was, "Well, we don't have to provide evidence". But then, having – not having to provide
5 any evidence, including evidence with which my case could be – I could withdraw my case, being satisfied that my suspicions were invalid.

I got 600 pages of evidence and nowhere in those 600 pages is there evidence that I had requested. So in terms of – that's – my submission is that, you know, I said,
10 "You know, can you show me that I'm wrong?" And instead of doing that, I got 600 pages of evidence that, you know, was sort of – didn't contain evidence that the allegation is false. And I note that there has been no defence, there has been no denial of the allegation. And having put on 600 pages of evidence voluntarily, the evidence that I was asking for is not in there. So I believe that, in terms of a – sorry,
15 your Honour – a strong prima facie case that the allegation is correct, I don't have – I – yes, there's no – there is no evidence of the contrary being provided.

The other side has been asked, you know, "Do you have evidence that this allegation is false?", and they haven't provided any, they haven't filed a defence denying the
20 allegation. I've got evidence that made me very suspicious, and then when I analysed the reason for doing it I found a possible – it may not be the right motive, but I found an arguable motive for why that document would have been created in 2007. So all of the evidence says this is what the situation is. There is no evidence and no denial contradicting my submission that there is a strong prima facie case of fraud and that
25 claims of privilege should not be afforded to people who have engaged in deliberate deception and have sought legal advice. Everything by Dr Molineux, who was documenting everything that was being done, that is really the documentation of a criminal activity, a fraudulent activity, conducted by the respondents, your Honour.

30 HIS HONOUR: Yes.

MR DUNSTAN: Thank you, your Honour.

HIS HONOUR: Thank you. Yes, Mr McDermott. Now, I've read your detailed
35 written submissions, so it's over to you.

MR McDERMOTT: Thank you, your Honour, for that indication about having read the submissions filed on 13 September.

40 HIS HONOUR: Yes.

MR McDERMOTT: Your Honour, can I indicate that some of the matters that have come before the court today are not referred to in any of the previous written submissions that Mr Dunstan has put forward before the court. Some are; a lot
45 aren't.

HIS HONOUR: Yes.

MR McDERMOTT: In relation to the way in which he seeks to address the matter. I just want to briefly go back, by way of context, as to what it is that the respondents did following the case management hearing. They made a request to Mr Dunstan for particular documents, which had a potential connection to his case following his
5 offer to make them available at the first case management hearing. That was declined by Mr Dunstan and we put in a citation as to that. The respondents then independently sourced as much material as they thought was connected to the statement of claim as was possible to put before the court, and two of those documents are these. The first is the list of documents that was in the Besanko J
10 proceedings, and your Honour has seen the page references to that.

HIS HONOUR: Yes.

MR McDERMOTT: In part, that is connected to one of the Court of Appeals
15 findings, where a direct reference is made to the list of documents. The second document is exhibit number 21, which obviously assumed some significance in the statement of claim, but not quite for the reasons that have fallen from Mr Dunstan today. All that we did, by way of Ms McKeane's affidavit, was to source what was the exhibit as tendered by Mr Dunstan's counsel on 24 October 2013, and to put that
20 before the court by way of context.

HIS HONOUR: That was – that's a copy of the actual exhibit that was before Besanko J?

MR McDERMOTT: That's so. That was tendered by – and we've given the
25 pinpoint references to demonstrate how that's so, and that's included in the submissions to demonstrate how that has been done. That was all that the respondents did for the purposes of this summary judgment application.

HIS HONOUR: Yes.

MR McDERMOTT: As I think I indicated on 28 June, we do not rely on the content of the Molineux notes, proof positive for any particular matter going to matters underpinning any potential defence. It was to put forward context for the statement
35 of claim. The matters that Mr Dunstan has addressed today in the submissions largely go to his identification of matters, none of which are fresh facts in the requisite sense for the purposes of the fraud case that my learned leader will address in substance in relation to the reply. To remind the court, this document has been available to Mr Dunstan since around 4 October 2013, and we've given a pinpoint to
40 demonstrate how that's so, in the redacted form that appears at MCM21.

The call for production in the 8 June application only pertains to producing the unredacted iteration of exactly what appears behind MCM21. All that we committed to at the last case management hearing was to provide a more legible version of the
45 redacted iteration; we could not do it. We informed Mr Dunstan on 16 September. The unredacted version is obviously in contest and that is the only document the

formal subject of the actual application on 8 June. I will address the two files notes separately.

HIS HONOUR: Yes.

5

MR McDERMOTT: There are no other documents - - -

HIS HONOUR: Yes.

10 MR McDERMOTT: - - - that I understand to be called for as part of what is being
addressed by the court – by Mr Dunstan and the court today. Under cover of
objection in relation to some of the matters that Mr Dunstan has raised for the first
time, having regard to the program, nothing in any of the matters that Mr Dunstan
has taken you to in the pinpoints, from MCM21 – that’s pages 499 to 530 –
15 identifies, first, that there is a fourth book of Molineux notes. If your Honour turns
up page 524 of MCM21. It’s a bit difficult to read, but your Honour will see the date
range - - -

20 HIS HONOUR: Sorry, I’ve just got to pull that up again. Sorry, what was page is
that again?

MR McDERMOTT: 524.

25 HIS HONOUR: Yes, I’ve got that. Yes.

MR McDERMOTT: 524, your Honour will see the indication under the Topic
Subject, at the bottom of what appears to be a 48-page exercise book:

21.8.97 – end Sep ’97.

30

HIS HONOUR: Yes.

MR McDERMOTT: Mr Dunstan then took your Honour to page 530.

35 HIS HONOUR: Yes.

MR McDERMOTT: There’s no date on this specific entry relating to the word
“Robyn”, and then the three lines underneath:

40 *John Higham at sixes and sevens –*

And Mr Dunstan read out those particular sentences. And then Mr Dunstan also read
out the entry underneath John White, in the middle of the page. As I understood it,
Mr Dunstan’s suspicion is that there is a fourth book based on, in part, simply what is
45 identified on those particular pages. By reference to Mr Molineux’s expertise in
relation to human resources and his integral involvement in that process, involving
what occurred with his employment and also the fact that he was a good note-taker,

or a – words to that effect. This particular entry does not demonstrate at all that there is any form of fourth notebook, one way or the other. It is pure conjecture. It also does not establish that there is any basis whatsoever to an allegation, connected to the current version of the statement of claim, about the matters concerning Mr
5 Growder’s evidence in earlier proceedings, or Mr Higham’s evidence in earlier proceedings. At best, it is a generalised connection to a credit – to another way of attacking Mr Higham’s credit, that was open to him back in the Burns proceeding when he had this available to him. It is my respectful submission, a matter of note that he was represented by two barristers in that proceeding, at that time.

10 The other entry that the court was taken to is going back to page 520. It’s unclear which part of the book this pertains to but there is a date which appears to be, I think, Mr Dunstan read this out, 10 July ’97, in the middle of that page?

15 HIS HONOUR: Yes.

MR McDERMOTT: And the focus of Mr Dunstan’s submissions related to the – under the heading, “John White” and then the lines relating to:

20 *Then will take JH –*

I interpolate, John Higham –

to AGS Tony Burslem to confirm charges.

25 And there was some suggestion from Mr Dunstan that particular meeting with Mr Burslem from AGS occurred on either 14 July or 17 July. Your Honour, can I just go back in sequence, to assist the court as briefly as I can, and I don’t wish to belay this because Ms Firkin will deal with this more in relation to the substantive sum of
30 judgment. The sequence was this: Mr Higham prepared a draft report on 11 July 1997, formal advice was received by the Australian Government Solicitor Tony Burslem on 29 July, there was a finding of fact in the Besanko proceeding that Mr Higham finalised his report in around the time that he laid the charges after he came back from overseas, and the difference between those two reports is that the top part,
35 which relates – this is in summary form, your Honour – the top part deletes the reference to draft and there is no date, relevantly, on the document.

Then, in material respects, the content is identical and there is also a reference, your Honour, Mr Dunstan made to a statement of reasons that came later from Mr
40 Burslem, sometime in 1998, that was a procedure under the Administrative Decisions Judicial Review Act where Mr Dunstan made a request for reasons and Mr Burslem referred to Mr Higham’s reasons and there is a – it’s not entirely identical because parts of the document relate to the request, etcetera, but the actual reasons, substantive reasons are near identical to the content of either the draft or the final
45 report because those documents are material identical.

HIS HONOUR: So Mr Burslem's statement of reasons were in relation to what decision?

5 MR McDERMOTT: In relation to – pardon me, your Honour, I will just pull that reference up.

HIS HONOUR: So presumably they're his reasons for making a decision of sorts; is that right or?

