FEDERAL COURT OF AUSTRALIA

McFarlane as Trustee for the S McFarlane Superannuation Fund v IOOF Holdings Limited [2018] FCA 692

File number:	NSD 1827 of 2017
Judge:	**GLEESON J**
Date of judgment:	18 May 2018
Catchwords:	**PRACTICE AND PROCEDURE** – application for preliminary discovery – prospective "fraud on the market" representative action – whether reasonable belief in right to relief – whether public information sufficient to enable decision as to commencement of proceedings – whether documents directly relevant to right to relief – preliminary discovery granted
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) s 12DA *Australian Consumer Law* (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) s 18 *Corporations Act 2001* (Cth) ss 674, 1014H *Federal Court Rules 2011* r 7.23

Cases cited:	*Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391 *Apache Northwest Pty Ltd v Newcrest Mining Ltd* [2009] FCAFC 39; (2009) 182 FCR 124 *Benchmark Certification Pty Ltd v Standards Australia International Ltd* [2004] FCA 1489; (2004) 212 ALR 464 *Clarke v Sandhurst Trustees Ltd* [2014] FCA 580; (2014) ACSR 215 *Costin v Duroline Products Pty Limited* [2013] FCA 501 *EBOS Group Pty Ltd v Team Medical Supplies Pty Ltd (No 3)* [2012] FCA 48; (2012) 199 FCR 533 *GlaxoSmithKline Australia Pty Ltd v Pharmacor Pty Ltd* [2014] FCA 1202 *Glencore International AG v Selwyn Mines Ltd* [2005] FCA 801; (2005) 223 ALR 238 *Higgins v Hancock* [2011] FCA 1492; (2011) 199 FCR 393 *L'Oreal Australia Pty Ltd v BrandPoint Pty Ltd* [2015] FCA 978 *Matrix Film Investment One Pty Limited v Alameda Films LLC* [2006] FCA 591 *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193; (2017) 351 ALR 103 *Reeve v Aqualast Pty Ltd* [2012] FCA 679 *Sandhurst Trustees Limited v Clarke* [2015] FCAFC 21; (2015) 321 ALR 1 *St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360; (2004) 211 ALR 147
Date of hearing:	1 February 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance

Category:	Catchwords
Number of paragraphs:	89
Counsel for the Prospective Applicant:	Mr I Jackman SC
Solicitor for the Prospective Applicant:	ACA Lawyers
Counsel for the Prospective Respondent:	Mr J Peters QC
Counsel for the Prospective Respondent:	King & Wood Mallesons

ORDERS

NSD 1827 of 2017

BETWEEN:	**JOHN DOUGLAS MCFARLANE AS TRUSTEE FOR S MCFARLANE SUPERANNUATION FUND** Prospective Applicant
AND:	**IOOF HOLDINGS LIMITED (ABN 49 100 103 722)** Prospective Respondent

JUDGE: **GLEESON J**

DATE OF ORDER: **18 MAY 2018**

THE COURT ORDERS THAT:

1. The prospective respondent give discovery to the prospective applicant of the following documents:

   Any documents raising the allegations reported in the Sydney Morning Herald online ("SMH") between 20 and 27 June 2015, or referred to at the Senate Committee hearing on 7 July 2015, and identified by Mr Jackman SC at the hearing on 1 February 2018, of:

   front-running of research reports prepared by IOOF's equities team;

   insider trading;

   IOOF staff sitting compulsory training on behalf of Peter Hilton;

   overstated performance of IOOF funds;

   client recommendations made with no reasonable basis;

   plagiarism in research reports;

   breaches of the *Corporations Act 2001* (Cth) by financial planners;

   failure to maintain proper compliance controls for client data and to manage conflicts of interest;

improper share allocations;

"stuffing a capital shortfall in the capital raising of ING Office Fund into one of IOOF's funds to the detriment of customers of that fund";

"suspected naked short selling" in around January 2009;

improper use of passwords;

not investing in and properly maintaining IT;

advice given by equities team analysts who were "not compliant to provide general or specific advice"; and

bullying, harassment and isolation,

within IOOF or any subsidiary of IOOF in the period from 1 January 2008 to 15 June 2015 ("alleged misconduct").

Reports, communications and any other documents setting out the findings from any investigations by IOOF or any other person or entity, including PricewaterhouseCoopers, as to whether any of the alleged misconduct occurred.

Any documents, including but not limited to board minutes, board papers, reports and plans, evidencing any action taken as a result of any of the alleged misconduct, including:

commencing an internal or external review or investigation; and

actions taken as a result of the findings of any investigations or review in relation to the alleged misconduct, regardless of whether the alleged misconduct was substantiated.

The internal and board reviews, notifications to industry regulators, reviews of compliance measures and controls and independent investigations conducted in relation to the issues raised in the SMH articles published online on 20 June 2015 and referred to in the 22 June 2015 announcement, and any documents, including but not limited to board minutes, board papers, reports and plans, evidencing any actions taken as a result of those internal and board reviews, notifications to industry regulators, reviews of compliance measures and controls and independent investigations.

The "March 2014 action plan" referred to by Mr Kelaher at the Senate Economics References Committee, Scrutiny of Financial Advice Inquiry ("Senate inquiry") on 7 July 2015, also referred to as the March 2014 "research and corrective plan" in the articles published in the SMH online on 20 June 2015.

The July 2014 Risk and Compliance Committee report referred to in a SMH article published online on 20 June 2015.

2. Within seven days, each of the parties file and serve written submissions on the costs of the preliminary discovery application.

3. The costs of the application to be determined on the papers.

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

REASONS FOR JUDGMENT

GLEESON J:

1. By application dated 13 October 2017, the prospective applicant ("Mr McFarlane") sought preliminary discovery from the prospective respondent ("IOOF") of eight categories of documents pursuant to r 7.23 of the *Federal Court Rules 2011* ("Rules"). IOOF opposed the application.

2. Mr McFarlane is the holder of 2,000 shares in IOOF, which he purchased on 2 June 2015. The share price of IOOF dropped significantly following Fairfax Media Limited's ("Fairfax") publication of articles in the Sydney Morning Herald ("SMH") from 20 June 2005 that alleged corporate misconduct within IOOF. The purpose of the preliminary discovery application is to enable Mr McFarlane to decide whether to commence a representative action on behalf of persons who acquired shares in IOOF between 1 March 2014 and 5 July 2015 seeking statutory compensation for losses suffered by reason of IOOF's alleged breaches of continuous disclosure obligations and/or misleading or deceptive conduct, in contravention of s 674(2) and s 1014H(2) of the *Corporations Act 2001* (Cth) ("Corporations Act"); s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ("ASIC Act") or s 18 of the *Australian Consumer Law* (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ("ACL").

