Supreme Court of Victoria

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246 (17 May 2018)

Last Updated: 24 May 2018

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL DIVISION

TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

S CI 2014 04435

BRIGHTON AUSTRALIA PTY LTD (ABN 23 108 995 553)	Plaint
v	
MULTIPLEX CONSTRUCTIONS PTY LTD (ABN 70 107 007 527)	Defenda

JUDGE:	RIORDAN J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 and 20 March and 26 April 2018
DATE OF JUDGMENT:	17 May 2018
CASE MAY BE CITED AS:	Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd
MEDIUM NEUTRAL CITATION:	[2018] VSC 246 2nd Revision: 24 May 2018

BUILDING AND CONSTRUCTION – Claim based on alleged misleading conduct – Whether implied representation arose from tender documentation incorporating a construction program.

PRACTICE AND PROCEDURE – Purpose of pleadings – Whether a claim based on a continuing representation was pleaded – Whether the case conducted on the basis of a

continuing representation – Failure to plead non-disclosure – Whether claim was a drastic departure from the pleading.

PRACTICE AND PROCEDURE – Principles to be applied on application to adopt the report of a special referee under r 50.04 – Whether a finding with respect to the making of a representation is a question of law.

CONSUMER LAW – Misleading conduct – Meaning of a 'continuing representation' considered – Consideration of test to be applied in determining whether a representation was made.

PUBLIC POLICY – Juridical basis for the unenforceability of contractual bars to claims under Australian Consumer Law considered – Whether a clause regulating the time a claim could be brought under s 236 of the Australian Consumer Law is unenforceable.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr F Corsaro SC with Mr D McAndrew	Thomson Geer
For the Defendant	Mr M Roberts QC with Mr T J Breakspear	Norton Rose Fulbright

The following cases are referred to in the judgment:

ACCC v Telstra Corporation Ltd [2007] FCA 1904; (2007) 244 ALR 470

Admiralty Commissioners v SS Valverda [1938] AC 173

Awad v Twin Creeks Properties Pty Ltd [2012] NSWCA 200

Banque Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279

Bateman v Slatyer (1987) 71 ALR 553

Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 174

Bennett v Elysium Noosa Pty Ltd (in liq) [2012] FCA 211; (2012) 291 ALR 191

Borg v Northern Rivers Finance Pty Ltd [2003] QSC 112

Butcher v Lachlan Realty Pty Ltd [2004] HCA 60; (2004) 218 CLR 592

Byers v Dorotea Pty Ltd (1986) ATPR 40–760

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304

Campomar v Nike International [2000] HCA 12; (2000) 202 CLR 45

Chocolate Factory Apartments v Westpoint Finance [2005] NSWSC 784

Clarke Equipment v Covcat (1987) 71 ALR 367

Collins Marrickville v Henjo Investments Pty Ltd (1987) 72 ALR 601

Commonwealth of Australia v Verwayen (1990) 170 CLR 394

Cramaso LLP v Ogilvie-Grant [2014] UKSC 9; [2014] AC 1093

Crown Melbourne v Cosmopolitan Hotel (2016) 260 CLR 1

Davies v Davies [1919] HCA 17; (1919) 26 CLR 348

Demagogue Pty Ltd v Ramensky [1992] FCA 557; (1992) 39 FCR 31

Dibble v Aidan Nominees Pty Ltd (1986) ATPR 40–693

Downer Connect Pty Ltd v McDonnel Dowell Constructions (Aust) Pty Ltd [2008] VSC 77

Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498

FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd [1993] VicRp 76; [1993] 2 VR 343

Fenech v Sterling [1984] FCA 310; (1983) 79 FLR 244

Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd [2012] NSWSC 1122

Fitzgerald v FJ Leonhardt Pty Ltd [1997] HCA 17; (1997) 189 CLR 215

Futuretronics International Pty Ltd v Gadzhis [1992] VicRp 63; [1992] 2 VR 217

Galloway v Mapmakers Pty Ltd (Burchett J, unreported, Federal Court of Australia, 5 September 1985)

Gardam v George Wills & Co Ltd (No 1) [1988] FCA 194; (1988) 82 ALR 415

Heilbut, Symons & Co v Buckleton [1912] UKHL 2; [1913] AC 30

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd [1988] FCA 40; (1988) 39 FCR 546

Henville v Walker [2001] HCA 52; (2001) 206 CLR 459

Hunt v Hunt [1862] 31 L J (Ch) 161

IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm)

IFE Fund SA v Goldman Sachs International [2007] EWCA Civ 811

International Air Transport Association v Ansett Australia Holdings Ltd [2008] HCA 3; (2008) 234 CLR 151

Jones v Dumbrell [1981] VicRp 21; [1981] VR 199

Kay Group Holdings Pty Ltd v K & K Plastics Pty Ltd [2008] VSC 500

Lane Cove Council v Michael Davies & Associates [2012] NSWSC 727

Lieberman v Morris [1944] HCA 13; (1944) 69 CLR 69

MBF Investments Pty Ltd v Nolan [2011] VSCA 114; (2011) 37 VR 116

Miller & Associates v BMW Australia (2010) 241 CLR 357

Miller v Miller [2011] HCA 9; (2011) 242 CLR 446

Omega Air Inc v CAE Australia Pty Ltd [2015] NSWSC 802

Owners SP 62930 v Kell & Rigby Pty Ltd [2009] NSWSC 1342

Petera Pty Ltd v EAJ Pty Ltd (1985) 7 ATPR 40–805

Pioneer Shipping v B T P Tioxide (The Nema) [1982] AC 724

PJ Berry Estates Pty Ltd v Mangalone Homestead Pty Ltd (1984) 6 ATPR 40–489

Raiffseisen Zentralbank v Royal Bank of Scotland [2011] 1 Lloyd's Report 123

Rubenstein v Truth and Sportsman Ltd [1960] VicRp 75; [1960] VR 473

Sattva Capital v Creston Moly [2014] 2 SCR 633

Secure Parking Pty Ltd v Woollahra Municipal Council [2016] NSWCA 154

Sullivan v Sullivan [2006] NSWCA 312

Taco Co of Australia Inc v Taco Bell Pty Ltd [1982] FCA 136; (1982) 42 ALR 177

Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd [2015] 1 Qd R 214

Waghorn v George Wimpey & Co Ltd (1970) 1 All ER 474

Webster v Liddington [2014] EWCA Civ 560

Wenco Industrial Pty Ltd v WW Industries Pty Ltd (2010) 25 VR 119

Western Australia v Wardley Australia Ltd [1991] FCA 314; (1991) 30 FCR 245

With v O'Flanagan [1936] Ch 575

Woodhouse Ltd v Nigerian Produce Ltd [1972] AC 74

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd [1978] HCA 42; (1978) 139 CLR 410

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Summary

1 The plaintiff ('Brighton') pleaded a number of claims including a claim ('the ACL claim') that it entered into two subcontracts ('the Subcontracts') with respect to the construction of a building at 700 Bourke Street, Docklands, Victoria ('the NAB Project') in reliance on representations made by the defendant ('Multiplex') that were misleading or deceptive in contravention of s 18 of the Australian Consumer Law ('the ACL').

2 In his opinion published on 1 December 2017 ('the Opinion'), Mr Richard Manly QC ('the Referee'), who had been appointed as a special referee by this Court, relevantly found that the ACL claim should fail on the following bases:

> (a) The representations, which were alleged to be implied from the tender documentation provided by Multiplex between September and December 2011 ('the Tender Documentation' — which is summarised in [54] below), were not made.
>
> (b) Brighton's statement of claim did not plead a misleading and deceptive conduct claim based on a failure to disclose a change of circumstances in early 2012; and the parties did not conduct the case on the basis of such a claim.
>
> (c) The pleaded representations were not misleading or deceptive.
>
> (d) Brighton did not rely on the pleaded representations.
>
> (e) Brighton was precluded from bringing the ACL claim because notice of the claim was not given within the 7 day period prescribed under the Subcontracts.

3 I have determined that the Referee's opinion should be adopted because he made no error in making the findings referred to in subparagraphs [2(a) to (c)] above.

4 However, the Referee did make an error in finding that Brighton was precluded from bringing the ACL claim because of the failure to give notice of the claim within the 7 day period prescribed under the Subcontracts.

Background

5 On 5 April 2011, Multiplex was appointed under a head contract to be the principal contractor for the construction of the NAB Project.

6 Between 2 September 2011 and 24 October 2011, Multiplex sent the Tender Documentation to Brighton.

7 On 2 December 2011, Brighton submitted its final tender.

8 In early March 2012, Brighton mobilised to site, and on 5 March 2012 (as the Referee found) Multiplex and Brighton entered into the Subcontracts.

9 By summons filed in the Technology and Construction List in the Supreme Court of New South Wales on 1 April 2014, Brighton claimed damages and other relief against Multiplex arising out of the Subcontracts.

10 By order of Hammerschlag J in the Supreme Court of New South Wales made on 15 August 2014, the proceeding was transferred to the Technology, Engineering and Construction List in this Court.

11 By order of Vickery J made on 5 May 2017, the Referee was appointed pursuant to Order 50 of the *Supreme Court (General Civil Procedure) Rules 2015* to provide an opinion to the Court on all questions of liability and quantum in the proceeding.

12 The Subcontracts were described by the Referee as follows:

15. Brighton was engaged by Multiplex as a plasterwork Subcontractor pursuant to two written Subcontracts to perform two packages of work:
    i. Base build works — The base build works comprised all the plastering work which connected to the external shell of the building. This included the mesh tiled ceilings, works in the stairs, plant room and risers, as well as the medium density fibreboard (MDF) spandrel panels located underneath the façade glazing. The MDF panels covered radiant heating, so Brighton first installed the frames, then waited for the heating to be installed by another Subcontractor. Brighton then returned to place the covering MDF panel on top; and
    ii. Fitout works — This was the plastering work for NAB's fitout. This primarily involved the construction of offices. Those offices required installation of services in the ceilings and walls (by other trades) and installation of plaster ceilings and walls by Brighton.
16. The base build and fitout works were performed by Brighton at the same time.

13 The Referee described the NAB Project as follows:

4. The building at 700 Bourke Street is an office building comprising two basement levels (Levels 00 and 01), a ground floor or "concourse" level (Level 2), a "Sky Lobby" (Level 3), 11 floors of office space (Levels 4 to 14), plant rooms and a rooftop terrace at roof level (Level 15).
5. The NAB Project involved a commercial development with a floor area of more than 5.7 million m^2. To put the size of the building into perspective, one side of the building is 240 metres long by 140 metres wide. The building contains the largest freespan ceiling in the southern hemisphere, which spans a very large atrium space in the centre of the building (the atrium is about 2,500 m^2 on each floor).
6. The plan layout of the building is in the shape of an irregular triangle with the apexes pointing approximately to the North, South-East and South-West.
7. On the three elevations of the building, the southern elevation contains the main entrance and is referred to in the documents as the "Concourse" elevation. The eastern elevation faces out over Wurundjeri Way. The western elevation, or "rear " elevation faces the Etihad Stadium.
8. The main structure of the building is formed by a reinforced concrete frame comprising four vertical building cores, columns set out on a regular grid system and post-tensioned reinforced concrete floor slabs.
9. As is typical of such buildings, the service risers, lifts, fire stairs, toilets and amenities are located within the building cores.
10. At each of the typical floors (Level 4 to 14) the remainder of the floor area is given over to open-plan office space, a number of meeting and/or function rooms, and a lift lobby area.

11. An atrium of irregular shape rises up the inside of the building from Level 2 to Level 14, protected by glass balustrades at each floor.
12. The building envelope or façade is constructed using a “curtain wall” system, which is a non-vertical load bearing system comprising prefabricated glass / aluminum panels attached to, and supported by, the reinforced concrete structure.
13. Of particular note is that the façade of the building incorporated a number of vertical “Fissures ”, on the Wurundjeri Way and Concourse elevations, which are architectural features resembling natural rock fissures. These features are of irregular geometry and an uncommon level of complexity.
14. The Developer and Owner of the building was CBUS. Multiplex was contracted by CBUS to carry out the base build component of the works. The commercial tenant of the building was National Australia Bank (NAB). Multiplex was contracted by NAB to perform the fitout component of the works.

14 At the time of the referral, the relevant pleadings were as follows:

(a) Second Further Amended Statement of Claim dated 30 March 2017 (‘the Statement of Claim’) filed pursuant to an order of Vickery J made 24 February 2017;

(b) Defence and Set off to Statement of Claim dated 1 May 2017; and

(c) Reply dated 27 June 2017.

