SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Tuggeranong Town Centre Pty Limited v Brenda Hungerford Pty Limited (No 2)**
Citation:	**[2017] ACTSC 88**
Hearing Dates:	16, 17, 18, 19, 22, 23, 24, 26, 30 September 2014 1, 2, 3, 7, 8, 9, 10 October 2014, 28, 29 January 2015
Submission Dates:	31 October, 12 and 21 November 2014
Decision Date:	28 April 2017
Before:	Refshauge ACJ
Decision:	1. There be judgment for the plaintiff on its claim in the sum of $88,223.06 with costs. 2. The defendant's counterclaim be dismissed with costs. 3. There be judgment for the defendant on its third party claim in the sum of $1 377 561.94. 4. The defendant and the third party file and serve any written submissions as to costs of the third party claim on or before 1.00 pm on 5 May 2017. 5. It be declared that the plaintiff was entitled to enter the premises being shops 185A, 186 and 187 on Subleasing Plan 5100 on the land being Block 3 Section 1 Greenway to recover possession of them on or about 31 January 2008 and that the plaintiff was entitled to terminate the sublease of those premises to the defendant on that date under s 115 of the *Leases (Commercial and Retail) Act 2001* (ACT). 6. It be declared that the third party is entitled to call on the guarantee given by the National Australia Bank Ltd dated 29 August 2003 on behalf of the plaintiff for so much of the judgment sum in favour of the plaintiff as is secured by the guarantee and to account to the plaintiff for all the funds received from the bank in response to that call.
Catchwords:	**TRADE AND COMMERCE –** TRADE PRACTICES AND RELATED MATTERS – Misleading and deceptive conduct – silence or non-disclosure as a form of misleading and deceptive conduct – non-disclosure need not be intentional – non-

disclosure did amount to misleading and deceptive conduct – representations to constitute conduct – s 52 of the *Trade Practices Act 1974* (Cth)

EVIDENCE – EXPERT OPINION – Concurrent expert evidence – preference of evidence – influence of instructions given – nexus of argument – "in conclave"

DAMAGES – ASSESSMENT – Loss and damage must be actual loss and damage suffered – link between reliance of the misleading and deceptive conduct and the loss of damage claimed – causation – reasonableness – mitigation – liability to third parties – compensation payable as a consequence of loss of rent due to abandonment of premises – exit costs – damages for capital outlays – damages for trading losses – damages for borrowing costs – interest payable – s 82 of the *Trade Practices Act 1974* (Cth) – s 46 of the *Fair Trading Act 1992* (ACT)

Legislation Cited:

Civil Law (Property) Act 2006 (ACT), ss 5, 205
Civil Procedure Act 2005 (NSW), s 22
Competition and Consumer Act 2010 (Cth), s 82(1)
Corporations Act 2001 (Cth), ss 135, 135(2), 198E, 202A, 251A, 285, 286
Districts Act 2002 (ACT)
Fair Trading Act 1992 (ACT), ss 46
Land Titles Act 1925 (ACT), ss 77, 78
Leases (Commercial and Retail) Act 2001 (ACT), ss 12, 15, 22, 30, 37, 57, 58, 65, 66, 70, 71, 81, 84, 85, 86, 87, 89, 90, 91, 112, 115, 117, 122, 157A
Limitation Act 1985 (ACT), ss 11, 21, 51
Supreme Court Act 1970 (NSW), s 78
Trade Practices Act 1974 (Cth), ss 52, 82, 82(1), 82(2), 87
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Australian Competition and Consumer Commission v 4WD Systems Pty Ltd [2003] FCA 850; 200 ALR 491
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Australian Protective Electronics Pty Ltd v Pabflow Pty Ltd (1996) ATPR ¶41-524
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Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd [2010] ACTSC 20; 4 ACTLR 114
CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd [2004] VSCA 232; (2005) ATPR ¶42-042
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Parties:	Tuggeranong Town Centre Pty Ltd (Plaintiff and Cross Defendant)
	Brenda Hungerford Pty Ltd (Defendant and Counter Claimant)
	Leda Commercial Properties Pty Ltd (Third Party)
Representation:	**Counsel**
	Mr M Walsh (Plaintiff and Cross Defendant)
	Mr C Erskine SC and Mr J Masters (Defendant and Counter-Claimant)
	Solicitors
	Mills Oakley (Plaintiff and Cross Defendant)
	Donohue & Co (Defendant and Counter-Claimant)
File Number:	SC 616 of 2008

REFSHAUGE ACJ:

1. On 1 September 2003, the defendant, Brenda Hungerford Pty Ltd, to whom I will refer as "**BHPL**", became the sublessee by assignment of a sublease of certain premises at the Tuggeranong Hyperdome, a shopping centre in the Tuggeranong district of Canberra. Districts in the Australian Capital Territory are provided for in the *Districts Act 2002* (ACT): *The Owners of Units Plan No 932 v Marhaba* [2017] ACTSC 13 at [21]. Tuggeranong is the southernmost district of Canberra. I shall refer to the centre as "**the Hyperdome**". I shall refer to the Sublease as "**the Sublease**".

2. At the time, the third party, Leda Commercial Properties Pty Ltd, to whom I shall refer as "**Leda**", was the landlord.

3. On or about 6 December 2005, Leda sold its interest in the Hyperdome to Tuggeranong Town Centre Pty Ltd, the plaintiff, to whom I shall refer as "**TTC**". On or about that date, Leda purported to assign to TTC its interest in the Sublease.

4. On 31 January 2008, BHPL abandoned the premises the subject of the Sublease. In the ordinary course, BHPL would be required to pay the landlord, then TTC, for the rental and other payments due under the Sublease until the expiry of the term.

5. As a result, TTC commenced these proceedings claiming the moneys it said BHPL owed it under the Sublease. BHPL defended the claim and counter-claimed for damages caused by misrepresentations it said had been made in connection with its entry into the Sublease.

6. BHPL also joined Leda as a third party. Both TTC as plaintiff and Leda as third party were represented by the same lawyers. Thus, where the interests of these two parties in the proceedings coincide, I will refer to them as "**TTC/Leda**".

7. Because TTC's claim was largely undefended, save for its counter-claim, BHPL began the hearing.

The background

8. In order to render the proceedings and these reasons intelligible, it is appropriate to set out the factual background to the claims and counterclaims. Much of the evidence about these matters was undisputed. I make the following findings.

The Hyperdome

9. The Hyperdome is a shopping centre located in the Tuggeranong Town Centre in the suburb of Greenway, ACT, in the District of Tuggeranong, occupying the major part of the land bounded by Anketell Street, Athllon Drive, Reid Street North and Pitman Street. It is, from the maps and plans produced and admitted into evidence, a relatively large shopping centre.

10. To the west of Athllon Drive is a large building containing government offices which housed Centrelink, formerly the Department of Society Security.

11. Originally, the Hyperdome was bounded on the west by Scollay Street, which was parallel to but east of Athllon Drive, but when the Tuggeranong Markets closed, the Hyperdome expanded into that area and Scollay Street was closed from Reid Street North to Pitman Street.

12. The Hyperdome then established a building over the former site of the markets in about November 1992 which, in these proceedings, was called the "**Lifestyle Centre**". It was located to the west of the main, and larger, Hyperdome building and connected to it through an open space which I will call the **Courtyard**, about which there was significant evidence given in the proceedings.

13. To the east of the Courtyard was an entry to the main Hyperdome building which became known, in these proceedings, as the "**Target Door**". It led into a large arcade of shops extending towards the Anketell Street boundary of the Hyperdome, though at the upper level at that end; the actual entry from Anketell Street is at the ground level. That mall was called, in these proceedings, the "**Target Mall**", because a large Target store was located within it.

14. While the formal entrance to the Hyperdome is in Anketell Street, there were a large number of other entrances to it, as would be expected. In particular, a further entrance from Athllon Drive was to the west. That entrance opened into the Lifestyle Centre. A mall through the Lifestyle Centre led to the Courtyard and to the Target Door to which I have already referred.

15. Parallel to but south of the Target Mall was a smaller arcade of shops which, because it included a Coles store, was called, in these proceedings, the "**Coles Mall**".

16. It extended from approximately the Anketell Street boundary of the Hyperdome, but again at the upper level, past the Food Court and on to an entrance which opened into the undercover storey of the multi-storey car park of the Hyperdome which, at that level, was to the south west of the building. There was a further storey of the car park above the car park at that level.

17. The entry into the Coles Mall from that undercover car park was called, in these proceedings, the "**Coles Door**". The Giving & Living store was located in the Coles Mall, a few shops down from the Coles Door.

18. To the south of the Lifestyle Centre was a large open air ground level car park for government and government employees' vehicles, at the eastern side of which was a roadway, roughly where Scollay Street had been and which led in a northerly direction to the Courtyard between the Lifestyle Centre and the main Hyperdome building. To the east of that roadway was the multi-storey car park to which I have referred at [16]. Still further east was the Coles Door, accessed through the undercover storey of the multi-stories car park. A pedestrian crossing was marked across the undercover car park to the Coles Door.

19. Immediately to the north of the Coles Door was a ramp that led to the upper storey of the multi-storey car park and it was serviced by a travelator. At times, it was exposed to the weather. Persons using the travelator could enter the Hyperdome through the Coles Door into the Coles Mall.

20. In the Coles Mall, there was, a short distance along it and approximately opposite the BHPL leased premises, a ramp to the lower floor of the Hyperdome. It was also serviced by a travelator, which I will call in these reasons the "**Coles travelator**".

21. Directly opposite the entrance from Athllon Drive into the Lifestyle Centre were a set of traffic lights servicing a pedestrian crossing across Athllon Drive from approximately the area of the Centrelink offices. They were installed and commenced operation on 15 August 2003. To the south and diagonally opposite the southern government car park, to which I have referred above (at [18]), at the corner of Athllon Drive and Reid Street North, the Commonwealth had commenced constructing further offices for the Australian Public Service, to be known as the Caroline Chisholm building. Along Reid Street North, opposite the Hyperdome on its southerly side were located various premises occupied by offices and commercial businesses.

The business

22. One of the stores in the Coles Mall was a retail gift and homewares store called Giving & Living. It had been established for 11 years in 2003 and was managed by the employed staff and occupied its premises under the Sublease.

23. The business was owned by a company, Giving & Living Pty Ltd, the owners of which were Richard D'Amico and his wife, Nadia D'Amico.

24. On 21 July 2003, BHPL was registered as a company and, on 21 August 2003, it entered into an Agreement for Sale of Business with Giving & Living Pty Ltd for the purchase of the Giving & Living business it operated at a price of $235 000, plus the cost of stock at valuation. I shall refer to the business in these reasons as "**Giving & Living**".

25. The purchase price was apportioned in the Agreement as follows:

(a)	the Business Name	$ 1.00
(b)	Plant	$ 35 000.00
(c)	Goodwill	$199 999.00
(d)	The residue of the Vendor's Lease	$ 1.00

26. Following completion of the sale, BHPL, on 1 September 2003, took possession of the premises in which the business was conducted.

27. It appears that the Sublease was formally assigned to BHPL on 4 November 2003 effective from 1 September 2003.

28. On the same date, 4 November 2003, a Variation of the Sublease was executed, though it was a curious document. Despite the date of effect of the assignment of the Sublease, it apparently taking effect on the date it was signed, was nevertheless signed by Giving & Living Pty Ltd as "Lessee" and BHPL as "New Lessee".

29. The variation extended the term of the Sublease by two years and provided for further review dates for the rent and the amount thereafter payable for those extra years.

30. On 31 January 2008, BHPL vacated the premises and ceased to pay rent or other amounts to TTC after that. A new tenant took over the premises on 1 June 2008.

The pleadings issues

31. As noted above, TTC commenced these proceedings against BHPL seeking payment of moneys due under the Sublease. BHPL defended the proceedings and counterclaimed against TTC and Leda.

32. The pleadings consisted of a Statement of Claim (the Second Further Amended Statement of Claim dated 15 September 2014), a Defence and CounterClaim (the Second Further Amended Defence to Second Further Amended Statement of Claim and Second Further Amended CounterClaim dated 29 September 2014), a Reply (the Further Amended Reply to Second Further Amended Defence dated 6 October 2014) and Answer to the CounterClaim (Further Amended Answer to Second Further Amended CounterClaim dated 6 October 2014), a Third Party Claim (Further Amended Statement of Claim to accompany Third Party Notice dated 29 September 2014) and a Defence to the Third Party Claim (Further Amended Defence to Further Amended Third Party Claim dated 6 October 2014).

33. Regrettably, the Defence was drafted in a way that I have described in *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20; 4 ACTLR 114 at 119; [9], as being in "quite inappropriate language", following what fell from Connor J in *Inglis v Moore* (1981) 51 FLR 293 at 296, where the drafter denies paragraphs of a pleading instead of denying the allegations or assertions or claims in it.

34. Nevertheless, a number of the allegations in the pleadings were admitted and these give some further background to the proceedings. From those admitted pleadings, I can make the following further findings.

35. As required by the principles set out in cases such as *Moldex Ltd v Recon Pty Ltd* [1948] VLR 59 at 60, the pleadings alleged and I accept that all the parties were corporate entities able to sue and liable to be sued in their respective corporate names.

36. On 1 September 2000, Giving & Living Pty Ltd became sublessee to Leda from 1 September 2000 until 31 August 2007 of shop premises in the Hyperdome Shopping Centre, being shops 185A, 186 and 187 on subleasing plan 5100 on the land being Block 3, Section 1, Greenway in the Australian Capital Territory. I shall call these premises the "**Premises**". It was there that the company conducted the Giving & Living business.

37. BHPL succeeded Giving & Living Pty Ltd as sublessee of the Premises from 1 September 2003. There was, however, some dispute on the pleadings about the precise mechanism whereby that happened. In essence, TTC asserted that the change in sublessee was effected by an assignment of the Sublease; BHPL asserted that it was effected by the issuing to it of a new sublease with some different terms and conditions.

38. In any event, the term of occupation was extended to 31 August 2009 and BHPL was required to provide a bank guarantee equivalent to three months rent. It did so by causing the National Australia Bank Ltd to provide the required guarantee.

39. BHPL says that these were terms of a new lease; TTC says the term of the Sublease, being that originally granted to Giving & Living Pty Ltd were merely varied, and that the requirement for a bank guarantee was a term of the Sublease. When the Sublease was assigned, TTC claimed the requirement simply became an obligation of BHPL. The Sublease was merely varied not replaced by a new Sublease.

40. The Sublease (whether an assigned sublease or a new sublease) required payment of certain moneys, including base rent, contribution to outgoings, and an amount equal to any goods and services, consumption, value added or similar tax applying to any of the payments, and required BHPL to make payments without set-off, counterclaim, withholding or deduction. The terms and conditions included a provision that expiry or termination of the Sublease would not affect BHPL's obligations to make payment of any moneys due under it and that BHPL would indemnify TTC against any liability or loss in connection with any breach by BHPL of the Sublease. BHPL, in its defence, relied on the terms and conditions of the actual document without admitting the accuracy of this summary set out in TTC's Statement of Claim.

41. Around 31 January 2008, BHPL abandoned the Premises which, by s 115 of the *Leases (Commercial and Retail) Act 2001* (ACT), resulted in the termination of the Sublease, though BHPL in its defence denied any breach of the Sublease.

42. Although BHPL said that "as it did not know the facts it could not admit them", TTC (although, in error, referring in paragraph 10 of the Second Further Amended Statement of Claim to the "applicant" instead of the "plaintiff") found a new tenant for the Premises. I am satisfied that I can find that the new tenant took occupation of the Premises from 1 June 2008, thus ending any further obligation of BHPL for payments to TTC.

43. TTC alleged it had suffered damage by the breach of the Sublease and abandonment of the premises and claimed $52 841 being rent and outgoings for the period from February 2008 to May 2008.

44. On or about 27 August 2003, BHPL arranged for the National Australia Bank to provide the required guarantee for the benefit of Leda.

45. A question arose, to which I will refer below, about the enforceability of that guarantee. TTC sought declarations as to its entitlements to the benefit of the guarantee that it and Leda had. BHPL opposed the making of such declarations.

46. The issues arising out of the Statement of Claim and Defence are as follows:

    1. Whether the lease document under which BHPL occupied the Premises was the assigned Sublease from Giving & Living Pty Ltd or a new sublease.

2. Whether Leda had properly and effectively assigned its interest under the Lease (whether a new sublease or assigned sublease) to TTC.

3. What was the status of the bank guarantee that BHPL had given to Leda and whether it had been cancelled or whether Leda could, on behalf of, or accounting to, TTC, call on the guarantee for the moneys owed by BHPL.

4. In addition, BHPL alleged breaches of various obligations of TTC which, it said, were required of it under the *Leases (Commercial and Retail) Act* or the leasing documents, by reason of which BHPL was entitled to recover certain over-charges and that it was unconscionable for TTC and Leda to have charged for certain outgoings which, it was asserted they were liable to refund to BHPL.

5. BHPL further challenged the claim by TTC on the basis of the matters pleaded in the Counterclaim.

47. The CounterClaim was against TTC alone. It pleaded a series of allegations but the cause of action was clouded by a lack of clarity in the way they were said to render TTC liable.

48. Thus, the Counterclaim consisted primarily of allegations that officers of TTC or of Leda had made representations which were made in trade or commerce. The representations were said to be false, in that they related to future matters and there were no reasonable grounds for making the representations.

49. The representations which were said to have been misleading or deceptive were said to have been made by the following persons:

(a) Mr Duane Lord, said to have been made from the beginning of 2007 through to the end of 2007 and in particular on or about 8 and 23 March 2007;

(b) Mr Tim Beirne, said to have been made on or about 10 July 2003;

(c) Mr Shane McCann, said to have been made in about March 2004 and then again further representations by him said to have been made on or about 23 March 2006; and

(d) Mr Bob Cooper, said to have been made from shortly after the time Hot Dollar Australia (Canberra) Pty Ltd occupied shop 190 in the Hyperdome until about mid 2007.

50. I set out below the various representations in some detail as, unsurprisingly, much of the evidence in the proceedings concerned them, whether they were made, whether they were false, whether they were misleading or deceptive and whether they led to BHPL suffering damage.

51. It appears that, insofar as the representations were made by officers of Leda, the alleged liability of TTC was said to be a result of the assignment of the Leda's interests in the Lease as lessor to TTC had the effect of assigning "to" TTC the liabilities that Leda may have had to BHPL.

52. It was then alleged that BHPL relied upon these representations and, in reliance upon them, was induced to enter into the Sublease and do or refrain from doing other things which resulted in damage to BHPL.

53. It was said that the conduct in making the representations involved TTC engaging in unconscionable conduct, both in equity and within the meaning of the *Trade Practices Act 1974* (Cth), and amounted to misleading and deceptive conduct within the meaning of that Act and the *Fair Trading Act 1992* (ACT) and in breach of clause 18.1 of the Sublease.

54. The Counterclaim also referred to the over-payments to which I have referred above (at [46] 4) and sought repayment of those moneys.

55. The issues arising out of the Counterclaim and Defence to the Counterclaim are as follows:

    1. Whether Mr Lord made certain alleged representations and, if he did, whether they were misleading or deceptive?

    2. Whether TTC failed to comply with its obligations in connection with the assessment of claims for and reporting of relevant information about the outgoings to which BHPL was required to contribute and whether the contributions it paid were more than TTC was entitled to receive.

    3. Whether, following a grant of rental relief to BHPL by TTC, the rent and contributions to outgoings paid by BHPL was in excess of that it was required to pay.

    4. Whether Mr Beirne made certain alleged representations either expressly or impliedly and, if he did, whether TTC was liable for any remedy to which BHPL might be entitled as a result of them.

    5. Whether the matters the subject of the alleged representations of Mr Beirne were as described, such that the alleged representations were misleading or deceptive.

    6. Whether Leda was required to give to BHPL a disclosure statement and whether TTC was required to do so.

    7. Whether Mr McCann made certain alleged representations and, if he did so, whether TTC was liable for any remedy to which BHPL might be entitled as a result of them, especially as BHPL was by then already under a legal obligation to comply with the provisions of the Sublease.

    8. Further, whether, when Mr McCann made any of the alleged representations, he knew or ought to have known matters which BHPL alleged were inconsistent with the representations.

    9. Whether Mr Cooper made certain alleged representations and, if so, whether he knew matters or ought to have known matters which BHPL alleged were inconsistent with the representations.

    10. Further, whether certain matters the subject of the alleged representations made by Mr Cooper were untrue.

    11. Whether the claims by BHPL were barred by s 82(2) of the *Trade Practices Act* and s 11 of the *Limitation Act 1985* (ACT).

12. Whether TTC engaged in unconscionable conduct and, if so, whether BHPL suffered loss or damage thereby.

13. Whether TTC is liable for any cause of action BHPL has raised against TTC at a time before it had an interest in the Hyperdome and, if so, the extent to which its liability should be apportioned with Leda whose liability would be concurrent.

14. Whether any loss sustained by BHPL was caused or contributed to by BHPL.

56. BHPL issued a Third Party Notice to Leda. It was accompanied by a Statement of Claim as required under r 303(2) of the *Court Procedures Rules 2006* (ACT). The Third Party Claim was a rather curious claim. The claim was not for contribution or indemnity as is the usual claim made in a third party claim.

57. That, of course, is not the limits of such third party claims: r 302 of the *Court Procedures Rules*.

58. In this case, BHPL sought damages from Leda, not dependent upon any claim by TTC in its Statement of Claim which was for rent and other outgoings unpaid until the Premises were re-leased.

59. In this sense, it was truly a separate claim. It was, apparently, said to be permitted by virtue of it coming within the terms of r 302(b) and (c) of the *Court Procedures Rules* or both. That rule is as follows:

> A defendant may file a third-party notice if the defendant wants to –
>
> (a) claim a contribution or indemnity against a person who is not already a party to the proceeding; or
>
> (b) claim relief against a person who is not already a party to the proceeding that –
>
> (i) relates to or is connected with the original subject matter of the proceeding; and
>
> (ii) is substantially the same as some relief claimed by the plaintiff; or
>
> (c) require an issue relating to or connected with the original subject matter of the proceeding to be decided not only as between the plaintiff and defendant but also between either of them and a person not already a party to the proceeding.

60. This was a very similar situation to that in *Jardine v Vaughan (No 3)* [2015] ACTSC 33, where unpaid sale price instalments were sought from the defendant by the plaintiff and the defendant sought damages from the third party for misleading and deceptive conduct in connection with the sale. In that case, the third party proceedings were heard separately from the proceedings between the plaintiff and the defendant: see *Jardine v Vaughan (No 3)* at [8]-[9]. The defendant was awarded damages. Though that award was overturned on appeal, the Court of Appeal did not suggest the procedure was in any way defective: *Clarkson Williams Partners Pty Ltd v Vaughan* [2016] ACTCA 1.

61. There is no doubt that the Third Party Claim was substantially the same as the Counterclaim BHPL has made against TTC. Indeed, the final version of the Third Party Claim (that is the Further Amended Statement of Claim to accompany Third Party Notice dated 29 September 2014) was in substantially identical terms as the Counterclaim save for claims that were only maintainable against TTC, such as in relation to the subsequent variation of the Sublease.

62. Indeed, so similar were the two pleadings that, as in the Counterclaim, the Third Party Claim referred to BHPL as "the Defendant" and TTC as "the Plaintiff", but Leda was referred to, not as "the Third Party", which might have suggested some independent consideration of how the Third Party Claim should be pleaded but as "Leda" as in the Counterclaim. I suppose this says something about the use of computers to copy text without the need for independent thought.

63. Interestingly, BHPL asserted in the Third Party Claim that it had purchased an Assignment of Lease from Leda giving it entitlement to occupy the premises and that, on or about 4 November 2003, Leda varied the terms of the lease, pleadings which, at first blush, seems inconsistent with some of the defences it raised to the Statement of Claim.

64. The Third Party Claim repeated a number of the allegations of misrepresentation that had been included in the Counterclaim and alleged, as a result, that Leda had engaged in unconscionable conduct both in equity and within the meaning of the *Leases (Commercial and Retail) Act* and the *Trade Practices Act* and had engaged in misleading and deceptive conduct within the meaning of the *Fair Trading Act* and claimed damages.

65. The representations for which BHPL said Leda was responsible and which was said to have constituted the culpable conduct were those said to have been made by Mr Beirne, and the first 2004 representations said to have been made by Mr McCann.

66. In addition, BHPL alleged that, in or about April 2006, a prospective purchaser of the Giving & Living business from BHPL was instead offered an alternative tenancy in the Hyperdome by the shopping centre management, even though the purchaser had been introduced to the shopping centre by BHPL.

67. Curiously, BHPL also claimed, in the Third Party Claim, that Mr Lord's alleged representations, from beginning 2006 to end 2007 and particularly on or about 8 and 23 March 2007, had been made on behalf of Leda, even though it had sold its interest in the Hyperdome to TTC on 6 December 2005.

68. Leda filed a Defence to the Third Party Claim. It was, unfortunately, quite confusing. It denied that it or anyone on its behalf had made the certain representations alleged but then addressed other allegations as though they repeated certain parts of the defence even though it did not appear that they did so. It also appeared to controvert allegations that were not made in the Third Party Claim.

69. In the proceedings, no point seemed to be taken of the disconnect between the claims actually made in the Third Party Claim and the Defence to it.

70. So far as I could make them out, the issues arising out of the Third Party Claim and the Defence to the Third Party Claim were as follows:

    1. Whether Mr Beirne made certain alleged representations, either expressly or impliedly, and, if he did, whether the matters the subject of the representations were, as described, such that the representations were misleading or deceptive.

    2. Whether Mr McCann made certain alleged representations and, if he did, whether he knew or ought to have known matters which BHPL alleged were inconsistent with the representations.

3. Whether Mr Lord made certain alleged representations and, if he did, whether they were misleading or deceptive.

4. Whether Leda was responsible for any remedy to which BHPL might be entitled as a result of any representations made by Mr Lord.

5. Whether a prospective purchaser of the balance of the term BHPL had in the Sublease was improperly persuaded to enter into a lease of premises elsewhere in the Hyperdome.

6. Whether the procedures required to be followed in setting of and requiring payment for the outgoings payable by tenants were followed by Leda and whether BHPL had been overcharged for the contributions to outgoings it had paid.

7. Whether Leda had been required to give BHPL a disclosure statement under the *Leases (Commercial and Retail) Act*.

8. Whether the Third Party Claim was barred by s 82(2) of the *Trade Practices Act* or s 11 of the *Limitation Act*.

The representations

71. Central to these proceedings was the issue of the representations. Accordingly, it is appropriate to set them out here.

72. The first representations pleaded in the proceedings were said to have been made by Dwayne Lord, who was employed from April 2006 to January 2008 as the Centre Manager of the Hyperdome.

73. BHPL alleged that, from the beginning of 2006 to the end of 2007, and, in particular, on or about 8 and 23 March 2007, Mr Lord, on behalf of TTC, represented that:

(a) TTC wanted to keep BHPL's shop in the Hyperdome because it was a good shop;

(b) TTC was actively looking to relocate the shop to a better location in the Hyperdome; and

(c) in particular, from about March 2006 until December 2007, on approximately a weekly basis, the travelators near to the shop would be fixed soon.

74. These representations were known as the "Lord representations" and it was alleged that they were made in circumstances where Mr Lord knew or ought to have known that:

(a) TTC was not actively seeking to relocate the Giving & Living store to a better location;

(b) the Giving & Living store's turnover had fallen significantly and was, as a result, running at a loss; and

(c) TTC had no intention of fixing the travelators.

75. It was alleged that, in reliance on these representations, BHPL:

(a) was induced to remain in the same location;

(b) was induced not to take steps to sell the business;

(c) was induced to invest money in the business; and

(d) was induced not to terminate the lease and thereby mitigate its damages.

76. It was also alleged that, at all material times, TTC was aware that BHPL was relying on the Lord representations.

77. The first in time but second pleaded representations were alleged to have been made on or about 10 July 2003 by Timothy Beirne to Ms Hungerford. These were called "the Beirne representations".

78. Mr Beirne was, from January 2002, the Retail Manager at the Hyperdome. As such, he described himself as "dealing ... day-to-day with the tenants and the marketing of the Centre".

79. In the conversation with Ms Hungerford, Mr Beirne is claimed to have represented:

(a) that the Hyperdome was a good location in which to have a shop such as the Giving & Living store;

(b) the Giving & Living store's location was a good one because the Coles Door, nearest to the store, had passing through it the second highest foot traffic in the Hyperdome;

(c) there was nothing that BHPL should know about the Hyperdome that could impact upon the Giving & Living business; and

(d) the rent for the lease was market rent.

80. It was also said that, arising from these representations, it was impliedly represented:

(a) that the layout of the Hyperdome was not expected to alter during the term of the Sublease in any way that could affect the correctness of those representations;

(b) that the then volume of the foot traffic would not fall during the term of the Sublease in any way that Leda was then aware would affect the correctness of those representations; and

(c) the marketing and promotion of the Hyperdome was not expected to alter during the term of the lease in any way that would affect the correctness of those representations or, in the alternative, the Hyperdome would pursue best industry practices in marketing and promotion to ensure that the volume of the foot traffic would not fall during the term of the Sublease in any way that could affect the correctness of those representations.

81. BHPL claimed that, at the time of making the Beirne representations, Mr Beirne knew or ought to have known that:

(a) Leda had already planned extensive development works, integrating or linking the original Hyperdome block with the Lifestyle Centre, which would be likely to

divert foot traffic away from the Coles Door and be in breach of clause 18.5 of the Sublease or disturb BHPL's tenancy;

(b) Leda had already planned to introduce paid parking to the Hyperdome which would be likely to cause a substantial fall in the turnover of the shop and be in breach of clause 18.5 of the Sublease or to disturb BHPL;

(c) Leda had received a Market Research Report from AMRS recommending the implementation of many strategies to address identified shortcomings that negatively affected foot traffic in the Hyperdome; and

(d) the rent was substantially above market rent.

82. BHPL alleged that the representations related to future matters and that there were no reasonable grounds for making the representations. It was then claimed that, in reliance on the representations, BHPL:

(a) was induced to enter into the lease;

(b) was induced to remain in the same location;

(c) was induced not to terminate the lease notwithstanding the breaches of it;

(d) was induced not to take steps to sell the business; and

(e) was induced to invest money in the business.

83. BHPL also claimed that Leda was aware at all times that BHPL was relying on the representations made in the Beirne representations.

84. I pause to note that the allegation that the rent was market rent was not a representation as to a future matter and there was no pleaded allegation that the allegation was false. By implication, however, the pleading that Mr Beirne knew or ought to have known that the rent was substantially above market rent may be seen, despite the inadequacy of the pleadings, to raise the falsity of that representation. This was just another challenge for the Court to address arising from the rather inadequate pleadings.

85. The third pleaded set of representations were alleged to have been made by Shane McCann on behalf of Leda in or about March 2004. Mr McCann was employed at the Hyperdome as Retail Manager from October 2002 and in late 2003 or early 2004 was appointed Centre Manager at the Hyperdome, taking up his role in early 2004 until April or May 2006.

86. It was alleged that he first represented that Leda intended to lease a shop opposite the Giving & Living shop (the **Hot Dollar shop**), to a company, Hot Dollar Australia (Canberra) Pty Ltd, which would lift the turnover of the Giving & Living shop. This was known as the first McCann representations.

87. It was then alleged that, contrary to the representation, the Hot Dollar shop, would not be likely to draw any foot traffic appropriate to the Giving & Living shop.

88. The fourth set of pleaded representations were said to have been made, on or about 23 March 2006, by Mr McCann, again said to have been made on behalf of Leda, though it had by this date assigned its interest in the Hyperdome. Mr McCann was said to have represented to BHPL that Leda would negotiate with prospective purchasers of BHPL's business in good faith regarding the reduction of the shop

space and continuity of rent relief, which BHPL was then in the process of negotiating with Leda. This was known as the second McCann representations. BHPL alleged that the second McCann representations were made when Leda knew or ought to have known that it was not intending to engage in those negotiations.

89. A further, third representation was said to have been made that same date when Mr McCann, adding, on this occasion, that the representation was also said to have been made on behalf of TTC, was said to have represented that TTC would negotiate rent relief with BHPL in the order of 50 per cent to 30 per cent. This is known as the third McCann representations

90. BHPL said that all the McCann representations also related to future matters and that there were no reasonable grounds for making the representations. BHPL said that, in reliance on the representations, BHPL was:

    (a) induced to enter the lease (a matter, I interpolate, that could not be so since the representations post-dated BHPL entry into the Sublease);

    (b) induced to remain in the same location;

    (c) induced not to terminate the lease notwithstanding the breaches alleged;

    (d) induced not to take steps to sell the business (which, again, is odd in that the second McCann representation was that Leda would negotiate in good faith with prospective purchasers of BHPL's business); and

    (e) induced to invest money in the business.

91. BHPL further alleged that at all material times Leda (curiously not TTC as well, instead or at all) was aware that BHPL was relying on the first, second and third McCann representations.

92. Finally, the last set of representations alleged were said to have been made by Robert Cooper, who was employed from October 2004 to late 2008, as Retail Manager and then a leasing executive at the Hyperdome.

93. BHPL alleged that, after Hot Dollar Australia (Canberra) Pty Ltd moved into the Hot Dollar shop opposite the Premises, Mr Cooper, on behalf of Leda and subsequently of TTC, represented to BHPL that that company would be moving out of the space and would be replaced by a "good new retailer". This was known as the Cooper representations.

94. BHPL alleged that the Cooper representations were made when he knew or ought to have known that that company had moved into the shop opposite the Premises and that there would not be a "good new retailer" moving into that shop, which retailer would not be likely to draw any foot traffic appropriate to BHPL's business.

95. Again, BHPL alleged that this representation related to a future matter and there were no reasonable grounds for making the representation and that, in reliance on it, BHPL was induced to:

    (a) enter the lease (which, again, cannot be true since the representation was made well after BHPL had entered into the Sublease);

    (b) induced to remain in the same location;

    (c) induced not to terminate the lease notwithstanding breaches of the lease;

(d) induced not to take steps to sell the business; and

(e) induced to invest money in the business.

96. BHPL alleged that, at all material times, Leda was aware that BHPL was relying on the Cooper representations.

97. I note that, again, there was a deficiency in the pleadings in that, despite suggesting that the Cooper representation was made on behalf of TTC, as well as on behalf of Leda, there was no allegation that TTC was aware that BHPL was relying on the representation.

98. In all, once again, the pleadings were deficient and inadequate in a number of respects. In the result, none of these inadequacies were other than to make my task more complicated and, in requiring me to work out what was meant, delaying somewhat the completion of these reasons.

Consideration of representations

99. Only the Beirne representations were referred to in the written submissions of BHPL. These will need to be considered at some length below.

100. The failure to mention the other representations might imply, although it was not expressed, that the claims based on those representations were not pressed.

101. Extensive submissions were filed as to these representations by TTC/Leda.

102. In my view, it is not necessary to consider the representations, other than the Beirne representations, in any great detail.

103. I am prepared, however, on the basis of the evidence before me, to make the following findings.

The Lord representations

104. I have carefully read the evidence, including, especially, the evidence of Mr Lord and documents that he created or were created during his time at the Hyperdome.

105. I am satisfied that, at the time of the alleged representations, TTC was actively seeking to re-locate BHPL's shop, contrary to the pleaded claim.

106. I am also satisfied that, while Mr Lord was aware that the BHPL turnover had fallen significantly, this did not render any statement he made to be false, misleading or deceptive.

107. I am also satisfied that the Coles travelator and the travelator outside the Coles Door were not inoperative on many occasions as alleged and certainly had no continuing mechanical problems. I am satisfied that, initially, the travelator outside the Coles Door was switched off during wet weather but that, subsequently, Leda or TTC arranged for a non-slip substance to be applied to it and that it could then be used when wet. I am also satisfied that it could still be used when not moving. In addition, the evidence which I am prepared to accept was that, if a travelator was broken, it would be fixed quickly.

108. Accordingly, I am not satisfied that any representations made by Mr Lord as alleged were misleading or deceptive or constituted unconscionable conduct.

The McCann representations

109. In relation to the first McCann representations, BHPL gave no evidence in relation to it. Mr McCann denied making any such statement and it was not put to him in cross-examination that he had made the representation.

110. In any event, the representation was inconsistent with what appear to be the facts relating to the occupation by Hot Dollar Australia (Canberra) Pty Ltd of a tenancy in the Hyperdome.

111. Accordingly, I am not satisfied that the first McCann representation was made.

112. The second McCann representations involved an assertion of Leda's willingness to negotiate with prospective purchasers in good faith regarding the reduction of the shop space and continuity of rent relief.

113. This can conveniently be dealt with at the same time as third McCann representations, namely the allegation that TTC represented to BHPL that TTC would negotiate rent relief for BHPL in the order to 50 per cent to 30 per cent.

114. The evidence came from Ms Hungerford who said:

> I said to Mr McCann, 'The store is not doing well. The sales figures are continuing to decline. My original plan was to sell the business in two to three years after I purchased it. I need to know if I can get some relief from the Hyperdome.' He responded to me by saying – and it was a weird way that he put it, and that's why I remember it – 'Would 50 to 30 per cent rent relief assist you?' We were talking about various rent relief, but '50 to 30 per cent' I recall. I also – and, 'If I did obtain rent relief, would that be passed on to a buyer?' Because at that point in time, in 2005, I had appointed a broker to assist in the selling and marketing of my shop, and I had paid him marketing, and ... I said to Mr McCann, 'A broker has been employed, and I have paid a sum of money to the broker to assist in the selling of the shop. How would it affect the sale if I was able to have some assistance from the Hyperdome?' Mr McCann said to me, he would be able to look at the circumstances at the time that I had a buyer.

115. It is not in contest that TTC did grant BHPL a rent relief of $20 000 in the 2006/07 financial year and $32 000 in the 2007/08 financial year, though these were less than the 30 per cent minimum suggested by Ms Hungerford.

116. I am not satisfied that Mr McCann was offering a rent relief in the order of 50 per cent to 30 per cent of BHPL's rent. He was, as would be expected and appropriate, inquiring as to what level of rent relief was being sought. I cannot interpret what Mr McCann said as a representation that any particular level of relief would be granted.

117. If Ms Hungerford, who held herself out as an astute businesswoman, had wanted some clarity or certainty, she should have asked further questions. There was no evidence that she did so.

118. As to the representations alleged to have been made about passing on any rent relief to a purchaser of the Giving & Living business, Mr McCann did not say that it would be passed on. On Ms Hungerford's evidence, he merely said, very vaguely, that "he would be able to look at the circumstances at the time".

119. I note, too, that there was no reference in this evidence to any reduction in the floor space of the Giving & Living shop as had been pleaded.

120. Further, there was no evidence that any purchaser was found by BHPL or her broker or was ever presented to Mr McCann or anyone else for the relevant negotiation.

121. Accordingly, the evidence as a whole does not support the claim.

122. Insofar as the representation to negotiate with prospective purchasers is concerned, the highest it came was when Mr McCann is alleged to have said that he "would be able to look at the circumstances at the time that I had a buyer". That may be taken to have implied that Leda would negotiate. As no buyer was submitted, however, there is no evidence to suggest that Leda was not intending to engage in those negotiations. If Ms Hungerford wanted greater certainty, she could have, as an astute business woman, asked further questions or perhaps obtained a written assurance to pass on to her broker or any prospective purchaser.

123. So far as the allegation that TTC would negotiate rent relief in the order of 50 per cent to 30 per cent, the evidence of BHPL does not rise that high. On Ms Hungerford's evidence, Mr McCann was simply suggesting a possibility. Indeed, BHPL clearly understood that it was not necessarily going to be provided when she said, "If I did obtain rent relief, would that be passed on to a buyer?".

124. That BHPL did not obtain rent relief between 50 per cent and 30 per cent does not make what Mr McCann said in this representation to be false, misleading, deceptive or unconscionable conduct.

125. Mr Lord had sent an email to BHPL on 11 May 2006. In it, he said:

> 1. Rental Subsidy – we are prepared to look at this option if you can provide us with a certified P&L's [sic] for the last 2 years from your accountant. As a precursor to a decision on this, we encourage you to take advantage of the options to try and increase your sales we discussed i.e casual leasing, P.A announcements, in-centre signage etc.

126. BHPL conceded that this was consistent with what Mr McCann had said to her making it clear that there was no guarantee or offer that the subsidy would be 50 per cent to 30 per cent.

127. Accordingly, I find that Mr McCann did represent that TTC would negotiate with prospective purchasers and that this representation was not misleading or deceptive. I also find that Mr McCann did not represent that the rent relief would be in the order of 50 per cent to 30 per cent but that it would be negotiated and, no doubt, that figure would be considered.

128. Accordingly, I do not find any of Mr McCann's second or third representations to be false, misleading, deceptive or unconscionable.

The Cooper representations

129. Finally, I consider the Cooper representations.

130. As I have noted above, this allegation is inconsistent with the allegation in the Third Party Claim. One alleges that Hot Dollar shop, had already moved in, while the other that the company was going to move into the shop area opposite the Giving & Living shop.

131. These representations were not mentioned in the oral evidence Ms Hungerford gave. Mr Cooper's evidence was that he had no recollection of making any such representation.

132. In cross-examination, Mr Cooper agreed that there was a period of one to two weeks when the shop opposite the Giving & Living shop ceased to trade by reason of a lock-out. It was not, however, put to Mr Cooper that he had said anything to Ms Hungerford about the shop or the company.

133. Indeed, the company's occupation of the Hot Dollar shop pre-dated BHPL's occupation of the Premises and the assignee, Hot Dollar Australia (Canberra) Pty Ltd, continued to trade under the same name and, it appeared, in the same way with more years left on the lease than BHPL had in the Sublease for the Giving & Living shop.

134. I am not prepared to find that Mr Cooper made the claimed representation.

Conclusion on representations

135. As a result, so far as the claims based on the Lord representations, the first, second and third McCann representations, and the Cooper representations are concerned, BHPL's claim must be dismissed. The result of this that judgment will be given for TTC on the Counterclaim.

Respective liabilities of TTC and Leda

136. It is appropriate at this stage to deal with an issue that I must address about which there were no submissions.

137. As I have noted above, the Counterclaim, which was a claim against TTC alone, did, however, claim against it in respect of all the representations, not only those of its officers for whom it may properly be said to be vicariously liable. TTC would be liable ordinarily for misrepresentations, misleading or deceptive conduct or unconscionable conduct by its employees acting in the course of their employment without any allegation other than the allegation of employment or agency. See *Creedon v Measey Investments Pty Ltd* (1988) 91 FLR 318 at 320-1.

138. As for representations said to have been made by the employers or agents of Leda, however, there was little explanation of how it was alleged by BHPL that TTC was liable for any such misrepresentations or misleading, deceptive or unconscionable conduct. The highest the allegation came was in paragraph [12] of the Second Further Amended Counterclaim as follows:

> If (which is not admitted) the effect of the assignment referred to in paragraphs 5 and 6 of the Statement of Claim also assigned to the Plaintiff the liabilities of Leda to the Defendant, in respect of the matters set out in the following paragraphs, the Defendant further says as follows.

139. For completeness, I note that paragraphs [5] and [6] of the Statement of Claim (in identical terms in the relevant pleading of TTC, the Second Further Amended Statement of Claim) were as follows:

> 5. On or about 6 December 2005 Leda's interests as lessor in the Sublease were assigned to the plaintiff.
>
> 6. The assignment of the reversion and the benefits of covenants by the defendant in the Sublease were transferred by Leda to the plaintiff on registration of the transfer of the land which included the Premises to the plaintiff on 28 June 2006.

140. The assignment, however, is not a method whereby at law, the obligations of an assignor incurred prior to the assignment can be transferred to the assignee. They remain as obligations of the assignor. See *Provident Financial Corporation Pty Ltd v Hammond* [1978] VR 312 at 318; *Mitchell v Purnell Motors Pty Ltd* (1961) 78 WN (NSW) 26 at 28-9; *Stoddart v Union Trust Ltd* [1912] 1 KB 181 at 194.