3. Rule 7.23 provides:

> (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:
>
> (a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and
>
> (b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and
>
> (c) reasonably believes that:
>
> (i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and

(ii) inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

4. The terms "prospective applicant" and "prospective respondent" are defined in r 7.21 of the Rules as follows:

> ***prospective applicant*** means a person who reasonably believes that there may be a right for the person to obtain relief against another person who is not presently a party to a proceeding in the Court.
>
> ***prospective respondent*** means a person, not presently a party to a proceeding in the Court, against whom a prospective applicant reasonably believes the prospective applicant may have a right to obtain relief.

5. Mr McFarlane contends that he is a prospective applicant and that IOOF is a prospective respondent, both within the meaning of r 7.23(1).

6. By its written submissions, IOOF contended that the Court's discretion to make an order under r 7.23 has not been enlivened because none of the requirements of r 7.23(1)(a), (b) and (c) are satisfied. In any event, IOOF submitted, the Court should decline to exercise its discretion to order preliminary discovery. At the hearing of the application, IOOF's submissions were less concerned with denying Mr McFarlane's entitlement to relief than with limiting it in accordance with the scope of preliminary discovery under the Rules. Senior counsel for IOOF, Mr James Peters QC, argued that the application was flawed because it failed to identify the limits of the proposed cause of action by reference to the known facts. In particular, Mr Peters QC submitted, and I accept, that the extent of the proposed preliminary discovery should be tested against the current evidence of corporate misconduct.

7. For the reasons that follow, I am satisfied that Mr McFarlane is entitled to preliminary discovery limited by reference to the alleged misconduct identified in articles published in the SMH between 20 and 27 June 2015 and a hearing of the Senate Economics References Committee, Scrutiny of Financial Advice Inquiry ("Senate inquiry") on 7 July 2015.

EVIDENCE

8. Mr McFarlane relied upon three affidavits of Mr Craig Allsopp, his solicitor, sworn 13 October 2017, 30 January 2018 and 31 January 2018.

9. IOOF did not adduce any evidence.

BACKGROUND FACTS

10. IOOF is a publicly listed company and a provider of financial services including financial advice, platform management and administration, investment management and trustee services.

11. According to a redacted copy of a report prepared by PricewaterhouseCoopers ("PwC") in May 2015, in 2009 and 2014, IOOF conducted an internal investigation into misconduct by an IOOF employee. The outcomes from the 2009 investigation were considered by management and reported to the Risk and Compliance Committee ("RCC") in November 2009.

12. According to the same report, in a letter dated 22 December 2014, an IOOF employee made allegations that the previously investigated IOOF employee had engaged in "systematic and ongoing insider trading/front running of research" since about 1998; and that on 30 March 2015, PwC was engaged by IOOF to investigate the matter in order to determine whether there was any evidence that the subject of the letter had engaged in insider trading or "front running" or had plagiarised material with respect to research reports he had produced.

PwC May 2015 report

13. The May 2015 report is entitled "IOOF Holdings Limited Forensic Assistance – Bridges matter". A redacted version of the report was in evidence. That document sets out the following background:

> On 22 December 2014, an IOOF employee made allegations via a letter to Commissioner Hampton of the Fair Work Commission and senior IOOF managers that company employee and [redacted] has engaged in irregular and/or insider trading through IOOF's ASX participant business Bridges (Australian Financial Services Licence Number 240837) (*refer Appendices* - ***Item A***). The employee alleged that [redacted] has, since approximately 1998, been trading securities on behalf of [redacted] through her Bridges trading account, at the same time as he has been

publishing research through IOOF for company clients which has impacted the price of those securities.

In their letter the employee provided 58 examples of alleged insider trading/front running of research reports by [redacted] for the period 1998 to 2009 (excluding 2004) and further stated "*I have yet to go through 2010, 2011, 2012, 2013, 2014 and 2015 YTD*". In response to the letter, additional information was requested by Company Secretary & General Manager Human Resources Ms Danielle Corcoran ("Ms Corcoran") via email. On 6 March 2015 the employee declined, via email, to provide additional information.

The employee also alleged that [redacted] has extensively plagiarised work in research reports that he has produced. As a result of this alleged conduct, [redacted] is alleged by the employee to have violated the Corporations Act 2001 and company obligations.

In their letter the employee made a series of other allegations regarding [redacted] alleged conduct which is being addressed internally by IOOF and were not part of our scope. IOOF also advised that similar allegations regarding [redacted] conduct were received and investigated internally by IOOF in 2009, and again in 2014. The outcomes from the internal investigation conducted in 2009 were considered by management and reported to the RCC in November 2009.

14. The report sets "scope exclusions", as follows:

We have not had access to:

- Interview the employee who has made the allegations
- Interview or directly request information from staff within the research department
- Interview [redacted]
- Data/ information from client order books for details of other Bridges trades in securities that were personally traded by … (through his and/or … trading accounts) around the same time period
- [redacted] work computer hard drive(s) and electronic device(s)
- [redacted] work email files

During the course of the engagement we did not consider:

- [redacted] trading history prior to 22 December 2008
- Other allegations made by the employee in their letter dated 22 December 2014
- If [redacted] had access to other trading facilities through another broker

Our Services have been primarily based upon the information provided by IOOF. We have relied on and not verified the truth or accuracy of all information or material provided or made available to us during our engagement. We do not assume any responsibility and make no representations with respect to the accuracy or completeness of any information provided by you and on your behalf.

15. PwC's report notes that only one trade of the 58 examples fell within the six year review period covered by the report.

16. The executive summary records the following findings:

> 1.2.1 *Insider trading or front running*
>
> Based on the information received and reviewed, we did not identify any information to indicate [redacted] engaged in front running from 22 December 2008 to March 2015 through research reports released by IOOF/Bridges. Specifically, we identified no instances of [redacted] buying securities through either his or [redacted] accounts ahead of issuing a favourable research report in relation to the same security, or issuing a negative research report and buying securities shortly after the price had moved.
>
> We identified the potential for [redacted] to front run using an asset management role he held in late 2008/ early 2009, through which he was able to make trades using Questor group funds from clients, and potentially influence price of those securities through the volume of trading activity. We have not had opportunity to review Questor records against trades made through [redacted] accounts. Details of the potential to front using Questor funds are documented in Section 3.1.4 of the report.
>
> In the letter from the employee, there are no specific allegations relating to insider trading, as distinct from allegations relating to front running. We were also advised by IOOF that no information has been received from the Australian Securities and Investments Commission ("ASIC") to indicate independent enquiries have been conducted in regards to [redacted]. Based on this information, and upon review of the findings in relation to allegations of front running detailed in this report IOOF advised that review of [redacted] computer or email file was not required in order to identify receipt of any other inside information which he may have acted upon.
>
> 2 .2 *Plagiarism*
>
> In early 2014, IOOF investigated allegations of plagiarism made against [redacted] by another employee. The investigation focussed on two issues:
>
> - Use of material from JP Morgan ("JPM") in research reports – An agreement between JPM and Ord Minnett Limited ("OML") governing use of this information was identified by IOOF.
>
> ○ We reviewed the agreement dated 11 May 2008 and confirmed it covered the period during which research reports were released.
>
> - Use of material from internet sources in presentations – A small sample of presentations was reviewed by IOOF and found to contain graphs and statistical data that were not appropriately referenced. This finding was considered in decision making and action taken by IOOF management at the time.
>
> ○ Given the employee's letter dated 22 December 2008 [sic] makes no specific reference to plagiarism in relation to presentations, as well as this issue already having recently been investigated and considered, we conducted no further work during the course of the engagement.