15 At the time of closing submissions, a Joint List of Issues was submitted to the Referee which included the following issues relevant to the plaintiff’s claim based on the ACL claim:

1. Did [Multiplex] make the Representations to Brighton?

2. Did Brighton acknowledge that each (and if so which) of the alleged Representations were not made by reason of answering Item 46 of the interview questionnaire in the affirmative on 26 October 2011?
3. Were the alleged Representations in relation to a future matter (including the doing of, or the refusing to do, any act) within the meaning of s 4 of the ACL?
4. Was [Multiplex]’s conduct (including the making of the alleged Representations) misleading and deceptive within the meaning of s 18 of the ACL?
5. When (if at all) did a binding agreement or agreements (the Preliminary Subcontract Agreement) come into existence on the basis of the Tender Documents and Final Tender?
6. What was the nature and extent of structure and façade procurement delays known or that ought reasonably to have been known to [Multiplex] that would impact upon the execution of Brighton’s works at the time when [Multiplex] commenced the Subcontract works on or about 9 March 2012?
7. Did Brighton in fact rely upon any misleading and deceptive conduct by:
    a. deciding that it was prepared to accept the contractual risk of contracting with [Multiplex]?; and
    b. pricing its Final Tender on the resource requirements that it determined it required to meet the requirements of the Construction Program?[1]
8. What would have occurred for [Multiplex] not to have engaged in conduct that was misleading (the counterfactual) and what would Brighton have done in those circumstances?

9. If [Multiplex] engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, did Brighton suffer loss and damage because of that conduct for the purposes of s 236 of the ACL?
10. ...
11. Is Brighton's claim under Section 18 of the ACL barred, released or waived by:

    a) clause 46.3, 46.6 and 4.2(e)?

    b) clause 33.2(e) of the sub-contracts?

16 Brighton abandoned many of its claims during the course of the hearing before the Referee and, as a result, the Referee was only required to determine two of Brighton's claims, being:

(a) the implied contract/restitution claims based on what was known as the July Agreement; and

(b) the ACL claim.

17 By his Opinion published 1 December 2017, the Referee dismissed these claims and Brighton does not contest the dismissal of the former claim. However, it does oppose the entry of judgment against it on the basis of the dismissal of the ACL claim.

18 In summary, Brighton's pleaded claim under the ACL was as follows:

(a) Multiplex made the following representations in the 'Tender Documents ... in particular by the information set out in the Construction Programme' ('the Representations'):[2]

> (a) The Tender Documentation and the Construction Programme were the most current and accurate information then available to Multiplex as to the planning, organisation and management of the construction of the building and Brighton's Subcontract works;
>
> (b) The Tender Documentation and the Construction Programme were a true and accurate reflection of Multiplex's intentions on how it would plan and organise and manage the construction of the building and Brighton's Subcontract works;
>
> (c) The Construction Programme was then the most reliable and accurate document showing an indication of when Multiplex would make areas of information available to Brighton and constituted the most accurate guide as to when and how Multiplex intended to plan, sequence and complete predecessor trades and activities on which Brighton's works depended;
>
> (d) The Tender Documentation and the Construction Programme were a true and accurate reflection of Multiplex's intentions of when it would make areas of information available to Brighton and constituted the most accurate guide as to when and how Multiplex intended to plan, sequence and complete predecessor trades and activities on which Brighton's works depended;

(e) Tender Documentation and the Construction Programme provided to Brighton the most complete and accurate information that Multiplex had available as to the timing and completion of the building and the planning, sequencing and completion of predecessor trades and activities on which Brighton's works depended to enable Brighton to properly assess its contractual risk in assessing the price for which it was prepared to carry out the base building and fitout works.

(b) The Representations were as to existing facts or future matters.[3]

(c) Brighton relied on the Representations, and in particular the information in the Program, in deciding to contract with Multiplex.[4]

(d) The Representations were misleading and deceptive in that:

(i) the Tender Documentation and the Construction Programme was not the most current and accurate information then available to Brookfield as to the planning, organisation and management the construction of the Building, and Brighton's Subcontract works;

Particulars

The most current and accurate information then available to Brookfield as to the planning, organisation and management the construction of the Building, and Brighton's Subcontract works was:

(A) The Brookfield Target Program [BRA.001.004.7921] ("BMC Target Program") which:

(I) covered a period from (around) 20 February 2012 to 28 August 2012;

(II) showed a sequence of drywall installation and services which differed significantly from the Construction Programme sequence in that the drywalling installation was shown:

(1) in parallel with the stated installation of services by the four separate services Subcontractors (Richstone – hydraulic; Entire – sprinklers; D&E – mechanical ducts and Stowe – Electrical);

(2) in three zones per floor (defined by areas which appear to correspond to slab pours);

(3) in three stages:

• "Fix Dry Wall Head Tracks";

- "Studs and Sheet Walls (One Side)"; and

• "Sheet Walls (Remainder)";

(III) recorded the start of the drywall installation as commencing on or around 20 February 2012, which was more than two months in advance of the corresponding activity on the Construction Programme.

(B) To meet the Construction Programme for drywalling, it was necessary that the floor slabs, services rough in and curtain wall activities to proceed in accordance with the dates shown in the Construction Programme.

(C) By 20 January 2012, Brookfield knew or ought to have known that the floor slab construction, which was a predecessor trade to the base-building works and the fit-out works, was not proceeding in accordance with the Construction Programme and therefore that it would be unlikely that the drywalling could proceed in accordance with the dates shown in the Construction Programme;

(D) By 9 March 2012 at the latest, Brookfield knew or ought to have known that the curtain wall installation, which was a predecessor trade to the base-building works and the fit-out works, was not proceeding in accordance with the Construction Programme and that it would be unlikely that the drywalling could proceed in accordance with the dates shown in the Construction Programme;

(E) By 9 March 2012 at the latest, Brookfield knew or ought to have known that Brighton could not proceed with the base build works or the fit out works in accordance with the Resource Requirements set out by Brighton in the Final Tender nor in accordance with the timing set out in the Construction Programme.

(ii) the Tender Documentation and the Construction Programme were not true and accurate reflections of Brookfield’s intentions on how Brookfield would plan, organise and manage the construction of the Building, and Brighton’s Subcontract works.

Particulars

The true and accurate reflection of Brookfield's intentions on how Brookfield would plan, organise and manage the construction of the Building, and Brighton's Subcontract works included an intention to:

(A) plan and organise and manage the construction of the Building, and Brighton’s Subcontract works in accordance with the BMC Target Program; and

(B) require Brighton to complete the drywalling in advance of predecessor trades.

(iii) the Construction Programme was then not the most reliable and accurate document showing an indication of when Brookfield would make areas and information available to Brighton and did not constitute the most accurate guide as to when and how Brookfield

intended to plan, sequence and complete predecessor trades and activities on which Brighton’s works depended.

Particulars

The most reliable and accurate document showing an indication of when Brookfield would make areas and information available to Brighton and the most accurate guide as to when and how Brookfield intended to plan, sequence and complete predecessor trades and activities on which Brighton's work depended was the BMC Target Program.

(iv) the Tender Documentation and the Construction Programme were not true and accurate reflections of Brookfield’s intentions of when Brookfield would make areas and information available to Brighton and did not constituted the most accurate guide as to when and how Brookfield intended to plan, sequence and complete predecessor trades and activities on which Brighton’s works depended.

Particulars

The most true and accurate reflection of Brookfield’s intentions of when Brookfield would make areas and information available to Brighton the most accurate guide as to when and how Brookfield intended to plan, sequence and complete predecessor trades and activities on which Brighton’s works depended was:

(A) the BMC Target Program; and

(B) Brookfield's intention to require Brighton to complete the drywalling in advance of predecessor trades.

(v) the Tender Documentation and Construction Programme did not provide Brighton with the most complete and accurate information that Brookfield had available as to the timing and completion of the Building and the planning, sequencing and completion of predecessor trades and activities on which Brighton’s works depended to enable Brighton to properly assess its contractual risks in assessing the price for which it was prepared to carry out the base building and fitout works.

Particulars

The most complete and accurate information that Brookfield had available as to the timing and completion of the Building and the planning, sequencing and completion of predecessor trades and activities on which Brighton's works depended was:

(A) the BMC Target Program; and

> (B) the floor slab construction, which was a predecessor trade to the base-building works and the fit-out works, was not proceeding in accordance with the Construction Programme and therefore that it would be unlikely that the drywalling could proceed in accordance with the dates shown in the Construction Programme;
>
> (C) the curtain wall installation, which was a predecessor trade to the base-building works and the fit-out works, was not proceeding in accordance with the Construction Programme and that it would be unlikely that the drywalling could proceed in accordance with the dates shown in the Construction Programme. [5]

(e) As a result of the contravention of s 18 of the ACL, Brighton suffered damage.[6]

(f) Further, in the alternative, had Brighton known the true position, it would not have entered into the Subcontracts.[7]

(g) As a result of entering into the Subcontracts, Brighton had suffered damage.[8]

19 The Referee dismissed the ACL claim on the basis of the following:

(a) The Representations as pleaded were temporally limited to the period from 2 September 2011 to 2 December 2011.[9]

(b) The pleaded Representations were not made.[10]

(c) The Representations were not misleading or deceptive.[11]

(d) Brighton did not rely upon the pleaded Representations.[12]

(e) Brighton's ACL claim is time-barred by cl 46 of both Subcontracts.[13]

20 Brighton alleged that each of these conclusions was an error. Each is considered, in turn, below.

Principles on adoption of report of a special referee

21 Rule 50.01 of the *Supreme Court (General Civil Procedure) Rules 2015* provides that a court may refer any question to a referee for the referee to decide the question or give the referee's opinion with respect to it.

22 Rule 50.04 provides that:

> The Court may as the interests of justice require adopt the report of a special referee or decline to adopt the report in whole or in part, and make such order or give such judgment as it thinks fit.

23 In *Wenco Industrial Pty Ltd v WW Industries Pty Ltd,*[14] the Court of Appeal provides 'a general guide' as to how the adoption of a referee's opinion (or report) should be approached:

(a) First, in exercising the power conferred by r 50.04 to adopt the report of a Referee, the Court has a wide power which is to be exercised ‘as the interests of justice require’. This broad mandate should not be the subject of restrictions laid down in advance of judges exercising it. Subject to what follows, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised.

(b) Secondly, the purpose of rules 50.01 and 50.04 is to provide, where the interests of justice so require, a form of partial resolution of disputes alternative to orthodox litigation. Further, that purpose would be frustrated if the reference were to be treated as ‘some kind of warm-up for the real contest’.

(c) Thirdly, insofar as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.

(d) Fourthly, where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards acceptance of the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for inquiry and report.

(e) Fifthly, if the referee’s report reveals some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that would ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from the according to particular aspects of it different weight; and perversity or manifest unreasonableness mean a conclusion that no reasonable tribunal of fact could have reached. The test denoted by these phrases is more stringent than ‘unsafe and unsatisfactory’.

(f) Sixthly, generally, the referee’s findings of fact should not be re-agitated in the Court. The Court will not reconsider disputed questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. Thus, the Court will not ordinarily interfere with findings of fact by a referee where the referee has based his or her findings upon a choice between conflicting evidence.

(g) Seventhly, the purpose of r 50.01 and r 50.04 would be frustrated if the Court were required to reconsider disputed questions of fact in circumstances where it is conceded that there was material on which the conclusions could be based.

(h) Eighthly, the Court is entitled to consider the futility and cost of re- litigating an issue determined by the referee where the parties have had ample opportunity to place before the referee such evidence and submissions as they desire.

(i) Ninthly, even if it were shown that the Court might have reached a different conclusion in some respect from that of the referee, it would not ordinarily be (in the absence of any of the matters referred to in sub para (e) above) a proper exercise of the discretion conferred by r 50.04 to allow matters agitated before the referee to be re-explored so as to lead to qualification or rejection of the report. [15]

24 I summarise the principles of particular relevance to this application as follows:

(a) The trial Judge is to consider and determine all disputed questions of law.

(b) The Court will not reconsider disputed questions of fact determined by the referee unless such a finding was not open, in the sense that there was insufficient factual material to entitle the referee to make the finding, or no reasonable tribunal could have reached that finding.

(c) The fact that the Court may have reached a different conclusion in some respects from that of the referee will not ordinarily be a basis to reject or permit re-agitation of matters dealt with by the referee.