10 MR McDERMOTT: To charge Mr Dunstan in October 1997.

HIS HONOUR: Right.

15 MR McDERMOTT: The reference is MCM4, pages 105 to 108, is the statement of reasons. Sorry, that's the 16 May affidavit, your Honour. I apologise for not identifying that.

HIS HONOUR: Yes.

20 MR McDERMOTT: So your Honour will see there, there's a date to Mr Dunstan's request, 24 March '98, under the ADJR Act, in the second paragraph on page 105. Then there is the reference to a section 13 request, that's paragraph 4, about Mr Higham's decision made on or about 13 October 1997.

25 HIS HONOUR: I see.

MR McDERMOTT: And thereafter, your Honour, there is a series of dot points, which, when you marry that up with the draft report and the final report - - -

30 HIS HONOUR: I see. So Mr Burslem was simply providing Mr Higham's reasons, not his reasons - - -

MR McDERMOTT: Your Honour, that's – yes that's right.

35 HIS HONOUR: - - - or any decision made by him. I follow.

MR McDERMOTT: That's the procedure under the - - -

40 HIS HONOUR: Yes. No. I understand.

MR McDERMOTT: - - - ADJR Act with the AGS representing the at that relevant time. So your Honour, coming back to it, the point that Mr Dunstan is making is, there was no final report circa the time of Mr Higham's return from overseas and at around the time that he charged Mr Dunstan on 13 October because there is no evidence before the court of that. And none of the Molineux notes that are currently before the court, demonstrate, one way or the other, anything connected to that particular thesis that the court is being asked to arrange – to deal

45

with as part of the claim. The Molineux notes, as relied on in the statement of claim, only pertain to matters concerning what may or may not have been said on 13 May 1997, which was the day when proceedings were – the proceedings and the private prosecutions were laid against Mr Growder and Mr Seymour and they also
5 pertain to the issue of Mr White reporting that Mr Higham’s was going to see Tony Burslem in mid-July.

Those are the only matters that are currently in the statement of claim, and we have addressed those matters in the substantive submissions already. The matters that Mr
10 Dunstan otherwise provides today do not connect with those matters, in relation to the final report, other than at a very high level of abstraction as to Mr Higham’s credibility which my learned leader will address in the context of the very significant factual overlap issues concerning the matters that were run before Burns J. Your Honour, there is otherwise some references by Mr Dunstan that something must have
15 happened after that particular final page of MCM21. In my respectful submission, that is just a different form of conjecture with no basis, in relation to there being, either, some further book, or a further book which actually contains any material matters which could have been relevant to any cause of action before Burns J. I should also just include in on that point, there is no document marrying up to a fourth
20 book that has been put before the court in the affidavit for the purposes of the application for the production as well. All that we are meeting is that actual pages which correspond to MCM21. Your Honour, can I turn then to the LPP issue?

HIS HONOUR: Yes.

25 MR McDERMOTT: Which, I think, I can be a lot more brief with. Your Honour, in my respectful submission, the issue does not rise on the pleadings. The two documents identified in the list of documents, number 40 and number 41, have no connection, whatsoever, to any allegation that is currently in the statement of claim.
30 None has otherwise, really, been identified, other than at a very high level of abstraction to say a very significant matter, that it contained advice about how you might go about victimising Mr Dunstan, there is no basis for that submission on any of the material. In terms of the issue – the principal submission that I say is that it does not rise on the pleading, it does not pertain to the production application,
35 formally, and under cover of objection, those matters do not need to be determined by the court.

None of the matters, however, that I have taken your Honour to from Molineux notes, demonstrate anyway, whatsoever, that there has been some form of waiver in
40 relation to the substance of the advice, if it is actually recorded in the file note of 18 June in the substantive – in those three lines that the court was taken to before. I should indicate, your Honour, I don’t – I don’t wish to accede to there having been any form of relevant waiver in relation to what is recorded in the file notes on 12 June. There may very well be very different information contained therein about the
45 actual substance of the legal advice that was provided by the relevant officer at AGS to the relevant ATO officer who was recorded, and then that – Donaldson, I believe the name is, and then to Mr Growder. Simply because there is an advertence to the

substance – or partly to the substance of it is both conjecture – but may also be that there are other matters contained therein.

5 HIS HONOUR: Yes. Well, the description of the documents in 40 and 41 doesn't precisely marry up to the disclosure in the Growder document. I'm just trying to pull those documents up again. They're - - -

MR McDERMOTT: Yes. I can assist your Honour with that.

10 HIS HONOUR: Yes, I think – so 40 - - -

MR McDERMOTT: So the list of documents is in CM6 - - -

15 HIS HONOUR: Yes.

MR McDERMOTT: - - - pages 225 to 229.

20 HIS HONOUR: So the first one simply says conversation with Tony Burslem relating to the Federal Court proceedings instituted by the applicant, which doesn't necessarily seem to be a reference to any – the - - -

25 MR McDERMOTT: The connection between that and the advice potentially recorded on 18 June in the file note is less than clear, in my respectful submission. And then, presuming that the file note at number 40 – which then potentially may connect to what is at 41 – again, the same point is made.

30 HIS HONOUR: That's advice provided to the AGS, and independent advice being sought concerning technical questions before considering laying the charges. I mean, that – but – and your other point is that even if the – there was some overlap, there may be other material there as well. But - - -

MR McDERMOTT: Indeed.

35 HIS HONOUR: Can I ask you this: was – so this was a list of documents, and there was privilege claims in relation to 40 and 41: was that ever contested, and was - - -

MR McDERMOTT: Your Honour - - -

40 HIS HONOUR: - - - were there findings in relation to it?

MR McDERMOTT: I – yes, your Honour, it was, but let me explain the context for that. In the authorities bundle, your Honour will see – Mr Dunstan was quite correct: Mansfield J was case managing - - -

45 HIS HONOUR: Yes.

MR McDERMOTT: - - - the Besanko proceedings. You will see, behind tab 28, Dunstan v Orr & Ors [2007] FCA 652.

HIS HONOUR: Yes.

5

MR McDERMOTT: I just need to take your Honour to paragraph 4. Does your Honour have that?

HIS HONOUR: Yes, I do.

10

MR McDERMOTT: Thank you. Your Honour will see the reference to schedules 2 and 3 of the list.

HIS HONOUR: Yes.

15

MR McDERMOTT: So that marries up with the – all the documents that are identified under that heading. Schedule 2 relates to LPP, and that is where number 40 and 41 features:

20

There is nothing in the material before me to indicate that the description of those documents is inaccurate.

And then his Honour Mansfield J goes on to explain:

25

On their face, they are clearly privileged.

Leave to appeal – that’s all I need from that judgment, your Honour. Leave to appeal was sought by Mr Dunstan, and it was determined by Buchanan. And that is tab 29, paragraphs 15, 16 and 22. And spoiler alert, your Honour: leave to appeal was refused in relation to that matter. And I just need to make it very clear that in the Court of Appeal matter, which is behind tab 36, the Court of Appeal identified that one of the documents, which is not either 40 or 41 – but it was a wholly contested document, which is the Higham minute of 29 July – their Honours recorded in that judgment that Mansfield and Buchanan JJ did not look at the Higham minute. They only looked at the list pertaining to that minute.

30

35

There’s no clear finding in the Court of Appeal which suggests that any of the other documents were looked at, but it may be the case that the same results as well.

40

HIS HONOUR: Well, then – I mean, I think these findings simply go no higher than that, based on the descriptions in the documents – well, there was no suggestion that the descriptions are inaccurate – based on the descriptions themselves, they’re privileged, and it doesn’t seem to have gone beyond that.

45

MR McDERMOTT: That’s so, your Honour. And indeed, Mr Dunstan identifies largely that – at least in – when he first identified the matter via his legal representatives, that it was – it may have been a likely error as between was

disclosed, be it in 1999 versus what was the subject of a redaction in the page that we went to before. But there is otherwise no allegation pertaining to negligence or fraud connecting to those particular file notes otherwise. So the issue simply does not arise on the current iteration - - -

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HIS HONOUR: Yes.

MR McDERMOTT: - - - of the statement of claim. Your Honour, can I indicate we do have the Molineux notes unredacted, which corresponds to page MCM1 – sorry, 10 pages 499 to 530, in court to hand up. In my submission, it is unnecessary, as I’ve identified, because the rules are not relevantly enlivened for the reasons that I have identified. In the event that your Honour wishes to inspect the documents, I may wish to be heard further in relation to matters concerning privilege and relevance.

