FEDERAL COURT OF AUSTRALIA

Garrett v Make Wine Pty Ltd [2014] FCA 1258

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| Citation: | Garrett v Make Wine Pty Ltd [2014] FCA 1258 |
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| Parties: | **ANDREW MORTON GARRETT v MAKE WINE PTY LTD, VOK BEVERAGES PTY LTD and TREASURY WINE ESTATES VINTNERS LIMITED** |
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| File number: | VID 248 of 2014 |
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| Judge: | **MORTIMER J** |
|  |  |
| Date of judgment: | 21 November 2014 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** Application for summary judgmentpursuant to r 26.01 of the *Federal Court Rules 2011* (Cth) **–** whether the proceeding has any reasonable prospects of success **–** whether the applicant has standing **–** whether frivolous or vexatious **–** whether an abuse of the processes of the Court **–** application granted  **PRACTICE AND PROCEDURE –** Vexatious proceedings order against applicant sought by respondents pursuant to s 37AO of the *Federal Court of Australia Act 1976* (Cth) **–** whether applicant has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals **–** order made |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2 s 18  *Corporations Act 2001* (Cth) Part 5.4, s 495G  *Federal Court of Australia Act 1976* (Cth) ss 31A, 37AO, 37M  *Supreme Court Act 1935* (SA) s 39  *Trade Marks Act* *1995* (Cth) ss 58, 88  *Federal Court Rules 2011* (Cth) rr 8.05, 26.01 |
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| Cases cited: | *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41  *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28  *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd* (2007) 248 LSJS 349; [2007] SASC 173  *Aon* *Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27  *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49  *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; [2006] HCA 27  *Cummings v Claremont Petroleum NL*(1996) 185 CLR 124  *Daemar v Industrial Commission of NSW (No 2)*(1990) 22 NSWLR 178  *Garrett v Australian Trade Commission* [2014] FCA 575  *Garrett v Bransbury* [2007] FCA 529  *Garrett v Deputy Commissioner of Taxation* [2014] FCA 576  *Garrett v Foster’s Wine Estates Ltd* [2007] FCA 253  *Garrett v Macks* [2008] FCA 1419  *Garrett v National Australia Bank* [2007] FCA 530  *Garrett v Rann* [2007] FCA 528  *Garrett v Westpac Banking Corporation* [2007] FCA 439  *Garrett v Westpac Banking Corporation* [2007] FCA 525  *Kuczborski v The Queen* [2014] HCA 46  *Liao v New South Wales* [2014] NSWCA 71  *Pakallus v Cameron* (1982) 180 CLR 447  *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589  *Re Bankrupt Estate of Cirillo; Ex parte Official Trustee in Bankruptcy* (1996) 65 FCR 576  *Re Garrett as Trustee for the Garrett Family Trust* [2009] FCA 252  *Reichel v Magrath* (1889) 14 App Cas 665  *Rogers v The Queen* (1994) 181 CLR 251  *Samootin v Official Trustee in Bankruptcy (No 2)* [2012] FCA 316  *Samootin v Shea* [2010] NSWCA 371  *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275  *Spencer v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28  *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1  *Universal Holidays Pty Ltd v Tseng* [2008] FCA 1011 *Garrett v Mildara Blass Ltd* [2009] SASC 19  *Williams v Spautz* (1992) 174 CLR 509 |
|  |  |
| Date of hearing: | 5 August 2014 |
|  |  | |
| Date of last submissions: | 5 August 2014 | |
|  |  | |
| Place: | Melbourne | |
|  |  | |
| Division: | GENERAL DIVISION | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 219 | |
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| Counsel for the Applicant: | The Applicant appeared in person | |
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| Counsel for the Respondents: | Mr SR Senathirajah | |
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| Solicitor for the Respondents: | Corrs Chambers Westgarth | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| MELBOURNE DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 248 of 2014 |

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| BETWEEN: | ANDREW MORTON GARRETT  Applicant |
| AND: | MAKE WINE PTY LTD  First Respondent  VOK BEVERAGES PTY LTD  Second Respondent  TREASURY WINE ESTATES VINTNERS LIMITED  Third Respondent |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 21 november 2014 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1 There be judgment for the respondents in the proceeding.

2 There be an order pursuant to s 37AO of the *Federal Court of Australia Act 1976* (Cth) that:

Andrew Morton Garrett is hereby prohibited from:

a) instituting in his own name; or

b) causing others to institute; or

c) being concerned, whether directly or indirectly, in the institution of

any proceedings in any registry of the Federal Court of Australia against Make Wine Pty Ltd, VOK Beverages Pty Ltd, Treasury Wine Estates Vintners Limited or any related body corporate, employee, agent or adviser of Make Wine Pty Ltd, VOK Beverages Pty Ltd, Treasury Wine Estates Vintners Limited without the leave of this Court.

3 The applicant is to pay the respondents’ costs of and incidental to the proceeding, including any reserved costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| BETWEEN: | ANDREW MORTON GARRETT  Applicant |
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| JUDGE: | MORTIMER J |
| DATE: | 21 november 2014 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# INTRODUCTION AND SUMMARY

1 During the 1980s and 1990s the applicant, Mr Garrett, was a well-known Australian winemaker. This proceeding concerns the ongoing consequences for Mr Garrett of a decision he made in 2000, as part of the settlement of litigation in South Australia, to divest himself of many of his winemaking interests, including his interests in trade marks and marks bearing not only his name but his signature. This is far from the only proceeding which has had as its subject matter, in broad compass, the consequences for Mr Garrett of that decision. An examination of the judgments in all these proceedings and Mr Garrett’s evidence in this case reveals the significant toll which the course of events over the last two decades has taken on him, regardless of how responsibility for the course of events is allocated.

2 In this proceeding, Mr Garrett makes a wide range of claims against the three respondents, especially against the third respondent, Treasury Wine Estates Vintners Ltd (**TWEV**). In broad terms, those claims concern a Deed of Settlement made between him and TWEV (when it was called Mildara Blass) and a number of other parties in July 2000. All of his claims involve either allegations of payments he says he is entitled to under the Deed, breaches of other entitlements he says were given to him in the Deed or allegations about dealing in and use of trade marks and other intellectual property assigned by Mr Garrett to TWEV in the Deed. His battle with the third respondent (in its current and previous corporate iterations) has been drawn out, predating the Deed. His claims against the first respondent, Make Wine Pty Ltd (**Make Wine**), and the second respondent, Vok Beverages Pty Ltd (**Vok**) are new, but derive from assignments of intellectual property to them by TWEV. That intellectual property has formed for many years part of the subject matter of disputes between Mr Garrett and TWEV.

3 The respondents have applied under r 26.01 of the *Federal Court Rules 2011* (Cth) for the proceeding to be dismissed summarily, or permanently stayed, on a number of grounds. They have also applied for orders under s 37AO of the *Federal Court of Australia Act 1976* (Cth) declaring Mr Garrett to be a vexatious litigant and requiring him to seek and be granted leave to commence any further proceedings against them in this Court.

4 For the reasons I set out below, the proceeding should be dismissed as an abuse of process. I have declined to dismiss the proceeding by way of summary judgment on the merits of Mr Garrett’s legal and factual arguments, for reasons I set out at [84] to [108] below. I have upheld some of the respondents’ arguments on standing and estoppel. My conclusions on these matters, and on abuse of process, mean that Mr Garrett has no reasonable prospect of successfully prosecuting his claims in this proceeding, although not because of any conclusion I have reached on their legal or factual merits.

5 The orders sought by the respondents under s 37AO of the Federal Court Act against Mr Garrett should be made in the terms sought. In my opinion, orders under s 37AO, wider than those sought by the respondents, and applicable to any proceeding Mr Garrett seeks to institute in this Court, may well be appropriate. That is not an issue which concerns the respondents to this proceeding and it would not be appropriate for orders of that kind to be made in this proceeding, nor without notice to Mr Garrett. I have, however, decided to draw my reasons for judgment in this matter to the attention of the Attorneys-General of the Commonwealth and the State of Victoria, and the Registrar of this Court, so that consideration might be given to whether wider orders under s 37AO(3) of the Federal Court Act should be sought.

# THESE PROCEEDINGS

6 These proceedings were commenced on 1 May 2014. Mr Garrett has maintained that the only reason he commenced these proceedings at the time he did was because of his fear of the limitation period expiring. In one sense, even if this explanation is accepted, it is consistent with the submissions made by the respondents that the proliferation of proceedings brought by Mr Garrett concerning issues stemming from the 2000 Deed arises from Mr Garrett making choices, in his own interests, about which kinds of claims he should bring at certain times.

7 Even allowing for Mr Garrett’s position as a self-represented litigant, the statement of claim is not particularly informative. It does not descend into identifying the causes of action on which Mr Garrett relies. As a consequence, the Court directed that Mr Garrett file and serve a statement of the kind which would usually be provided pursuant to Practice Note CM8 and r 8.05 of the Federal Court Rules, in relation to matters in the Fast Track list. This statement did provide more detail about the nature of Mr Garrett’s claims. It described the nature of the dispute in the following terms:

1. This matter is a Commercial Dispute between me and the First, Second and Third Respondents (“the Respondents”) over the use of my name in the production of wines whether within the jurisdiction of the Commonwealth of Australia or elsewhere (“The Jurisdiction”).

2. The dispute arises from the alleged multiple breaches of contract by the Third Responded and failure to comply with the overall purpose, the terms and conditions of the contract between the parties as set out in the Deed of Settlement dated 26th July 2000 and in particular the failure to pay money for the use of my name to me (“The Deed”).

3. The central provisions of the Deed where the breaches by the Third Respondent are alleged by me to have occurred are contained within;

3.1. Clause 9.1 as it relates to payments due under the Garrett Family License

3.2. Clause 9.2 as it relates to payments due to me for the use of my name.

3.3. Clause 9.6 as it relates to due diligence at any time (“Due Diligence”)

3.4. Clause 14 (“The Option”)

3.5. Clause 15 (“The Right of First Refusal”)

3.6. Clause 17.3; the MBL Indemnity of the AMG Entities (“The Treasury Indemnity”)

4. It is my case that;

4.1. the breaches and failures of the Third Respondent under the Deed are sufficient to cause this Honorable Court to make orders to set aside the Deed and re-enliven matters that were to be determined in a proceeding in the Supreme Court of South Australia given Action Number SASC-96-2244; Me and Ors v The Third Respondent **(“The Proceeding”)** such that those matters may be now determined by this court in this proceeding in so far as they relate to the parties in this proceeding.

4.2. The conduct of the Respondents has at all relevant times been harsh, oppressive and unconscionable within the meaning of the unwritten law which has cause me loss in all of my capacities.

5. Trademark Numbers 534254, 636564, 671716 & 926213 (“The Trademarks”) now show as being registered in the name of the First Respondent however there is no contractual arrangement between me and/or the Trustee of the Garrett Family Trust with the First or Second Respondents to make and market wines in the jurisdiction bearing my name nor is there an expressed or implied license to use my name in favor of either the First or Second Respondents therefor the First and Second Respondents have no rights in respect to the Trademarks.

5.1. I do not know what contractual arrangements are in place or have been in place between the Respondents which detail needs to be fully discovered.

8 This statement then sets out, over several pages, a number of issues Mr Garrett alleges will arise in the determination of this dispute. The issues alleged are wideranging. They include whether interpleader proceedings taken by TWEV in the Victorian Supreme Court in July 2005 were commenced for certain alleged ulterior purposes and were a breach of the 2000 Deed, which breaches and ulterior purposes were continued when the proceeding was cross-vested to the South Australian Registry of the Federal Court. A further issue identified was whether those proceedings “caused [Mr Garrett] to be impecunious”. They also include allegations that if Mr Garrett succeeds in having his bankruptcy annulled, then agreements and consent orders made in the South Australian Federal Court proceedings should not remain binding on him, contentions about what should happen to the asserted surplus of Mr Garrett’s bankrupt estate, and whether this proceeding can “be considered as an application for leave to appeal” from the decision of Lander J in SAD 5 of 2006 (the cross-vested proceeding).

9 The statement asserts a number of breaches of the 2000 Deed, relating to an option and the grant of a right of first refusal given to him under the 2000 Deed, as well as breaches of an indemnity Mr Garrett says he is entitled to from TWEV. Finally, Mr Garrett makes a claim for a sum of $8.4 million, said to be made up of payments of $600,000 per annum owed to him by TWEV under the 2000 Deed. The $8.4 million is said by Mr Garrett to be only the current sum owed: Mr Garrett alleges he is entitled under the 2000 Deed to be paid that sum on an annual basis “forever”.

10 Some of the issues are expressed in more straightforward terms: for example, whether the Court should order pursuant to s 88 of the *Trade Marks Act* *1995* (Cth) that the Registrar remove the name of Make Wine from the Register of Trade Marks, in relation to the marks registered under its name. Another example might be the alleged issue of whether the respondents have, in creating and using a new trade mark bearing Mr Garrett’s signature and a thumbprint, contravened s 18 of the Australian Consumer Law, as set out in Sch 2 to the *Competition and Consumer Act 2010* (Cth), on the basis of a representation that the wine bearing that mark is endorsed by Mr Garrett.

11 After filing this statement, and before the filing by the respondents of this r 26.01 application, Mr Garrett then filed two further interlocutory applications in this proceeding. The first of those applications sought orders requiring TWEV to reimburse to him $100,000 in costs he incurred in proceedings in the South Australian Supreme Court, which he says is owed to him by the operation of the indemnity he claims against TWEV under the 2000 Deed. The second seeks freezing and ancillary orders pursuant to rr 7.32 and 7.33 of the Federal Court Rules against proposed new respondents, including the trustees of his and his wife’s bankrupt estates, Mr Macks and Mr Duncan. Mr Garrett also has new proceedings in the Victorian Registry of the Federal Court against those two individuals.

12 Mr Garrett then made statutory demands pursuant to Part 5.4 of the *Corporations Act 2001* (Cth) against Treasury Wine and TWEV, totalling $70,867,893.34. During the course of the proceedings a number of those statutory demands were withdrawn. There remained five statutory demands, totalling $6,528,039.20, for which those respondents made applications for orders to set aside pursuant to s 459G of the Corporations Act.

13 The frequency and range of applications made by Mr Garrett (including the statutory demands which produced inevitable responding applications from the respondents) led me to make orders restraining Mr Garrett from making interlocutory applications in this proceeding without leave. These matters were also referred to a Registrar for case management and a case conference, with a view to confining the issues in the proceeding, and giving the parties the opportunity to resolve matters in dispute where possible without further litigation.

14 After a constructive and productive case management process, the parties agreed on the issues which would be determined at the r 26.01 hearing. Directions were given by a Registrar accordingly. Mr Garrett agreed to his other applications not being dealt with until the Court had given judgment on the respondents’ r 26.01 application. He also agreed at the case management conference to withdraw all but five of the statutory demands which had been made. Following subsequent negotiations between the parties, on 5 August 2014, the Court made orders by consent setting aside the statutory demands.

15 At the end of the r 26.01 application hearing, and then again after that hearing in email communications with the Court, Mr Garrett contended that at the r 26.01 hearing the Court had failed to deal with what he described as his “debt matters”, to which reference had been made in the orders made by the Registrar after the case management conference. His contention was that there had been an agreement the Court would determine on a final basis whether TWEV and others owed him the amounts asserted in the withdrawn statutory demands. There is no basis for Mr Garrett’s contention. The transcript of the case management conference before the Registrar makes it clear the Registrar’s directions referred to the hearing on 5 August dealing with what are described as the “debt matters” only in the context of the respondents’ r 26.01 application.

THE REGISTRAR: All right. Well, hopefully the transcripts are still on, and I’m pretty sure they are, and it’s now just gone past 3.30 pm. The time has been usefully used to conduct confidential conferences with the parties. For obvious reasons, I won’t go into the details of those confidential conferences, save for various issues which I’m authorised to clarify. Before I do so, I think it’s worth summarising again that there are a number of different issues raised in the pleadings and applications and I will summarise those for the benefit of the record, and then I will clarify what it is as being resolved by way of confidential conference processes.

For the avoidance of doubt, I would just like to confirm now that we are in, again, an open session in case management which the parties can refer to and rely on anything that’s said in this process. The issues which have been identified include the following – and hopefully mostly the following; the payment claims – these are the applicant’s claims – the payment claims which are issues to do with what – how to construct the contract around a debt and who should pay what and when and to whom; the option claims as to whether the option was exercised; the right of first refusal claim as to whether that was given and, in fact, exercised; the indemnity claims or 17.3 of the settlement deed and whether or not indemnity applies for certain costs that have arisen for the applicant; and various trademark claims.

In addition, there has been a number of other issues identified; that is, 11 statutory demands that have been served recently by the applicant on various respondents; a request for pro bono assistance – pro bono legal assistance; the joinder of various parties or the substitution of at least one party; questions to do with the trustee and bankruptcy of Mr Garrett relating to standing conflict and annulment of the bankruptcy, most of which, I understand, will be dealt with in a separate proceeding before Justice Tracey; and questions of contempt of court by the company treasury allegedly arising on the basis of failure to pay in accordance with court orders.

MR GARRETT: We should call that “TWEV”.

THE REGISTRAR: TWEV.

MR GARRETT: Treasury Wine Estates Vintners Limited, as distinct from Treasury

Wine Estates Limited.

THE REGISTRAR: Thank you. Now, in addition to that, of course there are the – there is the application brought by the respondents seeking to obtain summary judgment or summary dismissal; to have the proceedings struck out or dismissed; to obtain a stay of this proceeding if necessary and to obtain various vexatious proceedings orders. Now, the application of the respondents is returnable on 5 August, is my understanding, before Justice Mortimer.

MR SENATHIRAJAH: Yes.