Ground 1 — The Representations as pleaded were temporally limited to the period from 2 September 2011 to 2 December 2011

25 The Referee found that the relevant period was:

(a) from 2 September 2011 — being the period pleaded in paragraph [2A] of the Statement of Claim, from which date first Multiplex issued the Tender Documentation to Brighton; and

(b) to 2 December 2011 — being the date pleaded in paragraph [2C] of the Statement of Claim, on which date Brighton submitted its final revised tender.[16]

26 The Referee rejected Brighton's attempt to seek to 'broaden its pleaded case to dates and events outside of its own pleaded relevant period without any application to amend its pleadings'.[17]

Brighton's submissions on Ground 1

27 Although the Representations were pleaded as being implied from the Tender Documentation (which was all communicated by the end of October 2011) Brighton submitted that both on:

(a) the pleadings; and

(b) the manner in which the case was run by the parties;

> its case was that the Representations were continuing until the parties' entry into the Subcontracts on 5 March 2012.[18]

28 Brighton submitted that the pleadings should be read as alleging a continuing representation for the following reasons:

(a) Mr Corsaro SC, on behalf of Brighton, submitted that a continuing representation was one that continues to operate; and that a representation will be continuing unless:

(i) upon a proper construction of its terms and contextual circumstances it only applies to a set of circumstances limited as to time; or

(ii) expressly or implicitly only relates to circumstances that no longer apply.

(b) The particulars to the allegation that the Representations were misleading and deceptive, in paragraph [36] of the Statement of Claim, rely upon knowledge of Multiplex after the relevant period, being 20 January 2012 and 9 March 2012.

(c) The unpleaded silence or non-disclosure of Multiplex was part of the circumstances in which the Representations were to be considered in determining whether the Representations were misleading or deceptive.

29 It was further submitted that, for the following reasons, the Referee should have found that the trial was conducted on the basis that the Representations were continuing:

(a) In opening submissions Brighton foreshadowed a case based on Multiplex's non-disclosure and failure to correct, in submitting:

> In all the circumstances which occurred there was a reasonable expectation that relevant facts (ie the Construction Program was not the most current and accurate record of how the works would be carried out) would be disclosed to Brighton. Indeed, even where a statement that is true, non-disclosure of an important qualifying fact will be misleading if the recipient would be misled, absent such disclosure, into believing that the statement was complete: *Miller & Associates v BMW Australia* (2010) 241 CLR 357 [14]–[23].[19]
>
> ...
>
> In considering whether misleading or deceptive conduct has occurred the following objective facts must be considered:
>
> ...
>
> (f) despite having ample opportunity to correct the erroneous assumptions that Brighton had been induced to and did in fact make, [Multiplex] did not correct its misleading conduct;
>
> (g) to the contrary, [Multiplex] repeated and reinforced its misleading conduct on 1 March 2012 when it provided a further copy of the Construction Program[20] and did not provide any other relevant information to put Brighton on notice of its erroneous assumptions.

(b) Brighton's closing submissions also referred to failure to correct stating:

> Instead of correcting its misleading conduct, [Multiplex] sent Brighton reissued the Construction Program to Brighton on 1 March 2012 as the 'latest' Construction Program.

(c) The expert report prepared by Senogles Consulting dated 22 December 2016, at the request of Brighton; the expert report prepared by David Watson of Hinds Blunden Pty Ltd dated 24 July 2017, at the request of Multiplex; and the joint report of Senogles and Watson dated 1 August 2017 all considered the following question:

> Q: Would [Multiplex] have known, at the time that [Brighton] commenced work that the Base Build Works and the Fit Out Works could not be completed in accordance with the Construction Program and what is the earliest date [Multiplex] would have been aware of this?[21]

(d) Issue A6 of the Joint Statement of Issues specifically dealt with the issue of structure and façade procurement delays known to Multiplex with respect to the ACL claim (not the contract claim), identifying the issue as follows:

> What was the nature and extend [sic] of structure and façade procurement delays known or that ought reasonably to have been known to [Multiplex] that would impact upon the execution of Brighton's works at the time when Multiplex commenced the Subcontract works on or about 9 March 2012?[22]

Multiplex's submissions on Ground 1

30 Multiplex submitted that Brighton was not entitled to rely on post 2 December 2011 conduct for the following reasons:

(a) The Representations pleaded in paragraph [5A] and the allegations in paragraph [36] that the Representations were misleading and deceptive refer to 'the most current and accurate information then available', which should be read as a reference to what was 'then' available, being at the time the Representations were made.

(b) The particulars to the misleading and deceptive allegation principally rely upon the BMC Target Program, which as paragraph [36] of the Multiplex defence alleges, and as found by the Referee, was not issued until May 2012.

(c) To the extent the particulars to paragraph [36] of the Statement of Claim refer to post 2 December 2011 knowledge, they are irrelevant.

(d) The allegations in paragraph [5C] of the Statement of Claim focus on Brighton relying on the Representations with respect to the pricing of the final tender.

(e) The Statement of Claim does not allege any other factors, such as silence, as the basis for the implication of the pleaded Representations.

(f) To the extent that Brighton attempts to rely upon allegations outside the pleadings made in its opening and closing, Multiplex 'made it clear in its Opening Submissions dated 18

August 2017 and its Closing Submissions dated 28 September 2017, that it intended to hold Brighton to its pleaded position'.[23]

(g) To the extent that the expert reports referred to conduct after the relevant period, such matters were relevant to Brighton's claim in contract and therefore could not have been the basis of an objection by Multiplex.

Conclusion on Ground 1

Was the Brighton Non-Disclosure Claim within the ambit of the pleading?

31 The Representations, as pleaded, may be reduced to the assumption that Mr Sisic of Brighton said in evidence that he made, which was 'the Construction Programme was the most current and accurate information available to [Multiplex] in relation to how and when its works and the successful plastering tenderer's works would be carried out'.

32 A claimant alleging a contravention of s 18 of the ACL is not required to plead a representation.[24] As Gummow J in *Demagogue Pty Ltd v Ramensky* explained:

The question is 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. Conduct answering that description may not always involve misrepresentation'.[25]

33 However, Brighton's statement of claim specifically and solely relies upon the Representations alleged in paragraph [5A] as being express or implied from the Tender Documentation. Paragraph [5B] alleges that the Representations were:

(a) as to existing facts; or

(b) as to future matters for which (as alleged in paragraph [37]) Multiplex did not have reasonable grounds.

34 The Referee did not find that the Representations were false as to existing facts or that, to the extent they were with respect to future matters, there were no reasonable grounds for making them. On this application, Brighton does not take objection to those findings.

35 Brighton contends that Multiplex's misleading and deceptive conduct arose from the following:

(a) despite the Referee's finding that the Representations were not false at the time they were made, there was a change in circumstances in early 2012, of which Multiplex became aware, that subsequently rendered the Program no longer accurate; and

(b) Multiplex did not disclose the change in circumstances to Brighton prior to it entering into the Subcontracts on 5 March 2012.

Brighton contends it relied upon the above misleading conduct and, in particular, the failure to disclose the change in circumstances in deciding to mobilise to the site and enter into the Subcontracts in March 2012 ('the Brighton Non-Disclosure Claim').

36 Counsel for Brighton submitted that the Brighton Non-Disclosure Claim was within the pleading because the alleged Representations were not, expressly or implicitly, temporally limited to the point in time when Brighton submitted its Final Tender on 2 December 2012; and they were therefore continuing representations.

37 In *Jones v Dumbrell,*[26] Smith J explained the meaning of a continuing representation, in a case where the representation was true at the time it was made, as follows:

> When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were initially represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly, therefore, an inducing representation is a 'continuing' representation, in reality and not merely by construction of law.[27]

38 In *With v O'Flanagan,*[28] Lord Wright MR, in the context of the tort of deceit, explained that another way, to the same effect, of explaining a continuing representation was a duty to communicate a change of circumstances, which has occurred after a representation that was true at the time it was made.[29]

39 More recently, Lord Reed in *Cramaso LLP v Ogilvie-Grant*[30] explained that a representor has a continuing responsibility for the accuracy of the representation:

> The continuing effect of a pre-contractual representation is reflected in a continuing responsibility of the representor for its accuracy. Thus a person who subsequently discovers the falsity of facts which he has innocently misrepresented may be liable in damages if he fails to disclose the inaccuracy of his earlier representation ... The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into... The law is thus capable ... of imposing a continuing responsibility on the maker of a pre-contractual representation ... where there is an interval of time between the making of the representation and the conclusion of a contract in reliance on it, on the basis that, where the representation has a continuing effect, the representor has a continuing responsibility in respect of its accuracy.[31]

40 Accordingly, the expression 'a continuing representation' applies when:

(a) a representor innocently makes an inaccurate representation as to existing fact and subsequently becomes aware of the inaccuracy; or

(b) a representor makes an accurate representation as to existing fact (or a representation as to a future matter or an opinion, based on reasonable grounds), which, as a result of changed circumstances, the representor subsequently becomes aware is no longer accurate.

Brighton asserts, in this hearing, that Multiplex made a continuing representation in the latter sense.

41 A continuing representation, in this sense, should be distinguished from the circumstance where a false representation is made, which continues to have an effect so that subsequently the claimant enters into a transaction in reliance on the false representation ('a Single Misrepresentation Claim').[32] I reject Brighton's submission that a continuing representation is any representation, other than one that only applies to a set of circumstances limited in time; or only relates to circumstances that no longer apply.

42 So understood, silence, or non-disclosure, is a critical part of a continuing representation alleged to constitute misleading or deceptive conduct. Consequently, in these circumstances the silence or non-disclosure must be pleaded. As explained by French CJ and Kiefel J in *Miller & Associates v BMW (Australia)*:[33]

> The pleading of misleading and deceptive conduct 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.[34]

43 In *Borg v Northern Rivers Finance Pty Ltd*,[35] MacKenzie J considered whether the plaintiffs should be permitted to rely on silence or a non-disclosure in the following circumstances:

(a) The plaintiffs claimed that they had entered into an investment scheme in reliance on misleading conduct constituted by representations about the tax deductibility of their investments.

(b) The statement of claim pleaded that the representations were made 'expressly and orally'. However, the plaintiffs ultimately contended that the representations 'were conveyed by a combination of what was said, both orally and in print, and what was not said'.[36]

(c) Counsel for the plaintiffs submitted (as counsel did in the present case) that 'whether conduct was misleading or deceptive is to be gauged in the light of all relevant circumstances constituted by acts, omissions, statements or silence'; and therefore the Court could have regard to the failure to explain.[37]

44 Mackenzie J said that some latitude with respect to pleadings is ordinarily allowed; but explained that the proper approach is as follows:

> If the case presented and proved is a variation, modification or development of what is contained in the pleadings, judgment can be given on the case proved by the evidence. However, where the case proved or attempted to be proved is new, separate and distinct

> and constitutes a radical departure from the pleaded case, the case cannot succeed.[38]

45 Mackenzie J held that to permit the plaintiffs to rely on unpleaded material omissions or silence 'would go beyond proper bounds'. He stated:

> Had an allegation of failure to explain ... been intended to be a material omission or silence, it should have been pleaded. It is significantly different in character from express and oral.[39]

46 I reject Brighton's submission that the Brighton Non-Disclosure Claim was within the ambit of the pleading, which was based on the proposition that (although not pleaded) the silence or non-disclosure by Multiplex was part of the circumstances in which the Representations had to be considered in determining whether the Representations were misleading or deceptive.

47 Although it may be accepted that the question of whether representations are misleading or deceptive must be 'determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances',[40] the Brighton Non-Disclosure Claim critically relies upon a change of circumstances and the failure to disclose that change. As those matters were an essential part of the conduct said to be misleading and deceptive, Brighton was required to clearly identify and plead these matters as part of its ACL claim.[41] The alleged silence and non-disclosure underpinning the ACL claim are 'significantly different in character'[42] from what was pleaded.

48 Accordingly, I consider that the Referee was correct in finding that an ACL claim, based on a continuing representation, was outside the ambit of the pleadings.

Was the hearing before the Referee conducted by the parties on the basis of the Brighton Non-Disclosure Claim?

49 However, counsel for Brighton alternatively submitted that the hearing was at all material times conducted by the parties on the basis of the Brighton Non-Disclosure Claim.

50 The purpose of pleadings is to:

(a) give fair notice to other parties about the case they must meet; and

(b) determine what evidence is relevant at trial. [43]

However, if the parties fairly embrace issues at trial, the Court should determine the real controversy between the parties based on the evidence as presented at trial.[44]

51 In terms of how the case was presented, on the one hand:

(a) Brighton's particulars did include facts, which occurred in early 2012, from which it could have been inferred that it was relying on non-disclosure of matters subsequent to the 'existing facts' at the time of the making of the Representations.

