SUPREME COURT OF QUEENSLAND

CITATION:	*Mooloolaba Slipways Pty Ltd & anor v Cashlaw Pty Ltd & ors* [2011] QSC 236
PARTIES:	**MOOLOOLABA SLIPWAYS PTY LTD AS TRUSTEE FOR THE SLIPWAYS TRUST** ACN 180 975 916 (first plaintiff) **MOOLOOLABA ENGINEERING SERVICES PTY LTD AS TRUSTEE FOR THE ENGINEERING TRUST** ACN 121 643 598 (second plaintiff) **v** **CASHLAW PTY LTD** ACN 101 574 008 (first defendant) **LESLIE BROWN** (second defendant) **ANTHONY GUY BROWN** (third defendant) **LESLIE ROY APPS** (first defendant by counterclaim)
FILE NO:	SC No 9311 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 August 2011
DELIVERED AT:	Brisbane
HEARING DATES:	16 , 17, 18, 19, 20, 23, 24, 25 and 26 May 2011
JUDGE:	Atkinson J
ORDERS:	**1. The orders will be:** **a) The defendants pay the first plaintiff the sum of $704,656 less rent and outgoings owing to the first defendant by the first plaintiff, together with interest at 5 per cent per annum on the net amount of $637,406 less outstanding rent and outgoings.** **b) The defendants pay the second plaintiff the sum of $1,081,264.** **2. I shall hear submissions as to the calculation of the amount to be awarded under paragraph 1 (a) and as to costs.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – STATEMENTS AS TO FUTURE MATTERS AND PROMISES – where the first plaintiff entered into a sublease with the first defendant for slipway premises located on the Mooloolah River – where the defendants made representations that they would repair and make various improvements to the slipway premises – where in reliance on those representations the plaintiffs were induced to enter into the lease, occupy the premises and commence business – whether the representations were in fact made

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ADVICE, STATEMENTS AND NON-DISCLOSURE – GENERALLY – where, in reliance on the defendants' misrepresentations, the plaintiffs incurred expenditure in performing capital works to the site and sustained losses in operating the slipway and engineering business – where the defendants alleged the plaintiffs' loss and damage should be assessed on a much narrower basis – whether the plaintiffs were entitled to damages – on what basis the damages should be calculated

DAMAGES – GENERAL PRINCIPLES – MITIGATION OF DAMAGES – PLAINTIFF'S DUTY TO MITIGATE – where the defendants failed to carry out the works the subject of the representations – where the plaintiffs endeavoured to come to some kind of commercial arrangement – where the plaintiffs sought a developer interested in buying the site – where the plaintiffs proposed the development of a boat stacker on the site – whether the plaintiffs are entitled to recover their losses in pursuing their attempts to mitigate their loss

LANDLORD AND TENANT – LEASES AND TENANCY AGREEMENTS – CONSENT OF THIRD PARTIES – CONSENT OF MINISTER OF CROWN – where the sublease required the Minister's approval pursuant to the *Land Act 1994* (Qld) – where the defendants never obtained the plaintiffs' consent to any amendments to the sublease – whether the sublease was valid

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where on the morning of the sixth day of the trial the defendants

made an application for leave to amend the defence – whether leave should be granted

Civil Liability Act 2003 (Qld), s 30
Evidence Act 1977 (Qld), s 92
Land Act 1994 (Qld), s 332
Property Law Act 1974 (Qld), s 129
Trade Practices Act 1974 (Cth), s 51A, s 52, s 75B, s 82, s 87CB

Ace Property Holdings Pty Ltd v Australian Postal Corp [2010] QCA 55, cited
Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424, cited
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549, cited
Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, applied
Browne v Dunn (1893) 6 R (HL) 67, cited
Bull v Attorney-General for New South Wales (1913) 17 CLR 370, cited
Chan v Cresdon Pty Ltd (1989) 168 CLR 242, cited
Devenish v Jewel Food Stores Pty Ltd (1991) 172 CLR 32, cited
Donoghue v Stevenson [1932] AC 562, cited
Enzed Holdings Ltd v Wynthea Pty Ltd (1984) 4 FCR 450, cited
Fortuna Seafoods Pty Ltd as trustee for The Rowley Family Trust v The Ship "Eternal Wind" [2005] QCA 405, cited
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109, cited
ICI Australia Operations Pty Limited v Trade Practices Commission (1992) 38 FCR 248, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited
Palmdale Insurance Limited v Sprenger [1988] 1 Qd R 414, followed
Perre v Apand (1999) 198 CLR 180, applied
Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322, applied
Sutherland Shire Council v Heyman (1985) 157 CLR 424, cited
Tweed Motors (Qld) Pty Ltd v Moran Motors Pty Ltd, Unreported, Supreme Court of Queensland, Wanstall J, 8 June 1964, cited
Tweed Motors (Qld) Pty Ltd v Moran Motors Pty Ltd (1965) 39 ALJR 279, cited
Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15, cited

COUNSEL: C C Heyworth-Smith for the plaintiffs and first defendant by counterclaim

R A Perry SC for the defendants

SOLICITORS: Schultz Toomey O'Brien Lawyers for the plaintiffs and first defendant by counterclaim
Barclay Beirne Lawyers for the defendants

[1] Two brothers, Leslie Roy Apps, commonly known as Les Apps, who is also the first defendant by counterclaim, and Barry Apps, became the directors of the plaintiff companies, Mooloolaba Slipways Pty Ltd ACN 180 975 916, which was trustee for the Slipways Trust ("Mooloolaba Slipways"), and Mooloolaba Engineering Services Pty Ltd ACN 121 643 598 as trustee for the Engineering Trust ("Mooloolaba Engineering"). Both companies carried on business on part of Lot W on SP 143293, County of Canning in the Parish of Mooloolah bearing title reference 40033760 situated at 10 Parkyn Parade, Mooloolaba ("the slipway") from September 2006 to February 2010. Mooloolaba Slipways carried on the business of an operator of the slipway and Mooloolaba Engineering carried on the business of an engineering firm at the same premises.

[2] The first defendant, Cashlaw Pty Ltd ACN 101 574 008 ("Cashlaw"), was the lessee of land which included the slipway pursuant to a lease entered into with the Department of Transport. From 20 May 1985 to 1 April 2002, Ernest Leslie Brown, the second defendant, commonly known as Les Brown, was a director of the first defendant, Cashlaw. Since 14 April 2009 Les Brown's son, the third defendant, Anthony Guy Brown, has been the director of the first defendant. Both Les Brown and his son, Anthony Brown, had control over Cashlaw at all times relevant to this action.