THE REGISTRAR: One of the things that has been agreed to in general terms, as I understand it, is that – subject to something I will have confirmed in a moment – the – a couple of key things will, in a sense, bubble to the surface and hopefully be dealt with by her Honour on 5 August in a fulsome way. This will be the respondent’s application to strike out, because obviously, if that strike out or summary judgment application is successful, then all of these other issues – well, most of them – will tend to fall away. The second is this question of the debt; and when I say “the debt” I refer to the various aspects of payments that are alleged should have been made to Mr Garrett or his interests arising from clause 9.1, clause 9.2 and clause 17.3 of various agreements.

And I think it’s understood between the parties that wherever possible, the debt issue – being those three limbs of the debt issue – will be fully aired – or as fully aired as possible – on 5 August, **within the context of the strike out application**. On that understanding then, certain things have taken place during the confidential conference, and I will endeavour to summarise those and ask that the parties clarify and confirm their understanding of these matters. (Emphasis added.)

16 This extract makes it plain that Mr Garrett was aware that what he called the “debt matters” would be raised at the interlocutory hearing on 5 August 2014 only in the context of them forming part of the subject matter of the respondents’ application under r 26.01.

# EVIDENCE ON THE APPLICATION

17 The respondents read and relied on an affidavit of Ms Claire Newhouse affirmed on 7 July 2014. Ms Newhouse is a solicitor acting on behalf of the respondents. Ms Newhouse’s affidavit deposed to the history of proceedings brought by Mr Garrett and their outcomes. It also exhibited a considerable number of documents drawn from those proceedings, and communications between various parties including between Mr Garrett and the third respondent and its solicitors. Her affidavit also sought to prove all payments which TWEV submitted it was obliged to make had been made pursuant to the 2000 Deed.

18 Mr Garrett filed three affidavits, but sought to rely on only two of them. His first affidavit dated 29 May 2014 deposed to matters leading to the commencement of this proceeding, together with some matters concerning his bankruptcy. His third affidavit (the second one being the affidavit he informed the Court he did not rely upon) is dated 14 July 2014. In it Mr Garrett deposes to matters concerning what he alleges to be the surplus of his bankrupt estate, as well as setting out allegations he relies on to impugn the conduct of his trustee in bankruptcy, Mr Macks. As I have noted above, Mr Garrett has an outstanding interlocutory application to join Mr Macks, amongst other people and entities, to this proceeding, which has been adjourned to await the outcome of the respondents’ r 26.01 application.

19 Following discussions between the parties, together with the assistance of a Registrar of this Court at the case management conference held on 9 July 2014, it was agreed that Mr Garrett would select the exhibits from these two affidavits which he considered were necessary for him to respond to the r 26.01 application, and only those exhibits would be reproduced in the Court Book to form the evidence on the r 26.01 application. Accordingly, only some of the exhibits to Mr Garrett’s two affidavits have been received in evidence on this application.

20 Neither party made any objections to the reception of the material in the Court Book into evidence. In addition, Mr Garrett sought to tender a second and updated psychological report from his treating psychologist. A report from 2010 was already in evidence. The respondents did not object to the tender, but submitted as a matter of weight it was unclear how either report could be of any probative value in any of the issues on the r 26.01 application. Given the approach I have taken to the determination of the respondents’ application, it is not necessary for me to make any findings about the matters in the two psychological reports.

# RELEVANT FACTS

21 It was a difficult task for Mr Garrett to confine the factual matters on which he wished to rely in this application. Given he is self-represented and the respondents seek summary judgment on all his claims, his difficulty is explicable. Mr Garrett was concerned to ensure the Court understood the indisputably complicated factual matrix of events which occurred after the 2000 Deed, and which led him to make the wideranging claims he has made in this proceeding. Understanding the factual background, not only as Mr Garrett would present it, but also more objectively, is made all the more difficult because of the multiplicity of proceedings brought by Mr Garrett in the past, many of which have involved overlapping claims.

22 I take the following facts from a combination of sources, including the evidence in this r 26.01 application and the relevant facts as found and as set out in the judgments of Lander J in *Universal Holidays Pty Ltd v Tseng* [2008] FCA 1011 and Layton J in *Garrett v Mildara Blass Ltd* [2009] SASC 19, both judgments being central to several of the issues in the current application. The factual and legal findings in those cases bind Mr Garrett and, at least, the third respondent in this proceeding.

23 In a statement filed in proceedings in the South Australian Supreme Court in the proceeding before Layton J, and which was annexed to his first affidavit in this proceeding, Mr Garrett described his entry into the winemaking industry in the early 1980s and the successful businesses he built within it. He described his development of a company called “The Wine Company”, through which he made a wide range of wine and which by 1989 had a turnover of $12 million, with an annual crush of 6,500 tonnes. He described the creation and registration as business name of “Andrew Garrett Wines” in the mid-1980s, and the development of a stylised signature of his name which became regularly used on wine labels. He deposed to the registration of trade marks from the early 1990s which involved his signature, and during the same period to the expansion of the business through the introduction of investors.

24 However, the introduction of outside investors also appears on the evidence to have spelled the beginning of difficulties for Mr Garrett’s personal involvement in the now extensive winemaking business of The Wine Company and the Andrew Garrett labels. By agreement Mr Garrett left The Wine Company in May 1993, and by early 1994 had embarked on a new venture in winemaking with Tatachilla Winery Pty Ltd, although his involvement appears to have been as an employee. A winery was purchased, new wines produced and there was an attempt by Mr Garrett to register new trade marks, which was rejected because of similarity with the stylised signature still owned by The Wine Company.

25 Mr Garrett then describes how during the second half of 1994 The Wine Company sought to sell the Andrew Garrett Wine brands, and he entered into a competitive process with Mildara Blass for the purchase of those interests. It appears at the same time that his relationship with those who controlled Tatachilla began to deteriorate. Instead of continuing to compete with Mildara, he sought to negotiate an arrangement with it so that he could be involved again in the production of wines under the Andrew Garrett label. These negotiations appear not to have been successful. Mr Garrett deposes that in January 1995 The Wine Company sold the business of Andrew Garrett Wines to Mildara Blass, and Tatachilla also assigned its interests in what Mr Garrett describes as “the Garrett Family Licence” to Mildara Blass. Mr Garrett’s evidence discloses that, where it was necessary, he and his wife consented to various assignments as part of these transactions.

26 Mr Garrett retained an interest in a winery property in South Australia called “McLarens on the Lake”, and there appears from the evidence to have been some ongoing disputes with Mildara Blass about the use by Mr Garrett of his name, and perhaps of signatures, in advertisements and perhaps also on labels. Mr Garrett deposed to continuing to pursue his own path in the winemaking business after the sale to Mildara Blass. His statement contained many paragraphs of criticism of the way Mildara Blass managed the Andrew Garrett Wines business after purchasing it from The Wine Company.

27 It appears from the evidence that it was Mr Garrett’s dissatisfaction with the sale to Mildara Blass, the collapse of his business relationship with Tatachilla, and the consequences of these events, which resulted in him issuing proceedings in the Supreme Court of South Australia in November 1996. The proceeding included contractual claims and claims in relation to intellectual property over the Andrew Garrett name, marks and signature marks.

28 In 2000, the 1996 South Australian Supreme Court proceedings were settled. A Deed of Settlement was signed. It is this document which forms the basis of almost all of Mr Garrett’s claims in the current proceeding, and which has formed the basis of his claims in other proceedings. The parties to the 2000 Deed relevantly included Mr Garrett and his then wife Avril Garrett in their personal capacities, Mr and Mrs Garrett as trustees of the Andrew Garrett Family Trust, and Mildara Blass, being the then corporate name of TWEV. In the remainder of these reasons for judgment I refer to Mr Garrett’s claims about “the 2000 Deed and its consequences” as a shorthand way of trying to encapsulate the ripples of effects which flowed from Mr Garrett’s decision to enter into the 2000 Deed. Whether directly or indirectly, it seems to me most of his subsequent dissatisfaction, financial and legal difficulties, and litigation, can be traced back to the entry into this Deed, and the disputes which arose about its performance.

29 Without descending into too much detail about the course of events, in September 2004 Mr Garrett was declared bankrupt on the application of the Deputy Commissioner of Taxation. On Mr Garrett’s evidence the debt was said to relate at least in part to failure to pay GST liability imposed as a consequence of payments pursuant to the 2000 Deed. Mr Garrett made submissions in the current application that the Commissioner has recently acknowledged GST was not payable and the liabilities have been reversed. How and to what extent that affects Mr Garrett’s bankruptcy in 2004 is a matter not to be determined in this proceeding, but rather, if at all, in VID 304 of 2014. Mr Garrett, however, maintained this was yet another wrong done to him as a consequence of non-performance by Mildara Blass of its obligations under the 2000 Deed, in the sense that if Mildara Blass had not treated the payments as a taxable supply, no GST liability would have been imposed. It is not necessary in this proceeding to determine the legal merits of that argument, nor whether the evidence supports the assertions made by Mr Garrett.

30 In *Tseng* [2008] FCA 1011, Lander J describes the course of the bankruptcy in the following terms:

On 24 September 2004 a sequestration order was made against the estate of Mr Andrew Garrett and Mr Peter Macks was appointed his trustee in bankruptcy. Mr Garrett remains a bankrupt. His trustee objected to his discharge in October 2007 and, on 18 December 2007, the period of his bankruptcy was confirmed as being until 23 November 2012, being eight years from the date on which Mr Garrett filed his Statement of Affairs.

31 The evidence filed in this proceeding suggests the course of the bankruptcy in fact altered from these dates. Ms Newhouse deposes to having conducted a search of the National Personal Insolvency Register which revealed that Mr Garrett became a discharged bankrupt on 21 April 2009.

32 Peter Macks was appointed as Mr Garrett’s trustee in bankruptcy. Mr Macks’ performance of his role as trustee has also become the source of several allegations in different proceedings by Mr Garrett, including proceedings currently in this Court. Stephen James Duncan, who was appointed trustee of the bankrupt estate of Mr Garrett’s former wife, Averil Garrett, is also a respondent in these various proceedings. In addition to the proceedings currently before Tracey J in the Victorian Registry of this Court, the evidence suggests there were at least two proceedings in the South Australian Registry of the Federal Court, and one in the Court’s Western Australian Registry.

33 In approximately March 2009, Mr Garrett, Mr Macks and Mr Duncan entered into a deed of settlement (which I shall call the Macks Deed). The Macks Deed was in evidence on the r 26.01 application. During the hearing Mr Garrett handed up a version with at least two signed counterparts. One of the recitals to that Deed described the subject matter of the Deed as “the dispute … in respect of the right to receive payments from the Royalty Stream held in the Litigants’ Fund and payments from future payments made by FWE on the terms recorded in this agreement”.

34 “FWE” is defined in the Macks Deed as the entity originally known as Mildara Blass Ltd, which changed its name to Beringer Blass Wine Estates Ltd and then to Foster’s Wine Estates Ltd. It is now Treasury Wines Estates Vintners Ltd (continuing to have the same ACN number) and, according to Ms Newhouse’s evidence, Treasury Wine is its ultimate holding company. The “Royalty Stream” is defined in the Macks Deed as the 10-year quarterly payments the parties to the 2000 Deed agreed were payable to Mr and Mrs Garrett in their personal capacities and as trustees for the Andrew Garrett Family Trust. The “Litigant’s Fund” is defined in the Macks Deed as the fund held by the Federal Court into which FWE (as it then was) paid the Royalty Stream payments pending resolution of the dispute about to whom they were payable.

35 Mr Garrett deposes that between December 2011 and February 2012 “entities related” to him paid $310,000 into a solicitors’ trust account to be held to fulfil his instructions to commence proceedings against the three current respondents. Mr Garrett alleges no proceedings were commenced as he had instructed and those funds were unlawfully dissipated by the solicitors for other purposes. He describes how he has made a complaint to the Legal Services Commissioner which, although the LSC appears on the evidence to have made decisions on the complaint, those decisions have not satisfied Mr Garrett and he has sought judicial review in the Victorian Supreme Court in relation to the LSC decision-making.

36 I refer to other aspects of the evidence on the r 26.01 application in the following parts of the judgment dealing with the various aspects of the application before me.

# SUMMARY OF THE RESPONDENTS’ ARGUMENTS AND MR GARRETT’S RESPONSES

## Summary judgment grounds: The 2000 Deed

37 The respondents sought summary judgment in respect of all the applicant’s claims against them in this proceeding. The interlocutory application did not specify the basis for the application, although in oral submissions the respondents’ counsel relied on r 26.01 of the Federal Court Rules. There is no reliance on s 31A of the Federal Court Act.

38 The respondents’ counsel submitted that they relied on r 26.01(a)-(d) inclusively, which provide:

(1) A party may apply to the Court for an order that judgment be given against another party because:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or

(b) the proceeding is frivolous or vexatious; or

(c) no reasonable cause of action is disclosed; or

(d) the proceeding is an abuse of the process of the Court; or

...

39 The respondents’ written submissions summarised the applicant’s claims and their contentions in response in this way:

The Applicant has claimed that the Third Respondent has not paid him in accordance with clause 9 of the Settlement Deed. In particular, the Applicant has claimed that the:

(a) Third Respondent failed to pay the Trustees under clause 9.1(b) a fee of $2.00 per case;

(b) Third Respondent failed to make all payments to the Applicant under clause 9.2(a) a minimum of $75,000 per quarter;

(c) Third Respondent failed to pay the Applicant under clause 9.2(b) the maximum of $600,000 per annum; and

(d) payments made under clause 9.2(a) to the Trustees incorrectly included GST.

40 The respondents accepted in their submission that the dispute between the parties involves the proper construction of cl 9 of the 2000 Deed. Clause 9 provides:

9.1 In consideration of the assignment by the Trustees of the Australian trade mark application number 634077 and registered marks set out in Part B of Schedule 2 to this Deed:

(a) MBL shall pay the Trustees $1.8 million on the Commencement Date. Payment shall be made by telegraphic transfer to the following account:

[bank details of Mr Garrett]

(b) Subject to clause 9.2 MBL shall pay to the Trustees a fee of $2.00 for each Case of Product sold by MBL in the MBL Territory or Japan or overseas wine clubs in the period commencing 1 July 2000 and ending 30 June 2010. MBL shall not be required to make any further payments to AMG for sales of Product after 1 July 2010. Sales to any associated company of MBL shall be ordered sales for the purposes of this clause. Payment shall be made by telegraphic transfer as set out in clause 9.1(a).

9.2 Regardless of the value of actual sales made by MBL in accordance with sub-clause 9.1(b):

(a) Subject to 9.2(b), MBL shall pay AMG a minimum of $75,000 in each quarter from 1 July 2000; and

(b) the maximum MBL shall be liable to pay AMG in any 12 month period from 1 July 2000 shall be $600,000.

9.3 The amounts set out in clause 9.1(b) and 9.2 above shall be payable on sales made during each quarter commencing on 1 July, 1 October, 1 January and 1 April in each year and shall be paid within thirty (30) days of the last day of each such quarter.

…

9.6 If AMG so requires, his nominated firm of chartered accountants may, on reasonable prior notice to MBL and at any reasonable time during business hours, inspect and audit the accounts and records of MBL and any other book record voucher receipt or invoice relating to the manufacture, sale and disposal of the products referred to in clause 9.1(b). If any such examination reveals an error exceeding five (5) per cent of the total sums paid to AMG, the cost of its inspection and audit shall be borne by MBL.

41 It was common ground, and the 2000 Deed makes clear, that “MBL” is Mildara Blass Ltd (now TWEV), “AMG” is Mr Garrett and “the Trustees” is a reference to Mr and Mrs Garrett as trustees of the Andrew Garrett Family Trust.

42 The respondents’ submissions identified at least three construction issues: who is entitled to payment under cl 9, the amount required to be paid under cl 9 and at what point payments are no longer required to be made under cl 9.

43 The respondents’ submissions then addressed in some detail what they contend is the proper construction of cl 9`, by reference to the text of the 2000 Deed, contractual construction principles and the previous decisions of Lander J and Layton J in the matters referred to above at [22]. In summary, by reference to all these matters, and admitting both “errors” and lack of clarity in the text of the clause, they contend “in order to arrive at an interpretation which is practical and commercially sensible” a correct reading of cl 9 is that all payments were to be made to the trustees, not to Mr Garrett, despite the references to “AMG”.

44 Mr Garrett contends the proper construction of the clause, on its plain words, is that payments under cl 9.1 are to be made to the trustees, and have indeed been made in accordance with that clause, in the way the respondents’ evidence reveals. However he contends payments are due to him personally pursuant to cl 9.2. Mr Garrett contends he is entitled to $600,000 per annum in perpetuity, and none of this has been paid.

45 On the basis of their submissions about the proper construction of cl 9, and cl 9.2 in particular, together with the evidence adduced through Ms Newhouse’s affidavit about the payments which have been made, the respondents contend the applicant’s case on his entitlement to further payments has no reasonable prospect of success.

46 The respondents then made submissions about the other three claims made by Mr Garrett based on the 2000 Deed.

47 The first of these is whether Mr Garrett was able to exercise the option granted by cl 14 of the 2000 Deed to reacquire certain trade marks bearing his name and stylised signature from Mildara Blass, and whether the circumstances in which the option was not (in fact) exercised constituted a breach of the 2000 Deed. Clause 14 provides:

14.1 Commencing 30 June 2005 and ending 30 July 2005, AMG (or an AMG Entity nominated by him) shall have the option to acquire from MBL subject to clause 15 at the Option Price MBL’s rights to use:

(a) the Andrew Garrett Trade Mark;

(b) the Garrett Trade Mark; and

(c) the Garrett Family Trade Mark and the Stylised Script Mark granted by this Deed,

including any registered trade marks and pending application for those trade marks but for the avoidance of doubt not including any real property, plant, equipment, grapes or other materials.

14.2 AMG may exercise the option referred to in clause 14.1 by:

(a) providing written notice to MBL by 5pm 30 July 2005; and

(b) paying to MBL subject to clause 15 the Option Price no later than 90 days from the Option Exercise Date.

In default, the option will be deemed not to have been exercised.