(b) Brighton's opening and closing submissions referred to a failure to qualify or correct its misleading conduct.

(c) The experts were asked to comment on the nature and extent of known structure and façade procurement delays as at the date of the commencement of the Subcontract works.

52 On the other hand:

(a) Brighton had amended the pleadings on a number of occasions; and Multiplex had emphasised the fact that it was conducting the case on the basis of the pleadings.

(b) During the hearing before the Referee, Brighton did not assert the critical aspect of the Brighton Non-Disclosure Claim being that, despite the fact the alleged Representations may have been true at the time they were made, Multiplex did not disclose subsequent facts. In particular:

(i) the reference to the failure to qualify the Representations, referred to in subparagraph [29(a)] above, would appear to refer to a failure to qualify the Representations at the time they were made; and not to a failure to disclose subsequently changed circumstances; and

(ii) the reference to a failure to correct its misleading conduct, referred to in subparagraphs [29(a) and (b)] above, does not assert that the Representations may have been true when made. On the contrary, the submission assumes the Representations to have been false when made and to Multiplex 'having ample opportunity to correct the [existing] erroneous assumption that Brighton had been induced to and did in fact make, [Multiplex] did not correct its misleading conduct'.

(iii) the evidence relating to the state of works in March 2012, referred to in subparagraph [29(c)] above, would be relevant to both liability and quantum on a Single Misrepresentation Claim.

53 I consider the Referee correctly refused to consider Brighton's case beyond the pleadings for the following reasons:

(a) If Brighton wanted to put its claim on the basis that (if the Representations were correct at the time they were made) subsequent information became available to Multiplex which it was obliged to disclose, it was required to identify with precision those facts that gave rise to the obligation. This is a matter of fairness — not pleading pedantry. Whether Multiplex was obliged to inform Brighton of a change of circumstances would be determined by reference to the extent and materiality of the changes to the Program. The cross-examination of Mr Sisic disclosed that variations measured in days may have been immaterial; but delays measured in months may have been critical. Accordingly, a claim based on misleading conduct arising out of a failure to disclose that the Representations were no longer accurate, required proper pleading and particularisation of the change of circumstances.

(b) Brighton at no time formulated a properly pleaded claim under the ACL, which reflected the Brighton Non-Disclosure Claim; and did not apply to amend for that purpose. To the extent that Brighton relies on its particulars to paragraph [36], I do not consider that they filled the gaps in the pleading in a manner sufficient to give Multiplex fair notice of the Brighton Non-Disclosure Claim.[45]

(c) The ACL claim was only one of numerous complex claims pleaded by Brighton. The Referee was in a superior position to determine whether the Brighton Non-Disclosure

Claim was fairly presented by Brighton and whether Multiplex had a fair opportunity to respond to it. I do not consider it appropriate that I should permit re-agitation of this matter.

Ground 2 — The pleaded Representations were not made

54 The Representations were said to be implied from the Tender Documentation and in particular the Program. In the Opinion, the Referee identified the Tender Documentation as follows:

231. First, the Multiplex Site Instruction BMPX-IS-000808 dated 2 September 2011 which was sent to all tenderers by Multiplex stated:

> "Please find attached 'Expression of Interest for Invitation to Tender' document for 700 Bourke Street, National Australia Bank fitout works.
>
> It is a requirement from NAB that all prospective tenderers to complete this questionnaire (ie: Tender Prequalification Questionnaire) before [Multiplex] can issue tender documentation.
>
> Tender documents will be ready on 30 September 2011, we request you complete this no later than Wednesday September ..."

232. This document supports the plea in paragraph 2A of the 2FASOC. However, the document contains nothing relevant to the five pleaded implied representations.
233. Second, Multiplex Transmittal BMPX-TRANSMIT-000629 dated 8 September 2011 addressed to Eddie Alves of Brighton. The document related to the plasterboard tender for the base build Subcontract package. It stated:

> "Please see attached documentation for the plasterboard walls and ceilings package for 700 Bourke Street (base build). Please provide your quotation by COB Wednesday 21 August (give me a call to discuss this date if required)
>
> Note: Scope of works, invitations to tender and programme to be issued via separate instruction ... "

234. Third, there was a second Multiplex document sent to tenderers on 8 September 2011, ie: Site Instruction BMDX-IS -000849 addressed to Eddie Alves of Brighton. Attached to this document was a copy of the Program. I find that Brighton was in possession of the Program on and from 8 September 2011. Also attached to this document was a copy of the Scope of Works.
235. Fourth, Multiplex Scope of Works for the base build Subcontract which provides on page 5 as part of the General Conditions:

> "Executing the works in the sequence required by Brookfield Multiplex including any breaks in continuity, but excluding any temporary demobilization from site as a result."

236. Fifth, Multiplex issued Site Instruction BMPX-SI-001226 dated 12 October 2011 to all tenderers relating to the fitout works Subcontract package. The instruction stated:

"Please find attached the following documents for the PARTITIONS TENDER:

• Partitions Scope

- Final Agreed Works Program (see Exhibit C1, Folder C1, p387)

• Site Logistics Plan

• Partitions Invitation to Tender".

237. The attached fitout Scope of Work stated:

"Executing the work in the sequence required by [Multiplex] including any breaks in continuity, but excluding any temporary demobilization from site as a result."

238. Sixth, Multiplex Invitation to Tender for the fitout works Subcontract. This was part of the 12 October 2011 correspondence. At 2.0 this document states:

"2.0 Tender Documents and Review process.

The documents provided for this tender are attached and include:

(A) Scope of Works;

(B) Aconex Transmittal - Drawings, Specifications and Schedules;

(C) Final Agreed Works Program;

(D) Site Control Plans Rev 3 (Logistics plan);

(E) Invitation to Tender;

(F) Subcontract Template."

239. At "3.0 Programme" it states:

"Refer to the Tender Works Programme contained within the tender documents:

4.1 The anticipated starting date for the Work is: (February 2012)

4.2 The anticipated completion date for the Works is: (October 2012)."

240. Seventh, on 24 October 2011 a tender interview meeting took place with Brighton. Following the meeting Multiplex issued Site Instruction BMPX-SI-001381 dated 24 October 2011 regarding the base build Subcontract to Eddie Alves, Grant Johnstone and Peter Petrovski of Brighton which provided additional documentation. The instruction stated:

"As per our meeting this afternoon, please see attached documentation to be returned with your BAFO (ie: best alternative final offer) on Wednesday afternoon:

• Scope of Works - initial each page

• Programme - initial each page

• Interview Questionnaire - complete and sign

• Drawing List - initial each page

• Smoke Baffle - initial each page

• Acoustic Enclosures (Mechanical - initial each page

• Rigid Thermal Insulation - initial each page

• Head Contract Warranty - initial each page

• Subcontract Pro forma - FYI

• Agreement for Lease - FYI

• Façade Clarifications Drawings - FYI ..."

(my emphasis)

241. Eighth, the Subcontractor Tender Interview Questionnaire dated 24 October 2011 signed by Peter Petrovski and Grant Johnstone on 26 October 2011.

242. Relevantly, Multiplex rely on the following questions and answers:

Question 1: Do you accept the conditions of the Multiplex Standard Subcontract Agreement?

Answer: Yes.

Question 46: The tenderer is aware that the sequence of work may change and that temporary openings, critical areas and the like would be performed out of sequence and all associated costs have been allowed in the tender.

Answer: Yes.

243. Ninth, Brighton (Grant Johnstone) submitted its final tender offer for both packages of work on 2 December 2011.

...

246. Tenth, the form of Subcontract was in the possession of Brighton as part of the Tender Documentation. The drafting of this document did not change from the tender

> period up to when they were executed. The content of the Subcontracts is relevant because the rights and obligations therein are what Brighton's tender risk allocation is based on. These documents embody the bundle of rights Brighton was seeking to acquire by the tender process.

55 The Referee found that the Representations were not implied from the Tender Documentation (including the Program) for the following reasons:

(a) A reading of the Program did not support the implication of the Representations because:

(i) the document was expressed on its face to be 'revision 58' indicating a changing document;

(ii) the document on its face had last been revised on 20 June 2011 and had been printed on 29 July 2011;

(iii) the document does not purport to communicate anything as to what had occurred on the job; and

(iv) the document did not represent the status of NAB Project work at 20 June 2011 and did not record the work to that date. In particular, the Program was fixed in time before Multiplex had even won the principal contract on 5 April 2011. It could not be assumed that it had been updated taking into account work or delays up to June 2011.[46]

(b) The implication that the Program would not have changed was inconsistent with the following terms of the Subcontracts:

(i) The definition of 'Construction Programme' in cl 2.1 provided:[47]

> Construction Programme means the programme attached at Annexure Part J as updated and changed by Brookfield Multiplex in accordance with Clause 33.2.

(ii) Clause 33.2 of the Subcontracts made it clear that Multiplex provided no warranty that it would provide access in accordance with the Program or that work would be continuous or uninterrupted.[48] Clause 33.2 was relied upon by both parties. In full, it provided:

> Without limiting its obligations under Clause 33.1, the Subcontractor shall proceed with the work under the Subcontract in accordance with the Construction Program. Notwithstanding this obligation the Subcontractor acknowledges that:
>
> (a) Brookfield Multiplex does not warrant that it will provide access to the Subcontractor in accordance with the Construction Program;
>
> (b) Brookfield Multiplex does not warrant that the Subcontractor will be able to carry out the work under the Subcontract in a continuous or uninterrupted manner; and
>
> (c) the Subcontractor has not relied upon receiving access in accordance with the Construction Program, or being able to carry

> out the work under the Subcontract in a continuous or uninterrupted manner.
>
> Brookfield Multiplex shall make a copy of the Construction Program available to the Subcontractor. Brookfield Multiplex may change the Construction Program from time to time and for any reason, including in relation to the sequencing of work under the Subcontract.
>
> Changes to the Construction Program, any resequencing of the work under the Subcontract by Brookfield Multiplex or any discontinuity in or interruption to the performance of the work under the Subcontract will not:
>
> (a) relieve the Subcontractor from or alter its liabilities or obligations under this Subcontract, including the obligation under Clause 35.2; or
>
> (b) give rise to any entitlement (or otherwise) to any Claim (other than under Clause 35.5).
>
> The Subcontractor shall not depart, without a written direction from Brookfield Multiplex lodged on Aconex, from the Construction Program.

(iii) Clause 33.1 provided that Multiplex could 'direct in what order and at what time the various stages or parts of the work under the Subcontract shall be performed'.[49]

(iv) Clause 12.4 provided that Multiplex made no warranty about the work of separate contractors and accordingly it could not be assumed that the façade contractor would have its work completed in the vicinity of Brighton's works.[50]

(v) Although Clause 27.1 contained provisions with respect to access to the site, delayed access was not a breach of the Subcontracts; but rather a basis for an extension of time claim.[51]

(c) In the Subcontractor Tender Interview Questionnaire of 26 October 2011, Brighton had stated it was 'aware that the sequence of work may change and that temporary openings, critical areas and the like would be performed out of sequence and all associated costs have been allowed in the tender'.

(d) Although the program in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* was not a contractual document, the Referee considered that some of the following comments of Finkelstein J were apposite:[52]

> The first point is trite. It is that there is a significant risk of delay and disruption inherent in every major construction project. Numerous things can go wrong at any one of the many stages between the planning and completion of construction. Things may be overlooked; mistakes can be made; climatic and physical conditions may not be as expected; contractors, suppliers or agents may not meet their

> obligations, to name just a few. It is inevitable that time will be taken up with these matters and costs will be incurred. For this reason a works program, especially a program which is not contractually binding may, when prepared by a contractor, be little more than a statement of intention or a statement that the contractor will use his best endeavours to comply with it. If prepared by an owner, a works program may be more than a statement of expectation; it may be said to contain a timetable which is regarded as feasible. But, in each case, the program will always be regarded as subject to the ever present risk that the project may be delayed or disrupted for a myriad of reasons, including reasons that may be beyond the control of the parties.[53]

(e) The Referee accepted the evidence of Andrew Morgan of Multiplex,[54] who said of the Program:

> The Works Program illustrated Multiplex's planned approach to the construction of the building at a high level only, and did not provide detail about what each trade needed to do to complete individual tasks, rather it just lists the task start and end date. That is, the Works Program was a general program for all Subcontract works. It was not a program prepared specifically for one trade and therefore did not identify every work activity for every trade.[55]

56 Accordingly, the Referee concluded that:

> The contractual significance of the Program is minor because it is inherently changeable both by definition and by power under clause 33.2. The Program is subsidiary to and subject to the overriding powers Multiplex has from clause 33.1 about order of work and times for performance of work.[56]

57 He later added:

> The changeable nature of the Program was made clear to Brighton and in particular, the various provisions of the Subcontracts to that effect. I find that none of the representations as pleaded were impliedly made by Multiplex.[57]

Brighton's submissions on Ground 2

58 It was submitted on behalf of Brighton that its claim was that, although Multiplex reserved the right to change the Program under the Subcontracts and the Program was inherently changeable after entry into the Subcontracts, the Tender Documentation constituted an implied representation that 'Brighton would be allowed to commence its works in accordance with the time, manner and sequence stipulated in the Program, being the most current, accurate, reliable and complete information available to Multiplex in relation to how it would execute its works'.