141. Such a transfer could have been effected by novation. See, for example, *Tattock v Harris* (1789) 3 TR 174 at 180; 100 ER 517 at 521; *Olsson v Dyson* (1969) 120 CLR 365 at 388.

142. Of course, some of the obligations of Leda are transferred by an assignment of a lease because they are obligations that run with the land. See *City of London Corporation v Fell* [1993] 4 All ER 968 at 973-4. It does not seem to me, however, that a breach of an obligation not to engage in misleading, deceptive or unconscionable conduct is other than a personal obligation and could only be assigned by novation.

143. As pointed out in *Mitchell v Purnell Motors Pty Ltd* however, this may not have the effect of preventing a party in the position of BHPL from seeking to set-off its damages claim against the TTC claim for costs, but not to claim any damages over and above those for which it was liable. In this case, however, there is no claim by Leda against which BHPL can counterclaim or seek a set-off.

144. The consequence is that any claim for damages to which BHPL is entitled as against Leda is not recoverable from TTC. This will have to be considered in the final orders to be made.

Breach of the *Leases (Commercial and Retail) Act 2001* (ACT)

145. In addition to the various misrepresentations or misleading or deceptive conduct which BHPL complained had been made by TTC/Leda or in which they had engaged, BHPL complained of breaches of the *Leases (Commercial and Retail) Act*.

146. There were, however, ultimately no submissions made by BHPL about this aspect of its claim. It is, therefore, necessary to say little about it, though, on the evidence adduced, only one aspect of the claim seemed to me to have any substance.

147. There were four claims:

- an alleged failure by Leda to give BHPL a disclosure statement under s 30 of the *Leases (Commercial and Retail) Act*;
- an allegation that TTC/Leda had engaged in unconscionable, harsh or oppressive conduct in dealing with BHPL, contrary to s 22 of that Act; and
- that TTC/Leda had made representations that were and TTC/Leda knew or should reasonably have known were, false or misleading is a material particular in the course of the negotiations; and
- the claim by TTC/Leda for a contribution to outgoings was excessive and not authorised by law so that BHPL was overcharged $77,895.97.

Disclosure Statement

148. The issue of the disclosure statement depended on the alleged assignment of the Sublease being regarded as the grant of a new lease. In its defence, BHPL had pleaded that the leasing arrangements with Leda following the sale of the Giving & Living business by Giving & Living Pty Ltd to BHPL was the issuing of a new lease and not an assignment of the existing lease. As such a new lease, it would appear to be a "proposed lease", so that s 30 of the *Leases (Commercial and Retail) Act* required Leda to give to BHPL a disclosure statement. A prescribed form of disclosure statement (AF2003-4), made under s 157A of the Act, is an eight page document prescribed on 11 March 2003 and so applicable here. It requires a good deal of information to be disclosed, such as details of the premises the subject of the lease, details of rent and other outgoings, finishes and make good details, and details of agreements and representations. In particular, for shopping centres, it requires additional details to be given, especially relevant in the context "changes or developments planned by the owner and timing of any changes or developments for: 1. Shopping Centre, 2. Surrounding roads".

149. In this case, the term of the lease was extended and provision made for review of the rental for extra years. It appears that BHPL relied on the variation to say that this constituted a surrender of the current Sublease and a re-grant of the Sublease. This would be in accordance with what was held by the Privy Council in *Take Harvet Ltd v Liu* [1993] 2 All ER 459 at 467, as follows:

> In *Jenkin R Lewis & Son Ltd v Kerman* [1970] 3 All ER 414 at 419, [1971] Ch 477 at 496 Russell LJ, delivering the judgment of the Court of Appeal, summarised a set of circumstances in which, on well-established principles, a lease will be treated as having been surrendered by operation of law:
>
> > If a tenant holding land under a lease accepts a new lease of the same land from his landlord he is taken to have surrendered his original lease immediately before he accepts the new one. The landlord has no power to grant the new lease except on the footing that the old lease is surrendered and the tenant by accepting the new lease is estopped from denying the surrender of the old one. This "surrender by operation of law" takes effect whether or not the parties to the new lease intend it to take effect. Moreover, even if there is no express grant of a new lease the old lease will be surrendered by operation of law if the arrangements made between the landlord and the tenant are such as can only be carried out so as to achieve the result which they have in mind if a new tenancy is in fact created.

150. The question of whether there has been a surrender and re-grant is, however, a question of fact. As Young J said in *Pascoe-Wabbe v Nusuna Pty Ltd* (1985) 3 BPR 97,231 at 9622:

> Up until fairly recently courts would usually take the view that unless there was some relatively minor alteration in the terms of the lease the parties must have intended a surrender and a regrant, see eg *Lewis & Cassidy Landlord and Tenant Law*, (1966) p 122. However, such a question is a question of fact (*Wirral Estates Ltd v Shaw* [1932] 2 KB 247 at 257 as applied by the Court of Appeal in *Stedman v Shaw* (1970) 91 WN (NSW) 190 at 196) and courts have been more ready to infer a mere variation, especially in cases of adjustment to the rent, in the last 20 years and the present law is probably accurately summed up in the 4th edition of *Halsbury* vol 27 para 448. That summary includes the statement that normally where the term of the lease is altered it is difficult to satisfy the court that there has been a mere variation.

151. I am not satisfied, on the balance of probabilities, that the evidence was sufficient in this case to make a finding as to the relevant facts, though it would seem from what Young J said that the variation may have been found to be a surrender and re-grant.

152. While the issue about whether the leasing arrangements constituted an assignment of the Sublease originally granted to Giving & Living Pty Ltd or the issuing of a fresh lease was not the subject of submissions by BHPL. Nevertheless, it is appropriate that, I confirm as part of the TTC claim for rent and other expenses that BHPL was bound.

153. The lease to Giving & Living Pty Ltd, which commenced on 11 September 2000, was in evidence. Also in evidence was a transfer of the lease from Giving & Living Pty Ltd to BHPL executed by both parties. That transfer was registered (registered number 1358384).

154. Sections 77 and 78 of the *Land Titles Act 1925* (ACT) makes provision for the effect of registration of such a transfer. The sections are relevantly as follows:

> 77 (1) On the registration of a transfer, the interest in land described in the transfer, shall pass to the transferee.
>
> ...
>
> 78 By virtue of every transfer of a ... lease, the right to sue upon the memorandum of ... lease, and to recover any debt, sum of money, annuity or damages thereunder (notwithstanding that the right may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity or damages shall be transferred so as to vest it in the transferee thereof.

155. In *Danel Investments Pty Ltd v Nexstar Investments Pty Ltd (No 2)* [2011] ACTSC 120 at [269], Foster J explained the effect of the registration of the instrument of transfer of a sublease. His Honour said:

> 269. In the ACT, a registered sublease may be assigned at law by the execution and registration of a form of Transfer of Sublease in the prescribed form. Upon the instrument being registered, the estate or interest of the assignor (the named sublessee in the registered sublease) as specified in the instrument of transfer will pass to the assignee. Thereafter, the assignee will become subject to and liable for all of the same requirements and liabilities to which the assignee would have been subject and liable if he or she had originally been named in the sublease (see ss 77 and 78 of the *Land Titles Act*). It is registration which completes the transaction and which effects a transfer of the legal estate.

156. I respectfully agree with his Honour's analysis. Thus, BHPL was bound by the terms of the Sublease.

157. The approach is consistent also with similar considerations of this issue in other cases. See *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53; 235 CLR 81 at 100-1; [55]-[56]. See also *Provident Capital Pty Ltd v Printy* [2008] NSWCA 131 at [31].

158. It is unclear, but BHPL may have been relying on a construction arising from s 15 of the *Leases (Commercial and Retail) Act* for its Defence. I reject any such argument. That section simply provides that where an assignee conducts its activities in a way that would exclude the lease from the application of the Act by virtue of s 12, then the Act does not apply while the assignee is a lessee of the premises. That has no relevance here.

159. A second, somewhat different argument is relevant to the liability of BHPL, though not directly relevant to the issue of whether the arrangements constituted a new lease or an assignment.

160. TTC's Statement of Claim alleged that on or about 6 December 2015, following the sale of the Hyperdome to TTC, Leda's interest as lessor in the Sublease was assigned to TTC.

161. BHPL declined to admit this allegation but further said that no notice of any such assignment had been given to BHPL. In its reply, TTC did not assert that any notice had been given to BHPL but relied on the operation of law.

162. As with a number of the other matters to which I have referred, this was not the subject of express further submissions. Nevertheless, it seems to me that there is no basis for the pleaded Defence by BHPL relating to this issue.

163. I am satisfied that, as pleaded in the Statement of Claim, Leda's interests as sublessor in the Sublease were properly, legally and effectively assigned to TTC. The transfer was registered under the *Land Titles Act*, as noted above (at [153]). As a consequence, by s 78 of the *Land Titles Act*, the interest Leda had in any debt, sum of money or damages payable under the assigned lease was transferred to and vested in TTC.

164. Any requirement for notice in respect of the assignment of a debt arose under s 205 of the *Civil Law (Property) Act 2006* (ACT). That Act, however, does not apply where it is inconsistent with any provisions of the *Land Titles Act*: s 5 of the *Civil Law (Property) Act*. For the reasons already stated, the *Land Titles Act* provisions are inconsistent.

165. Accordingly, the lack of notice, if there was such, did not affect the right of TTC to sue under the lease: *Property Builders Pty Ltd v Adelaide Bank Ltd* [2011] NSWCA 266; 15 BPR 98,491 at 29,418; [40].

166. Further, BHPL did pay rent to TTC after the assignment and, it is clear from a number of exhibits, including emails to Ms Hungerford, and letters she sent to BHPL by TTC as landlord, that she knew there was a change of landlord.

167. This seems to me to constitute an attornment by BHPL. An attornment is an acknowledgement by a tenant of the change of owner of the reversionary interest in the premises: *Cornish v Searell* (1828) 8 B&C 472 at 476; 108 ER 1118 at 1119. As Brereton J pointed out in *Adamow v Kirk* (1958) 75 WN(NSW) 514 at 518 "[t]he commonest and simplest form of attornment is by tender and acceptance of rent". The tenant must, of course, be aware of the change: *Fenner v Duplock* (1824) 2 Bing 10 at 11; 130 ER 207 at 208. Such an attornment then creates an estoppel: *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453.

168. Thus, BHPL cannot deny that it was a tenant of TTC.

169. What is particularly unclear is that, because of the circumstances of the variation which showed Giving & Living Pty Ltd as the lessee, it may be that the disclosure statement was required to be given to Giving & Living Pty Ltd and not BHPL. I am fortified in this by the terms of s 15 of the *Leases (Commercial and Retail) Act* which provides for the application of that Act in the case of an assignment.

170. Nevertheless, the *Leases (Commercial and Retail) Act* makes no provision for the sanction, if any, that flows from the failure to provide a disclosure statement. None of the provisions for compensation or other orders under that Act on which BHPL relied,

namely ss 22, 37 and 81, make provision for the response to a failure to provide a disclosure statement.

171. I note that, when BHPL sought to amend the Counterclaim to insert the pleading that relied on the failure to provide a disclosure statement, no point was taken as to the consequences, if any, of such a failure: *Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd* [2014] ACTSC 197.

172. Otherwise, there appears to have been no consideration of this issue and I can find no relevant authority on the question.

173. Section 117 of the *Leases (Commercial and Retail) Act* gives a tenant a right to terminate a lease on 14 days' written notice if the landlord has not given a disclosure statement as required, if the disclosure statement is false or misleading in a material particular or if it omits such a particular. This sanction does not assist BHPL for that time has now long passed. There is no provision for an extension of time.

174. In any event, this is not what BHPL sought, but it claimed damages for breach of the obligation. This was a civil action purportedly based on a breach of a statutory duty.

175. Because there was no submissions on this issue by either party, I need, I believe, to make only the briefest reference to it. I have carefully considered the helpful analysis of when a statutory duty gives rise to a civil action in Carolyn Sappideen and Prue Vines, *Flemings Law of Torts* (Thomson Reuters Lawbook Co, 10th ed, 2011) at 424-8; [18.20]; and R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed 2013) at 515-23; [16.10]-[16.25].

176. In addition, I note that the *Leases (Commercial and Retail) Act* does provide identified remedies for other breaches of the Act itself or conduct which the Act prohibits. See ss 22, 37, 57, 58, 81, 84-7, 89-91, 112 and 122.

177. The fact of these specific provisions, together with the specific provision in s 117 of the *Leases (Commercial and Retail) Act* relating to a sanction for the failure to provide a disclosure statement, leads me to conclude that there is no civil action for damages for a breach of the obligation to provide a disclosure statement. See *Martin v Western District of Australasian Coal & Oil Shale Employees' Federation* (1934) 34 SR (NSW) 593 at 596.

Unconscionable conduct

178. The Counterclaim also alleged that the Hyperdome engaged in unconscionable, harsh or oppressive conduct. The pleading was somewhat difficult to follow here as it made a kind of omnibus claim for these other matters. There appeared on the pleadings to be three sources of this: the alleged misrepresentations of Mr Beirne; the failure to provide a disclosure statement and the carrying out of building works on the Hyperdome, including the establishment of the Lifestyle Centre and upgrading of the Courtyard between it and the Target Mall; the erection of pipe railings and a sign in the undercover car park leading to the Coles Door pointing to shops away from the Coles Door; and the introduction of paid parking.

179. Whether conduct is unconscionable has been considered by a number of authorities in the context of the *Trade Practices Act*. It is clear that its meaning, in that context, is wider than its meaning in the context of "the unwritten law", that is according to

principles of equity. See *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; 146 FCR 292 at 299; [24].

180. In *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* [2003] FCA 850; 200 ALR 491 at 544; [184]-[185], Selway J provided the following helpful discussion:

> 184 The ordinary or dictionary meaning of the word "unconscionable" was explained in *Hurley v McDonald's Australia Ltd* (2000) ATPR 41-741 at [22]:
>
> > For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated - *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever 'unconscionable' means in s 51AB and s 51AC, the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable* - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term 'unconscionable' import a *pejorative moral judgment* - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.
>
> 185 In order to find that conduct is "unconscionable" it is necessary to do more than merely show that the behaviour is misleading or deceptive, or otherwise in breach of some other provision of the TPA. What is necessary is to show that the conduct is so unacceptable that it can properly be described as "unconscionable". Normally it might be expected that behaviour would only be "unconscionable" if some moral fault or responsibility is involved. Normally it might be expected that this would involve either a deliberate act, or at least a reckless act. Mere unreasonableness or unfairness may not be sufficient, at least in the absence of some moral fault. This is why it was critical to the conclusion he reached in *Simply No-Knead* that Sunberg J was able to find an "overwhelming case of unreasonable, unfair, bullying and thuggish behaviour". Of course, those words are not a definition of "unconscionable". But having made that finding it is quite apparent that the behaviour could properly be characterised as "unconscionable".

181. I deal with the representations of Mr Beirne later and also the matters relating to the building works.

182. So far as the failure to give a disclosure statement is concerned, I do not consider it comes, in the circumstances, to being even close to amounting to unconscionable conduct.

183. The establishment of the Lifestyle Centre cannot be regarded as such conduct because it was established prior to the sale to BHPL of the Giving & Living business.

184. So far as the other works are concerned, I deal with those at some length below. There is, however, no basis for the allegation that the development of those works constituted, unconscionable, harsh or oppressive conduct within the proper meaning of the term. It is, therefore, unsurprising that there were no submissions by BHPL on this issue.

Representations and misleading or deceptive conduct

185. So far as any representations or misleading or deceptive conduct might be actionable under the *Leases (Commercial and Retail) Act* are concerned, there is the same conduct for which claims are made under the *Trade Practices Act* and the *Fair Trading Act*.

186. The only basis for such a claim is under s 22 of the *Leases (Commercial and Retail) Act*, namely that such representation or conduct is unconscionable or harsh or oppressive. It is not clear what, if anything, "harsh and oppressive" adds to the notion of conduct being unconscionable.

187. Even if any representations are made or TTC/Leda engaged in any misleading or deceptive conduct, I am not satisfied that such conduct in this case could come near the correct application to it of the term unconscionable as interpreted by the High Court in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51. See, for example, per Gleeson CJ at 64; [14]. There was here none of the "high degree of moral obliquiry" required by Spigelman CJ in *Attorney-General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261; 63 NSWLR 557 at 583; [121].

Contribution to outgoings

188. The pleadings did raise the issue of the contribution BHPL was required to make to the outgoings of the Hyperdome. It was alleged that TTC/Leda had overcharged BHPL for its contribution because of a failure to give required notices to BHPL, that the amounts claimed were not in accordance with ss 70 and 71 of the *Leases (Commercial and Retail) Act* and an expenditure statement and auditor's report as required by clauses of the Sublease.

189. BHPL alleged that the conduct of TTC/Leda breached ss 65, 66, 70 and 71 of the *Leases (Commercial and Retail) Act* because of these alleged failures as well as various terms of the Sublease.

190. It was alleged by BHPL that the breaches of the terms of the Sublease meant that BHPL was entitled to terminate the Sublease because of these breaches.

191. Again, no substantive submissions were made as to these issues and Ms Hungerford gave no evidence about them.

192. On the other hand, TTC/Leda did adduce evidence about those issues. The evidence was not challenged and the deponent to the relevant affidavit, Jeremy Watson, was not cross-examined.

193. The evidence was that, contrary to the pleaded allegations of BHPL,

(a) written estimates of the outgoings that BHPL was required to contribute under the Sublease were given at least a month before the start of each accounting period, except in 2004 when the estimate was given on 4 June 2004 for the accounting period commencing on 1 July 204; and

(b) written reports prepared by auditors were sent to BHPL within 3 months of the end of each accounting period, except in 2006 when the report was sent on 16 October 2006 for the accounting period ending on 30 June 2006.

194. The *Leases (Commercial and Retail) Act* makes no provision for any sanction for non-compliance with these provisions. For the reasons generally set out above (at [175]-[177]) lead me to the view, though in the absence of submissions from BHPL that any breach of these provisions does not given BHPL a civil cause of action, an entitlement to terminate the lease, especially as such terms in the Sublease cannot be regarded as essential terms or serious breaches of innominate terms, or to decline to pay the amounts demanded, if otherwise payable. See also *Dovastand Pty Ltd v Mardosa Nominees Pty Ltd* [1991] 2 VR 285.

195. Neither the pleadings nor any particulars supplied to me identified the way in which any of the claims for outgoings breached any provision of ss 70 or 71 of the *Leases (Commercial and Retail) Act*. I have inspected the claimed expenses and none seem to me to be outside the permitted range of recoverable outgoings. The term

"outgoings" is a term "of very wide import" which include "the ordinary expenses of cultivating and managing the property": *Newman v McNicol* (1938) 38 SR(NSW) 609 at 625. I see no reason not to construe the relevant legislative provisions in the light of the common law.

Limitation Period

196. Another issue raised in the proceedings but which was not addressed by either party, although pleaded was the limitation period in the *Trade Practices Act* and the *Limitation Act* as a matter of defence in TTC's Defence to the Counterclaim and Leda's Defence to the Third Party Claim. This may require that it be addressed unless it can be shown that the relevant party, in this case TTC/Leda has abandoned the defence. I have been unable to find any relevant direct authority.

197. On the other hand, it is clear that the limitation issue must be pleaded before a court can consider it: *Piscioneri v Reardon* [2015] ACTSC 61 at [54], [56]. See also *Piscioneri v Reardon* [2016] ACTCA 33 at [46].

198. The pleading in this case was that any cause of action pleaded by BHPL, since arising prior to 20 February 2006 is barred by statute. The basis on which that date has been chosen is not clear. The proceedings were commenced on 20 February 2008. While the reference to 20 February is consistent with the pleading, the year is not.

199. The reference to 20 February 2006 would provide only for a two year limitation period. There is no basis for so finding.

200. On the other hand, BHPL filed its Defence and Counterclaim and its Third Party Claim on 10 August 2009.

201. So far as TTC is concerned, the end of the limitation period for the claims of BHPL against it under the Counterclaim is 20 February 2008, for s 51 of the *Limitation Act* provides that the claim in such a counterclaim is brought on the date when TTC became a party to the original action, namely 20 February 2008. This is a statutory modification of what was formerly regarded as the position, namely that the limitation period for a counterclaim (as opposed to a set-off) ended when the counterclaim was commenced: *Lowe v Bentley* (1928) 44 TLR 388.

202. Leda, however, was not a defendant to the Counterclaim issued by BHPL. The similarity between the Counterclaim and the Third Party Claim, however, suggested that it had a similar position in the proceedings.

203. It appears from *Nelson v Wyong Shire Council* (1989) 68 LGRA 164 at 167-9, that a Third Party Claim may be encompassed within s 51 of the *Limitation Act* which provides for the application of the Act to claims made by "set-off, counterclaim or cross-claim". It is to be noted that the procedure in New South Wales was under consideration in that decision. In that jurisdiction, "cross-claim", includes a third party claim: s 22 of the *Civil Procedure Act 2005* (NSW) (replacing s 78 of the *Supreme Court Act 1970* (NSW) which was applicable at the time of that decision, though in similar terms). Ordinarily, a cross-claim would, however, be a claim against another party, that is the plaintiff or a co-defendant and not a third party claim.

204. A claim in third party proceedings is usually contingent upon the defendant's liability to the plaintiff. In such a case, the cause of action would not arise until the defendant's liability is determined: *Allman v Country Roads Board* [1959] VR 614 at 619-21, approved in *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355; 31 VR 46 at 52; [20]. In that case, the cause of action accrues when the plaintiff was given judgment against the defendant for a cause of action in respect of which the defendant may be entitled to compensation. See s 21 of the *Limitation Act*.

205. This is not the case here. In effect, BHPL is seeking to litigate the same claim it is litigating against TTC in the Counterclaim. In those circumstances, it would seem that the third party would be in the same position as a non-party defendant to a counterclaim and s 51 of the *Limitation Act* would apply. That is to say, the action commences, for the purpose of the *Limitation Act*, when Leda became a party, namely when the Third Party Notice was issued. That was 10 August 2009.

206. Thus, the claims must have been brought within the limitation period in both cases and that period must not have ended, in the case of TTC before 20 February 2008 and, in the case of Leda, before 10 August 2009.

207. The limitation period commences when the cause of action accrues. A cause of action accrues when every fact has come into existence which each party must prove, if traversed, in order to support her, his or its right to judgment: *Do Carmo v Ford Excavations Pty Ltd* (1984) 52 ALR 231 at 240; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 558.

208. It is clear from *Wardley Australia Ltd v Western Australia* at 525, 551, that the statutory cause of action under s 82 of the *Trade Practices Act*, or s 46 of the *Fair Trading Act*, arises only when the actual loss or damage is sustained.

209. It is not entirely clear when this may be, for, in this case, there were ongoing losses that BHPL says it suffered from the relevant conduct. That loss, however, seems to have flowed from the entry into the contract of sale at the earliest and possibly the entry into the Sublease. The former was on 21 August 2003, the latter on 4 November 2003. These, then, must be the earliest dates on which the cause of action accrued. The latter date is consistent with the approach of this question in cases such as *Emanuele v Chamber of Commerce and Industry SA Inc* (1994) ATPR (Digest) ¶46-121 at 53,570, namely that, when BHPL became the assignee of the Sublease (or the new sublessee under the Sublease), it was unconditionally bound by the Sublease to make payments which constituted at least part of the loss and damage it alleged it suffered.

210. The only question, then, is the length of the limitation period. Under s 82(2) of the *Trade Practices Act*, that period was initially for three years, but in 2001, by the *Trade Practices Amendment Act (No 1) 2001* (Cth), the period was extended to six years. Thus, in 2003, the period was six years from the date on which the cause of action accrued.

211. As to the *Fair Trading Act*, no period was specified in 2003. Thus, the general period set out in s 11 of the *Limitation Act* applied. This, too, was six years.

212. Accordingly, I am satisfied that the limitation period for the claim of BHPL against both TTC and Leda was six years.

213. The dates of 20 February 2008 and 10 August 2009 both fall within six years from 21 August 2003 and, per force, from 4 November 2003.

214. Accordingly, there is no bar to the claims under the relevant limitation provisions for the claims made by BHPL in these proceedings.

The Evidence

215. Because of the findings I have made about some of the representations about which BHPL made complaint, it will not be necessary to address all the evidence given unless relevant for the issues that remain.

The view

216. On the second day of the proceedings, namely 17 September 2014, the Court viewed the Hyperdome and its surrounds. It was helpful and the Court appreciates the assistance of the lawyers for the parties and the staff of the Hyperdome for facilitating the view.

217. Although, since the events the subject of these proceedings, the premises have changed in a number of respects, some of which were the subject of evidence in these proceedings, the general layout was the same as that at that earlier time and the view was very helpful in allowing me to get a physical picture of the Hyperdome generally and the Premises. Relevant changes were pointed out to me.

218. Representatives of the parties, as well as counsel and instructing solicitors for both parties, were present during the view and counsel pointed out relevant features. The conversations were not recorded by the Court's transcription services but, in my assessment, nothing was said that was not later stated or implied from evidence actually given in Court.

219. The view was entirely conducted for the purpose of enabling me to understand the issues in the proceedings, the evidence adduced and how to apply it. I did not, however, put the results of the view in place of evidence. There was no agreement between the parties for me to do that and I did not do so. See *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 313.

Brenda Hungerford

220. Brenda Hungerford was the sole shareholder and owner of BHPL. She had made some affidavits that were filed but not read. All her evidence was given orally.

221. She had been for many years a financial planner. In 1985 she was the Branch Manager of St George Financial Planning at Parramatta moving into financial planning in April 1987. In 1988, she became General Manager for Nelson Parkhill BDO and in 1990 became General Manager of NWA Financial Services Pty Ltd.

222. From 1990 to 2000, she owned her own financial planning practice with a dealer's licence from 1996, Hungerford Financial Services Pty Ltd. In July 2000, her practice merged with another practice, to become Halliday Financial Services Pty Ltd of which she became Director and Financial Advisor. She left the merged practice in February or March 2002. She then commenced her own practice in business consulting and share trading, Hungerford Management Pty Ltd.

223. As a financial consultant, she managed portfolios of her clients' investments, giving business advice as to tax strategies and effective ways of managing her client's portfolios, both in superannuation and other investments.

224. She later undertook business consulting through the commercial division of LJ Hooker Ltd, a real estate agency, and also some retail consulting on the South Coast for a large store there. Some years prior to that, she had owned a retail business of Herbal Solutions in Annandale, but she did not seem to rely on this experience, judging by her evidence.

225. She was a Certified Investment and Financial Advisor and had been a Senior Associate of the Australian Financial Planning Association since 1993. In 1996, she obtained an Investment and Security Dealer's Licence and became a Dealer Member of the Financial Planning Association in 1997. She was a Member of the Australian Institute of Company Directors.

226. In April or May 2003, she started thinking about other investment opportunities. At that stage, she had a fairly substantial financial portfolio in excess of $3 000 000, made up of savings, real estate, shares and a superannuation account. She was looking to invest in a managed business without needing to work in it on a day-to-day basis.

227. She spoke to Philip Roberts of LJ Hooker Woden to see if such a business might be available. The business she was looking for was one that was effectively and profitably managed by somebody, but of which she would have overall control.

228. Mr Roberts gave her some suggestions and she also investigated opportunities through trade magazines.

229. In about early June 2003, Mr Roberts referred her to the Giving & Living business. It sounded of some interest to her.

230. As a result, she went to the Hyperdome to familiarise herself with the Centre and the business, though, oddly, she had also said she was already familiar with it. She had a look at the shop and the Hyperdome. She looked at the number of people in the Coles Mall and familiarised herself with the area around the Hyperdome as well.

231. At that stage, Ms Hungerford was living on the South Coast and, when she drove up, she parked in the multi-storey car park outside the Coles Door. She found a chair outside the Giving & Living shop and sat there and watched the people a number of times. She visited the shop a few times, until finally she introduced herself to the director, Mr D'Amico.

232. Mr D'Amico gave her carte blanche, allowing her to talk to any of the staff and for them to give her any information. She was given access to the daily diaries filled in by staff at the end of each day to show sales information. She was also given access to reports of takings and expenses.

233. Mr D'Amico gave her some accounting figures which she forwarded to her accountant with the daily diary figures.

234. She confirmed her interest in the shop with Mr Roberts. She walked around the whole of the Hyperdome, looking in the Target Mall and the Lifestyle Centre. She noticed that there were not many people in the area that linked the Lifestyle Centre and the Target Mall, to which I will refer in these reasons as "**the Courtyard**". That

she undertook such investigations was not generally challenged, though the extent of some of it was disputed.

235. She made an appointment to meet Mr Beirne on 10 July 2003 to discuss the sale. Mr Beirne was very welcoming and they had a good conversation.

236. She told Mr Beirne that she was interested in purchasing and investing in the Giving & Living business and she said Mr Beirne told her, "It is a good business to invest in, and it has the second highest door count".

237. According to her, the conversation continued as follows: Ms Hungerford said, "I am interested in the marketing that the Hyperdome does. This is an important part of my considerations that the advertising and marketing is appropriate". Mr Beirne then said, "The marketing of the Hyperdome is very good quality and you will be able to take part in the marketing campaigns". He continued, "There is also in-house radio advertising" and he made it clear she would be able to take part in that also. This, she understood was announcements that were made throughout the Hyperdome using its public address system.

238. Ms Hungerford said that, by this time, she had found out about residential developments around the Hyperdome and new government offices, now the Caroline Chisholm Building, being erected. She also noted other buildings being constructed in the area. She was aware that the LJ Hooker office in Tuggeranong was the "highest selling office in the world".

239. As a result of this knowledge, she asked Mr Beirne about the developments and, according to her, he said, "I also know about the developments, and it is a very good thing – going to be very good for Giving & Living that the developments are happening".

240. Mr Beirne then requested her to complete an application for a tenancy and, before she could be accepted as a tenant, the application had to be accepted. She had, at that time, explained some of her background to Mr Beirne.

241. Her evidence was that she then said, "Is there anything that I need to know about why Ric D'Amico is selling his business?" and Mr Beirne said, "No, it's a very good business and you will do very well. It is the second highest store. You will do well with that".

242. The words used in the second last sentence of that answer are odd. The reference to "second highest store" has little meaning in this context. It was not the subject of a pleading. Further, Ms Hungerford had earlier said that the actual words used by Mr Beirne were, "... it has the second highest door count". See above (at [236]). Even that is an odd answer.

243. This evidence shows some of the problems with Ms Hungerford's testimony. It seems to me that, because Mr Beirne himself conceded that he had told her that the Coles Door had the second highest foot traffic count in the Hyperdome, these two statements were intended, in a rather unsatisfactory way, to refer to that statement Mr Beirne acknowledged that he had made.

244. Ms Hungerford then said that she asked Mr Beirne, "Is there anything about the Hyperdome that I need to know that would affect my investing in Giving & Living?". She said in evidence that Mr Beirne said, "No, there is nothing".

245. She took the application form away and completed it over the weekend. It required her to disclose her assets and liabilities, personal details, bank accounts, and also to set out a retail plan.

246. As a result of her conversation with Mr Beirne, however, she rang Mr Roberts and told him that she was prepared to proceed with the purchase of the business and, on 11 July, paid a 10 per cent deposit of $23 500 from her superannuation fund account.

247. She then submitted the tenancy application form on 14 July 2003. This included her curriculum vitae as the director of BHPL.

248. That document, which was in evidence, showed Ms Hungerford's involvement in the financial services sector. The information about her background is described above at [226]-[228].

249. In the tenancy application, she showed an anticipated annual turnover of $750 000 in the first year rising to $825 000 in the second year and $900 000 in the third year, an annual increase of 10 per cent. She also prepared a 12 month cash flow from August 2003 to July 2004.

250. She gave the tenancy application to Mr Beirne on 14 July 2003, noting that she had included a retail plan which showed that her sales would increase by 10 per cent each year. She told him that she intended to sell the business in two to three years.

251. She said that, when meeting Mr Beirne on 10 July 2003, she had also told him that she wanted a new lease to extend the current term by two years so that she would then have at least a three to five year lease to sell the business.

252. She told Mr Beirne, "Because I am taking an extra two years on the lease, I would expect that I would be able to get a discount on the lease because of taking the extra two years". Mr Beirne said, "That this would not be possible because the rent was currently at market rate". Mr Beirne also said, "You will be required to have a bank guarantee of three months rent".

253. In relation to the extension of the term of the lease, Mr Beirne said, "We would be able to do a lease on no less terms than had previously been with Giving & Living".

254. Ms Hungerford said that, on 14 July 2003, Mr Beirne told her, "I am very glad that you are purchasing the business. You will do very well with your background and I will put the application into Leda".

255. Her evidence was that she then proceeded to negotiate the precise terms of the purchase of the business from Giving & Living Pty Ltd. She also continued with what she described as her "due diligence". She visited the Hyperdome, familiarising herself with it and ensuring that the foot traffic was going to substantiate the figures that she had been given. She continued her investigations at the Hyperdome and the surrounds to ensure that before she exchanged contracts she was doing the correct thing as far as her investment was concerned.

256. In particular, she said that she saw in the Coles Mall people coming in the door at approximately 25 people per minute at 11:00am in the morning. She said that she had done this on one occasion in mid-week and then corrected herself and said that she did it on several days on about six occasions at different times. She noted that there was often a queue at the counter in the Giving & Living shop and that people were being well serviced by the staff. She noted that the shop had a large

kitchenware section and described it as a “specialist kitchen shop as well as homewares”. She saw there was a great deal of interest in the kitchenware side of the shop as well as the homewares.

257. She saw people whom she described as wearing “ID tags” going into the shop and she identified them as employees from government offices. She also noted people walking across the government car park under the multi-storey car park into the Coles Door. She noted that there were extra staff in the shop between 11:00am and 3:00pm on weekdays.

258. Mr D’Amico had told her that lay-by transactions were an important part of the business and she noted people paying deposits for lay-bys in the shop.

259. She also noticed people coming across the government car park had crossed at the traffic lights at the Athllon Drive/Reid Street North intersection from the government offices.

260. On 21 July 2003, she had incorporated BHPL, as I noted above (at [24]). It was to be the vehicle through which she was to purchase the business.

261. On 21 August 2003, contracts between BHPL and Giving & Living Pty Ltd were exchanged for the purchase of the Giving & Living business. Settlement occurred on 1 September 2003 when BHPL took control of the business.

262. After exchange of contracts, Ms Hungerford went with the store manager, Claudia Montagner, to a trade show where suppliers demonstrated their products and arrangements for bulk-buying of products were made by retailers. She submitted credit applications to various suppliers and bought goods from existing suppliers as well as from new suppliers.

263. In the first quarter after purchase of the business, she attended at the shop on a weekly basis, although sometimes she was there more than once a week. She retained Ms Montagner as the Manager of the store and made no staffing changes at that stage. Apart from some new suppliers with whom she had made arrangements at the trade show, there were no changes that she made at the shop.

264. During this quarter, she received daily accounting from the staff of the shop. These were daily run sheets which accounted for all cash and EFTPOS transactions and any cheques, though there were very few, and it detailed all expenses that were paid. Ms Montagner prepared those or, if she was not there, the next most senior person in the shop did so. The documents came to Ms Hungerford by facsimile transmission.

265. Ms Hungerford kept a graph at home and a chart of these reports. She also faxed them to a bookkeeper, operating the Mind Your Own Business (MYOB) accounting package for the business, and reporting the results to her accountant on a weekly basis.

266. When she attended at the shop, she photocopied the daily diaries. She also prepared the necessary work for payment of all the wages and superannuation contributions. She prepared graphs of income and expenditure from the reports in the daily diary sheets. Towards Christmas, however, she visited the shop more frequently and obtained information on each visit.

267. She also received all the suppliers' invoices and, it appears, arranged for payment.

268. The graphs she prepared had daily, monthly and annual figures for gross sales.

269. As a result of this monitoring of the affairs of the business, Ms Hungerford found that the retail turnover for the shop had fallen steadily; a reduction of about 50 per cent of retail turnover since the purchase of the business up to November 2007.

270. It appears that the figures prepared by the MYOB system were presented to the management of the Hyperdome. Ultimately, the management of the Hyperdome were also given BHPL's balance sheets and profit and loss accounts. The monthly sales figures required to be provided to the Hyperdome, however, were submitted on a document pro forma that the Hyperdome management required BHPL to complete.

271. In early 2004, Ms Hungerford found that Ms Montagner was completing that form for the Hyperdome management but discounting the sales figure by 20 per cent. Ms Hungerford asked her why she was doing that and was told that it was the practice employed by Mr D'Amico previously. Ms Hungerford said that she did not want that to continue. She said, "You can't do the figures that way. They cannot be discounted. I need you to give the Hyperdome [the] figures as they are" and Ms Montagner agreed to do that.

272. She then reported to the Manager of the Hyperdome who, by that time, was Mr McCann, that the figures had been discounted by 20 per cent and that she had instructed her staff not to do that anymore. It is not clear what, if anything, resulted from that report.

273. Ms Hungerford also gave evidence that the Hyperdome layout changed after BHPL had commenced conducting the Giving & Living business. The changes started from November 2003 and continued through to December 2006. Initially, she noticed that barricades were erected on the perimeter of the multi-storey car park and also in the Courtyard. Steel barriers were erected in various places, and new footpaths and kerbing were constructed. Ms Hungerford said that the effect of these changes was to cause people coming to the Hyperdome to approach the building from another direction and enter through other entrances than through the Coles Door.

274. Temporary metal barriers were erected where workers were engaged in building the developments.

275. Steel pipe barriers were, she said, erected along the perimeter of the ground floor of the multi-storey car park. Low brick walls were built on the government car park side of the path or roadway leading into the Courtyard.

276. Ms Hungerford said she also saw other work, including pavings and preparatory work in the Courtyard, where, also, there were constructions barriers.

277. After February 2004, Ms Hungerford said she saw construction work in the Courtyard and around the Lifestyle Centre. This appeared to continue into 2006. She did not actually know what the works were, but she saw people working in and around the area.

278. In January/February 2004, she noted parking booths being erected and that outdoor car parking was being prepared for paid parking to be introduced into the Hyperdome multi-storey car park.

279. Ultimately, paid parking was introduced; Ms Hungerford thought that it was introduced in February 2004 but, in fact, it was introduced on 1 March 2004.

280. Thus, customers who wished to park in the multi-storey car park had to go through a barrier by collecting a ticket and, on exit, give a ticket to an attendant in a booth and pay fees. Initially, Ms Hungerford said that she understood that parking fees were charged from the beginning of the time when a car entered the car park but, at some point, the system was changed so that the first three hours of the parking was free. At the time, as she understood it, Ms Hungerford said that the government car parking appeared to have paid parking also. Ms Hungerford said that she had not been told, at any time, about the introduction of paid parking and, in particular, had not been told of it by Mr Beirne in her meeting with him on 10 July 2003.

281. Similarly, no-one had told her about the construction of the steel pipe barriers along the edge of the multi-storey car park and, in particular, Mr Beirne did not mention that in his meeting with her on 10 July 2003, nor did he mention the erection of the low brick wall, both items which she said inhibited people who crossed the government car park from going on into the multi-storey car park and through the Coles Door, though she gave no details of how she arrived at that conclusion.

282. Similarly, with the work being done in the Courtyard, Ms Hungerford said that she had not been advised about it prior to its commencement and, in particular, no-one from the Hyperdome had mentioned it to her.

283. Photographs of the steel pipe barriers were admitted into evidence. Ms Hungerford said that, although the photographs were taken in 2012, the barriers and their location had not changed since they were installed. She also identified a bollard next to the pedestrian crossing across the ground floor of the multi-storey car park. That also was not there in September 2003.

284. Ms Hungerford pointed out some of the development in the Courtyard which had not been there when BHPL took over the Giving & Living shop in September 2003.

285. She identified improvements that had been made on the westerly side of Athllon Drive around the government offices where pathways had been constructed leading to the traffic lights at the pedestrian crossing on Athllon Drive leading to the entrance to the Lifestyle Centre. This, of course, was not development undertaken by the Hyperdome owners.

286. Ms Hungerford referred to the traffic lights at that pedestrian crossing across Athllon Drive. She said that she did not know that they were going to be installed, but became aware of them in early February to March 2004. No-one from the Hyperdome had told her about the installation of these lights.

287. Ms Hungerford then gave evidence about the conduct of the Giving & Living business. That changed, to some extent, when she terminated the employment of Ms Montagner and appointed another employee, Lina Sutherland, to take over as manager at the end of June 2004. Ms Sutherland had been a casual employee, but as manager worked full-time in the store. From that time, however, Ms Hungerford had a somewhat more “hands-on role”. She did not explain precisely what this meant.

288. She reduced the hours of the casual staff from about February 2004 as a result of the fall off in patronage. She had noticed that there was a reduction in the number of people walking through the Coles Mall though she did not do any counting. She raised the issue with Mr McCann in about February. In response, Mr McCann then offered her a casual leasing of a kiosk in the Target Mall. At the time, Ms Hungerford also noticed the difference in the number of customers.

289. Her evidence was that the sales figures in October and November 2003 were up slightly but that the sales figures in December 2003 had declined and the decline continued from then on until BHPL abandoned the premises.

290. In January and February 2004, she realised that she needed to take some action and that was when she reduced the number of casual staff and, in March 2004, let the second full-time sales person go.

291. So far as the casual staff were concerned, there would be two people in the store between 11:00am and 3:00pm, but not every day of the week.

292. In February 2004, she attended her second trade show and, as a result, introduced the sale of jewellery. Her "diligent and experienced staff" also took part in a major effort to keep the shop looking as good and attractive as possible. There was also a change in the lay-by business which continued until, in 2005, she cancelled it except for lay-bys over $200. The number of sales through lay-by had been declining steadily from November 2003. At the time, she was selling nativity scenes at Christmas time which, she said, people loved, but were always put on lay-by because they were sold for between $300 and $400.

293. Her evidence was that, when she had been undertaking her due diligence prior to purchase, there were "always people in the store and their [sic] [was] often a queue at the counter" but that over Christmas 2003, it was only necessary to have three instead of five employees and then she needed only two.

294. So far as the jewellery she introduced was concerned, it consisted of smaller, cheaper items, which she said were very popular. They included items such as bangles and necklaces of a price from $10 to $30.

295. In 2004, she opened two additional stores, one in Manuka in June 2004 and one in Yarralumla in July 2004. The Manuka shop was not an existing business but she purchased the lease and established the business from the beginning. She used some stock from Tuggeranong.

296. The Yarralumla shop was, in fact, an existing business, which she purchased for about $23 000. The stock there had, however, become run down; therefore she filled the store with stock from Tuggeranong. Each of these two stores were much smaller in size than the Tuggeranong store.

297. There was, however, no real difference between the stock on offer between the three stores, although there was less kitchenware in the two smaller stores, especially not larger items such as saucepans.

298. Ms Hungerford next explained that, in her view, the marketing at the Hyperdome was of an extremely poor quality.

299. Up until June 2004, Ms Hungerford did use the in-house radio advertising through the public address system of the Hyperdome, although she said it was not successful. She participated in Hyperdome catalogues for special occasions such as Christmas, Mother's Day and Easter, but she said they were of poor quality. None were in evidence.

300. She undertook some advertising of her own. She arranged for a designer to design a new logo for the store and she undertook some catalogue drops herself. She also purchased radio and television advertising for about five months. It became, however, too expensive and was not bringing in sufficient custom.

301. She could only justify marketing on her own account through radio and television if she could spread it over the three stores. She also hoped that the two new stores would support the cash flow for the Hyperdome store. She gave no specific examples of what she said was the poor quality of the marketing of which she complained.

302. When she opened the Manuka and Yarralumla stores she changed the name of the Tuggeranong store to "Hungerfords" and used that name for the two new stores. She said that she had to change the name because of an agreement with Mr D'Amico which was that she "was only allowed to have that one shop with the name Giving & Living".

303. Ms Hungerford also arranged for tea and coffee to be sold at the Tuggeranong store from about June 2005 but stopped it in about October because it was not helping sales and income and it took up floor space with the tables and chairs.