14.3 If AMG exercises the option and makes payment to MBL in accordance with clause 14.2, MBL must cease forthwith all use of the Andrew Garrett Trade Mark, the Garrett Trade Mark, the Garrett Family Trade Mark and the Stylised Script Trade Mark. AMG (or the AMG Entity nominated by him) must purchase all stocks of existing Products from MBL at the cost of producing the Products multiplied by a factor of 1.25. The cost of grapes used in making the wine will be calculated by the greater of the actual cost to MBL or the market value of those grapes.

14.4 The rights under this clause 14 may not be assigned by AMG.

48 The second is whether the right of first refusal given to Mr Garrett by cl 15.1 of the 2000 Deed was engaged by the notice given to him by (then) FWE that it intended to sell its rights in the trade marks to Make Wine. Clause 15 provides:

15.1 Before a party (“offeror”) sells or agrees to sell its rights in respect of the Andrew Garrett Trade Mark, the Garrett Trade Mark, the Garrett Family Trade Mark and the Stylised Script Trade Mark to any third person, the party must first in writing offer:

(a) if the party is an AMG Entity, MBL; or

(b) if the party is MBL, AMG (or an AMG Entity nominated by him) (“offeree”)

the right to purchase those rights on the same terms and conditions as the proposed sale to the third person. The offer must be sufficiently detailed to be capable of acceptance on its face and must identify the third party to whom sale is proposed if this right of purchase is not exercised.

15.2 If an offer is made to a party pursuant to clause 15.1, the offeree must accept the offer in writing within seven days of notice of the offer (or such longer time as the offeror agrees) or the right to purchase lapses and, subject to clause 15.3 the offeror may sell the rights to the third person nominated pursuant to clause 15.1 on the terms and conditions offered to the offeree.

15.3 If the offeror:

(a) does not complete the sale to the nominated third party within six months of making the offer to the offeree pursuant to clause 15.1 and still or again proposes to sell the rights; or

(b) proposes to sell or agree to sell the rights to a third person on terms and conditions more favourable to the third person than those offered to the offeree pursuant to clause 15.1,

the offeror must make a new offer to the offeree in accordance with clause 15.1.

15.4 Clause 15.1 does not apply to a sale or agreement to sell by:

(a) MBL to a related body corporate; or

(b) an AMG Entity to another AMG Entity, if the prospective purchaser agrees to be bound by the terms of this Deed and enters into the appropriate deed to that effect.

15.5 This right of first refusal conferred by this clause will be extinguished if AMG (or the AMG Entity nominated by him) exercises the option granted in clause 14 and settlement occurs within 90 days of the Option Exercise Date (or such longer period as agreed by MBL) provided that the price payable by AMG (or the AMG Entity nominated by him) on the exercise of the option under this clause 15 from MBL shall be the higher price of the offer made in accordance with this clause or the Option Price.

49 The third claim is whether cl 17.3 of the 2000 Deed operates as an indemnity in Mr Garrett’s favour in respect of these very proceedings, and all other proceedings he has taken against the third respondent. Clause 17.3 provides:

MBL indemnifies the AMG Entities against all actions proceedings claims demands or prosecutions of any kind or nature and howsoever arising by whomsoever and whenever brought or commenced against or incurred by the AMG Entities (or their agents and employees) and also against all costs and damages and expenses which the AMG Entities may pay or be made liable to pay in defending or settling the same arising directly or indirectly out of the registration or use by MBL of the Andrew Garrett Trade Mark, the Garrett Trade Mark, the Garrett Family Trade Mark or the Stylised Script Trade Mark in the MBL Territory or arising directly or indirectly from any act or omission of MBL or any of its agents, representatives, employees or servants in relation thereto.

50 As to cll 14 and 15, the respondents submit that since Mr Garrett was bankrupt at the time the option was exercisable, only his trustee in bankruptcy could exercise either right under the contract. In the alternative, they submit Mr Garrett did not properly exercise the option and did not pay the option price. As to cl 15.1, they submit that, because Make Wine was a related body corporate, the right of first refusal in cl 15.1 did not apply by reason of cl 15.4. As to cl 17.3, they submit the indemnity clause could not and should not be construed as operating between the parties to the indemnity. Rather it could only operate to satisfy a liability owed by Mr Garrett to someone other than the indemnifier, relying on *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28 at [23].

51 Mr Garrett submitted that since he has proceedings on foot to annul his bankruptcy, and maintains his bankruptcy was null and void, any arguments based on his bankruptcy should not be accepted as a basis for summary judgment. He also submits that the entire sale to Make Wine was a “sham”, deliberately designed to overcome his right of first refusal under the 2000 Deed.

## Summary judgment grounds: Trade mark claims

52 The respondents submit that the applicant’s claims of trade mark infringement have no reasonable prospects of success. That is because three of the four trade marks in issue were expressly assigned to Mildara Blass in the 2000 Deed. The fourth trade mark, which includes a stylised script signature of Mr Garrett and an image of a fingerprint, is a composite mark, and insofar as it uses the stylised script of Mr Garrett’s signature, this was transferred to Mildara Blass in the 2000 Deed by way of a perpetual licence. Mildara Blass (by then, TWEV) then validly sold its rights in the trade marks (including the stylised script licence) to Make Wine. The respondents submit there is a finding by Lander J in *Tseng* [2008] FCA 1011, which governs this issue. At [60], Lander J states:

On 26 July 2000 Mr and Mrs Garrett, and Mr and Mrs Garrett as trustees of The Garrett Family Trust and other parties associated with them, entered into a settlement deed with Mildara and Vinpac International Pty Ltd (the Deed of Settlement). The Deed of Settlement brought to an end the disputes which were raised by the proceedings in Action No 2244 of 1996. Effectively, that Deed gave ownership of all the intellectual property rights owned by Mr and Mrs Garrett and associated entities to Mildara which thereafter was entitled to market and sell wine and other products bearing the Andrew Garrett Trade Mark, the Garrett Trade Mark, the Garrett Family Trade Mark and the Stylised Script Trade Mark in Australia, New Zealand and Japan.

53 They further submit that Mr Garrett had an opportunity to object to the granting of the fourth composite mark, but failed to do so within time.

54 In response Mr Garrett submits his cause of action under s 88 of the Trade Marks Act is not time barred, nor affected by whether he had at the relevant time any “legal interest” in the trade marks. He says he is a person aggrieved for the purposes of s 88, having an interest in the trade marks which is greater than an ordinary member of the public. Section 88 provides:

**88 Amendment or cancellation—other specified grounds**

(1) Subject to subsection (2) and section 89, a prescribed court may, on the application of an aggrieved person or the Registrar, order that the Register be rectified by:

(a) cancelling the registration of a trade mark; or

(b) removing or amending an entry wrongly made or remaining on the Register; or

(c) entering any condition or limitation affecting the registration of a trade mark that ought to be entered.

(2) An application may be made on any of the following grounds, and on no other grounds:

(a) any of the grounds on which the registration of the trade mark could have been opposed under this Act;

(b) an amendment of the application for the registration of the trade mark was obtained as a result of fraud, false suggestion or misrepresentation;

(c) because of the circumstances applying at the time when the application for rectification is filed, the use of the trade mark is likely to deceive or cause confusion;

(e) if the application is in respect of an entry in the Register—the entry was made, or has been previously amended, as a result of fraud, false suggestion or misrepresentation.

## Summary judgment grounds: Standing

55 The respondents put quite distinct submissions that Mr Garrett had no standing in relation to several of his causes of action.

56 They submit that all but one of the causes of action relied upon by him in this proceeding vested in his trustee in bankruptcy from at least the date of Mr Garrett’s sequestration on 24 September 2004. They submit that, even after Mr Garrett’s discharge from his bankruptcy, those causes of action remain vested in his trustee. The respondents’ counsel conceded that the cause of action concerning cl 15 of the 2000 Deed arose after Mr Garrett’s discharge from bankruptcy and there was no issue about his standing in relation to that claim (although, of course, the respondents relied on other arguments to submit that claim should be dismissed).

57 Mr Garrett maintained that his discharge from bankruptcy revived his ability to bring claims of the kind he now makes.

## Res judicata, issue estoppel, Anshun estoppel

58 The respondents submit that the question of breach by TWEV of cl 9 of the 2000 Deed was an allegation made and determined in the proceedings before Layton J in *Garrett v Mildara Blass Ltd* [2009] SASC 19 in the South Australian Supreme Court. They submit the allegation in that proceeding was that TWEV breached cl 9 by not paying the royalty stream to the correct party.

59 They also contend that Lander J in *Tseng* [2008] FCA 1011 made findings about the ownership of the trade marks upon which Mr Garrett bases his claims in this proceeding.

60 The respondents submit Mr Garrett was estopped, in accordance with *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589, from making allegations in this proceeding about other breaches of the 2000 Deed (aside from the breach of cl 9) which could reasonably have been made in the proceedings before Layton J.

61 It seems that Mr Garrett’s allegations in relation to cl 15 of the 2000 Deed should be excluded from this submission. As the respondents’ counsel conceded in relation to the standing submission, the cause of action in relation to breach of cl 15 did not arise until October 2009, which was after the determination of the South Australian Supreme Court proceedings.

## Abuse of process, improper purpose

62 The respondents put their abuse of process contentions in a number of different ways. Generally, all except two depended upon the establishment of one of the other grounds they identified. In other words, the respondents relied on — for example — their estoppel grounds to also submit the proceedings were an abuse of process.

63 The two separate grounds which appear to be relied upon are that the proceedings have been instituted and continued vexatiously, and for an improper purpose.

64 The vexatious ground appears to be relied on by the respondents as an independent basis on which these proceedings could be dismissed, as well as founding a prohibitive order under s 37AO.

65 The improper purpose submission is intertwined with the estoppel submissions, and the application for an order under s 37AO. The respondents contend that Mr Garrett is simply moving jurisdictions, or in the case of this Court, moving registries within the one jurisdiction, and re-agitating the same claims before different judges. In that sense, the respondents submit, these proceedings were commenced for the improper purpose of attempting to secure differ outcomes on the same substantive issues to those given to Mr Garrett in South Australia.

66 On both the estoppel and abuse of process arguments, Mr Garrett maintained the arguments he makes in this proceeding are distinct from others he has previously made, and there is no abuse of process.

## Application under s 37AO of the Federal Court Act

67 The respondents submit that an order of this nature may be made on the Court’s own motion, or on the application of a party affected. They submit all respondents are such parties: the first and second respondent because the current proceeding is vexatious, the third respondent because Mr Garrett has instituted previous proceedings against it, or its predecessor entity.

68 By reference to evidence given by Ms Newhouse in her affidavit, together with reported judgments, the respondents identify a large number of proceedings which have been brought by Mr Garrett, in multiple jurisdictions, all dealing in one way or another with the same subject matter as this proceeding.

69 The respondents rely on previous proceedings brought by Mr Garrett in a number of ways. They rely on declarations by the South Australian Supreme Court that he is a vexatious litigant, made in *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd* (2007) 248 LSJS 349; [2007] SASC 173.

70 In that case, Anderson J made orders prohibiting Mr Garrett from instituting proceedings against the National Australia Bank or related entities without leave of the Court. Having summarised the various proceedings instituted against the NAB and its related entities, and the many applications made on those proceedings, his Honour found (at [227]-[236]):

Unfortunately for Mr Garrett, there is within the summaries of his many applications in the different actions set out above, evidence of the mind set of someone who shows a lack of balance in accepting how the cold hard realities of the commercial world operate when there are defaults in relation to repayment obligations.

Insofar as it is necessary I reject his argument that he has acted reasonably. Mr Garrett is an intelligent man who has chosen to be stubborn and belligerent in taking on not only NAB but also many other professional people who have been discharging their duties to their clients. He has also added to the list of those whom he attacks, various judicial officers who have made findings against him.

In my view he was treated with considerable patience and understanding by the court for a long time and in particular I refer to the many opportunities that he was given before Gray J who dealt with his constant applications and who was occupied for many months in the hearings. The same also applies to Judge Lunn.

When things finally started to mount up against him and he started to get decisions which went against him Mr Garrett then chose to attempt to re-litigate the same matters under different guises.

Again, when he perceived that the masters and judges of this court were regularly making findings against him he chose to transfer his attention to the Federal Court, where although there were some subtle differences, the same type of allegations were made and the same catchcries were heard.

I find specifically that he did not have reasonable grounds for instituting the many proceedings already referred to. I find that he has persistently instituted these proceedings vexatiously.

He has also been persistent in seeking redress from NAB by way of compensation to him in the sum of tens of millions of dollars as a means of his attempt to restore his financial position and that of his businesses.

Mr Garrett has clearly chosen to use the various proceedings, described by me earlier, as a means of venting his anger and frustration. He has incorporated in his submissions both written and oral an overall allegation of corruption and conspiracy by NAB and its officers. Those unfounded allegations have ballooned out to include many legal practitioners and accountants, including receivers and liquidators.

There are no particulars given in respect of any specific allegations but only broad generalisations which are difficult to understand and almost impossible to rebut.

In conclusion, Mr Garrett's whole attitude in all of the various applications and arguments I have described are summarised by his statement referred to earlier in the reasons at, [73] to the effect that he will have his say one way or the other and will not be gagged by certain members of this Authority.

71 On applications, made by both FWE and the Attorney-General for South Australia as intervener, pursuant to s 39 of the *Supreme Court Act 1935* (SA), Layton J made similar orders in respect of FWE (a predecessor entity of the third respondent), but also in respect of any proceedings in any Court in the State of South Australia: see *Garrett v Mildara Blass Ltd* [2009] SASC 19. Her Honour’s reasons state (at [323]-[324], [329], [332]):

The Attorney-General’s application alone indicates that Mr Garrett was the instigator of Actions 127 of 2004, 78 of 2005, 145 of 2005, 257 of 2005, 422 of 2005, 423 of 2005, 1443 of 2005, 590 of 2006, 7132 of 2006, 7624 of 2006, 7625 of 2006 and 780 of 2007. This is quite apart from the numerous proceedings issued by Mr Garrett in which he has sought unconnected substantive relief within actions commenced by others, in order to achieve the same end as if it had been an originating action by him, without the need for the payment of the court fees associated with an originating action.

Whilst being unrepresented may initially have hindered Mr Garrett in his understanding of court processes and court procedures, this did not continue for long. Further, it does not explain his refusal to accept decisions against him and his frequent efforts to either repeat the action or to make creative efforts to try and circumvent possible impediments in order to pursue litigation.

…

As a result of my findings, I have concluded that 32 proceedings in the Supreme Court, four proceedings in the District Court and four proceedings in the Magistrates Court instituted by Mr Garrett, amounted to vexatious proceedings within the meaning of s 39 of the Act. The period of time over which these proceedings were instituted was from 20 August 2004 to 19 December 2007. The various grounds upon which I have concluded they were vexatious proceedings include being an abuse of process of the Court, re‑litigation of matters decided already by a court, instituting proceedings without reasonable ground or utterly hopeless grounds, numerous attempts by Mr Garrett to find other legal entities by which to take action to agitate his own personal concerns; and also proceedings instituted for the purpose of annoying and harassing named litigants who were often non-parties to the action in which proceedings have been instituted. In my view, these matters alone would have been sufficient for me to conclude that Mr Garrett has persistently instituted vexatious proceedings within the meaning of s 39. This conclusion is fortified when seen in the context of other proceedings issued by him in the Federal Court.

…

Whilst I will not endeavour to comment on each proceeding instituted by Mr Garrett in the Federal Court, I will make the following observations. In the course of the 21 actions, at least 20 proceedings instituted by Mr Garrett in the actions were dismissed, struck-out or refused. Reasons were published for the majority of these decisions, and within these reasons the proceedings instituted by Mr Garrett are described, *inter alia*, as “hopelessly misconceived”, “incoherent”, “embarrassing”, “vexatious”, “ostensibly untenable” and as having “no reasonable prospect of success”.

72 The respondents rely also on the numerous proceedings instituted by Mr Garrett to which each of those decisions refer, to demonstrate the persistence and frequency of Mr Garrett’s litigation.

73 They rely on litigation by Mr Garrett against Westpac, and other proceedings against the National Australia Bank in the South Australia Registry of this Court: namely *Garrett v Westpac Banking Corporation* [2007] FCA 525; *Garrett v National Australia Bank* [2007] FCA 530. They submit these proceedings are further evidence of Mr Garrett’s pattern of litigation, and of the fact that successive judges have found his proceedings to involve the re-litigation of previous issues or the raising of claims which have no underlying merits and are brought in a “scattergun” way.

74 They rely on two further pieces of litigation in this Court, which they submit demonstrate that Mr Garrett seeks to re-litigate issues, sometimes by raising matters which could have been raised in earlier proceedings, or raising matters which appear to be contentious for the first time, despite the underlying subject matter of the litigation being the same as previous proceedings. They refer to *Tseng* [2008] FCA 1011, where at [120] Lander J held that two years into the litigation Mr Garrett made an allegation for the first time that the Garrett Family Trust was entitled to the royalty stream under the 2000 Deed.

75 They refer also to proceedings in the Western Australian Registry, *Re Garrett, as Trustee for the Garrett Family Trust* [2009] FCA 252, where Gilmour J held that Mr Garrett was attempting to re-litigate the matters decided by Lander J in *Tseng*.

76 The respondents then refer to various interlocutory applications filed in the current proceedings by Mr Garrett. They include applications to join four further parties related to the first and second respondent, applications for freezing orders, and the statutory demands to which I have referred at [11] above. Again, they submit, these applications demonstrate a pattern in Mr Garrett’s litigious behaviour that he habitually seeks to increase both the scope of his litigation, and the parties affected by it.

77 The respondents refer to other matters which have recently been decided in this registry, submitting they demonstrate Mr Garrett continues to bring proceedings which are misconceived and without merit. They refer to his proceedings against the Deputy Commissioner of Taxation (*Garrett v Deputy Commissioner of Taxation* [2014] FCA 576), against Austrade (*Garrett v Australian Trade Commission* [2014] FCA 575) and a further proceeding against the Deputy Commissioner of Taxation which was discontinued by Mr Garrett (VID 233 of 2014). They note he now has further proceedings in this Court against Mr Macks in relation to his bankruptcy, despite the deed signed with Mr Macks. Those proceedings are currently being case managed by Tracey J and bear the proceeding number VID 304 of 2014.

