Authorised report: 13 ACTLR 252

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

COURT OF APPEAL

Case Title:	**Leda Commercial Properties Pty Ltd v Brenda Hungerford Pty Ltd**
Citation:	**[2018] ACTCA 17**
Hearing Dates:	9 May 2018 – 11 May 2018
Decision Date:	23 May 2018
Before:	Elkaim, Loukas-Karlsson and Bromwich JJ
Decision:	See [126]
Catchwords:	**APPEAL –** Appeal against primary judgment and judgment on costs – whether the trial judge awarded relief not founded on the pleadings – whether the trial judge erred in finding that any non-disclosure amounted to misleading and deceptive conduct – whether the trial judge erred in making a finding of reliance – whether the trial judge erred in his assessment of loss and damage sustained – whether the trial judge erred in his assessment of his costs **CROSS-APPEAL –** Cross-Appeal against primary judgment and judgment on costs – whether the trial judge erred in his assessment of loss and damage sustained – whether the trial judge erred in his assessment of costs
Legislation Cited:	*Court Procedures Rules 2006* (ACT) r 1725 *Leases (Commercial and Retail) Act 2001* (ACT) s 154 *Trade Practices Act 1974* (Cth) ss 52 and 82
Cases Cited:	*Banque Commercial SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; 273 ALR 664 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 *Commonwealth of Australia v Davis Samuel Pty Ltd (No 7)* [2013] ACTSC 146; 282 FLR 1 *Gray v Richards (No 2)* [2014] HCA 47; 89 ALJR 113 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 *Mareva Building Consultants v Zevon (No 2)* [2012] ACTSC 24 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 *Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 2)* [2017] ACTSC 88 *Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 3)* [2017] ACTSC 301; 325 FLR 436 *Water Board v Moustakas* (1988) 180 CLR 491

Parties:	Leda Commercial Properties Pty Ltd (First Appellant/First Cross-Respondent)	
	Tuggeranong Town Centre Pty Ltd (Second Appellant/Second Cross-Respondent)	
	Brenda Hungerford Pty Ltd (Respondent/Cross-Appellant)	
Representation:	**Counsel**	
	Mr M Walsh SC and Mr J Hartley (First and Second Appellant/First and Second Cross-Respondent)	
	Mr P Walker SC and Mr J Masters (Respondent/Cross-Appellant)	
	Solicitors	
	Mills Oakley Lawyers (First and Second Appellant/First and Second Cross-Respondent)	
	Donohue & Co (Respondent/Cross-Appellant)	
File Number:	ACTCA 22 of 2017	
Decisions under appeal:	Court/Tribunal:	ACT Supreme Court
	Before:	Refshauge ACJ
	Date of Decision:	28 April 2017
	Case Title:	Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 2)
	Citation:	[2017] ACTSC 88
	Court/Tribunal:	ACT Supreme Court
	Before:	Refshauge J
	Date of Decision:	18 October 2017
	Case Title:	Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 3)
	Citation:	[2017] ACTSC 301

THE COURT:

1. This is an appeal from two decisions of Refshauge J arising out of a retail tenancy dispute concerning a gift shop at a shopping centre. The primary judge upheld a landlord's claim for rent and damages by reason of the tenant abandoning the premises, awarding just over $83,000 plus costs. The primary judge also upheld a Third Party Claim against the original landlord at the time that the tenant took over the premises arising out of representations made concerning that part of the shopping centre, awarding well over $1.3 million. Other claims failed or were not pressed. Orders were made for interest and costs.

2. Tuggeranong Town Centre Pty Ltd was the plaintiff and cross defendant in the original action in its capacity as the landlord. Brenda Hungerford Pty Ltd was the defendant and

counter claimant in its capacity as the tenant. Leda Commercial Properties Pty Ltd was a third party in its capacity as the original landlord. Consistent with the primary judgment, these parties will be referred to as **TTC, BHPL and Leda** respectively.

3. The primary decision (*Tuggeranong Town Centre Pty Limited v Brenda Hungerford Pty Limited (No 2)* [2017] ACTSC 88) was handed down on 28 April 2017. The second decision, addressing the question of costs, was handed down on 18 October 2017 (*Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 3)* [2017] ACTSC 301; 325 FLR 436).

4. Refshauge ACJ made the following orders in the primary decision:

    (1) There be judgment for the plaintiff [the landlord, TTC] on its claim in the sum of $88,223.06 with costs.

    (2) The defendant's [the tenant's, BHPL's] counterclaim be dismissed with costs.

    (3) There be judgment for the defendant [the tenant, BHPL] on its third party claim in the sum of $1,377,561.94.

    (4) The defendant [the tenant, BHPL] and the third party [the original landlord, Leda] file and serve any written submissions as to costs of the third party claim on or before 1.00 pm on 5 May 2017.

    (5) It be declared that the plaintiff [the landlord, TTC] was entitled to enter the premises being shops 185A, 186 and 187 on Subleasing Plan 5100 on the land being Block 3 Section 1 Greenway to recover possession of them on or about 31 January 2008 and that the plaintiff [the landlord, TTC] was entitled to terminate the sublease of those premises to the defendant on that date under s 115 of the *Leases (Commercial and Retail) Act 2001* (ACT).

    (6) It be declared that the third party [the original landlord, Leda] is entitled to call on the guarantee given by the National Australia Bank Ltd dated 29 August 2003 on behalf of the plaintiff for so much of the judgment sum in favour of the plaintiff as is secured by the guarantee and to account to the plaintiff for all the funds received from the bank in response to that call.

5. His Honour made the following orders in the costs judgment:

    (1) It be declared that r 1725(2)(c) of the *Court Procedures Rules 2006* (ACT) applies to the assessment of the costs of the claim by the plaintiff [the landlord, TTC].

    (2) The third party [the original landlord, Leda] pay one half of the costs of the defendant [the tenant, BHPL] of the Third Party Claim.

    (3) The defendant [the tenant, BHPL] pay the reserved costs thrown away as a result of the adjournment on 30 September 2014.

    (4) There be no order as to the costs reserved in respect of the adjournment on 28 January 2015.

    (5) As to the costs reserved on 28 and 29 January 2015, the defendant [the tenant, BHPL] pay the plaintiff's [the landlord, TTC's] costs thrown away on 29 January but otherwise there be no order as to costs.

6. After a substantial number of amendments, the pleadings ultimately consisted of:

    (a) An Originating Claim (Amended Originating Claim dated 5 January 2010);

    (b) A Statement of Claim (the Second Further Amended Statement of Claim dated 15 September 2014);

(c) A Defence and Counterclaim (the Second Further Amended Defence to Second Further Amended Statement of Claim and Second Further Amended Counterclaim dated 29 September 2014);

(d) A Reply (the Further Amended Reply to Second Further Amended Defence dated 6 October 2014);

(e) An Answer to the Counterclaim (Further Amended Answer to Second Further Amended Counterclaim dated 6 October 2014);

(f) A Third Party Claim (Further Amended Statement of Claim to accompany Third Party Notice dated 29 September 2014); and

(g) A Defence to the Third Party Claim (Further Amended Defence to Further Amended Third Party Claim dated 6 October 2014).