17. The executive summary also notes that PwC identified breaches of IOOF/Bridges policies by five trades through a particular account. The breaches concerned

preclusions against research staff trading in securities which are either the subject of current research (three of the five trades) or within two days of the release of a research report (two of the five trades).

18. At the Senate inquiry hearing on 7 July 2015, IOOF's managing director, Mr Kelaher told the inquiry that the board was given PwC's findings but not the PwC report. Mr Kelaher noted that "The findings were nil … there was no frontrunning". In response, the Chair, Senator Dastyari, said:

> It is hard for me to have faith in a report that has been produced on the basis of claims by a whistleblower when the whistleblower has not even been spoken to in the production of that report. It reeks of a whitewash.

June 2015 media articles

19. Mr McFarlane asserted, and it was not disputed, that prior to 20 June 2015, IOOF had made no announcements in relation to any relevant corporate misconduct identified within IOOF.

20. On 20 June 2015 at 12.27 am, the SMH published online the first of several articles published by Fairfax concerning alleged misconduct within IOOF. The article was entitled "Litany of wrongdoings at IOOF included insider trading by senior employee". The article commenced:

> One of Australia's largest financial institutions, IOOF, did not call the corporate cops when it caught one of its senior employees insider trading, Instead IOOF made him pay the profit to a charity of the company's choice.
>
> An investigation by Fairfax Media uncovered the internal investigation at IOOF in 2009 into the senior staff member's "Suspicious trades" as part of a wider expose that has revealed a litany of wrongdoings at the financial planning giant.

21. Apart from insider trading, the article alleged that Peter Hilton, IOOF's head of advice research, engaged in "front running", which the article described as illegal and as "occur[ing] when stock is bought ahead of the release of research report that could benefit the buyer of the stock", and "cheating" by "instructing a direct report to complete … training on his behalf". The article also referred to "explosive whistleblower testimony".

22. Towards the end of the article, there is reference to a "research corrective action plan" document, released in mid-2014 and said to highlight misrepresentation of

outperformance numbers of funds. The article says that a "decision had then been made that outperformance numbers would no longer be produced as representative".

23. Later that day, at 12.38 pm, Fairfax published online a second article entitled "IOOF's boiler room throws customers to the wolves". This article referred to a senior equities analyst who "was about to become a company whistleblower, a move that would expose another financial scandal and cost him his job". The article sets out details of a conversation between the analyst and IOOF's head of investigations, Mr Rob Urwin, on 12 December 2014. The conversation appears to include an allegation of facts that on their face amount to front-running in December 2014.

24. There is reference to:

> … an explosive file dating back to 2009 that includes an investigation by the company into possible front-running by its head of advice research Peter Hilton, who has been with IOOF since 1989, possible insider trading by some other staff, taking allocations for placements ahead of clients, and stuffing a capital shortfall in a capital raising of ING Office Fund into one of IOOF's funds to the detriment of customers of that fund.
>
> ...
>
> The file sighted by Fairfax Media includes: a compliance report titled "potential front-running by head of research" on behalf of a relative's account in August 2008; a history of the trading patterns of Hilton's relative from 1995; four versions of a member from group legal services "interview with Peter Hilton – trading behaviours" dated April 9, 2009; internal emails relating to the internal investigation and a first and final warning letter to Hilton. (Far from leaving he would later be promoted).

25. At the end of a section entitled "Insider Trading" is the following:

> A different analyst again in January 2009 was raked over the coals over suspected naked shortselling at a time when it was banned after the government had used taxpayers' money to prop up the financial services sector. It is believed this matter was never referred to ASIC. IOOF declined to comment.
>
> …
>
> Fairfax Media has also seen evidence Hilton was investigated in relation to share allocations, specifically his relative managing to get one of the largest allocations across the entire network of planners in the float of Platinum Asset Management on May 17, 2008 only to flip the 100,000 shares 11 days later for a $69,000-plus profit. Hilton's relative also ended up with significant allocations for raisings by Challenger Infrastructure and Macquarie Convertible Preference Shares.

26. Under the heading "Testing time" the article states:

> Fast forward to March 2014 and a "research and corrective plan" indicates problems continued to exist in the research department. The note refers to a separate series of incidents including a breach of password access and "P Hilton to receive a letter

advising of breach and final warning". His responsible manager status was revoked immediately. Two other staff [who Fairfax Media has not named] were instructed to "read and accept IT code of conduct and password management policy" and a third staff member was told not to "complete training on behalf of others".

Another breach refers to allegations of Hilton "instructing a direct report to complete Kaplan and eLearning training". It says the board was advised of the March 2014 training breach. It says "Hilton to re-sit all eLearning modules" and "Hilton to complete 12 hours training" and that "training must be supervised".

27. Further down this section, the article states:

One critical IOOF report seen by Fairfax Media states: "We do not invest in new technology that will support/facilitate the development of new or improved products/ services or delivery channels."

Further, data integrity issues are rated "high" in Risk and Compliance Committee report from July. It says data transmitted between IRESSNet and XPlan has missing transactions resulting in inaccurate client records. The report also shows client email accounts were "compromised resulting in fraudulent withdrawal requests being sent to platforms".

28. The article concludes by setting out matters concerning the sacking of the whistleblower.

29. On 23 June 2015 at 12.15 am, Fairfax published online an article entitled "IOOF racks up breaches and errors". The article includes the following:

Embattled financial services house IOOF notched up 16 breaches and unit pricing errors within its case management funds arm alone in the space of two year, an investigation by Fairfax Media has found.

…

The fresh revelations are part of a wider investigation into IOOF by Fairfax Media that has drawn on hundreds of internal company documents showing senior staff members at IOOF have engaged in a range of wrongdoings including insider trading, front-running, misrepresentation of performance figures and cheating on exams for accreditations to work in the finance industry.