59 Brighton further submitted as follows:

(a) There were two stages of the inquiry into whether a representation had been made, being:

(i) whether a party in fact conducted itself in a certain way (eg made an oral representation) ('Stage 1'); and

(ii) how, subjectively, the innocent party viewed the conduct. Relevantly, whether the meaning which Brighton attributed to the Tender Documentation is the same meaning as the implied representation established at Stage 1 ('Stage 2').

(b) In this case, the determination of Stage 1, being whether the pleaded Representations were made (as opposed to whether Brighton understood the Representations were made in the same way) involved a legal issue because:

> (i) the determination of whether the Tender Documentation conveyed the implied Representations to Brighton required the Referee to make a finding as to the proper construction of the Program which was a contractual document; and
>
> (ii) the construction of a contractual document is a matter of law and 'it could hardly be suggested that the question of whether there is a contractual representation is a question of fact'.

(c) Accordingly, the proper test was whether the conduct (here the provision of Tender Documentation that became contractual documents) was incapable of conveying the untrue meaning (namely the Brighton pleaded Representations) involved a finding on a legal matter. This was the test applied in *Taco Co of Australia Inc v Taco Bell Pty Ltd*:[58]

> In extreme, but not necessarily infrequent cases it may be correct to hold that, as a matter of law, conduct said to contravene s 52 [being the analogue of ACL s 18, under the former *Trade Practices Act*] is incapable of conveying the untrue meaning alleged or any other false meaning. Such cases aside, whether or not conduct amounts to a misrepresentation is a question of fact to be decided by considering what is said and done against the background of all surrounding circumstances.

60 It was submitted that the Referee actually found that Multiplex's conduct, in providing the Tender Documentation, was *incapable* of conveying the untrue meaning, being Brighton's pleaded Representations; and that this finding involved a finding on a legal matter. It was further submitted that that finding was an error for the following reasons:

(a) The risk, which was accepted by Brighton in the Subcontracts, of the actual schedule of works varying from the Program, only related to the period after entering into the Subcontracts.

(b) As at the date of entry into the Subcontracts, Multiplex knew that the timetable in the Program was not achievable.

(c) Brighton was contractually obliged to comply with the Program and accordingly the observations of Finkelstein J in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd*[59] were not applicable.

Multiplex's submissions on Ground 2

61 Multiplex submitted that it was well established that the question of whether the conduct amounted to a representation was not a matter of law, or mixed fact and law; but rather 'a question of fact to be answered in the context of the evidence as to the alleged conduct and as to relevant surrounding facts and circumstances'.[60]

62 Accordingly, it was submitted that the Court should adopt the finding of the Referee unless it can be shown that there was some 'perversity or manifest unreasonableness in fact finding',[61] such that 'the referee has reached a decision which no reasonable tribunal of fact could have reached; that is, a decision any reasonable referee would have known was against the evidence and weight of evidence'.[62] In this context 'the test denoted by these phrases is more stringent than "unsafe and unsatisfactory".'[63]

63 It was submitted that it was open to the Referee to make the factual findings that the Representations were not implied from the Tender Documentation and in particular the Program.

Conclusion on Ground 2

64 For a claimant to establish a contravention of s 18 of the ACL, it is not necessary for the impugned conduct to convey an express or implied representation, if the conduct leads or was likely to lead another party into error.[64]

65 However, Brighton has relied upon the Representations, as pleaded, and accordingly the Referee was required to undertake the following two-step analysis:

(a) Were each or any of the pleaded Representations conveyed by the conduct alleged?

(b) Were the conveyed Representations misleading or deceptive or likely to mislead or deceive?[65]

Is the making of a representation a question of fact or law?

66 Addressing the first of those two questions, it has been stated that 'whether or not conduct amounted to a representation [is] a question of fact to be decided by considering what was said and done against the background of all surrounding circumstances'.[66]

67 However, whether an alleged representation is conveyed by a document or a conversation which, together with the surrounding circumstances, is admitted or proved, is a question of law, unless the circumstances suggest a special meaning or the possibility of several meanings.[67]

68 As the learned authors of Halsbury's Laws of England explain:

> If the representation is contained in a document, or if, when orally made, its terms are admitted or proved, and there are no surrounding circumstances of such a nature as to suggest an artificial or special meaning, or the possibility of several meanings, the question of what sense should be attributed to it is a question of law to this extent, that it is for the court to say whether it is capable

> of the meaning alleged, or, on the other hand, whether it admits of any interpretation other than that alleged. Subject to this principle, every question as to the sense which the representation in fact bore, or would have conveyed in the context in which it was made to the mind of the representee, is an issue of fact, as to which (in the case of a suggested special sense, at all events) evidence is admissible, and may even be necessary.[68]

69 The fact that the construction of an oral representation can also be a question of law was confirmed by Keane J in *Crown Melbourne v Cosmopolitan Hotel*, who stated '[w]here the terms of an oral representation have been established as a fact, its construction is a question of law'.[69]

70 Keane J cited *Heilbut, Symons & Co v Buckleton*[70] in support of the above proposition, in which Viscount Haldane LC stated:

> My Lords, as neither the circumstances of the conversation nor its words were in dispute, I think that the question of warranty or representation was one purely of law, and that it ought not to have been submitted to the jury.[71]

I note that his Lordship considered the question to be one of law where, not only the words, but the circumstances were not in dispute.

71 Although the construction of the document simpliciter may be a matter of law, the determination of whether a representation has been made will normally require consideration of the document in the context of the evidence as a whole and the surrounding circumstances. These matters are not usually undisputed and, accordingly, the determination of whether an alleged representation is made will usually be part of the question of fact being whether conduct is misleading or deceptive. As was explained by McHugh J in *Butcher v Lachlan Realty Pty Ltd:*

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the [defendant's] conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.[72]

What is the test for determining whether a representation has been made?

72 To determine whether an express representation has been made, the Court asks the question:

– Would a reasonable person have understood the representor's words in their context, to mean the representation?

73 To determine whether an implied representation has been made, the Court similarly asks:

– Would a reasonable person have inferred, from the representor's words and conduct in their context, that the representation was being implied?

74 As Toulson J explained in *IFE Fund SA v Goldman Sachs International*:[73]

> In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.[74]

Application to the facts

75 In this case, the Referee found that the Tender Documentation did not convey any of the alleged Representations for the reasons set out in paragraphs [55]-[57] above. In summary, he found that:

(a) Brighton acknowledged as tenderer that it was aware that the sequence work may change and that it accepted the conditions of the standard Subcontract agreements;

(b) analysis of the Tender Documentation did not support the alleged implied Representations;

(c) the Program itself did not purport to be the up to date program even at the time it was provided to Brighton, and much less at the time of entry into the Subcontracts; and

(d) the implication that the Program would not change was inconsistent with the terms of the Subcontracts.

76 Accordingly, the Referee considered the Program in the context of all of the relevant documentation and critically also considered the factual question of the role a works program plays in the building industry. In this respect, he accepted the evidence of Multiplex's witness, Andrew Morgan, about the general purpose of the Program.[75]

77 I reject Brighton's submission that, because the Representations are alleged to have been implied from the Program, which was a contractual document, then the Referee's finding about the alleged Representations was therefore a matter of law.

78 Although, it is correct that the construction of a written contract is a question of law,[76] this is an historical 'legacy of the system of trial by juries, who might not be all literate'.[77] As a result, legal obligations assumed under a written agreement are assessed as a matter of law. However, the Referee was not engaged in construing the legal effect of a contract. His task was to determine whether Multiplex, by providing the Tender Documents to the Brighton, impliedly made the Representations.

79 Further, although a contractual promise or (as in this case) a document, which is incorporated into a contract, can form part of the impugned conduct that in the circumstances may contravene s 18 of the ACL,[78] the fact that a document might be described as contractual does not change the nature of the inquiry about whether the alleged representations have been made.

80 I consider that the Referee's finding that the alleged Representations were not made was plainly open on the evidence; and, whether the findings are properly matters of fact, law or mixed fact and law, I am unable to detect any error in the Referee's reasoning or conclusion on this question.

81 I do not accept the submission that Brighton's acceptance of the risk of the actual schedule of works varying from the Program only related to the period after entering into the Subcontracts – for the following reasons:

(a) Brighton's submission that the statements about the flexibility in the Program only applied after entry into the Subcontracts is not supported by any material and is inconsistent with the statement in the Subcontracted Tender Interview Questionnaire of 26 October 2011 to the effect that Brighton was 'aware that the sequence of work may change'. That question and answer did not purport to limit that awareness from the date of entry into the Subcontracts.

(b) There was nothing in the Program which suggested that there would be no changes prior to the date of entry into the Subcontracts and, as was suggested by Finkelstein J in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd*,[79] it would be surprising if a program would not have been subjected to significant changes over the many months between preparation of the document and the entry into the Subcontracts.

(c) The fact that under cl 32.3 Brighton agreed to 'proceed with the work under the Subcontract in accordance with the Construction Program', does not, in my opinion, make the observations of Finkelstein J inapposite. [80] On the contrary, a reading of the full text of cl 33.2[81] underlines the need for Brighton to be flexible and that Multiplex was not bound by the Program. Clause 33 is inconsistent with the alleged Representations and Brighton had been provided with the terms of the standard form Subcontracts as part of the Tender Documentation.

(d) Multiplex's knowledge about whether the Program was not achievable, as at the date of entry into the Subcontracts, says nothing about whether the alleged Representations were conveyed by the Tender Documentation as pleaded.

Ground 3 — The Representations were not misleading or deceptive

82 The Referee noted that Brighton had sought in its opening submissions, and in its closing submissions, to allege that the Representations were misleading and deceptive because Multiplex knew that the Program was not up to date because of:

(a) façade delay; and

(b) delays due to concrete pours and propping.[82]

83 He rejected the allegation on the basis that there was no evidence that these events occurred during the relevant period, or that Multiplex was aware of them during the relevant period.[83]

84 The Referee noted that Brighton did rely upon four pleaded issues being:

(a) the allegation that the BMC Target Program existed from as early as 20 February 2012;

(b) Multiplex intended that Brighton was to do its drywalling work in advance of predecessor trades;

(c) floor slab construction delay; and

(d) curtain wall installation delays.[84]

85 The Referee rejected these allegations for the following reasons:

> (a) The BMC Target Program was introduced in about late April 2012 and did not exist during the relevant period.[85]
>
> (b) During the relevant period, Multiplex did not intend to require Brighton to perform drywalling activities in advance of other trades.[86]
>
> (c) The evidence that Multiplex knew 'at the time when the works commenced in early March 2012' that the floor slab construction was running between three and six working weeks behind the Program was not evidence that Multiplex's knowledge arose during the relevant period; and therefore it did not accord with the pleaded case.[87]
>
> (d) Brighton's case that there were considerable façade delays, which was not disclosed to Brighton prior to the commencement of the work, was misconceived because the Representations were made during the relevant period and there was no evidence that Multiplex had available more complete and accurate information about the curtain wall installation delays during the relevant period.[88]

Brighton's submissions on Ground 3

86 On behalf of Brighton, it was submitted that the Referee erred in finding that the Representations were not misleading or deceptive because he wrongly refused to take into account conduct outside the relevant period ending on 2 December 2011. In particular, he did not have regard to:

(a) the evidence about the significant curtain wall procurement delays which became known to Multiplex in January 2012 but were not disclosed to Brighton prior to entering into the Subcontracts on 5 March 2012; or

(b) the knowledge of Mr Morgan of Multiplex with respect to the significant Chinese façade procurement delays which were not communicated to Brighton before entering into the Subcontracts.