15 All I wish to say in headline at the moment is that a judge of the ACT Supreme Court, intimately connected with matters which do very fundamentally factually overlap with matters that Mr Dunstan seeks to agitate before this court, ruled upon LPP, ruled upon relevance, there was no challenge to it, and it is no small thing for 20 this court to simply accept the proposition, as Mr Dunstan has said in his submissions, that it was dealt with in a perfunctory way. In my respectful submission, that is not made out on the limited materials that Mr Dunstan has put before this court.

25 And there is no need for this court to engage in an assessment of LPP or relevance of those claims. That – the rules are not enlivened. I’m very grateful to my learned leader for reminding me that all that is before the court is the list of documents.

HIS HONOUR: Yes.

30 MR McDERMOTT: The two file notes of 12 June are not part of the affidavit, redacted or unredacted. They are, as I understand it, available to the court in the material from the Besanko J proceeding, but they are not part of any part of the evidence that the respondents have relied upon as part of their summary judgment or strike out application, and there has been otherwise no specific indication in the 35 summary judgment application why Mr Dunstan requires them to deal with any of the matters raised.

HIS HONOUR: Yes.

40 MR McDERMOTT: Unless I can be of any further assistance, your Honour.

HIS HONOUR: Yes. Thank you, Mr McDermott. Yes, Mr Dunstan. Anything in reply, just in relation to the production issue?

45 MR DUNSTAN: Yes. Thank you, your Honour. Sorry. I just heard a few pages that were referred to then. One was page – in the affidavit – it’s page number 520, which is a page that you were taken to of the Molineux notes that has a discussion

about – the note about John White taking John Higham to see the Government Solicitor.

HIS HONOUR: Yes.

5

MR DUNSTAN: And in – the other document that was referred to earlier was my annexure CGD8.

10

HIS HONOUR: So where are we – where might I find that? Which affidavit is it annexed to?

MR DUNSTAN: Affidavit 22 June 2022.

15

HIS HONOUR: Two – June. What page?

MR DUNSTAN: It's on page 29. Well – sorry, go back to page 28 to see the context first.

20

HIS HONOUR: Yes. Yes.

MR DUNSTAN: Page 28 is a fax of 29 July from the Government Solicitor to John Higam.

25

HIS HONOUR: I haven't seen a fax for a long time.

MR DUNSTAN: Sorry?

HIS HONOUR: I haven't seen a fax for a long time.

30

MR DUNSTAN: Yes. And the next page is the document dated 29 July. And there was some conjecture about whether the meeting took place in mid-July. The first paragraph of that letter dated 29 July – it says:

35

I refer to our discussion on 14 July 1997 and the material which you have provided to me.

40

And that includes the draft report dated 11 July. And it then goes through what happened, Mr Burslem's understanding of what was discussed at that – recording what was discussed at that meeting. And page 30, the final paragraph of the information that was provided – sorry. Yes. At the very top of the page – advice – he says:

You have stated in your draft notes –

45

and that's a reference, I suggest to the 11 July 1997 draft report produced by John Higham. Starting at the last two words on the bottom of the page, your Honour, turning over to page 31.

HIS HONOUR: Yes.

MR DUNSTAN: And if you go back to page 520 in Ms McKeane's affidavit.

5 HIS HONOUR: Sorry. Where were you just directing my attention to again?

MR DUNSTAN: Sorry. The Molineux notes on - - -

10 HIS HONOUR: No. No. Just in Mr Burslem's letter.

MR DUNSTAN: Yes. The last two – on page 30 - - -

HIS HONOUR: Yes.

15 MR DUNSTAN: - - - the last two words, beginning, "I do." Following over the page:

20 *I do not believe that it is legally open to you to conclude that Mr Dunstan may have failed to fulfil his duty as an officer.*

HIS HONOUR: Mr Burslem's advice being - - -

MR DUNSTAN: That was just - - -

25 HIS HONOUR: - - - in short terms that there was no evidence of your state of mind when you're accessing the mainframe.

30 MR DUNSTAN: Yes. And that's phrase, not legally open to Mr Burslem to make a conclusion that I could have failed to fulfil my duty as an officer, that was the phrase he used in the 29 July minute that he wrote when that document arrive, and I would suggest that the information on page 520 of Dr Molineux's notes - - -

HIS HONOUR: Yes.

35 MR DUNSTAN: The last part of that, John White, the last four lines:

40 *Expects John Higham to interview Colin on Tuesday, then we will take John Higham to AGS, Tony Burslem. To confirm charges, I will do inquiry notice and notice of cessation of salary.*

That did not happen, and I suggest that this thing – I will take John Higham to the government solicitors, but that was what is referred to in Tony Burslem's letter where he talks about a meeting that took place on 14 July 1997.

45 HIS HONOUR: Okay.

MR DUNSTAN: So that's the evidence that meshes that note with the meeting that took place with the government solicitor.

5 HIS HONOUR: So what you get from that is that the note of the events under John White occurred at some time on or shortly before the – probably shortly before 14 July; is that the point?

10 MR DUNSTAN: It looks like the meeting took place on exactly 14 July and this note is about what was going – yes – sorry – that note is a discussion between John White and Dr Molineux about what is about to happen.

HIS HONOUR: All right.

15 MR DUNSTAN: So it would have been shortly before 14 July.

HIS HONOUR: And the relevance of that is - - -

20 MR DUNSTAN: Well, we've just heard that there was nothing to tie that note with when John Higham changed his opinion about what to do. I'm just saying so this letter from the government solicitor arrived on 29 July describes exactly when that meeting took place, it was on 14 July. So we have the note by Molineux about the planning of the meeting, we have the outcome of the meeting in a document dated 29 July from Tony Burslem, and we know from that note that the advice was provided 14 July, and we know that what Dr Molineux and John White had expected to 25 happened did not happen.

HIS HONOUR: Right. And - - -

30 MR DUNSTAN: And that fits with what I've put in my statement of claim that John Higham changed his mind about not charging me on – as a result of that meeting.

HIS HONOUR: When you say changed his mind in relation to not - - -

35 MR DUNSTAN: Not charging me - - -

HIS HONOUR: Not – yes - - -

40 MR DUNSTAN: Yes.

HIS HONOUR: Sorry. He decided - - -

MR DUNSTAN: Yes.

45 HIS HONOUR: - - - not to charge you as a result of the meeting.

MR DUNSTAN: That meeting. Yes. And what happened with the document of 29 July, he was simply – he – sorry, your Honour it was put to you that there was nothing in that Molineux note to decide and to be able to decide when that took place information in the report that Tony Burslem wrote back in 29 July that shows
5 exactly when that meeting took place, and Dr Molineux’s note was clearly the planning for that meeting, and the outcome when you read the advice of Tony Burslem of what he said on 14 July, it clearly was not what had been planned and – anyway – the suggestion that there was no way of tying – working out the date of the meeting from that note is not that difficult, it’s inside the report that Tony Burslem
10 wrote on 29 July.

HIS HONOUR: Sorry. Just reminding in my ignorance, but why are we concerned about the day of that meeting?

15 MR DUNSTAN: That was raised - - -

HIS HONOUR: But beyond the fact that it was raised by why - - -

MR DUNSTAN: Yes. Well, I’m just pointing out that there is no difficulty in
20 ascertaining the date that that note was made because - - -

HIS HONOUR: Okay.

MR DUNSTAN: - - - the evidence is in the minute that was written on 29 July by
25 Tony Burslem, so it’s not a problem. If it was being raised as a problem, it’s not a problem, the evidence is there in the document dated 29 July, so we know when John Higham changed his mind and Dr Molineux was keeping notes of expectations. The other point – sorry, your Honour – that was raised was about conjecture of there being no third book - - -
30

HIS HONOUR: Fourth book.

MR DUNSTAN: Sorry. Fourth book. Yes. If you look at page 509 of Ms
35 McKeane’s affidavit.

HIS HONOUR: Yes.

MR DUNSTAN: That’s a cover of a book that John Molineux has written. Under
40 subject, he has put start date:

21.5.97 – 19.8.97.

HIS HONOUR: Yes.

45 MR DUNSTAN: And I suggest he couldn’t write 19.8.1997 as the end date until he came to the last page of the book.

HIS HONOUR: Yes.

MR DUNSTAN: And then we skip – and then on page 524 - - -

5 HIS HONOUR: So you would say that suggests that if – so the last page of the book is - - -

MR DUNSTAN: He fills an end date when he gets to the end and that - - -

10 HIS HONOUR: That's a page 530, so - - -

MR DUNSTAN: Yes.