78 The respondents also refer to current proceedings Mr Garrett has lodged in the original jurisdiction of the High Court against the Commissioner of Taxation (M48 of 2014). Aside from seeking relief by way of mandamus and injunction against the Commissioner, and exemplary and punitive damages, he also seeks relief (apparently by way of declaration) in the following terms:

That the Court declares that the Common Law and Constitutional “*Right of Access to Justice*” is a matter arising out of the interpretation of the Constitution and that that right is more properly interpreted as the “*Right of Represented Access to Justice*”.

That the current administration of Legal Aid by the States, Territories and the Commonwealth is unconstitutional and that it discriminates between different classes of litigants and in particular against those with complaints in the Commercial sphere of the Civil Jurisdiction.

That the current adversarial system of administration of justice is unconstitutional and does not support unrepresented litigants.

That the System of Justice in Australia should be reformed to include authority for Judicial Officers to exercise Discretion in line with the Inquisitorial System of Justice.

That the Commonwealth Attorney General appoints a number of Advocate Generals to assist the Judicial Officers in the Commonwealth of Australia and each State and Territory.

79 The respondents then refer to proceedings Mr Garrett sought to file in the South Australian Registry of the Federal Court to “reopen” SAD 5 of 2006, which was resolved by consent orders made by Lander J on 27 March 2009. He made that application on 24 June 2014 by the following email to the South Australian Registry of the Federal Court:

Dear Registry

I advise that I wish to apply to re-open SAD 5 of 2006 and SAD 101 of 2008 in order to vacate all orders made as set out in the attached proposed consent orders sent to the Solicitor for Treasury Wine Estates Limited (*previously known as Mildara Blass Limited, Berringer Blass Limited and Fosters Wine Estates Limited)* (“TWE”)

I have written to TWE seeking those consent orders in accordance with my obligations under the Civil Disputes Resolution Act 2011 (Cth)

The solicitor for TWE has responded to me as attached advising that his client rejects the proposed consent orders.

Concurrently, I also wish to reopen SAD 29 of 2005 for the purpose of withdrawing relevant sections of my affidavit material.

I now advise that I withdraw the relevant section of all my affidavits sworn by me in SAD 29 of 2014, SAD 5 of 2006 and SAD 101 of 2008 in so far as they make statements as to my genuine belief and understanding as to the effect of the Deed of Settlement dated 26th July 2000 and that the proceeds of the Payments due under any clause of the Deed were ever the property of the Andrew Garrett Family Trust.

Furthermore I do not propose to serve either Peter Ivan Macks or Stephen James Duncan on the applications as I have made application to annul my Bankruptcy in VID 304 of 2014 and agreed to take the same steps in respect to my ex-wife Averil Gay Garrett.

It is my case that Macks and Duncan do not have standing.

I seek direction of the Court as to how to make that application and the relevant rules that may be applicable.

Best regards

Andrew Garrett

80 The proposed consent orders he sought were in the following terms:

1. That an order reopening this proceeding.

2. That an order is made that the orders made in this proceeding are vacated.

3. That these orders are made expartie in so far as the First and Second Respondents.

4. That an order is made that the Garrett Family Trust and the Andrew Garrett Family Trust are two separate and distinct Trusts.

5. Such other orders as this Honourable Court Deems Fit

81 It suffices to note that one of the objects Mr Garrett sought to achieve with these proposed orders is to set aside the finding made by Lander J which is adverse to many of the consequential arguments he seeks to agitate in this proceeding.

82 The respondents rely on extracts from some of these judgments as evidence of judicial views about previous approaches taken by Mr Garrett which, they submit, also describe his approach to the current proceeding. They submit:

In *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd* [Unreported, Supreme Court of South Australia, Lunn J, 13 January 2006 at [49]] it was held that:

The[se] applications have been part of a relentless campaign by Andrew Garrett [...]. While he is entitled to pursue any legal rights which he may arguably have, he is not to be permitted to abuse the processes of the Court through pursuing many untenable applications [...].

In *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* [2007] SASC 173 the Applicant was held to be “an intelligent man who ha[d] chosen to be stubborn and belligerent in taking on not only NAB but also many other professional people [...]”.

In *Garrett v Mildara Blass Ltd* [2009] SASC 19 it was held that the Applicant, “Despite having been told on many previous occasions that he lacked valid standing, [...] continued to creatively contrive proceedings in this Court using the guise of another legal identity to air his grievances.”

83 They rely also on findings made by Layton J in *Garrett v Mildara Blass Ltd* [2009] SASC 19 at [329], [332]:

[...] 32 proceedings in the Supreme Court, four proceedings in the District Court and four proceedings in the Magistrates Court instituted by Mr Garrett, amounted to vexatious proceedings [...]The various grounds upon which I have concluded they were vexatious proceedings include being an abuse of process of the Court, re-litigation of matters decided already by a court, instituting proceedings without reasonable ground or utterly hopeless grounds, numerous attempts by Mr Garrett to find other legal entities by which to take action to agitate his own personal concerns; and also proceedings instituted for the purpose of annoying and harassing named litigants who were often non-parties to the action in which proceedings have been instituted.

…

In the course of the 21 actions, at least 20 proceedings instituted by Mr Garrett in the actions were dismissed, struck-out or refused. Reasons were published for the majority of these decisions, and within those reasons the proceedings instituted by Mr Garrett are described, inter alia, as “hopelessly misconceived”, “incoherent”, “embarrassing”, “vexatious”, “ostensibly untenable” and as having “no reasonable prospect of success”.

# CONSIDERATION

## Summary judgment grounds: The 2000 Deed

84 In *Spencer v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28, the plurality emphasise that s 31A of the Federal Court Act “departs radically” from the earlier provisions permitting summary judgment, which required formulation of “a certain and concluded determination that a proceeding would necessarily fail”: at [53] per Hayne, Crennan, Kiefel and Bell JJ. The respondents in this application do not move under s 31A and no submissions by them were directed to that provision. Accordingly, the Court must proceed on the basis their application is founded only on r 26.01 and the respondents must persuade the Court to the standard set out in *Spencer* at [53]. A proceeding should not be dismissed under r 26.01 if the Court is required to determine contested issues of fact or engage in significant fact finding, given the evidence is invariably incomplete and untested: *Spencer* at [21], [24] per French CJ and Gummow J, citing *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at [94]-[95] per Lord Hope of Craighead.

85 In *Spencer* 241 CLR 118; [2010] HCA 28 at [24], French CJ and Gummow J expressly referred to the need for caution to attend the termination of proceedings summarily. So much is also evident from their Honours’ use of terms such as “incurable” and “unanswerable”. Their Honours referred then to several decisions, including *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; [2006] HCA 27 at [46] and *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 at [57], where the language of “a high degree of certainty” was used.

86 Putting to one side issues of abuse of process and estoppel, it is problematic to apply r 26.01 to Mr Garrett’s claims, in terms of determining whether he has reasonable prospects of successfully prosecuting the proceeding, or part of the proceeding. All of his claims depend heavily on evidence, and evidence of events and transactions a considerable time ago. Some (like his cl 9 arguments) also depend on a construction of a clause in a contract which on its face is ambiguous. Clause 9.2 plainly needs to be rewritten for the respondents’ argument to succeed. Clause 9.2 itself refers to “AMG”. The respondents contend this is a mistake and the parties meant it to refer to the trustees. Mr Garrett contends otherwise. Other clauses, such as cl 9.6, also refer to “AMG” and again the respondents say these are mistakes and should be construed by rewriting them. That is not an exercise lightly undertaken: *Pakallus v Cameron* (1982) 180 CLR 447 at 452 per Wilson J.

87 Especially when Mr Garrett is self-represented and the details of his arguments are likely to emerge as the proceeding develops, possibly in a way which is dependent on evidence, I do not consider it can be said with sufficient confidence at an early stage that Mr Garrett has no reasonable prospects of successfully prosecuting a claim in this proceeding, in terms of the legal and factual merits of those claims. That is not to find the converse. Rather it is to recognise the complexity of the legal and factual contentions involved.

88 However, because of the other bases on which the respondents put their r 26.01 application, I have concluded some of the respondents’ contentions on standing and estoppel should succeed and that their abuse of process arguments should be accepted. In that sense, Mr Garrett has no reasonable prospects of successfully prosecuting his claims in this proceeding, not because of any independent assessment by this Court of the legal and factual merits of the claims, but rather because of the existence of those other factors.

## Summary judgment grounds: Trade mark claims

89 The same approach should be taken to the application for summary dismissal of the trade mark claims. A distinction must be made between the claims about the three marks which were included in the 2000 Deed and the mark which includes Mr Garrett’s signature and fingerprint.

90 In relation to the claim about the three marks in the 2000 Deed, as the respondents acknowledge in their submissions, these came to be owned by the first respondent through an exercise of the “first right of refusal” process in cl 15 of the 2000 Deed. That is the process which Mr Garrett alleges was a sham. I note from Ms Newhouse’s affidavit, the price (then) BBWE placed on the sale of the marks back to the applicant (through the offer and first right of refusal process in the 2000 Deed) was $23 million. It refused to allow the applicant any extension of time to obtain any due diligence in relation to this price, asserting cll 14 and 15 contained no such condition. Whether or not that is correct, there is no evidence as to the price paid by the first respondent for the marks — whether $23 million or otherwise. I note the respondents conceded the claim in relation to cl 15 did not arise until after Mr Garrett was discharged from his bankruptcy, so this claim is not affected by the respondents’ contentions as to standing.

91 I am not prepared, in a matter concerning rights of such value, contested claims about performance of contractual obligations, depending on evidence about transactions where I have no basis for determining whether I have complete evidence about those transactions before me, to dismiss summarily Mr Garrett’s claims on these issues on the basis of lack of legal or factual merit. The evidence adduced by the respondents was hearsay from the respondents’ solicitor, deposing to her instructions and exhibiting vast bundles of correspondence about which no submissions were made. This is a wholly unsatisfactory basis for summary judgment to be given.

92 As to the fourth mark, this claim is even less susceptible to determination in a summary way. It appeared from submissions (rather than evidence) that this mark was created by the third respondent, in part in reliance on the licence for the “stylised script” it submits was assigned in the 2000 Deed, and in part by the addition of a thumbprint. Mr Garrett’s consumer law claim is based on the association between the thumbprint and his signature. He contends that is a representation that the thumbprint is his, and that his imprimatur is given to the wine which bears the mark. That is not a claim which in my opinion is suitable for dismissal for having no reasonable prospects of success on its legal and factual merits without proper argument, having heard evidence on both sides. The respondents did not address any separate submissions to this aspect of Mr Garrett’s claims.

93 The claims are also intertwined: it can be seen for example that Mr Garrett’s consumer law claim might also provide at least some foundation for the application of s 88(2)(c) of the Trade Marks Act. His claims concerning the 2000 Deed and, for example, the breach of cl 15 (the right of first refusal clause), might be relevant to a claim under s 88(2)(b), or s 88(2)(a) by reference to s 58 of the Trade Marks Act. None of these points were developed by Mr Garrett, it must be said. However, since he is self-represented, the Court must satisfy itself with less assistance than would usually be the case whether his proceedings have no reasonable prospects of success on their legal and factual merits, and in my opinion this requires at least some examination of how s 88 might apply.

94 The trade mark claims, however, like others made by Mr Garrett, are susceptible to being dismissed on other bases.

## Summary judgment grounds: Standing

95 The respondents submit that “all causes of action relied on” by Mr Garrett vested in his trustee in bankruptcy, Mr Macks, and remain vested in Mr Macks even after Mr Garrett’s discharge from bankruptcy. As I have noted, during oral argument counsel for the respondents properly recognised this submission could not apply to Mr Garrett’s claim about cl 15 of the 2000 Deed, which did not on any view arise until after the date of his discharge from bankruptcy.

96 It may be accepted that an argument based on an applicant’s standing is, if sufficiently clear, a proper basis for summary dismissal under r 26.01. I do not consider, however, the respondents’ arguments are sufficiently clear for a conclusion to be reached that these proceedings should be summarily dismissed on that basis.

97 Standing to bring a cause of action, as the respondents accept, depends upon the concept of sufficient interest: see *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49 at [43] per Gaudron, Gummow and Kirby JJ; see also *Kuczborski v The Queen* [2014] HCA 46 at [182] per Crennan, Kiefel, Gageler and Keane JJ. What will be a sufficient interest for a particular cause of action will vary.

98 Here, there is no real doubt that Mr Garrett has a “real interest” in the claims he makes. He alleges, variously, that he is entitled to large sums of money under the 2000 Deed, to which he is a party in two capacities. He alleges he is entitled to damages for breaches of obligations under that Deed. He alleges he is entitled to have the register of trade marks corrected (or entries cancelled) under s 88 of the Trade Marks Act in respect of three trade marks which he previously owned and which he contends he was unlawfully denied the right to repurchase. He also claims rectification or cancellation in relation to one trade mark he says is misleading. He alleges that his signature and a thumbprint that an “ordinary” or “reasonable” consumer would consider is his are being used to mislead and deceive consumers of wine using labels produced by the first and second respondents.

99 There could be no controversy over Mr Garrett’s standing in relation to any of these claims but for his bankruptcy.

100 On the effect of his bankruptcy, the respondents relied on the case of *Samootin v Shea* [2010] NSWCA 371. On this issue the lead judgment was given by Campbell JA, with Beazley and Hodgson JJA agreeing.

101 Mrs Samootin engaged in a series of proceedings in the New South Wales Supreme Court, the details of which are not relevantly material. She was declared bankrupt in relation to unsatisfied costs orders flowing from some of those proceedings. She challenged her bankruptcy as far as she was able, to the point of being refused special leave to appeal to the High Court. Various proceedings by her, aimed at obtaining orders in relation to assets she claimed were hers, or damages, remained on foot during her bankruptcy, and were continued in the name of her trustee in bankruptcy. During her bankruptcy, Mrs Samootin filed a “holding summons” in relation to seeking leave to appeal from orders made by a single judge. After she was discharged from her bankruptcy, she sought to reactivate these appeal proceedings on her own behalf. Her former trustee in bankruptcy made it clear he did not adopt the proceedings she had commenced (and in respect of which leave to appeal from interlocutory orders was sought), had no interest in continuing the proceedings and alleged further that Mrs Samootin “has no capacity to commence or maintain the proceedings either as an undischarged or discharged bankrupt”. The respondents similarly objected to Mrs Samootin’s attempts to reactivate the proceedings, submitting that the application for leave to appeal related to property which had vested in the Official Trustee by operation of the sequestration order made several years earlier.

102 The Court found Mrs Samootin lacked standing to bring the application for leave to appeal. It noted that the property which vested in a trustee in bankruptcy at bankruptcy included choses in action, relying on *Daemar v Industrial Commission of NSW (No 2)*(1990) 22 NSWLR 178 at 184-185 per Kirby P, with whom Clarke and Meagher JJA agreed. That proposition is well established: see also *Re Bankrupt Estate of Cirillo; Ex parte Official Trustee in Bankruptcy* (1996) 65 FCR 576 at 583 per Branson J; see also *Samootin v Official Trustee in Bankruptcy (No 2)* [2012] FCA 316 at [19] per Katzmann J.

103 The Court of Appeal also found (at [95]) that discharge of a bankrupt from bankruptcy does not cause any assets that have vested in the Official Trustee to revert to the bankrupt. Campbell JA further found (at [99]):

Similarly, if an asset that the bankrupt owned at the time of the bankruptcy but that was thought to be worthless is shown, after the bankrupt has been discharged, to have some value, that asset remains vested in the Official Trustee, and if the Official Trustee is of the view that that value is worth realising, it is only the Official Trustee who has the power to realise that value.

104 I respectfully agree with the reasoning of Campbell JA at [92]-[100], and consider that it applies to Mr Garrett’s circumstances.

105 Campbell JA referred to *Cummings v Claremont Petroleum NL*(1996) 185 CLR 124, which in my respectful opinion is also relevant to the matters in issue on this application. At 136, Brennan CJ, Gaudron and McHugh JJ held that:

… a bankrupt has no right to bring or prosecute proceedings to protect, enhance or add to the property of which he has been divested on bankruptcy.

106 The Court also held, at 138, that

A bankrupt’s contingent interest in a surplus does not give him an interest which would allow him to sue to enforce proprietary rights….

107 Mr Garrett’s causes of action in relation to alleged breaches of the 2000 Deed, and any interests he had to be paid, or rights he had available for exercise, under that Deed which could have resulted in additional funds being available for creditors vested in his trustee in bankruptcy. Having been divested of that property on bankruptcy, he does not reacquire it after his discharge and is not able to issue proceedings in relation to the 2000 Deed.

108 There may, as the respondents conceded, be some doubt whether these principles apply to the cause of action in relation to cl 15 of the 2000 Deed, which did not and could not have arisen until after Mr Garrett’s discharge from bankruptcy. Whether one potential cause of action under the 2000 Deed could survive the bankruptcy and be available to Mr Garrett is not, in my opinion, immediately obvious. To so conclude may be inconsistent with the approach taken in *Samootin* [2010] NSWCA 371 and the authorities there referred to. However I do not need to decide this because in my opinion any claim by Mr Garrett in relation to cl 15 of the 2000 Deed is precluded for reasons of abuse of process.

## Res judicata, issue estoppel, Anshun estoppel

109 I do not accept the submissions by the respondents that Layton J’s judgment in *Garrett v Mildara Blass* *Ltd* [2009] SASC 19 operates as res judicata in relation to Mr Garrett’s claims in this proceeding based on the 2000 Deed. The matters before Layton J, and the decisions her Honour made, are apparent from the introduction to her Honour’s judgment:

There are three applications before me. The first is a Notice for Specific Directions filed on 3 May 2007 by Andrew Morton Garrett in Action Number SCCIV-96-2244 (“Action 2244 of 1996”). Mr Garrett seeks, *inter alia*, to re-open and set aside the judgment entered in that action.