304. In 2005, Ms Hungerford took on more of the day-to-day role in the business and was in the shop quite often. She actually took over the management of the store in December 2005. From that time, she was in the store three to four days a week and at Christmas time five days a week.

305. In April 2006, she travelled to China to attempt to work out a way of reducing the cost of stock. A friend introduced her to a Chinese man who introduced her to suppliers in China. A bit oddly, she actually said that she made six trips to China from 2004 to 2007. The stock she bought from China was similar to stock that had previously been in the store, save for the kitchenware; she did not buy stainless steel items from China. The difference in price was very significant and, for example, she mentioned that the jewellery was about 10 times cheaper than jewellery supplied in Australia. The jewellery had the highest profit margin but also glassware, chinaware and candles sourced from China were all items that had much higher profit margin than from sales of similar stock she could acquire in Australia.

306. She said that she noted that the foot traffic in the Coles Mall continued to decline steadily, especially early in the morning. She had no actual evidence of this, even compared to the figures she had obtained from her due diligence. She had noted, when doing due diligence, that there were people waiting at the door to enter at 9:00am but said that this rarely happened from 2004. Indeed, she said that the Coles Mall did not have shoppers until about 10:00am and, while the numbers then increased, that was only by a few more people.

307. During this time, she visited the Target Mall and noticed that there were far more people in the Target Mall, especially at the end nearest the Lifestyle Centre, though it was unclear from what base she was able to say there was an increase. These numbers were, she said, not that high in 2003, though she had no exact figures for this. She also noticed that those people using the Coles Mall did not appear to have the ID tags that she had noticed before. She did notice people with such tags, however, in the Target Mall and also in the Food Court of the Hyperdome. Her evidence as to this was rather anecdotal and unsatisfactory.

308. She gave evidence about conversations she had had with Mr McCann. In light of my findings about the representations he is alleged to have made, I do not need to deal with those.

309. She did, however, obtain some casual leasing within the Target Mall where she could set up a small store as a temporary kiosk. She had to pay a fee of $1500 for the week. She also had to hire a cash register and arrange for stock and a full-time staff member but, at the end of the week, sales in the main shop did not increase and the expenses did not justify the temporary casual leasing.

310. Ms Hungerford said that she did speak to various people including Mr McCann and Mr Cooper about the falling numbers of people in the Coles Mall.

311. In August or early September 2004, Ms Hungerford spoke to Mr McCann about the rent which was due to increase from 1 September 2004. She says that she told Mr McCann, “The foot traffic has fallen so much in the Coles Mall and my sales have been declining and I am hoping that you can give me some help and that the increase in rent should be absorbed by the Hyperdome because of the decline in people and also the decline in my sales”. She was told to put the request in writing which she did. She received no reply from the letter.

312. She had a further conversation with Mr McCann in 2005 and she described it as “a good conversation with him”. She again described to him the problems she was having with the store and the declining sales figures; she asked for rent relief. Again, I have addressed this conversation and do not need to repeat it.

313. On 27 March 2006, she sent an email to Mr McCann pointing out that the shop had an all-time low in sales the previous day with sales income of $168; when she had purchased the shop, the normal daily sales were well over $1000.

314. BHPL continued to operate the Manuka store until the lease expired at the end of 2008 and sold the Yarralumla store in October 2010. BHPL maintained a separate profit and loss account for each store. Ms Hungerford received daily summaries and they were all sent to her bookkeeper. The balance sheet, however, combined the finances for the three stores.

315. In March 2006, she said that she advertised the sale of the Giving & Living store through a broker. One person expressed an interested in all three shops. The interested purchaser consulted Mr Cooper who, she thought, was the Leasing Manager of the Hyperdome at the time. She then had a conversation with the broker and, although it was unclear, it appears that the broker was told that the purchaser was no longer interested.

316. As a result, she went to see Mr Cooper and said to him, “You’re giving me the mushroom treatment. You have turned my only good potential buyer away from buying my three stores”. Mr Cooper denied that he did that and said that the prospective purchaser, after looking around the Hyperdome, had decided that he would instead set up another store in another location. Ms Hungerford suggested that he was lying but he denied it.

317. She later complained to Mr Lord who, by that time, had become Manager of the Hyperdome. She also had a further conversation with Mr Lord about rent relief. She said, “I have previously applied to Shane McCann for rent relief, though I have had no response, and my figures are still declining and I am getting to the stage where I cannot continue. My assets are being sold down and I have a lot of debts”. Mr Lord asked her for a statement of assets and liabilities, which she gave him, and also he wanted it verified by her accountant, as well as being supplied with a balance sheet and profit and loss statement.

318. In late June or July 2006, Mr Lord advised that she had been granted $20 000 a year rent relief. She thanked Mr Lord.

319. She also referred to a conversation she said that she had had when she said Mr Lord had come to her store and commented on how few people there were in the Coles Mall; he said, “You could fire a cannon down this Mall” and she said, “Yes, that is true”. Mr Lord then said to her, “Would you like to come for a walk around the Mall to see where you would prefer to be located?” and she agreed. They had a walk around the Mall, mainly the front adjacent to Anketell Street. Mr Lord did show her a small shop at the bottom end of the Target Mall and another one. Both were however much smaller. One was not suitable because it was in, what Ms Hungerford perceived to be, a bad location; the other was in a more reasonable location which she thought would be appropriate.

320. She also had a conversation with Mr Lord about the coffee bar and cafe.

321. The relocation did not proceed. Mr Lord advised her by email that the Hyperdome was not prepared to fund the re-location. He indicated that, should she wish to relocate, she would have to do so at her own cost. He would be happy to discuss it further. She did not proceed with that option.

322. There was also a discussion about a reduction in the size of the store but Mr Lord advised that “[g]iven the amount of vacancies currently within the Centre, we are not prepared to purposely create another at this stage”.

323. In May 2006, she invited Mr Lord to publicise her store through the public address system. I assume that this happened, but there was no evidence about it.

324. It was not entirely clear but it was suggested that this was the period of time when Ms Hungerford also pursued the idea of serving coffee and tea in the Giving & Living store but was told that she would have to purchase insurance and draw up a plan for the store. Her earlier evidence had been that this was at least 12 months earlier as noted above (at [304]).

325. When the rental relief was granted to her, it was granted conditionally, including that the relief was only available to BHPL and not to any purchaser of the Sublease or the business. It was only available until her sales increased to $550 000 a year and was conditional upon all arrears being paid immediately.

326. Unsurprisingly, Ms Hungerford was unhappy with these conditions as it was impossible for her to pay the back rent immediately. She was also concerned about the other conditions.

327. Ms Hungerford was sure that she had other conversations with staff of the Hyperdome in 2006 but not recall them. She said that she had further conversations with Mr Lord in 2007 about the business. In particular, in November 2007, he brought to her attention that her rent was $25 000 in arrears.

328. She gave evidence about assistance provided by the Hyperdome in marketing. She did seek the assistance of Hyperdome staff but she said that the help consisted of some posters that were put up and displayed around the Hyperdome. She also expanded her range of jewellery across the three shops and introduced a loyalty card with substantial discounts for people who accrued loyalty points. She undertook a letterbox drop and in-house radio advertising. Sourcing stock from China was also a big part of her efforts to improve sales.

329. By June-July 2007, although she had to keep a minimum of two staff in the store and it was rarely more than that, she found that sometimes she would often be that other member of staff. Only during busy periods, Easter and coming up to Christmas, would she employ further casual staff. She would herself work on Friday nights and over the weekends.

330. Ms Hungerford observed the foot traffic in the Coles Mall still declining in June-July 2007, and although the customers were few in the store, the decline had evened out by 2007. It did not seem to decline further, she said, from early 2007 to January 2008. There were very few people coming into the Giving & Living shop at that time.

331. She again approached Mr Lord for rent relief and it was granted in the sum of $32 000 per annum.

332. In November 2007, she had a further conversation with Mr Lord in which he referred to possible relocation when Bankwest had expressed an interest in the Premises. That, however, fell through. It was during this particular conversation that she was informed that her rent was then $25 000 in arrears.

333. The store continued to trade until January 2008 when it ceased trading because, Ms Hungerford said, she had run out of money.

334. Ms Hungerford was asked about her conversation with Mr Beirne on 10 July 2003. She said that, if he had told her about the developments at the Hyperdome which she had described, she would not have proceeded with purchasing the store.

335. She also said that, if Mr Beirne, when asked by her about whether there was anything she needed to know about the Hyperdome that would affect her investment in Giving & Living, had he told her about the developments at the Hyperdome which she subsequently saw in the Courtyard and around the multi-storey car park, she would not have proceeded with the purchase.

336. She explained that, at the time, she did not need to buy a shop to work in; she had other projects on which she was working as well as real estate developments that she could have progressed with her existing real estate portfolio.

337. She was also asked about the original leasing arrangements. She said that she was aware that, at some point, there was an assignment of interest from Leda to TTC. She said, however, that she did not become aware of that assignment until it was disclosed in these proceedings. She said that the only notification which she received was a letter from the Hyperdome requiring her to pay her monthly rent to another entity. This seemed an oddly casual approach to her leasing arrangements for a self-proclaimed astute business woman.

338. Ms Hungerford was also asked questions about BHPL's obligation to pay a share of outgoings of the Hyperdome. She said that, from time-to-time, she had received documents from the Hyperdome in relation to those outgoings. This confirms the evidence to which I have earlier referred about those documents. She received, through Mr D'Amico, the estimated budget for outgoings for 2003/2004 and other relevant documents.

339. She also gave evidence of borrowing funds from the National Australia Bank (**NAB**) for BHPL to purchase the Giving & Living business. She said that she had a flexi mortgage, known as the Bingie Facility, from the NAB which was used as a business loan facility secured against her home. She, not BHPL, was the borrower personally on that facility.

340. During BHPL's occupancy of the leased Premises in the Hyperdome, BHPL borrowed money from NAB and from Ms Hungerford personally from time-to-time. The money borrowed from her was borrowed through the Bingie Facility but shown in the books of the business as a loan from her.

341. Many of those loans were still in existence and had not been repaid.

342. Prior to taking over personally as Manager of the business, Ms Hungerford said that BHPL had paid its Manager a salary of $50 000 a year. Apparently, however, she told Mr Peter Haley, an expert witness BHPL retained for the proceedings, that the Manager had been paid $60 000. There was no explanation for this discrepancy.

343. She also said that there was a requirement for Director's fees to be paid by BHPL, but she said that there was no documentation which evidenced that obligation, curiously saying, in answer to a question about any such documents, "Only the cash flow", meaning the draft document produced earlier in the proceedings.

344. Ms Hungerford was then extensively cross-examined.

345. She said that she was currently working as a practice manager for her solicitor and that, as well as generally running the practice and looking after clients and general office duties, she had, under supervision of her employer, day-to-day carriage for the firm of these proceedings on behalf of BHPL. She spoke with experts, for example, and witnesses in regard to the matter and she prepared her own affidavit. That affidavit was prepared in part when she was simply a client and later completed it when she was employed. She also had quite an involvement in the preparation of the proceedings before they came to Court.

346. One part of the proceedings in which she was particularly involved was the discovery process and in the examination of the documents produced on discovery by TTC/Leda. Some of those documents were reproduced as exhibits to her affidavit.

347. She had been working on those documents since late 2008 in conjunction with her lawyer.

348. She agreed that her recollection of events since 2003 or 2004 has faded and admitted that some matters had been hard to recall. These included the exact words of conversations, the dates of those conversations and the like. Without the assistance of reference to documents, including many produced on discovery, she could not remember some dates. The discovered documents assisted her to reconstruct some of those matters. She had, however, some emails and also her own records in addition. She had looked, at all of these to reconstruct the sequence of events of what happened in 2003 and 2004. She had also read her affidavit thoroughly before giving her evidence.

349. She admitted, however, that she had not put before the Court any document in regard to her conversation with Mr Beirne on 10 July 2003. She said that she did make some notes on her computer which had since "died".

350. She agreed, however, that she did not write a letter to the Hyperdome confirming her discussion with Mr Beirne.

351. It is not necessary to detail or summarise the whole of the extensive cross-examination, although there are a number of areas where that becomes important.

352. For example, it was asserted by her counsel in final submissions that she was "an astute businesswoman". This was based on her accumulation of considerable wealth over her then working life to which I have already referred.

353. She was, however, challenged on that in cross-examination where it was suggested that, despite this description, her knowledge of and qualifications for the conduct of a retail business were not such as to justify the submission of her counsel.

354. She agreed that her only direct involvement in retail business was with the Moruya Shop, Silly Willy's, where she had provided some business consultancy. The report she prepared for that was admitted into evidence.

355. That report set out a proposal for ongoing business consulting and management and dealt at some length with the aims and objectives of the client, the development of staff and some timeframes. It was not entirely clear from the document the extent to which Ms Hungerford would be involved. In some of the aims and objectives there was an express reference to her. In some, however, there was a recommendation for an outside consultant; in others there was no reference to the person who was to undertake the work, whether Ms Hungerford or someone else. In some cases, it was clear that this responsibility was with the owner; in other cases there was just silence on the issue. It was possible that Ms Hungerford would be engaged to do some further work, but, on the other hand, it may have been the owner who would undertake that work, a not unreasonable expectation since part of the proposal was to provide him with the capacity to deliver an efficient retail business. For this, it was likely that he should be directly involved in much of the work.

356. Nevertheless, it was also in stark contrast to the "business plan" submitted to Leda when Ms Hungerford made application for a tenancy. Indeed, in cross-examination, she acknowledged that her business plan for BHPL was "a far departure from what [she] advised Silly Willy's to do" in the draft she had prepared.

357. Ms Hungerford agreed that the turnover estimate in the "business plan" she had prepared for the tenancy application and which was the only one she had ever prepared as part of a business plan was a "ball park back of the envelope calculation" and, at the time of giving evidence, she could not recall the methodology behind the calculations.

358. She agreed that there were no documents containing more detail than the retail plan submitted and that she had not created another one at any other time; it was "all in [her] head".

359. That it was in her head and not in writing she agreed was not in accordance with the proper approach to a business plan, which, she agreed, should be in writing and include details of staff training, financial controls and profitability, development of goals and, more broadly, operational and financial benchmarks. There was no such document for the Giving & Living store. She agreed that this approach was not in accordance with the approach she had taken in the advice she gave Silly Willy's.

360. She denied, however, that the lack of a formal business plan was one of the reasons that the Giving & Living store failed to meet her objectives and expectations.

361. This was, perhaps, even more curious because she had originally purchased the business and invested in it with a "hands-off approach". While she had regular staff meetings, it was only in 2004 that she started looking at marketing strategies and the need to change her original retail plan. She did not have a Standard Operating Procedures and Induction Manual for the staff; she said that this was because most of them had been working there for 10 to 12 years.

362. The contrast between what she had proposed for Silly Willy's and what she had implemented in relation to the Giving & Living store was quite telling.

363. Ms Hungerford also placed considerable emphasis on the due diligence that she conducted prior to the purchase of the business. This was also the subject of significant cross-examination. The following elements as she described them seemed to constitute her due diligence:

> Discussion with staff, her observation of the foot traffic, her observation of nearby developments, the delivery of relevant financial documents to her accountant and her discussion with Mr Beirne.

364. I will deal with the last matter separately.

365. The assessment of foot traffic was relatively simplistic and impressionistic. Certainly, initially, she suggested in her evidence that she was quite diligent in assessing that. She said that during the period of 14 July to 19 August, she was looking at foot traffic at least once a week. She was, at that time, also at the store about once a week and talking to staff as frequently. She agreed that the impression she wished to leave with the Court was "that she was performing due diligence on an ongoing basis week by week". It appeared, however, that, between 25 July and 11 August 2003, she was overseas in the United States of America.

366. This meant that, on the basis of her evidence, she could only have been at the shop and noticing the foot traffic on two or at best three occasions, namely between 14 and 25 July and between 11 and 19 August, somewhat less than three weeks.

367. Her impression of the foot traffic for public servants was based on those persons who were wearing lanyards, presumably attached identification tags, and there were no figures or detailed records to which she could refer.

368. This contrasted strongly with the rather more professional approach that the Hyperdome had taken to foot traffic and whose records did not confirm the changes that she noticed. Indeed, it showed that the Coles Door had been the highest or second highest entry point to the Hyperdome by reference to the foot traffic count and continued to be so until BHPL vacated the Premises.

369. While I do not have to make any precise findings about it, although encouraged by TTC/Leda to do so, it seems to me that, consistently with other criticisms of her evidence, Ms Hungerford was attempting to exaggerate the level of due diligence that she had conducted in this area. I address this further below (at [903]-[923]).

370. Nevertheless, I accept that she was aware that foot traffic was an important underpinning for the success of the Giving & Living store and she was aware of a level of what it was at that time of purchase.

371. As to the nearby developments, Ms Hungerford gave evidence of the significance she placed on those developments. For example, the newly proposed public service Caroline Chisholm Building was given pre-eminence because it was to house public servants, a market that BHPL targeted. This was critical for her plan to increase turnover by 10 per cent year-by-year.

372. Her basis for that expectation, however, was quite limited. She relied on what she saw with the developments surrounding the Hyperdome but her investigations were simply that she "drove past them, [and] looked at them". She did not go around building sites. Despite agreeing that it would have been prudent to have "made inquiries", she "chose not to make those inquiries".

373. It was perhaps telling that, in relation to the Caroline Chisholm Building, she was aware that it was one of the more significant developments in Tuggeranong and on which she was relying. Certainly, the building had not even "grown out of the ground" in 2003 when BHPL purchased the business.

374. She understood (that is, did not actually know) that the building was completed in about 2006, thereby making no contribution to her proposed increased turnover. What was telling is that, in answer to the question, "So you can't have been expecting any increased foot traffic from what became the Caroline Chisholm Building, can you?" she responded, "In hindsight, no". Later evidence suggested that the building was not actually tenanted by January 2008 and may not have had significant public service occupancy until later.

375. Despite having worked with LJ Hooker Woden, she seems to have made no inquiries from that agency about its staff's knowledge of the developments at Tuggeranong.

376. She did say that she had been told by "someone" that the development sites would be occupied within two to three years. She could not recall who had told her. That is, in itself, striking because her plan was so dependent upon the increased population within the precinct and it is at least surprising that she could not remember who misled her in such a spectacular way.

377. It also shows that the failure of the business to meet her self-identified targets was related to the delay in surrounding developments.

378. This undermines, to a significant degree, her projected increased turnover which appears to be based on the flimsiest of evidence, contrary to what she, as a management consultant, must have understood to be an appropriate basis on which to found her business plan.

379. The next item was the investigation of the financial affairs of the Giving & Living business which she undertook in conjunction with her accountant, Peter Shaw. She gave him what she said was a bundle of documents. The documents that she identified, however, could not have been provided to Mr Shaw in July 2003 because a number of the documents included financial information for periods well after that, in one case, including some figures for 2007.

380. In cross-examination, Ms Hungerford agreed that she had been in error in saying that the documents had been given to Mr Shaw, although she tried to avoid having to make that concession.

381. It became unclear as to what material she had given Mr Shaw and, therefore, the reliance that could be placed on his advice. That was not an insignificant matter because it appeared that, at the time of purchase, Giving & Living Pty Ltd was in arrears of rent which would have excited careful consideration of the financial circumstances of the business.

382. As part of her due diligence, Ms Hungerford placed considerable reliance on the conversation that she had had with Mr Beirne. Given that this was the basis for one of her primary claims, this is unsurprising. Whether, however, she was relying on it in particular with hindsight was a relevant issue.

383. Despite this, no documents of any kind were produced to the Court in relation to the conversation. That was rather odd given the importance which Ms Hungerford had placed on the conversation and, in particular, the representations she said had been made by Mr Beirne in it, even if she had recorded it later when she saw things happening at the Hyperdome about which she had not been told.

384. Her evidence then became somewhat problematic. It was suggested that no such documents were produced to the Court because there were no such documents but she denied that. She said that she did make them on a computer but that her computer had “died”. She was asked a number of questions about the computer in cross-examination and agreed that she did not take any steps to recover the information from the computer. Indeed, she did not know the brand of the computer, whether it was a laptop or a desktop, the model, where she purchased it, or when exactly it “died”. She made no attempt to get it repaired because she had spoken with “someone in Moruya, who advised that it wasn’t worth fixing”. She thought she may have given the computer to her grandchildren but had not inquired whether they still had it.

385. Given the importance of the representations made by Mr Beirne, this rather casual approach to contemporaneous records is, at least, surprising and justifies an available inference that there was no such computer or there was a computer but it contained no records of a conversation with Mr Beirne or, if it did contain such a record, it did not corroborate Ms Hungerford’s version of events.

386. One of the representations Ms Hungerford asserted Mr Beirne had made was that Mr Beirne had told her that the current rent was “market rent”. It was suggested to her that Mr Beirne had said that the rent was “ongoing rent” and she denied that.

387. She later agreed that what Mr Beirne had said may have been “going rate” instead of “market rate”.

388. I have to say, I have found the submissions on behalf of TTC/Leda to be a little confusing. My own view is that, contrary to those submissions, there must be a similarity between “market rate” and “going rate”, although “ongoing rate” is quite different.

389. Some evidence in an unchallenged affidavit suggested that BHPL was not paying either a market rate for the rent it paid to the Hyperdome under the Sublease.

390. As noted above (at [295]-[296]), Ms Hungerford opened shops at Manuka and Yarralumla in an endeavour to increase sales. In doing so, she both opened them under a different name and also changed the name of the Giving & Living store. Some evidence, to which I will refer below, suggested that the change of name was not a satisfactory marketing approach. When that was put to Ms Hungerford, she suggested that she had changed the name because she was obliged to under the agreement with Mr D’Amico and his company. She said that the agreement to purchase the business prevented her from opening another shop under the brand name “Giving & Living”.

391. A copy of the written Sale Agreement, which was in evidence, did refer to change of the name of the business.

392. Relevantly, however, the agreement provided:

> Should the purchaser [BHPL] wish to expand the business r [sic] into the areas from which the vendor is restrained in clause 12 she [sic] shall use the name in conjunction with the location such as Giving and Living Batemans Bay. Provided however that should she change the nature of the business she will not use the name Giving and Living in any location.

393. The areas of restraint of the vendor under clause 12 of the Sale Agreement where the vendor would not carry on business in a shop for the retail sale of home décor products including ceramic, crystal and kitchenwares was:

> In ... the Australian Capital Territory together with the south eastern corner of New South Wales being an area from the east coast of New South Wales 100 km inland commencing from and including Nowra to the New South Wales/Victorian border.

394. This, as Ms Hungerford agreed, did not have the effect that she described and would have allowed her to open in Canberra any number of stores under the name “Giving & Living” and, indeed, the two she opened could have been called “Giving & Living Yarralumla” or “Giving & Living Manuka”.

395. Ms Hungerford, however, then maintained that the prohibition from opening more than one store under that name was based on an unspecified oral agreement subsequently made with Mr D’Amico, but for what consideration and how it bound her she did not say. She could not recall where the agreement was made or whether it was made over the telephone or face to face. Her evidence was confusing because she first admitted knowledge of the clause to which I have just referred but later said

that she did not realise that she did have such knowledge because of the alleged oral agreement.

396. It is difficult to see how the oral agreement could have been binding on her in the circumstances and its vagueness undermines the likelihood of its existence.

397. Challenges in the cross-examination of Ms Hungerford also related to the extent of her involvement with the preparation of these proceedings and the character and quality of her evidence.

398. As noted above (at [345]-[347]), Ms Hungerford was closely involved in preparation of BHPL's factual case and she had a close connection with the preparation of affidavit evidence. She had read various affidavits and was involved in the preparation of some of them. Her evidence to suggest that this did not influence her evidence or her recollection was unconvincing.

399. Despite agreeing that it would be normal to remember what she had learnt in preparing those affidavits, she denied that, if she heard an additional fact in the course of preparing someone else's affidavit, it would add to her understanding of the facts. She agreed, however, that she could not deny that her understanding had been supplemented in this way. Her initial unwillingness to concede that this was likely tended to suggest that she was more of an advocate for her cause than merely a witness of fact.

400. Another problem that this created was through her involvement in the preparation of the expert evidence. Each expert witness called by BHPL acknowledged speaking with Ms Hungerford in connection with the preparation of their reports and, indeed, two of the witnesses undertook site visits with her.

401. While, at one level, it is not surprising that the owner and director of BHPL would be consulted by experts as to the factual basis on which they were to provide their reports, the contact seemed to have extended beyond what was appropriate. Thus, Ms Hungerford was closely involved in the preparation of the expert accounting evidence report, especially by way of giving express instructions about its contents.

402. This led to instructions which seemed to amount to directions of the basis on which the reports were to be prepared rather than simply factual information which could be independently assessed by the experts as such.

403. Both of these matters were significant when evaluating the way in which Ms Hungerford gave her evidence. TTC/Leda submitted that she had tailored her evidence to fit with documents about matters she had not recollected.

404. An example given was not one that was critical to the case but was instructive. In her oral evidence, Ms Hungerford had said that, when paid parking was introduced, those parking vehicles had to pay from the moment they entered the car park. She also said that this had changed after about three weeks when the Hyperdome gave a free period of two or three hours before the vehicle owner had to pay for parking.

405. In her affidavit, however, she had deposed that, when paid parking was first introduced, it allowed the customer free parking for the first two hours free but later said that, after three weeks, the free period was extended so that it allowed the first three hours to be free.

406. The two matters were inconsistent. She agreed that, notwithstanding that she had a different recollection when giving evidence from what she swore to in her affidavit, she nevertheless did that by giving greater comfort to the documents than to her memory although, apparently, not resiling from her memory.

407. This did mean, however, that it was necessary to scrutinise her evidence very carefully because of the risk that her recollection was not accurate or was influenced by reading other documents, including the affidavits of other witnesses.

408. Unsurprisingly, because the events occurred more than 10 years before the time when Ms Hungerford was giving evidence, she agreed that there were many things of which she lacked a clear recollection. This is consistent with ordinary human experience.

409. Nevertheless, it is often the case that witnesses can remember the relative occurrence of events either through the sequence of events or the temporal relationship between them. Precise dates, times and, of course, exact words, are likely to be lost over time.

410. Ms Hungerford admitted that, after the discovery process in the proceedings, she was able to look at the discovered documents "to identify and reconstruct when something occurred". That was, she admitted, the process by which she built up her recollection not only of dates but sequences of matters, although adding that she also had emails from her own records as well.

411. There were many occasions when she was unable to recall precise dates and made some errors in the dates she gave from time-to-time.

412. Nevertheless, Ms Hungerford "doggedly" refused to concede that her extensive reference to documents and conferences with other witnesses would have led to a reconstruction by her of the events of which she gave evidence.

413. The example of this suggested problem put to her in cross-examination was, however, not a very clear cut one.

414. In her evidence, Ms Hungerford had referred to a possible purchaser of her business, Mr Mackennal. She said that she had not spoken to Mr Mackennal at the time of the events about which she had given evidence. She did say, however, that she had spoken to her broker at the time.

415. She said that she had, however, assisted Mr Mackennal in the course of preparing his affidavit. Unconvincingly, she denied that her recollection of events had been assisted and improved by speaking with him and preparing his affidavit and denied that there was any need to quarantine the information that Mr Mackennal had told her from her own recollection of events.

416. While she could not have had first-hand knowledge of the conversations between Mr Mackennal and Mr Cooper or the contents of any such conversations, and can only have known of them from reading his affidavit or speaking to him, it did not seem to me that this was a significant problem with her evidence.

417. It adds to the concern I have about her evidence, however, and I consider that her evidence must be scrutinised with care. Indeed, so far as her recollection of events and conversations is concerned, I would not be prepared to rely on her recollection alone unless confirmed by documents or other evidence.

418. In re-examination, Ms Hungerford was shown some letters that BHPL's lawyers had written on her instructions, seeking a new lease from the Hyperdome. Those documents were admitted in evidence and were said to support her case that she had sought a new lease, not merely the assignment of the lease to Giving & Living Pty Ltd. This, however, did not take the issue much further.

419. In relation to suggestions that decisions taken by Ms Hungerford herself were responsible for the demise of her business, she said that she had had a number of conversations with the managers of the Hyperdome from time-to-time but that the quality of the management she was providing to the Giving & Living business had never arisen. It was, however, not clear that the managers were required to be aware of the quality of her management of her business, were competent to comment on it, or had the knowledge or expertise to be able to assess it. There was no evidence about any of these matters.

420. Nevertheless, she did say that Mr Lord had told her that the store "always looked very – as good as it could and that the staff and service were excellent".

421. She also said that none of the Hyperdome management staff had ever talked to her about her business plan submitted with her tenancy application. Again, there was no evidence about any requirement or competence to do that on the part of any of the managers.

422. In particular, she said that the topic of her "quitting the lease" did not arise in any of the conversations with Hyperdome managers until 30 January 2008, when she did meet them to say that she was abandoning the Premises, as she did the next day. She said that the meeting was "quite an aggressive meeting", at which she was told that, if she did abandon the Premises, she would be sued, presumably for outstanding rent but that if she stayed she "could the [sic] rent free".

423. There were some questions also about the outgoings but, in the light of the issues that I have to decide, I do not need to summarise or refer to that evidence.

Timothy Beirne

424. The first witness for the plaintiff was Mr Timothy Beirne. He was a property executive with qualifications in property economics and business.

425. Mr Beirne made two affidavits which were filed and from which certain paragraphs were read. A number of documents were annexed to his affidavits and these included the original Sublease, a letter from Giving & Living Pty Ltd of 9 April 2003 seeking rent relief, which was refused and offering BHPL a choice to pay out the lease or vacate, a letter from BHPL's lawyers seeking information about the tenancy, which was supplied, a copy of the various lease documents evidencing the transfer to BHPL, the variation and the tenancy application by BHPL, together with copies of internal Hyperdome newsletters from June 2003 referring to paid parking at the Hyperdome, and some other documents.

426. The paragraphs read in his second affidavit replied to a Report by Mr Martti Honkanen and denied any intent by him or the Hyperdome to divert pedestrian traffic away from the Coles Door to the Target Door. It also gave background to the introduction of paid parking and the installation of pipe rails, the latter being to ensure cars paid for parking and installed for no other purpose. He also denied that the improved amenities in the Courtyard were designed to divert foot traffic.

427. Since 1996, Mr Beirne had been interested in shopping centre management and had, since that time, been in employed in various shopping centres.

428. He was appointed Retail Manager to the Hyperdome in January 2002. He reported to the Centre Manager but undertook most of the day-to-day management issues dealing directly with tenants. In September 2002, he became the Centre Manager.

429. Mr Beirne emphasised the obligation he took seriously to maintain confidentiality both in respect of the business of the shopping centre and its owner but also the businesses of the tenants. He described his duties as Retail Manager and then as Centre Manager to protect and enhance the income stream of the owner, at the time, Leda. This involved also concern with the overall "health" of the Centre and the financial performance of the Centre including its tenants.

430. In the case of the Hyperdome, he noted that almost all of the income stream to the Hyperdome came from the payments made by tenants under their leasing arrangements. He had approximately 10 staff members to assist him in his tasks.

431. The Centre issued regular newsletters to tenants. These were prepared by Centre Management and distributed to each tenant, principally by the security officers. His attention was drawn to the Hyperdome's June 2003 newsletter to tenants which included information about the introduction of paid parking at the Centre. The government had proposed to introduce paid parking in the government car parks in the area and, as a result, the Hyperdome was investigating the introduction of paid parking for the multi-storey car park associated with the Hyperdome. His attention was also drawn to a further newsletter in November 2003 which also reported further on the issue of paid parking. The fee structure for such parking would be similar to that at the Woden Plaza, another shopping centre in south Canberra.

432. The newsletter contained other information. For example, the June 2003 edition, also mentioned that a new shop, Hot Dollar, was to open in the site formerly occupied by the Go-Lo shop, opposite the Giving & Living store.

433. Mr Beirne generally had little recollection of the events of 2003. He was, however, able to identify the standard procedure to be followed by him in respect of the relevant matters.

434. He outlined the standard procedure he followed when dealing with an inquiry for the assignment of a lease by a purchaser of a business that was an existing tenant of the Hyperdome. The procedure involved him meeting the proposed assignee and introducing himself. It involved giving the assignee a bundle of documents which included information to be completed and returned to him for consideration. He would then make a recommendation to the Retail Manager for Leda and, if the assignment was approved, the assignee would be involved. He did note that about nine out of 10 applications for assignments did not ultimately eventuate.

435. He stated that tenants of the Hyperdome had to report sales information to Centre Management every month on receipt, he reviewed the reports that were submitted. He treated them confidentially and never disclosed the information in those reports even with prospective purchasers of such businesses. The reports were required so the Hyperdome could monitor and assess the state of retail trading in the Centre. He assessed the reports on both a macro- and a micro-level. That is to say, it assisted him to assess the financial health of the Centre as a whole but also the financial

health of each of the tenants. He was not asked by either counsel what he did when the financial health of a tenant was not good and he did not explain.

436. He was also given by his staff a schedule of those tenancies which were in arrears with rent and this assisted him in identifying those tenants which were defaulting or likely to default. He confirmed, again, that he would not disclose that information to other parties.

437. He was asked some questions about conversations that he might have had with prospective assignees of leases and purchasers of businesses within the Hyperdome. He was asked if he would ever disclose to such a person that the lease was in "a good location". He said that he would not use those words in relation to any location. In any event, he pointed out that this was very much dependent upon the nature of the business; one location may be good for one tenancy but not for another. He said that, if he had been asked such a question, he would tell the prospective assignee to make their own inquiries.

438. He accepted that the Hyperdome had various precincts such as the Food Court, the Fashion Court and so on. This might be relevant to the appropriate location for an individual tenancy.

439. He was also asked how he would respond if questioned about whether there was anything that a prospective assignee should know about the Centre. He said it was a difficult question to answer because he would not know what the questioner actually wanted to know. He said that, to the best of his recollection, he had never encountered that question. He would certainly not divulge information about the business of the assignor and, again, would suggest that the questioner should go and make inquiry of the business itself. His standard response was that the person should "go and find out".

440. This applied also to questions about whether the rent for premises of a business was at market rent or not and he would, as a standard approach, suggest that the inquirer make their own inquiries.

441. He recalled the Giving & Living business, but had no detailed recollection of it. He also had no independent recollection of his dealings with Ms Hungerford in July 2003. He had looked at the documents produced in these proceedings in an attempt to refresh his memory but, even looking at those documents, he had little recollection of the actual events. Thus, he said he did not remember Ms Hungerford asking about whether the Giving & Living shop was in a good location and he had no reason to suppose that he would not have applied the ordinary standard procedure he followed to such questions. He said he made no comment about the location of businesses to prospective assignees.

442. He was also asked about developments around the Hyperdome. He said that, again, it was not his practice to make comments about proposed developments and, in particular, about adjacent vacant blocks of land.

443. He was again asked whether he had described the Giving & Living business as "a good business" and said that he had been trained not to use the word "good". He repeated that the standard procedure was not to make comment to proposed assignees about anything to do with buying a business in the Hyperdome. He did recall, however, that the Coles Door to the Hyperdome had the second highest foot

traffic of any door in the Hyperdome. He was also asked about the question Ms Hungerford said she had asked him, namely, “Is there anything I need to know about why Rick D’Amico is selling the Giving & Living business?”. He had no recollection of that inquiry, but said that that was a matter of confidentiality between the landlord and tenant and not a matter that was to be disclosed. He would have suggested, if such a question had been asked by Ms Hungerford, that she should go and ask Mr D’Amico directly.

444. He was asked also about what he would say if he had been asked by a prospective purchaser whether the purchaser should know anything about the Hyperdome or its operation in regard to the business the purchase of which they were thinking of buying. He said that his response would, at first instance, be to ask what the questioner wanted to know. He was asked whether he might say, “No, there is nothing you need to know” and said that his standard procedure had trained him not to respond like that but to ask what the questioner wanted to know.

445. He pointed out that there were a number of things that were happening at the Hyperdome and to say that there was nothing that was needed to be known would be inappropriate. The Centre would develop over time and keep developing to ensure that it remained competitive.

446. He pointed out that there were approximately 200 retailers in the Hyperdome and that it would not be possible to make sensible comments to anyone about such matters. He also seemed to suggest that it would be unethical.

447. He was asked to comment on a suggestion that he said to Ms Hungerford, “I am very pleased you are taking the shop” and he pointed out that what was here involved was an assignment of a lease that was an existing commercial arrangement and that it did not matter to him if that lease was assigned or not. He said it was not a representation that he would have made in 2003.

448. He was also asked about whether he would have said to Ms Hungerford, “You will do well with the business [that Mr D’Amico was selling to her]” and again he pointed out that he had been trained not to comment on how retailers will perform or otherwise and that he had no reason to believe that he would have departed from what his training taught him to do and say in regard to any of these matters in 2003. He pointed out that there was no need to deviate from any of the procedures and he would have had to make a report of any such deviation as he was scrutinised by those to whom he had to report. He said that a comment like, “You are making a good business decision by buying the business”, would fall into the same category.

449. He said that he was not aware that the conversation that he had with Ms Hungerford was part of any due diligence that she was undertaking.

450. He was asked about Ms Hungerford’s suggestion that it was as a result of this conversation that she formed the view that the Hyperdome was not expected to alter during the term of any prospective lease. He said that that was not a representation that he would give either then or now and that he was unlikely to have said anything to give rise to that belief.

451. He was asked about marketing and promotion conducted by the Hyperdome and a suggestion that Ms Hungerford said he had told her that it was not expected to alter during the period that she would be a tenant. He said that he did not recall discussing

that. There was a marketing team in place and, in any event, questions about marketing would have been referred by him to the marketing team.

452. Mr Beirne also gave some evidence about the paid parking which he said commenced on 2 March 2004, according to the documents he had seen, though he had no independent recollection.

453. He also had no independent recollection of Ms Hungerford requesting a new lease rather than an assignment of the Sublease. All he could say was that the Sublease was on foot and there was a request for an assignment and an extension of the term which, he noted, was, in fact, granted. He noted that the document that had been signed was, in fact, an assignment of lease.

454. He noted that the Sublease required a bank guarantee and personal guarantees to be provided by the sublessee. The present guarantors were Mr D'Amico and his wife.

455. He was shown a letter from Mr Shaw, Ms Hungerford's accountant. He had no recollection of receiving that letter but noted that it had been received, because standard practice, required a certified statement of assets and liabilities from an accountant for the prospective assignee. He identified his signature on the recommendation that he then made the Sublease be assigned as proposed.

456. Mr Beirne was also shown a document which set out the foot traffic for July 2005. It showed that at that time, the Coles Door had the highest foot traffic for that month in the Hyperdome.

457. Mr Beirne was cross-examined at some length. He agreed that he had left the employ of the Hyperdome in 2004. Since then, he had worked in Melbourne, Sydney and Brisbane.

458. He said that he was first asked in 2012 about the meeting he had had with Ms Hungerford; this was in preparation for the first affidavit he made in the proceedings. He had no recollection of the conversation with Ms Hungerford and he agreed that his recollection of the Hyperdome itself was a little bit hazy. He did not consider that his recollection of the events of 2003 were clearer in his mind in 2012 than when he was giving evidence. He was honest and made admissions against interest.

459. He said that he did not knowingly say anything incorrect in his affidavit. He recalled, in the witness box, discussing the foot traffic through the Coles Door but agreed that insofar as anything was said in his affidavit, that was the best of his memory at the time.

460. He was asked about the process for having a tenant approved as a prospective new tenant. He agreed that a tenancy application form would have to be completed and submitted. He would scrutinise the form and make a recommendation to the Retail Manager for Leda, who would make the final decision as to whether to accept the tenant or not. He alone made the recommendation without necessarily input from other members of his team. His recommendation was based on the information he had at the time and an assessment of the application, and he would provide any relevant information to the Retail Manager for consideration.

461. The assessment of the application was part of his job to protect the income stream of the owner, Leda, and that was one of the reasons why he required a prospective new tenant, such as BHPL, to provide financial and capability information together with an indication of the person's experience in business in order to assess the application. He also required a business plan to be submitted and this would all be part of the information on which he would base the recommendation to the Retail Manager. Ultimately, it was the job of the Retail Manager to accept or reject the application. He would, in making the recommendation, draw to the Retail Manager's attention any matter that he would consider relevant. Sometimes he would suggest that the Retail Manager should discuss the application with him.

462. In the case of Ms Hungerford's application, he did not note anything to suggest that there were any concerns about the application. The Minute that he sent to the Retail Manager was in evidence and he confirmed that what was said in the Minute was his belief at the time. He agreed that he noted in the Minute that there were no current issues with the tenancy, namely Mr D'Amico's existing tenancy. He did accept, however, that the tenant was liable for some arrears of rent from time-to-time.

463. His attention was drawn to a request in March 2003 that Mr D'Amico had made on behalf of Giving & Living Pty Ltd for rent relief. In the letter, Mr D'Amico indicated that the situation was quite significant and that, if rent relief was not forthcoming, he may have to leave the Premises. This situation had arisen, in part because of the move of the Go-Lo business from the Coles Mall to the Lifestyle Centre. As a result, Mr D'Amico stated that the foot traffic had significantly dropped. Mr Beirne agreed that it would be a significant matter if a tenant said that, without rent relief, it would have to vacate. A vacancy would affect the income stream of Leda and the environment of the Centre and there would be risks about being able to pursue the tenant for rent arrears. There were also potential implications for stores in the vicinity.

464. He was also taken to the reply to Mr D'Amico's request for rent relief which declined to provide that relief. It noted that, at the time, the store was three months in arrears, although Mr Beirne seemed to think that it was only two months in arrears at the time.

465. The reply also indicated that Leda would consider an early surrender of the tenancy and agreed that such a surrender would end any obligation for payment of rent.

466. He agreed that the Hyperdome would have considered coming to a mutually agreeable solution with Mr D'Amico, but he had not received any further requests from him. It was suggested to him that that was the same position when Ms Hungerford approached him and he confirmed that there had still been a possibility that Mr D'Amico would seek to surrender the Sublease early and leave the premises.

467. He agreed, too, that there were issues with the Giving & Living tenancy at the time when Ms Hungerford approached him because there were still rent arrears. He was unable to be precise, but it appeared there were either two or three months rent in arrears at that time. He had no recollection that Mr D'Amico brought the rent up to date and agreed that he could not have done so because there were still arrears at the time BHPL took over the premises.

468. As a result, the Hyperdome had an incentive to agree to the assignment to BHPL and Mr Beirne agreed that this was so.

469. He also acknowledged that the rent payable for the Giving & Living store was in excess of market rent and that the assignment meant that he would be ensuring that above market rent was being paid to the Hyperdome for the balance of the lease and, indeed, for the two year extension; he agreed it was "a pretty good deal" for the Hyperdome. This was, in part, because if he had offered a fresh lease to Ms Hungerford, such a lease would have to be at market rent which was, of course, a lower rate than the current lease required to be paid and which would, of course, continue to be required under the assignment of the lease. These were frank admissions that Mr Beirne made, strengthening my view of his honesty as a witness.

470. Mr Beirne agreed that a good indication about the quality of the location of a store in a shopping centre like the Hyperdome would be the number of people passing by, the foot traffic. He agreed that, while it was by no means the only indication of whether the store was at an appropriate location, it was certainly an important one. He agreed that it was an indicator about which he would expect any prospective tenant to show concern or interest. He agreed that it was particularly important with shopping malls, compared with shops in the street, because shopping malls are an enclosed space and there are only a certain number of people who go in, so where they walk is particularly important, because that is the only source of people for passing traffic necessary for the health of many stores in the Centre.

471. He agreed that he had a recollection of telling Ms Hungerford that the Coles Door had the second highest foot traffic in the Hyperdome. He agreed, after some prevarication, that this meant that he was, in effect, telling Ms Hungerford that the store was in "a good location". He agreed that this was something he had volunteered despite, according to his training and experience, he should be trying not to make representations or assurances about the worth of the location in the Hyperdome.