15 HIS HONOUR: - - - perhaps that suggests that the whatever is recorded there was on that date in August 1997.

MR DUNSTAN: Yes. So the third book begins two days after the end date of the book before, so we've still got one book, there's one to the new book and the written 21.8.97 has a start date on the cover, and in fact, his first note on page 525 is dated
20 21 August - - -

HIS HONOUR: I'm sorry. I've jumped too far ahead.

25 MR DUNSTAN: I'm sorry. Page 524 and 525.

HIS HONOUR: Right. Okay.

MR DUNSTAN: On the cover of page 525, he has written:

30 *End September '97.*

HIS HONOUR: Yes,

35 MR DUNSTAN: And I would suggest he wouldn't have known what date the book ended at until it came to the last page, which I'm – so it's not idle conjecture that there's a missing book.

40 HIS HONOUR: But there might be a fourth book, but might have absolutely nothing to do – Mr Molineux may have moved onto something else or - - -

MR DUNSTAN: Except that the end of his book – the last mention in his book at the end of September contradicts what we have is evidence from John Higham, saying that he has put an affidavit saying he has made a decision at the end of September, Dr Molineux's notes contradict that and as I'm saying, there's a mystery,
45 we don't know how the story ends. Something happened between the end of September and 13 October and we just don't know. I'm sorry. Yes. The idea that it was conjecture that there's no fourth book as well. We filled up book number 3 and

something was still happening and he was the person advising the tax office on what to do, so it's not idle conjecture, it's just a likely possibility, and I couldn't put it any stronger than that, your Honour. Sorry. But it's not idle conjecture that is - - -

5 HIS HONOUR: ask Mr Molineux in cross-examination in any of the previous proceedings whether he had a fourth book?

MR DUNSTAN: Nobody ever knew that that – sorry – he said when he gave evidence on the eighth day of the hearing that he had kept books and then he
10 provided copies of all of them to the tax office in 1997 - - -

HIS HONOUR: Right.

MR DUNSTAN: - - - but we hadn't provided – had – we had only received that
15 four pages in the administrative appeal book tribunal when a summons was issued to the commissioner of taxation, we didn't know of the existence of the books that he had provided copies of to the tax office, we could match up three or four pages from the administrative appeal tribunal summons to the contents that were provided on 7 September 2013, but that was two weeks – we got them two weeks after John
20 Molineux had finished giving evidence and he wasn't recalled to ask if there was any extra information that hadn't been provided. And we didn't know that there might have been more information.

HIS HONOUR: Yes.
25

MR DUNSTAN: I can't explain or add any more to that, just that we don't know, but there's an inference that there's a part of the story that we don't know because John Higham hasn't yet given a definitive and credible explanation for what happened between when he was at sixes and sevens, in favour and counselling me,
30 and we don't know what – he hasn't given an accurate reason for what caused him to challenge the – all we know is he has given a lot reasons that are not correct.

HIS HONOUR: Yes, very well.

MR DUNSTAN: Sorry. On the no final report and you're asked to say that I'm asking the court to deal with the fact that there's no evidence that it did not exist in 1997, that would only arise if there is a defence filed in which it is denied – when the allegation that it was created in 2007 is denied, and that has not been done. And the Federal Court Rules say that in the absence of a denial of an allegation in a statement
40 of claim, it is assumed to be true. So the idea that the court would need to waste its time looking at evidence where something has not yet been denied is simply not true.

HIS HONOUR: Well, Mr Higham's evidence was that the report existed, and you've criticised his evidence in various ways, before Burns J and in submissions in support of the appeal in the Court of Appeal of the ACT. And your submissions in that regard were rejected.
45

MR DUNSTAN: It was never alleged that he had fabricated that document, because it never occurred to anyone during those hearings that it might have been fabricated. It did not occur to anyone until after the conclusion of those hearings. And so that was – the document was there, but a fresh fact was the possibility and the - - -

5

HIS HONOUR: It's not a fresh fact. That's fresh – it's not a fresh fact. It's just a fact that someone, you, had thought about something after the fact. That's not a fresh fact.

10 MR DUNSTAN: No, it is, your Honour.

HIS HONOUR: It's not.

MR DUNSTAN: And the same as the precedents that exist in the UK, a signature on a piece of paper was there during the hearing. The signature was on the piece of paper when the claim that it was alleged to be a fraudulent signature was made. It was still the same document. It was still the same signature. It was still in front of the court the time before. It was even mentioned in the first proceeding that that document – that signature may be forged. But the court said, “Well, we're not
15 looking at that at the moment”. And that person was allowed her right to file an application alleging fraud on the basis that it was not simply a fresh fact, but it was also a cause of action that had not been argued and had not been determined before. And because it had not been determined before, it was held that that person had the right to commence a proceeding to have that question determined.
20

25

HIS HONOUR: Yes, very well.

MR DUNSTAN: Just to clarify what happened with the inspection of documents in 2007. What – the solicitors for the respondents provided the documents over which
30 privilege was claimed in a sealed envelope, and it's my understanding and also a – there was evidence in the Burns proceedings that the understanding was that the documents were still stored here in the Federal Court in a sealed envelope; they hadn't been inspected. In relation to that, there's no need for the court to order production, because they were produced to the court in 2007 as a result of an order
35 made by Mansfield J.

HIS HONOUR: Well, it's not so much production as disallowing the claim for privilege.

40 MR DUNSTAN: No, production is required first in order for a court to examine documents to determine if they are privileged.

HIS HONOUR: No, no, but they've been produced.

45 MR DUNSTAN: Yes.

HIS HONOUR: There's – the point is they've already been produced, so it would be a question of - - -

MR DUNSTAN: Yes, that's correct. Yes, that's - - -

5

HIS HONOUR: You're asking me to make a finding that there has been waiver and therefore those documents – the privilege claims in relation to those documents should be disallowed.

10 MR DUNSTAN: Yes, and – yes, and to describe the process – and even if we – even if they had been inspected at the time, there was no – it wouldn't have been obvious to anyone, the judge, to the solicitors for the respondents or to me, that the privilege claim on them was based on a redaction of a document, and that still hasn't been determined. And it was also, as you've suggested, it was unclear as well. It's
15 only that we now have the unredacted version next to them that it was possible but not just definite that the privilege has been waived. It would require an inspection, not only of the documents, but of the unredacted version of the note.

And as I said, no – in 2007, even if you had looked at the document and then you
20 looked at the redacted version of John High – of John Growder's letter, nobody would know that that letter related to – could possibly have related to those, because the relevant piece was redacted the question of had it been waived couldn't have been answered at that time, even if the process had been commenced. It's only when you look at the unredacted version from 1998 and think, "This disclosure does or
25 does not waive privilege over those". It's a matter that's up in the air; it's not determined yet, your Honour.

HIS HONOUR: Yes.

30 MR DUNSTAN: There's something in terms of the evidence about the final report. What is odd is that the solicitor for the respondents in 2007 receive a bundle of documents that he had requested from the Tax Office personnel area, and he was then helping John Higham his affidavit, and I'm surprised that he didn't notice that John Higham had a document to attach to his affidavit that wasn't among the
35 documents that the Tax Office had provided. And I would have thought a question he might have thought of asking is, "Where did that document come from?" I would have been suspicious if I was a solicitor representing John Higham at that time, when I was filing his affidavit, your Honour.

40 HIS HONOUR: Yes.

MR DUNSTAN: And that is the evidence that the respondents have filed in response to my question, which was, "Is there any evidence that this document existed in 1997?" I didn't ask them to put in that evidence, but they've filed the
45 2007 list voluntarily.

HIS HONOUR: Yes.

MR DUNSTAN: And there was – sorry, there was one part of the rules of the court that they were concerned about. Yes, in set 3, your Honour, I’ve got an extract from the Law Council of Australia, the Federal Court of Australia Case Management Handbook. It’s just on page 2 of 6, the first three paragraphs really deal with what I
5 had in mind. I was asking the respondents and the – the fourth respondent, if they had any evidence that would dispel my – that would answer my allegation that the document was created earlier, and they didn’t answer.

HIS HONOUR: Yes.

10 MR DUNSTAN: So we’re only here because they didn’t give me an answer to say – you know, I’ve gone, “This doesn’t look very right to me. Do you have any evidence to dispel it?” And I didn’t get any answer at all. And under 5.68 it says:

15 *Under Federal Court Rules, the party must not give discovery unless the court has made an order for discovery.*

But the court, of course, has the power to make such an order at any stage of the proceeding. So with the objection to me not having raised a particular rule of the
20 court to engage discovery, it says under the current case management handbook, the court has the power to order discovery at any stage, and certainly in that case I was asking, “Do you have evidence to prove or to establish that I don’t have a case to run with?” And I still haven’t got any evidence. And there’s 600 pages of affidavit evidence. I don’t have any answer to my allegation that says, “Look, we’ve got this
25 and it does say it was produced in ’97”. There’s no independent corroborating evidence of the allegation.