…

Macquarie Bank issued a note on Monday saying it expected IOOF's earnings to be impacted by the fallout of the allegations, according to media reports.

"Allegations of this nature are highly material for financial services businesses built on confidence and reputation", the bank said in the note.

30. At some time later at 1.40 am, Fairfax published online an article entitled "IOOF shares plunge as regulator moves". This article includes the following:

Fairfax Media revealed a litany of poor corporate behaviour within the once-venerable friendly society. The allegations include insider trading, suspected front-

running, the misrepresentation of performance figures and cheating on compliance and training exams.

…

Fairfax Media can also reveal further serious issues within IOOF, including the quality of its IT systems and several breaches and unit pricing errors within its cash management area.

IOOF had notched up 16 breaches within its cash management trusts according to an internal document detailing unit pricing breaches on a register, according to documents seen by Fairfax Media.

31. At 12.14 pm on the same day, Fairfax published online an article entitled "IOOF head of advice research Peter Hilton 'on leave' as more whistleblowers come forward". The article includes the following:

Fairfax Media also revealed that IOOF financial planning subsidiaries have had a number of run-ins with ASIC over the years, with a number of planners banned and at least one sentenced to prison.

…

IOOF has also been rocked by allegations its IT systems are riddled with issues, an allegation the company strongly denies.

32. On 27 June 2015, Fairfax published online an article entitled "IOOF research division under fire over report copying". That article includes the following allegation concerning equities research notes generated "out of IOOF subsidiary Bridges":

Stunningly, some of the research recommendations appear to lack a reasonable basis and don't fit with the ratings system and raise issues about the breach regulatory guidelines.

33. This article refers to a former IOOF employee who said "issues with the research notes and performance figures were raised last year", and continues:

He says PwC conducted the review and it was confirmed that "outperformance" numbers had been misrepresented. According to an internal document seen by Fairfax Media, the Research Corrective Action Plan, it was agreed that outperformance numbers would no longer be produced as representative.

The same document, written mid last year, flags bullying, harassment and isolation in the team and a potential plagiarism breach. It lists an action plan that requires the team, including Hilton, to attend a one-hour session on bullying, harassment and discrimination in the workplace.

34. Later, the article states:

An internal document written a few months ago by an IOOF employee raises several issues within the research department. It alleges conflicts of interest are not disclosed. "There is no register".

35. The article includes the following concerning the internal document:

> The document says there are also instances where certain clients call up analysts about potential recommendations on a corporate action before the research has been sent out to IOOF's financial planning network.
>
> Concerns with this process were that the equities team was not ASIC compliant to provide general or special advice (governed by another standard, RG146).

IOOF June 2015 announcements

36. On 22 June 2015, IOOF made an announcement to the market entitled "IOOF statement on Fairfax articles". The statement included the following:

> Most of the claims appear to have been promoted by a former employee who is in a legal dispute with the company and are historic in nature.
>
> All of the issues raised, historic or recent, have been dealt with appropriately at the time; this includes, where relevant, thorough internal and board review, notifying industry regulators, ongoing review of compliance measures and controls, employee education and independent investigations. These initiatives have, where necessary, led to enhancement of processes and procedures and sought to improve the client experience.
>
> A number of misleading statements have been made that must be addressed.

37. Senior counsel for Mr McFarlane, Mr Ian Jackman SC, noted that, despite the reference to a "number of misleading statements", the statement then continued to address only two matters, identified as IOOF's risk register and systems and services, and unit pricing. Mr Jackman SC submitted that the effect of the statement was to leave the reader in doubt as to the extent to which IOOF was accepting that the allegations in the article were well founded apart from those two specific matters.

38. On behalf of IOOF, it was submitted that the 22 June 2015 announcement was intended to communicate to the market that IOOF considered it had at all times acted appropriately and in accordance with sound governance principles in relation to any corporate misconduct that occurred within IOOF, and had complied with continuous disclosure requirements. In other words, IOOF argued, by this announcement, IOOF represented to the market that, notwithstanding any corporate misconduct identified in the earlier media articles, it was not required to make any announcements to the market in relation to corporate misconduct within IOOF prior to the 22 June 2015 announcement.

39. On 24 June 2015, IOOF published another announcement, entitled "IOOF commissions independent review". The announcement stated that IOOF had engaged PwC to commence an independent review of the IOOF Group regulatory breach reporting policy and procedures and the control environment within its Research division.

July 2015 Senate inquiry hearing

40. On 7 July 2015, Mr Kelaher appeared at the Senate inquiry to respond to questions about the alleged corporate misconduct. The transcript of that appearance shows that Mr Kelaher gave the following evidence:

(1) A May 2009 email showed that a Mr Edward Youds was internally accused of insider trading, and that IOOF resolved that Mr Youds would donate the proceeds of profit from the sale of ETC shares to a charity.

(2) Early in 2014, the sharing of passwords and the lack of an asset register in the research group were raised as issues "by compliance".

(3) In March 2014, an action plan for the research department outlines a series of violations in research, referring to bullying, harassment and isolation and misrepresentation of performance figures on a hypothetical advisory portfolio.

(4) The issue of front running was "revisited after 2008-2009", around Christmas of 2014. At that point, PwC was asked to review "all of the trades in question from 2008 to 2014. This review found no evidence of front running. PwC was also tasked with reviewing the issue of plagiarism.

(5) Reports published by Fairfax that 57 customers were compensated for $2.8 million were correct, and breach reports were delivered to ASIC in connection with those breaches.

June 2015-2016 ASIC investigation

41. In July 2015, ASIC commenced inquiries into allegations made against IOOF and its subsidiaries including issues raised by a former employee of IOOF (the whistleblower). The allegations were said by ASIC to have also been the subject of

several media articles and an inquiry by the Parliamentary Joint Committee on Corporations and Financial Services.

42. On 8 July 2016, ASIC published a media release entitled "ASIC's inquiry into IOOF" in which it said, relevantly:

> ASIC has now finalised its inquiries.
>
> Some of the allegations concerned an IOOF staff member's involvement in insider trading when they traded in securities prior to the release of IOOF research reports relating to those securities. ASIC's market surveillance team has completed a thorough review of the circumstances and trades involved. This review determined that the release of the research reports had no material effect on the price of the relevant securities and there was no other evidence to warrant the commencement of a formal investigation. As such we have decided to take no further action In relation to these allegations.
>
> ASIC's inquiries also included a review into allegations relating to corporate governance and licensee breaches by IOOF. This review identified a number of concerns relating to IOOF's compliance arrangements, breach reporting, management of conflicts of interest, staff trading policy, disclosure, whistleblower management and protection and cyber security. We have raised these concerns with IOOF. We have also advised IOOF that in our view the corporate culture at that time within IOOF contributed to these issues occurring.
>
> Concurrent with ASIC's inquiries, IOOF appointed PriceWaterhouseCoopers to conduct an independent review of its regulatory breach reporting policy and procedures and the control environment within its research team, IOOF has made significant changes to their policies and procedures as a result.
>
> While ASIC welcomes initiatives and steps taken by IOOF to rectify these issues, ASIC has also reached an agreement with IOOF to engage an external compliance consultant to conduct an expanded, broader and more comprehensive review of compliance arrangements within all IOOF business units.
>
> ASIC will continue to monitor and work cooperatively with IOOF and its board to ensure the necessary changes are properly effected.