472. He agreed, however, that, by saying this, he had "certainly gone a very long way" towards telling Ms Hungerford that, "[i]t probably [was] a good location". He agreed that, on reflection, and having regard to his training experience, he probably should not have said that. He thought that he should have qualified that by saying something like, "But that might change in the future because we are doing a few things outside that might affect it".

473. He did know, at the time, that the Hyperdome was planning to undertake some developments and that these might affect the foot traffic count at the Coles Door. That is, he knew that, quite apart from paid parking, which would affect the whole of the Hyperdome, there were works involving the erection of barriers of different kinds in order to put a ring around the paid parking locations, although he recollected that there was pedestrian access through the barriers. He knew that, in order to install the relevant equipment there would have to be some temporary barriers erected while the building works were being undertaken and he also knew that there were pipe rails and some kerbing and guttering that would discourage cars from driving wherever they chose to in the areas subject to paid parking. He was aware that it was going to cost a lot of money to undertake the necessary building works for the introduction of paid parking, and that it was not just the installation of boom gates, but involved an extensive allowance for putting up railings and bollards.

474. He was aware that these works had the potential not only to impede cars from moving through those areas but the potential to impede pedestrians from moving wherever the metal railings were going to be erected. He agreed that it would have been a fair thing to do to tell Ms Hungerford of the work that might affect her and agreed that it was not something that she could find out from other sources.

475. He also knew that there were other plans to upgrade, in particular, the area between the Target Mall and the Lifestyle Centre, the Courtyard. He was aware, in particular, of the work to be done there, namely the erection of some toilets, and some windbreaks and an awning. This would, he knew, integrate the main part of the Hyperdome with the Lifestyle Centre. He was aware that there was already an extension that had brought the Hyperdome physically into better contact with the Lifestyle Centre, but there was still a gap as at 2003 and he was aware that the Hyperdome had a strategy to make the gap more attractive by upgrading its amenity. He agreed that this would make it attractive for people who were in the Lifestyle Centre to move into the main part of the Hyperdome and vice versa. They would do so through the Target Door.

476. He also agreed that there were upgrades to make the Hyperdome more accessible through the Lifestyle Centre. He was aware that there was a substantial government office building, the Centrelink building, on the other side of Athllon Drive from the Lifestyle Centre, where there were a substantial number of office workers. He agreed that it would be desirable to encourage those people to visit the Hyperdome, although he said that they were already doing that.

477. He agreed that he wanted to get as many people walking into the Hyperdome as it was reasonable to accommodate and he agreed that Leda wanted to make the Lifestyle Centre an attractive entry from Athllon Drive. He agreed that Leda wanted to encourage people who had not been used to shopping at the Hyperdome to come to the Hyperdome so as to attract not merely existing customers but potentially new customers. He agreed that it was desirable for them to spend as much time as they reasonably could in the building and that Leda wanted to encourage that.

478. He knew that people entering the Coles Door were not just people who had parked in the car park outside that entry, but that they were coming from further away, and he was aware that some of them had identification tags around their neck. He knew that some people coming into the Hyperdome worked at offices on the other side of Athllon Drive.

479. He was also accepted that, in the middle of 2003, pedestrian traffic lights made it easier for pedestrians to cross Athllon Drive. In the middle of 2003 the only lights relevantly across Athllon Drive were at the corner of Reed Street North. The pedestrian lights outside the Lifestyle Centre were in later installation.

480. He agreed that he knew that, by making the Lifestyle Centre entry a more attractive place for people to enter the Hyperdome, it might have the effect of encouraging the office workers in the Centrelink building to use that entry rather than, for example, a “closed door” such as the Coles Door. He agreed that, on reflection, he should have told this to Ms Hungerford. He was aware, for example, that, at the time, she lived on the south coast.

481. Mr Beirne was also asked questions about turnover rent. He explained that when a tenant had earned in excess of a particular amount set in the lease document, the tenant would pay an additional amount of rent to Leda, the "turnover rent".

482. Mr Beirne indicated that he would set the turnover rent after negotiations with the tenant.

483. In re-examination, Mr Beirne said that he could not recall what Ms Hungerford had asked him. In particular, he could not recall whether she had asked him about the strategy or plans in relation to foot traffic but he did say that if she had asked him he would have told her.

484. He agreed that Mr D'Amico and his wife were guarantors of the Sublease and that this would be a means of using leverage against the tenant if required. That gave Leda comfort because of the guarantee. This made it, for example, a different circumstance to a tenant that had given no guarantee or a more limited guarantee than the one required under the Sublease. Nevertheless, he said that Leda was "commercial" in its dealings; that is to say, it would be prepared to negotiate an arrangement such as the surrender of a lease.

485. He recalled that there was, from time-to-time, arrangements which might have included rent forgiveness for a period of six months or similar.

486. He also agreed that the pipe railings that were installed in connection with the paid parking allowed for easier pedestrian access and simplified relocation, although he did not particularise where that would be.

487. He also said that he did not recall seeing ID cards on customers coming across from Athllon Drive.

Duane Robert Lord, Robert Frederick Cooper and Shane Henry McCann

488. Because of my earlier findings, it is not necessary for me to summaries the evidence given by employees of TTC/Leda Messrs Lord, Cooper or McCann, in particular about representations that they are alleged to have made.

489. I have rejected the allegation concerning the representations they were alleged to have made and the evidence is not relevant to the other issues that I have to decide in this case.

Harold Kolodziej

490. The General Manager of Mirimax Pty Ltd, trading as TCS Instruments, Harold Kolodziej gave evidence. The business of TCS Instruments was, amongst other things, to provide people counting services to a whole range of businesses. It provided such services to the Hyperdome.

491. In the event, the issues in the proceedings mean that I do not have to make particular findings about the question of people counting. Accordingly, it is not necessary to recount Mr Kolodziej's evidence in detail.

492. In summary, the counting mechanism used by TCS Instruments operates through the installation of sensors across a door space. On one side is a transmitter that transmits a light beam constantly and on the other side a sensor receiving the light beam. When a person passes through the door space, the light beam is broken and that is counted as a person.

493. Of course, where two people walk through the door space precisely side-by-side, the system will not count both individuals. The evidence was that, where the doorways have a low volume of person traffic, less than 100 people per hour, the error rate is extremely small and the volume not significant enough to affect the overall system. With busier doors, the company uses other technology, usually a visual thermal device overhead, which can detect every individual and has the capability of tracking multiple individuals entering concurrently.

494. In auditing the system at the Hyperdome, it was found that the error rate was less than 15 per cent and that was sufficient for the purposes of the Hyperdome.

495. Mr Kolodziej said that an audit was conducted by a technician regularly and who would check the system in 15 minute counting modes. The technician would use a mechanical clicker to identify each individual going in and out, recording the start time and the finish time of his testing so as to compare with the sensor system.

496. Mr Kolodziej identified statistical reports of door counts for the Hyperdome from July 2005 to October 2008. They were admitted into evidence. They were clearly more accurate or relevant than the surveys conducted by Ms Hungerford or on her behalf.

497. He was also able to identify one-off events that cause sensors to provide inaccurate measurement.

498. He indicated that each time the beam is broken, the count is only one half of a person because for every entry, there will be an exit and, accordingly, accuracy requires that to be included in the process for accurately calculating entries to the Hyperdome.

499. TCS Instruments had provided people counting services and audited those services to the Hyperdome since 2001.

500. In cross-examination, Mr Kolodziej indicated that there could potentially be periods where an audit would not be conducted for a period of 24 months.

501. He was also asked about some extraordinary counts that the staff of the Hyperdome had identified, but he was unable to make a comment as he had not been asked to investigate the records for that purpose and did not recall the issues.

502. Documents admitted into evidence showed that there were issues in relation to the people counting from about May to October 2005. For example, in the Weekly Summary Report of 27 May 2005, the relevant software had been disabled; in the Weekly Summary Report of 20 May 2005, it was noted that the Anketell Street entry had been under-reporting, which was also noted in the Weekly Summary Report of 7 June 2005 when the audit indicated the under-report maybe as large as 29 per cent.

503. A further problem was noted in the Weekly Summary Report of 1 July 2005 when over two days a count of 2927 persons was recorded for a period when the Centre was closed. A similar problem was noted in the Weekly Summary Report of 12 August 2005 and 14 October 2005.

504. While such problems would raise concerns about the accuracy of the reports of the people counting systems, it was not at all clear that it would affect the relativity of the size of foot traffic through the various entries to the Hyperdome.

505. In any event, the Weekly Summary Report of 14 October 2005 did report that the problem had resolved. After referring to irregularities in the system, including the odd counts at 8:00pm and 9:00pm on Saturday and Sunday, when the Hyperdome was closed, it recorded:

> The problem was investigated by the system administrators but unfortunately they could not pin point the problem as the system had not been regularly audited for over 24 months. Therefore they could not explain the errors. They did however support my suspicions that the system has been over counting consistently at unusual periods and the only conclusion that they could provide for this was that the counts were being manually manipulated. The system has now been locked and manual manipulations are only possible via the use of a password which only Bright Lights have access to. It should be noted that the errors ceased once the traffic system was audited.

506. The reports of the foot traffic counts for all entries to the Hyperdome for the period from July 2005 to January 2008 were in evidence. I am satisfied from this evidence that for the period from July 2005 to October 2005 the absolute numbers are likely to be in error but that the relativities between the various entries to the Hyperdome are, on the balance of probabilities, correct because of the correlation with later counts reported.

507. I am also satisfied that for the period November 2005 to January 2008 both the absolute numbers and the relativities are correct.

508. These showed that from July 2005 to April 2007 and for August 2007, the Coles Door showed the highest foot traffic of any of the 16 entrances for which counting was undertaken, including the Target Door.

509. I also note that, for the months of May 2007 to July 2007 and for September 2007 to January 2008, the Coles Door showed the second highest foot traffic of the 16 entrances to the Hyperdome.

510. This evidence is in stark contrast to the anecdotal evidence of Ms Hungerford about the falling off of foot traffic through the Coles Door. In this regard, I note that the counting through the Coles Door does not include the foot traffic through the Coles Travelator for which there was a separate count.

Expert Evidence

511. The expert evidence was presented as concurrent evidence. This is a more modern method of adducing expert evidence which results in the Court being better and more helpfully informed about their evidence. See *Strong Wise Ltd v Esso Australia Resources Pty Ltd* [2010] FCA 240; 185 FCR 149 at 175; [93]-[96]

512. The method has been helpfully described by the Administrative Appeals Tribunal in *Re The International Fund for Animal Welfare (Australia) Pty Ltd and the Minister for Environment and Heritage* [2005] AATA 1210 at [43]-[45], as follows:

> 43. The means by which most of the evidence was taken was the process now frequently used in the Tribunal which the Tribunal has called '**concurrent evidence**'. All of the witnesses prepared reports or made affidavits. The reports and affidavits were admitted without objection except as to relevance. Prior to giving evidence witnesses whose evidence related to similar areas of expert knowledge conferred with one another. This process involved up to four witnesses at a time. Legal representatives were not present. Sometimes the meeting was wholly or partly by telephone including international telephone calls. Witnesses who gave evidence on more than one area of expert knowledge were involved in more than one meeting. The witnesses who took part in this process included the chief

executive officers and other employees of the zoos. The chief executive officers were also cross examined conventionally on non expert issues. During their meetings the experts were asked to isolate the matters on which they reached agreement and the matters on which they continued to disagree. They were asked to reduce this to writing. So far as the Tribunal is aware this process took place without any intervention from the legal representatives except, perhaps, in the provision of typing facilities.

44. Each group of witnesses took an oath or affirmation to be truthful. They sat alongside one another. Not all witnesses were in the hearing room. Some were overseas. They joined the **concurrent evidence** session by video link. In one case ... the evidence was received by telephone. [two witnesses] gave evidence concurrently from the United Kingdom by video link. At the time they were in separate parts of the country.

45. At the beginning of each session the agreed statements were received in evidence. The witnesses were then asked, in turn, to state succinctly what they wished to stress as the essential parts of their evidence. Some of the witnesses accepted this opportunity. Others did not. They were then asked, in turn, whether they wished to ask any of the other witnesses questions or to comment on what the other witnesses had said. Counsel for the parties were then invited to ask questions of any of the witnesses. During all this time members of the Tribunal asked questions when they thought it was appropriate.

513. While not precisely in this form, the concurrent evidence was generally given in this way. The pre-hearing "conclave" of the witnesses in each area or discipline was most useful and helped identify the areas of agreement and disagreement and the reasons for the latter.

514. This was a useful way of proceeding and it did highlight the differences between the experts and the reasons for those differences in a very helpful way.

Forensic Accountants

515. Concurrent evidence was given first by the forensic accountants for the respective parties, Peter James Haley for BHPL and Gregory Meredith for TTC/Leda.

516. Mr Haley was retained by BHPL and provided an expert report. Mr Haley was a Chartered Accountant. He held the Degree of Bachelor of Commerce and a Graduate Certificate in Applied Finance and Investments. He was a Member of the Institute of Chartered Accountants in Australia and a Member of the Financial Services Institute of Australia.

517. He was a Partner, Forensic Accounting and Litigation Support, of Vincents Chartered Accountants.

518. He had had over 27 years experience in business analysis and the accountancy profession, most recently 11 years specialising in forensic accounting. He had prepared and submitted forensic accounting reports as expert evidence and had appeared to give evidence in various courts and tribunals in Queensland as well as in the Supreme Court of Queensland, the Supreme Court of New South Wales, the Federal Magistrates Court of Australia (since 12 April 2013, renamed the Federal Circuit of Australia), and the Family Court of Australia.

519. He had prepared assessments of damages in relation to various commercial disputes including trade practice disputes, business interruption claims, retail shop lease disputes, partnership disputes, shareholder disputes, defamation actions and

professional negligence claims, as well as in family law matters and economic loss reports in person injuries matters.

520. Mr Haley made two affidavits, both effectively annexing Reports. They were filed and read. In both, Mr Haley acknowledged that he was bound by the Expert Witness Code of Conduct. He also attached a statement of his qualifications.

521. In his first Report, Mr Haley set out the background of the Giving & Living business and then calculated the loss and damage he assessed attributable to the alleged misleading or deceptive conduct. Given the substantial progress made in the pre-evidence discussions between him and Mr Meredith, the "conclave" as it became known, it is not necessary to set out his calculations or reasons in detail.

522. Mr Haley assessed the economic loss suffered by BHPL as a result of the claimed conduct by TTC in the sum of $4 613 481. This was broken down as follows:

Capital Outlays	$ 281 451
Borrowing Costs	$ 139 407
Trading (Profits/Losses)	$ 720 465
Interest on funds advanced	$ 984 899
Liability to pay remuneration	$1 252 488
Loss of Profits	$1 234 771

523. His second affidavit was prepared in response to Mr Meredith's affidavit which caused him to provide updated calculations. Mr Haley also responded to various matters raised in Mr Meredith's affidavit. Again, these were dealt with in the conclave and in the concurrent evidence hearing.

524. Mr Haley's supplementary report based on further information and assumptions re-calculated the total losses in the sum of $5 296 052, made up as follows:

Capital Outlays	$ 281 451
Borrowing Costs	$ 139 407
Trading (Profits/Losses)	$ 701 531
Interest on funds advanced	$1 256 599
Hungerford's liability to pay remuneration	$1 458 738
Loss of profits and increase in value of good will	$1 458 326

525. Mr Meredith was also a Chartered Accountant and was a Partner of the firm, Ferrier Hodgson, Chartered Accountants. He held the Degree of Bachelor of Economics and was a Fellow of the Institute of Chartered Accountants. He was a Member of the Insolvency Practitioners Association of Australia, the Financial Services Institute of Australia, the Australian Institute of Company Directors, and special interests groups in forensic accounting and business valuation of the Institute of Chartered Accountants of Australia.

526. He had experience as an expert witness in a wide variety of cases and in various litigation support assignments. He had prepared expert reports for a large number of legal actions including business, shares and option valuations, loss and damage assessments, investigation of financial transactions and solvency reports. He had acted as a court appointed referee.

527. Mr Meredith made one affidavit which was filed and read; to it was exhibited his Report. He also acknowledged that he was bound by the Expert Witness Code of Conduct.

528. Mr Meredith's Report was a comprehensive document which attached the documents on which he relied as well as detailed schedules with his calculations. It attached a curriculum vitae, the letter of instructions, and a list of the documents with which he was provided.

529. Mr Meredith assessed the total loss and damage sustained by BHPL on two bases. Initially, in respect of the pre-lease representations alleged, he quantified the loss within a range of $64 399 to $435 684. In respect of what were described as the trading representations, namely those made after BHPL had entered into the Sublease, he assessed those within a range of $46 937 to $516 752. These two would be added together to provide the total loss, if both representations led to liability.

530. If the losses from the trading representations alone were considered, the losses would be reduced by lease exit costs and he quantified those within the range of $65 817 to $535 632.

531. As with Mr Haley, it is not necessary to summarise his Report as the relevant issues were dealt with in the concurrent evidence hearing.

532. Mr Haley and Mr Meredith then conferred "in conclave" and produced a document which tabulated the positions of the two accountants and identified the differences between them.

533. It is appropriate to approach the evidence in this way.

534. The first area was the initial capital outlay. Mr Haley identified that the initial capital outlays were constituted by $228 538 being goodwill and $52 913 separately as being the cost of plant and equipment. Both figures were recorded in the financial statements of BHPL for the financial year 2004. They exceeded the amount paid for the business and there was no explanation as to why there was such a difference of $46 451 from the actual purchase price which would seem to me to be the actual capital outlay of BHPL. Mr Haley did not apply a separate figure for the purchase of stock as he dealt with that as part of the trading losses.

535. Mr Meredith relied on $235 000 as the actual purchase price paid, assuming that it was reflective of both the value of goodwill and of the plant and equipment. He then added the amount paid in relation to stock, namely $123 895, in addition to that purchase price.

536. Thus, Mr Haley assessed the capital outlays in the sum of $281 451 while Mr Meredith assessed them in the sum of $358 895.

537. The fundamental difference between the approach taken by Mr Meredith and by Mr Haley for the other items of damage was that Mr Haley consolidated the three stores ultimately owned by BHPL, namely the Giving & Living store, the Manuka store and the Yarralumla store. His view was that, but for the original purchase, BHPL would not have purchased the other two stores and, accordingly, any losses attributable to the inducement of BHPL by the misrepresentations or misleading or deceptive conduct to enter into the purchase of the Giving & Living store was compensable.

538. Mr Meredith considered that the purchase of the Manuka and Yarralumla stores did not flow from any misrepresentations and the decisions amounted to a separate commercial decision not flowing directly or causatively from the initial decision. He pointed out that, if one store was struggling, it was a questionable decision to invest in another two stores.

539. So far as the borrowing costs were concerned, there was agreement on the quantum of those costs which, in respect of the Giving & Living store, totalled $66 449 up to the end of the financial year 2008. These were the costs that Mr Meredith assessed as damages flowing from the purchase of the business following the misrepresentations.

540. Mr Haley, however, assessed the borrowing costs in the sum of $139 407. This amount included the borrowing costs referable to the Manuka and Yarralumla stores and also continued the costs through to financial year 2011.

541. Mr Meredith noted that the Giving & Living store ceased trading on 31 January 2008. He considered that it was not appropriate to include costs beyond this date as they would relate to the other stores.

542. If, contrary to Mr Meredith's opinion, the borrowing costs had to be extended to the end of the financial year 2011, he indicated that the costs referable to the Giving & Living store were about two thirds of the borrowing costs for the three stores. This would add $33 749 for the additional three years bringing the total to $100 198.

543. As to trading losses, Mr Haley assessed those as in the sum of $701 531, whereas Mr Meredith assessed them as in the sum of $549 651.

544. The principal difference was that Mr Haley assessed the trading losses on a consolidated basis, that is inclusive of the three stores, Giving & Living, Manuka and Yarralumla. Mr Meredith assessed the trading losses only as they pertained to the Giving & Living store.

545. It appeared to be common ground that those figures were adjusted to add back non-cash expenditure (depreciation) but also borrowing costs and interest which would have been taken into account under other heads of claim.

546. Again, Mr Haley continued the losses through to the financial year 2012. It is not entirely clear why that was done since the stores had closed some years before; the Giving & Living store closed on 31 January 2008, the Manuka store closed in December 2008 and the Yarralumla store was sold in October 2009. It was not clear to me the basis on which trading losses would extend, on any basis, beyond the end of the financial year 2010.

547. The next head of damage was the interest on funds advanced by Ms Hungerford to BHPL. Mr Meredith did not concede that this was an appropriate head of damage.

He was unable to find any documentation or other indication in the records of BHPL that showed the terms of any moneys advanced by Ms Hungerford and, prima facie, accepted that any loans, which had, of course, to be repaid, would be interest free.

548. Mr Haley calculated interest on those funds advanced to financial year 2011 in the sum of $907 531. He had reduced this from his original assessment because he was subsequently provided with a breakup of the non-current liabilities and agreed with Mr Meredith's calculation of the interest payable on the portion of the liability that related to advances from Ms Hungerford.

549. This was because, principally, the non-current borrowings related to a bank overdraft account as well as to the advances from Ms Hungerford. The interest on the bank overdraft account, however, had already been accounted for in the profit and loss account and, accordingly, the inclusion of that would overstate the payable interest. Mr Haley appeared to accept that.

550. Mr Meredith's concern was that there was no record in the accounts of BHPL showing any accrual of such interest and none was in fact paid. There was no note to recognise that liability in the accounts.

551. Mr Haley indicated that his instructions were that Ms Hungerford had always intended to recover interest on the money paid. She had not included any indication of that in the accounts because the company had losses anyway and the inclusion would only increase the losses in BHPL and result in a taxable income to Ms Hungerford personally when she was not receiving the funds. In this sense, Mr Haley suggested that one had to look at a "group" as a whole which involved Ms Hungerford, BHPL and her superannuation trust. It was, however, contended by TTC/Leda that this was an inappropriate characterisation because BHPL was incorporated for the specific purpose of protecting assets and quarantining losses; there was no "group" to which TTC or Leda was liable.

552. Mr Meredith, however, expressed the opinion that it was, in any event, a shareholder's loan made interest free. There was no record of interest being charged on the loan, there were no notes to the accounts nor was there any reflection in the financial statements of any liability because it was neither charged nor accrued. Mr Haley was simply instructed that there was such an intention of Ms Hungerford. There was, however, no documentation or any other indication in the records of the company on which he relied; he simply relied on the instructions he was given. There was no evidence to substantiate the claim.

553. Mr Haley pointed out that, in the case of a company such as this, with only one shareholder and director, there were no obligation to prepare accounts. The only requirement for accounts to be prepared would be for the purposes of providing a tax return. Since the company was in a loss position, the increased loss through the interest accruing but not paid would not affect the tax position.

554. Mr Meredith considered that accounts should be prepared in accordance with accounting standards and, if there was a loan which was interest bearing, the interest should at least have been accrued or there should have been a note to the accounts to that effect. He considered that the accounts should reflect the actuality of the situation of the company and, on the records of the company, the loan, which was reflected in the company's accounts, was otherwise interest free. Further, if Ms Hungerford, made her tax returns on a cash basis, it would be irrelevant to her.

555. The next head of damage was remuneration payable to Ms Hungerford by BHPL. There were two aspects of this. The first was that she claimed director's fees and associated superannuation and, secondly, from the date of termination of Ms Montagner's employment as manager, manager's fees and superannuation on them.

556. Mr Meredith did not concede that this was an appropriate head of damage. Again, he said that there was no documentation or record in the company's records of any agreement to pay director's fees and there was no agreement to remunerate Ms Hungerford for the managerial role.

557. He expressed the further opinion that the fees were being charged for the three businesses and this was not a recoverable damage because they were being charged after the closure of the Giving & Living store.

558. Mr Haley assessed the total remuneration for nine years in the sum of $1 458 738. This comprised directors fees of $72 000 per annum together with superannuation at a rate he was instructed to apply of $27 600 per annum, manager's wages of $60 000 per annum together with superannuation of those wages at the standard community guarantee rate of nine per cent, less a small amount of remuneration of $26 262 that Ms Hungerford had received.

559. Mr Meredith expressed the opinion that the remuneration, if payable, should only be paid for the period of the operation of the Giving & Living store and, in the case of the manager's fees, only from the departure of Ms Montagner.

560. He expressed no view on the amount of the director's fees, but considered that, if she was entitled to any fees, the superannuation should be at the guarantee rate of nine per cent per annum.

561. So far as the superannuation was concerned, Mr Meredith expressed the opinion that it should be at the guarantee rate of nine per cent, thus assessed in the sum of $6480 per annum on the fees of $72 000.

562. Mr Haley, however, used a figure $27 600 per annum which appeared to come from a document prepared by Ms Hungerford of cash flow which showed her intention to receive that amount in superannuation, a rate of 38 per cent.

563. The amount of manager's fees also was different. Mr Haley used the amount of $60 000, which was the amount Ms Hungerford instructed him that BHPL had been paying its previous manager, though this was not her evidence: see above (at [331]). Mr Meredith based his assessment, namely $30 565.28, on an average of the award wage for the relevant period. Both applied the community guarantee rate of superannuation at nine per cent per annum.

564. The next head of damages was loss of profits. This arose from the submission that, had BHPL not invested in the Giving & Living business, it would have invested in an alternative business which would have produced the expectations she had of a 10 per cent increase in sales each year and an ability to sell at the end of two or three years for a substantial profit.

565. Mr Haley relied on Ms Hungerford's predictions and calculated an amount of $474 768 for lost profits, $36 023 for loss of goodwill, and $947 535 for interest on the lost profits, making a total of $1 458 326.

566. Mr Meredith considered that, as no alternative business had been identified which would have performed in line with Ms Hungerford's expectations, it was not appropriate to include this head of loss. Mr Haley did not identify any such alternative business but said that he was instructed to assume that such a business could have been acquired.

567. In addition to pointing out that no alternative business had been identified, Mr Meredith made two further points.

568. The first was that the acquisition of such an alternative business would have required a similar capital outlay, which would have meant BHPL would have still incurred borrowing costs and interest, thus, an expense for the alternative business. Further, an award for the lost capital would amount to double counting. He also considered that the assumptions of the profits that would be recoverable from the Giving & Living store and the increase in goodwill were not sustainable. The premise of an alternative business that could provide such a return was unsubstantiated as there was no information available to suggest that the Giving & Living store could yield the growth assumed by Ms Hungerford in her projections provided to Mr Beirne. The actual growth in sales for the business between the financial year 2001 and the financial year 2002 was only four per cent. Ms Hungerford, however, had projected a growth of 28 per cent. There was no material from which that significant increase could be justified.

569. Mr Meredith explained his methodology in some detail. He assessed the pre-purchase information and formed the view that the purchase price was a fair purchase price and that the real value of the business based on that information was, in fact, the purchase price. Thus, the purchase of the business, based on pre-purchase information would show no loss.

570. That, of course, does not address the complaint by BHPL, not that the business was worth less than what was paid for it, but rather that she would not have purchased the business at all had the misrepresentations not been made, because of future risks.

571. Mr Meredith accepted that the business after purchase traded at a loss. He recognised that it might take some time for Ms Hungerford to work out that the business was not trading well and so he allowed trading losses incurred in the first six months in the sum of $57 959.

572. If, however, the real measure of the future maintainable earnings of the business reflected post-purchase could reasonably be reflected by the trading of the business after purchase, then using a capitalisation of future maintainable earnings method to the value of the business, while the business would be worth zero, the real value would probably be the residual value of the stock at the purchase price at the time of purchase resulting in a loss of $354 906.

573. Representations made after the purchase of the business would be relevant if the Court found that it was reasonable for BHPL to stop trading, for example, at the end of June 2005. While it would have ongoing lease obligations, he noted that, in fact, when BHPL abandoned the business, TTC was able to re-lease the premises within four months. That, of course, assumes not only the capacity to re-lease the premises but also that the rent would be at the same level or greater for, if not, BHPL may remain liable for any reduced rent recoverable by TTC from a new tenant.

574. Accordingly, Mr Meredith identified the trading losses to 30 June 2005 in the sum of $263 492 including the pre-lease trading losses to which he added the loss of stock which resulted in a total loss of $349 619. It would be necessary, he considered, also to identify the lease exit costs.

575. He calculated the total loss, were BHPL to have left the premises on 30 June 2005, would be $642 578 and, at 31 January 2008, approximately $875 765.

576. Mr Meredith emphasised that the owner of a business such as BHPL, where acting reasonably, would cease trading when it was clear that the business was unprofitable.

577. Mr Haley was cross-examined at some length. The thrust of the cross-examination was to show that his Report was substantially influenced by instructions he was given, even though, in some cases, those instructions were different from his expressed opinion. The inference to be drawn from this, it was submitted, was that the Report was not a truly independent expert report but was constrained by instructions and directions that could either not be independently verified or limited the expertise applied.

578. To this end, a series of email exchanges between him and BHPL's solicitors was admitted into evidence which showed a close and directive involvement in the preparation of his Report by Ms Hungerford and her lawyers.

579. For example, the loss occasioned because BHPL had not been able to earn profits from an investment in an alternative business was considered at some length. Mr Haley had some experience of calculating a lost profit scenario when there is an opportunity lost such as suggested here, and he said that his experience was that such losses are calculated where there is strong evidence that a claimant had considered purchasing another business but that he had not seen any such evidence in this case. He confirmed that there were no other potential business reports that he had received. His conclusion was that, "Therefore, the current claim for losses on those items is not applicable". He agreed, rather reluctantly, that his experience was that if there is no evidence of an alternative business there can be no claim for loss of opportunity or loss of alternative profits.

580. He was then shown an email from BHPL's solicitors where he was instructed, "But for the misrepresentations the company would have made the profits and increases in goodwill as projected in its cash flow statement". Mr Haley said he "[t]ook that as [his] instructions". He said that he felt bound to accept those instructions in preparing his expert report.

581. He agreed that, if there was no alternative business to be purchased by BHPL, there was no loss of opportunity claim.

582. He acknowledged, also, that BHPL's solicitors had instructed him to adopt a cash flow statement prepared by Ms Hungerford "[a]s the profit number to adopt in the opportunity loss calculation".

583. Accordingly, he included such losses in his Report on the basis of investments in another business that would have returned profits to the extent of those calculated by Ms Hungerford in her original business plan.

584. Similarly, in a further email, Mr Haley discussed the appropriate rate for the interest on the calculated loss of profit of the business.

585. Mr Haley said:

> What is the assumed increase in profitability of the notional business we would have invested in? This increase in profitability flows through to an increase in Goodwill value – greater profits = greater goodwill. I can adopt the lease default interest rate if instructed but I just don't think there is any justification for doing so. What the lease says is the penalty interest rate bears no relationship to how the business would have traded. As it's an arbitrary assumed rate of increase it is normal to adopt a round, consistent percentage, in my experience.

586. In response to that, BHPL's solicitors instructed:

> I appreciate what you say, but as it is an arbitrary rate of increase anyway, I think it is better to take a rate that at least has some connection with the case, so we will go with the least default interest rate.

587. Again, with some reluctance, Mr Haley agreed that his opinion at the time was that there was no justification for the lease default interest rate as being applied in these circumstances. He agreed, in evidence, that "the penalty rate under the lease does not necessarily reflect what would have been earned".

588. His final view was expressed in the following exchange of evidence:

> ... as an expert giving evidence to his Honour today you would stand by your proposition, as you say in your email truthfully in 2012, that you don't believe there is any justification for adopting that interest rate. As an expert that is your evidence, isn't it? --- Although I took on board Mr Giles' comments that there is a rate that has some connection with the case so that's a justification, yes.
>
> But as an accounting expert there was no justification then and there is no justification now, is there? --- Well it was still a rate that was within the range of the possibilities, yes.
>
> But it didn't have any connection you said at the time, did it? --- I didn't, before I had Mr Giles' further comment that he considered it didn't – it had a connection with the case.
>
> So it is fair to say that you incorporated that rate on Mr Giles' instructions rather than on your opinion as an expert accountant? --- It was his instruction but yes, I considered it a rate but after taking on board what he was saying that it had a connection to the case, yes.
>
> Don't you say down the bottom, 'Am happy to adopt the lease default interest rate if so instructed for this'? --- Yes.
>
> And that was seeking instructions as to whether or not to incorporate that interest rate? --- It was, yes.
>
> And Mr Giles provided you with those instructions? --- He did.
>
> And the basis for you utilising that lease default interest rate was solely Mr Giles' instructions, wasn't it? --- It was.

589. In further examination, Mr Haley's attention was drawn to the rate of interest he had used to calculate the interest payable by BHPL to Ms Hungerford on the loans supplied by her. He adopted the "indicator lending rate/Small Business/Variable/Small Overdraft" rate published by the Reserve Bank of Australia for the month before the start of the company's financial year as representing the appropriate interest rate to apply. He chose that because he said that "it represents a rate of which small business would borrow and this is a small business that has borrowed ...". He chose it because he thought it was an appropriate rate.

590. In general terms, I prefer the evidence of Mr Meredith to that of Mr Haley which, in my view, has been compromised by his reliance on instructions that were not borne out by the admitted evidence.

Retail Economists

591. Evidence was given by two retail economists, one retained by each of TTC/Leda on the one hand and BHPL on the other.

592. BHPL retained Sean Stevens who was a retail economist with Essential Economics Pty Ltd, with particular expertise in market assessments, location analysis and impact assessments for retail commercial developments. He had an Honour's Degree in Economics and was a Member of the Retail Committee of the Property Council of Australia (Vic) and a Member of the Victorian Planning and Environmental Law Association.

593. Gavin Duane was an economist at Location IQ in Sydney. He was retained by TTC/Leda. He had a Degree of Bachelor of Economics (Honours) and had advised in the fields of market analysis and strategic research since 1993 to a wide range of clients in the retail, residential, commercial, industrial, and shopping centre industries. He had appeared as an expert in a number of planning courts and tribunals.

594. These witnesses also conferred and prepared a helpful document which identified the areas of agreement and disagreement.

595. Mr Stephens made three affidavits which were filed and read. The first affidavit was really used to annex his Report which was prepared in the form of what was called an "Expert Witness Statement". He acknowledged being bound by the Expert Witness Code of Conduct.

596. His Witness Statement included a detailed Curriculum Vitae and a brief summary of the instructions he had received. He also outlined visits he made, documents he reviewed and the discussions he had, particularly with Ms Hungerford and BHPL's lawyers.

597. His Witness Statement heavily relied on instructions. This included his instructions that Ms Hungerford, before the purchase of the Giving & Living business, "undertook a process of due diligence" but it was not clear that he had details of what actually was done. Regrettably, some of his instructions were incorrect, in particular, in respect of the opposite tenancy being vacated by Go-Lo and then occupied by Hot Dollar.

598. In his Witness Statement, Mr Stephens opined that the developments in the Courtyard resulted in "a significant increase in the investment risk" of the purchase of the Giving & Living business, undermining the potential for customer traffic through the Coles Door.

599. He further considered that "an objective" of the developments was "to encourage people" coming from the south-west car park and the government offices to enter through the Courtyard and the Target Door at the expense of the Coles Door. He undertook a calculation of the moving annual door counts between April 2004 and October 2008 which showed a decrease of 15.3 per cent for the Coles Door and an increase of 7.8 per cent to the Target Door. He also relied on a survey to which I later

refer taken on one day for an hour over lunchtime which showed a much smaller number of persons displaying what was said to be government identification.

600. As a result, he considered the potential trading impact on the Giving & Living business much greater than just the reduction in gross foot traffic through the Coles Door would imply.

601. He also undertook a zone analysis showing the shops in the Target Mall out-performed the shops in the Coles Mall from June 2003 to December 2007 in increasing retail sales which, he said, supported his view that the development work had caused a detriment to the Giving & Living business.

602. He considered that the introduction of paid parking would have had an effect on the relative attendances of the Hyperdome as the location of a retail business. He also considered "operational issues" and considered, on the basis of the instructions he had received and the information available to him that the Giving & Living business after purchase by BHPL was well-managed. He considered that the Hyperdome had a relatively low marketing budget but could not say what the exact impact on sales would be. He considered economic conditions in Canberra were generally strong and there were no significant impacts on the retail section.

603. His conclusion was that the most important factor in the trading performance of the Giving & Living business was the decline in passing foot traffic with a secondary factor being the competition provided by the Hot Dollar store.

604. His second affidavit also annexed a Report responding to the Report of Mr Duane. He agreed on a number of matters but disagreed on the extent of the competition from the Lifestyle Centre shops, the extent of the effect of the change to foot traffic in the Coles Mall and the extent of the effect of general economic conditions. He explained his reasons for disagreement.

605. His third affidavit annexed a supplementary report which provided information on the location of tenancies that experienced a decline in their sales between June 2003 and December 2007 which he said was a result of the development works.

606. Mr Duane made two affidavits which were filed and read almost in their entirety. The first affidavit effectively annexed his Report commissioned by the solicitors for TTC/Leda. He acknowledged being bound by the Expert Witness Code of Conduct.

607. The Report included a detailed Curriculum Vitae. In it, he also set out the letter of instructions given to him and the material he had received and on which his Report was based. In the Report, he described the Giving & Living business and its sales. It referred to the general circumstances of the business, including the general economic conditions at the Hyperdome, including the Lifestyle Centre. He then addressed particular issues: paid parking, the Hot Dollar tenancy, the Manuka and Yarralumla stores, the pedestrian signals at Athllon Drive, and the Courtyard works. He also undertook a zone analysis and considered the issue of rent relief.

608. He concluded that the key factors impacting on the sales decline that the Giving & Living business experienced were the opening of the stores in the Lifestyle Centre and the Manuka and Yarralumla stores. He considered that the introduction of paid parking, the developments in the Courtyard and the Hot Dollar tenancy would not have had a material impact on the Giving & Living store and that a sales impact would

have been experienced from the low growth or lack of growth in the Tuggeranong trade catchment area.

609. His second affidavit also annexed a further Report which addressed further affidavits filed by BHPL, including those of Mr Stephens, Mr Honkanen and Mr Benjamin Grima (to which I refer below at [864]). He concluded that the further survey conducted by Mr Grima did not show a significant change in foot traffic and that the pedestrians using the Coles travelator would have had the same relevant exposure to and visibility of the Giving & Living store as those using the Coles Door.

610. Fundamentally, the substantial disagreement between Mr Stephens and Mr Duane was on the amount and then the effect of decline in foot traffic in the Coles Mall on the trading of the Giving & Living shop.

611. Both of them agreed on the importance, particularly for small speciality retailers in a shopping centre environment, of the volume of pedestrian or customer traffic passing in front of the shops. In the words of Mr Stevens, "In a shopping centre often you are not renting the floor space of a shop itself, you are actually renting the people who are going past your door".

612. Both witnesses agreed that there had been a decline in foot traffic in the Coles Mall between April 2004 and July 2008. This was not inconsistent with the evidence of the foot traffic counts which showed that the Coles Door remained the highest or second highest entry for foot traffic, for the table produced by Mr Duane showed a decline in Coles Travelator and the Target Door also.

613. The effect on trading for the other stores in the Coles Mall was, however, somewhat dissimilar. The Giving & Living store, which changed to Hungerfords, had a fall of 42 per cent in sales; the next highest fall in sales revenue of a store in the Coles Mall, however, was Design Home Australia at only 13 per cent. The store opposite Giving & Living, Hot Dollar, had increased sales over the period, as did the optometrist, OPSM, and Beaky's Books.

614. Mr Stevens also indicated that there seemed to be a fall in the number of government employees passing through the Coles Door. While the identification of such employees was rather rudimentary, namely as to whether they had identification tags on or not, there seemed an acceptance that this was an appropriate method. I am not sure that it was. It is likely to give an underestimate.

615. Mr Duane, however, pointed out that neither the Manuka nor the Yarralumla stores were particularly close to government offices; indeed, there was very little by way of government employment around the Yarralumla shops. While the Giving & Living store was decreasing in sales, the Yarralumla and Manuka stores were maintaining reasonable sales.

616. Mr Stevens relied on some door counts that were conducted in 2009 and 2013, to which I refer below (at [860]-[863]). Those counts purported to show relatively small numbers of people coming through the Coles Door compared to those coming through the Target Door. They also purported to show, based on identification tags, relatively few government employees coming through the Coles Door as compared to the Target Door.

617. There were, however, a significant number of problems with these surveys. In the first place, the time period is well out of any relevant period for this case. In the second place, there was no count comparable to these for the period prior to September 2003 when BHPL purchased the Giving & Living store.

618. It is also relevant that traffic lights were installed across Athllon Drive at approximately the entry to the Lifestyle Centre. These were installed prior to BHPL purchasing the Giving & Living store. That gave protected access to public servants from the buildings immediately across Athllon Drive, namely Centrelink, though there was, before the installation of the traffic lights, a pedestrian crossing which give pedestrians a right of way. There were, it would appear, large numbers of government employees in those buildings. There were also developments in the grounds of those buildings over which the Hyperdome had no control.

619. Mr Duane also criticised the data because the first survey was conducted on one day only for a period of about one hour. He submitted that it was very weak or, "in economic terms, not statistically robust". The survey, in April 2013, was for a period from 11:30am to 1:30pm of the Coles Door and it showed that 25 per cent of those entries were, based on identification tags, government workers. That throws doubt also on the validity of the 2009 survey.

620. Mr Stevens relied upon a comparison between the Target Mall and the Coles Mall. He noted that the foot traffic in the Target Mall increased by 23 per cent over the period, whereas the foot traffic in the Coles Mall had increased by two per cent over that same period. That, of course, can depend on the base numbers; for a small base, a small absolute increase can, nevertheless, be a large percentage increase. He also pointed out that three stores in the Coles Mall that had experienced declines in sales were stores between the Coles Door and the Coles travelator. That is to say, they would have missed foot traffic entering the Coles Mall from the Coles travelator.

621. There was a difference between Mr Stevens and Mr Duane in relation to the effect of traffic through the Coles travelator. Mr Stevens felt that it would have little effect because it did not lead foot traffic entering the Coles Mall by the Coles travelator past the door of the Giving & Living store. Mr Duane pointed out, however, that it did open into the Coles Mall opposite a significant shop window for the Giving & Living store so that its wares were obvious.

622. Mr Duane pointed out, further, that the Target Mall was a much "younger" mall and that this could have an effect on the percentage growth, a version of the point I made above at [620].

623. Mr Duane also pointed out that the decline in sales for the three stores in the Coles Mall that suffered a decline in sales was markedly different for two of them compared to the Giving & Living store. A computer store experienced sales decline of one per cent. This was compared to the Giving & Living store decline of 42 per cent. As indicated above at [602], Design Home Australia only experienced a sales decline of 13 per cent.

624. He also remarked that another store in roughly the same location, between the Coles Door and the Coles travelator, Hot Dollar, had a significant increase in sales.

625. Mr Duane also felt that competition elsewhere in the Hyperdome was also relevant. He considered it an important issue. He felt that the Hot Dollar store significantly affected the sales of the Giving & Living store.

626. Mr Stevens, in his original report, was, unfortunately, mis-informed that Hot Dollar had not opened its store until February 2004.

627. He reviewed the product lines sold by Hot Dollar and identified approximately 50 per cent of the merchandise which he thought would compete directly or indirectly with the Giving & Living store. He suggested this would account for approximately $567 200 in sales.

628. Subsequently, he was corrected that Hot Dollar had, in fact, opened prior to BHPL taking over the Giving & Living store. He also seemed to resile from his suggestion that there was a significant overlap and competition between the two stores, particularly as Hot Dollar had experienced an increase in sales over the relevant period. He did not explain his change of mind.

629. Mr Duane was also of the view that the reduction in foot traffic was difficult to relate to the reduction in sales of the Giving & Living store. During the relevant period, foot traffic in the Coles Mall, if the Coles travelator is included, reduced by only about six per cent to eight per cent; if a count was just taken of the Coles Door itself, it reduced by 10 per cent to 12 per cent. He considered that it was not rational to correlate that with the 42 per cent fall in sales of the Giving & Living store.

630. Mr Stevens agreed that there was not necessarily a linear relationship between drop in foot traffic and reduction in sales but referred to the “dynamics”, although it was not entirely clear to what he was referring.