HIS HONOUR: Yes.

30 MR DUNSTAN: Of the claims that John Higham made, that he wrote it in ’97.

HIS HONOUR: Yes.

MR DUNSTAN: But I can understand why he might have needed to invent it, if he
35 didn’t want Besanko J to know that he had done anything at all in July of 1997, when he wrote the draft. And he seemed – and also, I was puzzled when I got the draft version, after Besanko J ordered the respondents to file a list of documents. The first letter I got from the Government – from their solicitors was, “I’ve got a bundle of documents from the Tax Office; they’re all privileged”, and that was it. And then I
40 put in a notice of motion asking for an order that they list the documents that they had, and in answer to that, that was when I got the list saying, “Here are 49 documents. And by the way, while we said all of them were privileged, the first 29 or something in the list turn out not to have been privileged at all”. And that was when I learned of the draft report dated 11 July. And when I compared it to the file
45 report - - -

HIS HONOUR: Well, Mr Dunstan, I think you're straying beyond reply and straying into other areas.

MR DUNSTAN: Okay. Sorry, your Honour.

5

HIS HONOUR: Okay. Now, I've given careful consideration to your written submissions and the submissions - - -

MR DUNSTAN: Okay.

10

HIS HONOUR: - - - today. I don't propose to order the respondents to produce the unredacted version of the Doctor Molineux notes. And I propose to dismiss your production interlocutory application. I also do not propose to revisit the issue of the privilege claim in respect of the two documents referred to in documents 40 and 41 of the list of documents in the Besanko proceedings or require those documents to be produced. So no documents will be produced. In those circumstances, as I have foreshadowed, I propose now to move onto the respondent's application for summary dismissal or strike out. And I will, of course, provide reasons in respect of my findings concerning the production application in a final judgment. Yes.

20

MR DUNSTAN: If I may, your Honour, I would like to ask for an adjournment at this stage. I'm, sort of, feeling quite exhausted. And I really would like to be able to rely upon my legal representatives to take up this case because I feel this is a very serious matter. And it has been very trying for me. And I'm mentally exhausted. I do - I'm sorry for the inconvenience, your Honour. But I really would like an adjournment at this point, to be able to have my legal representatives take the case up for me from here.

25

HIS HONOUR: Well, I will just - Ms Firkin, what's the respondent's position - or Mr - - -

30

MS FIRKIN: My learned junior - - -

HIS HONOUR: - - - McDermott?

35

MS FIRKIN: - - - is still going, your Honour.

MR McDERMOTT: Thank you, your Honour.

40

HIS HONOUR: I don't need to hear submissions from you at this stage. Is the application - - -

MR McDERMOTT: Your Honour, we have identified previously, in correspondence to Mr Dunstan, that in the event that he was unsuccessful in relation to his production application, there was no reason for the summary judgment application and the strike out application not to be heard, as your Honour had previously indicated on 28 June. I don't know if Mr Dunstan wishes to elaborate

45

further on the particular reasons in relation to why the adjournment ought to be sought and leave for representation other than that factor. We say that's not a sufficient factor for that to occur in the circumstances, when this matter has been listed since 28 June. An opportunity to put forward matters under the case management program, to put on written submissions and the like – your Honour had indicated what the approach would be in relation to how that matter would be dealt with if he was – if Mr Dunstan was unsuccessful, on 29 June.

So he was alive to the possibility that that would occur after this, determination of the production application. In those circumstance – and we have no indication as to leave or representation, notice of address of service and the like. In those circumstances, your Honour, there is no significant basis for an adjournment. And Mr Dunstan ought to be ready to proceed in relation to those matters. I should indicate, as part of the outcome of the last application, the respondents seek their costs on the production of the application.

HIS HONOUR: Well, Mr Dunstan, I understand you're representing yourself, as you have throughout the proceedings to date. And I understand that that carries with it certain stressors and burdens. However, the application was set down for hearing today and tomorrow some time ago. You've had, it seems, adequate opportunity to obtain legal representation if you wished to do so. Though all of the submissions and documents that have been prepared have been prepared by you, not legal advisors. I understand that it's a difficult and complex matter. But it has been, always – and you have been aware that the matter was coming up and was listed for hearing. So at the moment, I'm not persuaded that there is any sound reason for an adjournment.

MR DUNSTAN: If I may, your Honour - - -

HIS HONOUR: Yes.

MR DUNSTAN: I have been kept quite busy with submissions on an application for leave to appeal the submissions. The final submission I made on that was on 4 pm, last Thursday. My barrister said that he had a case that was part heard. And he had to continue on that case Monday and Tuesday of this week. If it's a matter of costs, I would exceed to any cost order your Honour would like to make. In terms of having to adjourn today, I'm sorry.

HIS HONOUR: Well, unfortunately, it's not simply a matter of costs. It's a matter of the best interests of the administration of justice. I mean, there are – the matter has been set down for hearing for some time. The respondents are all here. It has taken up my time and taken up time that would otherwise have been provided to other litigants in the court. So it's not just a question of costs. It's, really, the proper administration. Now, this case involves events that go back as far as 1997. And it's important that we move on. And if it is not heard today, it may not be able to be heard for the rest of the year. It's not that simple to simply find new dates for the hearing of a matter as difficult as this. So I'm afraid that, at this stage, I'm not

persuaded that an adjournment is warranted. I understand the difficult predicament that you're in. Ms Firkin will be going first in relation to the application.

5 So you won't be on your feet this afternoon. If you want a 10-minute adjournment to collect your thoughts, then I'm prepared to do that. And we will sit on a little bit later to make up that time. But it is, I think, important, since we're all here, to move forward. The matters have been addressed at great length in written submissions. And as I said, you've had ample opportunity to obtain legal assistance if you, generally, wanted it. But none of the material has been provided by lawyers. And as 10 Mr McDermott has pointed out, no lawyers have filed any notice of appearance. So at this stage and therefore, the fact that one of your barristers that you've approached is not available today is, really, neither here nor there. So I refuse your adjournment application. Do you want to take 10 minutes or are you prepared to go on now?

15 MR DUNSTAN: I would prefer to take 10 minutes, your Honour.

HIS HONOUR: Yes. Very well. Well, I will adjourn for 10 minutes. And then we will commence. We will sit through till 4.30 this afternoon.

20 **ADJOURNED** [3.32 pm]

25 **RESUMED** [3.43 pm]

HIS HONOUR: Yes, Ms Firkin.

30 MS FIRKIN: Thank you, your Honour. If I can start with one housekeeping matter. Obviously, today, we've been handed an amended statement of claim.

HIS HONOUR: Yes.

35 MS FIRKIN: How I – under cover of an – formal objection - - -

HIS HONOUR: Yes.

40 MS FIRKIN: - - - to receiving that document at this stage, I am going to do my best to address the matters that have been added - - -

HIS HONOUR: Yes.

45 MS FIRKIN: - - - to the original pleading. It might be that that happens more tomorrow - - -

HIS HONOUR: Yes.

MS FIRKIN: - - - rather than today. But in light of – so the court can resolve all issues before it, in light of that, I do seek to make an amendment to the respondent’s interlocutory application dated 16 May.

5 HIS HONOUR: Yes.

MS FIRKIN: And that is in particular paragraph 2 - - -

HIS HONOUR: Yes.

10

MS FIRKIN: - - - where, in the alternative, there’s an application to strike out what was the current statement of claim; at that point in time, to add the words “and/or the amended statement of claim dated 20 September 2022”.

15 HIS HONOUR: I take it you’ve got no objection to that course, Mr Dunstan. It’s just so that we – effectively, we’re proceeding on the basis that if gets to the issue about strike out, then it’s – in the alternative, it’s a strike out of your amended pleading, rather than the original one.

20 MR DUNSTAN: Except there aren’t – no. I have no objection, your Honour.

HIS HONOUR: Yes, thank you. Yes.

25 MS FIRKIN: Thank you, your Honour. In terms of how I propose to deal with my submissions, there are obviously lengthy written submissions, a lengthy response, and also a reply. I seek to adopt the respondent’s written submissions in full and take your Honour through them, bringing together the submissions and reply where necessary. I won’t go through all detail, obviously, though, in the interests of time. In terms of the principles – the legal principles in relation to summary judgment and
30 striking out of a pleading, I simply refer to the summary of those principles which is found in the respondent’s submissions at section A.

HIS HONOUR: Yes.

35 MS FIRKIN: And when I refer to the respondent’s submissions, that’s shorthand for our original submissions and our reply.

HIS HONOUR: Yes.