87 Accordingly, it was submitted that the Court should remit the question with respect to whether Multiplex engaged in misleading or deceptive conduct to the Referee on the basis that:

(a) the Representations were continuing and operative until entering into the Subcontracts on 5 March 2012; and

(b) in assessing whether Multiplex's conduct was misleading or deceptive, regard should be had to its conduct up to entering into the Subcontracts on 5 March 2012.

Multiplex's submissions on Ground 3

88 On behalf of Multiplex, it was submitted that this ground was identical to the first ground and should be rejected for the same reasons as the first ground.

Conclusion on Ground 3

89 In the pleading, and before the Referee, Brighton contended that the Representations were false as at the time they were made. As noted above, the Referee rejected this contention and Brighton does not contest this factual finding in this hearing.

90 However, Brighton submits that the Referee erred in failing to consider the Brighton Non-Disclosure Claim, being that Multiplex failed to disclose the changed circumstances in early 2012.

91 I accept the submission of Multiplex that the Referee's refusal to accept the Brighton Non-Disclosure Claim required him to disregard any changed circumstances, which occurred after the time it was alleged that the Representations were made, for the purpose of determining whether the Representations were misleading.

Ground 4 — Brighton did not rely on the pleaded Representations

92 The Referee noted that Mr Sisic gave evidence of his reliance on the Program and, in his witness statement, said as follows:

> When I authorised Mr Johnstone to send the Final Tender on 2 December 2011 and subsequently authorised Brighton to mobilise to site to commence the works in early March 2012, I assumed that the Construction Program was the most current and accurate information then available to [Multiplex] in relation to how and when its works and the successful plastering tenderer's works would be carried out.[89]

93 However, the Referee was not satisfied that Brighton had established reliance on the pleaded Representations stating:

> The relevant enquiry is whether Brighton has established that Rudi Sisic (the sole Brighton witness called to establish reliance) actually relied on the pleaded representations and not simply that he relied on the Program. In my opinion Brighton failed to present evidence to this effect.[90]

94 The Referee also found that the 'real motivation' for Mr Sisic to tender for the Subcontracts was as stated in his witness statement of 4 October 2016:

> I saw the NAB Project as an opportunity for Brighton Australia to consolidate its presence in Melbourne, and as a potential opportunity to enter the Melbourne construction market as a fitout Contractor in a significant way ... I saw the NAB Project as important because it had a high profile for a major bank, and a successful outcome would confirm Brighton Australia's reputation.[91]

95 Accordingly, he concluded that:

> It is these commercial considerations that led Brighton to tender as it did and nothing in the Tender Documents and including the Program impacted on these considerations as it now asserts. The Tender Documents and including the Program do not support the alleged implied representations pleaded by Brighton.[92]

Brighton's submissions on Ground 4

96 On behalf of Brighton, it was submitted that the Referee erred in finding that Brighton did not prove that it relied upon the Representations for the following reasons:

(a) The commercial considerations referred to in the evidence of Mr Sisic only related to the reasons that led Brighton to decide to tender. It was not put or submitted that it was the sole reason for Brighton's entry into the Subcontracts and the finding was not open on the evidence.

(b) The finding that the evidence in the supplementary witness statement of Mr Sisic, dated 11 August 2017, only established reliance on the Program, and not the pleaded Representations, was a misapprehension of the evidence in the supplementary witness statement.

Multiplex's submissions on Ground 4

97 On behalf of Multiplex, it was submitted as follows:

(a) The Referee's finding that Brighton failed to establish reliance was a finding of fact and therefore it would be necessary for Brighton to establish that no reasonable tribunal of fact could have reached such a finding.

(b) The Referee did not make a finding about the relevant counterfactual being that Brighton would not have entered into the Subcontracts because he found that the Representations were not made.

(c) The assertion that the Referee failed to take into account the evidence in the supplementary witness statement of Mr Sisic is unsustainable because the Referee refers in detail to this statement.[93]

(d) The Referee's finding that the reason for Brighton entering into the Subcontracts was related to commercial motivations and unrelated to the pleaded Representations was open on the evidence.

Conclusion on Ground 4

98 If there had been a continuing representation that the Program was accurate, then Mr Sisic's evidence that he relied on the accuracy of the Program in mobilising to the site would have been evidence of relevant reliance.

99 I understand the Referee's reasoning as being that, as he had found that the pleaded Representations had not been made, he was not satisfied that Brighton had relied on them. So much would be uncontroversial — because if there were no representations, then the issue of reliance does not arise.

100 If I had found that the question of whether the Representations had been made should be re-agitated, it would have been necessary to reconsider the question of reliance on the Representations.

101 The Referee may have found that Brighton's principal motivation for tendering was commercial; but he did not make a finding that Brighton would have mobilised to the site in March 2012, if it had been aware of the then current program with the NAB Project.

102 However, my conclusions about adopting the Referee's report on the questions of:

(a) whether the pleaded Representations were made; and

(b) whether the pleaded Representations were false;

mean it is not necessary to further consider this question.

Ground 5 — The ACL claim is barred by clause 46

103 Clause 46.1 in each of the Subcontracts required Brighton to give a prescribed notice of any claim within 7 days of the earlier of:

> (a) when the Subcontractor was or could reasonably have been aware of the conduct, circumstance, event, act, default, omission, direction, fact, matter or thing upon which the Claim is or will be based ('Claim Event'); and
>
> (b) when the Subcontractor could reasonably have been aware of the entitlement to make the Claim;

104 Clause 46.3 of the Subcontract provided that any claim not so notified would be 'absolutely barred'.

105 The Referee found that the ACL claim was a claim within the meaning of cl 46 and that, in the absence of any evidence of compliance with the requirements of that clause, the claim was barred. He rejected the submission that cl 46 was in the nature of an exemption clause and found that the temporal limitation set out in the clause was permissible[94] adopting the reasoning in *Owners SP 62930 v Kell & Rigby Pty Ltd,*[95] *Lane Cove Council v Michael Davies & Associates*[96] and *Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd*.[97]

106 With respect to Brighton's submissions that these authorities did not apply to a claim for damages based on a 'no transaction case', the Referee found that there was no valid and applicable basis on which to distinguish these decisions.[98]

Brighton's submissions on Ground 5

107 On behalf of Brighton, it was submitted that, for the following reasons, cll 46.3 and 46.6 were void for illegality because the clauses had the effect of excluding liability under s 18 of the ACL:

> (a) The limitation is not only temporal but actually requires Brighton to deliver a compliant notice. Such a notice may be required to be served prior to a cause of action accruing under s 236 of the ACL because the cause of action only accrues when damage is suffered — not when the breach occurs.[99]
>
> (b) The object of the *Competition and Consumer Act 2010* (Cth), which includes s 18 of the ACL in its second Schedule, is to provide consumer protection similarly to its predecessor, s 52 of the *Trade Practices Act 1974* (Cth) ('the TPA'). In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd,*[100] Lockhart J (with whom Burchett and Forster JJ agreed) said it would be contrary to public policy to allow the remedy under the TPA to be ousted by a private agreement.[101]
>
> (c) The finding of the Full Federal Court in *Western Australia v Wardley Australia Ltd,*[102] that the time requirement for the bringing of an action under s 82 of the *TPA* (which is analogous to s 236 of the ACL) was procedural and could be waived was made in the context of a defendant waiving the strictures of the limitation provision, which only supported the public policy objective of the *TPA* by extending the plaintiff's access to a potential remedy for the alleged misleading conduct.
>
> (d) The authorities to the effect that there could be temporal or monetary limitations in respect of claims for damages for misleading conduct under the TPA should not be followed. In particular:

(i) In *Kell,*[103] McDougall J did not address *Henjo* or other authorities to the fact that temporal and monetary limits were inconsistent with the Consumer Law.

(ii) In *Lane Cove*,[104] Sackar J followed McDougall J's decision in *Kell* but again did not address *Henjo* and other authorities to the same effect.

(iii) In *Firstmac,*[105] Sackar J followed his decision in *Lane Cove*.

> In *Omega Air Inc v CAE Australia Pty Ltd,*[106] Ball J noted the abovementioned authorities but expressed his opinion that, referring to *Henjo,* it was reasonably arguable that parties could not contract out of the six-year limitation period.[107]

108 In any event it was submitted that, as Brighton's case was that of a 'no transaction' counterfactual, Multiplex cannot rely upon a provision in the Subcontracts that Brighton would not have entered into but for the misleading and deceptive conduct.

Multiplex's submissions on Ground 5

109 On behalf of Multiplex, it was submitted as follows:

(a) The Referee correctly found that cl 46 of the Subcontracts comprised a procedural temporal limitation, which was enforceable in ACL claims in accordance with the decision in *Lane Cove* and *Firstmac*.

(b) The clause did not exclude the operation of the ACL, it merely 'regulated' it.

(c) The 'no transaction' aspect of Brighton's claim is merely a component of the assessment of damages. There was a transaction and the fact that damages might be assessed on the basis of a 'no transaction' counterfactual does not change the reality of the entry by the parties into the Subcontracts.

(d) Brighton had not presented any case for relief under the ACL for the Subcontracts to be declared void.

Conclusion on Ground 5

110 Section 18 in Ch 2 of the ACL provides as follows:

Misleading or deceptive conduct

> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in Part 3-1 [which is about unfair practices] limits by implication subsection (1).

111 The remedy for a contravention of a provision in Ch 2 of the ACL (including s 18) is provided in s 236, which provides as follows:

> **Actions for** damages
>
> (1) If:
>
> (a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3;

> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
>
> (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

112 It was common ground that a clause excluding liability in the Subcontracts would not be effective in preventing a claim under s 18 of the ACL. However, the Referee found that the temporal limitations set out in cl 46, which, in substance, required Brighton to give a prescribed notice of any claim within 7 days of the earlier of:

(a) Brighton becoming aware of any act on which the claim would be based; and

(b) when Brighton could reasonably have been aware of the entitlement to make the claim;

were effective and applied to prevent the ACL claim, if the requirements were not met.

Why can liability under the ACL not be excluded by contract?

113 To determine this question, it is first necessary to identify the juridical basis for the accepted proposition that liability under s 52 of the TPA cannot be excluded by contract ('the no exclusion principle'), which has been held to equally apply to s 18 of the ACL.[108]

114 The no exclusion principle was acknowledged by the High Court in *Campbell v Backoffice Investments Pty Ltd*, in which the plurality stated:

> It is as well to add, however, that, of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained. As pointed out earlier, by reference to the reasons of McHugh J in *Butcher*, whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one.[109]

115 In *Trade Practices Law – Competition and Consumer Law*, the learned authors identify six explanations for the no exclusion principle.[110] The most often cited and, in my opinion, the proper basis, for the no exclusion principle is on the ground of public policy.[111] As stated by Lockhart J in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd:*[112]

> There are wider objections to allowing effect to such clauses. Otherwise the operation of the Act, a public policy statute, could be ousted by private agreement. Parliament passed the Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with

> which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act.
>
> There are various judgments of judges of this Court where this approach has been adopted and they are collected in the judgment of the trial judge, so I need not repeat them.[113]

116 The no exclusion principle is an application of the policy of the common law that where:

(a) a statute embraces public rather than private rights; and

(b) the legislative purpose will not be fulfilled if the Court enforces private contractual arrangements,

the Court will refuse to enforce the private contractual arrangements on the grounds of public policy.[114]

117 In *Equuscorp Pty Ltd v Haxton*,[115] French CJ, Crennan and Kiefel JJ identified the following categories of agreements which may be unenforceable for statutory illegality:

> (i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
>
> (ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;
>
> (iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a "contract associated with or in the furtherance of illegal purposes". [116]

118 With respect to s 52 of the TPA and s 18 of the ACL, as a matter of construction of the relevant statutes, there is no express or implied prohibition on contracting out of those provisions. Because of this, the relevant category, which has been relied upon by the courts to establish the no exclusion principle is the third category identified in *Equuscorp*. With respect to this category their Honours said:

> In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable'. As in the case when a plaintiff sues another for damages sustained in the course of or as a result of illegal conduct of the plaintiff, 'the central policy consideration at stake is the coherence of the law'.[117]

119 As the High Court explained in *Miller v Miller*,[118] the refusal to enforce the private contractual arrangement does not stem from express or implied legislative prohibition but rather from public policy.[119] To determine whether public policy will render contractual arrangements ineffective, in the absence of breach of the norm of conduct or express or necessarily implicit statutory requirement, 'regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose would be fulfilled without regarding the contract as void and unenforceable'.[120]

120 For these reasons, in my opinion the proper juridical basis of the no exclusion principle is in public policy; and, in cases where the relevant statute is silent as to contracting out, public policy will nonetheless demand the protection of rights properly characterised as public rights. So understood, the issue in this case is whether the no exclusion principle:

(a) is limited to exclusion of the statutory norm provided by s 18 of the ACL; or

(b) extends to the remedy provided in s 236 of the ACL and in particular the right to commence an action within six years after the relevant date under s 236(2).