43. On 9 July 2016, The Australian published an article entitled "IOOF boss Chris Kelaher looks to future as ASIC ends inquiry". The article included the following:

> IOOF boss Chris Kelaher says his company is "on the cusp of a fairly bright future" after the corporate watchdog declined to take formal action against the financial services giant despite admitting alleged front running and insider trading within the group would not pass "the pub test".
>
> Following a lengthy inquiry into IOOF whistleblower blew the lid on misconduct within the $2.4 billion group's research division as far back as 2009, the Australian Securities & Investments Commission found a number of issues with the company's staff trading policies, whistleblower protection, disclosure procedures and cyber security.
>
> …

But ASIC's investigation, which stopped short of issuing an enforceable undertaking against IOOF, found the information Mr Hilton was trading on was not material, leaving the behaviour outside of the remit of the law.

…

In the pub test people would say 'this isn't good', 'that's highly unprofessional; or 'that's unreasonable' and they're probably right," Mr Tanzer said.

"But it doesn't mean it's a criminal offence."

ASIC did, however, take a parting shot at IOOF's corporate culture.

"We have also advised IOOF that in our view the corporate culture at that time within IOOF contributed to these issues occurring,' ASIC said.

Since the scandal broke in mid-2015, IOOF's share price has struggled to regain its strength despite largely positive analyst recommendations on the stock's underlying business. The shares have slid from $10.66 in June last year, closing at $8.20 a share yesterday.

IOOF, which manages about $150bn of customer money, appointed PwC to review the research division's solicitors and procedures in the wake of the allegations, and ASIC said it welcomed steps to rectify the issues, which have included the outsourcing of all equity and fund research.

PwC will also conduct an "expanded, broader and more comprehensive review"' across IOOF's entire business, which will be carried out at arm's length from ASIC and will only be made public if IOOF decides to do so.

"We'll certainly be observing and keeping tabs on the review as it goes ahead," Mr Tanzer said.

Mr Kelaher said he had always maintained that there was "no truth" in the allegations and that the closing of the probe cleared the way for IOOF to build its business.

"'You can say it a hundred times but now the regulator has come out and said it and it's very pleasing," he told *The Weekend Australian*.

…

Shaw and Partners analyst Martin Crabb said the fallout was unlikely to have a lasting effect.

"The share price depreciation … does highlight how susceptible financial services firms, such as IOOF, are to negative press involving compliance, governance or regulatory issues," Mr Crabb said.

Share price

44. Mr McFarlane alleges that IOOF's share price experienced its largest ever single day fall on 22 June 2015, closing down 13.32% or $1.42 per share. The evidence shows that IOOF's closing share price dropped from $10.66 on 19 June 2015 to $9.24 on 22 June 2015.

45. Following Mr Kelaher's appearance at the Senate inquiry on 7 July 2015, IOOF shares closed down a further $0.29 or 3.27%.

46. In the period from 19 June 2015 to 7 July 2015, the share price dropped from $10.66 to $8.57.

Mr McFarlane's belief

47. Mr Allsopp's evidence was that Mr McFarlane believes that he, on behalf of the S McFarlane Superannuation Fund, may have the right to obtain relief from IOOF for:

(1) breaches of IOOF's continuous disclosure obligations under ASX Listing Rule 3.1 and s 674(2) of the Corporations Act during the period 1 March 2014 to 19 June 2015 (or 6 July 2015) in relation to corporate misconduct which it is alleged IOOF engaged in from at least 2009 through until March 2014; and

(2) misleading or deceptive conduct pursuant to s 1041H(1) of the Corporations Act, s 12DA of the ASIC Act and/or s 18 of the ACL.

48. The March 2014 date corresponds with the completion of the "research and corrective plan" referred to in the two 20 June 2015 articles, and the "action plan" referred to by Mr Kelaher at the Senate inquiry hearing.

49. The first day the share price dropped was 19 June 2015, the day before Fairfax's publication of the first SMH online article, while the last day of the share price drop was 6 July 2015, the day before Mr Kelaher's evidence before the Senate inquiry.

INFORMATION SOUGHT

50. According to written submissions filed on his behalf, Mr McFarlane seeks documents which will enable him to determine whether and when IOOF became aware of corporate misconduct within IOOF, reported in the articles set out above, and following which the share price of IOOF dropped significantly. In the written submissions, Mr McFarlane also seeks the documents so as to assess the strength of IOOF's anticipated defence that it had reasonable grounds for not disclosing corporate misconduct within IOOF prior to 7 July 2005.

51. Mr McFarlane's written submissions contended that, in the event that the information set out in the media articles referred to above is correct and given the effect that the

information's revelation had on IOOF's share price, Mr McFarlane and other shareholders have potential claims against IOOF on the basis that IOOF:

i. contravened its continuous disclosure obligations by failing to inform the market of corporate misconduct within IOOF; and/or

ii. engaged in misleading or deceptive conduct contrary to the Corporations Act, the ASIC Act and/or the Australian Consumer Law including by making the representations conveyed by the 22 June 2015 announcement.

52. The written submissions argued:

o. Given IOOF's duty not to make misleading or deceptive announcements to the ASX, it may be inferred that IOOF is likely to have documents which are directly relevant to whether or not IOOF ought to have disclosed corporate misconduct within IOOF prior to 7 July 2015. In its 22 June 2015 Announcement IOOF was foreshadowing that it had a complete defence to any proceeding based on allegations of contravening conduct in relation to the non-disclosure of corporate misconduct within IOOF, as alleged in the June 2015 Fairfax Media articles.

p. While the assertion that IOOF was not required to disclose the matters revealed in the June 2015 Fairfax Media articles is difficult to reconcile with the dramatic share price drop and the material able to be accessed publicly and the inferences and conclusions to be drawn from those materials (as summarised above), Mr McFarlane was and is unable to ascertain, from the material available, whether or not the matters disclosed in the June 2015 Fairfax Media articles were accurate, the point in time, if ever, when IOOF had information concerning corporate misconduct within IOOF that required disclosure to the market and whether the foreshadowed defence of IOOF to any claim by the prospective applicant has merit (collectively, the Relevant Information) and hence Mr McFarlane was and is unable to decide whether proceedings against IOOF should be commenced.