631. It appeared that he was referring to a drop in government employees accessing the Coles Mall but, of course, there was no comparative information of that in the evidence. He also suggested that, while the Hot Dollar store did not experience a decline in sales, it was arguable that it would have experienced a greater increase had the fall off in foot traffic not occurred. That would be extremely difficult if not impossible to demonstrate accurately. That, of course, does not mean the argument should be ignored.

632. Mr Duane denied that the difference in foot traffic would be substantially in terms of government employees. He also took the view that the changes in the architecture of the Hyperdome, with the erection of bollards and pipe railings and the low wall would be unlikely to have caused substantial changes in the habits of pedestrians.

633. Mr Stevens relied on the installation of the traffic lights across Athllon Drive at approximately the entry to the Lifestyle Centre. It has to be noted that those lights, however, were installed prior to BHPL purchasing the Giving & Living store.

634. It was further pointed out that they replaced a zebra crossing where, of course, pedestrians have a priority over vehicle traffic.

635. Mr Stevens relied upon the 2009 survey which showed a larger percentage of government employees (again, only assessed by virtue of their identification tags), coming through the Target Mall rather than the Coles Mall. The difficulty with that

survey was that there was no “before” survey to say whether either the absolute number or percentage of government employees had fallen. It was, also, undertaken for a very limited period, namely one hour in one day.

636. From that perspective, it might be compared with the 2013 survey which took a snapshot of two hours of the Coles Door showing 25 per cent of those entries were government identified workers.

637. Mr Stevens referred to a zone analysis. A zone analysis breaks up a shopping centre into particular components, but then allows a judgement about the relative performance of the zones. It also provides information from which an analyst or an economist can draw conclusions about why that may be occurring and what can be done about it.

638. He described what he said had happened in the Hyperdome, when he compared the traders in the Coles Mall from the Coles travelator as one zone and those in proximity to the Target Door as the other zone. He said it was immediately apparent, undertaking that zone analysis, that the traders in the Target Mall had significantly out-performed those in the Coles Mall. The sales of stores in the Target Mall increased by 23 per cent over the period whereas the sales of stores in the Coles Mall by only two per cent over the same period. Thus, he concluded the Target Mall zone had out-performed the Coles Mall zone and he sought a common feature across all the tenants in the Coles Mall zone and, in particular, that three tenants there experienced a sales decline. He considered that the common feature was the level of customer traffic using the Coles Door.

639. Mr Duane was sceptical of that analysis. He pointed out that the Target Mall was a new zone establishing itself. Growth profiles for the tenants were at different levels and, as noted above, the Target Mall was a “younger mall”. He felt that the zone analysis was of limited value in this instance.

640. He also noted that there were competitive pressures which might explain the sales decline for some of the other stores. For example, the computer store had other competitors in the Target Mall and in the Lifestyle Centre.

641. He felt that it was too much of a leap to say that foot traffic was the whole answer, particularly where the Hot Dollar store had increased its sales.

642. Consideration then turned to identifying competition more precisely. Mr Duane felt that the competition from the Lifestyle Centre and the Target Mall was a very important issue. In addition, the Hot Dollar store opening opposite Giving & Living also affected its sales and Mr Stevens agreed with that.

643. Mr Duane noted that the stores which Mr Stevens suggested had a 10 per cent direct competition level and another with a 30 per cent direct competition level were significant levels of competition. Those two stores had sales revenue of $1 000 000 each.

644. Further, other competitors in the region of $400 000 to $500 000 of sales revenue had started operating prior to BHPL taking over the Giving & Living store. His view was that these competitors must have had a significant impact on the sales of Giving & Living.

645. Mr Stevens agreed that there was competition; “every retailer is competing”. The issue, then, was not whether there was competition, but whether the competition significantly affected sales over a period of time. He considered that the Lifestyle Centre was anchored by a large electrical and white goods store which had very little or nothing to do with the core functions of the Giving & Living store.

646. Nevertheless, Mr Stevens agreed that there were some product lines in stores in the Lifestyle Centre which had a relevant crossover with the Giving & Living store. He noted that the Giving & Living store was a specialist gift and home wares store whereas for the other traders those product lines were ancillary type products. He considered, however, that there was a functional difference between a store with a wider range of products and a more specialised store. He also noted that reports he had seen showed that, during the relevant period, the Hyperdome was “underweight in terms of giftware and home wares”. If that were so, it is difficult to explain why the Giving & Living store suffered such sales reduction if it was being conducted well.

647. Mr Duane had a different view. He considered that the three competitive stores were much larger and felt that if a customer was in the business of shopping for home wares or gifts, these stores would have provided a much greater range and depth. Mr Duane considered that the Giving & Living store was not able to respond to that competition when impacted by it; the competition was just not handled reasonably well.

648. Mr Stevens pointed out, however, that it was important for competition that there be a significant passing foot traffic for the speciality stores.

649. The issue of the two new stores at Manuka and Yarralumla was then considered.

650. Mr Duane made the point that it was highly unusual for a retail chain of any sort to be opening stores in an environment where it had declining sales. He thought also that it might impact on the sales in the Giving & Living store because there would be persons who would be likely to go to the closest stores rather than to Tuggeranong. This would affect, in particular, residents within the northern part of the catchment for the Giving & Living store. Thus, he considered that there would be some lost sales for the Tuggeranong store. That, of course, would be different were the stores to be further away and not within the catchment for Tuggeranong and the Hyperdome.

651. Mr Stevens took the view that the other stores were, in fact, outside the trade area served by Tuggeranong. Although Mr Duane did agree that they were outside the trade area, he did not agree that they were “well outside” the trade area. Mr Stevens also felt that the nature of the stores meant they were far more likely to serve a localised catchment. He did not disagree that there might potentially have been some decisions made where a purchase was from Yarralumla rather than Tuggeranong but he considered that it would not have a meaningful impact on the trading performance of the Giving & Living store.

652. In essence, both agreed that there could be an impact; Mr Duane said that it is significant and had to be taken into account, whereas Mr Stevens said it was not significant and should not be taken much into account.

653. Mr Duane pointed out that the two stores contributed about $360 000 in sales. Thus, even if 10 per cent or 20 per cent of those sales were a redirection from the Giving & Living store, it would contribute $40 000 to $80 000 of the reduced sales of the

Giving & Living store, which is 10 per cent to 15 per cent of total sales for the Giving & Living store. He did not believe that it was an unbelievable scale of impact.

654. Mr Stevens could not accept that "with the wealth of opportunities that people have to purchase giftware and home wares – all manner of locations across southern Canberra" these impacts were a reasonable assumption to make.

655. The change of name was then discussed. Mr Stevens considered that the change of name had no meaningful effect, in part because there was no change of location. He relied also on the fact that there was an advertising campaign that would create awareness of the new name. He did not think that there was necessarily a cause and effect between the change of name and the decline in sales.

656. Mr Duane considered that the change of name, which was accompanied by a change in livery and colour scheme, would effectively mean to the consumer that it was a brand new store; a different store from what it previously was. His view was that it would have some consequences for those who were previously loyal to the Giving & Living brand. Mr Duane said that it was not the main cause but it was a component, particularly for a brand that had been in the location for 10 to 11 years. To change to an unknown brand could, he said, most likely have had some sort of impact on the sales of the store.

657. Mr Stevens felt that it could just as well be a positive as well as a negative impact. He felt that the change of name may have arrested part of the decline particularly as he found that there was then some stabilisation in the sales in the store. He did not provide any information linking the two, however. Indeed, he agreed that it was not necessarily the case and said, "We'll never actually know that".

658. He accepted that there was some goodwill associated with the Giving & Living name but felt that it was limited, particularly as it was, in his opinion, a "one-off home wares and giftwares store". He could not see that the goodwill could not be transferred to another name as long as it was providing an appropriate level of service, pricing and products.

659. Mr Duane agreed that changes in name can have a positive effect but, in this instance, it did not seem one of the more obvious examples of this, given that it did experience a decline in sales and other stores in the same location did not experience the same decline in sales.

660. The final area of consideration by these experts was the question of the management of the store.

661. Mr Duane felt that the quality of management could have had a significant impact. He noted that a major employee had been dismissed, there had been a change of livery and brand, and two other stores opened within the same catchment.

662. His view was that "those operation[al] issues in total would have had an impact". Further, the one person was now trying to operate three stores as opposed to one and the management of the store would have impacted on the performance.

663. Mr Stevens, however, saw that while the Giving & Living store was declining, the other stores were managing to generate increases in sales. That, from his point of view, meant he was somewhat confident that there were processes in place able to generate increasing sales.

664. He also noted that the Hyperdome Centre Management rated BHPL highly as an operator and wanted to retain it as a tenant. This was, of course, based on alleged representations that were disputed.

665. He noted that there had been an internal promotion for the store supplemented by Ms Hungerford herself. He was not convinced, accordingly, that management processes were to be blamed evenly partly for the significant decline in sales.

666. Mr Duane agreed that there was not what might be called "base evidence", to say whether the management was good or bad. He made the point that the two new stores at Manuka and Yarralumla were very low trading stores and had come off a very low base of sales, which would mean percentage increases were not meaningful.

667. Mr Stevens said that the key issue was the direction of the sales. He also pointed to the decline in sales for the other stores in the Coles Mall.

668. Mr Stevens gave evidence about the importance of visual cues between locations which assist in customer and pedestrian flow and traffic. Sight lines are important so that, if, for example, a customer can see the other end of a mall and the type of trade that is there, that might allow for customer to be attracted to follow that visual cue.

669. He also thought that the pipe railings were a visual cue that limited permeability and would have inhibited pedestrians from continuing into the multi-storey car park to the Coles Door.

670. Mr Duane agreed with the principle of sight lines but was hesitant to talk about the barriers as it was not his field of expertise. He felt, however, that such barriers as were installed here would not change people's knowledge or view of the "entry statement" to the Coles Mall. Importantly, they were not impermeable and had pedestrian gaps. He agreed, however, that the person with less specific intent could potentially be influenced but that it was hard to be precise about that. His experience was that shoppers are creatures of habit and will use the same entry and the same route many times.

671. Mr Duane agreed that while those persons who were in the habit of travelling through to the Coles Door would continue to do so but, for example, government employees more recently joining departments might be more inclined to be guided by the rails. Nevertheless, he pointed out that, over time, people would get to know the Hyperdome and understand what components they could and would want to visit.

672. Mr Stevens was asked about the relative sales in the Coles Mall and the Target Mall. He noted that over the relevant period the average increase in sales for the speciality shops in the Target Mall was an increase of 48 per cent whereas in the Coles Mall it was an average of two per cent. I note that, of course, the Target Mall as a younger mall would have a lower base. Nevertheless, there did seem to be an increased performance in the Target Mall.

673. Mr Stevens reiterated that speciality shops rely on the exposure to customer traffic that is generated by the anchored tenants and the other components of the shopping centre; that is effectively what drives the sales and patronage of those stores.

674. Mr Duane pointed out that the Target Mall would benefit also from the Lifestyle Centre flow on increases as earlier discussed. The Lifestyle Centre was, of course, already part of the Hyperdome when BHPL became a tenant. He pointed out, also, that the total Centre sales increased by five per cent or, from June 2003 to December 2007, by 7.5 per cent. The Coles Mall increased by two per cent so that the under-performance was not a significant under-performance.

675. Mr Duane also agreed that a large number of people who were going through the Coles Door would be going to Coles, which had a loyalty program as well encouraging them to go to that store. He pointed out that the speciality shops grew at the same two per cent that the whole Mall, including Coles, grew in their sales.

676. Mr Stevens was not attracted by the argument that the Target Mall speciality shops were starting from a low base. He noted that there were various factors involved which was the nature of retailing; particular types of traders will have different trading levels. To him, the important thing was the absolute level and the trend.

677. There is another difference between Mr Stevens and Mr Duane. Mr Duane felt that the existence of the Lifestyle Centre and its development by the Hyperdome would have made particular benefits accruing to the Target Door. He thought that these were much more significant than the improvements in the Courtyard.

678. Mr Stevens had visited the Lifestyle Centre and found that it was not particularly busy but was used mainly as a thoroughfare by office workers. He felt that the works in the Courtyard had made significant changes to the accessibility of pedestrians to the Target Mall, particularly from across the south west car park.

679. Mr Duane was cross-examined. He agreed that specialty stores such as the Giving & Living store relied on customer flow and, for that reason, a location at the end of a mall can be desirable.

680. He was asked some questions about the comparative situation with the Coles Door and the Target Door. He agreed that the Coles Door lost traffic and that the Target Door had gained traffic and that this would give greater opportunities for retailers in the Target Mall. He agreed that there was then a potential for the Giving & Living store to lose shoppers. He doubted, however, that there was evidence that it happened in significant numbers.

681. He felt that habits of customers were important so that government employees who were accessing the Hyperdome for lunch may well still use the Coles Door as they could still access the Food Court more conveniently through the Coles Mall.

682. Part of the issue was, of course, the Coles travelator which was included in the calculations about foot traffic in the Coles Mall but not, of course, in the calculations of foot traffic through the Coles Door. Mr Duane agreed that most users of the Coles travelator would turn right and would only turn left if they were intent on browsing in the few shops within the Coles Mall to the left of the Coles travelator or were going to a specific shop.

683. He thought, however, that the Giving & Living store was in a different position as the users of the Coles travelator would have clear sight of its window for about 20 metres and thus, any attraction in the nature of passing traffic would still be relevant for that store.

684. It was put to him that a survey had shown that 17 per cent of users of the Coles travelator turned left and 82 per cent turned right, and while he accepted that the majority turned right, he said that the number of customers turning left was not insignificant.

685. He was asked questions about BHPL opening two extra stores in Manuka and Yarralumla. His view was that it would have a deleterious effect because customers from part of the catchment area would attend closer stores rather than to go to Tuggeranong. This, of course, relied on some branding recognition, but it did have the capacity to cannibalise the support for the Giving & Living store. He said that there were also differences because Yarralumla and Manuka were what were known as strip-based shopping centres where, for the most part, potential customers could see the shops by driving past, unlike the Hyperdome where most stores could only be seen on entry into the shopping centre.

686. He accepted that there was a relatively large government business, Medibank Private, at the outskirts of the Manuka Shopping Centre, although it was also close to the Kingston Shopping Centre. He said, however, that it was unusual to open new stores when the current store was not doing well.

687. He thought that the casual leasing by BHPL of a kiosk in the Target Mall was a positive strategy, as was sourcing cheaper goods, but only if they were goods that customers valued. He thought that the provision of tea and coffee, as proposed by BHPL and which was tried, was positive but with a qualification, namely if that was what people wanted.

688. He was unsure about whether the change of name was a positive step. He pointed out that it could affect people at the margins, who may not be aware that the store continued to be operated by the same people, and confirmed his view that it probably affected the Giving & Living shop's sales in a negative way. He agreed that branding is irrelevant in terms of exposure but would not have the added attraction of prior knowledge for those who are not regular customers.

689. He agreed that if the travelator outside the Coles Door was not operating that would affect the customer exposure to the Giving & Living store.

690. He agreed that the efforts BHPL had made to relocate the store into the Target Mall was a good strategy and agreed that decreasing staffing, including staff hours, was also an appropriate strategy, but again conditionally, namely only if the level of service did not decline and did not reduce sales.

691. He agreed that extra marketing was appropriate.

692. He noted that, in his view, it was a problem that a competent manager had been dismissed and replaced with a less experienced person and that this, combined with the opening of additional stores, would put significant adverse pressure on management.

693. He also agreed that paid-parking could influence foot traffic, especially if cheaper or free parking was available elsewhere and that this did not lead persons arriving by car to the Coles Door. There was, of course, no free parking elsewhere and there was no evidence of comparative parking fees.

694. He was asked a number of questions about Ms Hungerford's business plan increases. He agreed that it was necessary for a business to increase sales particularly as costs such as rent increased. He noted that, of course, the same result could be achieved by savings. He did not agree that it would be expected that the increase in sales would be the same as the increase in rent. That must be obvious because of the different cost-base.

695. He considered that the 10 per cent per annum growth projected by Ms Hungerford was unrealistic, particularly in a situation of limited population growth and increasing competition. His view was that it would be very difficult to achieve that growth. He noted that, for a shopping centre, such as the Hyperdome, the expected growth in sales was about three per cent.

696. He also pointed out that this was a particularly challenging target when the store was an established one.

697. I was generally disposed to accept Mr Duane's evidence which seemed to me to be more consistent with the other evidence in the case and had a plausibility that encouraged acceptance.

698. Mr Stevens, was also cross-examined. He explained that, in September 2009, Ms Hungerford showed him around the Hyperdome. He then took photographs and had discussions with her at the time about her trading performance and other matters, including a description of her concerns and the issues she had.

699. He was aware of the door count survey conducted on 9 October 2009. He also made two site visits with Ms Hungerford and a number of independent visits on his own.

700. He did discuss his Report with BHPL's solicitor for whom Ms Hungerford worked for a time, but did not recollect having any significant discussions with her about the Report.

701. Mr Stevens was asked about the store, Hot Dollar, which opened opposite Giving & Living at approximately the same time as BHPL took ownership of the Giving & Living store. He was asked about the review in his Report of the product line sold by Hot Dollar finding that "approximately 50% of sales at Hot Dollar are in merchandise which compete either directly or indirectly with [Giving & Living]". He accepted that the Hot Dollar store increased its sales over the four year period during which it competed with the Giving & Living store. He was asked about whether, if foot traffic was relevant to the drop in sales at the Giving & Living store, the Hot Dollar ought also to have shown a drop in figures. He agreed but suggested that it would have experienced lower sales than otherwise would have been achieved.

702. It was suggested to him, however, that, alternatively, Hot Dollar might have conducted its business more effectively. He was, apparently, unwilling to concede that, diverting the question to a comparison of the market to which the two had directed their businesses.

703. He did make the point that Hot Dollar had only commenced in late 2003 whereas Giving & Living had been an established business. On the other hand, it is to be noted that Hot Dollar replaced a Go-Lo store which, in his Report, Mr Stevens accepted also sold products in competition with the Giving & Living store. This would, of course, moderate the effect of the competition which would have been experienced

had the Hot Dollar store replaced a completely different store or started from a completely new location.

704. Nevertheless, Mr Stevens pointed out that it was difficult to know whether the Hot Dollar store would have increased its sales beyond that which it did if the changes to the Hyperdome, which he said were prejudicial to the trading operations of the retailers in the Coles Mall, had not occurred. He pointed out that the Hot Dollar store was trading at about $1.3 million in sales whereas the Go-Lo store had achieved $1.7 million worth of sales.

705. It was also pointed out to him that the Coles store did not experience a drop in sales over the period, but he pointed out that, because of its location, further down the Mall and closer to the interior of the Hyperdome, it would attract customers from multiple directions within the Hyperdome not available to either the Hot Dollar or Giving & Living stores. In any event, he pointed out that Coles was an "anchor tenant" because of it general strength of its operations and general attractiveness.

706. It was suggested to Mr Stevens that the specialty stores in the Coles Mall overall experienced an increase in sales of two per cent despite the substantial decline of the Giving & Living store. It was suggested to him that this was inconsistent with the systemic or structural explanation he provided for BHPL's turnover decline and he disagreed. He said that the reduction in customer access would result in a "moderating influence on the achievable sales for the traders ... within that zone" and then compared it with the increase in turnover in the Target Mall which did not seem to me to answer the question or explain why he disagreed at all.

707. He was asked whether the significant drop in sales showed that the Giving & Living store was an "outlier". For some reason, unexplained on the evidence, he would not accept that description, although it seemed to me to be patently obvious in that the Giving & Living store experienced a very significantly larger drop in sales, more than two times that of any other store in the Coles Mall. This must have meant there was some difference in cause inherent in the Giving & Living store.

708. He was asked some questions about the October 2009 foot traffic survey and agreed that it did not, of itself, inform whether there was a reduction, an increase or no change. He said, however, that his experience and professional opinion was that the changes in the car park reduced the accessibility to the Coles Door.

709. He said that the results of the October 2009 survey confirmed his views, but was unable to say why they confirmed his views, rather than simply being consistent with them. In this regard, his answers seemed to me to be curious. He was asked, "In statistical analysis, to draw any conclusion of change, one needs to look at the situation before and the situation after?" and he agreed, "Absolutely". He agreed that, from this survey, he could not say whether the figures "reflect a rise, a fall or no change at all". When it was put to him that the opinion that the survey confirmed his views was "simply an example of confirmation bias", he gave the somewhat curious answer that "given the fact that I was testing my own proposition with this table I don't think that that is confirmation bias. I think that is good analytical practice". I did not understand how that could be so in the circumstances.

710. He was then asked some questions about what he saw as the barriers and changes that affected the number of customers entering and passing through the Coles Mall. He described them as "changes to the car park and the bollards and the like". He

was then shown photographs of at least one of the bollards and of the pipe rail barriers. He was asked to explain how the bollard diminished the extent to which the Coles Door was capable of being used as an access and he answered, somewhat oddly, having regard to his other evidence, that he did not think it reduced accessibility at all. He could not recall whether any of the other bollards were different or not, making his reference to the bollards reducing accessibility rather curious.

711. He was also asked about the pipe rails and agreed that there was accessibility between the pipe rails and, indeed, at the very point of the pedestrian crossing. He was asked whether the effect would be to "cause pedestrians to travel safely towards the pedestrian crossing" and, instead of agreeing, as one would expect, he simply asked whether it was the purpose of the rail barriers. He agreed, however, that this was a reasonable purpose to assume but also, reasonable as well, that the purpose was to try to prevent cars from crossing the barrier.

712. He was asked about the risk of "having pedestrians wander freely through car parks" and agreed that there had to be "some sense of pedestrian safety" but that pedestrians generally do wander through car parks. He agreed, however, that it would be reasonable to plan for pedestrians to be directed towards the pedestrian crossing.

713. He was asked some questions then about the dome over the Courtyard, which he had described as an attractive entry point to the Hyperdome.

714. When it was pointed out to him that it had not been erected until 2006, he agreed that it could not be the cause of the approximately 34 per cent drop in sales of the Giving & Living store between 2003 and 2005.

715. He did not agree that the change of name would have had any meaningful impact and he did not consider that the opening of the Manuka and Yarralumla stores would result in any reduction in sales of the Giving & Living store.

716. He agreed that the opening of the Lifestyle Centre would have an effect on the Giving & Living store sales but agreed that it was part of the normal competitive effect and that he had not taken it into account in his investigations as a significant contributing factor to the reduction in sales in the Giving & Living store. It was not clear to me why the normal competitive effect would not be taken into account.

717. He acknowledged that the Hot Dollar store had some competitive effect, which he put at about 20 per cent. I could not see any facts set out in his Report to assist in identifying whether that was a reasonable percentage or not. That would have resulted in accounting for 8.4 per cent of the decline in the Giving & Living store sales.

718. He also relied, as additional factors, on the sign on the ground floor wall of the multi-storey car park directing pedestrians to the shops through the Courtyard and the fact that the travelator outside the Coles Door was, he was instructed, regularly broken down. He considered the bollards, pipe rail and link works, however, were the main factors leading to lower foot traffic and that the others were peripheral.

719. He was asked questions about the effect of government workers using the Coles Mall, the reduction of which he considered to be very significant.

720. He had not undertaken any personal investigations, but he referred to a Marketing Report prepared for the Hyperdome which identified various market segments and indicated a significant reliance on office workers. It was not clear whether they were only government workers or whether they included workers from the other private offices around the Hyperdome. No doubt, however, the larger number would be government workers.

721. He agreed that he had no evidence that other stores in the Coles Mall were in any sense reliant on government workers or not and that he had, in fact, no actual evidence of a decline in the number of government workers in the Coles Mall.

722. I was generally concerned by the evidence that Mr Stevens gave. He seemed unwilling to concede matters that seemed obvious; he could not explain changes between his Report and his evidence and he seemed to avoid answering questions which may have disclosed some discrepancies between other facts and his Report.

723. I would be hesitant in relying on the opinions of Mr Stevens without clear factual corroboration which was, for the most part, not evident.

Experts as to the physical environment

724. The next conclave of experts which resulted in concurrent evidence involved those whose evidence related to the physical changes to the Hyperdome and their effects. Four experts gave evidence in this part of the proceedings.

725. Timothy Hunter was the Principal Architect of Hunter Architects, which firm had been the architects for the Hyperdome from about 2002, engaged to undertake a whole series of works at the Hyperdome between 2003 and 2006, including at the Lifestyle Centre.

726. He held the degrees of Bachelor of Environmental Design and Bachelor of Architecture and had been involved in building projects in Australia and internationally.

727. Michael Baker was an independent retail shopping centre economist with 18 years experience in the industry. He worked for shopping centre developers on acquisitions, retail expansion strategies and associated projects.

728. Martti Honkanen had completed five years of a six year degree in architecture but did not graduate and so was not entitled to call himself an architect, though he did carry out architectural work. He had worked in other areas of construction, mostly in building and development work, as well as assessing and advising on the work of others. He was accredited as an arbitrator and mediator and held various building licences.

729. Graeme William Shoobridge was an engineer, holding the degree of Bachelor of Civil Engineering. He was a Member of the Institution of Engineers Australia and the Association of Professional Engineers, Scientists and Managers Australia. He was a Divisional Director of Mott MacDonald Group, engineers and consultants. He had over 40 years experience as a Senior Traffic Engineer in both the Commonwealth and ACT Governments.

730. Each of the experts filed affidavits, largely annexing reports they had prepared at the request of the lawyers for the parties.

731. Mr Hunter made three affidavits of 24 October 2012, 30 June 2014 and 11 September 2014. His first affidavit set out his background and relationship with the Hyperdome as described elsewhere (at [724]-[726], [737]). He also attached relevant plans, photographs and documents describing the work he and his firm undertook for the Hyperdome. The work was set out in five development applications to the ACT Planning and Land Authority, as follows:

DA2003 8422 -	submitted 1 September 2003 relating to new awning structure and a toilet block in the Courtyard. The application was approved on 14 October 2003. The awning replaced an existing awning over the walkway between the Lifestyle Centre and the main Hyperdome building.
DA2003 8417 -	submitted 1 September 2003 relating to development of the Lifestyle Centre, including retractable awnings on it, a new loading dock and windbreak. It included a low brick wall between the government car park and the unpaved area that led to the Courtyard. It was approved on 1 October 2003.
DA2004 3238 -	submitted on 8 October 2004, relating to a cove; kiosk, stage and associated works in the Courtyard. It was approved on 23 December 2004. The plans were later amended. The works were not commenced until after August 2005.
DA2004 0291A	- approved on 3 March 2005 relating to reconfiguration of existing shops fronting on to the Courtyard.
DA2005 04574	- submitted on 11 October 2005 to amend shop T9 in the Lifestyle Centre.

732. Mr Hunter's second affidavit was in reply to the affidavit of Mr Honkanen. He took issue with some of Mr Honkanen's costings, but I do not need to address that. He also said that the works were completed in April 2004 not, as alleged by Mr Honkanen, in January 2004. There were other matters of disagreement which I do not need to address.

733. Mr Hunter, however, did contest Mr Honkanen's view that the development works had a detrimental effect on the foot traffic through the Coles Door. He pointed out that the Courtyard was already in 2003 of good amenity; it was open space which included trees, public seating, external lighting, a covered awning over the walkway between the two buildings and was flanked by two restaurants and a bar, which included the open space with external tables and chairs.

734. His conclusion was that the works did improve the amenity but "would not have had a significant effect of drawing people away from the Coles [Door]".

735. He also disputed Mr Honkanen's opinion that the pipe rails served "a visual barrier" and noted that the pedestrian traffic signals on Athllon Drive replaced an existing pedestrian crossing.

736. Mr Hunter's third affidavit set out a detailed Curriculum Vitae, noted that he was bound by the Expert Code of Conduct and confirmed the opinions he had earlier expressed.

737. Mr Hunter gave oral evidence of his involvement as architect for the Hyperdome. He had no involvement, however, in the conversion of the government car park, the development and installation of paid car parking at the Hyperdome or the installation of the pedestrian traffic signals on Athllon Drive. His main involvement was in the improvements to the Courtyard, which had crossed over Scollay Street before it had been closed. This work included the construction of a kiosk and the extension of the shops within the Target Mall area.

738. He was engaged in 2003 to design and supervise construction of covered access to that Courtyard and to give general advice. He gave detailed explanations of the development and the various stages of it. In particular, the work started in 2004 though, in 2003, there had already been a covered canopy that linked the Lifestyle Centre and the main Hyperdome building through the Target Door.

739. The final completion was the erection of a kiosk in the Courtyard and the high tensile dome over it, which were completed in 2006. His evidence was that the works were intended to enhance the existing good amenity which, of course, would have had the effect of increasing the foot traffic through the Target Door.

740. Mr Hunter's evidence was that he had not set out to alter foot traffic but to enhance the amenity and, indeed, he had had no discussions with the Hyperdome about foot traffic.

741. Mr Hunter's view was that the improvements to the Courtyard were not the cause of the increase of foot traffic through the Target Door, but this was caused by other contemporaneous developments, including the opening of the Lifestyle Centre and the business of its key tenants including, in particular, "Good Guys". His view was that they drew people to the Lifestyle Centre and there was a natural progression from there into the Target Mall through the Courtyard and the Target Door.

742. Mr Hunter pointed out that, prior to the improvements being made, there were existing tenancies, including restaurants and a "pub" in the Courtyard which were conducive to people meeting there.

743. In cross-examination, Mr Hunter made it clear that he had not had much discussion with the managers or owners of the Hyperdome about foot traffic. In particular, there was no discussion with him about the impact that any of his design work would have on the foot traffic through the Coles Door.

744. I did not find much of the cross-examination of Mr Hunter to be of very great assistance. He was asked about the possibility of putting up pipe railings to assist with "sort of subliminally or otherwise creating a sideline" that would influence a person on foot to use the Target Door over the Coles Door and he said that he considered that such railings would be ineffective to achieve such a goal and he identified other and better ways of doing that. He also felt the painted sign "To Shops" in the multi-storey car park on the Coles Door level was ineffective.

745. He considered that the pipe rails were "a very weak solution", so far as pedestrians were concerned, as it was still open for people to move through the rails and, if there was a need to re-direct people, "more than a pipe barrier ... would be utilised". He felt it "wouldn't be the best solution".

746. His brief when enhancing the Courtyard was to enhance the connection between the two buildings adjoining it, the Lifestyle Centre and the main Hyperdome building, so that it was dealing better with the foot traffic that was already moving through that zone from one part of the Hyperdome to another; it was not unsafe before the changes were made.

747. Mr Hunter also agreed that bollards were used to stop vehicular access without stopping foot traffic.

748. In re-examination, Mr Hunter indicated that he received instructions from the owners of the shopping centre rather than from the centre manager or centre management.

749. He also said that he was never instructed to design components of his works to direct foot traffic away from the Coles Door.

750. Mr Baker gave evidence next. Much of his Report related to a challenge to the concept of a "desire line" promoted by Mr Shoobridge. Accordingly, I will interpolate the evidence of Mr Shoobridge here.

751. Mr Shoobridge made three affidavits which were all read. In the first affidavit, he set out his qualifications and experience. He also reported on his investigation of the installation of the pedestrian traffic signals on Athllon Drive which he reported were commissioned on 15 August 2003 as part of the Athllon Drive duplication project.

752. He deposed that he had inspected the pipe rails which he said had been installed to prevent direct vehicular traffic between the two relevant car parks and which did not prevent pedestrian access. He expressed that his experience showed that pedestrians choose a travel path determined by a desire line between the person's current location and their destination and that pedestrians are reluctant to vary the desire line which would mean the pipe rails would be unlikely to deter pedestrians. He considered that the low brick walls would have an impact in diverting pedestrian traffic, but not from the Coles Door if that was the destination of their desire line. He also considered that the paid parking would not have a long term impact on the number of visitors to the Hyperdome. He dealt with other matters which, in the context of these proceedings, I do not need to repeat.

753. His second affidavit set out his relevant experience in more detail. I do not have to summarise it save to say he had long and detailed experience in traffic matters, especially related to pedestrians. The affidavit added some supplementary matters to his earlier affidavit.

754. Mr Shoobridge was now in private practice and, as such, had been involved with the redevelopment of the Woden Plaza Shopping Centre, the Queensland Investment Corporations redevelopment of the Canberra Centre, as well as a member of the Technical Advisory Group for AMP Capital Shopping Centres.

755. Finally, his third affidavit added further details of his experience, especially in relation to shopping centres, annexed photographs of relevant areas and added some further supplementary material. The main part of his affidavit was directed to answering Mr Baker's Report, especially that part of it which challenged the notion of the desire line. He produced material to show that it was a widely used concept in traffic engineering, as I am satisfied that it is, and he expounded its use in this context. The matter is further dealt with below. He confirmed his view that the pipe rails and low brick walls would not alter the pedestrian desire line to a significant degree.

756. He first gave evidence about the pedestrian traffic signals across Athllon Drive; they had commenced operations on 15 August 2003 prior to BHPL's occupation of the Premises.

757. He noted that, before the installation of the traffic signals, there had been a "Zebra" pedestrian crossing there, established because the exit from the Lifestyle Centre led the pedestrians there. Such a crossing is, however, appropriate as a safe pedestrian facility in roads with low volumes and speeds of traffic and single lanes in each direction. In this case, the increase in traffic and duplication in the road required the installation of pedestrian lights at the crossing.

758. He noted that the installation of the pedestrian traffic signals was part of the duplication of Athllon Drive and that such a project would normally be foreshadowed on the governments' capital works programme some years before it was actually included in the budget.

759. Thus, it was likely that there would have been a public display of the proposals, perhaps even within the Hyperdome, and the Hyperdome management would be aware of what is going on; there would have been opportunities for public submissions. The proposal would have been publicly known.

760. He further referred to the effect of the introduction of paid parking in the Tuggeranong Town Centre and, in particular, at the Hyperdome.

761. His evidence was that the Town Centre before 2003 had free parking while other Canberra Shopping Centres had paid parking, providing the Hyperdome with an advantage to motorists. The Hyperdome, thus, "surrendered" its advantage over centres such as those at Belconnen, Woden and Civic. He noted, in particular, the period of free parking (initially two hours, later increased to three hours) on week days, which would have been sufficient for most shoppers.

762. He next discussed the pipe barriers installed at the time of the introduction of paid parking. He considered that the pipe barriers would not prevent pedestrian access because of the space between the end of the barrier and the structural column of the multi-storey car park and, indeed, on his site inspection, he observed that the space was used by numerous pedestrians.

763. He explained that a path adopted by pedestrians is largely determined by what he described as "the desire line" between the current location of the pedestrian and the person's destination. His experience was that pedestrians are generally reluctant to vary their travel paths significantly from the usual desire line and, as the pipe barrier did not completely obstruct that access, he believed it would have had no significant effect in deterring pedestrians, especially those who regularly entered the Hyperdome in this way, from entering and crossing the multi-storey car park to the Coles Door. Indeed, he felt that some pedestrians would feel more comfortable and even safer, following the exclusion of vehicles from the pedestrian walkway.

764. He noted that the concept of a desire line was well-known in traffic engineering and he referred to an official Austroads publication which made reference to the concept.

765. He made the point that the desire line was a line between where the pedestrian is and where the pedestrian wants to go and it would be appropriate externally to the shopping centre, that is prior to the entry point, but not necessarily within the shopping centre. That is to say, the desire line does not always terminate at a

particular store but rather at the point of entry which the pedestrian can see from his or her point of departure. He noted that, once inside the shopping centre the desire line has less utility because shopping centres are designed so that pedestrians move through malls in particular directions once inside, limiting their choices for path of travel.

766. He re-iterated his view that observations have shown pedestrians engaging in "straight behaviour of patterns" and they will "cross informally wherever the desire line takes them". This is why traffic engineers importantly establish pedestrian facilities as close as possible to the recognised desire lines.

767. His view was that pedestrians do not like to go away from where they are heading and are reluctant to walk away and then come back, so the pedestrians on the south east side of the Hyperdome would be unlikely to walk up Athllon Drive to cross at the traffic signals across Athllon Drive but would cross at the intersection between Athllon Drive and Reed Street North if that was closer to their place of work and go across the car park. Mr Honkanen agreed with Mr Shoobridge on this point.

768. Mr Shoobridge commented on the pipe rails, explaining that they were necessary because even concrete kerbs were not sufficient to prevent vehicles trying to exit without paying for parking. The pipe rails were primarily, he said, for ensuring that vehicles remained within their appropriate area and the drivers paid for parking. It was noted that, apart from the small area for which the pipe rail upright goes onto the footpath, it does not extend for the majority of the footpath which is unimpeded.

769. Mr Shoobridge was then subject to cross-examination. Some of the cross-examination was, quite frankly, unhelpful.

770. Mr Shoobridge did not accept that signalised crossings were designed to encourage pedestrians to cross at the particular place but said that they were designed to provide a safe facility for pedestrians to cross at that point. That is to say, they are designed to provide a safe pedestrian crossing facility at that location. When it was suggested to him that they were designed to regulate the crossing of the road, his response was that it was very difficult to regulate pedestrians and pedestrian behaviour. That is likely to be a matter of common sense.

771. Mr Shoobridge made it clear under cross-examination that a desire line is a pedestrian engineering term not related to motor traffic and that it does not normally have application within a building because it loses its significance at the point of entry to a contained environment. He noted that the destination of a desire line did not necessarily have to be within sight and that, over time, the desire line would become part of a habit and subconsciously followed. Thus, there would have to be a decision-making process for an individual to change their ordinary desire line. That might include, for example, a fence erected around a car park through which the pedestrian ordinarily walks.

772. He was asked about the creation of informal paths, one of which was shown in one of his photographs, and said that people would follow such paths generally and, if a paved path was provided in an appropriate place, they would use it, but, if the paved path was not in an appropriate place, they would establish a short cut that is likely to define where the desire line is. He agreed that such a path could be used to encourage people to use it and a lot of paths are put in as a safe facility for them in all

weather conditions. He noted, however, that if the path is too far from the desire line or the path a person intends to take, the person will create their own path.

773. I found Mr Shoobridge's evidence cogent, soundly based and helpful. It seemed to me also to be consistent with the statistical evidence that was available from the evidence of Steven Beattie about the various door counts.

774. Mr Baker made one affidavit which was filed and read. To it was annexed his expert report. He also acknowledged that he was bound by the Expert Witness Code of Conduct. His Report included a detailed Curriculum Vitae.

775. His challenge to the concept of a "desire line" relied on by Mr Shoobridge suggested that it was inconsistent with "decades of consumer research", though it did seem to me that the two experts were discussing slightly different concepts. This was clearer in that Mr Baker set out, in his reference to consumer research, a series of questions, none of which were directed to the concept of which of a variety of entries available to access a shopping centre was chosen and why. The questions asked what the shopper did in the Centre and where they had come from, but not where they parked or otherwise arrived and how they entered, which was a critical issue in this matter.

776. He then discussed the distinction between "purpose-driven" shoppers and "recreational" shoppers. Again, this was very useful but seemed to miss the point.

777. Mr Baker further addressed the issue of office workers which was said to be a core part of the Giving & Living business customer base. He also addressed the purpose of the development of the Courtyard, which he suggested was to attract more foot traffic to the Target Mall. He considered that most shoppers were not single-minded as to their shop destination in the Hyperdome. Thus, he concluded, the vast majority of trips to large shopping centres like the Hyperdome will be by shoppers whose choice of initial entry will be "flexible, variable and easily subject to diversion". It did not seem to me that this followed at all. If the shopper was not purpose driven, he or she would not care which entry was used, and was likely to use the one they usually used and were in the habit of using.

778. Mr Baker's Report, however, suggested that the fallacy in the notion of a desire line was that shoppers were not always approaching a shopping trip with the knowledge that they are going to a specific store and when they arrive at the shopping centre will proceed directly to that store. That, he said, was not how the majority of shopping trips to large shopping centres like the Hyperdome actually work. Again, while this may be true, it did not address the point of where they would enter.

779. He indicated that shopping trips to shopping centres were typically divided into two types. The first were recreational shopping trips in which the shopper did not have a particular goal but was visiting the centre to browse, do general shopping, spend time with friends or for other non-specific reasons.

780. The other type was the "purpose-driven" trip in which the shopper had a particular goal in mind although not necessarily for visiting only one store.

781. He said that generally the Hyperdome would have a much higher percentage of recreational shoppers and, based on research, he said approximately of 80 per cent of all shopping trips to a centre like the Hyperdome would not be driven by the objective to visit a single specific store.

782. This seemed to miss the point of Mr Shoobridge's description of the desire line which, as he pointed out, was generally used up to the point of entry of the facility, not thereafter inside.

783. Mr Baker pointed out that much of his opinion depended on the reason a shopper had for being in the shopping centre but his evidence seemed to be more directed to the activities of pedestrians within the shopping centre rather than the method of arriving.

784. It did not seem to me that Mr Baker's research was inconsistent with Mr Shoobridge's description, which seemed convincing to me.

785. Mr Baker next indicated that, where office workers have access to good shopping facilities near their offices, the percentage of their non-grocery shopping carried out during work days was markedly higher than for office workers with access to poorer retail facilities. He also said that office workers spend a material amount on retail goods and services during work days.

786. He then analysed the sales decline for the Giving & Living store and identified a number of possible causes. His conclusion was that the only likely cause was a permanent loss of foot traffic as a result of a reconfiguration of the Hyperdome.

787. He based this opinion on the following:

- the sales growth asymmetry heavily biased towards the Target Mall and against the Coles Mall that occurred after the upgrading of the Courtyard and the opening of the Lifestyle Centre, areas which were perfectly aligned with the crossing on Athllon Drive and the central spine of the shopping centre;
- the erection of pipe rails along the western side of the multi-storey car park; and
- the sign in the multi-storey car park that pointed pedestrians towards the Courtyard and therefore the Mall, rather than the Coles Door.

788. He was cross-examined on his Report and asked, in particular, about the installation of the high tensile dome in 2006. He responded that his understanding was that the works at the Courtyard and in the Lifestyle Centre were distributed over the period from late 2003 to 2006. This was correct but the high tensile dome was installed in 2006, replacing an existing covering of part of the Courtyard between the Lifestyle Centre and the Target Door.

789. He agreed that the upgrading of the Courtyard and the evolution of the Tuggeranong Markets into the Lifestyle Centre and then the consequent improvement of the stores in the Lifestyle Centre was one of the likely causes of the declining sales pattern at the Giving & Living store. He was, however, concerned that the data stream in terms of the sales pattern began too late to draw a quantifiable relationship between them. He was aware that the Lifestyle Centre had opened and was trading before BHPL bought the Giving & Living business. He agreed that a covered passageway established before September 2003 between the Lifestyle Centre and the Target Mall would have provided a degree of amenity. That, of course, already existed.

790. He agreed that, while workers were travelling across the open-air car parks, the sign at the northern wall of the multi-storey car park would have had little, if any, effect on the decision of the shopper to go to the Target Door or the Coles Door.

791. When it was put to him that, by the time a shopper was in the car park where they could see the sign, they would be "on a mission" to the Coles Door and he agreed, but did not know whether, therefore, the sign would have had a minimal effect on a hypothetical government worker. He later retracted that and said that he disagreed because it would, he said, depend on the familiarity of the shopper with the shopping centre and how often they went there. He agreed, however, that it was a bad sign.

792. Indeed, given that the evidence by the experts called by BHPL was that the pipe rails were a deterrence to pedestrians, it would seem that the sign would have no effect for the only people who could see it were those already in the multi-storey car park and they would have passed the barrier of the pipe and so be unlikely to follow the sign. Thus, as Mr Shoobridge pointed out, they would, on this argument, be effectively directed, in fact, to the obvious and unobstructed Coles Door that they could see and which itself had significant signs above it. In addition, the pipe rails would have an effect of directing those parking in the multi-storey car park to the Coles Door.

793. Mr Baker was also asked a number of questions about shoppers who enter the Coles Mall through the Coles travelator. Although reluctantly, he did agree that people would see the Giving & Living store and some people would see the whole of the store even though they were going to turn right into the Coles Mall to go to the Coles store.