7. The order awarding damages of $1,377,561.94 on the Third Party Claim was made under s 82 of the *Trade Practices Act 1974* (Cth). This entitlement to damages was derived from a finding that the third party, Leda, had been in breach of s 52 of this Act in that it had engaged, by silence or non-disclosure, in misleading or deceptive conduct in relation to the leasing, or assignment of the lease, of the premises to BHPL.

8. The premises at the centre of the dispute were located in the Tuggeranong Hyperdome. This is a shopping centre. It has expanded over time. This expansion and the layout of the centre is described in the primary judgment from [9].

9. In 1992, a business called Giving & Living started to operate from the premises. BHPL bought this business in 2003. The sale was settled on 1 September 2003. The sublease was assigned to BHPL on 4 November 2003, but with effect from 1 September 2003. At that time, Leda was the landlord.

10. There was some dispute as to whether the sublease had been assigned or a new sublease was executed. The dispute was not significant but it is noted that, whatever the case, the term of BHPL's occupation was extended to 31 August 2009.

11. On or about 6 December 2005, Leda sold the centre to TTC. Leda assigned its interest in the sublease with BHPL to TTC. Thus, TTC became BHPL's landlord.

12. On 31 January 2008, BHPL abandoned the premises and ceased to pay rent or other amounts to TTC. The abandonment terminated the lease, leaving BHPL owing TTC rent, outgoings and interest. A new tenant took over the premises on 1 June 2008. This had the effect of confining the rent obligations of BHPL to TTC.

13. TTC made a claim against BHPL for a debt of $21,404.77 and damages of $86,690.24. This claim was commenced in the Magistrates Court. It was later transferred to the Supreme Court to allow BHPL to pursue its counterclaim in the same proceedings.

14. Refshauge ACJ ordered that there be judgment for TTC on its claim in the sum of $88, 223.06 with costs. This order is not under appeal. However, the costs order is the subject of the Notice of Cross-Appeal.

15. BHPL's counterclaim against TTC for damages arising from alleged misrepresentations was dismissed with costs. The part of this order relating to costs is also the subject of the Notice of Cross-Appeal.

16. BHPL also brought a Third Party Claim against Leda. The Third Party Claim was successful. Refshauge ACJ ordered that there be judgment for BHPL on its Third Party Claim in the sum of $1,377,561.94. This order is the subject of this appeal.

17. BHPL has also filed a Notice of Cross-Appeal. In respect of the primary judgment, it appeals from the quantum of damages awarded under Order 3 and Orders 1 and 2 relating to costs. In respect of the costs judgment, it appeals from all of Orders 1 and 2.

18. The state of the pleadings and, in particular, whether the primary judge was able to reach the final orders that he made is a central issue in the appeal. Refshauge ACJ was obviously aware of the dispute about the pleadings and devoted, from [31] of the primary judgment, a good deal of consideration to the issue. At [84] he referred to the "rather inadequate pleadings".

19. His Honour described the issues as between TTC and BHPL at [46] of his primary judgment:

> 46. The issues arising out of the Statement of Claim and Defence are as follows:
>
> 1. Whether the lease document under which BHPL occupied the Premises was the assigned Sublease from Giving & Living Pty Ltd or a new sublease.
>
> 2. Whether Leda had properly and effectively assigned its interest under the Lease (whether a new sublease or assigned sublease) to TTC.
>
> 3. What was the status of the bank guarantee that BHPL had given to Leda and whether it had been cancelled or whether Leda could, on behalf of, or accounting to, TTC, call on the guarantee for the moneys owed by BHPL.
>
> 4. In addition, BHPL alleged breaches of various obligations of TTC which, it said, were required of it under the *Leases (Commercial and Retail) Act* or the lease documents, by reason of which BHPL was entitled to recover certain over-charges and that it was unconscionable for TTC and Leda to have charged for certain outgoings which, it was asserted they were liable to refund to BHPL.
>
> 5. BHPL further challenged the claim by TTC on the basis of the matters pleaded in the Counterclaim.

20. His Honour then went on to describe the counterclaim against TTC. After noting the "lack of clarity" in the allegations, his Honour described the counterclaim and its contents at [48] – [49] of the primary judgment:

> 48. Thus, the Counterclaim consisted primarily of allegations that officers of TTC or of Leda had made representations which were made in trade or commerce. The representations were said to be false, in that they related to future matters and there were no reasonable grounds for making the representations.
>
> 49. The representations which were said to have been misleading or deceptive were said to have been made by the following persons:
>
> (a) Mr Duane Lord, said to have been made from the beginning of 2007 through to the end of 2007 and in particular on or about 8 and 23 March 2007;
>
> (b) Mr Tim Beirne, said to have been made on or about 10 July 2003;
>
> (c) Mr Shane McCann, said to have been made in about March 2004 and then again further representations by him said to have been made on or about 23 March 2006; and
>
> (d) Mr Bob Cooper, said to have been made from shortly after the time Hot Dollar Australia (Canberra) Pty Ltd occupied shop 190 in the Hyperdome until about mid 2007.

21. At [55] of the primary judgment, his Honour stated what he considered were the issues arising out of the counterclaim and the defence to it:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. In relation to the identities of the persons referred to in the statement of issues, Mr Lord was the Centre Manager from about April 2006 to January 2008, Mr Bierne was the Retail Manager from January 2002 and Centre Manager from September 2002 to 2004, Mr McCann was the Retail Manager from about October 2002 to late 2003 and Centre Manager from early 2004 to April 2006, and Mr Cooper was the Retail Manager and Leasing Executive from about October 2004 to late 2008. Ms Brenda Hungerford was the sole owner and shareholder of BHPL.

23. As already noted, the counterclaim against TTC failed and, other than concerning costs, this order is not the subject of the appeal.

24. After describing the counterclaim, his Honour went on to examine the Third Party Claim against Leda. He noted that it was essentially the same claim as had been made against TTC. Noting his introductory comment, he summarised the issues at [70] of his primary judgment:

> 70. So far as I could make them out, the issues arising out of the Third Party Claim and the Defence to the Third Party Claim were as follows:
>
> 1. Whether Mr Beirne made certain alleged representations, either expressly or impliedly, and, if he did, whether the matters the subject of the representations were, as described, such that the representations were misleading or deceptive.
> 2. Whether Mr McCann made certain alleged representations and, if he did, whether he knew or ought to have known matters which BHPL alleged were inconsistent with the representations.
> 3. Whether Mr Lord made certain alleged representations and, if he did, whether they were misleading or deceptive.
> 4. Whether Leda was responsible for any remedy to which BHPL might be entitled as a result of any representations made by Mr Lord.
> 5. Whether a prospective purchaser of the balance of the term BHPL had in the Sublease was improperly persuaded to enter into a lease of premises elsewhere in the Hyperdome.
> 6. Whether the procedures required to be followed in setting of and requiring payment for the outgoings payable by tenants were followed by Leda and whether BHPL had been overcharged for the contributions to outgoings it had paid.
> 7. Whether Leda had been required to give BHPL a disclosure statement under the *Leases (Commercial and Retail) Act.*
> 8. Whether the Third Party Claim was barred by s 82(2) of the *Trade Practices Act* or s 11 of the *Limitation Act.*

25. The alleged representations are set out from [71] of his Honour's primary judgment. As the counterclaim against TTC failed, and is not under appeal, the relevant dealings are those with Leda prior to 6 December 2005.