[3] Les Apps was an experienced businessman who operated a business as an exporter of spanner crabs. His business was called Crabpak Australia conducted by the company Crabpak Holdings Pty Ltd ("Crabpak"). Crabpak operated on the river front near the mouth of the Mooloolah River at Parkyn Parade, Mooloolaba on the Sunshine Coast next door to another business, DeBrett Seafood. The leaseholder of the land on which DeBrett Seafood is situated is Cashlaw. The leaseholder of the land on which Crabpak was situated is Tabuka Pty Ltd ("Tabuka"), another company controlled by Les Brown. The business Crabpak was sold to CEAS Pty Ltd in March 2007.

[4] Les Apps gave his evidence candidly. He sometimes made mistakes as to dates and such like but no more than might be expected by a truthful witness. Barry Apps is a more practical man less used to expressing his views in sophisticated terms. As he said, his brother was the academic one and he was more "nuts and bolts". He struck me as very honest and a person who preferred to avoid conflict. His answers in cross-examination were, however, not very useful. He tended to be agreeable and therefore often agreed to propositions put to him which on further examination it was clear that he did not unequivocally adopt. As a result I found his answers to non-leading questions more reliable. Except where indicated I have found the evidence of Les Apps and Barry Apps referred to in these reasons as honestly given and reliable.

[5] Les Apps was told about the property into which Crabpak moved by his friend Robert Phillips, a solicitor. Mr Phillips is a long standing friend of Les Apps of about 35 years and was the best man at his wedding. Les Apps knew that he acted

as a solicitor with the firm Klooger Phillips Lawyers for Mr Brown. Les Apps moved into the Crabpak premises in about mid 2006. At that time the slipway had been shut down for about six months. It had previously been operated by Phillip Ashworth and his father for Les Brown.

[6] Les and Barry Apps had been the directors of a company which had run a slipway at Flying Fish Point near Innisfail which was managed by Barry Apps. Barry Apps was the operations manager for a number of prawn trawlers owned by that company and the slipway. From 2000 he worked as maintenance manager for 4 Seas Pty Ltd, a company involved in long line fishing for tuna whose premises were near the slipway at Mooloolaba. He was aware that the slipway had become vacant in early 2006. It had been closed down due to a serious accident so that workplace health and safety issues could be addressed. According to Barry Apps, Les Brown often asked Barry Apps if he was interested in taking on the slipway. Les Brown said that Barry Apps told him on several occasions that "they" were interested in it.

[7] Les Apps became aware in the latter part of 2006 that Les Brown had spoken to a number of people about leasing the slipway. One of those was Douglas Cuthbert who, together with his wife, operated a slipway at Toorbul. Another was Michael Rider, managing director of Suncoast Marine Pty Ltd ("Suncoast Marine"). Mr Rider was unavailable to give evidence in person because he was at sea off the coast of Thailand at the time of the trial. His evidence was admitted under s 92 of the *Evidence Act 1977* (Qld). Mr Rider advised Les Brown that he was not interested in Mr Brown's proposal that Mr Rider operate the slipway for Les Brown for a share of the profits, but would rather require a lease of at least five years with an option. Les Brown and Mr Rider discussed the state of the building and Les Brown said that he "would fix the slipway up to comply with Workplace Health and Safety requirements." Mr Rider's evidence was that Les Brown indicated that an area in the water near the slipway would be made available to tie up boats. However Les Brown also told Mr Rider that plans had been drawn up for a boat stacker, but he did not know whether that would receive council approval. This was apparently confirmed by Les Brown's evidence in cross-examination that he had written to Queensland Transport prior to the Apps taking on the lease enquiring about the proposal of redeveloping the area and putting in a boat stacker. Les Brown did not reply to a letter from Suncoast Marine dated 1 July 2006 containing a proposal to lease the slipway at Mooloolaba.

[8] Les Brown approached Barry Apps and then later Les Apps. There were a number of discussions between Les Apps and Les Brown about the slipway. The occurrence of and the contents of those conversations were contentious. Evidence was given about them by Les Apps, Barry Apps and Shane Miller for the plaintiffs and Les Brown and Anthony Brown for the defendants. The plaintiffs' version was also supported to some extent by the fact that in September – October 2006 the Apps told Steve Maiden, whom they subsequently employed as slipway manager, about the repairs Les Brown had said he would undertake. Mr Maiden was informed by Barry Apps in late 2006 that the landlord had agreed to fix the wharf and the building and generally bring the slipway site up to a standard suitable to enable government contracts to be secured.

[9] It is necessary to make a general observation about Les Brown's evidence. He is not a young man but has a very sharp mind. He was capable of tailoring his evidence to suit his case and clearly did so on a number of occasions. His reliability

was of course thereby undermined. He also appeared to be a person who was easily angered and expressed his anger forcefully. His son, Anthony Brown, appeared to be trying to be more candid in his evidence. Unfortunately his credibility was compromised by a letter to Les Brown from Klooger Phillips dated 24 August 2009 which enclosed a draft letter to the plaintiffs' solicitors saying:

> "Please carefully read each of the items and comments contained in the letter to ensure they are accurate and can be substantiated from your records or recollection of events. It is essential that Mooloolaba Slipways Pty Ltd is not in a position to prove that the comments are incorrect, as this would indicate that your recollection or records are unreliable in the eyes of the Court.
>
> You may care to review the contents of the letter with Anthony to ensure that the comments are accurate.
>
> Please advise any amendments required."

[10] Les Brown denied that they colluded in their evidence but agreed that he showed the letter and attached draft letter to his son, Anthony. Mr Phillips from Klooger Phillips agreed in cross-examination that he asked his client, Les Brown, to get together with Anthony to go over together what their recollections were to make sure they had a consistent story. That is of course not an acceptable instruction for a solicitor to give and inevitably undermined Anthony Brown's capacity to independently corroborate evidence given by his father.

Description of the slipway

[11] The slipway consists of a large industrial building with two jetties jutting out into the river. Between the two jetties are rails on the riverbed which extend along the riverbed about six metres further than the jetties and which go up into a dry dock on the slipway where ships can be built and repaired. The two jetties were about the same length as each other. The eastern jetty was often referred to as Wharf C and the western jetty as Wharf D. The area of water between the eastern jetty and the next property to the east was referred to as the "sick bay area" where boats could be moored in order to be repaired whilst still in the water. Within the slipway building there were a number of areas including an engineering area, fitting room, other work areas and an office.