794. Mr Baker also agreed that some people are creatures of habit and some are not. He agreed that, under certain circumstances, people might form a habit of parking in a particular place or walking through a particular entry to a shopping centre. He agreed that whether the person was a purpose driven shopper or a recreational shopper would not matter.

795. He was also asked about the pipe rails. His attention was directed towards the break in the pipe rails and, rather curiously, he said that he did not know whether the gap would have an effect to break a habit of the pedestrian intending to go to the Coles Door. This seemed to undermine his suggestion that the pipe rails could be a significant cause of the decline in foot traffic through the Coles Mall if he simply did not know whether the pipe rails would act in that way. Further, he agreed that it would be sound practice in a shopping mall to have a controlled area for pedestrians which is distinct from the area where the cars drive. He agreed that it would be prudent for pedestrians to follow through the gap in the pipe rails onto the pedestrian crossing.

796. Mr Baker was then asked some questions about the percentage of shoppers that were "purpose driven" and those who were recreational. Various figures were shown to him and, it seemed to me, there was a distinct lack of clarity between the meanings of these terms. At one stage, he suggested that the purpose was to go to a particular single store and drew some statistics which did not seem to be consistent or easily made consistent with the other statistics quoted.

797. Next, Mr Baker was asked about the quality of management of the Giving & Living business. He relied, in his Report, on the fact that the Manuka and Yarralumla stores were successful which, he said, showed that the management of the Giving & Living store was adequate.

798. His attention was then drawn to the fact that, of those two stores, one never traded at a profit and the other only had a year or two of marginal profits. He then suggested

that profitability can be the result of a number of factors that have nothing to do with management. That seemed to me to undermine his suggestion that the performance of the Manuka and Yarralumla stores made it clear that the performance of the Giving & Living store could not be the result of poor or inadequate management.

799. He did point out that profitability is not necessarily the purpose of all retail stores pointing out that some are established to secure market share, with branding, with "the glory of the name" and so on. While that may, of course, be true, it seems to me that the comment was irrelevant to the purpose for which BHPL opened the stores, specifically to increase the profitability of the whole enterprise in which BHPL was engaged.

800. He suggested that the change of name did not, from the evidence, form a major issue, but he could not discount it.

801. He agreed that, given the relative decline in sales of the three other stores in the Coles Mall which also experienced a decline, it was possible that the Giving & Living store was "an outlier" and that it could suggest an explanation particular to that store rather than to foot traffic.

802. Mr Baker indicated at first that he agreed with the conclusions reached by Mr Stevens but that he might have "gotten to my own answer a little bit differently". Nevertheless, he said, in his Report, that Mr Stevens had "analysed the competition issue in depth and I agree with his findings". It is a little difficult to see how, with that comment, he could distance himself from Mr Stevens' methodology, particularly as he included no methodology of his own in his Report. That is, of course, ordinarily a requirement of an expert. See *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705 at 743-4; [85].

803. Mr Baker was then asked certain questions about the competitive effect of the Hot Dollar shop and some stores in the Lifestyle Centre which Mr Baker had identified as competitive.

804. Following the calculations in Mr Stevens' Report, it was suggested that 84 per cent of the reduction in sales of Giving & Living were attributable to those stores. Mr Baker disagreed but did not explain why he did so. He was asked whether he was genuinely of the opinion that the competitive effect of those stores was of no significance. He said that it was of significance but of limited significance because he was "looking for" something which was "a much greater factor" to explain the sales factor that he saw at the Giving & Living store. It is not clear why such substantial competition would not meet this test.

805. He was also asked about the termination of the experienced manager of the Giving & Living store and, again, his answers were entirely unclear to me. He suggested that part of being a good retailer is human relations and pointed out that you can make mistakes and still be successful. He pointed out that, in this case, there was one store that was experiencing "incredible volatility in sales" and other stores not experiencing that volatility, which suggested to him that there was something systemic or endemic in what was happening in that one store. He would not, however, embrace the possibility that the dismissal of an experienced manager who had been part of the previously successful store was part of that and descended into generalities which were of little assistance.

806. While, of course, a proper investigation of causality requires the elimination of possible causes, Mr Baker seemed to eliminate possible causes because they were not the desired cause. Thus, if foot traffic was a cause of declining sales, then the termination of the employment of an experienced manager would not be justified and, indeed, may exacerbate the decline, as other experts opined.

807. I was further not satisfied that the other stores were necessarily performing so well as to show that the manager of the Living & Giving store was not a cause of its sales decline. A careful and logical approach did not seem to have been adopted by Mr Baker in this consideration.

808. Despite his eminence and expertise, when it came to the specifics of his evidence, Mr Baker seemed dependent on opinions without a great deal of evidence or fact expressed to support them and relied assertions rather than argument or explanation.

809. Thus, I accepted Mr Shoobridge where he differed from Mr Baker and I do not accept Mr Baker's analysis of the cause of the decline in sales of the Giving & Living store.

810. Mr Honkanen made one affidavit which was filed and read. It principally attached his Report which included his Curriculum Vitae.

811. Mr Honkanen's Report addressed the cost of various of the works at the Hyperdome and then made some comment on the effects of the relevant works on access and foot traffic.

812. He costed the works which included awnings to the existing Hyperdome, retractable awnings to the Lifestyle Centre, toilets, a loading dock, wind break structures, low brick walls and additional car parks, in the sum of $1 292 347. This did not include goods and service tax, development approval fees, building approval fees or lease consolidation costs.

813. It was not immediately obvious as to the relevance of this evidence. It was said to address the allegation in Leda's defence that the works "were not extensive and not likely to and did not divert foot traffic away from the door nearest to the defendant's premises".

814. The cost of the works, in itself, is not particularly helpful to determine whether works have been significant without understanding a little more how that should be interpreted. The value of the whole building would be needed to act as a comparison and the relative size of the development work to the whole building would be important.

815. While strictly admissible, it seemed to me that this evidence was of little assistance.

816. Mr Honkanen then also made a number of comments about the effect of the various developments. It did not seem to me that these were other than opinions that any lay person could have held and it was difficult to identify expertise that was relevant or necessary for the opinions expressed, including challengeable opinions such as that the purpose of the installation of the pipe rails was not to stop vehicular traffic (despite this expressed view of Mr Hunter, an architect, and Mr Shoobridge, a traffic engineer) because they were built "in many places where vehicles cannot enter anyway, such as long footpaths separated from vehicular areas by kerbs". It seems Mr Honkanen has never seen a motor vehicle mount a kerb nor understood the steps that some

people will take to avoid paying for parking. Mr Shoobridge's evidence was more persuasive.

817. Mr Honkanen, in cross-examination, agreed that it was suggested to him there was an over-arching plan to make the Target Door the dominant entry for foot traffic coming from the western side of the Hyperdome. He agreed and said that this approach was explained to him in discussions with Mr Giles, BHPL's solicitor, and Ms Hungerford.

818. He agreed that his instructions effectively required him to assume and adopt an opinion as to the effect of the Hyperdome works namely to be the cause of the decline of the foot traffic to the Giving & Living store. He understood that he was being asked to confirm the opinion held by Ms Hungerford and Mr Giles. He acknowledged that an opinion on this matter was within the area of expertise of retail economists and that he had no such expertise; his expertise was in building.

819. He agreed that some parts of his Report had been prepared in an area that was clearly within the area of retail economics but he explained that he attempted to prepare the Report from a builder's point of view.

820. He also agreed that he had no knowledge of what was in the minds of Leda's Board or staff at the time he wrote the Report.

821. Mr Honkanen regarded himself as a building consultant and agreed that he did not have direct expertise in matters of foot traffic in shopping centres but "only as far as it impacts on my own expertise in designing and construction". He agreed he did not have any expertise in traffic engineering or in pedestrian movements. He agreed that Mr Shoobridge would have greater expertise in relation to traffic engineering and pedestrian movements.

822. He agreed that the basis of his costs was the well-known publication, *Rawlinsons Australian Construction Handbook* (Rawlinsons Publishing, 26th ed, 2008) (**Rawlinsons**). He agreed that Rawlinsons gave prices for Adelaide, Brisbane, Melbourne, Perth and Sydney, but not Canberra, but he did not accept that this made calculations in reliance on it a "guesstimate". He suggested it was a reasonable estimate of costs at the time if applied with his experience.

823. He did not explain, in his Report, how he had calculated from the information in Rawlinsons to arrive at the rate he applied in the cost calculations.

824. In his Report, he opined that certain segments of the works would have a "detrimental impact on the volume of foot traffic through the Coles entrance in the period 2003 to 2006". He agreed that he did not know the volume of traffic during that period and he had no quantified information available that would assist in confirming his opinion. It was suggested to him that it was observation in the nature of speculation and he rejected that saying "that its observation and forming an opinion based on my experience on those observations". He said that the experience was as training in architecture and being involved in development of his own projects and other projects.

825. It did not seem to me, with respect, that Mr Honkanen's Report was of great assistance. It was difficult to see what expertise he brought to the opinions he expressed other than in relation to costs. I do not rely on his Report.

826. Accordingly, having considered the evidence of these experts, I am not satisfied that TTC/Leda intended, by any of the development work at the Hyperdome, to reduce the pedestrians who entered the Hyperdome by the Coles Door, nor do I consider that it had this effect to a significant degree.

827. So far as the installation of traffic signals at Athllon Drive were concerned, I accept that they may have caused some government employees in the Centrelink buildings to use that crossing in preference to the crossings available at the Reed Street North-Athllon Drive intersection. I accept, however, that this was a decision of the ACT Government for proper traffic reasons as explained by Mr Shoobridge and that it was not caused or contributed to by TTC/Leda.

828. I accept that the development of paid parking, with the associated installation of the pipe barriers, was relevant. It was, however, clear that notice had been given to tenants about that and it would have been possible for Ms Hungerford to have found out about the introduction of paid parking. The introduction of this, in itself, however, seems to have had minimal effect if, as BHPL submitted, a significant portion of her customers were government employees and paid parking would not have affected them. The generous initial free period would also have been unlikely to affect other shoppers. The effect of paid parking, also, would have been of short duration.

829. I accept that the pipe rails may have had some minimal impact on the number of government employees crossing the multi-storey car park to the Coles Door but given that it remained one of the two entry points with the highest traffic, this cannot have been a substantial cause of her sales downturn.

Other evidence

830. A number of other affidavits made by various deponents as to fact were read and the deponents not cross-examined.

Jeremy Wilson

831. Mr Wilson was retail manager of the Hyperdome from September 2010. Prior to that, he was a casual leasing executive from January to November 2009, with duties to manage the short-term leases in the common areas of the Hyperdome.

832. He had access to the records of Colonial First State Global Asset Management, the manager of the Hyperdome on behalf of TTC.

833. Mr Wilson made three affidavits. His affidavits were principally for the purpose of adducing into evidence various documents in connection with the proceedings. So far as they were relevant and it was necessary for these reasons, I have read not only the affidavits but the exhibits and annexures where it was relevant or helpful to the case. I read all to which reference was made by counsel for either party.

834. Annexed to his first affidavit was the Sublease together with a copy of the Memorandum of Provisions referred to in that Sublease and registered by Leda on 24 July 1998.

835. He also annexed a copy of the Transfer of the Sublease to BHPL which was registered on 4 November 2003 but operative from 1 September 2003, which is shown from the Consent to Assignment of Lease, a copy of which was also annexed. Mr Wilson's affidavit also annexed a copy of the Variation of Sublease which

extended the term to 31 August 2009 and made variations of the fixed review dates and rental payable thereafter.

836. He annexed to his first affidavit a copy of the Bank Guarantee given by the NAB in favour of Leda at the request of BHPL, although it was only a copy and he indicated that the original was unable to be found in the Hyperdome business records.

837. Annexed to his first affidavit was the documentation surrounding the transfer of the Hyperdome from Leda to TTC which was by way of retirement of Leda as trustee of the Tuggeranong Town Centre Trust Deed and the appointment of TTC in its stead.

838. TTC then appointed CPT Custodian Pty Ltd, trading as "Centro Properties Group", to manage the Hyperdome. A copy of a letter dated 8 December 2005 to Ms Hungerford advising her of the accession of Centro as the manager of the Hyperdome and a further letter requiring her to pay rent to Centro Properties Group were annexed to Mr Wilson's first affidavit.

839. Annexed to the first affidavit were letters to BHPL dated respectively 28 August 2004, 29 August 2005, 11 September 2006 and 13 August 2007 advising of the increase in base rent in each occasion on 1 September of the relevant year.

840. Also annexed to Mr Wilson's first affidavit were copies of approvals or other documentation showing rental subsidies granted to BHPL as follows:

- 1 July 2006 to 30 June 2007 $20 000
- 1 July 2007 to 30 June 2008 $32 000

841. On 28 December 2007, however, Mr Lord sent to BHPL an email, a copy of which was annexed to Mr Wilson's first affidavit, advising that the 2007 rent subsidy would not be applied because the account was in arrears.

842. Mr Wilson's first affidavit annexed copies of letters showing estimated outgoings for the financial years commencing 1 July 2004, 1 July 2005, 1 July 2006, and 1 July 2007, setting out the tenant's share of the outgoings in each case.

843. Also annexed were notices showing adjustments to the share of actual outgoings following auditing for the years commencing 1 July 2003, 1 July 2004, 1 July 2005, and 1 July 2006.

844. Mr Wilson's first affidavit described the provision of invoices and statements of account issued to BHPL and copies of them were annexed.

845. Mr Wilson annexed to his first affidavit a copy of the letter dated 7 December 2007 in which BHPL advised TTC of its intention to vacate the shop at the end of January 2008 and he deposed that the premises were vacated by BHPL on 31 January 2008.

846. Mr Wilson's affidavit set out calculations of rent, outgoings and promotional levies with respect to the 2007 rent subsidy but, in the circumstances, I do not need to consider that further. He annexed a summary of the amounts outstanding to TTC from BHPL at the date of abandonment of the Premises. That showed an amount of $21 404.77 owing and he further deposed that no payment has been made or credit accrued which would reduce that amount owing since the date of that summary, namely 12 February 2008.

847. Mr Wilson's first affidavit also annexed copies of documents relating to outgoings to which I have already referred.

848. Mr Wilson's first affidavit annexed a copy of a Lease between TTC and Tybar Pty Ltd of 27 June 2008 when that company entered into a sublease of the Premises abandoned by BHPL. Tybar Pty Ltd commenced occupation of the Premises on 1 June 2008 for a period of seven years.

849. As a result, Mr Wilson calculated the amount of lost rent, outgoings and promotional levies for the period from the abandonment of the premises to the re-leasing of them in the sum of $55 170.24, though an amount of $2329.24 had to be deducted from that in respect of the promotional levies leaving an amount of $52 841.

850. A further affidavit by Mr Wilson attached documents relating to the occupation of the business opposite Giving & Living. Originally it was occupied by Go-Lo but Mr Wilson's evidence was that, in or around January 2003, the business re-located to the Lifestyle Centre leaving the shop (Shop 190) vacant.

851. Around April 2003, Leda commenced negotiations with Long Champ Enterprises Pty Ltd trading as "Hot Dollar Tuggeranong" for the lease the shop, and which lease was executed on 15 July 2003, and Hot Dollar commenced to trade from the premises formerly occupied by Go-Lo on or about 1 August 2003.

852. Mr Wilson's second affidavit showed that in March 2004, Leda was advised that the Hot Dollar Tuggeranong business had been sold to Hot Dollar Australia (Canberra) Pty Ltd and an Assignment of Lease was sought. That assignment was approved by Leda on 8 March 2004 and the relevant assignment documents were issued to Hot Dollar Australia on 29 March 2004.

853. Notwithstanding apparently non-execution of the relevant documents and non-fulfilment of certain terms and conditions, including payment of arrears of rent and provision of a bank guarantee, Hot Dollar Australia entered into occupation.

854. As a result, Leda gave Long Champ Enterprises Pty Ltd a Notice of Termination and on 10 November 2004 recovered possession of the premises.

855. A new Lease was sent to Hot Dollar (Australia) Pty Ltd for the balance of the term and that lease was executed on or around 16 November 2004. On 18 November 2004 Hot Dollars (Australia) Pty Ltd re-commenced to trade from those premises.

856. A third affidavit from Mr Wilson exhibited monthly sales turnover reports prepared by the managing agent of the Hyperdome, detailing the turnover of shops within the Hyperdome, compiled from figures reported to the Hyperdome Centre Management by those shops.

857. Those reports included sales turnover in the month of the report, sales turnover figures for the same month in the previous year, a percentage change year-to-year, a figure for the moving annual turnover (MAT) in the month of the report, and figure for MAT for the same month in the previous year.

858. These reports were the basis for a number of the calculations made by the experts.

James Hartley

859. An affidavit of James Hartley, solicitor for Leda and TTC, was admitted and read so far as it annexed a letter from the NAB. That letter was admitted not for the truth of

what it said but for the fact that the bank stated that it held the opinion that the Bank Guarantee it issued at the request of BHPL was valid and enforceable. Mr Hartley was not cross-examined.

Affidavits relating to foot traffic survey

860. BHPL conducted three counts of foot traffic and affidavits from two persons who conducted the counts were read. Neither of the deponents were cross-examined.

861. The first survey involved two of the counts on 9 October 2009 when Rachel Newton counted persons entering the Target Door and Claire Stacey counted shoppers entering the Coles Door. Both made affidavits.

862. They identified those who were wearing identification tags as government employees. That must, of course, be a minimum as some government employees may not wear their tags out or may have them where they cannot obviously be seen. It is not clear, however, which non-government employees wore such tags; there was no evidence about that.

863. Nevertheless, the results were as follows:

Entry Door	Pedestrians without ID tags	Pedestrians with Government ID tags	Total Shoppers
Target Door	278	348	626
Coles Door	353	25	378

864. Later, on 8 April 2013, Benjamin Grima counted persons entering the Coles Mall either from the Coles Door or the Coles travelator between approximately 10:07am and 3:10 pm. He also made an affidavit. His observations were also recorded and the results were as follows:

	Left turn from Coles Travelator towards Hot Dollar	Right turn from Coles Travelator towards Coles & K Mart	Total Entries from Coles Door	Entry from Coles Door with Govt ID tags
10:07am To 11:07am	10	50	205	2
11:30am To 12:30pm	18	55	335	63
12:30pm To 1:00pm	14	47	393	118

2:10pm To 3:10pm	8	27	162	10
Total	**50**	**179**	**1095 (incl. Govt ID tags**	**193**

Timothy Heaton

865. An affidavit of Timothy Heaton was also read. He was a Registered Valuer and a Certified Practising Valuer and he was asked to assess the market rent for the property. He assessed the market rent compared with the lease rent:

Valuation Date	Area (m^2)	Rate ($/$m^2$)	Rental p.a.	Adopted Value	Actual Lease Rent
1 September 2003	169	$450	$76 050	$75 000	$110 713.39
1 September 2004	169	$470	$79 430	$79 000	$114 588.35
1 September 2005	169	$490	$82 810	$83 000	$118 598.94
1 September 2006	169	$510	$86 190	$86 000	$122 294.90
1 September 2007	169	$530	$89 570	$90 000	$127 046.14
1 September 2008	169	$550	$92 950	$93 000	$131 492.75

866. Mr Heaton was not cross-examined.

Phillip Walter Roberts

867. Two affidavits of Phillip Walter Roberts were read. He was not cross-examined.

868. Mr Roberts was, in June 2003, employed as a business sales consultant for LJ Hooker Business Sales Division at Woden when Ms Hungerford was consulting to his employer and assisting with preparation of businesses for sale.

869. Mr Roberts deposed that Ms Hungerford had told him that she would be interested in investing in a good business if one should become available. In about June 2003, he referred her to the Giving & Living business. She said that she was familiar with that business, which he described as “attractively presented”. The staff were busy with customers on the day of his visit and the foot traffic in the Coles Mall was constant and busy. He visited on at least six occasions. He was told by the owner, Mr D’Amico, that a lot of his customers came from government offices across Athllon Drive and that the traffic was particularly heavy between 11:00am to 3:00pm. Mr Roberts said he saw this volume of traffic for himself and that it would have supported that shop.

870. He gave Ms Hungerford the marketing information that he had about the shop and Ms Hungerford told him later that she had visited it regularly. In due course, he arranged the sale of the business to BHPL.

871. He prepared a further affidavit which set out some information about a business in which he was involved with an invitation to Ms Hungerford invest. The invitation was made in early August 2004.

872. Ms Hungerford said that she was not interested at the present time because she was opening the additional stores in Manuka and Yarralumla.

John Randall

873. John Randall was a professional engineer and Managing Director of Indesco Pty Ltd, formerly Bill Guy and Partners Pty Ltd. He held a Bachelor's Degree in Civil Engineering with Honours and was a Chartered Professional Engineer. He was a member of Engineers Australia, Consult Australia, and the Australian Water Association. He was a Licensed Builder in the ACT and a Registered Professional Engineer in Queensland. He had 30 years experience in the management of multidisciplinary projects, infrastructure design, and construction contract management.

874. He filed an affidavit annexing various reports but was not cross-examined on it or its contents.

875. He prepared a Draft Traffic Impact Statement for the Hyperdome in or around March 2005 in relation to a proposed development of a two-storey building with retail shops in from the Hyperdome's main entrance off Anketell Street. A copy of the Report was annexed to his affidavit.

876. In order to prepare his Report, he obtained a copy of the ACT Parking Survey 2001 and he also arranged for his employers to undertake a count of cars in the Hyperdome car park.

877. His conclusions included the following:

- Traffic volumes will increase on the streets around the Hyperdome. However, the total traffic volumes are still within the traffic capacities of the street system.
- 99 parking spaces are required based on the proposed development of a restaurant, shops and offices. The parking survey indicates that there are 583 spare parking spaces available to accommodate the 99 vehicles generated by the proposed development.
- The parking survey indicates that the highest usage occurs on Saturday and the lowest on Friday at both the Hyperdome and the adjacent Town Centre parking facilities.
- Since pay parking was applied to the Tuggeranong Town Centre (TTC), public parking usage in the TTC has reduced between 2001 and 2005. However, the parking usage at the Hyperdome carpark has increased.
- According to the existing building usage at the Hyperdome, 2339 parking spaces are required, marginally more than the existing 2228 parking spaces at the Hyperdome.

878. He annexed to his affidavit a copy of the ACT Parking Survey of 2001 for the Tuggeranong Town Centre. It showed the Hyperdome multi-storey car park had a

56 per cent occupancy and the car parks associated with the Tuggeranong markets had a 64 per cent (south) and 69 per cent (north) occupancy.

879. He annexed to his affidavit a copy of the results of the survey his employers had undertaken. These showed a 61 per cent occupancy of the Hyperdome multi-storey car park and of the other two car parks a 37 per cent (south) and 52 per cent (north) occupancy. It showed that parking demand reduced generally in the Tuggeranong Town Centre from 67 per cent occupancy to 58 per cent occupancy between 2001 and 2005.

Steven Beattie

880. Steven Beattie filed two affidavits. He was, at the time, Property Manager at the Canberra Airport, but between 1987 and 2009, he held the position of Operations Manager at the Hyperdome employed by Leda and then by TTC. He produced a number of documents.

881. He described the history of the Centre. It had opened in 1987 and, since then, there had been three major extensions in 1991, 1999 and 2006. Since the 1991 and 1999 extensions, he described the following works as having been carried out:

(a) in the area between the Lifestyle Centre and the Target Mall, seventeen new car parks, toilets, fixed awnings, a loading dock and a low brick wall installed in 2003;

(b) wind breaks and a tensile canopy were installed in that area in 2005;

(c) changes in parking arrangements were made in January/February 2004; and

(d) in 2008 a pay on exit [sic] was removed and payment stations were installed.

882. He described the extensions in 1991 and 1999 and the installations in 2003. He said that, during those latter extensions, the construction work did not block the Coles Door to the Hyperdome.

883. He also gave some history of the introduction of paid parking to the Hyperdome. He noted that, on 12 November 2002, the ACT Government advised Leda that it intended to install paid parking in the Tuggeranong Town Centre by July 2003. Accordingly, Leda requested a proposal to design paid parking for its car parks, including the multi-storey car park.

884. The introduction of paid parking involved the installation of a ticket dispenser and boom gate so that cars could only move from the Reed-Athllon car park to the multi-storey car park through a particular entry. Prior to that cars could move between the two car parks freely. There was an occasion in 2008 when the boom gate and ticket machines were vandalised.

885. Mr Beattie stated that the only reason paid parking was introduced was to ensure that the there would be parking available for customers of the Hyperdome and to prevent public servants from parking there once the ACT introduced paid parking. The pricing of parking matched what was being charged at the Woden Plaza.

886. He referred to the installation of traffic lights across Athllon Drive and noted that Leda did not have any involvement in the construction of that crossing, which was carried out by the ACT Government.

887. He set out some evidence about door counting software. He noted that foot traffic figures were stored in a database but there was no information prior to 2005.

888. He also referred to the external travelator to the north of the Coles Door, which was first installed in 2000. This was the travelator from the upper storeys of the multi-storey car park and was not the Coles Mall travelator. He said it was first installed in 2000 and was covered except for the top landing. It was only turned off if wet weather created a slipping problem. Customers and staff could still use the travelator but it was simply not moving. Later the upper landing was covered by a roof and airlock, but there were still some occurrences of people slipping in wet weather as they walked water in on their feet and this necessitated the down travelator being closed during wet weather with a mat being rolled out. After about 12 months, sometime in 2005, the Hyperdome engaged a contractor to treat that travelator with a rubber grip product which negated the need to turn the travelator off during wet weather.

889. Mr Beattie pointed out that there was, in the ground floor level of the multi-storey car park, not only signage directing people to the Courtyard and so to the Target Door, but also large signs directing them to Coles and K-Mart through the Coles Door.

890. In his second affidavit, he clarified some errors in his earlier affidavit which I do not need to address.

891. He gave specific evidence about the pipe rails that were installed and said that the installation was a result of negotiations between himself, in his capacity as Operations Manager, and S & B Parking Services, which completed the modification to the car parks.

892. He had experience in 1982 working in the Woden Plaza as Manager of Pay Parking for Lend Lease Parking, where Woden Plaza already had paid parking. It was his experience that people would regularly drive over areas that were not intended for vehicular access in order to avoid paying for parking. He said that he commonly, as often as weekly, observe people, "driving over kerbs, garden beds and pathways in order to avoid paying for parking".

893. He explained that he was strongly of the view that if pipe rails were not erected next to the kerbs the same thing, that is people avoiding paying for parking, would happen at the Hyperdome. There was no other reason for installing the pipe rails and he did not intend the hoops to have the effect of diverting pedestrian traffic.

894. Mr Beattie was not cross-examined.

Liability

895. The context in which any liability of TTC to BHPL is to be considered is that Ms Hungerford, on behalf of BHPL was, in preparation for the purchase of the Giving & Living store at the Tuggeranong Hyperdome, conducting what became known in the proceedings as a due diligence process.

896. Ms Hungerford was, it was said, an astute business woman. She certainly had accumulated substantial wealth over her then working life which, by July 2003 amounted approximately to $3 million in total in savings, real estate, and her superannuation accumulation.

897. Ms Hungerford was, at the time of purchasing the business, a business consultant. She said that she had "some experience in retail" and was undertaking some business consulting through a real estate agency. She had owned a business in

Sydney, though on the Tenancy Application Form she submitted to Leda, she said that she had not "had a retail business".

898. The example of business consulting in the retail sector on which she relied was a project she undertook in connection with a discount store on the South Coast of NSW. A plan she prepared for the business was admitted into evidence. While it appeared to be a comprehensive review, a careful reading of it did not disclose that Ms Hungerford had any direct expertise in the retail industry. While there were brief references to the key issues such as stock, layout of premises and advertising, there was little indication of the particular expertise that Ms Hungerford would bring to the operation of a business in these areas, apart from facilitating meetings of staff to discuss such matters, preparing procedures and an induction manual, and documenting the results of staff meetings. It did not disclose any particular expertise that Ms Hungerford had in the actual conduct of a retail business or suggest she had the capacity to advise on matters of substance about the retail operation of the business, such as stock profile, marketing strategy, retail economics or the like. The plan showed a more generic contribution through the establishment of systems, the facilitation of meetings and the recording of the results of those meetings. There can be no doubt the value of such work, but the material did not show any particular skill in the retail sector more specifically or substantively.

899. The work she did for the real estate agency she described as assisting the agency to prepare small retail operations for sale. She described the work in her evidence as follows:

> What did that involve, please? --- As far as the other businesses were concerned, they were generally small retail outlets or operations that basically I did a make over for selling of the business to make them saleable.
>
> I don't understand that term 'make over.' Others might. What do you mean by that? --- To have the business operating correctly with usual business standards regarding their operation and their staff and management.
>
> And what expertise did you have in regard to that activity? --- I had experience from many years of consulting in my financial planning practice.

900. Again, the work seemed directed towards ensuring that financial systems and operational standards were adequate rather than substantive retail matters. Indeed, she agreed that this "wasn't so much changing the business as changing the cosmetics for sale".

901. In this case, that may not have been such an obvious problem, for Ms Hungerford was intending to purchase the business in reality as a managed investment rather than one where she was to be involved in the day-to-day business, though she ultimately had to do so. It was, she said, a business that was structured with stock and staff and going to run as it had been running.

902. Indeed, her evidence was that, apart from the improvement of some procedures, such as the introduction of computerisation of the store's processes, she gave no evidence of any intention to change the operation or practices of the store. She may well have had that knowledge, experience and skill, despite no direct retail experience or skill in the substantive operation of a retail business, though it was not apparent. She did not seek advice or assistance from any retail consultant.

903. The due diligence conducted by Ms Hungerford included the following elements. She attended the Hyperdome on a number of occasions. On these visits, she inspected the Giving & Living store, inspected stock, spoke to staff, spoke to the owner, and spoke to the Hyperdome management.

904. Initially, her evidence was that she attended the Hyperdome once a week from 14 July to 1 September 2003. It subsequently became clear, however, that she had, in fact, been overseas from 25 July to 11 August 2003, so that the inspections could only have been from 14 to 24 July 2003 and after 12 August 2003, though the sale agreement had been executed on 21 August 2003. She actually said a number of times that she had visited the store about six times.

905. On a number of these visits, she sat outside the shop watching the passing traffic. She was, in particular, looking at the foot traffic. She also walked around the Hyperdome, seeing how many people were in the Coles Mall and the Target Mall.

906. When sitting outside the Giving & Living store, she looked at how many people went into the store and "what type of customers" they were. I was not clear about how long she did this on each occasion or when she did it. She said she did it at different times, though she seemed to suggest that it was in late morning. She said she established about 25 people passing the shop per minute. She said she saw queues at the shop counter, people being well served and noticed that a number of them had white tags on lanyards around their necks, which she concluded were being worn by public servants. She gave no evidence of the numbers or percentage of people she considered were public servants. She also noticed, though presumably not from her position in the Coles Mall outside the shop, people coming from offices over the road, walking across the car park into the Coles Door. She also noticed people making lay-bys.

907. This was obviously helpful to her assessment of the circumstances of the store, though it was hardly a comprehensive assessment or a very prudent due diligence.

908. Ms Hungerford was confident that the foot traffic in the Coles Mall would not fall. The only explained source of her confidence was her reliance on the developments (presumably office buildings) that she said she saw in the areas surrounding the Hyperdome.

909. In this respect, however, her due diligence, on which she relied, must be described as superficial and very limited. She said that she saw developments "about to happen" in the areas surrounding the Hyperdome. She particularly relied on the proposed construction of what became the Caroline Chisholm public service building that was one of the significant buildings to be constructed in the area.

910. Her evidence of the information about these developments was surprisingly limited. Her evidence was that she "drove past them, [and] looked at them". There was no evidence of any other inquiry. Indeed, she said that she did not make any inquiries, though she accepted that it would have been prudent to do so. She said that she did not even look at any noticeboards or signs on the sites that may have identified when the buildings were to be opened.

911. She obviously had contact with a local real estate agency and she gave no evidence of even asking the sales staff there, who would, one would think, have had some

more detailed and expert knowledge of the developments or, at the very least, some knowledge of where or from whom reliable information could have been obtained.

912. Matters which she could have ascertained by inquiry, but did not, included the matter of the introduction of paid parking and the installation of the pedestrian traffic signals across Athllon Drive. Both of these were matters of public record before BHPL purchased the Giving & Living business. It was even referred to in a tenants' newsletter published by the Hyperdome in June 2003, to which I have referred above (at [431]). It appears that Ms Hungerford did not ask Mr D'Amico about any such matters, though she may have had to treat his responses with caution, he being the director of the seller of the business. She appears simply not to have made these clearly relevant inquiries.

913. Despite the lack of such prudence, Ms Hungerford then prepared a business plan which seemed largely, if not entirely, based on the increased pedestrian traffic past the Giving & Living store which she considered would come from the developments and would subsequently increase her sales by 10 per cent per annum.

914. It is unsurprising, then, that her predictions were wildly optimistic when the Caroline Chisholm building, on which she principally relied to increase her customers, did not open until 2008. Despite the building and the proposed increase in customers and, therefore, sales, from 2004, she had in actual fact no idea when public servants would start occupying the Caroline Chisholm building. She said that she thought it may be "in the next few years". She did not think it would be, as it was, as late as 2007/08 but did not seem surprised by that date when it was mentioned while she was giving her evidence.

915. I note, too, that her driving around the area did not draw to her attention the fact that the traffic signals at the pedestrian crossing in Athllon Drive, opposite the Lifestyle Centre leading to its entrance, were then being erected and were operational prior to her purchase of the Giving & Living business.

916. Ms Hungerford's due diligence included, as an important part, having her accountant peruse and advise her on the financial aspects of the business and she sent him the relevant details supplied by Mr D'Amico for his advice. Her accountant approved "the financials" and this effectively gave her the green light to proceed.

917. The final matters, and on which she relied heavily, were the inquiries she made of the Hyperdome Centre Management. She said that she met Mr Beirne on 10 July 2003 The conversation is set out above (at [235]-[244]).

918. While Ms Hungerford was challenged on her memory of this meeting, particularly suggesting that much of her evidence was, in fact, reconstruction, it was not suggested to her that she did not undertake a due diligence process of sorts. For example, it was not suggested to her that she had not spent some time looking at the foot traffic in the Coles Mall, though she was successfully challenged on her exaggerated claims of how many times she had done this.

919. Mr Beirne unsurprisingly did not recall much of the events involving him of which Ms Hungerford gave evidence. He did give evidence of the standard procedure he says that he would have followed in his dealings with Ms Hungerford. These standard procedures and his training made it unlikely that he would have responded in the way that Ms Hungerford had suggested he did in her evidence.

920. He said that he was not aware at the time that the conversation that he had with Ms Hungerford was part of her due diligence. Accordingly, he had not, thereby, imposed on him the duties that he would have had because of the obvious reliance that he would have then known Ms Hungerford was placing on his responses to her, such as to give rise to a duty of care at law. While that would prevent TTC/Leda being liable for negligent misrepresentation, there is no requirement for proof of the existence of a duty of care in the claim actually made by BHPL under the *Trade Practices Act* and the *Fair Trading Act*. See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197.

921. Mr Beirne, however, was aware of the developments proposed for the Hyperdome to establish paid parking and that some of those developments may have an impact of the foot traffic through the Coles Door as I have noted earlier (at [472]-[474]). He further knew of the proposed upgrade to the Courtyard and that this may have had an effect on the number of people entering through the Coles Door as I have also noted above (at [475]-[479]).

922. Mr Beirne acknowledged that the installation of pipe rails consequent upon the introduction of paid parking would have had some effect on pedestrians moving within the general area leading into the Coles Door. His evidence about that in the context of his conversation with Ms Hungerford was:

> MR ERSKINE: It would have been the fair thing to do to at least tell her there was work that might affect that? --- Yes.
>
> And you see, that's not something that she could find out; that is, the erection of barriers and the like. That's not something she would find out from other sources, was it? --- No.

923. Similarly, Mr Beirne was asked about the developments that were made to the Courtyard. He agreed that these developments were part of the wish of Leda to encourage more people to come into the Hyperdome and spend more time there. His evidence then was:

> But in any event you knew that by making the Lifestyle entry a more attractive place for people to go into the Hyperdome it might have the effect of encouraging them to use that doorway, rather than, for example, the closed door? --- Yes.
>
> Yes. Was that something you think you should, on reflection, have told Ms Hungerford? --- Yes.

924. Ms Hungerford's evidence was, on two occasions, that, had Mr Beirne described these developments to her, she would not have proceeded with purchasing the Giving & Living business. Again, this evidence was not challenged. Indeed, she repeated it in cross-examination without challenge.

925. While it was submitted for TTC/Leda that I should reject Ms Hungerford's evidence or, at least, treat it with great caution, I do not consider that I should reject this evidence in all the circumstances.

926. In the first place, as noted above (at [918]), Ms Hungerford's due diligence, though appropriately criticised, was not challenged on the basis that she did not undertake it, but only that she exaggerated it and I accept that she did carry out due diligence. I do not accept that the superficiality of it was an indication of its lack of importance to her, but rather a measure of her self belief that she would be able to assess the business

by doing what she did. She did look at foot traffic which was acknowledged as a very important factor for a business such as the Giving & Living store.

927. In the second place, her visit to Mr Beirne immediately before she made the final decision to proceed shows that this meeting was likely to be of significance to her as she said in her evidence that it was.

928. Finally, Mr Beirne's acknowledgement of the need to have disclosed the developments to Ms Hungerford shows the importance of them, an importance that, despite my reservations about Ms Hungerford's evidence and her capacities, I do not find that she would not have realised, especially given that she had obviously wandered around the Hyperdome and made herself aware of its layout at least.

929. What, however, is somewhat more difficult is to put the conversation with Mr Beirne in an appropriate context. On the one hand, Ms Hungerford's evidence as to the meeting of 10 July 2003 is set out above (at [235]-[244]).

930. When he gave his evidence, Mr Beirne was, I consider, careful and thoughtful. As would be expected, he did not recall the meeting. Perhaps it would have been useful if he had made a contemporaneous note of it, but there was no reason for him to think that it had particular importance. He was well aware of the limits he should recognise when providing his advice to prospective tenants, such as BHPL was to become, and I had no reason to believe that he was not very conscious of them in the conversation with Ms Hungerford.

931. Thus, he suggested that he would have, based on his experience, an obligation to his employer and would apply the standard procedures he understood and would not have answered the questions in the way that Ms Hungerford suggested. Thus, he would have deflected the questions: "Go and make your own inquiries", or similar or, in relation to the specific affairs of an existing tenant, "I can't give that information out". He said he had no reason to depart from his standard procedures.

932. He did say that the information about the foot traffic through the Coles Door, namely that it was the second highest count for entries to the Hyperdome, was not a confidential matter, but he did not recall saying it. In his first affidavit, filed in the proceedings, however, he recollected mentioning "the door count" and the Coles Door count "as being the second highest in the Centre". He also said that he may have told Ms Hungerford that a tenant was to occupy the Go-Lo site opposite the store opposite the Giving & Living store.

933. Having considered the evidence as carefully as I can, I am not satisfied that Mr Beirne made the representations alleged concerning the quality of the Giving & Living store, its location, the prospects for the business of the surrounding developments that it was a good business in which to invest, or that the rent was market rent or similar.

934. Ms Hungerford does not say that she told Mr Beirne that her conversation was part of her due diligence and I have no reason to believe that he thought that that was so.

935. It may be that, with her mindset on due diligence, Ms Hungerford has misconstrued pleasantries as representations. For example, though this was never suggested in evidence, Mr Beirne may have referred to the Giving & Living business during the pleasantries of his discussions with Ms Hungerford as "a good little business", an

accurate description of it at the time. Ms Hungerford may have heard that as some kind of representation.

936. The reference to the door count and the opposite tenancy, however, do show that the conversation was not only a clinical discussion about the requirements that Leda would impose were BHPL to apply for an assignment of the Sublease.

937. The claim of BHPL as ultimately put in its final submissions was that there was a material non-disclosure by Mr Beirne and, therefore, Leda, which constituted misleading and deceptive conduct.

938. Regrettably, neither party really addressed the issue of whether what Mr Beirne failed to say constituted misleading and deceptive conduct. BHPL submitted simply that "[t]he issue at the time of purchase was disclosure".

939. Understandably, this submission is likely, at least, by implication, because not expressly so worded, to be based on me finding that Ms Hungerford did ask Mr Beirne a question along the lines of, "Is there anything about the Hyperdome that I need to know that would affect my investing in Giving & Living?".

940. No submissions were put by BHPL as to why I should accept that evidence in preference to the denial of Mr Beirne that he was asked that or that, had he been asked, he would have said, "What do you need to know?".

941. Nevertheless, Mr Beirne did concede that he should have also mentioned the developments that had commenced, at the very least in planning, and which he accepted were relevant to the matters he had himself raised with Ms Hungerford, and which he knew were highly relevant to the success of the Giving & Living business.

942. Thus, the issue became one of silence or non-disclosure as a form of misleading and deceptive conduct rather than a positive representation that was misleading and deceptive.

The Law

943. The issue of silence or non-disclosure as misleading and deceptive conduct has had an interesting and varied history. See the helpful tracing of it in Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths, 4th ed, 2015) at Ch 5. The position now has been established by the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 (***Miller***).

944. In *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at 603; [32], 624-5; [108], 646; [179], the High Court had held that, for conduct to be misleading or deceptive, it was not necessary that it convey express or implied representations.

945. Thus, in *Miller*, French CJ and Kiefel J said at 368; [14]:

> In determining whether there has been a contravention of s 52 of the *Trade Practices Act*, it is necessary to determine "whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive". The term "conduct" is to be understood according to its definition in s 4(2)(a) and (b) of the *Trade Practices Act*, which includes a reference to "refusing to do any act". That, in turn, includes a reference to "refraining (otherwise than inadvertently) from doing that act".
>
> (footnotes omitted)

946. This, however, requires a clear articulation of the way in which the conduct, including the non-disclosure, is said to have been misleading. As their Honours had earlier said, at 364; [5]:

> The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off. Its pleading, however, requires consideration of the words of the relevant statute and their judicial exposition since the cause of action first entered Australian law in 1974. It requires a clear identification of the conduct said to be misleading or deceptive. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive conduct or whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive.
>
> (footnote omitted)

947. Thus, the way in which a matter is pleaded will be very important to the question of whether there has been misleading or deceptive conduct: *Barnes v Forty Two International Pty Ltd* [2014] FCAFC 152; 316 ALR 408 at 411-22; [8]-[12]; *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430 at [56].

948. The whole of the circumstances must be considered. In concluding that the appellant in *Miller* did not engage in misleading and deceptive conduct, French CJ and Kiefel J said in *Miller* at 369-71; [20], [22]:

> 20. In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business...
>
> ...
>
> 22. ... as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence...
>
> (footnotes omitted)

949. To a similar effect was what fell from Heydon, Crennan and Bell JJ at 384; [91], 385; [96]:

> 91. Was Miller's conduct in failing to inform BMW, in terms, that the policy to be funded was not cancellable, or that the policy in the bundle was the policy to be funded, misleading? That question requires close analysis of all of the circumstances of the transaction. The parties were commercially sophisticated. They were experienced in their respective fields. The transaction involved the assessment by BMW of an application to lend Miller's client $3.975 million. The only document that Miller supplied in support of the application which appeared to relate to the policy to be funded did not disclose the nature of the risks insured. But it did put BMW on notice that the underlying policy may be an unusual one. BMW made no further inquiry. BMW's failure to make reasonable inquiries would not automatically defeat its statutory claim for damages for misleading conduct. However, given the history of this transaction, it is a circumstance that is relevant to whether Miller's conduct in

failing to disclose its knowledge of the policy is correctly characterised as misleading.

...