The second is an application which was filed on 27 June 2007 by the first defendant, Mildara Blass Limited (“Mildara Blass”), now known as Foster’s Wine Estates Ltd (“FWE”), in Action 2244 of 1996. The Notice for Specific Directions seeks orders, pursuant to s 39 of the *Supreme Court Act 1935* (SA) (“the Act”),that Mr Garrett be declared a vexatious litigant, that he be prohibited from instituting any proceedings with respect to FWE and related entities without the leave of the Court, and a permanent stay of the proceedings issued by Mr Garrett in Action 2244 of 1996.

The third is an application filed on 10 October 2007 in Action Number SCCIV-07-1342 (“Action 1342 of 2007”), instituted by the Attorney-General for the State of South Australia against Mr Garrett pursuant to s 39 of the Act. This application seeks, *inter alia*, a declaration that Mr Garrett has persistently issued vexatious proceedings, and an order that he be prohibited from instituting any proceedings in any court without permission of the Court.

On 16 November 2007, I made an order that the applications in Action 2244 of 1996 be listed for hearing concurrently with Action 1342 of 2007. I also made an order that the applications should be heard both as to evidence and submissions, in the following order: first, the Attorney-General’s application in Action 1342 of 2007; second, the application by FWE in Action 2244 of 1996; and, lastly, Mr Garrett’s application to re-open in Action 2244 of 1996. I also ordered that, subject to relevance, the evidence adduced and submissions made in Action 1342 of 2007 be treated as evidence and submissions in the applications by the first defendant and second plaintiff in Action 2244 of 1996, and vice versa.

At the hearing, Mr Livesey QC, counsel for FWE, identified and made submissions with respect to two preliminary matters, namely:

• the effect of the declaration made by Anderson J on 17 May 2007 that Mr Garrett had persistently instituted vexatious proceedings as defined by s 39 of the Act; and

• Mr Garrett’s standing to take out the application in Action 2244 of 1996.

I will deal with these preliminary issues before moving on to the substantive matters which I will then deal with in the following order:

• the application made by Mr Garrett to re-open Action 2244 of 1996;

• the application made by the Attorney-General pursuant to s 39 of the Act;

• the application made by FWE pursuant to s 39 of the Act.

110 On the issue of Mr Garrett’s standing, in terms of acting as trustee and bring the proceedings in that capacity, her Honour found Mr Garrett lacked standing, and said at [28]:

the fact that Mr Garrett is an undischarged bankrupt is *prima facie* a circumstance which suggests that he lacks standing as a fit person to act on behalf of the trust. In this case, rather than there being other information before me which would rebut this presumption, to the contrary, the material before me confirms that he is an unfit person to act for the GFT. Despite having been told on many previous occasions that he lacked valid standing, he has continued to creatively contrive proceedings in this Court using the guise of another legal identity to air his grievances. In endeavouring to establish standing in the name of the GFT for the purpose of resurrecting Action 2244 of 1996, he is exposing the property of the GFT to the risk of detriment, including costs orders against it in the event that the application is dismissed.

111 Layton J did make some findings about “Action 2244 of 1996”, which was the proceeding compromised and settled by the 2000 Deed. This was the proceeding which, before Layton J, Mr Garrett was seeking to reopen, on the basis that the 2000 Deed had been “breached” and, or perhaps alternatively, terminated by the Garrett Family Trust: see *Mildara Blass* [2009] SASC 19 at [56].

112 At [58]-[59] Layton J describes the proceedings leading up to the 2000 Deed, and the Deed, in the following terms:

The brief background is that the action was commenced on 26 November 1996. The plaintiffs were Mr Garrett and the GFT. The Amended Statement of Claim pleaded various causes of action and the plaintiffs sought various remedies including damages and royalties in respect of a Licence Agreement and the use of the “Garrett Family” brand name for the making and selling of wine. FWE, the plaintiff by counterclaim, claimed that the named defendants by counterclaim were producing, selling and promoting wine in Australia in bottles bearing the mark “Andrew Garrett Winemaker” and other related marks, which was contrary to the Licence Agreement and also to the agreements for the purchase by FWE of the assets and intellectual property of the Andrew Garrett Group Pty Ltd.

On 26 July 2000, the GFT, FWE (which at the time was Mildara Blass Estates), International Vintners Pty Ltd and Andrew Garrett Vineyard Estates Pty Ltd, as well as Mr and Mrs Garrett personally, together with two other parties, Vinpack International Pty Limited and Andrew Garrett Wine Resorts Pty Limited (who are not parties to the action), entered into a Deed of Settlement to resolve proceedings. The Deed of Settlement is a comprehensive and complex 31 page document containing a number of separate agreements.

113 After describing some of the more relevant clauses in the 2000 Deed, and the fact that as a result of the conclusion of the Deed, consent orders were signed and filed dismissing Mr Garrett’s claims and the counterclaims by the respondents to that proceeding, her Honour then set out (at [63]-[64]) the arguments made by Mr Garrett to support his application to have the consent orders set aside:

• That FWE has breached the Deed of Settlement in that it has failed to comply with terms, conditions and the tenure of the Deed of Settlement from the date of its execution “until today’s date”, being 30 April 2007. This includes failing to pay $600,000 per annum, and instead paying only $300,000 per annum, and failing to use best endeavours, which resulted in reducing the value of the Andrew Garrett name brand and associated marks by half.

• That the AGFT No 3 was entitled to receive the income from the Deed of Settlement at the direction of the GFT until the date of termination of the Deed of Settlement on 20 July 2006.

• That Mr Garrett had terminated the Deed of Settlement in his capacities as trustee of the Andrew Garrett Family Trust; the AGFT No 2 and the AGFT No 3, on 20 July 2006.

• That the institution by FWE of an action in the Victorian Supreme Court to pay monies due under the Deed of Settlement into the Victorian Supreme Court Litigants’ Fund, which was later transferred by a cross-vesting action into the Federal Court, was contrary to the requirements of the Deed of Settlement.

114 Before dealing with each of these arguments in turn, I note the most obvious issue arising from these grounds is the contradiction between the assertion that the Deed of Settlement was terminated by Mr Garrett on 20 July 2006, and at the same time the assertion that FWE “continued” to breach the Deed of Settlement until 30 April 2007.

115 Clause 9 of the 2000 Deed is set out at [87] of Layton J’s reasons for judgment. At [88] her Honour describes cl 9:

Clause 9 of the Deed of Settlement on one reading suggests that FWE was to pay royalties to “AMG”, being the reference by definition to Mr Garrett. At the same time, there is a reference to payments being made into a bank account of the AGFT. The interpretation of this clause and the entity entitled to the income stream is the subject of other litigation discussed hereafter. I make no findings of fact which would impact on the outcome of that litigation.

116 The “other litigation” to which her Honour refers here is the interpleader litigation commenced in the Victorian Supreme Court. Her Honour describes this, and its cross-vesting, at [101]-[104]:

The circumstances in which FWE paid the income stream into court was as follows. The trustee in bankruptcy of Mrs Garrett’s estate issued Federal Court proceedings in SAD 29/2005, claiming an entitlement to the income stream on behalf of her bankrupt estate. Following Mr Garrett’s bankruptcy in September 2004, disputes arose as to who was entitled to the income stream. A number of parties asserted an entitlement to the FWE royalty payments, including Mr Shu Mu Tseng; Evajade Pty Ltd; Universal Holdings Pty Ltd; Mrs Garrett’s trustee in bankruptcy; and Mr Garrett’s trustee in bankruptcy. On 22 July 2005 FWE sought interpleader relief in the Supreme Court of Victoria, Proceeding No 7323 of 2005, seeking that it pay the income stream due under the Settlement Deed into court as a result of uncertainty of the terms of clause 9 of the Deed of Settlement and whether the income stream was payable to Mr Garrett or to the trustees of the Garrett Family Trust.

The interpleader relief was granted and FWE paid the income stream into the Victorian Supreme Court as a result of the Court’s determination. Action 7323 of 2005 was later cross-vested to the Federal Court and became Federal Court Action Number SAD 5/2006. Thereafter monies have been paid by FWE into the Federal Court.

With regard to Mr Garrett’s claim that FWE had breached the Deed of Settlement by paying monies due under the Deed of Settlement into the Victorian Supreme Court Litigants’ Fund, apart from this being a subsequent event, it is untenable to allege that a payment in accordance with a court order would thereby amount to a breach of the Deed of Settlement. The money is clearly being held until such time as the Court makes a determination as to whom the monies should be paid. FWE contends that clause 9 of the Deed of Settlement is ambiguous. This is manifest by the interpleader action in the Victorian Supreme Court. These matters, together with Mr Garrett’s flawed assertion that the AGFT No 3 is entitled to the royalty payments, underscores how untenable Mr Garrett’s argument is with regard to an alleged breach by FWE.

In my view, there is no basis upon which Mr Garrett can properly argue that the Court orders appropriately obtained by FWE amount to a breach of the Deed of Settlement. In light of the disputes arising from the uncertainty of clause 9, the orders sought by FWE and made in the Federal Court were appropriate and necessary in the circumstances.

117 Thus, it is apparent that the construction of cl 9 was centrally in issue in the cross-vested proceedings which became SAD 5 of 2006. Those proceedings were amongst the proceedings settled by the Macks Deed to which I have referred above, and in respect of which consent orders disposing of SAD 5 of 2006 were agreed and filed by the parties, and subsequently made by the Court.

118 The compromise of the proceedings meant the proper construction of cl 9 was never the subject of judicial determination. Layton J did not determine it, as her Honour’s observations at [88] make clear.

119 Her Honour’s conclusions refusing Mr Garrett leave to reopen were expressed in the following terms (at [105]-[109]):

Considering the number of years that have elapsed since the matter settled, together with the entirely flawed nature of the application instituted by Mr Garrett to re-open this proceeding, in my view, there is no reasonably arguable basis for the application brought by Mr Garrett. It is a vexatious proceeding instituted by him asserting that a wrong has been done without in any way being able to substantiate his arguments. Moreover, Mr Garrett’s attempt to put this argument on behalf of a trust suggests to me that he is using whatever means he can, in whatever capacity he can, to devise ways to try to establish standing to continue to litigate against FWE.

The application to re-open was filed on 3 May 2007. It came hot on the heels of a judgment delivered by Finn J on 2 March 2007 in Action Number SAD 12/2007, which Federal Court action in turn had been instituted by Mr Garrett on 24 January 2007.

In the Federal Court proceedings in *Garrett v Foster’s Wines Estates Ltd*,Mr Garrett, purporting to act in a number of different capacities, sought to set aside the Asset Sale Agreement between the Wine Company Pty Ltd, Mildara Blass and Suntory Australia Pty Ltd. The application also sought an order that FWE pay to Andrew Morton Garrett® in his capacity as Trustee of the AGFT No 3 the monies that would have been due under the Garrett Family Licence. The Asset Sale Agreement lay at the heart of the circumstances giving rise to the Deed of Settlement.

In the course of his reasons, Finn J referred to the Deed of Settlement entered into between FWE and other parties on 26 July 2000. His Honour noted that there was significant reference to this Deed of Settlement in the Statement of Claim, but indicated that Mr Garrett had accepted during the course of the hearings that the Deed of Settlement was not in issue in the proceedings before him. Nonetheless, Finn J noted that the documentation relied on by Mr Garrett with regard to the application sought “impermissibly, but irrelevantly for present purposes, to attack collaterally the leave given in the Supreme Court of Victoria.”

This application was therefore yet another contrivance by Mr Garrett to re‑agitate similar related matters in the Supreme Court to those which had failed in the Federal Court. This is yet another reason for being satisfied that this application constitutes the institution of a vexatious proceeding by Mr Garrett.

120 Layton J was concerned with the lawfulness of the payment into court by FWE in the interpleader proceedings. That conduct is not the subject of the current proceedings. The proper construction of cl 9 of the 2000 Deed clearly is. Mr Garrett was litigating that issue in SAD 5 of 2006, but then chose to compromise that proceeding. This in my opinion has unavoidable consequences for his ability to re-litigate the issues in this proceeding, but no res judicata is created.

121 The second finding relied on by the respondents in relation to their res judicata submissions is a finding by Lander J in *Tseng* [2008] FCA 1011. It is appropriate now to say a little more about those proceedings. Lander J described the issue in those proceedings (at [1]-[3] and [33]) as follows:

This is an application by Mr Andrew Garrett to be joined in the cross-claim in this proceeding as the sole trustee of the Garrett Family Trust. He also seeks an order that he be given leave to file a cross-claim in the action.

The claim in this proceeding has been disposed of. However, the trustee of the bankrupt estate of Mr Andrew Garrett and the trustee of the bankrupt estate of Mr Garrett’s wife, Averil Garrett, have brought cross-claims seeking orders against a number of parties.

This application is opposed by the cross-claimants on the ground that the Garrett Family Trust does not exist and has never existed at any relevant time as a separate trust.

….

The sole question for determination is whether or not the Garrett Family Trust has ever existed. Mr Garrett has made different claims as to when the Trust was settled but his case on this application is that it exists as a separate trust. Mr Garrett has sought to establish the existence of the Garrett Family Trust by reference to a number of documents in which there is a reference to the Garrett Family Trust. The cross-claimants contend that any reference to the Garrett Family Trust in any document was in fact a reference to the Andrew Garrett Family Trust and that there was only ever one trust at the relevant time.

122 The respondents contend that the finding made by Lander J at [60] in this judgment creates res judicata against Mr Garrett as to his trade mark claims in this proceeding. Lander J said at [60]:

On 26 July 2000 Mr and Mrs Garrett, and Mr and Mrs Garrett as trustees of The Garrett Family Trust and other parties associated with them, entered into a settlement deed with Mildara and Vinpac International Pty Limited (the Deed of Settlement). The Deed of Settlement brought to an end the disputes which were raised by the proceedings in Action No 2244 of 1996. **Effectively, that Deed gave ownership of all the intellectual property rights owned by Mr and Mrs Garrett and associated entities to Mildara which thereafter was entitled to market and sell wine and other products bearing the Andrew Garrett Trade Mark, the Garrett Trade Mark, the Garrett Family Trade Mark and the Stylised Script Trade Mark in Australia, New Zealand and Japan**.

(Emphasis added.)

123 Lander J’s findings on the issue before him appear at [120]-[122]:

I am satisfied, as the cross-claimants contend, that Mr Garrett has made a number of representations inconsistent with the existence of the Garrett Family Trust and has conducted his affairs inconsistently with the existence of that Trust. It was not until some two years into the litigation between the cross-claimants and Mr Garrett that he first asserted, as he has now, that in fact the Garrett Family Trust was entitled to the debt owed or income stream owing by Beringer Blass pursuant to clause 9 of the Deed of Settlement of 26 July 2000.

In my opinion, notwithstanding the occasional reference to the Garrett Family Trust in some of the transactional documents prior to 2000, there is not, and never has been, a separate entity called the Garrett Family Trust of which Mr Garrett or Mr and Mrs Garrett was or were the trustees.

Where the expression the Garrett Family Trust is used in the transactional documents, in my opinion, it is a reference to the Andrew Garrett Family Trust which was then the only relevant trust in existence.

124 The finding which I have extracted at [119] above is Lander J’s finding of the effect, at the time, of the 2000 Deed. As I understand Mr Garrett’s claims in this proceeding, he contends either he had and exercised an option to buy the trade marks back, alternatively he was entitled to but did not receive a right of first refusal if they were sold, as they were to the first respondent. Lander J’s finding about ownership of the trade marks, at the time of the conclusion of the Deed, is a finding preliminary to the arguments Mr Garrett seeks to make. I do not consider this finding has the necessary operation in terms of res judicata to the claims now sought to be brought by Mr Garrett.

125 For the same reasons, there is no issue estoppel.

126 The approach I have taken does not preclude a finding, which I make at [195] below, that Lander J’s finding about the non-existence of the Garrett Family Trust, and Mr Garrett’s subsequent claims contrary to that finding, are clear examples of the persistent non-acceptance by Mr Garrett of judicial findings made against him. The proposed consent orders to which I have referred at [80] above are another example of the extreme level of non-acceptance of judicial findings exhibited by Mr Garrett.

### Anshun estoppel

127 It appears that some of Mr Garrett’s construction arguments (in particular to cl 9 of the 2000 Deed) may not have been made in the same terms before. He seeks to use these arguments as a springboard for the same kind of relief he has claimed in the past in relation to the 2000 Deed: namely, the payment of further sums of money under the 2000 Deed. The respondents’ submission that Mr Garrett is estopped from making further claims in this proceeding of this nature, based on *Anshun* principles, should be accepted in part.

128 Mr Garrett’s own contentions place the dates for the breaches of the 2000 Deed at “from 1 July 2000”. His allegations about the exercise of the option under cl 14 place those events in June 2005, and the events surrounding cl 15 and the right of first refusal in approximately October 2009.

129 The respondents are correct that Mr Garrett’s claims to further payments under the 2000 Deed could and should reasonably have been raised in the earlier proceedings. In fact, they were the subject of SAD 5 of 2006, which was settled by agreement. The settlement, and the dismissal of the claims by consent, binds the parties including Mr Garrett. There is some recognition of the binding effect of the Macks Deed in Mr Garrett’s recent efforts to “re-open” SAD 5 of 2006 only this year. In that sense, the existence of the settlement reflected in the Macks Deed provides this Court with a basis stronger than a claim of Anshun estoppel on which to dismiss those aspects of Mr Garrett’s claims. I deal with this in more detail at [193] below.

130 As to the purported exercise of the option in 2005 pursuant to cl 14 of the 2000 Deed, it is unclear in which proceeding the respondents allege this claim could and should have been brought. The respondents have referred to a series of proceedings in this Court, but do not identify which of them was the proceeding in which Mr Garrett could, and should, have made a claim which arose on the evidence in June 2005. Reference was made by the respondents in submissions to *Tseng*, and to Lander J’s findings in *Tseng* about ownership of the Andrew Garrett trade marks. TWEV (in its former iteration as Beringer Blass) was a party to that proceeding. However, the connection between the claims in that proceeding and the cl 14 claim was not developed by the respondents.