[12] Les Brown gave evidence that Cashlaw commenced operation of the slipway from about 1985 to 1986. He said that Anthony Brown leased the slipway from 1998 to 2003. Anthony Brown operated the slipway under the name "Mooloolaba Slipways". Peter Ashworth managed the slipway during that time. Then from 2003 to 2006, Peter Ashworth and his son, Phillip Ashworth, leased the property. Anthony Brown gave evidence that he managed the slipway for seven years from 1998 to 2005 when his company was fined because of a serious workplace accident. Les Brown asserted in cross-examination that he had never had any conversations with the Ashworths about doing repairs or improvements to the premises. That evidence was directly contradicted by evidence contained in an affidavit sworn by Les Brown on 7 May 2008 in an action which Cashlaw took in the District Court against Ashworth Investments (Qld) Pty Ltd, where he deposed that following delivery of a draft lease to Phillip Ashworth in or about February 2004, "further oral correspondence was entered into between [Les Brown] and Phillip Ashworth and

Peter Ashworth as regards the terms and conditions of the Lease relating to, in particular, to [*sic*] the repair of improvements on the land on which the slipway was conducted." There can be no doubt that all relevant parties were aware of the state of poor repair of the slipway in 2006.

First Representations

[13] On the plaintiffs' case, representations were made by Les Brown which induced Mooloolaba Slipways to enter into a lease with Cashlaw, occupy the premises and commence business and induced Mooloolaba Engineering to occupy part of the premises and commence business. Some of those conversations took place in the tank room at Crabpak. Some of that conversation took place in the presence of Shane Miller, who was the tank room manager at Crabpak.

[14] In one conversation, Les Brown said to Les Apps that he was still trying to get Les Apps and Barry Apps interested in taking on the slipway. Les Apps said to Les Brown that there was a major problem with the "sick bay area". Les Apps also told Les Brown that the wharf adjacent to what should have been the sick bay area was in a poor state of repair and that the area adjacent to Wharf C needed extensive dredging. Les Brown said he would dredge that with his old excavator called a "gradall".

[15] Les Apps' memory of what Les Brown said was in language which he found difficult and embarrassing to use in court but was as follows:

> "I'll fucking dredge the silt out of the river using my excavator, and under cover of darkness I will disburse it into the fucking run out tide, so hopefully it flows down the river and ends up against that fucking Tony Pinzone's wharf."

[16] Shane Miller (who was not employed by Les Apps after he sold Crabpak in 2007) recalled being present for two conversations between Les Brown and Les Apps at the Crabpak premises. He stepped away when they were having their first conversation and while he overheard parts of it, he did not concern himself with what was being said. On the second occasion he heard Les Brown say that he would repair what has been referred to in these reasons as Wharf C and dredge out the sick bay at night on the outgoing tide using his old excavator.

[17] That conversation was particularly memorable for Les Apps and Shane Miller because of the likely effect on Crabpak if Les Brown did the dredging in that way. Crabpak had constructed large tanks for the storage of live spanner crabs for export. Those tanks were supplied with water from the river on the incoming tide. The concern expressed by Les Apps and Shane Miller was that if Les Brown excavated the sick bay in the way he suggested it might cause sediment to build up underneath the tank room. Shane Miller thought that Les Brown would do the dredging but not in the way he said he would because it would be "illegal and silly".

[18] Les Brown's version of the conversations was rather different, although he agreed that he had two conversations with Les Apps at the Crabpak premises. He said that on the first occasion he said to Les Apps that Barry Apps had told him to see Les Apps about the slipway because Barry Apps was interested in taking it on. Les Brown said he asked Les Apps if he was interested and he said he had no interest. Les Brown said a week or ten days later he again went to see Les Apps to see if he was interested and Les Apps again said he was not interested.

[19] Les Brown then invited Les Apps to come up and have a look at the slipway before making a final decision. He denied that there was any conversation about the sick bay or the need for it to be dredged. He said that the only other person present was some distance away (either six, 10 or 25 metres according to his evidence) and obviously out of earshot.

[20] Les Brown vehemently denied saying anything about dredging, although in a long non-responsive answer in cross-examination he revealed that he had previously used his old gradall to scoop out from the riverbed under cover of darkness "because Tony Pinzone is an irate little fellow and he would have went crook about doing it … ." Both the contents of his answer and the manner in which he gave it suggested the truthfulness of Les Apps' version of what Les Brown said.

[21] Later during cross-examination he denied he said he would use his old excavator to dredge the river because "it only reached about – be lucky to reach down to the water, go in the water above five feet, I'd say, never reach, never reach anywhere near it." This was of course inconsistent with the answer referred to in the previous paragraph.

[22] I am satisfied on the balance of probabilities that the version given by Les Apps of these two conversations is the more accurate. Les Brown wanted to have Les Apps and Barry Apps take over the lease of the slipway. As he himself said, they were already tenants through Crabpak and he knew them. They were not interested and needed persuasion because of the poor state of the facility. He told Les Apps that he would repair Wharf C and dredge the sick bay and how he would do it. That conversation was overheard and remembered by Shane Miller. Les Brown's evidence as to the conversations he had with Les Apps at the Crabpak premises was not given truthfully.

Second representations

[23] In August 2006 Les Brown arranged a meeting with Barry Apps and Les Apps, for the purpose, to use Les Apps' words, "to see if they could have one last crack at talking us into taking on the slipway." Les Apps said that up until then they had indicated they were not interested. Those present at the meeting were Les Brown, his son Anthony Brown, Barry Apps and Les Apps. There are different versions of precisely where the conversation took place and what was said.

[24] According to both Les Apps and Barry Apps, the conversation took place while they were standing on Wharf D. Barry Apps said they gathered there because from there they could see the slipway and the buildings. From Wharf D they could observe the appearance of Wharf C which had a "wave like appearance". That was because some of the posts that held up the structure had sunk and it was in a poor state of repair. From that position they could also see the sick bay. Les Apps said there was no water in the sick bay at low tide and "minimal water" at high tide. He said the building itself was in an overall poor state of repair: there were holes in the roof, the steel structure had rusted and it was in a general state of disrepair. He said he and his brother had discussions about what needed to be done in order to make a business conducted on the slipway viable. He thought that Wharf C would have to be repaired, the area adjacent to it would have to dredged out and the building itself "would have to be brought up to an appropriate level of repair" to meet applicable

building codes and EPA requirements. The problems with water and power supply would have to be attended to.

[25] Barry Apps said he raised with Les Brown the condition of the building and the overall dilapidation of the wharves and their adjacent mooring. The wharf beside the sick bay was in an unsafe condition. He said they told Les Brown that unless those things were looked at and could be addressed the Apps were not interested in taking on the slipway. Barry Apps said that Les Brown then said without hesitation, "Yes, look, don't you worry about bloody things like that." He told them he would sort it out. He said he would fix the wharves and dredge the sick bay area so they could moor vessels there. When Barry Apps spoke to Les Brown about the situation with the wharves and the need for dredging he said "Don't you bloody – you know – you fellas – don't you – I've got this in control. I'm – I'm going to do it. I'll assist youse. I'll do what I can for youse in this area."