Does the no exclusion principle prohibit restrictions on the time in which a claim can be made?

121 The ACL contemplates that the statutory norm will be enforced through the statutory remedy provided by s 236 of the ACL. As the statement by Lockhart J in *Henjo* explains, it would be contrary to public policy for a contract to deny 'a statutory remedy for offending conduct under the Act'[121]. Accordingly, the 'principle of public policy operates to preclude reliance on the contract to defeat the statutory remedy'.[122]

122 The public purpose of the remedy, including the period of time allowed to a claimant to bring an action, is demonstrated by the *Trade Practices Amendment Act (No 1) 2001* (Cth), which amended s 82(2) of the TPA by replacing:

(a) the words 'within three years after the date on which the cause of action accrued';

(b) with the words 'six years after the day on which the cause of action related to the conduct accrued'.[123]

The latter are the precise words that were adopted in sub-s 236(2) of the ACL.

123 Paragraphs [3], [4] and [6] of the Explanatory Memorandum to the *Trade Practices Amendment Bill (No 1) 2000* (Cth) stated as follows:

> The amendments to the Act update the enforcement and remedies provisions to ensure that the Act continues to deliver appropriate protection to Australian business and consumers and moreover promote competition and fair trading.
>
> The Joint Select Committee on the Retailing Sector, in its August 1999 report, Fair Market or Market Failure? (the Baird Report), also considered the provisions of the TPA and the protection it provides. The Committee recommended amendments be made to the TPA to enhance the protection provided to small business and consumers.

> ...
>
> The Bill amends the Act to improve access to the available remedies. The limitation period in which a person must commence legal proceedings will be extended to 6 years from the date that a cause of action accrued. The Courts will also be required to ensure that the victims of a contravention are compensated in preference to a fine or penalty being recovered.

124 In the Second Reading Speech, the Minister for Financial Services and Regulation explained the purpose of the Bill as follows:

> This bill is about consumer sovereignty. It is about promoting competition, ensuring fair outcomes in the marketplace, and about benefiting the Australian community.
>
> It will do this by:

- increasing the maximum penalty levels under the act to $1 million for offences against the consumer protection provisions;
- allowing the Australian Competition and Consumer Commission to protect consumers and small business by intervening in private proceedings and instituting representative actions;
- extending the limitation periods of the *Trade Practices Act* to six years; and
- ensuring the courts give preference to compensation over fines and pecuniary penalties.

> The government is committed to ensuring that the Trade Practices Act continues to deliver appropriate protection to Australian businesses and consumers while promoting the availability of the choice, information and redress necessary to ensure that businesses and consumers can make sound decisions.[124]

125 In my opinion, the Explanatory Memorandum and the Minister's statement underlines the public purpose of the compensation remedy enforcing the statutory norms established by the TPA (including the s 52 prohibition) and, in particular, the availability of the remedy for six years (rather than three years).

126 The importance, for public policy reasons, of not infringing on the remedy provided with respect to misleading and deceptive conduct for public policy purposes underpins the decision of Jackson J in *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd*.[125] The relevant facts were as follows:

(a) The plaintiff alleged that it had been induced to make an investment in a managed investment scheme by misleading and deceptive conduct in contravention of an 'off-shoot' of s 52 of the TPA,[126] being s 12DA of the *Australian Securities Investment Commission Act 2001* (Cth).

(b) The defendant filed a counterclaim in which it claimed damages under s 82 of the TPA (to the extent of any liability it had to the plaintiff) by reason of the plaintiff's misleading and deceptive conduct arising from its application form for the investment, in which it had

impliedly represented that it had not relied upon representations made by the defendant in making the investment.

(c) The plaintiff sought to strike out the counterclaim on the basis that it was tantamount to the defendant relying on 'exclusory and disclaimer clauses [which] cannot override the statutory prohibition against misleading and deceptive conduct or prevent the grant of appropriate statutory relief where loss or damage is, as a matter of fact, caused by contravention of the statute'.[127]

127 Jackson J struck out the counterclaim on the basis that public policy precluded giving effect to a counterclaim based on a reliance exclusion clause. His Honour reasoned as follows:

> Since 1824, and it has been often repeated since, judges have been warned against riding the 'unruly horse' of public policy illegality. However, in my view, intermediate appellate courts in this country have already engaged public policy as the principle which repels giving effect to the operation of an exclusory and disclaimer clause, except as a factual element going to the answers to the questions of misleading or deceptive conduct or causation.
>
> Consistently with that approach, in my view, the conclusion should also be reached that public policy precludes giving effect to a counterclaim based on the reliance exclusion clause as a claim for damages for breach of contract which is not maintainable because the representation and agreement is 'treated by the courts as unenforceable because it is a "contract associated with or in furtherance of illegal purposes".'[128]

128 Jackson J also found that the defendant's liability to the plaintiff was not 'loss or damage' within the meaning of s 82 of the TPA or cognate sections for a number of reasons including that, if such a claim was to be permitted, the scope of the statutory protection afforded with respect to the proscription of misleading and deceptive conduct would be considerably reduced. His Honour stated:

> In principle, any commercial supplier who engages in misleading or deceptive conduct within the scope of s 12DA could be effectively protected by a contractual clause which represented (or promised) that the acquirer did not rely on any pre-contractual conduct engaged in by the supplier, so long as the supplier would not have entered into the relevant transaction without that representation (or promise) having been made.
>
> The last of these reasons had an effect on the approach and reasoning of the courts to an exclusory and disclaimer clause set up as a defence, as appeared in the passage earlier set out from *Henjo*.[129]

129 Similarly, it would be absurd if a contractual provision, to the effect that any claim under s 18 of the ACL must be brought in (for example) one hour of the cause of action arising, would be enforceable. Extreme provisions, of which the one under consideration is

an example, could effectively preclude any claim under s 18 of the ACL except by the most punctilious of claimants. However, in my opinion, any attempt to restrict the remedy by limiting the time in which an action can be brought is an unacceptable interference with the public policy underpinning the provisions. As was observed by Ball J in *Omega Air Inc v CAE Australia Pty Ltd*:[130]

> If the parties can agree to limitations on those rights, it is not easy to see how the line can be drawn between those limitations that are acceptable and those that are not.[131]

130 It is not consistent with the public purpose of the ACL to leave claimants uncertain about whether courts, on a case by case basis, will determine contracted time limits to be so unreasonable as to be unenforceable.

131 I appreciate that the above conclusion differs from the decisions of McDougall J in *Kell*,[132] and Sackar J in *Lane Cove*[133] and *Firstmac*.[134] However, my conclusion is consistent with the observation of Ball J in *Omega Air Inc v CAE Australia Pty Ltd* that it is reasonably arguable that the parties cannot contract out of the six-year limitation period;[135] and the obiter of Hansen J in *Kay Group Holdings Pty Ltd v K & K Plastics Pty Ltd*.[136]

132 In *Firstmac*, Sackar J gave the following reasons for following McDougall J's approach in *Lane Cove*:

> In my opinion a distinction clearly needs to be drawn between a contractual term purporting for example to bar a statutory remedy altogether and one that purports to impose a monetary or temporal limit on the extent of the remedy.
>
> There is authority that it is permissible by contract to fix a shorter period of time than provided by in the relevant Limitation Act. As is pointed out, parties may, in addition for example agree not to plead a limitation period at all.
>
> As Mason J points out in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 404–406, some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred. It is necessary to characterise the legislation to perhaps detect whether the benefit conferred is personal or private, or whether it rests upon public policy or expediency. If provisions can be seen as procedural rather than substantive in nature, this would suggest they can be waived.
>
> The Full Federal Court in dealing with s 82 of the TPA, which provided that an action under the Act (s 82(2)) could be commenced within a period of three years, said that that provision should be regarded as procedural in character: *Western Australia v Wardley Australia Ltd* [1991] FCA 314; (1991) 30 FCR 245 at 259.[137]

133 With respect, his Honour was undoubtedly correct to observe, as a general proposition, that parties may by contract fix a shorter limitation period and may exclude some statutory rights unless such a contract is contrary to public policy. However, for the

reasons set out above, I have found that temporal restrictions on a claimant's right to claim within the period prescribed by s 236(2) is contrary to public policy.

134 His Honour also notes:

(a) that the time period prescribed under s 236(2) of the ACL is procedural.[138]

(b) the observation of Mason J in *Commonwealth of Australia v Verwayan* that: '[i]f provisions can be seen as procedural rather than substantive in nature, this would suggest that they can be waived'.[139]

135 Mason J cites, in support of this proposition, *Admiralty Commissioners v SS Valverda* in which Lord Wright stated:

> Thus statutes which deal with procedural or evidential requirements, such as the *Statute of Frauds* or the *Public Authorities Protection Act 1983*, may in some cases be the subject of waiver, although in Acts of that character considerations of the purpose of the particular statute may exclude waiver or contracting out.[140]

136 Accordingly, although the fact that the statutory limitation period in s 236(2) can be seen as procedural may suggest it can be waived, it is by no means determinative. The proper inquiry remains whether policy dictates that the right be preserved. In fact, as in *Western Australian v Wardley*[141] and *Commonwealth of Australia v Verwayen*,[142] a respondent to a claim made under s 236 of the ACL may be able to waive reliance on the statutory limitation period because that would, consistent with policy, extend the claimant's access to remedy; not diminish it.

137 Although the six-year limitation period in s 236(2) of the ACL may be procedural, I consider that the contractual limitation of the period in which an action may be brought is contrary to the public policy of the Act. To permit claims under the ACL to be defeated by provisions, such as cl 46 in the Subcontracts, would be inconsistent with 'the public policy of protection of people in trade and commerce from being misled, and the width of the powers given by the TPA that are apt to be employed in a manner conformable with the just compensation or protection of the representee'.[143]

Can liability under the ACL be affected by exclusion clauses in a 'no transaction case'?

138 Further, in my opinion, if it be accepted that, absent the misleading conduct, Brighton would not have entered into the Subcontracts, Multiplex is unable to rely upon the terms of the Subcontract in defeating Brighton's claim. As Shepherd J stated in *Clarke Equipment v Covcat*:

> If, as a result of the conduct, a person is induced to enter into a contract and suffers loss, an action to recover it lies. The terms of the contract are irrelevant.[144]

139 The appropriate remedy under the ACL is to put the applicant as nearly as possible in the same position as if the misstatement had not been made.[145] On the assumption that, but for the misleading conduct, Brighton would not have entered into the Subcontracts, its

damage, consequent on altering its position by reason of the breach of the Act, would be the difference between:

(a) the position it would have been in if it had not entered the Subcontracts; and

(b) the position it was in after entering into the Subcontracts.[146]

140 If Brighton had not entered into the Subcontracts, it would not have been subject to the regulatory clauses.

141 Accordingly, Multiplex cannot rely on the regulatory clauses to defeat Brighton's claim based on a contravention of s 18 of the ACL.

Orders

142 I will hear the parties on the appropriate orders to be made consequential on these reasons.

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[1] Note: In the materials before the Court, the relevant program is variously described as 'the Works Program', 'the Construction Program', 'the Construction Programme' or simply 'the Program'. Except when quoting, these reasons refer to the relevant program as 'the Program'.

[2] Paragraph [5A].

[3] Paragraph [5B].

[4] Paragraph [5C].

[5] Paragraphs [36] and [37].

[6] Paragraph [38].

[7] Paragraph [39].

[8] Paragraph [40].

[9] Opinion [219]–[224].

[10] Opinion [228]–[302].

[11] Opinion [308]–[351].

[12] Opinion [303]–[307].

[13] Opinion [352]–[375].

[14] (2010) 25 VR 119 (Redlich and Bongiorno JJA and Beach AJA).

[15] Ibid 126–7 [17] (Redlich and Bongiorno JJA and Beach AJA).

[16] Opinion [223].

[17] Opinion [311(iii)].

[18] Opinion [416], being the date on which the Referee found that Brighton and Multiplex treated themselves as legally bound by the terms of the Tender Subcontract Documents.

[19] The referenced paragraphs include a discussion by French CJ and Kiefel J as to the circumstances in which 'the existence of a reasonable expectation [may require] that if a fact exists it will be disclosed': 370 [21].