131 Another possibility is the decision of Gilmour J in *Re Garrett as Trustee* *for the Garrett Family Trust* [2009] FCA 252. It appears that TWEV (in its former iteration as Mildara Blass) was a party to that proceeding.

132 Gilmour J at [10]-[12] described the proceedings in the following terms, in part by reference to an affidavit sworn by Mr Garrett on 4 December 2008 and relied on in the proceeding before Gilmour J:

There then follows a claim, in terms, for:

(a) damages and loss allegedly suffered by all the Garrett related entities as a function of underpayments made to, relevantly, the Andrew Garrett Family Trust No 2 amongst others;

(b) damages suffered by all Garrett related entities as a consequence of impecuniosity caused by the Interpleader action commenced by Fosters Group Ltd in the Victorian Supreme Court in July 2005;

(c) damages and loss suffered by all Garrett related entities in SCCIV-127-2004, SCCIV-1767-2003 and Ors;

(d) projected gross margin earnings as at the acquisition dates of both the Garrett Family License (equivalent to the Wolf Blass Brand pursuant to the best endeavours clause) and the Andrew Garrett Brand ($5 mill per annum plus growth) for the last 12 years with respect to the Andrew Garrett Brand and 14 years with respect to the Garrett Family License;

(e) future sustainable gross margin earnings plus relaunch costs; globally; and

(f) costs.

There then follows reference to unpaid GST on certain payments; a claim for all of the monies held by this Court in respect of the proceeding in the South Australian Registry, SAD5 of 2006, as well as a claim against Fosters Wine Estates Ltd in respect of all monies set out in a spreadsheet attached to the correspondence in respect of the re-opening of SCCIV-2244-1996. Mr Garrett then foreshadowed certain proceedings under s 88 of the *Trade Marks Act 1995* (Cth) as well as under ss 51AA, 51AB, 51AC, 51ACAA, 52 and 53 of the *Trade Practices Act 1974* (Cth).

It is evident that the declaration sought in this proceeding in relation to the Andrew Garrett Family Trust No 2 sit within a very wide and complex set of facts involving claims against Fosters Group Ltd or companies within the Fosters Group.

133 The relief sought in (d) in particular might be thought to have been capable of encompassing a claim about the exercise of the option under cl 14 of the 2000 Deed. However, these arguments were not developed by the respondents and it is not possible to be satisfied of the basis on which it is said an Anshun estoppel arises.

134 The respondents conceded that Mr Garrett’s claim of breach of cl 15 (right of first refusal) does not give rise to any Anshun estoppel argument.

135 Accordingly, the only claims which could be said to be the subject of Anshun estoppel are the claims to payments under the 2000 Deed, based on a construction of cl 9 in particular, as against the third respondent only. The first two respondents have not been parties to any previous proceedings and no estoppels could be raised in relation to Mr Garrett’s claims against them. I accept the respondents’ submissions to that limited extent.

## Improper purpose

136 Under the heading of “illegitimate or ulterior purposes” the respondents’ submissions set out what are described as “three established categories” of abuse of process. Authority for this proposition is said to be the judgment of McHugh J in *Rogers v The Queen* (1994) 181 CLR 251 at 286.

137 The three categories identified by McHugh J at 286 are: the invocation of the court’s procedures for an improper purpose, the use of the court’s procedures in a way which is unjustifiably oppressive to one of the parties and the use of the court’s procedures in a way which would bring the administration of justice into disrepute. His Honour gave as an example of the second category the case of *Reichel v Magrath* (1889) 14 App Cas 665 where, although no estoppel could operate because there were different parties, an unsuccessful party in a previous case was not permitted to set up a defence in a second case which involved reliance on and re-litigation of issues on which judgment had been given against him in the first case.

138  *Reichel* has more recently been described by French CJ as a longstanding example of a re-litigation case decided on abuse of process grounds rather than on the basis of res judicata or issue estoppel: *Aon* *Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [33].

139 The respondents seek to rely on contentions to fit all three “categories”. In the circumstances of this proceeding, it is important to be clear about the various bases which have been identified for an order staying or dismissing a proceeding as an abuse of process. The concept is wide, and not closed, but different considerations may apply depending on the kinds of abuse of process contentions under consideration.

140 Particular considerations apply to a contention that a proceeding has been commenced or continued for an improper purpose. Although this submission was relied on by the respondents, they did not refer to the leading authority which is *Williams v Spautz* (1992) 174 CLR 509.

141  *Williams* concerned a proposed stay of private criminal prosecutions instituted, it was alleged, for a collateral and improper purpose of placing pressure on Dr Spautz’s employer (the University of Newcastle) to reinstate him to his position at the University. Dr Spautz had also commenced proceedings in the New South Wales Supreme Court seeking a declaration that his dismissal was invalid. Those proceedings were not resolved by the time the matter came before the High Court. At least 32 criminal proceedings were issued against individuals working at the University or who played a role in his dismissal. The offences for which the prosecutions were brought included criminal defamation, unlawful conspiracy and attempting to pervert the course of justice.

142 Although it concerned a proposed stay of a criminal proceeding, the majority judgment makes it plain the principles espoused apply equally to civil and criminal proceedings. The majority (Mason CJ, Dawson, Toohey and McHugh JJ) also emphasised the distinct considerations applicable where the particular abuse of process was said to be commencement or continuation of proceedings for an improper purpose. In such a circumstance, the key and distinct consideration is whether, notwithstanding the existence of a prima facie case (which, as the majority observed, would ordinarily entitle a litigant to prosecute his or her case to a conclusion), the litigant has no intention of prosecuting the proceedings through to a conclusion because he or she wishes to use them only for a collateral and improper purpose: *Williams* 174 CLR 509 at 522.

143 The improper purpose need not be the sole purpose in commencing or continuing the proceeding, but does need to be the predominant one: at 529. Applied to the circumstances in *Williams*, the majority agreed with the trial judge’s conclusion that, although Dr Spautz did have the purposes of vindicating his reputation by the criminal proceedings, his predominant purpose was to maintain the proceedings as a means of securing his reinstatement to his position at Newcastle University.

144 The collateral purpose given as an example by the majority in *Williams* is extortion of a pecuniary benefit from the defendant. But, just as the categories of abuse of process are not closed or closely defined, neither are the categories of improper purpose. A purpose involving bringing the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives a litigant in the event of such success is not relevantly an improper purpose: *Williams* 174 CLR 509 at 526.

145 It is apparent that there has been no attempt by the respondents to bring their contention within the principles of *Williams* 174 CLR 509. The “illegitimate or ulterior purpose” they rely on is the re-litigation of issues already decided against Mr Garrett. While such re-litigation may constitute an abuse of process, it is not of the kind discussed in *Williams* and should not be characterised as an improper purpose. To the contrary, it is patently clear Mr Garrett intends to prosecute these proceedings through to their conclusion in order to obtain the relief he seeks.

# ABUSE OF PROCESS

146 Improper purpose aside, it is the ground of abuse of process which, in my opinion, is fatal to all of Mr Garrett’s claims in this proceeding. My conclusions on this ground are also important to my conclusions on the respondents’ application for an order under s 37AO of the Federal Court Act.

147 A litigant’s unwillingness to accept findings in earlier litigation may be indicative of later claims constituting an abuse of process: *Liao v New South Wales* [2014] NSWCA 71 at [169] per Barrett JA (with whom Beazley P agreed). There were features of the Court of Appeal’s decision in *Liao* which were substantially different from those in the present proceeding: notably, that the litigant against whom the abuse of process allegation was made was a defendant in the first proceeding rather than a plaintiff. At [191], the Court of Appeal noted there was a “significant difference between, on the one hand, a plaintiff who, in later proceedings asserts, by way of either attack or defence, a case that the plaintiff has unsuccessfully pursued on an earlier occasion and, on the other, a defendant who initiates nothing, fails to withstand a particular attack and is later subjected to the same attack by a new claimant.” In the latter circumstance, the Court of Appeal concluded a court would be slower to reach a conclusion of abuse of process.

148 Mr Garrett’s circumstances fit within the first category, which the Court of Appeal in *Liao* clearly identified as within the concept of abuse of process. As I set out at [195] below, a feature of litigation commenced by Mr Garrett has been his unwillingness to accept findings made against his claims.

149 In *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279, having noted that the possible varieties of abuse of process are limited only by human ingenuity and the categories are not closed, French J said:

An unmeritorious claim brought merely in order to put pressure on a respondent for commercial or other reasons would no doubt be treated as an abuse. Such a claim might also be attacked as frivolous or vexatious or as disclosing no reasonable cause of action. Those designations are not mutually exclusive. An attempt to litigate in the Court a dispute or issue which has been resolved in earlier litigation in this or another court or tribunal may also, according to the circumstances, constitute an abuse of process even if not attracting the doctrines of res judicata or issue estoppel.

150 His Honour also noted (at 279) two policy considerations in dealing with abuse of process claims: namely a policy of preventing waste of judicial resources and their use for purposes unrelated to the determination of genuine disputes, and the necessity to maintain confidence in and respect for the authority of the courts.

151 In an allegation of abuse of process involving re-litigation, both those policy considerations are at work. The first because re-litigation involves the employment of judicial resources in a way which is properly described as “wasted” if the subject matter of the dispute has already been litigated and determined. The second because confidence in and respect for the authority of courts is diminished if final determinations by courts are permitted to be undermined by a litigant coming back to the same court, or a different court, seeking to raise again matters which have previously been decided. In considering these two policy considerations, and an allegation of abuse of process, unlike arguments of issue estoppel or res judicata, a broader view may be taken of what was “litigated” and what was “decided” by a previous court. That is because re-litigation of issues requires the court to examine the underlying subject matter of the various proceedings, as well as the determinations in fact made by the courts. The oppression and vexatiousness, and the inappropriate use of court resources, inherent in re-litigation arises from the institution and continuation of a proceeding, where it concerns the same or substantially the same subject matter as previous litigation. It is not only concerned with the findings made by a court to dispose of the previous litigation.

152 In my opinion, it is clear that Mr Garrett has engaged in substantial re-litigation of issues, having been unsuccessful to date in obtaining the outcome he desired from other proceedings. I have already referred in detail to the litigation in the Supreme Court of South Australia before Layton J and Anderson J. It is necessary now to refer in more detail to the litigation by Mr Garrett in this Court. I note also that Layton J referred to a number of cases in the Federal Magistrates’ Court, which her Honour took into account in making a vexatious litigant order against Mr Garrett.

## *Garrett v Westpac Banking Corporation* [2007] FCA 439

153 Finn J dismissed this proceeding brought by Mr Garrett. The subject matter of that proceeding was relevantly identical to one of the proceedings before Mansfield J, to which I refer below at [158]. Finn J described the subject matter in the following terms (at [10]-[11]):

On 2 January 2007 Mr Garrett acting in his capacity as agent for Mr Gray made an offer to the board of Qantas to acquire the issued share capital of Qantas and its subsidiaries. To anticipate matters, after a series of exchanges with Qantas’ legal advisers, Qantas not only rejected the offer (such had been foreshadowed at the outset), it also indicated it proposed no longer to acknowledge or to respond to his correspondence or telephone calls. Again to anticipate matters, Mr Garrett proceeded to make offers to acquire all of the issued capital of Fosters Group Ltd at a price of around $6.80 per share, this offer being made in his capacity as Managing Trustee of the Andrew Garrett Group – Corporate Investments Joint Venture (this last being a discretionary trust established by deed on 4 January 2007). The settlor of that was Mr Gray as Managing Trustee of Corporate Investments. The trust fund was the US$350 million Sight Draft issued on 18 December 2006. The beneficiaries were Mr Garrett in his capacity as trustee of the Andrew Garrett Family Trust (No 3) and Mr Gray in his aforementioned capacity. There is nothing to suggest how this draft drawn in favour of Cullen Capital could be so dealt with. Fosters indicated on 16 January 2007 that it attributed no credibility to the proposal and it did not propose to entertain the matter any further.

To complete the references to Mr Garrett’s proposed take over activities, on 12 January, purporting to act in the same capacity as he did in relation to Fosters, Mr Garrett made an offer to acquire the issued capital of Suncorp Metway Ltd. On 14 January he made a like offer to acquire the issued share capital of BHP Billiton Ltd. There is no evidence before me of the reception these offers received.

154 Finn J then proceeded to describe the way Mr Garrett framed his claims and Westpac’s characterisation of them (at [18]-[19]):

The essence of a claim made against the bank would appear to be captured in para 10 of the Statement of Claim. It is alleged that when Mr White received the Sight Drafts he should have arranged to credit Mr Garrett’s account with the amount on the face of the drafts pending clearance. His failure to do so is alleged to constitute a "breach of the Duty of Care owed by a Bank to its Customer, Unconscionable, Breach of Contract, Breach of the Bills of Exchange Act (C’th) (1909), breach of the Banking Act (C’th) (1959 and Breaches of Banking and Financial Institution law (sic)". These wrongs are not enlarged upon in any illuminating way in the pleading. Mr Garrett’s 37 page written submission does little to redress this. A large amount of wholly irrelevant material is contained in that submission.

…

Mr Garrett is an undischarged bankrupt. This provides part of the context for the respondents’ motion. As Westpac contends, the notion that Mr Garrett is in a position to negotiate genuine banking instruments with a value in the order of US$11.35 billion is so fantastic as to amount, of itself, to an absurdity.

155 At [23]-[24], Finn J then explained why Mr Garrett’s allegations did not raise any reasonable cause of action:

The short and insuperable response made by Westpac to this is that, whatever the function Westpac might have been assuming to perform when receiving the alleged bill, it was not making itself an acceptor of it and that this is apparent on the face of the instrument itself. Section 28(1) of the *Bills of Exchange Act* provides that a person is not liable as drawer, endorser or acceptor of a bill "if he has not signed *it* as such". Westpac simply did not sign the bill itself. It did sign a receipt for the bill. That signing does not satisfy the requirement of s 28(1). I agree. If such be Mr Garrett’s claim, it must fail.

The claimed breach of contract is unexplained and I do not speculate as to what was in contemplation, although the written submissions (which, in part, précis text and statutes dealings with bills of exchange and banker customer) seem to tie it, as also the negligence claim, to a wrong committed by Westpac variously as an acceptor of the bill and as a collecting bank. This pleading does not indicate the material facts giving rise to these claims. Nothing in the evidence put on by Mr Garrett would suggest that some viable cause of action is immanent in the circumstances upon which he relies.

## *Garrett v Foster’s Wine Estates Ltd* [2007] FCA 253

156 In another proceeding, Finn J set aside the originating process issued by Mr Garrett against FWE. After having dealt in some detail with a series of legal reasons why the allegations made by Mr Garrett gave his Honour concern about the accuracy of the representations made and the competence (in a legal sense) of Mr Garrett to make them, his Honour said (at [17]-[18]):

Having taken this course, I would not wish it to be thought that his Statement of Claim is not otherwise unobjectionable. The contrary is the case. It is an embarrassing document replete with grave assertions against persons and entities whether or not parties to the proceedings. It does not in any way properly reveal the basis upon which complaints were made. It simply asserts wrong doing. Additionally, I have already commented upon my concerns about the various capacities in which Mr Garrett purports to be making his claims. I can only suggest that if Mr Garrett is minded to institute further proceedings in this court (he has a considerable number running at the moment), he is likely to find documents cast in the form of his Statement of Claim in this matter are found to be quite objectionable.

What appears to underlie Mr Garrett’s complaints is his sense that the respondents (other than The Wine Company) have acted individually and in concert (hence the conspiracy allegations) to oppress the “Garrett Interests”, a description unexplained in the Statement of Claim.

157 At [19], Finn J then makes an observation of particular relevance in the context of the present applications before me:

Lest it be thought that I have overlooked a particular matter, Mr Garrett accepted during the course of the hearings before me that a Deed of Settlement he, amongst others, entered into with Mildara Blass Ltd on 26 July 2000 which was to be the final resolution of difficulties between, inter alia, Mr Garrett and Mildara Blass is not in issue in these proceedings. This notwithstanding significant reference is made to it in the Statement of Claim and he indicated in his affidavit of 25 January 2007 that action taken by Mildara Blass in relation to that Deed of Settlement (with the leave of the Supreme Court of Victoria), caused him to make the present application. Much in the documentation he has put on seeks impermissibly, but irrelevantly for present purposes, to attack collaterally the leave given in the Supreme Court of Victoria.

## *Garrett v Rann* [2007] FCA 528

158 This was a decision of Mansfield J, in a proceeding by Mr Garrett against nine respondents. Mansfield J dismissed the proceeding summarily. His Honour had indicated to Mr Garrett there were substantial difficulties with his claims against the respondents, and had given a series of directions designed to have Mr Garrett explain what his causes of action were against each of the respondents. Mr Garrett did not comply with the directions he was given by Mansfield J. Instead Mr Garrett filed an affidavit which Mansfield described in the following terms:

lengthy, discursive, disjointed, and in large measure incomprehensible … in affidavit form, and supported by various exhibits comprising the “constitution” of various companies, photographs of car racing teams, wine labels, various trust deeds, appointments of trustees, and decisions made by the Environment Resources and Development Court of South Australia…

159 His Honour noted the affidavit was in substance a repetition of claims made by Mr Garrett in another proceeding, *Garrett v National Australia Bank* [2007] FCA 530, in which his Honour gave judgment on the same day as the *Rann* proceeding, and which I discuss further below. In *Rann* at [5], Mansfield J said this of the other proceeding:

I dismissed that application because it discloses no arguable cause of action and the statement of claim is oppressive, embarrassing and vexatious. I will not repeat what I there said, but the comments there are equally applicable to the contents of this affidavit.