96. The requirement of the provision of "full policy information", contained in BMW's quotation dated 8 December 2000, did not make Miller's failure to advise BMW that the policy was not a cancellable property policy misleading. Miller had supplied BMW with a copy of the policy. BMW was an experienced premium lender. The policy was not a lengthy document. It was apparent that it did not insure the holders against loss or damage to property. It did not contain a cancellation clause. Miller's failure to draw to BMW's attention a circumstance that the document itself disclosed was not misleading or deceptive.

(footnotes omitted)

950. While French CJ and Kiefel J did refer in *Miller* to inadvertence, in the extract referred to above at [945], the Court there did not have to address that issue. Indeed, it noted in a footnote (No 46) that "...no issue of unintentional or unknown non-disclosure was agitated in this Court". The weight of authority is now in favour of the approach that the non-disclosure need not be intentional.

951. In *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232; (2005) ATPR ¶42-042 at 42,514; [34], Nettle JA, with whom Batt and Vincent JJA agreed, said:

> The second argument is both wrong in law and contrary to the evidence and the findings below. As to the law, the misleading and deceptive quality of remaining silent inheres in the non-disclosure of information; not in any refusal to provide it. Consequently, it does not follow from the fact that a failure to act must be intentional in order to be actionable, that silence must be intentional in order to be actionable. It is plain in principle and authority that it is not necessary that silence be intentional in order that it may constitute misleading and deceptive conduct for the purposes of s 52.

952. See also *Green v AMP Financial Planning Pty Ltd* [2008] NSWSC 1164; *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76; 248 FLR 193 at 237; [228]; *Clarkson Williams Partners Pty Ltd v Vaughan* [2016] ACTCA 1 at [78].

953. It is acknowledged that McLure P, with whom Pullin JA agreed held in *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* at 204-8; [45]-[66], that non-disclosure had to be intentional or, at least, not inadvertent. There is, of course, a difficulty in this because the nature of the intention required is not entirely clear. The intention cannot be an intention to refrain from disclosure in order to mislead, for an intention to mislead is not required for conduct to be misleading or deceptive for the purposes of s 52 of the *Trade Practices Act*: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228.

954. If that is accepted, it is difficult to see why the failure to mention a matter that the representor knows and knows is relevant and it is the failure to mention which renders what is mentioned misleading or deceptive would be caught by s 52 of the *Trade Practices Act* if the failure to mention was intentional, but not if it were not. That certainly undermines the comment of Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre* at 228 that the section is designed to ensure that "trading must not only be honest but must not even unintentionally be unfair".

955. If, however, the intention was limited to advertence, but without an intention to mislead or deceive (though, of course, such an intention would be caught by s 52 of the *Trade Practices Act*) then it is difficult to see the difference so far as the need for fair business dealings is concerned between an intention not to disclose simply because, for example, the representor mistakenly believed that it was not necessary to do so in order to make the conduct fair, and an inadvertent non-disclosure. Both have the same consequences, which is the concern of the prohibition in the section, and yet there is little to explain in that context why one is prohibited and not the other. After all, inadvertence may stem from carelessness, wilful blindness or ignorance, all of which could also infect an intention not to disclose which is not designed or intended to mislead or deceive.

956. Accordingly, I consider that while I am probably bound to follow at least *CCP Australia Airships Ltd v Primus Telecommunications Pty Ltd* because that would be in accordance with the requirements of the High Court in such circumstances as directed in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at 151-2; [135], I also consider, with respect, that it is correct. Further, I should, in any event, follow the preference for that view expressed by the Court of Appeal in *Clarkson Williams Partners Pty Ltd v Vaughan.*

Consideration

957. To accept BHPL's case at its highest, namely that Mr Beirne answered Ms Hungerford's question, "Is there anything about the Hyperdome that I need to know that would affect my investing in Giving & Living?" by saying that there was nothing, I have to accept Ms Hungerford as a reliable witness. It is her oral evidence alone on which this evidence depends.

958. Any contemporaneous corroboration, which Ms Hungerford says she had in her computer, which she no longer has, but which, curiously given the centrality of this matter, she has made no attempts to retrieve, is unavailable.

959. Counsel for TTC/Leda made detailed, methodical and comprehensive submissions as to Ms Hungerford's credibility by careful reference to the evidence she gave, especially the lengthy cross-examination of her and the other evidence in the case.

960. I do not need to reproduce those submissions; the length alone would preclude that. In general terms, I accept them.

961. In reply submissions, BHPL sought to re-establish Ms Hungerford's credibility by giving examples of "specific instances of TTC/Leda's *own witnesses* corroborating the evidence provided by Ms Hungerford".

962. Regrettably, this does not address the principal issue. The findings I was asked by TTC/Leda to make were as follows:

> 212. Ms Hungerford does not have a true recollection of the events in June/July/August 2003, but has reconstructed those events subsequently in an attempt to cast responsibility for the failure of BHPL's business on TTC/Leda.
>
> 213. Ms Hungerford's account of the representations by Mr Beirne, and matters concerning the events of June/July/August 2013, is replete with contradictions and uncertainties and is inherently unreliable.

963. Those findings perhaps go too far. I accept that, on a number of points, Ms Hungerford's evidence was corroborated by other evidence, including the

evidence of witnesses called by TTC/Leda. That, however, is not sufficient, in my view, to overcome the serious weaknesses in her evidence.

964. In short, I am not prepared to rely on the evidence of Ms Hungerford unless it is corroborated.

965. Further, I formed the view that Mr Beirne was a witness on whom I could rely. He was straightforward in his evidence, he was not argumentative and he made admissions against interest. Indeed, his evidence is the most important evidence on which this case depends and that was evidence that was clearly against the interests of TTC/Leda.

966. Accordingly, I am not prepared to find that Ms Hungerford asked Mr Beirne the question, "Is there anything about the Hyperdome that I need to know that would affect my investing in Giving & Living?". Nor am I prepared to find that he told her that there was nothing she needed to know about the Hyperdome.

967. That undermines the reliance BHPL is able to have on the representation which it submits is central to its claim against TTC/Leda. That representation is set out in paragraph 13(bi) of the Second Further Amended Counterclaim, dated 29 September 2014, as follows:

> In the course of that conversation he represented by Brenda Hungerford on behalf of the defendant that:
>
> ...
>
> (bi) There was nothing that the defendant should know about the Hyperdome that could impact upon the Giving & Living business.

968. While, as noted above (at [946]-[947]), there is a need to be specific in pleading the conduct which is said to be misleading and deceptive, it does not seem to me to be an absolute rule immune from the exceptions otherwise recognised in law and, indeed, laid down in a number of decisions of the High Court.

969. Thus, in *Gould v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517-18, Isaacs and Rich JJ said:

> Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. *But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.* There is abundant authority for this, even if the matter were required to rest on authority only. ... There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own facts.
>
> (footnotes omitted, emphasis added).

970. To the same effect was what fell from Mason CJ and Gaudron J (at 286-7) and Brennan J (at 288) in *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279. See also *Dare v Pulham* (1982) 148 CLR 658 at 664.

971. I approached a similar issue in *Commonwealth v Davis Samuel Pty Ltd (No 7)* [2013] ACTSC 146; 282 FLR 1 at 277; [1959], as follows:

> I shall not dismiss the issue on the basis that it was not pleaded; it seems to me that both parties conducted the proceedings on the basis that this matter was fairly in issue and addressed it comprehensively in submissions.

972. In this case, there was no challenge at the time that Mr Beirne gave the evidence I have reproduced above (at [932]-[933], [926]), that this evidence should be rejected as inadmissible because it was irrelevant to the pleaded case nor was there any subsequent challenge to the way in which this evidence was used by BHPL to justify the alleged misrepresentation. The submissions of both parties joined issue directly on these matters.

973. The pleadings of BHPL could be reasonably criticised quite seriously. They were drafted to some extent as if the claim was one of common law negligent misrepresentation (as to which see *Meredith v Commonwealth (No 2)* [2013] ACTSC 221; 280 FLR 385 at 428-30; [384]-[390]), though not completely. That is to say, they pleaded representations rather than conduct, though the representations, it is accepted, was said in the submissions in this case, to constitute the conduct.

974. In dealing with the issue of non-disclosure, however, the pleadings in this form showed some inflexibility, for the true conduct on which BHPL was relying was constituted by Mr Beirne's silence as to matters of which he was well aware in the context of the statements that were made by him.

975. Again, no point was taken about this by TTC/Leda and their submissions directly addressed the issue of non-disclosure. They submitted that this was not a "no transaction" case (cf *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8; (2007) ANZ ConvR 254) and that the admitted non-disclosure did not amount to misleading or deceptive conduct because, relying on *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 at 114, silence does not ordinarily amount to a breach of s 52 of the *Trade Practices Act*.

976. Further, TTC/Leda submitted that the non-disclosure was not capable of inducing error (*Butcher v Lachlan Elder Realty Pty Ltd* at 625; [109]), that a reasonable person in the position of BHPL would not have misunderstood the conduct to have meant that there were not going to be changes in the Hyperdome that would impact on the Giving & Living business (*North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2010] FCAFC 60; 269 ALR 262 at 272; [46]-[48]), and that the context of the conversations and the words said, especially to what they were in reply, were all necessary considerations which, in this case, would not have led to liability.

977. Indeed, TTC/Leda made detailed submissions about the issue of silence in the context of commercial transactions.

978. No challenge was made by TTC/Leda to the fact that the non-disclosure was not pleaded. In all the circumstances, I am satisfied that the issue was, in reality, despite the inadequacy of the pleadings, fairly an issue on which the parties were consciously and adequately joined.

979. The question then is whether the admitted non-disclosure by Mr Beirne amounted, in all the circumstances, to misleading or deceptive conduct.

980. The position taken by TTC/Leda was that the meeting of 10 July 2003 appears to have been one in which Ms Hungerford was merely introducing herself to Mr Beirne as a prospective new tenant and purchaser of the Giving & Living business. She was seeking information as to how she should effect the transfer of the Sublease and what other information was required. This, I have to say, was not expressly stated but seems to be the proper inference to be drawn from the submissions I received.

981. In order to assess the liability of TTC/Leda that BHPL says the conversation and non-disclosure made, it is necessary to explore a little more the context and circumstances of the meeting.

982. Mr Beirne expressly admitted that he referred to the foot traffic count at the Coles Door and accepts that he may probably have referred to the change of tenancy or filling of the tenancy at the store opposite to the Giving & Living store.

983. If the meeting was of the kind that I have inferred that TTC/Leda suggests it was, then these were, at least, curious statements to make at such a meeting.

984. The expert evidence in this case was that, for a business such as the Giving & Living business, foot traffic passing it was essential to its viability. There was no dispute about it. Mr Beirne accepted it also. Though I could not see where Mr Beirne was expressly asked about that, his acknowledged training and experience would certainly have equipped him with that knowledge.

985. In that context, the reference to these two matters must be seen as a qualitative reference to the sustainability of the business and the value of its location; the foot traffic coming through the Coles Door was the traffic of potential customers who were inevitably passing the Giving & Living store. That is, in the context, the real meaning of that information. In the context that was highly relevant information about the circumstances under which Giving & Living store was likely to be successful, having a large pool of potential customers.

986. That a store, with apparent likely customers attracted for a similar shopping intent, was to be established opposite the Giving & Living store would, of course, constitute competition but would also attract custom which would be available to be attracted to the Giving & Living store.

987. These pieces of information do not sit easily into a meeting that is merely about the administrative requirements expected by Leda of BHPL for the assignment of the Sublease. They stray considerably into the area of the value and sustainability of the Giving & Living business.

988. Both representations were true and cannot, of themselves, constitute misleading or deceptive conduct. The focus of them, however, must reasonably be seen as centrally concerned with the necessary pre-condition to the viability and value of the Giving & Living store, namely customers passing the store; foot traffic.

989. Mr Beirne, however, in his honest answers in cross-examination, was aware of changes to the Hyperdome which he also knew may likely have an effect on that very matter – the number of persons entering the Coles Door. He may have been wrong about that; indeed, it appears that the Coles Door remained for the whole of BHPL's tenancy of the Premises at the Hyperdome either the highest or second highest sources of foot traffic of any entry to the Hyperdome. That, however, is not the test.

990. The test is whether, by his failure to mention these developments, Mr Beirne had created a misleading impression that constituted misleading or deceptive conduct.

991. As with many such cases, this is not easy to resolve. Ms Hungerford must be taken to have understood, as a self-described "astute businesswoman", that neither statement constituted a guarantee that such a position would pertain indefinitely. Neither statement could be relied upon by her as a guarantee of the continued viability of the Giving & Living business or, indeed, the continued relative position of the Coles Door amongst other entries to the Hyperdome.

992. I also accept that this was an arms-length commercial transaction for which Ms Hungerford would need to rely on her own inquiries and, indeed, in which she did make some genuine attempts to undertake due diligence no matter how superficial I have found it.

993. It is a very important matter, however, that Ms Hungerford could not, on the evidence of Mr Beirne, have discovered this information herself. This was information known to Mr Beirne but which was unknown and unknowable by Ms Hungerford.

994. It was not information to which Ms Hungerford was entitled to know. Mr Beirne may well have made it available to her if he had thought that it provided a picture of a dynamic and developing centre of which BHPL may well wish to be a part. On his evidence, however, Leda's attitude to BHPL's purchase of the Giving & Living business was one of neutrality; it had a current tenant and was indifferent to whether there would be a change, so long as any incoming tenant was respectable, financially stable and able to conduct a worthwhile business. There was no need for Mr Beirne either to encourage or discourage Ms Hungerford from having BHPL proceed with the purchase.

995. In this context, it seems to me that Mr Beirne, having decided to disclose certainly the Coles Door foot traffic information and probably the Go-Lo store opening information, he was obliged also to disclose the moderating or even, to his understanding, possibly negative information about the relevant developments.

996. TTC/Leda submitted that I should not rely on Mr Beirne's concession that he should have mentioned the developments, the changes proposed to the Hyperdome.

997. It was submitted that this was a concession made with hindsight and "cannot be of assistance to the Court".

998. Indeed, it was submitted that, given what Mr Beirne *did* say about the foot traffic at the Coles Door and nothing more, I should infer that Mr Beirne considered at the time that the developments "were not relevant to that statement and were not necessary to mention". This, it was submitted, must be particularly so when Mr Beirne had no recollection of the conversation.

999. No such evidence was led from Mr Beirne; he was not asked whether this concession was the product of hindsight. His evidence was certainly not couched in those terms. He was aware that there were developments occurring in the Hyperdome, in particular, paid parking and "upgrades".

1000. The context of the conversation was important. In particular, Mr Beirne conceded that, because Giving & Living Pty Ltd was in arrears with its rent and had been discussing a surrender of the Sublease, the BHPL purchase was "a pretty good deal"

for the Hyperdome, especially as a surrender would have required a new tenant to pay only market rent which was less than that under the Sublease.

1001. Mr Beirne also conceded that what he said to Ms Hungerford was effectively a representation that the Giving & Living store was in "a good location" because of the essentiality for such a retail outlet on passing "foot traffic".

1002. He also knew, at the time, that the Hyperdome was proposedly to carry out developments that may affect the foot traffic through the Coles Door.

1003. Accordingly, it seems to me that, in this context, the non-disclosure by Mr Beirne did amount to misleading or deceptive conduct. I so find.

Damages

1004. BHPL sought damages under five categories. The total damages sought was in the amount of $4 313 100. The head of loss claimed were:

(a) Foreseeable consequential loss;

(b) Costs of borrowing as a consequential loss;

(c) Damages for the loss of the use of the money that BHPL paid away and lost as a direct consequence of the actions of the Defendant;

(d) Opportunity lost; and

(e) Loss of the cost of mitigating the loss, such as opening the shops at Yarralumla and Manuka.

1005. These were, however, not quantified under these heads of losses, but in a slightly different way. This resulted in part from the approach taken by the accountants who were called as experts, Mr Haley for BHPL and Mr Meredith for TTC/Leda. The two experts provided different approaches with some commonality. Both quantified the amount that, were I to find TTC or Leda or both liable, BHPL should recover. I have comprehensively addressed their evidence earlier.

1006. There was also some challenge by Mr Meredith as to the recoverability of some of the claimed losses but, in some cases, he opined that, were that claimed loss recoverable, the quantification should be calculated in a different way than that proposed by Mr Haley. I shall deal with those issues later, but it is convenient to set out here the categorisation of loss made by the experts and the quantum each calculated. This is as follows:

Category of Loss	Quantum – Haley	Quantum – Meredith
Capital Outlays	$ 281 451.00	$ 358 895.00
Borrowing Costs	$ 139 407.00	$ 66 449.00
Trading Losses	$ 701 531.00	$ 549 651.00
Interest on Funds Advanced	$ 907 531.00	$ 907 531.00 (Disputed category)
Remuneration to Ms Hungerford	$ 824 854.80	$ 391 722.69 (Disputed category)

Lost Profits	$1 458 326.00	$Nil
Total	$4 313 100.80	(a) $2 274 248.67 (b) $ 974 995.00

1007. In the column setting out the figures calculated by Mr Meredith the total losses is represented by two figures, one marked (a) by inclusive of the two disputed amounts and the other marked (b) without them.

The law

1008. BHPL's claim is for damages under s 82(1) of the *Trade Practices Act*. That section is as follows:

> **82. Actions for damages**
>
> (1) Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

1009. That section is substantively the same as s 82(1) of the *Competition and Consumer Act 2010* (Cth). It is also relevantly identical to s 46 of the *Fair Trading Act*, as it stood at September 2003. Subsection 82(1AAA) excludes from the action for damages under this section claims for personal injuries.

1010. While the section has been addressed in many decisions, the bounds and approach to the section has not been settled in any final way, though there is much of assistance in the current jurisprudence.

1011. In *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 495 (***Marks***) at 526-7; [95], Gummow J analysed the section as follows:

> Section 82 has at least five discrete elements. First, it identifies the legal norms for contravention of which the action under the section is given. Secondly, it identifies those by and against whom that action lies. Thirdly, the section specifies the injury for which the action lies as the suffering of loss or damage. Fourthly, it stipulates a causal requirement that the plaintiff's injury must be sustained "by" the contravention. Finally, the measure of compensation is 'the amount of' the loss or damage sustained.

1012. As a statutory provision, s 82 of the *Trade Practices Act* must be construed in its statutory context. Thus, for example, it is applicable to a wide range of conduct the contravention of which renders the contravening party liable to compensate the injured party for the damages for which it provides. See *Marks* at 509; [33]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 (***I & L Securities***) at 115-6; [12]. This requires a degree of flexibility of approach that prevents any particular approach as a paradigm.

1013. That it is a statutory provision also requires the courts to understand the statutory purpose and context of the provision which is essential to an understanding of its application. Thus, as McHugh J pointed out in *I & L Securities* at 135; [84], the statutory nature of the right of action the section provides necessarily distinguishes it from actions at common law in tort or contract.

1014. The relevance and nature of the purpose of the statutory regime within which s 82 of the *Trade Practices Act* appears was described by Gleeson CJ in *Henville v Walker* [2001] HCA 52; 206 CLR 459 at 470; [18], as follows:

> The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act.

1015. Nevertheless, the courts have used as analogies the actions in tort and contract, as, for example, in *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 290-1. Such analogies must be used circumspectly, however, for as Gummow J observed in *Marks* at 529; [103], "[a]nalogy, like rules of procedure, is a servant, not a master".

1016. Earlier statements in cases such as *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 and *Kizbeau Pty Ltd v WG & B Pty Ltd* that seemed to fix the assessment of damages more firmly in the processes of the common law of tort or contract, are now described as not to be read in that way and not to permit the assessment to be confined so rigidly: *Marks* at 525; [90] and 529; [103].

1017. Nevertheless, as McHugh J also pointed out in *I & L Securities* at 135; [84], "[i]n many cases, the application or tort or contract principles leads to a just result".

1018. On the other hand, it is clear since *Henville v Walker* at 482; [66], 505; [140] and 509-10; [165], that contributory negligence plays no part in the assessment of damages for misleading and deceptive conduct. That has been modified by statute but that statutory modification does not appear to be relevant to these proceedings.

1019. The loss and damage must be actual loss and damage that BHPL has suffered: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526; *Marks* at 531-2; [107]-[108]. The statement in the Full Court of the Federal Court in *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 261 that "[p]otential or likely damage is not actual damage which has already been suffered" was expressly approved by the High Court in *Wardley Australia Ltd v Western Australia* at 526-7. Once the amount of that loss and damage suffered by a claimant by the contravening conduct is determined, it has been said that this is the amount that the claimant has to recover: *I & L Securities* at 117; [20]; *Henville v Walker* at 503-4; [135]. Nothing in the words of s 82 of the *Trade Practices Act* justifies a court in compensating a claimant, who has suffered loss and damage by conduct in contravention of a relevant provision of the Act, for only part of the loss or damage which has been suffered by that person by that conduct: *I & L Securities* at 130; [61].

1020. Nevertheless, the amount of the loss or damage which is sought to be recovered, where the loss or damage is said to be a liability to a third party, requires the liability to be proved to exist, on the balance of probabilities: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2006] NSWSC 223; 14 *ANZ Insurance Cases* ¶61-701 at 75,511; [1154].

1021. The question of causation itself has, however, been considered a number of times, but without resulting in a final or definitive articulation of the way in which a court should approach it.

1022. There is, it has been suggested, a two-stage approach to the topic. In the first place, there must be shown that the contravening conduct, the misleading and deceptive conduct, must have led to the claimant taking particular steps or refraining from taking those steps, that is relying on the conduct. In the second place, there must be a sufficient link between that reliance and the loss or damage claimed. See *Australian Protective Electronics Pty Ltd v Pabflow Pty Ltd* (1996) ATPR ¶41-524 at 42,736.

1023. Thus, as Dixon J said in *Potts v Miller* (1940) 64 CLR 282 at 297, a plaintiff is "entitled to the full loss caused by his [sic] reliance on the misrepresentation". That case involved a claim for damages for the tort of deceit, but that has been a useful analogy on which the courts have relied over time.

1024. There is, however, a question of the connection between the plaintiff's reliance on the misleading or deceptive conduct and the loss. The question of causation is a complicated one because of the nature of the relationship between the contravening conduct and the loss or damage, as Brennan J explained in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 356-7, as follows:

> When conduct done in contravention of s.52 of the Act consists in the making of false representations inducing a person to act or to refrain from acting, the relevant loss or damage may flow from that person's own act or omission and only indirectly from the other person's contravening conduct. In such a case, the person's own act or omission is a link - not a break - in the chain of causation which stretches from the contravening conduct to the loss thus produced and the amount of the loss is recoverable by the person who has suffered it. The existence of a compensable loss and the amount of compensation is ascertained by inquiring whether and by how much that person is worse off as a result of acting or refraining from acting on the inducement of false representations by the other person...
>
> (footnotes omitted)

1025. The complexity in the area may be seen from the contrasting explanation in *Wardley Australia Ltd v Western Australia* at 526, where an analogy with damages for deceit was used to describe "the actual damage[s] directly flowing from [the misleading] conduct".

1026. Some matters are, however, clear. In the first place, the notion of causation is not one of high philosophy; the enquiry is not to find "one factual cause", an "effective cause" or the "proximate cause": *I & L Securities* at 128; [56]. There is no "universal connections between phenomena": *Henville v Walker* at 490; [97].

1027. Following on from this, the concept of causation is a practical or commonsense one: *Wardley Australia Ltd v Western Australia* at 525. As decided in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, it is not the "but for" test that had previously been promoted in some quarters.

1028. While commonsense and pragmatism are important, they are not regarded as overtaking the need for a principled approach as opposed to an approach which relies solely on values or policy, an approach that, with its normative considerations, risks subjectivism: *Travel Compensation Fund v Tambree (t/as R Tambree and Associates* [2005] HCA 69; 224 CLR 627 at 639; [28]-[29], 643; [46]-[47]. See, however, the trenchant criticism of this approach by Kirby J in the same case at 646-51; [57]-[70]

and the somewhat moderate approach to somewhat the same effect by Callinan J in the same case at 653; [80].

1029. The question, then, of the reach of the causative relationship between the contravening conduct and any loss or damage suffered by BHPL is somewhat diffuse and not subject to a clear legal formula. The cases, however, do point to some approaches that should be adopted.

1030. Thus, in *Henville v Walker* at 504; [136], McHugh J with whom Gummow J agreed said:

> Given the long history of the common law's recognition of the concept of remoteness in assessing damages in contract and tort and its relationship with the issue of causation, it seems proper to read the term "by" in s 82 as including the concept of remoteness. By remoteness, I mean that the loss or damage was not reasonably foreseeable even in a general way by the contravener.

1031. It is not, his Honour, however, added, a remoteness that re-introduces the concept of contributory negligence and causation.

1032. As with contributory negligence, it seems that foreseeability is irrelevant: *Henville v Walker* at 482; [66]. To that extent the common law concept of remoteness may have to be applied with relevant modification.

1033. A useful analysis of the reasons of the members of the Court found in David Wright*, "*Monetary Remedies under the Trade Practices Act" (2002) 22 *Australian Bar Review* 39. Mr Wright referred (at 46) to what McHugh J said in *Henville v Walker* at 505; [140]:

> There is no ground for reading into s 82 doctrines of contributory negligence and apportionment of damages. No doubt, if part of the loss or damage would not have occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s 82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the Act.

1034. He referred, too, to what Hayne J said at 510; [166] in the same case:

> Thus, if notions of remoteness of damage or reasonableness are to find reflection in s 82(1) it seems probable that they may do so only through consideration of the causation question which the sub-section poses. As Professor Stapleton has pointed out, questions of remoteness of damage in tort can be seen in terms of causation. Likewise, asking what is "reasonable" in assessing how much of the loss was caused by the contravention may invite attention to the nature and extent of the causal connection between the loss and contravening conduct. This case does not present such questions and it is not necessary to decide them.

1035. Mr Wright then helpfully concluded at 46:

> This test of "reasonableness", accepted by McHugh, Gummow and Hayne JJ in *Henville*, is a brake on the idea that the conduct of the plaintiff is irrelevant to damages under s 82. According to Hayne and Gummow JJ, the operation of this test of "reasonable" under the TPA is part of the test of causation. This test of 'reasonableness' is extremely relevant to a correct understanding of the operation of s 82 damages. Ideas such as contributory negligence are not relevant to the section but reasonableness may be. The discretionary nature of all this should be noted.

1036. Indeed, having regard to reasonableness, Gleeson CJ in *I & L Securities* at 120; [29], adopted what Hodgson J had said in *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575, namely:

> If *some part of the damage* would not have occurred but for negligent conduct of the claimant, or failure to mitigate, then it may be appropriate to apply notions of reasonableness in assessing how much was in truth caused by the contravention...
>
> (emphasis in original)

1037. McHugh J at 137; [88] in *I & L Securities* also adopted this passage. As his Honour then went on to say, this was a distinction adopted by all members of the Court in *Henville v Walker*, though the minority and majority justices differed in their application of it.

1038. While this concept, reasonableness, has a degree of fluidity, it is helpful in identifying the limits of the loss and damage that should be considered as having been caused by the contravening conduct.

1039. In addition, some further efforts have been made to identify those limits. Thus, for example, the courts have eschewed the suggestion that the author of the contravening conduct becomes the "underwriter" or "insurer" of any venture the claimant or plaintiff was induced to enter by the relevant conduct: *Henville v Walker* at 471; [23].

1040. The courts have also tried to identify how the extraneous or independent causes can be identified so as to exclude losses for which they are responsible. Thus, Gleeson CJ referred with approval in *I & L Securities* at 120; [29] to what Hodgson J had said in *Tefbao Pty Ltd v Stannic Securities Pty Ltd* at 575, as follows:

> It is clear that the contravention need not be the only cause of the loss or damage ... However, if some other cause is properly to be treated as 'the real, essential, substantial, direct, appreciable or effective cause' of the damage, the fact that the damage would not have occurred but for the contravention need not be enough for liability.

1041. McHugh J in *I & L Securities* at 137; [88], also approved that approach.

1042. Some other restraints have been identified. Thus, McHugh J in *I & L Securities* at 136; [85] approved of the approach of French J in *Pavich v Bobra Nominees Pty Ltd* (1988) ATPR (Digest) ¶46,039 that, although the contravening conduct may be the *sine qua non* of the loss claimed, there may come a point where the claimant's own conduct was "so dominant" in the causal chain as to constitute a *novus actus interveniens*. This approach was also referred to with approval in *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 286-7.

1043. This is not the only basis for a court holding that a loss or damage that follows contravening conduct is not relevantly caused by the contravening conduct, but the test is a high one. Thus, in *Henville v Walker* at 472; [27] and *I & L Securities* at 118; [24], factors of this kind are referred to by Gleeson CJ as "extraneous". In *I & L Securities* at 130; [62], McHugh J refers to them as "independent" of the contravention.

1044. As to sales of businesses, the Federal Court has considered this issue on a number of occasions. Thus, in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 562, the Court held that the allowance for trading losses post purchase of a business infected by contravening conduct is by no means automatic.

1045. In *Netaf Pty Ltd v Bikame Pty Ltd* (1990) 26 FCR 305 at 308, Sheppard and Pincus JJ said:

> We reiterate that, where a purchase has been induced by misleading conduct, it is not enough, in order to recover losses subsequent to the purchase, to prove that but for the misleading conduct or as a partial consequence of it, the agreement to purchase would not have been made; that is so in every successful application of that kind. It is not the law that in every such case the party held to have been engaged in misleading conduct (who may have acted quite innocently) becomes the insurer of the other's success and prima facie liable to indemnify him against the consequences of the purchase. As the trial judge said in the present case:
>
> > "To recover a loss sustained in the business, the applicant must show more than that it was sustained in the conduct of that business; for to show only that is to establish what is perfectly consistent with the loss having arisen from his own misguided management decisions, or even total neglect."
> >
> > His Honour said that he was:
> >
> > > "...not, however, persuaded the applicant has discharged the onus of showing that losses suffered after the completion of the purchase are attributable to the breach. Unfortunately, the applicant's directors were wholly unfamiliar with the liquor industry. The evidence called in the applicant's case establishes, in my opinion, that the business was not worth what was paid for it, but that is quite a different thing from saying that it was likely, not merely to earn a lower profit than anticipated, but actually to lose money".

1046. The notion of the contravening party not being the claimant's "insurer" is the same point made in *Henville v Walker* to which I referred above (at [1039]).

1047. The same point was made by Croft J in *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability and Environment* [2010] VSC 389; 241 FLR 360 at 422; [131], as follows:

> As the authorities indicate, it is not the law that in every case where a party is held to have been engaged in misleading conduct that party becomes the insurer of the other's success and liable to indemnify it against the consequences of a purchase. Not all losses after an acquisition are "caused" by the contravention in a legal sense. If losses result from the plaintiff's own continuation of the business after discovering the truth, the plaintiff is not entitled to recover the losses from the defendant. This is especially so where the plaintiff had the option of selling or otherwise exiting the business for a profit, but elects not to take up that option.
>
> (footnotes omitted)

1048. While BHPL would, were it to have abandoned the store at an earlier stage than it did, exposed itself to the risk of paying the rent for the balance of the term, this would have likely been less than the losses it ultimately incurred.

1049. On the other hand, the actual experience was that TTC was able to install a new tenant in the Premises within four months. It is, of course, likely that a shopping centre operator would be keen to avoid having empty shops in the centre and there would be an imperative to find a new tenant.

1050. It is, however, for the contravening party to "disentangle, as far as possible, the various contributing factors": *Henville v Walker* at 507; [148].

1051. Thus, the contravening party may be able to identify matters which have contributed to the loss which the non-contravening party has taken for which the contravening party should not be liable.

1052. Similarly, matters of mitigation which the non-contravening party has taken or should have taken are relevant.

1053. Some of these matters are, perhaps, best appreciated through a consideration of the matters which have been identified in the case law and I have been much helped by the thorough and insightful analysis in Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (at 425-33; [10.26]-[10.32]). I do not need to summarise what is there said, save to say:

- mitigation has some role to play: *Munchies Management Pty Ltd v Belperio* at 287; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)* (1989) 40 FCR 76 at 93; *Western Australia v Bod Corporation Holdings Ltd* (1991) 28 FCR 68 at 82; *Pavich v Bobra Nominees Pty Ltd* at 53,124;

- mitigation has three aspects:

  (a) positive action by the claimant, though in the chain of causation will not be made by reasonable conduct done with the aim of mitigating: *Hellyer Drilling Co v MacDonald Hamilton & Co Pty Ltd* (1983) 51 ALR 177 at 192, though unreasonable acts will break that chain: *Henville v Walker* at 503; [134]; *Drake v Mylar Pty Ltd* [2011] NSWSC 1578 at [61];

  (b) omissions by the claimant to take reasonable action after discovery of the true facts: *Bateman v Slatyer* (1987) 71 ALR 553 at 568; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)* at 83-5;

  (c) any action taken by the claimant which actually reduces the loss or provides a benefit to the claimant will be taken into account, even if there was no duty on the claimant to act: *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1991) 33 FCR 1 at 17;

- third party conduct may constitute a supervening cause between a contravention and the claimant's loss: *Hay Properties Consultants Pty Ltd v Vic Securities Corp Ltd* [2010] VSCA 247; 241 FLR 335 at 357-8; [86]-[92]. This will include the action of competitors of the claimant's business: *Netaf Pty Ltd v Bikane Pty Ltd* at 495;

- there is some hesitation in the cases in reducing losses for external factors, such as a weakness in the currency or economic downturn: *Bateman v Slatyer* at 568, *Jaldiver Pty Ltd v Nelumblo Pty Ltd* (1993) ATPR (Digest) 46-097 (see in this regard the unreported full judgment: Federal Court of Australia, Heeney J, 2 December 1992 at 95), such an event may be properly regarded as "extraneous": *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd (No 2)* [2009] WASC 183; 261 ALR 179 at 205; [118].

1054. Finally, BHPL submitted that, based on the decision of the High Court in *Hungerfords v Walker* (1989) 171 CLR 125, BHPL is entitled to recover the opportunity cost of money paid away which would otherwise have been available to BHPL to use for profitable investment.

1055. It is then necessary to apply these principles to the consideration of the claim made by BHPL.

1056. Before doing so, however, it is necessary to consider some more general matters which will inform the consideration.

The Forensic Accounting Experts

1057. I have noted above (at [516]-[589]), the general evidence of the experts called by the parties to give evidence of the value of the loss or damage recoverable, namely Mr Meredith and Mr Haley.

1058. While both were well-qualified forensic accountants with many years of experience, including in the preparation of expert reports for courts and the giving of evidence in courts, there were significant differences in their reports and their presentations.

1059. Mr Haley prepared two reports. In the first, he calculated the total losses claimable by BHPL as $4 613 481, somewhat more than that claimed by BHPL in its final submissions. In the second, he calculated the total losses as $5 296 052, well above that finally claimed by BHPL.

1060. The differences between the two amounts were:

(a) bringing to account a small profit of $18 934 made by BHPL in the financial year ended 30 June 2012 which had not been available to him when he prepared his first report;

(b) an increase in interest on funds advanced by third parties to bring it up to 30 June 2013 in his second report where the first report calculated this head of loss to 31 March 2012; and

(c) an increase in the loss of profits again bringing the calculation up to 30 June 2013.

1061. It is not clear why BHPL did not ultimately rely on this updated amount and how the figure sought was reconciled with his report.

1062. Mr Haley's reports, however, were heavily reliant on instructions. That is not a criticism, but it does mean that, unless those instructions reflected the admissible evidence which supports them, then the opinions based on those instructions are of no assistance in determining the question of damages.

1063. Thus, as Cresswell J said in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at 81:

> 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of an advocate.

1064. For example, there was a difference between the experts as to losses that would be caused to third parties, in particular Ms Hungerford, which she would, it appears, seek to receive from BHPL but for which there was no relevant documentation.

1065. In many of these cases, Mr Haley relied on instructions. This was the basis of his challenge to the refusal of Mr Meredith to acknowledge a liability of BHPL to Ms Hungerford for moneys owed for interest on advances to BHPL.

1066. Mr Meredith explained in his evidence about the loan:

> As far as I'm aware that it was a shareholder's loan made interest free. There's no record of interest being charged on that loan. I don't recall any notes to the accounts, which provide any further detail in terms – that there was interest on that loan to be accrued at any time. So from the perspective of BHPL my view, which is reflected in the financial statements is that there is no liability for that interest on that loan because it wasn't charged and it wasn't accrued.

1067. Mr Haley, in his second report, addressed this issue as follows:

> I am instructed that, as is normal practice with closely controlled entities, there was no formal documentation evidencing BHPL's liability to Ms Hungerford in respect of interest on funds advanced to it by her and the intention to remunerate Ms Hungerford was included in the twelve month cash flows provided to Leda. By bringing the interest and wages to account BHPL would have increased its losses whilst creating additional taxable income in Ms Hungerford's hands. I am instructed that BHPL was unable to make the interest payments and remunerate Ms Hungerford as a result of the poor trading performance of the business operated by BHPL.

1068. This was consistent with his oral evidence as follows:

> HIS HONOUR: How would you determine what the terms of the loan were?
>
> MR HALEY: Well, I was instructed in this case. The intention had been that there would have been interest paid. The reason why it wasn't paid was as I said before, but, yes, there is no documentation.

1069. There was no other evidence about these issues. No expert gave evidence about this "normal practice" though Mr Meredith gave evidence from his expertise about a different "normal practice".

1070. There was then some evidence about the need for documentation. Mr Haley's evidence was:

> When you sit down and prepare a set of accounts at the end of the year in circumstances like this, the company's accounts are basically – the profit is the taxable income. So most people wouldn't even prepare accounts if they didn't have to do a tax return. So you only put in there as expenses the things you intend to claim as deductions. So whether there was an obligation or not is not necessarily always reflected in the accounts because the accounts are only reflecting what actually occurred, and I think we're all in agreement, there was no interest paid.

1071. On the other hand, Mr Meredith pointed out:

> The only thing, accounts should be prepared in accordance with accounting standards. If there was a loan which was interest bearing, the interest should have been at least accrued, and it wasn't in the financial statements.

1072. Mr Haley's final comment was:

> Well, just that doesn't happen in the real world.

1073. It can be seen that there was a significant reliance by Mr Haley on the instructions he had received. There was, however, no direct evidence of these matters. There was no expert or other admissible evidence of the practice of "closely controlled companies". Ms Hungerford did not give any evidence about these matters, apart from one brief reference in which she suggested, but without any specific information, that directors of BHPL were to be paid $60 000 per annum.

1074. Her evidence about interest was also entirely confusing and it was not clarified in either subsequent evidence or submissions.

1075. In the absence of an evidentiary basis for the instructions provided to Mr Haley, the value of his reports was seriously diminished.

1076. Further, there were some problematic questions about the process of preparation of his reports. Thus, an email to BHPL's lawyer in which he queried the quantification of the loss was tendered in which he said:

> I am still working through the consequential losses suffered by related parties. Brenda has commented several times that her loss should be the difference between her net asset position at the time she bought the shop and her net asset position now. I'm still trying to reconcile that from a reasonableness point of view as that number is greater than $3 million but the losses suffered by the company that actually operated the shop is only $1.1 million.

1077. Mr Haley confirmed that, from a review of the financial statements of BHPL, he formed the view that the losses sustained were $1.1 million. He said that Ms Hungerford, however, had told him:

> that at the time she bought the shop she had a nett asset position of approximately $3 million and now it was zero. So therefore she's lost $3million.

1078. Later, in a further email to BHPL's lawyer, he had this to say:

> I consider it is fairly straightforward that the company incurred losses of $1.1million.
>
> Unless the financial statements for the company (which Brenda has signed off on over the years) are incorrect the $1.1 million is the loss suffered by the Party (the Defendant) to the action. On a reasonableness basis it is difficult to see how $1.1 million in direct losses convert to a $3 million total loss and this is what I'm having trouble reconciling.
>
> ...
>
> If we've identified the $1.1 million lent to the company (assuming the net amount owing on the Bingi facility represents that amount) then it will be difficult to convince a judge that a further $529,398 was lent to the company.

1079. The explanation he offered for the different result in his report was that there were "further leads that weren't reflected in the accounts as they were prepared", though he had earlier stated that he had no reason to doubt the veracity of the accounts with which he had been supplied. He explained that these changes were the result of instructions, but there was no probative evidence of the facts that would support those instructions. Ms Hungerford said nothing of these matters in her evidence nor were her accountants called to provide any such evidence.

1080. While an expert relies on his or her expertise, it must, of course, be grounded in the facts of the particular case. Those facts can come in various ways; as is clear from *J* (1994) 75 A Crim R 522 at 524, there is no one mandated way. To receive instructions as needed, Mr Haley acted properly. What is critical, however, is that the facts on which the expert relies must ultimately be proved, else the expert's opinion will be "weaken[ed] or destroy[ed]": *R v Tonkin* [1975] Qd R 1 at 17.

1081. In my opinion, the evidence of Mr Meredith should be preferred to that of Mr Haley because of the influence of instructions on Mr Haley which instructions were, ultimately, not shown to have been proved in the case.

The nexus argument

1082. Mr Haley included in his calculations of the damages suffered by BHPL amounts of loss or expense of BHPL which Mr Meredith rejected. At issue here between them

was the question of whether the entitlement to damages flowed as far as was opined by Mr Haley. This was termed "the nexus argument" for it raised the question of whether there was a relevant connection between the particular head of damages and the misrepresentations by silence on which BHPL relied.

1083. This, of course, depends in a significant part on the vexed question of causation to which I have referred above (at [1021]-[1043]). While no clear or simple test has yet been articulated, and it may not be reasonably possible for it to be set out in such terms, the courts must address the issue.

1084. It is to be addressed in a pragmatic, commonsense but principled way. Any damage must be related to the cause of action, namely in the reliance on the representation or conduct but recognising that the defaulting party is not the injured party's insurer or necessarily liable for all the losses that follow simply because it occurs temporally after the cause of action.

1085. In this case, there are two principal matters that need to be addressed. The first is the opening of the two additional shops in Yarralumla and in Manuka. Ms Hungerford explained that she had made various attempts to increase custom to the shop in the Hyperdome; she introduced a range of jewellery, she took efforts to keep the shop looking good and to have diligent and experienced staff.

1086. The Manuka store was a business she started by acquiring the lease; the Yarralumla business was an existing business, though the stock there had been "let go down". Ms Hungerford used stock from the store at the Hyperdome to replenish the stock there. In fact, the stock for the three stores was generally the same, though with minimal kitchenware.

1087. Ms Hungerford explained why she opened the stores as follows:

> I thought that with the marketing, which was extremely poor quality at Tuggeranong, that if I was able to do some marketing myself, radio and television marketing, and I could justify the expense between three shops as opposed to one shop, and I also hoped that the Manuka and Yarralumla shops would in some respect support the cash flow of Tuggeranong. Sorry, just one other thing. To even out the ups and downs of the – what I thought – I kept thinking it was going to recover because after paid parking was introduced, I thought it would recover. But of course it never did.

1088. No business plans to support the "hope" of supportive cash-flow were produced; it seemed just to be the possibility of giving an economy of scale for advertising.

1089. At no time was Ms Hungerford asked, nor did she say, that the misleading or deceptive conduct caused her to purchase the Manuka and Yarralumla stores. This is, perhaps, only a straw in the wind, for her explanation was as to marketing. It might be inferred that the losses BHPL was then suffering caused her to look at this. It was, however, her contention that the developments at the Hyperdome, which, she asserted, had led to the significant reduction in foot traffic through the Coles Mall, was the cause of her losses and that this was directly referable to the misrepresentations or misleading conduct.

1090. Thus, the poor marketing which may or may not have been relevant – there was no evidence about that other than Ms Hungerford's mere assertions – may well have meant that she would have opened the other stores even if there had been no reduction in foot traffic. This issue was simply not explored.

1091. Further, at the same time, she changed the name of the business. That potentially lost her the goodwill of the name of the Giving & Living store, especially as there was no evidence to suggest that the new name had any particular attraction or good will attaching to it.

1092. So far as the opening of the extra stores were concerned, no evidence was given as to whether that was a desirable option for BHPL to take. Of the experts, only Mr Duane commented on it. His evidence was:

> The first is you open – what's happened here is an environment where a store was going backwards and they've opened two new stores ... Within the same southern part of Canberra. It's highly unusual to have a retail chain of any sort to be opening new stores in an environment when you've got a decline in sales.