26. For present purposes, namely the Third Party Claim by BHPL against Leda, the pleaded relevant representations were made by Mr Beirne in a conversation with Ms Hungerford on 10 July 2003. The judgment states:

> 79. In a conversation with Ms Hungerford, Mr Beirne is claimed to have represented:
>
> (a) that the Hyperdome was a good location in which to have a shop such as the Giving & Living Store;
>
> (b) the Giving & Living store's location was a good one because the Coles Door, nearest to the store, had passing through it the second highest foot traffic in the Hyperdome;
>
> (c) there was nothing that BHPL should know about the Hyperdome that could impact upon the Giving & Living business; and
>
> (d) the rent for the lease was market rent.

27. Representations were also alleged to have been made by Mr McCann during Leda's term as BHPL's landlord. These representations are described at [85] and [88] of the primary judgment. However, as noted by his Honour, the latter representations were actually made after TTC became the landlord by assignment from Leda as lessor and were asserted to have been made on behalf of Leda.

28. A final set of representations, allegedly made on behalf of Leda, were made by Mr Cooper. These are set out at [93] of the primary judgment.

29. Ultimately, only the representations made by Mr Beirne were relied upon by BHPL. Notwithstanding BHPL's abandonment of the other representations, his Honour, conscientiously, made specific findings concerning them and dismissed them as being irrelevant. As a result of these findings, the counterclaim by BHPL against TTC failed (see [135] of the primary judgment).

30. His Honour also dealt with and dismissed a claim by BHPL arising from the *Leases (Commercial and Retail) Act 2001* (discussed at [145] onwards of the primary judgment). Once again, although pleaded, it was not a claim that was apparently pressed by BHPL. It was probably unnecessary for his Honour to reach conclusions on this claim but he did so, no doubt considering it safer because of the poor state of the pleadings.

31. The two main witnesses whose evidence dictated his Honour's findings on liability were Ms Hungerford and Mr Beirne. Their evidence was scrutinised carefully and conclusions were reached about their respective reliability. In relation to Ms Hungerford, his Honour found, at [417]:

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

32. In relation to Mr Beirne, his Honour said, at [469]:

> 469. These were frank admissions that Mr Beirne made, strengthening my view of his honesty as a witness.

33. There were later, and even starker statements about the reliability of the two witnesses. At [964] and [965] his Honour stated:

> 964. In short, I am not prepared to rely on the evidence of Ms Hungerford unless it is corroborated.
>
> 965. Further, I formed the view that Mr Beirne was a witness on whom I could rely. He was straightforward in his evidence, he was not argumentative and he made admissions against interest. Indeed, his evidence is the most important evidence on which this case depends and that was evidence that was clearly against the interests of TTC/Leda.

34. His Honour described why he accepted Ms Beirne's evidence and, at [928], explained why the undisclosed information was important. His Honour's path to establishing liability against Leda began with his findings about the matters Mr Beirne had not disclosed to Ms Hungerford. His Honour stated at [921] – [924]:

> 921. Mr Beirne, however, was aware of the developments proposed for the Hyperdome to establish paid parking and that some of those developments may have an impact of the foot traffic through the Coles Door as I have noted earlier… He further knew of the proposed upgrade to the Courtyard and that this may have had an effect on the number of people entering through the Coles Door as I have also noted above…
>
> 922. Mr Beirne acknowledged that the installation of pipe rails consequent upon the introduction of paid parking would have had some effect on pedestrians moving within the general area leading into the Coles Door. His evidence about that in the context of his conversation with Ms Hungerford was:
>
> > MR ERSKINE: It would have been the fair thing to do to at least tell her there was some work that might affect that? – Yes

> And you see, that's not something that she could find out; that is, the erection of barriers and the like. That's not something she would find out from other sources, was it? – No
>
> 923. Similarly, Mr Beirne was asked about the developments that were made to the Courtyard. He agreed that these developments were part of the wish of Leda to encourage more people to come into the Hyperdome and spend more time there. His evidence then was:
>
> > But in any event you knew that by making the Lifestyle entry a more attractive place for people to go into the Hyperdome it might have the effect of encouraging them to use that doorway, rather than, for example, the closed door? – Yes.
> >
> > Yes. Was that something you think you should, on reflection, have told Ms Hungerford? – Yes.
>
> 924. Ms Hungerford's evidence was, on two occasions, that, had Mr Beirne described these developments to her, she would not have proceeded with purchasing the Giving & Living business. Again, this evidence was not challenged. Indeed, she repeated it in cross-examination without challenge.

35. At [941], his Honour made this important statement:

> 941. Nevertheless, Mr Beirne did concede that he should have also mentioned the developments that had commenced, at the very least in planning, and which he accepted were relevant to the matters he had himself raised with Ms Hungerford, and which he knew were highly relevant to the success of the Giving & Living business.

36. At [942] his Honour then stated what had become the primary issue on the question of Leda's liability:

> 942. Thus, the issue became one of silence or non-disclosure as a form of misleading and deceptive conduct rather than a positive representation that was misleading and deceptive.

37. It is important to recall that by the time his Honour came to consider this avenue of liability he had rejected the whole of the pleaded case as advanced in the Third Party Claim (Further Amended Statement of Claim to accompany Third Party Notice dated 29 September 2014).

38. His Honour's comments and findings on the reliability of the primary witnesses and on the breadth of the pleadings have been set out in some detail because they are at the core of the three arguments which were central to the challenge by Leda on liability.

39. These three arguments may be summarised as follows:

    (a) His Honour clearly was of the view that the ultimate relief granted to BHPL against Leda was derived from a case that fell outside the pleadings. This fact would ordinarily prevent the relief being granted but that basic principle was not applicable here because Leda had acquiesced in the non-disclosure, or silence, issue being dealt with and had voluntarily joined issue on this claim. If his Honour's finding of acquiescence or joinder of issue was incorrect, then the finding, and awarding of damages against Leda, fell outside the pleadings and should not have been the subject of a judgment against Leda. (**The pleadings point)**

    (b) For an allegation of misleading conduct derived from silence to succeed there must initially be an analysis of whether or not there was a reasonable expectation that the asserted undisclosed facts would have been disclosed. (**The reasonable expectations point)**

(c) It is a fundamental step in the entitlement to damages flowing from a breach of s 52 of the *Trade Practices Act 1974* (Cth) that the 'victim' of the misleading conduct had relied upon the relevant representation or non-disclosure to its detriment. In this case, the reliance stemmed from Ms Hungerford's evidence that, had the matters about which Mr Beirne remained silent been disclosed to her, she would not have proceeded with the purchase of the business. If the acceptance of Ms Hungerford's evidence was flawed, then reliance and the entitlement to damages were equally flawed. (**The reliance point)**

40. The Court will deal with each of these arguments in turn.

The pleadings point

41. The starting point, as a matter of principle, is the following passage from the judgment of Mason CJ and Gaudron J in *Banque Commercial SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at [18]:

> The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In Liquidation)* [1916] HCA 81; (1916) 22 CLR 490, per Isaacs and Rich JJ. at p 517. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See, for example, *Browne v. Dunn*, at p 76; *Mount Oxide Mines*, at pp 517-518.