[26] Barry Apps said that the building was in a run-down condition: roof structures had rusted away, the main frame holding up the main roof had rusted out, there were holes in the roof, the doors and windows had broken out, the foundation work around the building was badly rusted, the timber work was infested with termites and broken through on the walkways and the workshop areas were "very grubby". Les Brown described in graphic detail how he would dredge out the sick bay and Barry Apps said to him the other things that he mentioned would have to be attended to including repairs of the building and the fixing of the power and water problems. Barry Apps said they needed to be able to complete all types of work related to the marine industry at the slipway including, most importantly, government contractual work particularly defence work for the navy or local government fisheries work. He said that Les Brown and Anthony Brown said there would be no problem attending to those matters.

[27] Les Apps told Les Brown and Anthony Brown that they did not have an interest in proceeding. Les Brown then said, "Well, what would it take to make it work?" Les Apps said a range of things would need to be done. He said that they would only be interested if they could get certification to attract government marine type work. Les Apps explained in his evidence that they would not have taken on the slipway just to work on fishing boats because most fishermen were struggling to pay their bills. Government work usually meant both better profit margins and security of payment.

[28] He went through with the Browns the points that would have to be addressed one by one. He said that Wharf C would have to be fixed and the area adjacent to it dredged, the water and power issues would have to be fixed, the building would have to be brought up to an appropriate standard and any issues with EPA would have to be addressed.

[29] Les Brown then said to Les Apps, "Well, what –what – what fuck – what fuck have I got to – what do you fucking want? What do you want?" Les Apps replied, "Those issues would have to be addressed. We would need a 15 year lease for security. To get the sort of work that we think would be necessary to make this viable, we'd have to spend a lot of money on equipment, engineering equipment." He said there was a general discussion about the terms of the lease and Les Apps said they would need some type of assistance for the first six months and it was agreed that rent would start when the work was completed. Rent would be

graduated so that they would not be paying the full rent of $10,000 per month until after six months. Barry Apps said that there was a "comedy of errors" as Les Brown and Anthony Brown sought a calculator as they could not work it out on their fingers.

[30] Les Apps said that Les Brown said, "Okay. I'll fucking do all those things. What, do you want to take it or not?" Les Apps then asked his brother Barry if he wanted to take it on and Barry said, "If Les Brown supports us and does all the things we've just mentioned, yes." Barry Apps said he took Les Brown to be a man of his word "on the basis that he would do those undertakings". They shook hands on it and left the premises. Barry Apps said that it was the representation by Les Brown that the works would be done that led to his agreeing to enter into the premises and the sublease.

[31] At that time, some repair works were being done to trusses on the roof by people employed by Les Brown. While the Apps were moving in to the slipway some of the rusted purlins and supports on the walls were patched by Les Brown's employees. Les Brown gave evidence that he had about four employees from his transport division replacing or sandblasting purlins. Some of those patches which were inserted, however, soon broke away. Les Brown said he assessed what work had to be undertaken, "Just by eyesight, just by going around and looking at the place… ." He said that when the repairs were concluded, it was "quite workable". He said by way of explanation, "It's only a slipway … It's purely a rough workplace and it's very old." He agreed that Wharf C was in "very bad" condition. He also volunteered that the supports for Wharf D were deteriorating. The only part of the evidence of Les Apps put to him with which he agreed was that he did say to the Apps something like, "What would it take to get you to take it on?"

[32] Later in his evidence, Les Brown talked about the extensive repair works done by him after the Ashworths left. It was clear, however, that more needed to be done and he promised the Apps that the various repairs necessary would be properly carried out. However, that did not happen.

[33] Apart from the repairs which were to be effected by Cashlaw, the 15 year lease was important to Les Apps because it gave Mooloolaba Slipways security of tenure as well as a valuable asset.

[34] Les Brown's version of the meeting was that they started just outside the slipway office and then walked down to the slipway. He said the Apps made no effort to inspect anything and they walked back between the two engineers' shops. Anthony Brown gave evidence that the discussion took place on the empty slipway. He said they had earlier walked over to the woodworking section where the lathe would be placed. Les Brown said that Barry Apps said "all of a sudden", "You know, we could build our crab boats here" and took off into the engineering shop. He said that Les Apps asked what concessions he would offer and they discussed reduced rental for six months. He said that two or three days later, Les Apps told him that would take on the slipway.

[35] Les Brown said that there was no discussion about dredging or repairs to Wharf C. With regard to repairs to the building, he told them that he had not yet finished the repairs to the building but that it would be finished in a week or so or that "we still had at least another week's work to do." He then said, somewhat inconsistently

with that evidence, that there was no discussion that day about the state of repair of the slipway building. He said there was, "No mention of the building whatsoever."

[36] Anthony Brown gave evidence that Barry Apps discussed the safety problems relating to the workplace accident where a man had fallen from scaffolding and the expense involved in erecting scaffolding, netting to deal with overspray, the size of the cradles and his desire to build spanner crab boats. He said his father said to the Apps, "You better bloody make your mind up because other people are interested." His evidence did not support the Apps' case as to the representations being made, nor did it support Les Brown's version that the lease would be on an "as-is, where-is" basis. He was careful to say on at least two occasions in his evidence as to whether or not various representations were made, "Not while I was there." However he was present while the representations were made by his father on this occasion and generally affirmed what his father was saying.

[37] Les Brown said that there was no agreement on that day but that Les Apps came to see him about two or three days later and said that they would take the lease. Les Brown said in evidence that he told Les Apps that the rent after the initial six month period would have to be $10,000 a month and, "The conditions then will be, you know, as you'd expect the slipway – as-is, where-is, and this is where you're going to carry on with this lease if we go ahead with it." During cross-examination, he asserted that he "forgot" to say in examination-in-chief that his statement that the lease of the slipway would be on the basis of "as-is, where-is" was made not just when Les Apps came to see him two or three days after the meeting at the slipway between Les and Barry Apps and Les and Anthony Brown, but also during the initial meeting at the slipway between those four when the rental was discussed. This amendment of his evidence was unconvincing. Mr Perry SC had given Les Brown every opportunity to give that evidence in examination-in-chief through open and sometimes, leading questions. It appears that the reason Les Brown "forgot" to give that evidence was because it was not true.

[38] For the reasons given, I accept the evidence given by Les Apps and Barry Apps as to the representations made at the slipway and their reliance on them.