53. At the hearing, senior counsel for IOOF, Mr Peters QC argued that the scope of the documents sought by Mr McFarlane extended well beyond what was necessary to determine the matters set out at [50] above. For example, the documents sought include any documents raising any allegations of misconduct of the kind identified in the SMH articles, not merely documents raising allegations of the specific instances identified by the SMH. Mr Peters QC contended that the vast majority, if not all of the allegations in the SMH articles, concerned IOOF's research division.

54. Although Mr Jackman SC submitted that it is not Mr McFarlane's intention to go beyond what was alleged in the Fairfax press, he also argued that there is no reason why preliminary discovery should be limited to the 58 examples of insider trading and front running identified by the whistleblower instead of any such allegation that occurred during the relevant period. Mr Jackman SC also suggested that the vast bulk

of what Mr McFarlane is seeking had probably already been collated for the purpose of the ASIC inquiry.

EFFORTS TO INVESTIGATE POSSIBLE RIGHT TO RELIEF

55. As Mr McFarlane observes, he is unable to ascertain from the material currently available:

(1) the accuracy of the media articles and, in particular, the precise nature and seriousness of the misconduct reported in the articles;

(2) when IOOF had information concerning the relevant corporate conduct;

(3) whether the conduct required disclosure to the market; and

(4) whether the "foreshadowed defence" of IOOF has "merit".

56. Mr Allsopp gave evidence that, following his review of the material referred to above, it was clear to him that the kinds of documents likely to reveal the information in [55] above are solely within IOOF's control and is not information which can be obtained by reasonable inquiries. Mr Allsopp's evidence sets out the various efforts on Mr McFarlane's behalf to obtain information concerning (1) to (4). These inquiries were submitted to include:

a. comprehensive review has been undertaken of publicly available documents, but upon that review has formed the view that the further documents he requires in order to decide whether to commence the Contemplated Class Action are documents internal to IOOF;

b. a request has been made of ASIC to supply documents concerning its inquiry however, ASIC has advised it is unable to consider the request as it did not conduct any s 19 examinations; and

c. requests have been made of IOOF to supply the documents (but these have been met with a refusal).

57. Mr McFarlane submitted that no further inquiries could reasonably be made in circumstances where the documents which are required are internal IOOF documents. Mr McFarlane submitted that the Court should therefore find, for the purposes of r 7.23(b), that despite making reasonable inquiries, he does not have sufficient information to decide whether to commence the contemplated class action.

LEGAL FRAMEWORK

58. There was no substantial dispute between the parties as to the relevant principles.

59. In *Sandhurst Trustees Limited v Clarke* [2015] FCAFC 21; (2015) 321 ALR 1 at [10], the Full Court adopted the following summary of the principles applying to an application under r 7.23 from the judgment of Greenwood J in *Clarke v Sandhurst Trustees Ltd* [2014] FCA 580; (2014) ACSR 215 at [10]:

> [A]n applicant must show, apart from any other considerations, that he or she believes that he or she may have a right against the proposed respondent to relief (deriving from an identified and contended cause of action) and the belief is, objectively, reasonably held rather than a "mere" belief or mere assertion or matter of speculation, notwithstanding that r 7.23 is to be construed beneficially so as to give the fullest scope reasonably allowed of the language of the rule (*St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360 at [26]) and also recognising that the notion of a "reasonable belief" reflects a threshold to be satisfied by the applicant set at "quite a low level". The evidence must demonstrate that there is some tangible support for the belief that takes the existence of the alleged right beyond mere belief, assertion or speculation (*Reeve v Aqualast Pty Ltd* [2012] FCA 679 at [65]).

60. A prospective applicant does not have to make out a *prima facie* case for relief: *EBOS Group Pty Ltd v Team Medical Supplies Pty Ltd (No 3)* [2012] FCA 48; (2012) 199 FCR 533 at [31]. However, the seriousness of the underlying allegation must be borne in mind when determining whether the prospective applicant has established that it holds the necessary objectively reasonable belief: *Higgins v Hancock* [2011] FCA 1492; (2011) 199 FCR 393 at [69].

Reasonable cause to believe in right to relief (r 7.23(1)(a))

61. In *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193; (2017) 351 ALR 103 ("*Pfizer*") at [69], Allsop CJ stated relevantly:

> It is at this point that one needs to remind oneself of the nature of the task demanded by r 7.23(1)(a) in circumstances such as this. The relevant question posed by the rule is whether the applicant reasonably believes that it may have the right to obtain relief. It is not whether one scientific view is more or less persuasive than another. In the field of science, expert views may differ about important scientific aspects that can be seen to bear upon a question. If the applicant has a belief that is founded on considerations or views reasonably open (even if contested as incorrect by others) that may well found a conclusion that the applicant has a relevant reasonable belief. On the other hand, if in the application it can be shown that the belief of the applicant appears to be based on considerations or views that are unreasonable, untenable, irrational or baseless, it would be difficult to conclude that the applicant has a reasonable belief. Much will depend on the evidence and the nature of the question in issue. The kind of interlocutory hearing anticipated for the operation of the rule will,

however, generally be inapt for the making of final judgments on contested scientific evidence. This is all the more so when, as here, there was no cross-examination.

62. At [120]-[121], Perram J expressed the relevant principles as follows:

> The following propositions about preliminary discovery applications should be accepted:
>
> (i) the prospective applicant must prove that it has a belief that it *may* (not *does*) have a right to relief;
>
> (ii) it must demonstrate that the belief is reasonable, either by reference to material known to the person holding the belief or by other material subsequently placed before the Court;
>
> (iii) the person deposing to the belief need not give evidence of the belief a second time to the extent that additional material is placed before the Court on the issue of the reasonableness of the belief. That belief may be inferred;
>
> (iv) the question of whether the belief is reasonable requires one to ask whether a person apprised of all of the material before the person holding the belief (or subsequently the Court) could reasonably believe that they *may* have a right to obtain relief; and
>
> (v) it is useful to ask whether the material inclines the mind to that proposition but very important to keep at the forefront of the inclining mind the subjunctive nature of the proposition. One may believe that a person may have a case on certain material without one's mind being in any way inclined to the notion that they do have such a case.
>
> In practice, to defeat a claim for preliminary discovery it will be necessary either to show that the subjectively held belief does not exist or, if it does, that there is no reasonable basis for thinking that there may be (not is) such a case. Showing that some aspect of the material on which the belief is based is contestable, or even arguably wrong, will rarely come close to making good such a contention. Many views may be held with which one disagrees, perhaps even strongly, but this does not make such a view one which is necessarily unreasonably held. Nor will it be an answer to an application for preliminary discovery to say that the belief relied upon may involve a degree of speculation. Where the language of FCR 7.23 relates to a belief that a claim may exist, a degree of speculation is unavoidable. The question is not whether the belief involves some degree of speculation (how could it not?); it is whether the belief resulting from that speculation is a reasonable one. Debate on an application will rarely be advanced, therefore, by observing that speculation is involved.