42. As already noted, his Honour was very alive to the pleadings issue. His Honour stated at [968] – [978]:

> 968. While, as noted above… there is a need to be specific in pleading the conduct which is said to be misleading and deceptive, it does not seem to me to be an absolute rule immune from exceptions otherwise recognised in law and, indeed, laid down in a number of decisions of the High Court.
>
> 969. Thus, in *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517 – 518, Isaacs and Rich JJ said:
>
> > Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. *But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.* There is abundant authority for this, even if the matter were required to rest on authority only.... There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own facts.
>
> 970. To the same effect was what fell from Mason CJ and Gaudron J (at 286-7) and Brennan J (at 288) in *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279. See also *Dare v Pulham* (1982) 148 CLR 658 at 664.
>
> 971. I approached a similar issue in *Commonwealth v Davis Samuel Pty Ltd (No 7)* [2013] ACTSC 146; 282 FLR 1 at 277; [1959], as follows:

> I shall not dismiss the issue on the basis that it was not pleaded; it seems to me that both parties conducted the proceedings on the basis that this matter was fairly in issue and addressed it comprehensively in submissions.

> 972. In this case, there was no challenge at the time that Mr Beirne gave the evidence I have reproduced above (at [926]), that this evidence should be rejected as inadmissible because it was irrelevant to the pleaded case nor was there any subsequent challenge to the way in which this evidence was used by BHPL to justify the alleged misrepresentation. The submissions of both parties joined issue directly on these matters.

> 973. The pleadings of BHPL could be reasonably criticised quite seriously. They were drafted to some extent as if the claim was one of common law negligent misrepresentation (as to which see *Meredith v Commonwealth (No 2)* [2013] ACTSC 221; 280 FLR 385 at 428-30; [384]-[390]), though not completely. That is to say, they pleaded representations rather than conduct, though the representations, it is accepted, was said in the submissions in this case, to constitute the conduct.

> 974. In dealing with the issue of non-disclosure, however, the pleadings in this form showed some inflexibility, for the true conduct on which BHPL was relying was constituted by Mr Beirne's silence as to matters of which he was well aware in the context of the statements that were made by him.

> 975. Again, no point was taken about this by TTC/Leda and their submissions directly addressed the issue of non-disclosure. They submitted that this was not a "no transaction" case (cf *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8; (2007) ANZ ConvR 254) and that the admitted non-disclosure did not amount to misleading or deceptive conduct because, relying on *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 at 114, silence does not ordinarily amount to a breach of s 52 of the *Trade Practices Act*.

> 976. Further, TTC/Leda submitted that the non-disclosure was not capable of inducing error (*Butcher v Lachlan Elder Realty Pty Ltd* at 625; [109]), that a reasonable person in the position of BHPL would not have misunderstood the conduct to have meant that there were not going to be changes in the Hyperdome that would impact on the Giving & Living business (*North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2010] FCAFC 60; 269 ALR 262 at 272; [46]-[48]), and that the context of the conversations and the words said, especially to what they were in reply, were all necessary considerations which, in this case, would not have led to liability.

> 977. Indeed, TTC/Leda made detailed submissions about the issue of silence in the context of commercial transactions.

> 978. No challenge was made by TTC/Leda to the fact that the non-disclosure was not pleaded. In all the circumstances, I am satisfied that the issue was, in reality, despite the inadequacy of the pleadings, fairly an issue on which the parties were consciously and adequately joined.

43. At [968] his Honour said:

> 968. While, as noted above (at [946] – [947]), there is a need to be specific in pleading the conduct which is said to be misleading and deceptive, it does not seem to me to be an absolute rule immune from the exceptions otherwise recognised in law and, indeed, laid down in a number of decisions of the High Court.

44. In short, his Honour was emphasising what he had already said in *Commonwealth v Davis Samuel Pty Ltd (No 7)* [2013] ACTSC 146; 282 FLR 1 at [1959]:

> 1959. I shall not dismiss the issue on the basis that it was not pleaded; it seems to me that both parties conducted the proceedings on the basis that this matter was fairly in issue and addressed it comprehensively in submissions.

45. The two most direct statements by the primary judge on the absence of any prejudice flowing from the deficiencies in pleading are contained in [977] and [978] of the

judgment. They are quoted above. An initial observation is that these statements are perhaps inconsistent with an earlier observation, made by his Honour at [938]:

> 938. Regrettably, neither party really addressed the issue of whether what Mr Beirne failed to say constituted misleading and deceptive conduct. BHPL submitted simply that "[t]he issue at the time of purchase was disclosure.

46. This observation seems to recognise that the parties had not properly dealt with the question of disclosure.

47. Senior Counsel for Leda was asked in plain terms whether Leda accepted his Honour's statements as to the pleadings recorded from [972] to [978] as being accurate. He said Leda did not accept the accuracy of those statements and maintained its position that the finding of misrepresentation by silence fell outside the pleadings and never became a subject of full and proper argument in the course of the hearing. Certainly, said Senior Counsel, Leda had never acquiesced in the inclusion of this topic as an issue joined in the proceedings.

48. Senior Counsel's statement led the Court to delve into the conduct of the hearing in order to resolve the difference between the direct statements made by his Honour and the submissions made by Senior Counsel.

49. BHPL, in support of its position that Leda had said all it might have wanted to say about silence, referred to the written submissions that had been filed on behalf of Leda and which can be found in Appeal Folder B from page 286. It was suggested that these submissions comprehensively covered everything Leda might have wanted to say about misleading conduct arising from silence. It is correct that the submissions are detailed and cover a number of the relevant authorities. They must, however, be looked at in their overall context. This examination demonstrates that the submissions were made within the parameters of attacking BHPL's case as framed in the pleadings.

50. For example, [10] and [15] referred to the pleaded case and [328] and [338] seek specific findings in relation to the pleaded case. In [255], a specific complaint is made about the use of Mr Beirne's evidence to support an implication that falls outside the pleaded case.

51. Any initial impression must also give way to an understanding of how these submissions were generated. They were a response to the submissions that had been filed by BHPL and which can be found in the Respondent's Further Supplementary Appeal Folder from page 94 but most relevantly on pages 96 and 97. These are the submissions BHPL relied upon in putting forward its case and to which Leda responded.

52. The submissions made at [13], [14] and [15], commencing on page 96, are set against the background of there not yet having been any findings about the reliability of the evidence of the principal witnesses. At this stage, BHPL's primary position would have rested on the acceptance of Ms Hungerford's evidence. On that basis, the non-disclosure referred to at [15] is consistent with the assertions of positive representations as pleaded. In other words, it was being asserted that the positive representations should be accepted, thereby highlighting what the representations did not include. This is different to an assertion of misleading conduct by silence in the absence of positive representations.

53. Against this background, the submissions on silence made by Leda answer the submissions made by BHPL in the above context. It is not to the point that the submissions made by Leda might well have been similar to submissions made on a differently pleaded case. Leda was entitled to respond to BHPL's submissions in the context of the pleaded case.

54. Further support for Leda's assertion that it had not acquiesced to the silence allegation being dealt with is contained in the transcript of the hearing that took place on 28 and 29 January 2015. By this time, the taking of evidence had been completed and written submissions had been filed. Oral submissions had been planned for those dates but this did not proceed because of the illness of BHPL's Senior Counsel.

55. The transcript reveals that his Honour was concerned to hear further submissions. He said to Mr Walsh SC, on 28 January 2015:

> …I only want to hear from you on disclosure and I only want to hear from Mr Erskine on damages. I want to hear both of you on those two issues but they seem to me critical issues... (T 1503.13 – T 1503.16).