160 At [7], Mansfield J noted in particular the allegations made against Justice Bruce Debelle, the fifth respondent in the proceeding before Mansfield J, in respect of decisions made by the Full Court of the Supreme Court of South Australia. Mansfield J stated:

the fifth respondent is asserted to have been biased and prejudiced so that he should have not have sat on that appeal. There is no foundation in the statement of claim or in the affidavit to support those assertions. They are inappropriately made in the circumstances. Nor is there any suggestion that there is a need for pre-action discovery to maintain that claim. If the appellant had such concern of ostensible bias on the part of the fifth respondent, his appropriate course was to object at the time to that judge sitting on the appeal. He did not apparently do so.

161 Noting that Mr Garrett, on being confronted with the difficulties in moving forward with his proceeding, claimed he was in reality making an application for pre-trial discovery in order to see if he had a cause of action against any or all of the respondents, Mansfield J concluded at [11]:

The material does not support any of those pre-requisites to the exercise of the discretion to make an order for pre-action discovery. There is no reasonable cause to believe that the applicant has any cause of action or a right to obtain relief in this Court from any of the respondents. He has not shown that he has made any inquiries, and far from reasonable inquiries, to ascertain whether he has such a cause of action and cannot presently decide whether to do so. There is no reasonable cause to believe that any of the respondents have or have had any documents relating to the question of whether the applicant has the right to obtain relief by a proceeding in this Court.

## *Garrett v National Australia Bank* [2007] FCA 530

162 This was another decision in which Mr Garrett’s statement of claim was struck out by Mansfield J and the proceeding was dismissed. There were 43 respondents to this proceeding. At [2]-[4] of the reasons for judgment, Mansfield J stated:

At a directions hearing on 21 February 2007, I raised many of problems I perceived with the statement of claim with the applicant. He was given leave to file an amended application and/or amended statement of claim by 21 March 2007. The applicant did not take up that opportunity.

At the next directions hearing on 11 April 2007, the applicant made submissions about why the statement of claim as originally filed should not be struck out and the application dismissed.

The applicant confirmed that he did not wish to amend the application or the statement of claim. Indeed, he did not consider that he could improve the form or content of those documents.

163 At [8], Mansfield J described the claims by Mr Garrett as “ill-conceived, ill-pleaded and scattergun. It [that is, the statement of claim which his Honour struck out] includes claims which are simply ludicrous, and many which are ostensibly untenable”. His Honour then addresses sequentially and in detail a litany of deficiencies in Mr Garrett’s allegations, including making allegations against people who were not respondents, making no allegations against people who were respondents, pleading non-existent causes of action, making serious allegations without any foundation in the pleadings, and seeking relief to which he was not entitled or had no standing, His Honour noted there were over 2000 discrete causes of action. At [39] his Honour stated:

Neither the Court nor the respondents should be required to wade through so many permutations of allegations in the pursuit of some allegation of clarity and relevance to each particular respondent, so that the claim against that respondent can be understood.

## *Garrett v Westpac Banking Corporation* [2007] FCA 525

164 This was yet another application by Mr Garrett which Mansfield J dismissed. This proceeding concerned transactions involving Westpac, whereby Mr Garrett had sought to raise in October 2006 (whether on his own behalf or on behalf of others), first, $350 million, to purchase assets in FWE (a predecessor to the third respondent in this proceeding) and, second, $11 billion, in order to purchase 100% of Qantas Airways Ltd. Westpac refused to deal with those transactions and it appears to have been that refusal which triggered the litigation. Westpac’s position was set out by Mansfield J at [12]:

The letter from the solicitors for the first respondent clearly identifies its position. It says the two Sight Drafts are incapable of being cleared because the first respondent had been unable to verify the existence of the financial institution upon which the funds are said to have been drawn, or that any such funds exist. The first respondent was concerned that the two Sight Drafts were fabrications, and likely to be fraudulent.

165 At [10], Mansfield J sets out the way in which he attempted to regularise this proceeding, to no avail:

I pointed out some possible problems with the applicant’s pleadings, particularly with the nature of the relief sought, at a directions hearing on 21 February 2007. At that time, I gave leave to the applicant to file such amended application and such amended statement of claim as he may have been advised by 21 March 2007. The applicant has not filed any amended application or amended statement of claim.

166 Noting Mr Garrett had applied to have this proceeding joined with another proceeding he had on foot, Mansfield J said this of the other proceeding (at [13]-[14]):

Matter SAD 9 of 2007 was commenced by the applicant on 24 January 2007. It has identical parties, and the applicant alleges identical causes of action in both matters, and filed identical statements of claim in both matters.

On 26 March 2007, Finn J ordered that the applicant’s application in matter SAD 9 of 2007 be summarily dismissed with costs: see *Garrett v Westpac Banking Corporation* [2007] FCA 439.

167 At [19], Mansfield J set out a fundamental problem with Mr Garrett’s proceeding:

There may also be a more fundamental reason why this claim must now be dismissed. Matter SAD 9 of 2007 involved the same claims between the same parties based upon the same alleged conduct. Relevantly, the essence of the claim in each matter was that the first respondent and its officers had failed to meet the first and second Sight Drafts so as to make available in the account of the applicant as trustee of the Andrew Garrett Family Trust No 3 the funds to which they referred. The causes of action in each matter are the same. The issues as to whether any of those causes of action are reasonably arguable have been decided in *Garrett* [2007] FCA 439. The difference in the nature of the relief sought does not mean those issues have not been decided. The applicant should be estopped in any event from litigating in this proceeding the same issues as he raised in that matter simply because he claims a different (but misconceived) form of relief.

## *Garrett v Bransbury* [2007] FCA 529

168 Continuing his apparent pattern of taking issue with every adverse decision, Mr Garrett issued proceedings in the Federal Court against Anderson J of the Supreme Court of South Australia, and the then Registrar of that Court, Ms Bransbury: see *Garrett v Bransbury* [2007] FCA 529. Mr Garrett’s claims appeared to stem from a series of decisions in the South Australian Supreme Court concerning the forced sale of the property known as “Springwood Park” and Mr Garrett’s attempt to secure a stay on orders made by the Court in respect of that sale by the purported deposit with the Supreme Court of an International Bill of Exchange drawn on Creditnet Bank Internationale for $1.7 million. Mansfield J held that, for a variety of reasons expressed by his Honour (see especially at [7] and [17]) the Court had no jurisdiction in relation to the claims made. Aside from the denial of any jurisdiction, his Honour also observed (at [16]) that:

one struggles to see any foundation for the orders sought in the application in any event. The grounds for those orders, as set out in [6] above, are obviously entirely misconceived, discursive and inappropriate. I shall not dignify them by going through them individually.”

169 Once again, at [2], Mansfield J describes Mr Garrett’s inability to cooperate or comply with the Court’s directions aimed at regularising his proceedings:

On 21 February 2007, I raised with the applicant some concerns about the competence of the proceeding. I gave him leave to file such amended application as he may be advised, together with any further affidavit upon which he relied and a brief outline of his contentions as to why the Court has jurisdiction to issue the proposed orders, all by 21 March 2007. He has not filed any further documents.

## Proceedings against Mr Macks

170 There are then proceedings such as those issued by Mr Garrett against his then trustee in bankruptcy, Mr Macks: *Garrett v Macks* [2006] FCA 601.

171 At [10]-[15], in summarily dismissing the proceeding under s 31A of the Federal Court Act, Lander J was highly critical of Mr Garrett’s claims:

During the cross-examination of Mr Evans, Mr Garrett referred to other affidavits sworn by Mr Evans in other proceedings in which Mr Garrett is a party, and in which National Australia Bank is a party in this Court and in the Supreme Court of South Australia. Mr Garrett told me that he wished to refer to those proceedings for the purpose of establishing in his cross-examination that Mr Evans had been guilty of fraud. He said that Mr Evans’ fraud was in swearing false affidavits. I think what Mr Garrett meant was that he wished to establish that Mr Evans had been guilty of perjury

I should say immediately that he established nothing of the kind. Mr Evans gave his evidence in a forthright and appropriate manner. I accept Mr Evans’ evidence which he gave today. There was nothing put or established that in any way indicated that Mr Evans was guilty of either perjury or fraud or that those claims should have ever been made in this Court today.

The proceeding, as I have indicated, is hopelessly inadequate and hopelessly misconceived. First, the applicant seeks to have me exercise a criminal jurisdiction which is not part of the jurisdiction of this Court. For that reason, there needs to be nothing more said in dismissing paragraph 4 of the application.

Paragraph 3 of the application alleges fraud, perjury, unconscionable conduct, etcetera. No party is entitled to allege fraud in any Court without giving proper particulars of the fraud which is said to have been committed. It seems to me the same ought to apply to perjury. In that regard, a party ought not to allege that another party has committed perjury without giving particulars of the perjury so that the party against whom the allegation is made is in a position to respond to it.

These claims in their bald form should never have been made. They make the most serious allegations against a number of people, three of whom are officers of this Court, two of whom are professional persons who act as liquidators and trustees and are, therefore, responsible in that manner to this Court, and one of whom, of course, is a senior public officer, being the Deputy Commissioner of Taxation. Mr Garrett has made no effort in any way to support the allegations made in the proceeding. It was put by Mr Evans, by way of evidence, but really by way of submission in paragraph 19 of his affidavit, that the allegations are scandalous. I agree.

The allegations are scandalous and should never have been made in circumstances where no effort has been made to support the allegations made. Paragraph 3 of the notice is struck out.

## *Re Garrett as Trustee for the Garrett Family Trust* [2009] FCA 252

172 Mr Garrett then took his litigation strategy to Western Australia. In *Re Garrett as Trustee for the Garrett Family Trust* [2009] FCA 252, Gilmour J dismissed an application for declaratory relief brought by Mr Garrett about what Gilmour J described as the “so-called Garrett Family Trust” and the Andrew Garrett Family Trust No 2. Gilmour J referred to Lander J’s finding in *Tseng* [2008] FCA 1011 that there was not, and never had been, any separate trust entity known as the “Garrett Family Trust”. Gilmour J noted Mr Garrett had sought, and was refused, leave to appeal from this decision. One of the grounds for the refusal of leave by Lander J was that Mr Garrett was in effect seeking to re-litigate before the Full Court on different terms and on different evidence than the application which had previously been before him: *Garrett v Macks* [2008] FCA 1419 at [26]. Before Gilmour J, Mr Garrett sought to distinguish what he sought in the proceeding in the Western Australian Registry from the proceedings before Lander J, saying the former sought different relief. He also informed Gilmour J that the purpose of seeking declaratory relief about the position of the trusts was because the proceedings before Gilmour J

relate to the equitable interests of each Trust in bringing an action under sections 52, 53, 51AA, 51AC of the Trade Practices Act (1974) and section 88 of the Trademarks Act (1995) against Fosters Wine Estates which I foreshadowed.

The only two parties to the foreshadowed proceedings will be me in my Trustee capacity and Fosters Wine Estates Limited I wish to have clarity by declaration prior to the commencement of those proceedings.”

173 At [9], Gilmour J then sets out some of the evidence adduced by Mr Garrett in the proceeding before him:

Mr Garrett’s application is supported by an affidavit sworn by him on 4 December 2008. It is expressed in par 1 to be an affidavit to clarify the interest under which he has brought this application. He has exhibited to the affidavit correspondence dated 30 November 2008 from him, in his several asserted capacities including as trustee of the Andrew Garrett Family Trust No 2, to Mr Martin Hudson, Chief Legal Officer and Company Secretary of Fosters Group Ltd in Southbank, Victoria. It refers to action SCCIV-2244-1996 which, it would appear, is an action brought by Mr Garrett in his personal capacity and Mr Garrett together with his wife, Averil Gay Garrett, as trustees of the Garrett Family Trust against Mildara Blass Limited, first defendant; Tatachilla Winery Pty Ltd, second defendant; and the Registrar of Trade Marks, third defendant. It includes a counterclaim by Mildara Blass Ltd. The correspondence begins:

As you know I applied to re-open that action with a view to setting aside the Mildara Blass Deed of Settlement dated 26th July 2000 as well as the previous existing Heads of Agreement dated 7th June 2000 and the Garrett Family License dated 24th March 1994. Her Honour Justice Layton has reserved her judgment.

174 Gilmour J then attempts to summarise (at [10]-[11]) the nature of the claims made by Mr Garrett. These claims appear to have been made in the proceeding before Gilmour J notwithstanding on its face that proceeding purported to be in respect of declaratory relief only and named no respondents:

175 There then follows a claim, in terms, for:

(a) damages and loss allegedly suffered by all the Garrett related entities as a function of underpayments made to, relevantly, the Andrew Garrett Family Trust No 2 amongst others;

(b) damages suffered by all Garrett related entities as a consequence of impecuniosity caused by the Interpleader action commenced by Fosters Group Ltd in the Victorian Supreme Court in July 2005;

(c) damages and loss suffered by all Garrett related entities in SCCIV-127-2004, SCCIV-1767-2003 and Ors;

(d) projected gross margin earnings as at the acquisition dates of both the Garrett Family License (equivalent to the Wolf Blass Brand pursuant to the best endeavours clause) and the Andrew Garrett Brand ($5 mill per annum plus growth) for the last 12 years with respect to the Andrew Garrett Brand and 14 years with respect to the Garrett Family License;

(e) future sustainable gross margin earnings plus relaunch costs; globally; and

(f) costs.

176 There then follows reference to unpaid GST on certain payments; a claim for all of the monies held by this Court in respect of the proceeding in the South Australian Registry, SAD 5 of 2006, as well as a claim against FWE in respect of all monies set out in a spreadsheet attached to the correspondence in respect of the reopening of SCCIV-2244-1996. Mr Garrett then foreshadowed certain proceedings under s 88 of the Trade Marks Actas well as under ss 51AA, 51AB, 51AC, 51ACAA, 52 and 53 of the Trade Practices Act.

177 The similarity, and substantial overlap, with the subject matter of the proceedings before me with these “foreshadowed” proceedings can be noted.

178 Gilmour J found the proceeding did not raise a federal matter and should be dismissed on that basis for want of jurisdiction. His Honour also found (at [19]):

it is an attempt to re-litigate the same issue as to the existence of the so-called Garrett Family Trust as was decided by Lander J and should be dismissed under O 20 r 5(1)(b) and (2) of the Federal Court Rules as an abuse of the process of the Court.

## More recent litigation

179 This is by no means an exhaustive list of all the published judgments in matters commenced by Mr Garrett in the Federal Court of Australia. Over the last 12 months Mr Garrett has commenced a number of proceedings out of the Victorian Registry of the Federal Court, aside from the one before me. In some, judgment has been delivered. In others, as I observe below, the proceedings continue.

180 In *Garrett v Australian Trade Commission* [2014] FCA 575, Davies J upheld an objection to competency made by the respondent and dismissed Mr Garrett’s proceeding against it. The second applicant, a company Mr Garrett asserted he controlled, and to which he provided consultation services, was refused an export market development grant by Austrade. The grant request included a request for a grant of $1.2 million to establish an “international marketing office”. The company had been placed in liquidation and the *Export Market Development Grants Act 1997* (Cth) precluded a grant being made to such a company unless (pursuant to s 87C(2)) the person administering it certified the company was able to pay all its debts as and when they become due and payable.

181 Austrade refused to accept Mr Garrett’s certification that he was the “controller” of the company in liquidation for the purposes of s 87C(2) of the Export Market Development Grants Act and could certify that the company could pay all its debts. Instead, Austrade required the certification of the company’s liquidator before Austrade would consider the grant application, which Mr Garrett did not produce. Davies J found there was no reviewable decision for the purposes of the *Administrative Decisions (Judicial Review*) *Act 1977* (Cth) and that, in any event, Mr Garrett had no standing to bring the proceeding. Her Honour. dismissed the proceeding.

182 In *Garrett v Deputy Commissioner of Taxation* [2014] FCA 576, Mr Garrett brought proceedings in his own right and again in the name of the company which was the second applicant in the Austrade proceeding. Mr Garrett applied under s 482 ofthe Corporations Act to have the liquidation of the company terminated. Davies J found Mr Garrett had no standing to bring such an application because he had not demonstrated that he had standing either as a creditor or as a contributory of the company. The respondent submitted the proceeding should also be dismissed as an abuse of process, because of the terms of s 206A of the Corporations Act, which provides:

A person who is disqualified from managing corporations under this Part commits an offence if:

(a) they make or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(b) they exercise the capacity to affect significantly the corporation’s financial standing; or

(c) they communicate instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation;

(i) knowing that the directors are accustomed to act in accordance with the person’s instructions or wishes; or

(ii) intending that the directors will act in accordance with those instructions or wishes.

183 The Deputy Commissioner contended that, in bringing the proceeding before Davies J, Mr Garrett contravened s 206A by acting as the managing controller of those companies to which he purports to have been appointed. Although Davies J found there was “some substance” in that contention, her Honour expressly did not decide the issue and did not rely on this as a basis to dismiss the proceeding.

184 In addition to the proceeding before me, there are currently six other proceedings by Mr Garrett issued in this registry and not yet finally determined.

185 In VID 304 of 2014, filed with the Court on 5 June 2014, Mr Garrett seeks by way of fast track application orders that the surplus of his bankrupt estate be paid to him by the respondent, Mr Macks, who is that estate’s trustee in bankruptcy. He also seeks orders that Mr Macks provide him with certain documents pertaining to the bankrupt estate, including documents constituting legal advice. The claims in this proceeding clearly overlap with previous claims made by Mr Garrett.

186 By way of originating application filed with the Court on 27 July 2014, in VID 425 of 2014 Mr Garrett seeks orders that the surplus of his former wife’s bankrupt estate be paid by the respondent, Mr Duncan, who is the estate’s trustee in bankruptcy. He seeks orders that the surplus be paid to Mr Garrett in his capacity as joint trustee of the Averil Garrett Family Trust. He also seeks certain interlocutory relief, including that the respondent provide to him certain documents relating to the administration of the bankrupt estate. Again, the claims in this proceeding clearly overlap with previous claims made by Mr Garrett. The existence and nature of these proceedings is of some relevance to the respondents’ vexatious litigant application, and their claims of abuse of process, as well ascertaining any overlap between the subject matter of this proceeding and the subject matter of the other proceedings.