Third representations

[39] Les Apps then organised a meeting between himself, Les Brown and Steve Davis, who was then the owner of DeBrett Seafoods, at the coffee shop in that area about a week after the meeting on Wharf D. Les Apps wanted Mr Davis to know precisely what was going on, particularly as Mr Davis had 15 boats in his fleet and therefore was likely to be a client of the slipway. Les Apps asked Les Brown to repeat in Mr Davis's presence what he had undertaken to do and he did so. Les Brown said, "I understand what Les [Apps] is trying to do. We are going to support him."

[40] Mr Davis was a director of Tasmanian Bluefin Pty Ltd which operated a fishing fleet out of Mooloolaba, from premises close to the slipway at 10 Parkyn Parade, Mooloolaba. He gave evidence as to the conversation with Les Brown and Les Apps at that meeting. Mr Davis recalled that Les Brown told Les Apps that he would help him out and would dredge out the side of the slipway (by which he meant the sick bay area) and Les Apps said that if the site were improved he could probably make it pay with navy boats and boats of that kind. Les Brown said he would make the slipway better and deeper and put concrete in the sick bay. He said

he would "fix it all up". There were discussions about the power to the site being inadequate and unreliable and Mr Brown said he would fix it.

[41] Les Brown denied that this conversation took place. He said that Mr Davis was one of the people he approached about taking on the slipway but Mr Davis was not interested. He did concede that he had a conversation over coffee with Les Apps and Mr Davis; he also conceded that the Apps' taking a lease over the slipway could have been mentioned but he said it was just a social gathering where they were "yakking about other things." Interestingly Les Brown did concede, when asked if he said words to the effect that Les and Barry Apps would have his support at the slipway, "That could have been their interpretation. Any of our clients we support them anywhere we can." Otherwise he said the version given by Les Apps and Mr Davis was "lies", "rubbish" and "a cock and bull story."

[42] A submission was made on behalf of the defendants that I should disregard Mr Davis's evidence because of his animus against Les Brown. He appeared to dislike and not to trust Les Brown by the time he gave his evidence. But his evidence did not appear to be tainted by his opinion of Les Brown which, after I reviewed the evidence, appeared not to be without justification.

[43] I conclude that the evidence given by Les Apps and Mr Davis is more likely to be accurate and reliable than that given by Les Brown.

[44] Shortly after the Apps moved into the slipway, Les Brown told Mr Davis that he was going to get his old excavator and dredge out the area. Mr Davis said that from his observations none of the work promised by Les Brown was ever done. As a result, it was often difficult to get his fishing boats on the slip as they were large vessels which could not go on to the slip unless the tide was right which might take up to a month. He said this would not have been an issue if the dredging and concreting promised by Les Brown had been done.

The representations alleged were made

[45] Accordingly, I am satisfied that the plaintiffs have proved paragraph 7 of the statement of claim as particularised, namely:

> "In or about late August 2006, the First Defendant represented to the Plaintiffs that the First Defendant would grant to Mr. Les Apps or one of his companies a long term sublease of the slipway and associated buildings and that if the First Plaintiff entered into such a sub-sublease of the slipway with the First Defendant, the First Defendant would:
>
> (a) repair the wharf at the slipway (now known as 'Wharf C') to facilitate the Plaintiff working on boats in the water;
> (b) upgrade the water to the slipway such that the slipway would meet fire safety standards;
> (c) place the building in a usable state of repair and repair any damaged or run down structures;
> (d) dredge the area adjacent to Wharf C; and
> (e) undertake any works required in order to rectify any issues raised by the Environmental Protection Authority."

[46] I am further satisfied that at the time the first defendant made the representations and thereafter it intended through its controlling minds, the second and third

defendants, that the plaintiffs should rely on the representations. At the time the representations were made, the defendants knew that the plaintiffs would rely on them to exercise due care and skill in making the representations; the plaintiffs' reliance was reasonable in the circumstances; the plaintiffs reasonably expected that due care would be exercised in relation to the making of the representations; the plaintiffs were in a position of vulnerability in relation to a lack of care being exercised by the defendants in that the plaintiffs were not in a position to know the true intentions of the defendants in relation to making of the representations; and each of the defendants could reasonably foresee that failure to exercise due care and skill in making the representations would result in damage to the plaintiffs.

[47] Each of the defendants breached their duty of care to the plaintiffs by failing to take reasonable care in the making of the representations, failing to take reasonable care to ensure that Cashlaw was, at the time the representations were made, ready and willing to carry out the works the subject of the representations and failing to inform the plaintiffs that Cashlaw may or may not perform the work the subject of the representations.

[48] In reliance on the representations referred to in paragraph 7 of the statement of claim, the plaintiffs moved in to the slipway premises to endeavour to operate a slipway business and engineering business, incurred capital expenditure (and associated borrowing costs) necessary to be able to conduct those businesses and Mooloolaba Slipways entered into a sublease document and exercised the first option contained in that sublease document.

Commencement of the slipway and associated engineering business

[49] In August to September 2006, Barry Apps moved into the slipway to clean the place up and prepare it for use. Barry Apps started getting the haul-out equipment serviceable and cleaned up the rusted cradles and repaired the winching equipment. He cleaned out the workshop areas which were very grubby, and they were cleaned, painted and wiring and lighting were installed. The part of the slipway building in which engineering was to be carried out was prepared for the installation of equipment.

[50] Machinery was ordered and some put on-site. Because Mooloolaba Slipways was a $2 company, Crabpak purchased equipment and borrowed from Westpac Bank for those equipment purchases for and on behalf of Mooloolaba Slipways or Mooloolaba Engineering. Westpac held chattel mortgages over the equipment. However, Mooloolaba Slipways and Mooloolaba Engineering were always responsible for and made all payments for this equipment. The leases and loans were subsequently transferred to Mooloolaba Slipways or Mooloolaba Engineering. The equipment acquired initially by Crabpak included abrasive blasting equipment from Burwell Technologies Pty Ltd on 13 September 2006 for $78,052.70. A tax invoice was raised by Crabpak on that date to Mooloolaba Slipways for that equipment. A welding station was purchased by Crabpak from TradeTools (Qld) Pty Ltd on 26 September 2006 for $29,225 and an invoice raised by Crabpak to Mooloolaba Engineering for that on the same date.

[51] Lathes, grinders, a milling machine, bandsaw, cold saw, shaper and drilling machines were purchased from 600 Machine Tools Pty Ltd on 26 September 2006 for $169,574.90 and other machinery from 600 Machine Tools Pty Ltd on 12

December 2006 for $183,704.40. Tax invoices were raised by Crabpak to Mooloolaba Engineering for $98,833.90 worth of equipment bought on 26 September and for all of the equipment purchased on 12 December 2006.