56. His Honour continued:

> …I think I'm entitled to seek a little bit of elucidation on the issue of silence and duty and expectation from Mr Erskine because it is clearly an assertion rather than an argument that he has put there but really, I need to hear from you about that a little further… (T 1503.20 – T 1503.23)

57. On 29 January 2015, it became apparent that Leda had now appreciated the shift that had occurred in the presentation of BHPL's case. Mr Walsh SC said to his Honour:

> And the change that your Honour identified in the BHPL case to the effect that the assertion was that it became untrue because of the development not being disclosed. That was raised in reply for the first time. (T 1529.17)

58. There was some discussion about a further half day hearing but, because this turned out to be impractical, an application was made for leave to put on further written submissions. This application was ultimately refused and the decision was reserved (T 1534.23).

59. It is important to note here that the final pleading relied upon by BHPL was not filed in Court until after the completion of the evidence of Ms Hungerford and Mr Beirne. As properly conceded by Mr Walker SC, on behalf of BHPL, this would have been the "perfect time" to amend the pleading if a new cause of action had emerged from the evidence already given. Although the pleading was the subject of approval prior to the hearing commencing, it was not filed until 30 September 2014. BHPL chose to continue with a pleading which explicitly relied on positive representations and not misleading conduct by silence.

60. The effect of the above examination of the proceedings is that Leda and TTC did not acquiesce to the Court dealing with the silence argument and the issue was not joined between the parties. In this regard it is noted that Leda has stated that, had it been dealing with silence as a pleaded issue, the cross-examination of Ms Hungerford would have been extended and Mr Beirne asked further questions. It should be accepted that, if there had been an amendment of the pleadings when filed on 30 September 2014, alleging a representation by silence, Ms Hungerford and Mr Beirne would, most likely, have been recalled for further questioning.

61. The next point to arise is whether his Honour's finding on the liability of Leda arising from a misrepresentation by silence could otherwise fall within the existing pleadings. Plainly it did not. The primary judgment highlights, on a number of occasions, the inadequacy of the pleadings and, specifically, the scope of the alleged misrepresentation.

62. His Honour said at [946] and [947]:

> 946. This, however, requires a clear articulation of the way in which the conduct, including the non-disclosure, is said to have been misleading. As their Honours had earlier said, at 364; [5]:
>
> > The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off. Its pleading, however, requires consideration of the words of the relevant statute and their judicial exposition since the cause of action first entered Australian law in 1974. It requires a clear identification of the conduct said to be misleading or deceptive. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive conduct or whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive.
>
> 947. Thus, the way in which a matter is pleaded will be very important to the question of whether there has been misleading or deceptive conduct: *Barnes v Forty Two International Pty Ltd* [2014] FCAFC 152; 316 ALR 408 at 411-22; [8]-[12]; *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430 at [56].

63. The already quoted [972] to [978], although containing the mistaken statement of acquiescence, plainly encapsulate his Honour's view that the pleadings did not encompass the silence issue. His Honour cannot be faulted on this conclusion.

64. BHPL submitted that his Honour's findings could fall within the scope of [13] and [14] of the pleading. This, with respect, faintly put submission must be rejected. The submission was based on the evidence that Mr Beirne provided the information about foot traffic, knowing that future plans for the centre might affect the level of this traffic, and Ms Hungerford not being told of the plans. It was said that if the representation by Mr Beirne was half true that would allow for the absence of the other 'half', that is the information not provided, to fall within the scope of the asserted representation.

65. Firstly, this is not the pleaded case and, secondly, [14] omits any reference to the allegation of silence. In short, the case was simply never run on this basis.

66. More importantly however, the authorities are clear to the effect that a complaint of misrepresentation by silence must be specifically identified and pleaded. In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357, French CJ and Kiefel J said at [5]:

> 5. The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off. Its pleading, however, requires consideration of the words of the relevant statute and their judicial exposition since the cause of action first entered Australian law in 1974. It requires a clear identification of the conduct said to be misleading or deceptive. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive conduct or

> whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive.

67. Even more specific to this case is the following excerpt from the judgment of Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at [32]:

> 32. In this Court, the purchasers emphasised the proposition that the expression "conduct" in s 52 extends beyond "representations". That proposition is sound. But the purchasers cannot claim any advantage out of an extension of "conduct" beyond "representation" in this case, since their case as pleaded was one based on representations to them by the agent. In this Court, counsel for the purchasers accepted that the alleged misrepresentation was a misrepresentation about the title to land.

68. The next issue to arise is whether the absence of the specific pleading necessarily means that his Honour was not entitled to deal with the misrepresentation by silence allegation. Generally, a case is dictated by its pleadings. There are exceptions. For example, in *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; 273 ALR 664 ('Betfair'), the Full Court of the Federal Court stated at [51]:

> 51. At trial a party is entitled to have the opposing party confined to that party's pleadings because the first party is entitled to come to trial to meet only the issues raised on the pleadings. However, if the first party does not seek to so confine the opposing party but allows the other party to raise other material facts and issues for the determination of the Court, then in our opinion the Court is permitted and possibly obliged to decide the proceeding on the further material facts and issues raised and addressed at trial: *Banque Commerciale* at 296-297; *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)* (1916) 22 CLR 490 at 517. If it were otherwise, the party who has failed to plead all of the material facts or issues upon which the party's case relies, but has brought those material facts or issues to the attention of his or her opponent at trial, would be denied natural justice if at the end of the trial the Court decided the proceeding on the pleadings without notice to that party. The first party in those circumstances would have been denied the opportunity to apply to amend those pleadings so as to formalise what was in fact addressed at the trial.

69. The situation contemplated in *Betfair* does not apply here. Leda was never faced with evidence indicating a different case to that which was being pleaded. As noted above, a specific pleading was filed after the evidence of the principal witnesses with no attempt made to amend that pleading to put forward a case that might have been said to arise from the evidence of one or more of the witnesses.

70. The ultimate conclusion must be that the primary judge found a case in favour of BHPL which had not been pleaded and which had not formed part of any acquiescence or joinder of issue on the part of Leda.

71. BHPL sought to rescue its position from the above finding by reliance upon the decision of the High Court in *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 ('Leotta'). There was, however, no application by BHPL to amend the pleadings to reflect the evidence during the original hearing. To the extent that it is suggested that Refshauge ACJ should have, of his own volition, amended the pleadings, that suggestion cannot be sustained. The obligation was squarely on BHPL to seek the amendment. In addition, *Leotta* is a case involving a jury where any amendment would need to have been made promptly because the matter could not be adjourned. That was not the case here.

72. There is another reason to treat *Leotta* with caution. Having reached the view that misleading conduct by silence had not formed part of the hearing it would have been

inappropriate for an amendment to have been made. The High Court in *Water Board v Moustakas* (1988) 180 CLR 491 said at [14]:

> 14. In *Leotta v. Public Transport Commission (N.S.W.)* (1976) 50 ALJR 666, at p 668; 9 ALR 437, at p 446, a case having been submitted to the jury which was factually different from that alleged in the pleadings and particulars, Stephen, Mason and Jacobs JJ. observed that the pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence. The failure to apply for the amendment in that case was held not to be fatal. But in *Maloney v. Commissioner for Railways (N.S.W.)* (1978) 52 ALJR 291; 18 ALR 147, Jacobs J., with whom the other members of the Court agreed, pointed out (at p 294; pp 151-152 ALR) that the conclusion in *Leotta* was reached only upon the presupposition that the new issue or new way of particularizing the existing issue had emerged at the trial and had been litigated.