1093. BHPL, in its submissions, inaccurately suggested that Mr Duane agreed that the opening of these additional stores "could and should have been done". That was not his evidence; he expressly said, "I'm not sure it is an affirmative strategy".

1094. Indeed, of the other strategies suggested, such as sourcing cheaper stock, opening a tea and coffee shop within the Giving & Living store, relocation, downsizing, and extra marketing, Mr Duane gave what can only be described as conditional support, dependent on other factors, such as whether the changes were what customers wanted. There was no evidence about whether such a condition was fulfilled in each case. Other matters, such as decreasing staff he described as "fraught with danger".

1095. As to the matter of the other two stores, it is to be noted that they showed sales growth at a time when the Giving & Living store was continuing to decline in sales. That, however, must be tempered by the fact that the Manuka store made losses in the years 2004 to 2007 and only a small profit of $10 196.12 in 2008, and the Yarralumla store made losses in 2004 and 2005 and profits of around $20 000 to $30 000 in 2006 and 2008. The profits were not sufficient to meet the losses earlier made, so that, overall, they made a loss and so made no contribution to the viability of the Giving & Living store.

1096. Ms Hungerford acknowledged that the opening of the two stores required her to spend more time in a "hands on" role leaving less time for her to attend to the strategy appropriate to address the problem she faced and mitigate it.

1097. The relevant circumstances to assess this strategy are:

- the absence of any business plan, much less a comprehensive one, or any due diligence or other strategic plan to address the way in which the opening of the two stores would properly constitute either mitigation of BHPL's losses or turn its fortunes;
- the only expert evidence being negative as to the strategy;
- the fact that the stores were initially a significant financial drain on BHPL and made no overall contribution to its financial health;
- the risk that opening the stores in the locations in which they were established risked "cannibalisation" of customers from the store at the Hyperdome; and
- the stores required further attention of Ms Hungerford which was not available then for the store at the Hyperdome, there was no relevant nexus

between the misrepresentations and the losses BHPL suffered by the operation of these two stores.

1098. It seems to me that it was not reasonable in all the circumstances to make the relevant causative link between the misleading or deceptive conduct that led to BHPL entering into the Sublease and the opening and conduct of the businesses of the stores at Manuka and Yarralumla. This was, no doubt, motivated by the fact of the continuing losses of the Giving & Living store but was an independent strategy for which the contravening conduct was not a relevant cause.

1099. The second matter is that BHPL continued to trade for a number of years with declining sales until it abandoned the store at the Hyperdome. The question was directly raised in the evidence of Mr Meredith that, at some point, BHPL should have done what it ultimately did and stem the ongoing losses by abandoning the store. This, after all, was what Mr D'Amico had proposed to do in 2003. This would have reduced the outgoings that continued to accrue although, of course, BHPL would still be liable to the payments under the Sublease until it could be re-let. On the other hand, as a fact, TTC was able to re-let the premises within a relatively short time.

1100. While this would expose BHPL to a claim for the Sublease costs, it would have moderated the other losses which it was incurring and which well exceeded those costs.

1101. This is a difficult matter. On the one hand, the liability under the Sublease would continue and BHPL was contractually bound by the obligations under it. The entry into the Sublease was directly related causatively to the misrepresentations or misleading conduct and so any losses occasioned by any claim under the Sublease by TTC would be losses recoverable in the action for damages for misleading and deceptive conduct.

1102. The abandonment of the premises would, however, mitigate the losses BHPL continued to incur. As I noted above (at [1053]), mitigation has a role to play.

1103. It seems to me that, at some point, when reasonable efforts by BHPL have been exhausted and failed to turn around the failures of the Giving & Living store, a reasonable step would be to abandon the store and cease incurring losses other than, of course, the ongoing obligations under the Sublease which would be compensable in an action against TTC or Leda. That is, of course, what BHPL ultimately did.

1104. Mr Meredith made relevant calculations for the financial years 2004 to 2007 and for the period to 31 January 2008 when the store was abandoned.

1105. TTC submitted that the period during which the misrepresentations had causative effect ended on 30 June 2004. In my view, that is not reasonable.

1106. In the time after that, Ms Hungerford made what I regard as reasonable efforts to encourage more patronage at the store by instituting a loyalty program and serving tea and coffee at the store. She also took up the offer of a temporary kiosk in the business parts of the Hyperdome.

1107. The change of name and, presumably, the advertising campaign, did have some effect of stabilising the losses, though it did not turn them around.

1108. The choice of a point at which BHPL should have mitigated its losses by abandoning the premises is, to some extent, inevitably an arbitrary decision.

1109. It seems to me that a reasonable point in time is 30 June 2005. By that time, it must have been clear to BHPL that the efforts being made were not going to improve the trading performance of the store. In addition, it was clear that the Manuka store was not going to contribute to the financial health of the business and the profits of the Yarralumla store were not going to be sufficient to make the business viable.

1110. Accordingly, it seems to me that the nexus between the misrepresentations or misleading conduct and the losses incurred by BHPL had ended by 30 June 2005.

Liability to third parties

1111. There is no doubt that BHPL was, in a real sense, closely connected with Ms Hungerford, but it was not her. She had taken the trouble, no doubt for good reason, to separate herself from the business which she wanted to buy, by incorporating a company, namely BHPL, which bought and conducted the business. It was, a corporation with limited liability which was separate from her.

1112. Ms Hungerford, however, did not always display an awareness of the real separation that her incorporation of BHPL caused. An instructive example occurred in her evidence when discussing a meeting with officers of TTC at which the abandonment of the premises was discussed.

1113. In her re-examination; when giving this evidence, she said:

> So 30 January 2008? --- A meeting with Mr Niall Flaherty from Centro, and Mr Duane Lord ... and ... it was quite an aggressive meeting, and Mr Flaherty said that if I left the – well, in fact the shop was already empty, that if I closed the doors, they would sue **me** if I didn't – and if I stayed, I could have the rent free ...
>
> The present proceedings that brings us to the court today, how did they begin? --- They began with TTC taking action against **me** for the rent from 31 January to the end of the lease which was in 2009.
>
> So when you say 'against me', you mean against BHPL? --- BHPL.
>
> (emphasis added)

1114. A number of the claims for damages were for losses said to have been incurred by third parties and not, at least directly, by BHPL. They were not losses of BHPL.

1115. TTC submitted that there should not be included in any damages payable by it to BHPL. Unsurprisingly, BHPL contended to the contrary.

1116. These losses were as follows:

- Directors' fees said to be payable but not paid by BHPL to Ms Hungerford;
- Superannuation payments said to be payable but not paid by BHPL to Ms Hungerford in respect of the directors' fees;
- Manager's wages said to be payable but not paid by BHPL to Ms Hungerford;
- Superannuation payments said to be payable but not paid by BHPL to Ms Hungerford in connection with the manager's wages;

- Interest on funds advanced by Ms Hungerford to BHPL; and
- Opportunity costs for the funds expended on the lease.

1117. In each case, Mr Haley had made provision; Mr Meredith did not. Mr Haley did so on instructions, though he did, on a couple of points, suggest that his professional experience would support the claim in the circumstances.

1118. The evidence for these amounts was, however, very problematic which made the issues a challenge.

(a) Directors fees and associated superannuation

1119. It is convenient to deal with both of these together.

1120. Mr Meredith reviewed the financial statements of BHPL for the financial years 2004 and 2011 and concluded that:

> (a) No liability is recorded in respect of remuneration payable to Ms Hungerford; and
>
> (b) No amount for Director fees or superannuation is disclosed in the notes to the financial statements or the Directors' Declaration.
>
> (c) I have also not identified a liability for remuneration in the MYOB files over the period FY04 to FY09.

1121. Under s 285 of the *Corporations Act 2001* (Cth), BHPL is required to keep financial records, but is not required to prepare financial reports. The records required to be kept under s 286 are:

> ...written financial records that:
>
> (a) correctly record and explain its transactions and financial position and performance; and
>
> (b) would enable true and fair financial statements to be prepared and audited.

1122. The *Corporations Act* also makes a number of relevant provisions in respect of the remuneration of directors. Thus, s 202A requires that the directors of a company are to be paid the remuneration that the company determines by resolution under s 135. That section is a "replaceable rule" which, under s 135(2) can be displaced by the company's constitution.

1123. Further, under s 198E of the *Corporations Act*, in the case of a company such as BHPL with only one director and shareholder, a director may exercise all of the powers of the company except those that the company's constitution requires to be exercised in general meeting.

1124. Under s 251A of the *Corporations Act*, a company is required to keep minute books in which, it records "within 1 month ... proceedings and resolutions of directors' meetings".

1125. There appears, therefore, no difficulty in BHPL making any necessary resolutions under its constitution, if such are required.

1126. In addition to these obligations, the Australian Accounting Standards Board had published a standard, *Employee Benefits* (Commonwealth, 2011) AASB 119 which provided, inter alia, that an entity to which the Standard applies is required to recognise:

(a) a liability when an employee has provided service in exchange for employee benefits to be paid in the future, and

(b) an expense when the entity consumes the economic benefit arising from the service provided by an employee in exchange for employee benefits.

1127. Though no longer in force, this appears to have been a helpful guide to the contents of financial statements. I am not satisfied that the Standard applied to BHPL at the relevant time if I consider the application of the Standard, but it seems to be a good guide to what should appear on BHPL's financial records.

1128. The evidence in this case did not include the constitution or any minutes of meetings of directors of BHPL. The only evidence was the following evidence given in chief by Ms Hungerford:

> MR ERSKINE: You were also a director of BHPL? --- Yes.
>
> Was there any requirement for directors fees to be paid by BHPL? --- There was.
>
> How much was that? --- I think that was 60,000.
>
> MR WALSH: I object.
>
> HIS HONOUR: On this basis of ---
>
> MR WALSH: What agreement.
>
> HIS HONOUR: Yes.
>
> MR WALSH: The agreement hasn't been established.
>
> HIS HONOUR: No.
>
> MR WALSH: I haven't seen a document to evidence such an agreement from the company.
>
> HIS HONOUR: Yes.
>
> MR ERSKINE: Were there any documents from BHPL which evidenced anybody to pay directors fees? --- Only the cash flow.
>
> At what point – I will start again. When did anybody actually pay directors fees, as you understand it, to you?
>
> MR WALSH: I object. That must be a matter for your Honour.
>
> MR ERSKINE: I accept that, your Honour.

1129. The cash flow document was not an operative company document in this context; indeed, it was not a resolution of BHPL. It appears that it may have been created before BHPL was incorporated. On the other hand, Mr Haley gave evidence that the document, referred to as the "cash flow" set out the intention of Ms Hungerford as to what she was to receive. That description makes it even less of a document of BHPL. No evidence was given to show that the document represented any decision of BHPL.

1130. No other evidence, in particular, no documentation that would comply with the *Corporations Act*, was admitted into evidence or even tendered.

1131. Mr Haley did make the point that the financial statements of BHPL were likely prepared solely for the purpose of submitting a return for the company to the Australian Taxation Office. He pointed out that the expenses included in such statements would only be those in respect of which a deduction is to be sought.

Thus, where the claimed debt is not actually paid, it would not be included. That, however, does not deal with the need required by the statute for the records to show that "financial position" of the company, necessary if for no other reason to allow a decision to be made as to whether the company was in a position to pay its debts as and when they fell due and thus to be solvent.

1132. Thus, while the purpose of the accounts prepared for BHPL may be limited to those necessary for a proper tax return, they remain financial records of the company. In this case, they are some of the few such records, none of which disclose any directors' fees to which Ms Hungerford was said to be entitled.

1133. Despite Ms Hungerford's evidence, Mr Haley, in reliance on the cash flow document, set out that Ms Hungerford was to receive $72 000 in directors' fees.

1134. It was not clear why there would be no record in the financial records of BHPL as to this entitlement. As Ms Hungerford would provide a tax return on a cash basis, she would not be disadvantaged by a tax liability of any amount due but not paid.

1135. In my view, there was no evidence of an entitlement of Ms Hungerford to directors' fees or superannuation in respect of them, which was a liability BHPL had to her and thus a loss of the company which was compensable in these proceedings.

(b) Manager's wages and superannuation

1136. Again, it is appropriate to consider both of these claims together.

1137. A similar approach was taken to the claim that Ms Hungerford was entitled to wages as a manager and that this was, accordingly, a liability of BHPL for which it should have been compensated.

1138. Ordinarily, it may be accepted, employees do not work in commercial businesses for neither wages nor salary. There may, however, be a difference when it comes to the owner of a business who may well work without remuneration: *Hadoplane Pty Ltd v Edward Rushton Pty Ltd* [1996] 1 Qd R 156 at 161-2. This may be because of the ways in which the owner can be remunerated otherwise, by dividends, growth in the value of the business and so on.

1139. Here the evidence was completely silent on any contract with Ms Hungerford. The evidence was that Ms Hungerford started working for the company probably three days a week. She was not paid anything for her work she says, although she did say she was paid either approximately $24 000 or $25 000 "in the first financial year" but nothing after that. She gave no evidence of an entitlement, contractual or otherwise, or any basis for any remuneration from BHPL. During that financial year, however, there was a full-time manager employed, so Ms Hungerford was not doing that work.

1140. The only evidence came from Mr Haley who used the figure of $60 000 per annum "on instructions".

1141. Ms Hungerford's evidence was that the previous manager, employed full-time, had been paid $50 000. This is above the award rate according to the evidence.

1142. There was no evidence from Ms Hungerford about whether she expected to be paid, what the terms of any employment contract were, what hours she worked or for what periods. The claim was unparticularised so far as such important details were concerned. This makes assessment very difficult if not impossible.

1143. There is no doubt that, in appropriate circumstances, unrewarded labour is compensable. As Jenkinson, Einfeld and Lee JJ said in *Cut Price Deli Pty Ltd v Jacques* (1994) 49 FCR 397 at 404:

> The necessity of working, without any financial reward, much longer each week than one had intended or desired to do in a business under one's control is in our opinion such a prejudice or disadvantage as the law will treat as compensable in damages and, therefore, properly included as part of the consequential loss sustained by the respondents.

1144. In *Jaldiver Pty Ltd v Nelumbo Pty Ltd* (Unreported, Federal Court of Australia, Heeney J, 2 December 1992), Heeney J said:

> In the words of Evatt J in *Martin v Osborne* 55 CLR [367] at 402, '(t)he famous dictum of the American financier, 'we are not in business for our health,' is so close an approximation to universal truth that it would be absurd not to act upon it in this case ...'
>
> To work without reward is to suffer loss, because ordinarily work is done in exchange for reward.

1145. BHPL relied on *Crystal Auburn Pty Ltd v I L Wollermann Pty Ltd (t/as Wollermann & Associates)* [2004] FCA 821 where, at [151]-[158], Goldberg J considered and granted the applicants damages to repay them for unpaid labour. See also *W P Kidd Pty Ltd v Panwell Pty Ltd* [2007] QSC 373; 177 A Crim R 528.

1146. This head of damage cannot be doubted. That, however, does not resolve the issue in these proceedings. In all the cases I have been able to find, the damages were payable to the natural person, the individual whose labour went unremunerated. No others were cited to me by BHPL to justify this claim.

1147. Even where companies entered into a lease of a business, such as in *W P Kidd Pty Ltd v Panwell Pty Ltd*, the individual workers were also applicants and it was they who were remunerated.

1148. Relevantly, Ms Hungerford was not a party to these proceedings. There appears to be no liability that BHPL has to her; there is no contract, implied or express, which sets out any of the terms and conditions which would constitute a binding employment contract such as to constitute a loss by BHPL for which it could seek to be compensated by TTC.

1149. There is, in my view, no liability of TTC or Leda to BHPL for any wages or superannuation in respect of them that Ms Hungerford might seek from it.

(c) Interest on funds advanced

1150. BHPL was incorporated for the purpose of purchasing the Giving & Living store. Accordingly, it had no capital of its own. Ms Hungerford provided it with funds for the purchase of the business and provided further funds from time-to-time.

1151. Mr Haley, in his Report, calculated $984 899 to be owing in interest by BHPL to Ms Hungerford. After conferring with Mr Meredith prior to preparation of the joint report (which included substantial differences between them on some aspects), the amount he then put forward was $907 531, based on errors identified by Mr Meredith.

1152. In his Report, Mr Haley used the Indicator Lending Rates for Small Businesses for variable small overdrafts, published by the Reserve Bank of Australia, as the rate for the interest. He expressed the opinion that this was "an appropriate interest rate to apply to the loan".

1153. He had to apply this rate because there was no documentation or other contemporaneous material that could provide the terms of the loan and, in particular, the interest rate payable under it.

1154. Mr Meredith expressed the view that there was no information from which any terms of a loan and, in particular, the interest on it, could be determined. While he accepted that there had been loans, he considered that they were shareholder's loans advanced interest free.

1155. Any loss of her interests by Ms Hungerford was a third party claim and not compensable by TTC/Leda.

1156. It was apparent from Mr Meredith's analysis that the evidence did not disclose:

(a) any loan documents;

(b) any interest charged to BHPL by any party; or

(c) any loan repayments.

1157. This was important, for the loans came from various sources and the evidence was silent on who was the lender. This would, of course, be important to determine the basis on which a loan was made and the terms. The various sources are noted above (at [339]-[340]).

1158. In the absence of this evidence, other evidence was required to prove that any interest bearing loan had been made. In the absence of such evidence, there was no way of determining what the terms of the loan were and, in particular, whether it was, instead of an interest bearing loan, either:

(a) a shareholder's loan interest free; or

(b) an injection of capital.

1159. Ms Hungerford did give some evidence about some loans. It was as follows:

> MR ERSKINE: ... Ms Hungerford, you have – right at the start of your evidence you told us about a loan that you took out from, I think, the National Bank in connection with buying BHPL? --- Yes.
>
> Sorry, buying Giving and Living. I beg your pardon? --- Yes.
>
> In whose name was that loan? Which entity? --- There was a loan in the company name that I took out.
>
> Just, sort of perhaps at this stage, can you identify which entities of yours were in existence ... from 1 September when you were actually starting in the business? --- From 1 September, BHPL was then in existence. Hungerford Management Pty Ltd was in existence, which was the trustee for my superannuation fund as well as a unit trust and I think that was it – and me personally.
>
> You had the relevant extensions under what's called the Bingie facility? --- The Bingie facility was a flexi mortgage from National Bank which was used as a business loan basically facility which was secured against my home.
>
> Thank you.
>
> HIS HONOUR: Who was the borrower? --- Brenda Hungerford.
>
> Personally; you personally? --- Yes.
>
> Yes, all right.

MR ERSKINE: From the time that you took over the Giving and Living business, which was the time that – or let's just continue it – in terms of the business, the Giving and Living business in Sydney and vacated Tuggeranong, did BHPL borrow any money? --- I'm sorry. Can I just ask – was that from the first – from when I purchased Giving and Living?

HIS HONOUR: From 1 September.

MR ERSKINE: From 1 September in the period that BHPL was running the store in Tuggeranong? --- Yes.

Did the company have occasion to borrow money? --- Yes.

From whom? --- The company borrowed money from – in the company loan from the NAB as well as borrowing money from me.

Without going into every single transaction, could you explain to his Honour the process by which it borrowed money from you? --- Yes. The – in most cases, the Bingie facility was used as the vehicle to pay money from – into the company and every or pretty much every transaction was marked as a loan from me to Giving and Living and there was also interest payments for the business that came out of that facility.

So it is mentioned on a bank statement. Is that what you mean? There was some annotation on a bank statement? --- Yes. When I made the – when I made the transaction, I put 'Loan G and L' ---

Something like that? --- '--- or 'BHPL' or whatever it was.

HIS HONOUR: I don't quite understand. The interest, do you want to explore that?

MR ERSKINE: What did you mean by interest? --- Interest on the growing facility, the growing Bingie facility, was paid out of that and also ---

Out of what; sorry, was paid out of what? --- Sorry, out – was paid from the Bingie facility. When I had to sell down my assets, I paid them into the Bingie facility to pay interest as well paying money into the company.

...

MR ERSKINE: Why was money being lent by you to BHPL? --- Because the income from the Tuggeranong store was declining and therefore, I wasn't able to pay the necessary costs out of the income from the Tuggeranong store.

How long did these loans go on for? --- They are still in existence. They have decreased as I have sold everything but they are still in existence.

1160. I found this evidence somewhat confusing and unhelpful. The situation was never clarified. It certainly did not provide any evidence of the terms of any loans made by Ms Hungerford. Insofar as she made loans, there was no evidence that they were not interest free loans. There was no explanation as to why I should not treat them as injections of capital.

1161. In this regard, it is to be noted that, by the time Ms Hungerford gave her evidence, Mr Meredith's Report had been served on BHPL. It was not as if the issue of the absence of documentation or other evidence as to the loans had not been a live issue in the proceedings.

1162. Mr Haley did calculate interest, as noted above (at [1151]). When asked how he determined the terms of the loan or loans, he said that he had been instructed to this effect. Those instructions, however, were never to become admissible evidence.

1163. Indeed, Mr Haley accepted that, if interest was payable and not accrued so as to be reflected in the financial accounts of BHPL submitted to the Australian Taxation

Office, those accounts would not accurately affect the affairs of BHPL. Indeed, that result would seem to be an inevitable consequence of the instructions he was given.

1164. Mr Haley explained:

> [S]imilar to the bank is entitled to interest for its funds put in, Ms Hungerford intended to receive a return on her funds lent to the company as well. And the reason for not doing it was because the company had losses anyway. So from a tax – the reason why the actual entry wasn't put through – that would only increase the losses in BHPL and result in taxable income to her personally which, given the overall position if you want to take it on a consolidated thing and sort of lump the company and her together and her other things.

1165. Despite this, however, Ms Hungerford herself did not give any such evidence.

1166. The issue came to a head in this exchange between Mr Haley and Mr Meredith:

> MR HALEY: When you sit down and prepare a set of accounts at the end of the year in circumstances like this, the company's accounts are basically – the profit is the taxable income. So most people wouldn't even prepare accounts if they didn't have to do a tax return. So you only put in there as expenses the things you intend to claim as deductions. So whether there was an obligation or not is not necessarily always reflected in the accounts because the accounts are only reflecting what actually occurred, and I think we're all in agreement, there was no interest paid.
>
> HIS HONOUR: No. All right. Do you want to comment on that?
>
> MR MEREDITH: The only thing, accounts should be prepared in accordance with accounting standards. If there was a loan which was interest bearing, the interest should have been at least accrued, and it wasn't in the financial statements.
>
> HIS HONOUR: Do you want to say anything further? I mean, I think ---
>
> MR HALEY: Well, just that doesn't happen in the real world.

1167. In submissions, BHPL said that "it is in defiance of common sense to argue that Ms Hungerford would lend BHPL interest free". That seemed to be the sum total of the argument; it relied on no evidence of any kind that might set out the terms of the loan, including a relevant rate of interest, where any demand had been made for it or any of it paid or, indeed, accrued. In particular, it gave no explanation of why it was not capital, in the absence of the terms of a loan. It was simply unexplained in the evidence.

1168. Ms Hungerford's counsel pointed out that, from a tax perspective, Ms Hungerford would be likely to be taxed on a cash basis so that any accrual would not cause her problems with the Australian Taxation Office requiring her to pay tax on moneys not received.

1169. I am not satisfied that BHPL can recover from TTC/Leda any interest applicable to any loans from third parties, including Ms Hungerford.

(d) Opportunity cost

1170. A further head of damage was said by BHPL to have been caused because the misleading or deceptive conduct induced Ms Hungerford to enter into the purchase of the business, including entry into the Sublease and thus lose the opportunity for those funds to be invested elsewhere more productively.

1171. There is no doubt that such damages are recoverable: *South Australia v Johnson* (1982) 42 ALR 161 at 170. This was directly applied to the situation where a party

harmed by misleading and deceptive conduct was induced to purchase a business by such conduct, but would have purchased another profitable business the profits of which would have accrued to the party and so were allowed as part of the damages awarded: *TN Lucas Pty Ltd v Centrepoint Freeholds Pty Ltd* (1984) 1 FCR 110 at 134.

1172. The evidence for this was complicated by the difficulty of separating a claim by Ms Hungerford, who was, of course, not a party to the proceedings, and by BHPL.

1173. BHPL was, of course, a corporate vehicle established for the purpose of purchasing the Giving & Living business. It had no assets of its own and all the capital it had for that purpose came from Ms Hungerford and entities associated with her, either through loans or by the investment of capital.

1174. There was no doubt that Ms Hungerford was intimately involved with the dealings; indeed, she was the operative and only human behind the operations of BHPL; nevertheless, she was separate from BHPL once it was incorporated.

1175. It is notable that the tenancy application made to Leda was, in fact, made by Ms Hungerford herself, dated 14 July 2003. By the time the Agreement for the Sale of the business of Giving & Living was signed on 21 August 2003, however, BHPL was incorporated and was the purchaser.

1176. The basis of the claim for loss of opportunity was a projection for anticipated annual turnover prepared by Ms Hungerford and submitted with the Tenancy Application. This showed an increase of profit in the business by 10 per cent each year.

1177. It was submitted that this was a reasonable projection, even though Ms Hungerford's evidence was that her retail plan was based on the fact that:

> [t]he business has been trading for 10 years and will continue unchanged except for upgrade of accounting procedures.

1178. Support was said to come from the Report of Mr Stephens who stated that for the years June 2003 to December 2007, specialty shops in the Target Mall of the Hyperdome achieved increases in sales of an average of 48 per cent.

1179. These figures, however, are unhelpful. A percentage increase can be large if the initial sales are low when a small absolute increase will show a large percentage increase. This also is expected from a new rather than an established business. The evidence was that the Target Mall was still "young" and, therefore, the shops there were growing, not established as was the Giving & Living store where growth might reasonably be expected to be more modest.

1180. The approach, however, was somewhat supported by the table produced by Mr Stephens which showed that the turnover increase of shops in the Target Mall between these dates was from \$2806/m^2 to \$3440/m^2. I am not sure what differences there are, for that table was for nine shops in the Target Mall, showing an increase of 23 per cent, while the 48 per cent increase was for seven of those shops only.

1181. If that latter figure is accepted, and it was not challenged, it would show that an increase of 10 per cent per year on average was attainable. That, however, does not show that the same investments made by BHPL would produce that same growth. For example, there was no history given of any of the seven shops in the Target Mall and what base sales they had had at the beginning of the period. This can be a

problem with averages and percentages, for an individual case of stellar performance can distort the picture.

1182. Further, it is to be noted that these figures are increases in turnover, not in profit which is the assertion by BHPL, making the likelihood of achieving that result even less, as Mr Haley acknowledged. No evidence as to profits over the period was produced.

1183. It is, of course, to be accepted, as did Mr Duane, that businesses wish to make profits and to increase sales over time, but that intention is far from showing the reality in the way required to prove this claim.

1184. There was no evidence that any store in the Target Mall making such increases in turnover was for sale during the relevant period.

1185. Some support was sought to be drawn from the fact that the relevant figures for proposed cash flow had been provided to Leda at the time of making the application for a tenancy and that this gave some imprimatur to the figures, assuming that some kind of evaluation of the likelihood of such a plan be achieved. No evidence was sought by BHPL from Mr Beirne or any other witness called by TTC/Leda to justify that assumption. In the absence of such evidence, it cannot be accepted.

1186. As to the evidence about what Ms Hungerford would have done with the funds that she otherwise invested in BHPL, the evidence was as follows:

> At the time I did not need to buy a shop to work in, and I had other projects and other business projects that I was working on, as well as real estate developments that I could have done with my existing real estate portfolio.

1187. She also gave evidence of share trading but, apart from denying that these were in amounts of $65 000, $50 000, $30 000 or $25 000, she gave no further information about the profitability of that trading.

1188. After the purchase of the Giving & Living business, Mr Roberts, the agent who introduced that business to her, provided her with information about other businesses though she said she took none of the proposals any further.

1189. There was, in reality, no real evidence that BHPL, as opposed to Ms Hungerford, would have invested in any other business had it not purchased the Giving & Living business. Ms Hungerford may not have had to incorporate a company for such another investment. The continuation of real estate projects and share trading was all activity of Ms Hungerford and none of it was ever suggested to have been intended or likely to have been conducted by BHPL.

1190. The court decisions in which the opportunity for investment in other businesses to have been an alternate investment denied to a person who is harmed by a misrepresentation was held to be recoverable as a head of damage have all relied on relatively clear evidence that the alternatives were not only available, but likely to have been taken up but for the misrepresentations and that they would have likely produced an income or profit for which compensation was payable. See, for example, *Arktos Pty Ltd v Idyllic Nominees Pty Ltd* [2003] FCA 329 at [70] (overturned on appeal but on a different point which effectively re-affirmed this finding: *Arktos Pty Ltd v Idyllic Nominees Pty Ltd* [2004] FCAFC 119; ATPR¶ 42-005), *Mark Bain Constructions Pty Ltd v Avis* [2012] QCA 100 at [141]-[143]. This is not a comparable situation to that submitted on behalf of BHPL.

1191. There was simply no evidence that BHPL would have invested in an alternative business or other investment and that it had, thereby, lost an opportunity that it is likely to have taken up and so suffered a loss for which it was entitled to be compensated.

1192. This was reinforced by email correspondence between Mr Haley and BHPL's lawyers in which he complained that the claim had not shown any "alternative business involved" for a claim "based purely on the cash flow statement". Strangely, the test that BHPL's lawyers could suggest to Mr Haley was that TTC was "put on notice with respect to the foreseeability of the quantum of damages". This is far from the evidence necessary to found the claim. Mr Haley relied on instructions, for which there was, at the hearing, no admissible, probative evidence.

1193. The submissions on behalf of BHPL were, in effect, statements of expectation not showing what had actually occurred in any likely place that would have sustained the claim made.

1194. Even were Ms Hungerford to have herself been a party to the proceedings, which she was not, and to have been entitled to be compensated for the losses she may have sustained by the failure to invest, the evidence fell far short of showing exactly what was likely so that any finding could be made on the balance of probabilities as to what those losses would have been.

1195. In my view, BHPL has shown neither an entitlement to damages nor evidence of proved loss under this head of damages. Any damages that could be proved under this head of damages would be payable to Ms Hungerford who was not a party to the proceedings.

Disposition

1196. Applying these principles, I make the following findings on the claims brought by BHPL and TTC/Leda.

1. Rights of TTC

1197. By abandoning the premises, BHPL breached the terms of the Sublease and became liable to TTC for the moneys payable under the Sublease until the premises were re-let, whereupon any liability of BHPL to TTC ceased.

1198. I am satisfied that TTC had a right to re-enter the premises to recover possession of them and that the tenancy of BHPL was terminated on 31 January 2008 under s 115 of the *Leases (Commercial and Retail) Act*.

1199. TTC seeks a declaration as to the right to re-enter. Section 115 of the *Leases (Commercial and Retail) Act* gives that power to the Magistrates Court to make a declaration that a landlord has a right to re-enter abandoned premises. There is, however, no material in the Act that suggests such a right is exclusive to that Court and that the power of this Court to make binding declarations of rights is somehow abrogated in this area.

1200. The Court's power to make declarations is set out in r 2900 of the *Court Procedures Rules*. The pre-conditions for such a declaration set out in PW Young, *Declaratory Orders* (Butterworths, 2nd ed, 1984) at 9-10; [202], have all been met. In the circumstances, TTC is entitled to such a declaration.

1201. The compensation payable as a consequence is the loss of rent and outgoings for the period between the abandonment of the premises by BHPL and when TTC was able to re-let the premises.

1202. While BHPL denied the claim, it did not mount any substantive defence to it, other than the alleged breach of lease in respect of outgoings, which I have rejected, but rather relied on its Counterclaim. I deal with that below.

1203. In those circumstances, it is appropriate for the sum claimed by TTC to be ordered to be paid by BHPL. The amount is the rent for each of February to May 2008 of $11 645.90 per month and outgoings of $1564.30 for each of those months, making a total of $52 841.00. TTC is entitled to interest on that sum, which I calculate at: $35 382.06

1204. TTC also sought a declaration entitling TTC to call upon the bank guarantee given by BHPL in accordance with the requirements made when transferring the Sublease. Given that I will dismiss BHPL's claim for damages for misrepresentation, it is appropriate for such a declaration to be made.

2. Rights of BHPL

1205. In its Counterclaim and Third Party Claim, BHPL sought damages, repayment of amounts said to have been overcharged by TTC, compensation, a declaration that it lawfully terminated the Sublease, orders under ss 82 and 87 of the *Trade Practices Act* and s 46 of the *Fair Trading Act*, and costs.

1206. In the circumstances and given my findings, it is not appropriate to make the declaration sought.

1207. BHPL adduced no evidence and made no submission sufficient to enable me to make any finding about amounts alleged to be overpaid to TTC/Leda. I decline to make the order sought.

1208. The claims for damages, compensation, and orders under ss 82 and 87 of the *Trade Practices Act* or s 46 of the *Fair Trades Act*, are effectively seeking the same result, namely the payment of damages in compensation for the harm suffered by BHPL as a result of the misleading or deceptive conduct. Only one such order should be made. No submissions were made to the contrary.

1209. So far as the damages are concerned, I shall address them under the heads for which they are claimed.

(a) Capital Outlays

1210. BHPL claimed $281 451 and TTC/Leda submitted that, if they or one of them were liable, the amount should be $358 895. The difference arose because Mr Meredith, for TTC, included in the capital outlay the amount paid for stock in addition to the purchase price, principally goodwill as well as plant and equipment.

1211. In order for the capital outlay to be recoverable, it needs to be shown that what was purchased was less valuable than what was paid. Mr Meredith considered that, on the basis of the financial statements for the business up to the end of 2002, the price was a fair price.

1212. He pointed out, however, that the future maintainable earnings at the time of purchase could reasonably be reflected in the trading of the business after purchase

which, in any event, was experiencing a decline in sales from June to October 2003, though it did improve between December 2003 and August 2004, according to the Hyperdome turnover reports. According to Mr Stephens, the growth was negative from December 2003.

1213. Using the capitalisation of future maintainable earnings method, to value the business, Mr Meredith opined that the business would be valueless. In the circumstances of where BHPL would not have purchased the business if the misrepresentations or misleading conduct had not been made, this seems to me the preferable approach.

1214. Mr Haley calculated the goodwill from what appeared in the financial statements of BHPL. I have some concern about the accuracy and reliability of those statements. In any event, the contract shows that the purchase price, which was the actual capital outlay of BHPL, was $225 000 and that this included goodwill, plant, the business name, and the residue of the Sublease. Mr Haley used the financial statements also to suggest that there would have been other amounts, such as legal fees and stamp duty, and that the amount shown for plant suggests that further plant or equipment was purchased during the year. There was no evidence about any such amounts.

1215. I am not satisfied that the financial statements are necessarily sound. There was no evidence given about these other matters. In that event, I am not prepared to proceed on the basis of what in reality is speculative inference on the part of Mr Haley. The additional amounts may or may not be as inferred. In the absence of evidence based on appropriate primary sources, I do not think it is proper to go beyond the documents that have been admitted into evidence, such as the contract for the sale of the business and on which there can be proper consideration, assisted by cross-examination.

1216. I see no reason not to use that figure of $225 000. The amount attributed in the accounts does not represent the outlay, though, if accurate, it may represent the value of what was purchased but, in this case, I do not need to consider that.

1217. Mr Haley did not include the stock as part of his calculation of the capital outlay as he included that in his calculation of the trading losses.

1218. I prefer to include it as part of the capital outlay. This is, in part, influenced by the fact that I prefer Mr Meredith's calculations concerning the trading losses because he has not included the losses from the Manuka and Yarralumla stores.

1219. Accordingly, I find that, had the misrepresentations not been made, BHPL would not have purchased the business and so is entitled to recover the price paid, namely $358 895.

(b) Borrowing costs

1220. BHPL claimed under this head $139 407. TTC/Leda submitted that, if they or either of them were liable for these costs, then they should be assessed as at $66 449. This is because Mr Haley included the borrowing costs of the Manuka and Yarralumla stores.

1221. For the reasons already identified, I do not consider that TTC/Leda or either of them are liable for any of the costs involved with the Manuka or Yarralumla stores. I have also found that BHPL should have mitigated its loss by abandoning the premises at

the end of financial year 2005 and so reduce the amount assessed by Mr Meredith by $43 544.

1222. Accordingly, I am satisfied that the borrowing costs should be fixed at $22 905.

(c) Trading Losses

1223. BHPL claimed for trading losses was in the sum of $701 531. TTC/Leda submitted that, if they or either of them were liable, the amount should be assessed as at various amounts depending on when the exit point should be determined.

1224. Again, I prefer the approach of Mr Meredith, particularly as his calculations exclude the losses from the Manuka and Yarralumla stores.

1225. Mr Meredith calculated the trading losses to 30 June 2005 in the sum of $298 355, excluding exit costs. The exit costs are dealt with by the judgment sum BHPL must pay TTC. He did so on the basis that this assessment was on the basis of the misrepresentations alleged to have been made after BHPL had entered into the Sublease. I have not found any of those misrepresentations were made.

1226. Included in Mr Meredith's calculations, however, was an amount for the cost of unsold stock. It seems to me, however, that, since I propose to award damages for the capital outlays which includes the cost of stock, to include that amount would amount to double counting, though attributable different items of stock, of course, and so I have deducted that.

1227. I have also ignored the "exit costs", that is the costs of abandoning the Premises and surrendering the Sublease for that will be included in the amount which, as losses payable to TTC, will be recovered from Leda. I deal with that below.

1228. Accordingly, I will award $263 492 as damages under this head of damages.

(d) Interest on Funds Advanced

1229. For the reasons already outlined, I do not consider that any allowance should be made for this head of damage.

(e) Remuneration of Ms Hungerford as director and manager

1230. For the reasons already outlined, I do not consider that any allowance should be made for this head of damage.

(f) Opportunity Cost

1231. For the reasons already advanced, I do not consider that an allowance should be made for this head of damage.

(g) Exit costs

1232. On the assumption that BHPL would abandon the premises at the end of the 2005 financial year, it would then become liable for the costs of such abandonment. That would include rental payments, the outgoings payable under the Sublease and any payment it was liable to make for "making good" the premises.

1233. In 2008, it abandoned the Premises on 31 January 2008 and TTC re-leased them from 1 June 2008. It is, of course, unclear whether this would have happened in 2005, though there was evidence in a very limited way that Mr McKennal was, in 2006,

interested in locating into the Hyperdome, so it cannot be accepted that the Premises would not be re-leased.

1234. In my view, the four months it took in 2008 to re-lease the Premises is a general guide.

1235. That would, in 2005, have been, so far as I can tell from the evidence available to me from Mr Meredith's very helpful calculations, amount to $59 705.

1236. Mr Meredith said that these costs, however, are only relevant if there is a cause of action in respect of those representations being misleading or deceptive conduct made after BHPL entered into the Sublease. That is not the situation here.

1237. On the other hand, the exit costs in fact payable to TTC are recoverable as they constituted a loss that is attributable to the entry into the Sublease and the need to abandon it. Accordingly, that must be taken into account. This will be the amount payable on the TTC claim. That amount should then be included.

(h) Interest

1238. Under r 1619 of the *Court Procedures Rules*, the Court may include in the damages it awards, interest on those damages until judgment. That interest is payable to compensate BHPL for the loss of being kept out of the amount of damages since the cause of action arose: *Grincelis v House* [2000] HCA 42; 201 CLR 321 at 328-9; [16]. That interest is properly categorised as part of the damages: *Haines v Bendall* (1991) 172 CLR 60 at 66.

1239. There is no good reason not to award such interest in this case and so it should be awarded: *Ruby v Marsh* (1975) 132 CLR 642 at 644.

1240. Under Sch 2 of the *Court Procedures Rules*, that rate of pre-judgment interest will be nine per cent per annum until 30 June 2010. From there, the rate for every six months is the rate that is four per cent above the cash rate published by the Reserve Bank of Australia before the start of each period or 1 January or 1 July each year. I shall calculate the interest on the amounts to be paid in accordance with these rules.

1241. So far as the capital outlays are concerned, the interest should date from BHPL taking over the business and entering into the Sublease, namely 1 September 2003.

1242. As to the borrowing costs, the amount does not warrant special treatment and so I will calculate the interest from to 30 June 2005.

1243. As to the trading losses, I shall calculate interest on the first year's loss assessed by Mr Meredith of $38 640 for 10 months from 1 September 2003 to 1 July 2004 and then the full amount thereafter.

1244. Calculating these amounts, the interest will be:

1.	Capital outlay on	$358 895.00:	$393 852.28
2.	Borrowings costs on	$ 22 905.00:	$21 357.63
3.	Trading losses on	$263 492.00:	$228 836.97

(i) Who is liable?

1245. The unity of interest of TTC and Leda in the proceedings has masked an issue that I need now to determine.

1246. The only misleading or deceptive conduct I have found for which BHPL is entitled to damages is that engaged in by Mr Beirne by silence or omission. He was, at the relevant time, employed by Leda. Thus, Leda is, under the Third Party Claim, liable to BHPL.

1247. On the other hand, TTC has no liability for this conduct. As noted above (at [144]), any liability of Leda was not transferred to TTC by the assignment.

1248. The consequence of this is that there must be judgment for TTC on its claim and BHPL's Counterclaim must be dismissed. There must be judgment for BHPL on the Third Party Claim.

Summary

1249. The amount payable to TTC by BHPL is $52 841 plus interest from 1 June 2008 which I calculate as $35 382.06. Thus, there will be judgment for TTC against BHPL in the sum of $88 223.06.

1250. The damages payable to BHPL by Leda are as follows:

Capital outlay	$ 358 895.00
Interest	$ 393 852.28
Borrowing costs	$ 22 905.00
Interest	$ 21 357.63
Trading losses	$ 263 492.00
Interest	$ 228 836.97
Total	$1 289 338.88

I will enter judgment for BHPL against Leda for this amount together with the amount of the exit costs payable to TTC.

Costs

1251. While TTC has obtained judgment on its claim and dismissal of the counterclaim, it should have its costs of both of its claim and of the Counterclaim.

1252. While BHPL has succeeded in obtaining judgment on its Third Party Claim against Leda, it should have its costs of that claim. There were, however, significant issues at the hearing on which ultimately BHPL did not ultimately rely. On some of these, I found against it. These included the post lease representations, about most of which, no submissions were made.

1253. Much was also made of the effect of the developments constructed by TTC and Leda on the foot traffic in the Coles Mall. Despite all this evidence, the Coles Door remained the door with the second highest foot traffic in the Hyperdome.

1254. While I accept that the works did reduce the traffic past the BHPL store, I would not have found on the evidence that this was intended by the works or created any unfairness to BHPL. There was no unconscionable conduct involved.

1255. Ultimately, I would not have found for BHPL on this basis.

1256. Accordingly, I consider that it is appropriate for the costs payable to BHPL on the Third Party Claim to be moderated in this case. While I could make an order as to costs of issues, I consider that a reasonable assessment would be that BHPL should have two fifths of its costs of the Third Party Claim.

1257. I will, however, hear BHPL and Leda as to these costs.

1258. I will enter judgment and make declaration and orders in accordance with these reasons.

1259. I sincerely regret that the pressure of business of the Court has delayed the delivery of judgment in this matter. I have been working on it for much of the time since the hearing. I have carefully read the entire transcript and so much of the exhibits as were relevant and referred to by the parties directly or indirectly. I have read my contemporaneous notes and have listened to parts of the audio recording of the proceedings. I have also had detailed and comprehensive written submissions from the parties which I have also carefully read a number of times. These have resulted in a good recall of the witnesses giving evidence, notwithstanding the passage of time.

I certify that the preceding one thousand two hundred and fifty-eight [1259] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Acting Chief Justice Refshauge.

Associate:

Date: 1 May 2017

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Amendment

1 May 2017

1. In paragraph 10 the word “Society” should be replaced with “Social”.
2. Please see additional paragraph “1259”.