40 MS FIRKIN: So that’s the respondent’s submissions. I do wish to say something about the background facts, your Honour, even though these are also dealt with in the respondent’s submissions, in particular, at section C, and that is because Mr Dunstan has answered or addressed these in various ways, added further facts to which I can’t speak to because that falls outside the judgments. So really what I wanted to do was
45 take your Honour through what I understand to be uncontested, based on what Mr Dunstan has put in his response, and, really, the critical facts, in order to understand the statement of claim as pleaded.

HIS HONOUR: Yes.

MS FIRKIN: Mr Dunstan was employed with the Australian Taxation Office, and as at 1987, he held the position of assistant director database services. Mr Dunstan
5 has issues – had issues in the workplace with another employee of the Australian Taxation Office, who is referred to as Ms X. Mr Dunstan was dissatisfied with the responses of the ATO management staff to the issues he raised about that and commenced some proceedings. There was a proceeding, which we referred to as the Heryock proceeding, which was served on Mr Growder, one of the respondents, and
10 Mr Seymour on 13 May two-thousand – sorry, wrong century – 1997.

On 23 April 1997, Mr Dunstan laid an information against both Mr Growder and Mr Seymour for alleged offences, and we have referred to them as the private prosecutions. Meanwhile, Mr Growder, who directly supervised Mr Dunstan,
15 became concerned about the extent to which he appeared to be accessing the ATO mainframes. On 7 or 8 May 1997, Mr Growder asked Mr Graham Littlejohn, a computer specialist, to perform an audit. That audit showed a number of systems violations. Mr Growder formed the opinion that Mr Dunstan had failed to fulfill his duty as an officer, and here we come to the first critical issue for the purposes of the
20 Besanko J proceedings. Mr Growder presented information to Robyn Orr, the acting assistant commissioner of Human Resources Services about that systems violation issue. On 4 June 1997, Mr Dunstan met with Mr Growder and Ms Orr. Mr Molineux, who was a senior consultant of human resources for the ATO, took notes. Mr Growder was asked about – sorry – Mr Growder asked Mr Dunstan about the
25 system violations, both Mr Growder and Ms Orr considered his responses unsatisfactory and here we come to the second critical issue for the purposes of the Besanko J proceedings.

Ms Orr suspended Mr Dunstan from duty under the Public Service Act 1922.
30 Thereafter, an independent investigation confirmed violations with a high degree of confidence. On 16 June 1997, Mr Dunstan met with ATO management and was given 19 Questions to answer over two days. On 18 June 1997, Mr Dunstan provided his answers. On 26 June 1997, Mr John Higham was appointed pursuant to section 61, subsection (2) of the Public Service Act to decide whether Mr Dunstan
35 should be charged with failing to fulfil his duty as an officer of the Commonwealth Public Service. Mr Higham collected information and communicated with Mr Dunstan, then Mr Higham prepared a draft report, recommending that charges be brought, that was on 11 July 1997. Now, this is one of the documents that gets some referencing, your Honour, it is set out in full – I'm happy to tell you either where it's
40 set out in the judgment or to take you to the original document, whichever you prefer.

HIS HONOUR: judgment ready at hand, so - - -

45 MS FIRKIN: So it's set out in full in the Dunstan v Higham decision in 2016 - - -

HIS HONOUR: Sorry. Is that the Court of Appeal or is that the - - -

MS FIRKIN: That's the Court of Appeal.

HIS HONOUR: Court of Appeal. Yes.

5 MS FIRKIN: Yes. And I believe that's at paragraph 44.

HIS HONOUR: Yes. I've got that.

10 MS FIRKIN: I don't need to take you through it, your Honour, just making sure you have at your fingertips - - -

HIS HONOUR: Yes.

15 MS FIRKIN: - - - all the critical documents. On 29 July, Mr Burslem, from the Australian Government solicitor, provided advice to the Australian Taxation Office, and the effect of that advice was there was no basis upon which to charge Mr Dunstan. That has also had some erring this morning. That advice you have already been taken to, but is found at – I've forgotten which affidavit – Mr Dunstan's affidavit, the 22 June affidavit, and it's exhibit number 6, and it's found at pages 29
20 to 31. Also, on 29 July 1997, Mr Higham sent a minute to Mr Growder and another person, concerning whether Mr Dunstan should be charged. Now, this minute we have referred to, your Honour, as the Higham minute. I think that it is sometimes referred to in the judgments as the National Office minute also. The full content of this minute is found in both of the ACT Supreme Court decisions. In the Court of
25 Appeal decision, it's found at paragraph 42.

HIS HONOUR: Yes.

30 MS FIRKIN: And as your Honour will be aware, there is – was subsequently an allegation by Mr Dunstan that the minute was a decision by Mr Higham, not to charge him with an offense and that Mr Higham disputed this. Thereafter, Mr Molineux thought the Burslem advice was wrong and sought urgent advice from a barrister, Mr Murray McInnis. On 21 August 1997, Mr McInnis provided a written advice that the Burslem advice was wrong and there was a sufficient prima facie case
35 of misconduct and that a charge should be prepared. That advice, your Honour, can be found as an annexure to the Ms McKeane affidavit, dated 16 May. It's exhibit number MCM17 and it's at pages 467 to 469. On the 15 August, Ms Orr drafted a minute to Richard Highfield, a second commissioner, with responsibility for executive leadership and management in the ATO. This document is referred to
40 there as – in the various judgments as the Orr minute.

The Orr minute can be found, again, as an annexure to the Ms McKeane affidavit of 16 May and it is MCM14, and it's found at pages 321 to 325. The Orr minute set out options available to the ATO in dealing with Mr Dunstan and made
45 recommendations including that the ATO continue with the disciplinary proceeding that had commenced. On 13 October 1997, Mr Higham decided to charge Mr Dunstan, obviously, I have reached another point of contention, but the facts as

found are that Mr Higham prepared his final report, that report, I believe you have been taken to but for the sake of a complete list of documents, your Honour, that is also found in Ms McKeane's affidavit of 16 May, it is MCM4, at pages 109 to 111. And as my learned junior pointed out earlier, the final report and the draft report are the same in material respects, other than the date and Mr Higham's name. The next document you have also been to - - -



HIS HONOUR: Sorry, Mr Higham's name?

MS FIRKIN: His name was omitted. The next document, your Honour, is on 28 July 1998. Again, you were taken to this already, today, in response to a written request made by Mr Dunstan on 27 March of that year, and a section 13 of the ADJR Act. Mr Burslem of AGS wrote to Mr Dunstan setting out the reasons for Mr Higham's decision, that has been referred to as the statement of reasons and that is, again, behind Ms McKeane's affidavit, at MCM4, pages 105 to 108. And as my learned junior indicated, the substantive content is similar in terms. On 4 December 1998, Mr Dunstan was arrested and charged. Now, I think, that Mr Dunstan takes some issue with the formulation of the words in the charge in his response to the respondent's submissions, but I don't believe that it is in dispute that it – the charge related to sending explosives, and that – it is not dispute that on 26 April 2000, Mr Dunstan was convicted and sentenced in the ACT Supreme Court in relation to those offences. He served a - - -

MR DUNSTAN: It was – nine years? Eleven.

MS FIRKIN: There is an issue taken with the length of the sentence, and nothing turns on that, your Honour. We're happy to not even say the length of the sentence. I understand it's not in dispute that he was released from prison on parole on 2 January 2008.

HIS HONOUR: Yes.

MS FIRKIN: On the – separately, on 21 May 2001, Mr Dunstan's employment under the Public Service Act was terminated by reason of his criminal conduct. They are, your Honour, the key – critical background facts that are necessary to understand the statement of claim. There are also a number of proceedings which I gather your Honour is relatively familiar with. I will be guided by your Honour as to whether you would - - -

HIS HONOUR: Well, the main ones I've looked at, of course, are the judgment of Besanko J, the judgment of Burns J and the Court of Appeal. They're the – really, the main ones that I've - - -



MS FIRKIN: Yes.

HIS HONOUR: - - - focused on.

MS FIRKIN: And they are the critical decisions, your Honour.

HIS HONOUR: Yes.

5 MS FIRKIN: So if – given that you’ve looked at them, I won’t recap them for you. I will simply note that, after the Besanko J proceeding, there was an appeal. That appeal was automatically dismissed for non-compliance. There were also, in the background, various proceedings in the AAT and Federal Court relating to a workplace-related injury. And after the Court of Appeal of the ACT decision, there
10 was an application to set it aside on the basis of mistake. That mistake, your Honour, is relevant.



HIS HONOUR: Sorry, the – that’s his application to set aside the Court of Appeal judgment?