[52] The balance sheet of the Slipways Trust as at 30 June 2007 shows various liabilities including a loan of $265,781 from ACN 104 535 864, the company name of Crabpak after the business was sold. There are other loans from companies related to the Apps: $5,692 from the Flaherty's Trust and $32,786 from Tuffy Pty Ltd. The balance sheet of the Engineering Trust as at 30 June 2007 shows a loan from the Flaherty's Trust of $14,173; from the Slipways Trust of $137,690; and from ACN 104 535 864 of $80,380. The arrangement at that time was that bills would be paid from the account of whichever company had funds at the time and inter-company loans raised.

[53] Exhibit 36 is a list of the equipment purchased by Mooloolaba Slipways and Mooloolaba Engineering. Mooloolaba Slipways purchased $223,873 worth of office equipment and machinery from 26 September 2006 to 14 March 2008. Mooloolaba Engineering purchased $347,253 worth of machinery and equipment between 26 September 2006 and 12 December 2006 and then between 22 April and 28 November 2008, it purchased $3,965 worth of equipment. Electrical work costing $4,638 was performed between 12 December 2006 and 31 March 2007. The total spent by Mooloolaba Engineering on machinery and equipment was $355,856. These items were purchased by way of chattel lease from Westpac.

[54] The first boat was put onto the slipway for repair on 1 October 2006.

[55] Barry Apps undertook the day to day operational control of the slipway and Les Apps' role was as a non-operational partner and co-director. They set up two companies on advice from their accountants: Mooloolaba Slipways, which had been purchased from the Browns, to conduct the slipway business and Mooloolaba Engineering to conduct the engineering business which was to be an integral part of the overall business of the slipway to give effect to the two permitted uses under the leasing arrangements with Cashlaw. There was no unauthorised sublease to Mooloolaba Engineering as Mooloolaba Slipways remained the tenant of the whole of the premises and did not part with possession of the premises.[1]

The sublease document

[56] Les Apps, on behalf of Mooloolaba Slipways, and Nancy Brown, on behalf of Cashlaw, executed a document entitled "Instrument of Lease" for a sublease of the slipway on 15 November 2006 ("the sublease document"). The permitted uses were "Engineering and Slipway". There was never any misconception that the premises would not be used for both engineering and a slipway. The name of corporate entities controlled by the Apps to carry out each business was not, as Les Brown conceded in his evidence, of any interest to him or to Cashlaw. The term set out in the sublease document was 1 September 2006 to 28 February 2007. There were three options to renew, each of five years.

[57] The description of the premises being subleased was "Part of Lot W on SP 164167 as shown on the attached Plan." The attached plan showed a cross-hatched area which was said to be the subleased area which included most of the building and the

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1 See *Ace Property Holdings Pty Ltd v Australian Postal Corp* [2010] QCA 55 at [79], [175] – [179].

dry part of the slipway, but not the rails in the riverbed between and extending beyond Wharf C and Wharf D which led up to and into the slipway. In addition the sublessee was granted non-exclusive use of the east side of Wharf D and exclusive use of Wharf C. Also attached to the sublease document was a plan of Lots W and X in Lot 1 on SP 143293. It is tolerably clear that the slipway building could not be used to slip and repair boats unless use was made of the slipway rails in Lot X and that use of Wharf D and Wharf C served no utility unless it was to access boats moored to them from the waters in Lot X.

[58] Les Brown volunteered whilst under cross-examination that he told Les Apps that the reason Wharf C and Wharf D were not put in the lease was because of their condition. He said that if they had been in good condition they would have been put in the lease. That matter was not put to Les Apps in spite of my observation that Mr Perry SC was being careful to comply with the rule in *Browne v Dunn*.[2] I conclude that detail was added by Les Brown in an attempt to bolster his case rather than because it was true.

[59] The following rental arrangements applied:

- rent for the first month (September 2006) was waived;
- rent for the second month (October 2006) was $3,500 inclusive of outgoings plus GST;
- rent for November 2006 to February 2007 was $7,000 per calendar month inclusive of outgoings plus GST; and
- rent for the first year of the first option period was $10,000 plus GST per month payable on the first day of each month.

[60] Rent was subject to review in accordance with the sublease document. Outgoings were only payable by Mooloolaba Slipways after the first six months and the percentage was four-sixteenths of the amount of the outgoings.

[61] Mr Perry SC for the defendants asked Les Apps whether he was aware that $10,000 per month was "essentially the equivalent to the amount of rent that the lessor had to pay to the government". Les Apps said he was not aware of that. A positive assertion was made on behalf of the defendants that the rental paid by Cashlaw to Queensland Transport for the area subleased to the first plaintiff was equivalent to the rent charged by Cashlaw to the first plaintiff. During the trial of this matter, by dent of careful cross-examination by Ms Heyworth-Smith, that assertion was shown to be quite untrue.

[62] The evidence showed that Cashlaw was paying $200,000 per annum rental for the whole of Lot W and that the hatched area was about one-quarter of Lot W for which Cashlaw paid to Queensland Transport $50,000 per annum. Cashlaw charged Mooloolaba Slipways $120,000 per annum so it could not be said, as Les Brown had asserted, that the rent payable by Mooloolaba Slipways to Cashlaw was equivalent to the rent payable by Cashlaw to Queensland Transport. Les Brown endeavoured to justify his position by saying that it was expected that the Apps would use areas outside of area demised to them, for example, for car parking. It may well have acted as a justification in Les Brown's mind for the rent charged that he knew that the plaintiffs would be using land and water outside the part of Lot W in the sublease document.

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[2] (1893) 6 R (HL) 67.

[63] Les Apps asked Les Brown's solicitor, Mr Phillips, who was also a friend of Les Apps, whether there were any "nasties" in it. He said that there were not and that it was a normal, straightforward lease. Mr Phillips, who made no notes of any of the conversations he had with Les Apps about this matter, could not remember having this conversation. I accept that the conversation was as Les Apps related. Les Apps signed it without insisting on any changes because he "trusted Les Brown at that stage to be a man of his word" and he trusted Mr Phillips. He had done the same in the past when Mr Phillips had drawn up the subleases from Les Brown's companies for Crabpak and Flaherty's, a chandlery business, also on the banks of the Mooloolaba River near its mouth. He conceded that had he been dealing with a solicitor he did not know, he probably would have sought legal advice, but did not because he trusted both Les Brown and Mr Phillips. This does not change the fact that he relied on the representations made by Les Brown in deciding both to enter into the premises and undertake the business of Mooloolaba Engineering and Mooloolaba Slipways there and to enter in the sublease document and its attached guarantee and indemnity.