63. In terms of the particular cause of action relied upon, I accept the following propositions:

(1) Rule 7.23(1)(a) requires a consideration of the elements that are necessary to establish the putative causes of action relied upon. That will require the Court to conclude, at least, that there is reasonable cause to believe that each of the elements of each such cause of action might be made out. While it is not necessary to prove that each of the elements is in fact satisfied, there must be some positive basis for a belief that the

applicant may have a right to obtain relief: *Benchmark Certification Pty Ltd v Standards Australia International Ltd* [2004] FCA 1489; (2004) 212 ALR 464 ("*Benchmark*") at [4] (per Emmett J).

(2) If there is no reasonable cause to believe that one of the necessary elements of a potential cause of action may exist, that would dispose of the application insofar as it is based on that cause of action: *St George Bank v Rabo Australia Ltd* [2004] FCA 1360; (2004) 211 ALR 147 at [26(d)]; *Pfizer* at [113] to [116].

(3) Where there is uncertainty as to the elements necessary to establish the possible causes of action:

such uncertainty may be sufficient to undermine the reasonableness of the belief relied upon: *St George Bank Ltd v Rabo* at [26(e)]; *GlaxoSmithKline Australia Pty Ltd v Pharmacor Pty Ltd* [2014] FCA 1202 at [44]; *L'Oreal Australia Pty Ltd v BrandPoint Pty Ltd* [2015] FCA 978 at [28];

the greater the uncertainty there may be in respect to one or other of the elements of the cause of action being advanced, the greater may be the judicial reluctance to accept that an applicant has a "reasonable cause to believe: *Apache Northwest Pty Ltd v Newcrest Mining Ltd* [2009] FCAFC 39; (2009) 182 FCR 124 ("*Apache*") at [63] per Flick J, referred to by Nicholas J in *Pfizer* at [178].

Insufficient information to decide whether to start a proceeding (r 7.23(1)(b))

64. The applicant must demonstrate as an objective fact that he lacks sufficient information to decide whether to start a proceeding. It is not sufficient that the applicant might genuinely feel unable, because of a lack of information, to decide to commence a proceeding: *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391 ("*Alphapharm*") (per Lindgren J), cited with approval by Tamberlin J in *Matrix Film Investment One Pty Limited v Alameda Films LLC* [2006] FCA 591 ("*Matrix*") at [17] and by Emmett J in *Benchmark* at [6].

65. The purpose of preliminary discovery is not to produce material which will strengthen or enhance a decision to commence proceedings, but rather to provide what is reasonably necessary to enable the decision to be made: *Matrix* at [19]; see also *Costin v Duroline Products Pty Limited* [2013] FCA 501 at [45] (per Yates J).

66. Justice Lindgren summarised the position in *Alphapharm* as follows:

> [I]t is difficult to avoid the conclusion that in seeking pre-action discovery, [*Alphapharm*] is seeking to eliminate a possibility, rather than to obtain key information without which it is not able to commence a proceeding. No doubt inspection of the documents referred to in *Alphapharm's* application would assist it in taking that decision, but I am of the view that it already has reasonably sufficient information to enable it to decide. Another way of expressing the matter is to say that *Alphapharm* has not, after making all reasonable inquiries, come up against an obstacle consisting of the lack of key information which it reasonably needs to enable it to decide whether to commence a proceeding; rather, it hopes to be comforted in taking the decision which it already has sufficient information to enable it to take.

Documents directly relevant to right to relief (r 7.23(1)(c))

67. The applicant must identify specific issues for which the documents are likely to be directly relevant, and in relation to which there is an insufficiency of information: *Benchmark* at [6].

68. The measure of preliminary discovery is the extent of information that is necessary, but no more than that which is reasonably necessary, in order to overcome the insufficiency of information already possessed by the applicant after it has made all reasonable inquiries to enable it to make a decision as to whether to commence proceedings: *Matrix* at [16] citing Lindgren J in *Glencore International AG v Selwyn Mines Ltd* [2005] FCA 801; (2005) 223 ALR 238 at [13]. See also *Costin v Duroline Products Pty Limited* [2013] FCA 501 at [35] (per Yates J); *Apache* at [31] (per Flick J); *Reeve v Aqualast Pty Ltd* [2012] FCA 679 at [65] (per Yates J).

CONSIDERATION

Belief and reasonable basis for belief that Mr McFarlane may have right to relief

69. It was not disputed that Mr McFarlane holds a subjective belief that he may have a right to obtain relief in the Court from IOOF in accordance with rule 7.23(1)(a). Based on the material set out above, I accept that the media articles and the evidence given at the Senate inquiry hearing provide Mr McFarlane with a reasonable basis for believing that there was misconduct of the kind identified in the articles and in the transcript of the hearing. In oral submissions, Mr Jackman SC identified in the evidence alleged instances of 16 forms of misconduct in respect of which preliminary discovery is sought.

70. I also accept that Mr McFarlane has a reasonable basis for believing that the relevant misconduct is of a kind that, if disclosed earlier, was reasonably likely to have affected IOOF's share price. The bases for that belief are the drop in the share price following the media articles and statements in those articles by market commentators to the effect that the information published by Fairfax was price sensitive. The available information concerning ASIC's investigation does not substantially detract from the reasonable basis for Mr McFarlane's belief, because the evidence suggests that the investigation was directed to the possibility of criminal conduct rather than a right to civil remedies of the kind that he wishes to investigate.

71. IOOF submitted that it was necessary for Mr McFarlane to identify the relevant information said to be the subject of the disclosure obligation. Orally, Mr Peters QC supported that submission by complaining that Mr McFarlane's application did not hang on the information in the articles.

72. I am satisfied that this is not a case where it was necessary for Mr McFarlane to propound a draft statement of claim in order to test whether there is a reasonable basis for believing that each of the elements of the proposed causes of action could be made out. The elements of the proposed causes of action are not complex: as Mr McFarlane's written submissions put it, the contemplated case is a "fraud on the market" type case.