73. The decision in *Leotta* also gave rise to an application in the course of the hearing of the appeal to amend the relevant pleading so as to include an assertion of misleading conduct by silence. The application was opposed and ultimately refused. It was refused because it incorporates the same vice as any application that would have been made during the trial. The evidence that would have been called by Leda in the trial to meet such an allegation was also not present in this Court. Allowing the amendment would have been another example of permitting trial by ambush.

74. It should also be observed generally in relation to the pleading issue that the basis upon which his Honour found there had been a non-disclosure by silence arose from a few lines of evidence of Mr Beirne. This evidence included a substantial volume of other evidence concerning actual representations. In the circumstances one would have expected that, as a matter of fairness, the few lines of transcript would have been the subject of a specific pleading if they were to be dealt with. This is against the background of the pleaded case of false representations being entirely rejected.

75. The result of the pleading issue is that the judgment against Leda must be set aside and judgment entered for Leda on the Third Party Claim. This is not a matter where the action should be remitted for a rehearing. The Court has found that the Third Party Claim should have failed within the parameters in which it was pleaded. Any remission of the matter would not change the scope of the pleadings and failure would again be inevitable.

76. It is unnecessary to deal with the remainder of Leda's assertions of error. The Court does, however, consider it important, having regard to the careful and comprehensive submissions put by both sides, to briefly deal with some of the other identified liability issues.

Reasonable expectation analysis

77. Leda submitted that the primary judge should have, but did not, carry out what it described as a reasonable expectation analysis. The failure to do so, said Leda, meant that his Honour's reasoning was not complete and could not properly have led to a finding against Leda.

78. Leda submitted that the principles contained in the relevant authorities could be distilled into the following five points:

> 1. Firstly, unless the circumstances give rise to a reasonable expectation that if some relevant fact exists that will be disclosed, mere silence will not support the inference that the fact does not exist.

2. Secondly, the characterisation of conduct must be undertaken by reference to circumstances and context, which includes the knowledge of the person who claims to be misled.

3. Thirdly, there is a risk in applying the reasonable expectation test by taking into account irrelevant considerations and unduly narrowing the relevant circumstances to be taken into account.

4. Fourthly, the judgment as to whether there is a reasonable expectation is objective.

5. Fifthly, the invocation of a reasonable expectation that if a fact exists it will be disclosed directs attention to the effect or likely effect of non-disclosure.

79. BHPL agreed with Leda's analysis but said that Point 1 was not relevant to the present circumstances. BHPL submitted that there was no need for the primary judge to have undertaken a reasonable expectation analysis. Once Mr Beirne referred to foot traffic he was required to disclose anything relevant to that topic, in particular whether there were planned works which might affect foot traffic. This was precisely the point made, said BHPL, by the primary judge at [995]:

> In this context, it seems to me that Mr Beirne, having decided to disclose certainly the Coles Door foot traffic information and probably the Go-Lo store opening information, he was obliged also to disclose the moderating or even, to his understanding, possibly negative information about the relevant developments.

80. Leda submitted that the conclusion reached by his Honour at [995] did not disclose an application of a reasonable expectation analysis and therefore involved a 'leap' over the required steps of an analysis.

81. In *Miller*, at [23], it was stated that a reasonable expectation analysis "is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation." That is not the position here. Palmer J in the New South Wales Supreme Court said this about a reasonable expectation:

> 71 Section 52 TPA does not impose on a vendor a duty to inform the purchaser of everything known to the vendor which could possibly be relevant to the transaction or which could possibly affect the purchaser's mind. That would impose an unrealistic burden on parties to a commercial transaction. A defendant's failure to disclose will only be misleading or deceptive for the purposes of s.52 TPA if, in all the circumstances, the Court finds that the information withheld was material to the plaintiff's decision and that the plaintiff would have had a reasonable expectation that the information would be disclosed.
>
> 72 The requirement of "reasonable expectation" must, to a large extent, be ascertained according to objective considerations. It would be too easy for a plaintiff, disappointed in the outcome of a commercial transaction, to say: "If only I had been told of x, I would never have proceeded". A defendant should not be held liable under s.52 TPA for failing to disclose information when the plaintiff did not indicate, directly or indirectly, to the defendant at any relevant time that information of that kind was material to the plaintiff's decision and when the defendant could not otherwise reasonably have been aware in all the circumstances that information of that kind was likely to be material to a person in the position of the plaintiff. See generally: *Demagogue Pty Ltd v Ramenski* (1992) 39 FCR 31, at 32 per Black CJ; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 79 ALR 83, at 95 per Lockhart J; *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, at 114 per Hill J.

82. While accepting that there was no other source of information about the future work besides Mr Beirne, the necessity for his Honour to have performed a reasonable expectation analysis as a precondition to his conclusion as stated in [995] must remain.

83. Leda submitted that a reasonable expectation analysis would be as follows:

> The analysis can be seen to involve four steps: *first,* BHPL had a reasonable expectation that, if a fact existed, Leda would disclose it; *second*, Leda did not disclose the fact *third*, therefore BHPL believed that the fact did not exist; *fourth*, the fact did exist, and therefore BHPL was lead into error by Leda's silence.

84. It is clear that his Honour, at [995], made a leap from Mr Beirne's statement about foot traffic to a conclusion that he was "obliged" to provide the "negative information". It may be that, applying the four step test, his Honour may have reached the same result. That is not known. The point is that the analysis should have been undertaken on the path to the conclusion.

Reliance

85. It is trite law to say that damages will not flow from a misrepresentation under s 52 of the *Trade Practices Act 1974* (Cth) unless the misrepresentation, be it by way of disclosure or non-disclosure, was relied upon. The reliance in this case was derived from his Honour's acceptance of Ms Hungerford's evidence that she would not have proceeded with the purchase of the business had the matters not disclosed by Mr Beirne actually been disclosed.

86. Senior Counsel for BHPL recognised the importance of this issue at the commencement of his oral submissions. He stated: "our case is primarily she [Ms Hungerford] would not have bought this shop".

87. His Honour's approach, which in principle cannot be faulted, was that notwithstanding his rejection of the reliability of Ms Hungerford's evidence, where her evidence had not been challenged, in particular on a significant point, it ought to be accepted.

88. The problem that arises is that the evidence was challenged in both indirect and direct terms. The following questions and answers can be found in the cross-examination of Ms Hungerford (AB B 141.26, 154.03, 156.42 and 174.33 respectively):

> Q. The situation was that at your meeting with Mr D'Amico, you said you had made up your mind to buy the business?
>
> A. I did not say that.
>
> Q. You see nothing in your conversation with Mr Beirne in any way influenced your decision to buy the business, did it?
>
> A. It did.
>
> Q. The truth is you weren't reliant upon Mr Beirne for his opinion as to the business at all?
>
> A. That's not true.
>
> Q. I also must suggest to you that at the time you bought the business nothing Mr Beirne said to you was a consideration for your decision to purchase or for BHPL to purchase the business?
>
> A. That's not true.