15

MS FIRKIN: Yes. Mr Dunstan contended it was wrong, and the – sorry, paragraph 45 of that judgment was wrong. And that paragraph read – this is the paragraph of the Court of Appeal judgment:

20 *When Mr Higham eventually decided to charge Mr Dunstan with misconduct, a document was provided to Mr Dunstan in the same terms as the draft report, save that the word ‘draft’ was deleted.*



Now - - -

25

HIS HONOUR: Why – I see.

MS FIRKIN: And the significance of that for the purposes of today is we are now here arguing about a – the date on which the final report was created – and this is a
30 reference to the report – and Mr Dunstan is challenging that he received a document on the same terms as the draft report, save that the word “draft” was deleted. He made that challenging by – challenge by alleging a mistake, and that application was refused.



35 HIS HONOUR: Is there a judgment in relation to that?

MS FIRKIN: Yes. Sorry, your Honour. It’s tab 37 in the respondent’s bundle of authorities.

40 HIS HONOUR: Yes.

MS FIRKIN: The citation is Dunstan v Higham (No 2) [2016] ACTCA 28. For completeness only, we note that there was a application to the High Court for special leave in relation to the Court of Appeal decision, which was refused. There was a
45 decision about security for costs and a further application for special leave in relation to that decision, which was refused.



HIS HONOUR: I saw reference – and it may have been a typographical error. I may be wrong. To a special leave application as recently as 2021 – what was that?



5 MS FIRKIN: It's correct, your Honour. And you can find it behind tab 40 of the respondent's bundle of authorities. That's in relation to the costs.

HIS HONOUR: I see.

10 MS FIRKIN: Yes. As we now understand it, particularly having – in light of the amendments to the statement of claim, there are two actions that Mr Dunstan pursues. The first is negligence, which the respondents understood from the original version of the statement of claim.



15 HIS HONOUR: And that's a plea against the Commonwealth.

MS FIRKIN: A pleading against the Commonwealth. And then we understood from the submissions which was later made by Mr Dunstan and the amendments to the statement of claim, he is also claiming fraud on the court and seeking to set aside the judgment of Besanko J. I propose to deal with the negligence claims first.
20 There's, clearly, some overlap between the two. But I would like to keep them separate for coherency. And I would like to start with the alleged duty of care which, as your Honour has indicated, is an allegation of a duty of care owed by the Commonwealth only. And that's found at paragraph 55 of the statement of claim.



25 HIS HONOUR: Just bear with me while I find – I will work, for present purposes, from Mr Dunstan's amended statement of claim. Yes.

MS FIRKIN: There's no relevant – there's no changes, as I understand it.



30 HIS HONOUR: Sorry. What paragraph was that?

MS FIRKIN: It's paragraph 55. And you will see, your Honour, that there are four bases which are alleged by Mr Dunstan to give rise to a duty of care on the part of the Commonwealth set out in the box of particulars. And I wish to address each of
35 them because, in our submission, none of those four allegations gives rise to a duty. The first is an allegation that a duty of care arises at common law. Mr Dunstan has not identified how any common law duty is owed to him. The alleged negligent acts are said to have occurred during the Besanko J proceeding and the Burns J proceeding. To that, the respondents say – and, in particular, the Commonwealth,
40 that a litigant doesn't owe another litigant a duty of care arising from the conduct of litigation. Your Honour, we have cited a number of cases. And in the interests of time, I don't propose to take you to them. But they are found in section E.1.1 of the respondent's submissions. Sorry. I'm a letter out. It's F.1.1

45 HIS HONOUR: So the Commonwealth are said to have owed a duty of care towards Mr Dunstan as, in his case, he is a litigant.

MS FIRKIN: It actually doesn't say, at all – it simply says, “establish by common law”. And to that we say – well, to the extent the alleged breach of this duty of care is said to arise from proceedings before Besanko J, to which the Commonwealth was not a party, I should note, and also proceedings before Burns J. The Commonwealth is making an assumption that it is somehow said that, by reason of being a party to or related to these proceedings, a duty of care arose. And in answer to that assumption, we say that a litigant does not owe a duty to another litigant. And there's significant case law on that, your Honour. And, equally, witnesses cannot be sued in a civil action for anything said by them as witnesses. So to the extent that Mr Dunstan asserts that the Commonwealth is vicariously liable for any of the individual respondents in some way – if those witnesses have an immunity from suit, it follows that the Commonwealth also has an immunity from suit. And we - - -

HIS HONOUR: Well, that's what is a little ambiguous about without being critical. The Commonwealth is said to provide a duty of care to the applicant. And it's said to be responsible for the negligence acts – negligent acts of the respondents and witnesses. That's a, kind of, vicarious liability. But it's - - -

MS FIRKIN: I think to the extent it is asserted that it's vicarious liability – and I do believe at paragraph 2, your Honour, there is a direct reference - - -

HIS HONOUR: To it being vicarious liability, yes.

MS FIRKIN: So to cover that off, the respondents submit that if a witness has an immunity from civil actions, it follows, so to does any principle who is vicariously liable for that witness. And there is authority for that, which we have cited. And we have also given some examples of superior courts summarily determining an allegation of a duty of care in similar circumstances. They're referred to in paragraph 61. If I could be a little bit more specific for your Honour – I don't need to take you to these paragraphs. But I can see that there's no paragraph pinpoints. So in particular, in paragraph 61, we refer to a case of Pereira. If your Honour could please consider paragraphs 52 to 54 and 57 to 60. And we also refer to two Eastlund decisions. But the relevant one is the second one. It's against O-r-e-z-y-k-o-w-s-k-i. And if I could ask your Honour to, please, consider paragraphs 13 and 17 - - -

HIS HONOUR: Is that in relation to the witness – a witness being immune from suit or is that in relation to whether - - -

MS FIRKIN: I would have to go - - -

HIS HONOUR: - - - one can owe a duty of care to another as a result of a litigation?

MS FIRKIN: I believe both of those were – no duty of care arises by reason of being a party. In terms of the responsibility for witnesses, we've referred to a case of Commonwealth v Griffiths, at paragraphs 115 and 116, and a case of Wende, W-e-n-d-e, at paragraphs 94 and 95. For these reasons, insofar as it's alleged a duty of care arises at common law, the respondents submit the allegation is, clearly, doomed to

fail. In response to this, Mr Dunstan's submissions at paragraphs 53 to 57 to do not directly grapple with the propositions that have been put. Instead, Mr Dunstan purports to rely on a case called Perpetual Trustee Company Limited v Crowley, which is tab number 57.



5 Now, this was a case where a party's legal representative was ordered to pay costs. And so the decision is really concerned with the jurisdiction of the court to award costs, effectively, by another party's legal representative. The particular facts of this case were that documents were relied upon by the defendants to obtain a judgment,
10 which had been falsified. The defendant's legal representatives had knowingly put this material before the court. The court identified that its jurisdiction extended to a lawyer to pay costs in this situation, because of the lawyer's behaviour, as part of the court's supervisory jurisdiction over lawyers, who owe a primary duty of care to the court. Mr Dunstan seeks to infer from this duty that lawyers owe to the court that
15 there is an implied inferred duty to other parties in the proceeding.

HIS HONOUR: But that's a solicitor's duty to the court. It's not a duty of care in negligence.



20 MS FIRKIN: Yes. And it doesn't extend to other parties in the proceeding, in the way that Mr Dunstan would have it. And moreover, it is a decision in that case about a party's legal representative, whereas the duty of care in this case is a duty of care said to be owed by the Commonwealth. The second basis for alleging a duty of care against the Commonwealth is said to be the applicant's employment, pursuant to the
25 Public Service Act. Again, Mr Dunstan - - -



HIS HONOUR: So sorry, the Commonwealth wasn't a party to the Besanko proceedings, or was it?



30 MS FIRKIN: That's correct.

HIS HONOUR: It wasn't?

MS FIRKIN: It wasn't.

35

HIS HONOUR: No.

MS FIRKIN: But it was a party to the Burns - - -

40 HIS HONOUR: Yes.

MS FIRKIN: - - - Burns J proceeding and some of allegations relate to what occurred at the Burns J - - -

45 HIS HONOUR: Yes.

MS FIRKIN: - - - in that proceeding. Again, Mr Dunstan doesn't identify how a duty of care is owed to him by reason of employment by the Commonwealth under the Public Services Act. We address this in detail, your Honour, at F.1.2, but the high point is this. Mr Dunstan ceased employment with the Commonwealth on 21
5 May 2001. Mr Dunstan was not an employee at the time of either the Besanko J proceeding or the Burns J proceeding, when the alleged negligent acts are said to have occurred. Insofar as there are references to the Public Service Act, Mr Dunstan ceased to be an officer as defined by section 7 of that Act when he ceased to be employed also in any capacity in the public service. And for those reasons, the
10 respondents submit that the Commonwealth can't sensibly owe any relevant duty of care by reason of Mr Dunstan formerly being an employee of the Commonwealth. In Mr Dunstan's submissions in response, he does not address the Commonwealth's submissions on this point.