73. On the other hand, I accept Mr Peters QC's submission that the published allegations do not support an entitlement to preliminary discovery in relation to any similar conduct in the relevant period. There is no reasonable basis to believe in a right to relief in relation to conduct about which there is presently no evidence. For example, the allegations of IOOF staff sitting compulsory training on behalf of Mr Hilton do not provide a reasonable basis for a right to relief in respect of similar misconduct on behalf of other IOOF staff. The allegation of "stuffing a capital shortfall in the capital raising of ING Office Fund" does not support a reasonable basis for a right to relief in respect of "imprudent funds management" more generally. The allegation that the equities team "was not compliant to provide general or specific advice" does not

support a reasonable basis for a right to relief in respect of "analysts not licensed to give financial advice".

74. Further, I accept that Mr McFarlane is not presently in a position to say which of the many individual instances of misconduct might have required disclosure, and some of the individual instances appear, on their face, to be unlikely to have warranted disclosure to the market (for example, "bullying, harassment and isolation"). However, on the present state of the evidence, it is not possible to form a view about the precise nature and seriousness of the reported misconduct and it is not unreasonable or irrational for Mr McFarlane to conclude that the reported misconduct may have required disclosure.

Sufficiency of information available to Mr McFarlane

75. I accept that the information currently available to Mr McFarlane is insufficient to enable him to determine whether to commence proceedings. Generally, in order to make that decision, Mr McFarlane requires information of the kind set out in [55(1)] to [55(3)] above, that is, information about:

    (a) the accuracy of the media articles and, in particular, the precise nature and seriousness of the misconduct reported in the articles;

    (b) when IOOF had information concerning the relevant corporate conduct; and

    (c) whether the conduct required disclosure to the market.

76. I am not persuaded that Mr McFarlane required information concerning the "foreshadowed defence" in order to make this determination, or that this basis for preliminary discovery added anything to the application. After all, the question of whether the conduct required disclosure may depend on circumstances that include whether the conduct was appropriately addressed by IOOF without the need for disclosure. Orally, Mr Jackman SC did not rely on the "foreshadowed defence" basis for preliminary discovery.

77. Mr McFarlane's lawyers appear to have taken all reasonable steps to investigate whether to start a proceeding to obtain the relief identified. At the hearing, Mr Peters QC did not suggest otherwise.

Documents directly relevant to right to relief

78. The documents sought must be "directly relevant to the question whether the prospective applicant has a right to obtain the relief".

Paragraph 1 of the schedule seeks "[a]ny documents raising allegations of" 16 specified kinds of misconduct "within IOOF or any subsidiary of IOOF in the period from 1 January 2008 to 15 June 2015". Having accepted IOOF's submission that the published allegations do not support an entitlement to preliminary discovery in relation to any similar conduct in the relevant period, the documents sought only to satisfy the direct relevance test to the extent that they refer to the allegations identified in the evidence before me. Accordingly, I will grant preliminary discovery in terms of para 1 but limited to those allegations.

79. I will not grant preliminary discovery in relation to alleged "inaccurate research reports" (para 1(l)), because the relevant allegations are the same as those relied upon concerning "making client recommendations with no reasonable basis" (para 1(e)).

80. Paragraphs 2 and 3 of the schedule seek:

> 2. Reports, communications and any other documents setting out the findings from any investigations by IOOF or any other person or entity, including PricewaterhouseCoopers, as to whether any of the alleged corporate misconduct occurred.
>
> 3. Any documents (including but not limited to board minutes, board papers, reports and plans) evidencing any action taken as a result of any of the allegations of corporate misconduct, including:
>
> (a) commencing an internal or external review or investigation;
>
> (b) actions taken as a result of the findings of any investigations or review in relation to the alleged corporate misconduct, regardless of whether the alleged corporate misconduct was substantiated.

81. Mr Peters QC submitted that these paragraphs are impermissibly wide and unnecessary. That submission was predicated upon the assumption that the alleged corporate misconduct is not limited to the matters identified in the media articles. Once limited in this way, I am satisfied that the documents sought in paras 2 and 3 satisfy the direct relevance test. I will therefore grant preliminary discovery of them.

82. Paragraph 4 of the schedule seeks:

> The internal and board reviews, notifications to industry regulators, reviews of compliance measures and controls and independent investigations conducted in

> relation to the issues raised in the Fairfax Media articles published on 20 June 2015 and referred to in the 22 June 2015 announcement, and any documents, including but not limited to board minutes, board papers, reports and plans, evidencing any actions taken as a result of those internal and board reviews, notifications to industry regulators, reviews of compliance measures and controls and independent investigations.

83. This paragraph reflects the language of IOOF's 22 June 2015 announcement, set out at [36] above. Mr Peters QC submitted that the request was not time related and not dependent upon a finding of misconduct. He submitted that documents of this kind would not reveal a systemic problem, and that para 4 should be rejected as an "excessive intrusion". I do not agree. Paragraph 4 is referrable to the "issues raised in the Fairfax Media articles published on 20 June 2015" and the 22 June 2015 announcement and consequently directly relevant to each of the matters set out at [75] above. I will therefore grant preliminary discovery of the documents referred to in para 4.

84. As I understood Mr Peters QC's submissions, he conceded that, if Mr McFarlane satisfied the "reasonable belief" test, then the March 2014 action plan (para 5 of the schedule) and the July 2014 RCC report (para 6 of the schedule) would each be documents falling within s 7.23(1)(c). Given Mr McFarlane has done so, I will grant preliminary discovery of these documents.

85. Paragraph 7 of the schedule seeks:

> Any review or report evidencing the findings of the external compliance consultant engaged to conduct an expanded, broader and more comprehensive review of compliance arrangements within all IOOF business units referred to in ASIC's media release dated 8 July 2016, and any document, including but not limited to board minutes, board papers, reports and plans, evidencing any actions taken as a result of the findings of the external compliance consultant.

86. Mr Jackman SC submitted that documents of this kind would bear on the extent to which the allegations were well-founded and the extent to which the allegations concern conduct of a systemic kind. These submissions do not support a conclusion that documents of this kind meet the test of direct relevance. It is a matter of speculation whether they might contain any material directly relevant to any of the three issues identified above. Accordingly, I will not grant preliminary discovery of this class of documents.

87. Mr Jackman SC did not press para 8 of the schedule.

DISCRETION

88. Although IOOF submitted that the Court would decline to exercise its discretion, it did not offer a reason for that submission. Having been satisfied of the various matters set out in r 7.23(1), I am also satisfied that I should grant preliminary discovery in accordance with my reasons set out above.

CONCLUSION

89. I will make orders in accordance with these reasons. Where it has been possible to frame the alleged misconduct more precisely by reference to the evidence, I have done so. Otherwise, I have framed the orders in accordance with Mr McFarlane's descriptions of the alleged misconduct, but limited preliminary discovery to the instances of the alleged misconduct identified by Mr Jackman SC in the evidence.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

Dated: 18 May 2018