89. The finding made by his Honour at [924] must, therefore, be treated as an error. BHPL submitted that, notwithstanding the error, the reliability of the evidence could still stand when measured against the general approach taken by his Honour that Ms Hungerford's evidence should only be accepted where it was corroborated. BHPL submitted that there was significant corroboration that she would not have bought the business. This included the following:

(a) The fact that Ms Hungerford took steps, no matter how ineffectual, to record foot traffic indicated the importance of the statistic to her.

(b) Ms Hungerford had never met the Centre Manager at any previous time.

(c) Following the meeting Ms Hungerford paid a deposit on the purchase price of the business.

(d) Following the meeting Ms Hungerford submitted an application for the lease.

(e) An inventory was taken after the meeting.

(f) Mr Beirne's evidence about foot traffic emphasised its importance.

90. When the above pieces of evidence are put together, BHPL submitted, they combined to corroborate Ms Hungerford's evidence on the decision that she would not have purchased the business had there been disclosure about upcoming plans for the centre.

91. It is correct that the above evidence could be seen as supporting the conclusion that Ms Hungerford regarded foot traffic as very significant and may have acted differently had there been information which was likely to impact upon future foot traffic.

92. There was, however, direct evidence to the contrary. Whatever the background to Exhibit 6 (a letter dated 8 July 2003 from the previous owner to a supplier), its content directly contradicts BHPL's position. The letter states:

> We have pleasure to announce that Giving and Living Tuggeranong ACT store has been sold to a tremendous lady, who will take this successful store to an even greater level of success!

93. Leda submitted that, as the letter predates the meeting between Ms Hungerford and Mr Beirne by some three days, the assertion that the decision to purchase the business only occurred after the meeting cannot be sustained.

94. There was independent evidence, therefore, to both corroborate and contradict Ms Hungerford's assertions.

95. It is worth repeating [924] of the judgment and adding [925]:

> 924. Ms Hungerford's evidence was, on two occasions, that, had Mr Beirne described these developments to her, she would not have proceeded with purchasing the Giving & Living business. Again, this evidence was not challenged. Indeed, she repeated it in cross-examination without challenge.
>
> 925. While it was submitted for TTC/Leda that I should reject Ms Hungerford's evidence or, at least, treat it with great caution, I do not consider that I should reject this evidence in all the circumstances.

96. BHPL also submitted, somewhat opaquely, that the above two paragraphs did not mean what they said. Rather, it was submitted, the reference to "not challenged" actually meant "not contradicted". This interpretation was said to be consistent with [930], which states:

> When he gave his evidence, Mr Beirne was, I consider, careful and thoughtful. As would be expected, he did not recall the meeting. Perhaps it would have been useful if he had made a contemporaneous note of it, but there was no reason for him to think that it had particular importance. He was well aware of the limits he should recognise when providing his advice to prospective tenants, such as BHPL was to become, and I had no reason to believe that he was not very conscious of them in the conversation with Ms Hungerford.

97. The argument seemed to be that where the evidence in question was controversial there was no need for a challenge to the evidence if other evidence already existed which affirmed the opposing side of the controversy. There were elements of a '*Browne v Dunn*' argument in the submission. However, the submission entirely fails to reflect the precise words his Honour used, namely that the evidence was "not challenged". This means that his Honour felt bound to accept it because no proposition to the contrary had been put to the witness. As has been seen, suggestions to the contrary were put to Ms Hungerford.

98. There is another difficulty with BHPL's argument. His Honour's assessment of Ms Hungerford's reliability required corroboration, not of surrounding circumstances, but of the specific fact that she was asserting. In other words, for his Honour to have been satisfied that she would not have purchased the business, there would have needed to be corroboration of that fact. This, for example, might have come from a note she made or a conversation she had in which it was stated that she would not have bought the business had she been told about the future works to be undertaken. This note or conversation might have occurred, again for example, after some of the works commenced.

99. Ms Hungerford's evidence that she would not have bought the business was the only evidence to that specific effect. When it is removed from consideration, the whole of the case on reliance falls away. Once this occurs, the pathway to damages is interrupted and cannot be restored. This is another reason why the verdict against Leda must be set aside.

Costs

100. The costs orders made by his Honour on 18 October 2017 are set out at [3], above. Only orders 1 and 2 are the subject of appeal. It is convenient to repeat them here:

> (1) It be declared that r 1725(2)(c) of the *Court Procedures Rules 2006* (ACT) applies to the assessment of the costs of the claim by the plaintiff [the landlord, TTC].
>
> (2) The third party [the original landlord, Leda] pay one half of the costs of the defendant [the tenant, BHPL] of the Third Party Claim.

101. TTC and BHPL have appealed against Order 1. Leda and BHPL have appealed against Order 2.

102. Leda's success in this Court on the Third Party Claim requires Order 2 to be set aside. This success however does not necessarily dictate an order that BHPL should pay Leda's costs below or on appeal.

103. The effect of Order 1 is that as between TTC and BHPL, TTC was entitled, in short form, to 50% of its costs. This is a product of the application of r 1725(2)(c) of the *Court Procedures Rules 2006* (ACT).

104. At this stage s 154 of the *Leases (Commercial and Retail) Act 2001* (ACT) needs to be introduced. The section states:

> The parties in a proceeding under this Act must bear their own costs unless the Magistrates Court or Supreme Court makes an order about costs.

105. As between BHPL and TTC, BHPL said s 154 applied to the claim brought by TTC but not to the counterclaim. TTC said s 154 applied to both its claim and the counterclaim.

The primary judge agreed with TTC's submission. After a lengthy and unimpeachable examination of the issue, his Honour concluded from [138]:

> 138. Despite the different terms used in the various industrial legislation to which I have referred, the general tenor of decisions, except the more recent ones in relation to s 824 of the *Workplace Relations Act*, suggest that a provision such as s 154 of the *Leases Act* should apply to the whole of the controversy being considered by the Court, not just those parts "directly" under or referable to the *Leases Act*, unless those latter issues are "colourable" or trivial.
>
> 139. Nevertheless, the analogy between these various provisions and s 154 of the *Leases Act* is a problematic one. In that section, there is no reference to "matters" which was significant in the consideration of the other provisions. It was a significant consideration in decisions such as *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate (No 2)* and *Stanley v Service to Youth Council Inc (No 3)*. On the other hand, the use of the term "matter" in some cases seems to extend into a wider concept given the broad interpretation given the term by *Fencott v Muller* (1983) 152 CLR 570 at 606-7, namely a justiciable controversy which may include claims under both (in that case) federal law and non-federal law. In attempting to provide a formula to decide what claims are disparate and what are not, the plurality decided a "sound guide" would be "common transactions and facts".
>
> 140. Using this guide, it seems to me that the claims in this case are all part of the one justiciable controversy. They arise out of the same facts and transaction; only the liability flowing from the facts and transactions flows from different statutes and the law of contract (through the Sublease), which each act upon the same facts and transactions. Indeed, in a number of respects, the liability, though with different statutory and legal bases, is otherwise identical in content, reach and consequence.
>
> 141. If the proceeding is the vehicle which brings these claims to the Court for adjudication and resolution, then it seems to me that the proceeding is under the *Leases Act*. That it is also under the *Trade Practices Act*, the *Fair Trading Act* and the common law of contract and equity does not deny that first proposition.