15 HIS HONOUR: But even as an employee, the Commonwealth may owe him a duty of care in relation to workplace-related issues, provide a safe workplace and the like, but it's a bit hard to see how that could extend to a duty of care in the context of litigation, in any event.

20 MS FIRKIN: I agree.

HIS HONOUR: But your point is that he wasn't an employee in any event, at the time of the alleged breaches.

25 MS FIRKIN: Yes.

HIS HONOUR: Yes.

MS FIRKIN: Your Honour, he had long since ceased being an employee. But we
30 adopt your Honour's view, that even as an employee this is not the ordinary situation where a duty of care would extend to safety in the workplace. The third basis for the alleged duty of care is said to arise from, effectively, the model litigant obligations under the Legal Services Directions. And again, we've dealt with this in detail in F.1.3, but the high point again, your Honour, is that the Legal Services Directions,
35 which are made under section 55ZF of the Judiciary Act, do not give rise to any civil liability for alleged noncompliance and cannot, by reason of section 55ZI(2) of the Judiciary Act, further the issue of the alleged noncompliance with the legal services directions can't even be raised by Mr Dunstan in this court, pursuant to section
40 55ZG(3) and we have referred to a decision which you will find in that section, confirming that no private right of action is capable of being pursued by Mr Dunstan on this basis. Again, Mr Dunstan's submissions do not address these arguments in response.

45 The final basis, your Honour, is said to be a duty of care which arises from the Legal Profession (Solicitors) Conduct Rules. The statement of claim does not identify which iteration of the rules is relied upon. The respondents, in preparing their submissions, assumed that Mr Dunstan relied upon the 2006 rules, because the 2006

rules applied at the time of the hearing before Besanko J, and the respondents submitted at paragraph 71 that none of those rules were engaged. None of the rules that Mr Dunstan has referred to, being 3, 19.6 and 20.1. In his reply – in his response, at paragraph 59 and 61, Mr Dunstan has submitted that he relies upon the 2015 Rules. These Rules applied from 1 January 2016, which was after the hearing of Burns J – in fact, after the Court of Appeal hearing, but before the Court of Appeal delivered its judgment on 24 June 2016. We submit that the submissions that have already been made in paragraph 71 are equally applicable to this version of the Rules.

Whilst there are some differences in the Rules that have been referred to, in particular, the respondents draw the court's attention to the fact that the statement of claim doesn't plead any material fact which demonstrates a solicitor, on behalf of the respondents, learnt of any matter which would enliven their relevant obligations under either the 2006 Rules or the 2015 Rules. Now that submission is made in relation to what the statement of claim pleads. In his submissions, Mr Dunstan says something about knowledge which can be imputed and that is this – and he says that at paragraph 62 to 65 – that, to the extent that the respondents argue that he ought to have raised challenges that he now seeks to make, at the time of Burns J proceeding and to the extent that the respondents indicate that he is now precluded from doing so – this court should infer that the respondents legal representatives each knew of the challenges that Mr Dunstan now seeks to make.

HIS HONOUR: It didn't know that Mr Dunstan was going to make those challenges. It knew the underlying facts: that - - -

MS FIRKIN: Yes. Yes. Well - - -

HIS HONOUR: - - - that's the allegations.

MS FIRKIN: I think it goes slightly further. Not only did they have knowledge – remembering that there were multiple sets of our legal representatives over the course of the last 25 years, but I think it goes – the submission goes slightly further to say that they ought to have come to the same understanding of the challenges - - -

HIS HONOUR: I see. Yes.

MS FIRKIN: - - - that Mr Dunstan now seeks to make. And if the court is prepared to infer that, then it would follow that there has been a breach of the conduct rules. And to that, the respondents submit that this chain of reasoning does not provide a sound or a sufficient basis to infer the imputed knowledge of any particular legal representative.

HIS HONOUR: But he can't – forgive me for not being au fait with the Legal Profession Act of the ACT or those specific provisions, but in any event, if there was a breach of those provisions, it doesn't necessarily sound in negligence or a duty of

care. It's just a breach of those provisions, unless there's something that refers to negligence in those rules, which I'm - - -

MS FIRKIN: Yes, that's - - -

5

HIS HONOUR: - - - assuming it does not.

MS FIRKIN: - - - the very next point. And it's - - -

10 HIS HONOUR: I'm sorry.

MS FIRKIN: - - - found in paragraph 72, which is even if those rules were engaged, and even if there were a breach, it doesn't give rise to a duty of care on the part of the Commonwealth to Mr Dunstan. Like witnesses, advocates are also subject to an absolute immunity from suit in relation to their conduct in litigation. There are – we've again cited a number of cases, your Honour, and they're found in section F.1.4. That immunity – the rationale for that immunity is for the maintenance of the administration of justice. And then it – therefore, it follows that the Commonwealth can't be liable in respect to the conduct of its or other people's legal representatives in these proceedings.

20

These submissions, which we made in our original submissions, we submit, apply equally to both versions of the rules that we now understand Mr Dunstan refers to. And Mr Dunstan's submissions in response don't meaningfully grapple with this issue. So on the basis of all of that, your Honour, we say that there is simply no basis for the alleged duty of care against the Commonwealth. If the court is satisfied that the duty of care that is pleaded is not maintainable, this is a sufficient basis in and of itself for the court to deal summarily – in a summary way with the negligence claim and/or strike out the negligence claim.

30

I'm getting a bit caught up here because we now understand there is a second claim. So our original submission was it was a basis to summarily dismiss and/or strike out the entirety of the statement of claim. And we do have a bit of a concern about the way the fraud allegations have been brought up, but I will come to that later.

35

HIS HONOUR: That's a different point. Yes.

MS FIRKIN: Now, your Honour, I'm mindful of the time, and the next topic I want to address on is breach, which is very convoluted, and given what has happened today, I would appreciate an opportunity to perhaps start on that afresh in the morning.

40

HIS HONOUR: Yes.

MS FIRKIN: I have been passed a note that the date of termination of Mr Dunstan's employment should be 20 March 2001, not 21 May. I don't know that anything turns on it.

45



MR DUNSTAN: Close. And I don't – I'm not sure. And – it doesn't matter, no.

MS FIRKIN: Okay. So – but just to ensure that there's no mistake, it was between March and May 2001.

5

HIS HONOUR: Yes. Anyway, not an awful lot so – very well. We will continue tomorrow. Now, how long – I know it's extremely difficult, but how long do you think you will be, Ms Firkin? I'm only asking because if the parties think it advisable, it may be, in any event, we might start at 9.30 just to make sure we can finish within time. Sorry. I'm about to be told that I can't do that. Is that definitely on?

10

COURT OFFICER: Yes.

15 HIS HONOUR: Sorry. Can't do. I've got a case management hearing and - - -

COURT OFFICER: We could do – we could move it to 9 am if we have to.

20

HIS HONOUR: That will just give them more time. They will take up the time anyway.

MS FIRKIN: I will go through things in light of what's happened today, your Honour, and try and be as brief as possible.

25

HIS HONOUR: Yes. Well, I'm not seeking to hurry it on up, it's the – factually and legally fairly dense, but, so, anyway, we will try and grapple with – well, we will see how we're proceeding tomorrow and we can shorten the lunchbreak if necessary and - - -

30

MS FIRKIN: If I could flag that myself and my learned junior do have a flight to catch tomorrow at 6 o'clock, so - - -

HIS HONOUR: Yes. So do I. So - - -

35

MS FIRKIN: - - - it will a problem to - - -

40

HIS HONOUR: - - - you're safe because I do too. Anyway, look, if – we obviously have to give Mr Dunstan sufficient time to deal with it and it's a matter of substance, so, anyway, we will see how we go tomorrow and if we have to cut into the lunchbreak, we can, and if that's not enough time and it has to go over, it has to go over, there's nothing we can do about it. I certainly don't want to hurry anyone up and I was – I only really raised that because I thought I could start early in the morning, but I've already got something that's going to take up a bit of time anyway. Yes. Very well. Well, I will adjourn it until 10.15 tomorrow.

45

COURT OFFICER: All stand. This court is adjourned till 10.15 tomorrow.

**MATTER ADJOURNED at 4.32 pm UNTIL
WEDNESDAY, 21 SEPTEMBER 2022**

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