[64] The defendants' case was that the conversations between Les Apps and Mr Phillips had not taken place. This was rather unconvincingly put to Les Apps in cross-examination and denied. In re-examination, Les Apps' telephone records were produced which convincingly corroborated Les Apps' evidence that he had conversations with Mr Phillips prior to and subsequent to signing the sublease document.

[65] The sublease document did not contain the promises that were the subject of the representations. Les Apps raised the fact that they were not incorporated into the written sublease document with Mr Phillips shortly afterwards, probably a day or two after he signed it. Mr Phillips told him those were his instructions.

[66] In addition to the sublease document Les Apps signed a deed of guarantee and indemnity on 15 November 2006. Again in doing so he relied on the representations made by Les Brown. In it he guaranteed payments to be made under the "lease".

[67] The land the subject of the sublease document was part of the land held by Cashlaw as sublessee from Queensland Transport ("the lease") and held by Queensland Transport on Perpetual Lease 217700 from the Department of Natural Resources and Water ("the perpetual lease"). The area leased by Cashlaw was Lots W and X on SP 164167. The lease was from 1 January 2003 until 30 June 2033. The rent payable was governed by a formula set out in the lease including a different rate for Lot W, the land above the high-water mark (AHWM), and for Lot X, the land below the high-water mark (BHWM). The rent for the land AHWM from 1 July 2006 to 30 June 2009 was nine per cent of the unimproved value; and for the land BHWM, the rent payable depended on whether it was used for mooring, pontoons, jetties, slipways, ramps or lift out facilities. Lot W covered the area AHWM which covered the slipway buildings and adjoined Parkyn Parade to the north, the high-water bank of the Mooloolah River to the south, and the edges of the slipway building on the eastern and western boundaries. Lot X covered an L-shaped area BHWM from the high-water bank of the Mooloolah River to the north, an area of river to the west of Wharf D as its western boundary, a line parallel to the end of Wharf D and Wharf C as part of its southern boundary and the length of the long concrete jetty to the east of the slipway facility as its long eastern boundary.

[68] Within Lot X were Wharf C and Wharf D, the water between them, which contained the rails for the slipway, the water to the west of Wharf D and the water to the east of Wharf C (known as the sick bay), and the water to the south of the sick bay from the end of Wharf C and adjacent to the long concrete jetty to the east. Les Brown conceded in evidence that although the water to the east of Wharf C was not part of the leased area, he would have had no objection to its being used by Mooloolaba Slipways. The same must be true for the water between Wharf C and Wharf D since the slipway could not otherwise be used. Les Brown's instructions to his solicitor recorded by Mr Phillips in handwriting show that he instructed that non-exclusive use was to be granted to Wharf D and that the subtenant would not therefore be able to moor boats on the west side. Implicit in that in the circumstances of this case is his understanding that boats could be moored elsewhere, for example, on the east side of Wharf D and on either side of Wharf C.

[69] The sublease document was governed by the provisions of s 332 of the *Land Act 1994* (Qld) ("*Land Act*") which provides:

> "**332 Subleases require Minister's approval**
>
> (1) A lease issued under this Act may be subleased only –
>
> (a) if the Minister has given written approval to the sublease or the lessee holds a general authority to sublease; and
>
> (b) to a person who is eligible to hold the sublease under this Act.
>
> (2) A copy of the proposed sublease must accompany the application seeking the Minister's approval.
>
> (3) The Minister may –
>
> (a) refuse to approve a sublease; or
>
> (b) approve the sublease on the conditions the Minister considers appropriate, including, for example, that a stated mandatory standard terms document form part of the sublease; or
>
> (c) approve the sublease unconditionally.
>
> (4) The Minister's approval lapses unless the sublease is lodged in the land registry within 6 months after the Minister's approval.
>
> (5) The Minister may extend the time mentioned in subsection (4).
>
> (6) If the Minister decides not to approve a sublease, the sublessor must be given written notice of the decision and the reasons for the decision.
>
> (7) The sublessor may appeal against the Minister's decision.
>
> (8) Without limiting subsection (3)(a), the Minister may refuse to approve a sublease of a lease if the Minister is satisfied that the subleasing would be inappropriate, having regard to the purpose and conditions of the lease."

[70] In order for Cashlaw to further sublease the land, approval of Queensland Transport was also required pursuant to clause 34.1.2 of Cashlaw's lease from Queensland Transport. Cashlaw was obliged within a reasonable time of the execution of the

sublease document to seek the relevant Minister's approval. Mr Phillips wrote to Queensland Transport seeking its approval on 7 December 2006 with copies to Les Brown and Les Apps.

[71] On 1 January 2007, Barry Apps, on behalf of Mooloolaba Slipways, exercised the option to extend the sublease for five years from 1 March 2007.

[72] It was a requirement of any consent that could have been given by either the Minister, or the Minister's delegate, and Queensland Transport, that a sublease not contain any options to renew the sublease which were not subject to Ministerial consent. That requirement was identified in a letter from Queensland Transport to the solicitors for Cashlaw on 9 March 2007. Even if such a requirement could not be imposed, Cashlaw could not allow an option to be exercised which was not subject to Ministerial consent. Further, Queensland Transport noted that there was no survey plan of the area proposed to be subleased attached to the sublease document.

[73] Mr Phillips replied to Queensland Transport on 2 July 2007 saying that he was awaiting a copy of the lease plan before resubmitting the amended document to Queensland Transport. Mr Phillips conceded in evidence that before any amendments could be made they would have to be agreed to by Mooloolaba Slipways. On the same day, Mr Phillips wrote to Les Brown alerting him to the areas in which the sublease document required amendment and asking Les Brown to arrange for his surveyor to prepare a formal lease plan to be annexed to the sublease document so that it could be registered. Mooloolaba Slipways were never alerted to any problems with or delays in obtaining the relevant approvals.

[74] On 4 September 2007 and, after not receiving any reply, again on 8 November 2007, Queensland Transport wrote to Mr Phillips saying that they had not yet received the plan which they had sought in March 2007. On 19 December 2007, Mr Phillips replied to Queensland Transport saying that he had again contacted his client about the preparation of a lease plan and expected it to be delivered to him within a week or two. Mr Phillips said he understood that the surveyor had taken longer than expected to prepare the plan. It does not appear, however, that any surveyor had been retained by then to prepare any such plan.

[75] On 10 July 2008, Mr Phillips wrote to Queensland Transport enclosing an amended sublease document and saying that he had only just received the amended lease plans from Cashlaw's surveyor.