[20] On this application, Brighton eschewed reliance on any representation arising from the provision of the Program in March 2012.

[21] Emphasis added.

[22] Emphasis added.

[23] Opinion [212].

[24] [1992] FCA 557; (1992) 39 FCR 31. Also see *Butcher v Lachlan Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, 623 [103] (McHugh J).

[25] Ibid 40-41.

[26] [1981] VicRp 21; [1981] VR 199.

[27] Ibid 203.

[28] [1936] Ch 575.

[29] Ibid 583–584 (with whom Romer LJ and Clauson J agreed).

[30] [2014] UKSC 9; [2014] AC 1093.

[31] Ibid 1103 [22]–[23].

[32] The continuing nature of a representation, in this sense, is explained in *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9; [2014] AC 1093 [16]–[17] (Lord Reed JSC).

[33] (2010) 241 CLR 357.

[34] Ibid 364.

[35] [2003] QSC 112.

[36] Ibid [78].

[37] Ibid.

[38] Ibid [80]. His Honour cites *Waghorn v George Wimpey & Co Ltd* (1970) 1 All ER 474 as an example of the latter scenario.

[39] Ibid [82].

[40] *Butcher v Lachlan Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, 623 [103] (McHugh J).

[41] *Miller & Associates v BMW (Australia)* (2010) 241 CLR 357, 364.

[42] *Borg v Northern Rivers Finance Pty Ltd* [2003] QSC 112 [82] (Mackenzie J).

[43] *Downer Connect Pty Ltd v McDonnel Dowel Constructions (Aust) Pty* Ltd [2008] VSC 77 [1]-[2] (Harper J).

[44] *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, 297 (Dawson J).

[45] *Rubenstein v Truth and Sportsman Ltd* [1960] VicRp 75; [1960] VR 473, 476 (Adam J).

[46] Opinion [271]–[274].

[47] Opinion [252].

[48] Opinion [264].

[49] Opinion [258].

[50] Opinion [254].

[51] Opinion [256].

[52] Decision cited at Opinion [284].

[53] *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174 [58].

[54] Opinion [274].

[55] Opinion [270].

[56] Opinion [264].

[57] Opinion [301].

[58] [1982] FCA 136; (1982) 42 ALR 177, 202.

[59] [2003] FCA 174 [58].

[60] Citing *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136; (1982) 42 ALR 177, 199 (Deane and Fitzgerald JJ).

[61] *Wenco Industrial Pty Ltd v W Industries Pty Ltd* [2009] VSCA 191; (2009) 25 VR 119, 127 [17(e)].

[62] *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784 [7(13)].

[63] *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* [2009] VSCA 191; (2009) 25 VR 119, 127 [17(e)].

[64] *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, 603 [32] (Gleeson CJ, Hayne and Heydon JJ); *Miller & Associates v BMW Australia* (2010) 241 CLR 357, 368 [15] (French CJ and Kiefel J).

[65] *ACCC v Telstra Corporation Ltd* [2007] FCA 1904; (2007) 244 ALR 470, 474 [14]-[15] (Gordon J).

[66] *Campomar v Nike International* [2000] HCA 12; (2000) 202 CLR 45, 84 [100] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) citing *Taco Co of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136; (1982) 42 ALR 177, 202 (Deane and Fitzgerald JJ). Also see *Gardam v George Wills & Co Ltd (No 1)* [1988] FCA 194; (1988) 82 ALR 415, 427 (French J) and *Bennett v Elysium Noosa Pty Ltd (in liq)* [2012] FCA 211; (2012) 291 ALR 191, 199 [20] (Reeves J).

67. [67] *Woodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741, 753, 755 (Lord Hailsham), 766 (Lord Cross); K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016) 79–80 [4-001].

[68] (LNUK, 5th ed, 2013) Vol 76, 515 [743].

[69] (2016) 260 CLR 1, 40 [131].

[70] [1912] UKHL 2; [1913] AC 30 (Viscount Haldane LC, Lord Atkinson and Lord Moulton).

[71] Ibid 36.

[72] [2004] HCA 60; (2004) 218 CLR 592, 623 [103] (underlining added).

73. [73] [2006] EWHC 2887 (Comm); upheld by the Court of Appeal in [2007] EWCA Civ 811 (Waller, Gage and Collins LJJ).
74. [74] Ibid [50]; applied in *Raiffseisen Zentralbank v Royal Bank of Scotland* [2011] 1 Lloyd's Report 123, 142 (Christopher Clarke J); and *Webster v Liddington* [2014] EWCA Civ 560; [2015] 1 All ER (Comm) 427 [39] (Jackson LJ with whom Briggs and Clarke LJJ agreed). Also see *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016), pp 79-80 [4-001]. For a similar test formulated in the context of estoppel see *Sullivan v Sullivan* [2006] NSWCA 312 [85] (Hodgson JA, with whom McColl JA agreed, stated the relevant test as 'if it was reasonable for the representee to interpret the representation ... in a particular way ....'. Handley JA dissenting).

[75] Opinion [274].

[76] *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] VicRp 76; [1993] 2 VR 343, 351 (Brooking J, with whom Nathan and Eames JJ agreed).

[77] *Pioneer Shipping v B T P Tioxide* [1982] AC 724, 736 (Lord Diplock). Cf *Sattva Capital v Creston Moly* [2014] 2 SCR 633, 655–657 [43]-[47] (Rothstein J).

[78] *Futuretronics International Pty Ltd v Gadzhis* [1992] VicRp 63; [1992] 2 VR 217, 238 (Ormiston J).

[79] [2003] FCA 174 [58]. See [55(d)] above.

[80] The Referee also considered to similar effect the statement by A Burr, *Delay and Disruption in Construction Contracts* (Informa Law, 5th ed, 2016) 354.

[81] See [49(b)(ii)].

[82] Opinion [309].

[83] Opinion [310].

[84] Opinion [320].

[85] Opinion [324]–[325].

[86] Opinion [335].

[87] Opinion [339]–[342].

[88] Opinion [348]–[350].

[89] Opinion [304].

[90] Opinion [307].

[91] Opinion [280].

[92] Opinion [282].

[93] Opinion [279].

[94] Opinion [361]-[365].

[95] [2009] NSWSC 1342 (‘*Kell*’).

[96] [2012] NSWSC 727 [70]-[73] (‘*Lane Cove*’).

[97] [2012] NSWSC 1122 [36]-[41] (‘*Firstmac*’).

[98] Opinion [362].

[99] Citing *Fenech v Sterling* [1984] FCA 310; (1983) 79 FLR 244 (Davies J).

[100] [1988] FCA 40; (1988) 39 FCR 546 (‘*Henjo’*).

[101] Ibid 561.

[102] [1991] FCA 314; (1991) 30 FCR 245 (Spender, Gummow and Lee JJ).

[103] [2009] NSWSC 1342.

[104] [2002] NSWSC 727*)*.

[105] [2012] NSWSC 1122.

[106] [2015] NSWSC 802.

[107] Ibid [31].

[108] *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWCA 154 [112] (Meagher JA, with whom Beazley P and Ward JA agreed). In the context of a claim under the ACL, also see Ball J’s treatment of *Henjo* in *Omega Air Inc v CAE Australia Pty Ltd* [2015] NSWSC 802 [31].

[109] [2009] HCA 25; (2009) 238 CLR 304, 348 [130] (Gummow, Hayne, Heydon and Kiefel JJ).

[110] Heydon, *Trade Practices Law – Competition and Consumer Law*, (Thomson Reuters, current edition) [160.1170].

[111] The object of the *Competition and Consumer Act 2010* (Cth) is stated, in s 2, to be ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.

[112] [1988] FCA 40; (1988) 39 FCR 546, 561 (with whom Burchett and Foster JJ agreed). The proposition that Lockhart J’s statement is an expression of the no-exclusion principle is supported by *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114; (2011) 37 VR 116, 168 [217] (Neave, Redlich and Weinberg JJA); *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214, 220 [40], 223 [46] (Jackson J). Also see *Disclaimers and Deceptive Conduct* (1986) 14 *Australian Business Law Review* 478, 479.

[113] The cases referred to by the trial judge, Wilcox J, in *Collins Marrickville v Henjo Investments Pty Ltd* (1987) 72 ALR 601, 613 were: *PJ Berry Estates Pty Ltd v Mangalone Homestead Pty Ltd* (1984) 6 ATPR 40–489, 45,638; *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 ATPR 40–805, 46,887; *Galloway v Mapmakers Pty Ltd* (Burchett J, unreported, Federal Court of Australia, 5 September 1985); *Dibble v Aidan Nominees Pty Ltd* (1986) ATPR 40 –693, 47,619; *Byers v Dorotea Pty Ltd* (1986) ATPR 40–760, 48, 230; and *Bateman v Slatyer* (1987) 71 ALR 553.

[114] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 404 where Mason CJ says: ‘Undoubtedly, some statutory rights are capable of being extinguished by the person

for whose benefit they have been conferred... [However], some rights may be conferred for reasons of public policy so as to preclude contracting out or abandonment by the individual concerned. It is therefore necessary to examine the relevant statutory provision ... in order to ascertain whether it is susceptible to extinguishment' (citations omitted). See also, *Lieberman v Morris* [1944] HCA 13; (1944) 69 CLR 69, esp 90 (Williams J with whom Rich and Starke JJ agreed); and *Davies v Davies* [1919] HCA 17; (1919) 26 CLR 348, 355 (Isaacs J) and 365 (Gavan Duffy J). The rule arises as an incident of the maxim *quilibet potest renunciare juri pro se introducto*, of which Lord Westbury said in *Hunt v Hunt* [1862] 31 L J (Ch) 161, 175, 'I beg attention to the words *pro se*, because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public and the claims of society forbid the renunciation of'; and the maxim *privatorum conventio juri publico non derogat*, which provides that 'if public policy requires the observance of [a] provision, it cannot be waived by an individual [in whose benefit it is granted]': G F L Bridgman (ed), *Maxwell on The Interpretation of Statutes* (Sweet & Maxwell, 7th ed, 1929) 331.

[115] (2012) 246 CLR 498 (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[116] Ibid 513 [23].

[117] Ibid

[118] [2011] HCA 9; (2011) 242 CLR 446, 458 [25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[119] Ibid 458 [25] quoting from *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] HCA 42; (1978) 139 CLR 410, 434.

[120] *Fitzgerald v FJ Leonhardt Pty Ltd* [1997] HCA 17; (1997) 189 CLR 215, 227 (McHugh and Gummow JJ); quoted in *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151, [70]-[72] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[121] [1988] FCA 40; (1988) 39 FCR 546, 561 (with whom Burchett and Foster JJ agreed) (Underlining added).

[122] *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214, 222 [40] (Underlining added).

[123] *Trade Practices Amendment Act (No 1) 2001* (Cth) s 20.

[124] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 June 2000, 18578–9 (Joe Hockey, Minister for Financial Services and Regulation) (emphasis added).

[125] [2015] 1 Qd R 214.

[126] Ibid 216 [3].

[127] Ibid 218–219 [23], quoting *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 [82].

[128] Ibid 223 [46]–[47].

[129] Ibid 224 [54]–[55].

[130] [2015] NSWSC 802.

[131] Ibid [31].

[132] [2009] NSWSC 1342.

[133] [2002] NSWSC 727.

[134] [2012] NSWSC 1122.

[135] [2015] NSWSC 802 [31].

[136] [2008] VSC 500 [98]. Hansen J found that a contractual provision that the purchaser would have no right to claim unless notice of irregularity was served by a particular date was no bar to a claim under the TPA.

[137] [2012] NSWSC 1122, [38]-[41] citations omitted.

[138] *Western Australia v Wardley Australia Ltd* [1991] FCA 314; (1991) 30 FCR 245, 259 (Spender, Gummow and Lee JJ).

[139] (1990) 170 CLR 394, 406.

[140] [1938] AC 173, 185 (with whom Lord Atkin and Lord Russell of Killowen concurred).

[141] *Western Australia v Wardley Australia Ltd* [1991] FCA 314; (1991) 30 FCR 245 (Spender, Gummow and Lee JJ).

[142] (1990) 170 CLR 394.

[143] *Awad v Twin Creeks Properties Pty Ltd* [2012] NSWCA 200 [43] (Allsop P, with whom McFarlan JA and Sackville AJA agreed).

[144] (1987) 71 ALR 367, 371 (with whom Fox and Jackson JJ agreed).

[145] Halsbury's Laws of Australia [100-1825].

[146] *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, 502–503 [132]–[134] (McHugh J).