106. This Court sees no reason to depart from his Honour's analysis and agrees that s 154 applied to the whole of the proceedings between BHPL and TTC. The difficulty that then arises is that, notwithstanding his conclusion about s 154, his Honour went on to apply r 1725 to TTC's costs against BHPL, ultimately resulting in Order 1.

107. While it is recognised that the primary claim by TTC against BHPL is the only claim that could be subject to r 1725, there is no apparent reason why the rule was applied instead of s 154, which his Honour had decided was applicable to all of the claims between the parties.

108. On this basis it does not matter whether r 1725 applies in the form in which it existed before or after 1 January 2012.

109. The last point arises from his Honour's conclusion that r 1725 was applicable in its current form because although the proceedings had commenced before the rule was amended on 1 January 2012 it was nevertheless applicable because the decision was given after this date.

110. BHPL submitted that r 1725 in its current form, or its predecessor, did not apply because costs were governed by s 154 of the *Leases (Commercial and Retail) Act 2001* (ACT). If this section applied the appropriate order should have been that TTC and BHPL each paid their own costs.

111. On this particular controversy his Honour noted that the rule he was applying commenced on 1 January 2012 and was not retrospective. He did, however, state that

it applied to judgments delivered after this date. Thus, although TTC sued BHPL in the Magistrates Court before 1 January 2012, the current rule nevertheless applied because the judgment was delivered in 2017. His Honour's approach was based on the decision of Katzmann J in *Mareva Building Consultants v Zevon (No 2)* [2012] ACTSC 24. Her Honour said this at [21] and [22]:

> 21. Neither party made any submissions on the effect of the amendments. Nevertheless, the amendment must not be taken to commence retrospectively, there being no clear indication to that effect: *Legislation Act 2001* (ACT), s 75B. If, contrary to this view, the amendment is to be taken to have retrospective effect or to apply to those costs incurred since 1 January 2012, I would exercise my discretion under subrule (3) of the amended rule to order that Mareva's costs and disbursements be determined without regard to the amendment. Otherwise, it would be quite unfair. It would penalise Mareva because of the time judgment was delivered. Mareva made no application that the discretion to depart from the costs limitations in r 1725 be exercised in its favour and, with this qualification, I see no good reason to do so.
>
> 22. I therefore order that Mr and Mrs Zevon pay 50% of Mareva's costs. For more abundant caution I also order that costs be determined in accordance with r 1725 of the Rules as in force until 31 December 2011.

112. TTC submitted that his Honour erred in his interpretation of *Mareva* and should have decided that the rule in its present form did not apply to any matter commenced before 1 January 2012. The combination of the second sentence in [21] of *Mareva* and the caution expressed at the end of [22] make it clear that her Honour was of the view that there could be no retrospective application of r 1725, regardless of the date of decision. This Court agrees with her Honour and disagrees with the primary judge.

113. As stated above however, it matters little whether the source of the discretion is the old or new rule.

114. Notwithstanding the controversy about r 1725, the Court repeats its agreement with the primary judge that s 154 applies to the whole of the controversy between the parties. Therefore, this Court will approach costs on the basis of whether or not the discretion allowed for by s 154 should be applied to produce orders other than that each party should pay its own costs.

115. To this effect, r 1725 will have no part to play. This is because the specific sub-rules within r 1725 provide for a specific regime of costs which might be seen as inconsistent with the general discretion provided by s 154. Any inconsistency will result in s 154 being considered in preference to r 1725. This is because of r 4(1):

> Unless a territory law otherwise provides, these rules apply to all proceedings in the Supreme Court and Magistrates Court.

116. Section 154 is a territory law "that otherwise provides". If the inconsistency does not exist so that r 1725 can be applied in conjunction with s 154, the result is a little different because both provisions allow for the exercise of a discretion.

117. Should then the discretion under s 154 be exercised by this Court? The primary judge examined the application of the discretion under s 154 from [151]. After a careful analysis he concluded at [175]:

> Similarly, it should be clear that the overriding consideration should be the interests of justice and fairness to the parties which should be the ultimate touchstone for any order, whether that be that there be no order as to costs or that there be an order that a party bear the costs of another party.

118. This conclusion is precisely in line with the overall statement of general principle made by the High Court in *Gray v Richards* (*No 2)* [2014] HCA 47; 89 ALJR 113 at [2]:

> The disposition of costs is within the general discretion of the Court. Ordinarily, that discretion will be exercised so that costs are awarded to the successful party, but other factors may have a significant claim on the discretion of the Court. The disposition which is ultimately to be made in any case where there are competing considerations will reflect a broad evaluative judgment of what justice requires.

119. In addition, as recognised by the primary judge at [152]:

> …The section should be construed as requiring the Court to give primacy to the consideration that each party should pay its or their own costs unless the Court considers that some other order is appropriate.

120. His Honour further noted that the "*Leases Act* gives no direct considerations or principles on which the Court should act."

121. It would seem apparent from the starting position in s 154 that a factor in exercising the discretion must be to promote affordable litigation between landlords and tenants, perhaps in particular in favour of the latter.

122. In this case the proceedings started with a 'conventional' suit by a landlord seeking recovery of outstanding rent and outgoings. This is precisely the type of proceeding which the Act might be thought to promote on a basis which minimises costs. The Court can see no reason why the discretion should be exercised in respect of the claim brought by TTC against BHPL.

123. The claims by BHPL against TTC and Leda fall into a different category. They were extensive claims which, either before the primary judge (in respect of TTC) or before this Court (in respect of Leda) entirely failed. They were based on representations which were never proved and were derived from the evidence of Ms Hungerford, the principal of BHPL, who the primary judge found to be an unreliable witness.

124. Unlike the claim by TTC, the counterclaim and Third Party Claim occupied significant court time and no doubt incurred significant costs in their defence.

125. In the view of the Court the discretion should be exercised to recognise that TTC and Leda were required to defend unjustified, detailed and extensive claims against them. The just result must be that BHPL pay the costs of both TTC and Leda in the court below. Again in the interests of achieving a fair result, this conclusion should not extend to any costs incurred by TTC in the appeal. TTC and Leda had the same representation and very little by way of separate submission was made on the behalf of TTC. BHPL should pay Leda's costs of the appeal.

Orders

126. The Court makes the following orders:

    (a) The appeal by Leda Commercial Properties Pty Ltd is allowed.

    (b) Order 3 made by Refshauge J on 28 April 2017 is set aside.

    (c) In lieu of Order 3 made on 28 April 2017 judgment is given for Leda on the Third Party Claim.

    (d) The cross-appeal by BHPL against Leda is dismissed.

(e) Orders 1 and 2 made by Refshauge J on 18 October 2017 are set aside.

(f) In lieu of Orders 1 and 2 made on 18 October 2017 the following orders are made:

(i) Each party is to pay its own costs of the claim made by TTC against BHPL.

(ii) BHPL is to pay the costs of TTC on the counterclaim brought by BHPL against TTC heard by Refshauge J.

(iii) BHPL is to pay the costs of Leda on the Third Party Claim in the proceedings heard by Refshauge J.

(g) TTC and BHPL are to pay their own costs of the appeal.

(h) BHPL is to pay Leda's costs of the appeal.

I certify that the preceding one-hundred and twenty-six [126] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Elkaim, Loukas-Karlsson and Bromwich JJ.

Associate:

Date: 23 May 2018