187 There are also further proceedings against the Deputy Commissioner of Taxation, and further applications for judicial review of decisions made by Austrade.

# MR GARRETT’S CONDUCT IN THE PROCEEDING BEFORE ME

188 Following the first directions hearing for this proceeding, Mr Garrett has corresponded by email frequently with staff in the Registry, staff supporting Registrar Pringle, and with staff in my chambers. The email correspondence was often lengthy, attaching multiple documents, and was copied to various individuals and organisations including the solicitors for the respondents and the respondents directly. It was also copied to professional advisers it appears Mr Garrett sought to retain, chambers of judges in the Supreme Court of South Australia, the Commonwealth Attorney-General’s Department and the Attorney-General for South Australia, and entities responsible for regulating the professional conduct of legal practitioners such as the Victorian Legal Services Commissioner. The Productivity Commission was also copied into the emails.

189 The emails canvassed a number of issues including this and other proceedings on foot in this Registry, the financial position of one of Mr Garrett’s companies, various demands for payment made by him to the respondents, his complaints to the Legal Services Commissioner regarding the conduct of legal representatives previously retained by him, his ongoing disputes with his and his wife’s trustees in bankruptcy, and freedom of information requests that it appears were issued by Mr Garrett to the Attorney-General for South Australia and the South Australian Supreme Court. The email correspondence also made allegations of conflict of interest against the respondents’ solicitors. Sifting through this correspondence to determine whether there were matters that required the attention of the Registrar or the Court took considerable staff time and resources. It also meant that Mr Garrett’s multifarious allegations against a wide variety of people were published to an even wider range of people.

190 In response to this correspondence, on 27 June 2014 Registrar Pringle wrote to Mr Garrett, setting out the protocols for communicating with the Court, including the limited circumstances in which it is appropriate for a party to communicate directly with judges’ chambers and the Registrar, and the kinds of matters on which it might be appropriate to do so, with reference to the overarching purpose of the civil practice and procedure provisions set out in s 37M of the Federal Court Act.

191 Following the filing of two interlocutory applications by Mr Garrett, to which I refer to at [11] above, and having formed a view that Mr Garrett was not listening to the advice he had been given about communications with the Court, I made orders restraining Mr Garrett from making any further interlocutory applications in this proceeding, without leave being granted, until the completion of a case management conference before Registrar Pringle. After that case management conference Mr Garrett did exercise some self-restraint and did not file any further interlocutory applications. He did, however, commence a number of fresh proceedings in the Victorian Registry.

192 Since I reserved judgment on the respondents’ r 26.01 application, Mr Garrett has continued to attempt to communicate directly with my chambers and with the staff of the Registrar, seeking further hearing on his “debt matters”, to which I have referred at [15] above. He has not accepted the position which I explained to him at the conclusion of the hearing of the respondents’ r 26.01 application. The staff supporting the Registrar directed Mr Garrett’s attention to the letter sent to him from the Registrar on 27 June 2014 regarding appropriate communication with the Court. He did then desist from further communications, but the resources expended on Mr Garrett’s persistent direct communications within the Court have been significant.

# WHAT FEATURES DO THESE REPORTED DECISIONS DISCLOSE ABOUT MR GARRETT’S LITIGATION?

193 Taking the previous proceedings brought by Mr Garrett into account, together with the conduct to which I have referred at [188] to [192] above, certain features emerge. There is considerable repetition of the same or similar allegations by Mr Garrett in different proceedings, sometimes directly, sometimes indirectly. He engages in a practice of naming large numbers of respondents while not making clear allegations against them all. He often seeks to join additional respondents. He engages in a practice of repeatedly naming the same respondents. The allegations he makes as the basis for claims in proceedings have been found by the judges who have dealt with his proceedings generally to be unintelligible, prolix and often inflammatory. The reported decisions record that he frequently fails to comply with court directions intended to have him clarify and regularise his claims.

194 Mr Garrett engages in the practice of bringing proceedings in various “capacities” but this practice is, in my opinion, in reality an attempt to distinguish proceedings where the subject matter is materially indistinguishable from previous proceedings. Mr Garrett is prone to making collateral attacks on findings made, or conclusions reached, by courts in other proceedings. He has issued proceedings in different registries of this Court, and in different courts, even though the subject matter overlaps with matters already dismissed or decided against him in other registries and courts. The reported decisions disclose that he often refuses to acknowledge deficiencies in the way the claims are made, and refuses to rectify deficiencies when they are identified to him. He displays no insight into the deficiencies or lack of legal merit of his claims. More than once, he has made inappropriate and inflammatory allegations without any disclosed factual foundation for them.

195 The impression which is created, attempting to characterise this behaviour as favourably as I can for Mr Garrett, is that he is so firmly persuaded in his own mind that he has not received any “justice” that he simply refuses to accept any outcome, including a judicially imposed outcome, that does not give him what he believes he is entitled to.

196 I consider that Mr Garrett has continued many of those features in the proceeding before me. First, the subject matter of the proceeding is once again the 2000 Deed, which has featured, directly or indirectly, in many previous proceedings brought by Mr Garrett. Likewise, the disputes over ownership of wine labels and trade marks have been raised in other proceedings.

197 There is no doubt that what Mr Garrett seeks to do in this proceeding is to revisit yet again the bargain struck by the 2000 Deed, and his complaints about the performance of that bargain. It should not be overlooked that the 2000 Deed itself was a compromise of proceedings brought by Mr Garrett in No 2244 of 1996 in the Supreme Court of South Australia. He appears never to have accepted the terms of that compromise as binding upon him in any realistic sense.

198 The consequences of the performance (or alleged non-performance) of the parties’ obligations under the 2000 Deed have been worked out in many of the subsequent proceedings brought by Mr Garrett. The interpleader proceedings transferred from the Victorian Supreme Court to the South Australian Registry of the Federal Court and which became SAD 5 of 2006 concerned payments under the 2000 Deed.

199 The interpleader proceeding was settled by consent orders, to which Mr Garrett was a party. Notwithstanding that fact, Mr Garrett has this year sought to reopen those proceedings. In the Victorian Registry, Mr Garrett now has proceedings which seek directly to interfere with the consent orders made by Lander J in Mr Garrett’s proceeding against Mr Macks, in circumstances where Mr Garrett was party to a deed of settlement with Mr Macks (and others) in respect of that proceeding (VID 304 of 2014).

200 The proceedings before Layton J in *Mildara Blass* [2009] SASC 19 concerned, amongst other things, the first attempt by Mr Garrett to reopen the proceedings in No 2244 of 1996, which had resulted in the 2000 Deed. The basis on which Mr Garrett sought to reopen those proceedings was first, that the 2000 Deed had been breached and, second, that he had terminated it. He relied on several affidavits sworn by him and, as Layton J noted at [62] of her Honour’s judgment, six volumes of annexures. I note of course (as Layton J did at [64] in the context of the application before her), that the second allegation made by Mr Garrett (of termination) is wholly inconsistent with his subsequent conduct in seeking to issue proceedings to enforce payments made under the 2000 Deed, including in this proceeding. The extract of Layton J’s judgment at [119] above clearly indicates that Mr Garrett’s determination to re-agitate and re-litigate many aspects of the 2000 Deed and its consequences for him (which have included his bankruptcy, the loss of assets and the sale of properties with which he was connected directly or indirectly) is not, and never has been, accompanied by any substantive legal arguments which can be said to have sufficient force for his numerous proceedings to survive even preliminary examination by a variety of judges in a variety of courts.

201 The subject matter of these proceedings — the 2000 Deed and its consequences — has been directly or indirectly the subject now of several proceedings brought by Mr Garrett. Since Mr Garrett seems incapable of exercising any self-discipline in relation to drawing a line under his wholly unsuccessful attempts to litigate his complaints about the 2000 Deed and its consequences, the Court must take action itself to prevent any further abuse of its processes by Mr Garrett.

202 The two policy considerations identified by French J in *Sea Culture* 32 FCR 275, and to which I referred at [149] above, are best served by the dismissal of this proceeding as an abuse of process. In my opinion there has been a very substantial waste of judicial resources over a period of more than ten years, dealing with repetitive claims by Mr Garrett, claims whose merits have been consistently assessed by a variety of judicial officers as indiscernible, in circumstances where Mr Garrett has stubbornly refused to attempt to reframe his claims in a more sensible and intelligible way, in accordance with court directions given to him. Those judicial resources include more than the time taken by judges in directions hearings, preliminary hearings and full hearings in dealing with the scattergun approach of Mr Garrett. They include time spent by judges’ staff in chambers in preparation for these hearings, and time spent in dealing with Mr Garrett personally. All this is time which cannot be devoted to other litigants and other cases in the Court, most of whom only ever have one proceeding in the Court.

203 Considerable non-judicial resources are also expended — court officers, transcript officers, the occupation of courtrooms which could be used for other cases: there are vast amounts of public funds involved in the provision of these resources, even if that is not always apparent to individual litigants, and considerable time spent in dealing with Mr Garrett at registry and chambers level. He has shown himself to be overly and unreasonably persistent in both the nature and frequency of his communications with the Court. His consistent challenging of any decision which he does not like, where there is no legal or factual basis for his dissatisfaction, simply compounds the disproportionate expenditure of the Court’s resources on his matters.

204 The Court’s resources (judicial and otherwise) are finite, and must be reasonably and effectively employed. These considerations, which have always been taken into account by the courts in the exercise of their powers, are now mandatory in this Court by reason of the terms of s 37M of the Federal Court Act. The continuation of a proceeding such as this does not facilitate the just resolution according to law of any dispute between the parties to this proceeding, and it certainly does not do so as quickly, inexpensively and efficiently as possible. That is because the underlying subject matter of the proceeding (Mr Garrett’s claims about the 2000 Deed and its consequences) has, in part expressly and in other parts in substance, already been the subject of determination according to law, whether by way of summary dismissal of claims or otherwise. Those parts which cannot be said to have been so determined either could have formed part of earlier claims (and may well have in fact formed part of earlier claims, if the documents had been more intelligible to the judges who had to deal with them) or nevertheless involve a level of re-litigation about the 2000 Deed and its consequences which should not be permitted. Parties who have already been entangled in litigation by Mr Garrett for more than a decade should not be subjected to further costs and expenditure of time and resources, especially in circumstances where it is apparent Mr Garrett has no capacity to compensate those parties if costs orders are made. Similarly, for entities made respondents by Mr Garrett for the first time (that is, the first and second respondents) in my opinion the naming of them is no more than a strategy to continue a debate which Mr Garrett has had, repeatedly, with the third respondent about the ownership of intellectual property transferred or assigned as a result of the 2000 Deed.

205 The second policy consideration to which French J referred, that of the necessity to maintain confidence in and respect for the authority of the courts, also compels the dismissal of Mr Garrett’s proceedings as an abuse of process. Time and again, judges of this Court, and other Courts, have ruled on the lack of merit and substance in Mr Garrett’s multifarious claims. Time and again he has refused to accept those rulings, and has looked for ways to circumvent them. Sometimes that has been by moving his claims to other registries of the same court. Sometimes it has been by way of unmeritorious appeals. Sometimes it has been by commencing proceedings in different “capacities”, or by making a claim which enables him to draw in, indirectly, his historic grievances arising from the 2000 Deed and its consequences. Whichever way one examines the history of Mr Garrett’s litigation over the last decade, it reveals a lack of respect for the authority of the courts’ decisions made against him.

206 For those reasons in my opinion the proceedings should stand dismissed in their entirety as an abuse of the processes of this Court. As I have found at [135] and [107] above, Mr Garrett is also estopped from making some claims in this proceeding and lacks standing to make others.

# APPLICATION UNDER SECTION 37AO OF THE FEDERAL COURT ACT

207 I have already set out (above at [70]-[71]) the summaries given by both Anderson and Layton JJ of the Supreme Court of South Australia, in different proceedings, of the number and extent of the proceedings brought by Mr Garrett to the date at which each of their Honours made orders in their jurisdiction declaring Mr Garrett a vexatious litigant.

208 Although Mr Garrett protested strenuously at the suggestion in the respondents’ submissions in this proceeding that one of the reasons he had commenced proceedings in the Victorian Registry of the Federal Court was to avoid the effect of the vexatious litigant orders in the Supreme Court of South Australia, I am prepared to infer that those orders constitute at least in part a reason for him having chosen to commence proceedings outside South Australia. I accept Mr Garrett may also be currently resident in Victoria, and indeed he has also referred to current proceedings he has in the Supreme Court of Victoria. Nevertheless, in the absence of the vexatious litigant orders, the Supreme Court of South Australia would otherwise appear to be the natural forum for Mr Garrett’s complaints.

209 Section 37AO of the Federal Court Act provides:

(1) This section applies if the Court is satisfied:

(a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or

(b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by paragraph (a), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The Court may make any or all of the following orders:

(a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;

(b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;

(c) any other order the Court considers appropriate in relation to the person.

Note: Examples of an order under paragraph (c) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

(a) the Attorney-General of the Commonwealth or of a State or Territory;

(b) the Registrar of the Court;

(c) a person against whom another person has instituted or conducted a vexatious proceeding;

(d) a person who has a sufficient interest in the matter.

(4) The Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under paragraph (2)(a) or (b) is a final order.

(6) For the purposes of subsection (1), the Court may have regard to:

(a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and

(b) orders made by any Australian court or tribunal; and

(c) the person's overall conduct in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal); including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

210 Section 37AM(1) defines “vexatious proceeding” as including:

(a) a proceeding that is an abuse of the process of a court or tribunal; and

(b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and

(c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and

(d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

211 For the reasons I have set out above, I have concluded this proceeding is an abuse of the process of this Court. It falls within the definition of vexatious proceeding in s 37AM(1)(a).

212 I have expressly declined to dismiss summarily Mr Garrett’s claims on their legal and factual merits: see [84] to [108] above. That does not however preclude a finding for the purposes of the respondents’ application under s 37AO that the proceeding was instituted “without reasonable ground”. I reach that conclusion because in the circumstances I have outlined in these reasons for judgment it cannot be said that Mr Garrett had reasonable grounds for commencing yet another proceeding to pursue his view of the performance of the 2000 Deed and its consequences. On any objective basis, both in terms of former opportunities, and the subject matter of previous proceedings, there was no reasonable basis to believe a Court would allow Mr Garrett yet another chance to re-litigate his view of the performance of the 2000 Deed and its consequences, with all the attached cost and resources impositions it placed on both the Court and the respondents. In that sense, this proceeding was in my opinion instituted without reasonable ground, for the purposes of s 37AM(1)(c).

213 As to the other requirements in s 37AO, in my opinion I am satisfied they are all met.

214 As to s 37AO(1)(a), Mr Garrett is a person who has, on any view “frequently” issued proceedings in both this Court (now in three different registries and on multiple occasions) and in the South Australian Supreme Court at least. Anderson and Layton JJ both found Mr Garrett’s proceedings before them to constitute an abuse of process, and found other proceedings he had issued were also an abuse of process. Mansfield and Lander JJ have made similar findings. Gilmour J also found in the proceedings before him that Mr Garrett was attempting to re-litigate issues. Their Honours’ descriptions of the nature of Mr Garrett’s claims in the matters before them confirm in my own mind those proceedings meet either paragraph (a) or (c) of the definition of “vexatious proceeding” in s 37AM(1), or both of those definitions. Further, and simply by way of example, there was no reasonable ground for the proceeding against the Deputy Commissioner of Taxation recently dismissed by Davies J. It is notable in my opinion that none of Mr Garrett’s substantive claims have ever been permitted to go to trial. This, in and of itself, satisfies me that he has frequently instituted vexatious proceedings within the meaning of s 37AM(1)(c).

215 Mr Garrett has had the opportunity of being heard both orally and in writing, in relation to the order sought by the respondents (s 37AO(4)).

216 I have taken into account, in accordance with s 37AO(6), the proceedings instituted by Mr Garrett to which I have referred in these reasons for judgment, together with the orders made by both Anderson and Layton JJ. I have also taken account of the summary dismissal orders made on several occasions in particular by Mansfield and Lander JJ, and also by Gilmour J. I have taken into account the conduct by Mr Garrett of this proceeding, as I have set out at [188]-[192] above, as well as the findings made in particular by Mansfield J in several of his Honour’s reasons for judgment concerning Mr Garrett’s non-compliance with directions made by the Court, which were essential to the existence of claims with sufficient legal and factual substance to be allowed to go to trial.

217 The orders sought by the respondents (who are entitled to make the application by reason of s 37AO(3)(c)) are:

1. Mr Garrett is hereby prohibited from:

(a) instituting in his own name; or

(b) causing others to institute; or

(c) being concerned, whether directly or indirectly, in the institution of

any proceedings in any registry of the Federal Court of Australia against Make Wine Pty Ltd, VOK Beverages Pty Ltd, Treasury Wine Estates Vintners Limited or any related body corporate, employee, agent or adviser of Make Wine Pty Ltd, VOK Beverages Pty Ltd, Treasury Wine Estates Vintners Limited without the leave of this Court.

218 I am prepared to make orders in the form sought.

219 In my opinion there is an ample basis on the evidence in this application, together with previous reported decisions and Mr Garrett’s spectrum of current litigation in this Court, for the making of wider orders under s 37AO(3), prohibiting Mr Garrett from commencing any further proceeding in any registry of the Federal Court, without the leave of a judge. On the basis of the conclusions I have reached in these reasons for judgment, and the number of proceedings I have now reviewed which he has instigated, it seems to me it is arguable that it would best serve the overarching purpose identified in s 37M of the Federal Court Act, and the object of s 37AO, if Mr Garrett were required to seek leave before commencing any further proceeding in this Court, in any Registry. I propose to draw my reasons for judgment in this matter to the attention of the Attorneys-General of the Commonwealth and the State of Victoria, and the Registrar of this Court, so that consideration might be given to this question. Of course, no such order could be made without giving Mr Garrett a reasonable opportunity to be heard in accordance with s 37AO(4).

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| I certify that the preceding two hundred and nineteen (219) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 21 November 2014