[76] The consent of Mooloolaba Slipways to any amendments to the sublease was never sought. Les Brown said that notwithstanding that he always believed that the sublease document was enforceable. What Mr Phillips did was simply to make handwritten amendments to the sublease document without seeking the agreement of the signatories or showing the survey plan to Les Apps. However it was not until 1 March 2010, well after this litigation had commenced, that Mr Phillips finally sent Queensland Transport the sublease document purportedly amended in accordance with Queensland Transport's letter of 9 March 2007. He did so on Les Brown's instructions and to protect Cashlaw's interests, even though the other signatory to the sublease document had not seen and did not know of the amendments made to it and, as Mr Phillips conceded, would not at that stage have agreed to it.

[77] On 8 and 9 April 2010, Queensland Transport informed Mr Phillips of further amendments Crown Law had suggested to the sublease document. He was asked to provide a copy of the signed lease, so that a "form 18 consent form" could be completed. He did so knowing that the amendments had not been agreed to by Mooloolaba Slipways. Mr Phillips then received the relevant government approvals. The approvals gained were not valid because, they were, unbeknownst to the Minister and Queensland Transport, based on an amended sublease document which had not been agreed by the parties to it. There was therefore no effective consent to the sublease document given by the Minister pursuant to s 332 of the *Land Act* or Queensland Transport pursuant to clause 34.1.2 of Cashlaw's lease.

[78] Cashlaw did not advise Mooloolaba Slipways or any of the plaintiffs that unconditional approval to the sublease had not been granted. Les Apps believed that Mooloolaba Slipways had a valid lease and continued in that belief until he found out in the course of this litigation that approval had not been given. He thought that there were no problems gaining the appropriate consents. Barry Apps was concerned about the delay in the return of a "stamped" lease but was never advised that there was any problem and assumed that it would come through in due course.

[79] During the plaintiff's occupation of the slipway, all parties operated on the basis that the sublease document and the option apparently exercised under it were valid and that rental accrued pursuant to it. In these circumstances it would appear that, without the relevant approvals, the sublease document could not act as a demise but rather was a concluded bargain defeasible on refusal of those consents or, I interpolate, upon the obtaining of consents on a basis which rendered those consents invalid. Entry into possession and payment of the rent created a tenancy upon the terms of the sublease document in all respects save for the duration of the term as it became determinable on one month's notice.

[80] This conclusion follows upon the terms of the *Land Act* and s 129 of the *Property Law Act 1974* (Qld) as explained by Connolly J, with whom de Jersey J (as his Honour then was) agreed, in *Palmdale Insurance Limited v Sprenger*.[3] His Honour referred to the decision of Wanstall J in *Tweed Motors (Qld) Pty Ltd v Moran Motors Pty Ltd*[4] and equivalent provisions of the *Land Act 1910* (Qld):

> "Nothing in the *Land Act* 1910-1959 made an agreement for sublease unlawful until the Minister's consent had been obtained so as to invalidate it: *Norton v Angus* (1926) 38 C.L.R. 523, 532, 536 and 540; *Robertson v Admans* (1922) 31 C.L.R. 250. It is a concluded bargain defeasible on refusal of consent: *Rawson v Hobbs* (1961) 107 C.L.R. 466, 491. His Honour examined the decision in *Butts v O'Dwyer* and pointed out that the legislation there under consideration in terms forbade and invalidated a transfer without consent. His Honour pointed out however, that the majority of the High Court at 279-80 regarded a transfer executed in anticipation of

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3 [1988] 1 Qd R 414 at 417-419.

4 Unreported, Supreme Court of Queensland, Wanstall J, 8 June 1964. The decision of Wanstall J was reversed on appeal by the High Court in *Tweed Motors (Qld) Pty Ltd v Moran Motors Pty Ltd* (1965) 39 ALJR 279. However, while Kitto and Windeyer JJ made *obiter* comments expressing doubt as to whether an instrument of sublease was ineffectual as a demise until the Minister gave approval, their Honours considered it unnecessary to come to a final conclusion on that point and the appeal was allowed on other grounds.

consent as valid and as effective to pass the estate once the consent was obtained. At 280, their Honours say:

> 'If the Minister's consent is obtained a transfer *will become capable of valid operation* and the plaintiff will be in a position to register the memorandum of lease under the Real Property Act.' (emphasis supplied.)

Section 166 of the *Land Act* 1910-1959 provided, amongst other things, that leases might be transferred with the permission of the Minister; and that any transfer or agreement to transfer a lease, not produced for the consideration of the Minister within three months from the date of the execution thereof, should be a breach of condition on which the lease was held and the lease should be liable to be forfeited accordingly. In *Norton v Angus* Isaacs J at 532 said:

> 'Sec. 166 was relied on in argument as an obstacle to the validity of the agreement. But that section does not invalidate this contract to transfer, even though there was no prior permission, and even though the intended transferee was not yet a qualified person. The contract did not contain an agreement to transfer without the previous permission of the Minister. But sec. 166 creates a *condition precedent to a valid and effective transfer,* namely, previous permission, the penalty for which is liability to forfeiture. The fact that the forfeiture may be waived does not detract from the statutory requirement in the first place of prior permission. The section is directed to the holder, because the 'breach of condition' is his breach, and the lease or licence which may be forfeited is his.' (emphasis supplied.) Cf. Higgins J at 539.

Wanstall J in the *Tweed Motors* case expressed his view of the effect of the provisions of the 1910 Act in the following language:

> 'These provisions, in my view, prevent the grant of a sublease by the plaintiff, giving the defendant an estate in the land, without the Minister's approval, but permit the making of a concluded agreement to sublease operative between them and binding on them, as an agreement, pending Ministerial approval and defeasible upon refusal of approval. I reach this conclusion by way of construction of the terms of s. 121 in the context of the whole Act and, in particular, the context supplied by ss 94, 130 and 166.'

As provisions to the same effect as all of the relevant provisions of the Act of 1910 are to be found in the current legislation, I am of the respectful opinion that this is a correct statement of the law and that it continues to be applicable.

However, entry into possession and payment of rent will create a tenancy upon the terms of the void lease in all respects save for the duration of the term: Woodfall, *Landlord and Tenant* (28th ed.) para. 1-0651. At common law a tenancy from year to year would have been implied but s. 129 of the *Property Law Act* 1974-1986 has

> abolished tenancies from year to year implied by payment of rent. Section 129(1) goes on to provide that if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time. The reference to there being no agreement as to the duration of the tenancy postulates there being no agreement between the parties 'operative at common law to incorporate as part of it a provision that it was to continue for a term of years or to be at will or for a periodic tenancy:'. *Dockrill v Cavanagh* (1944) 45 S.R. (N.S.W.) 78, 83 per Jordan CJ. In the absence of the Minister's approval there was, in my opinion, no operative agreement for a term in this case.
>
> It follows in my opinion that s. 129(1) applied. It was thus open to the appellants to have determined the tenancy at any time by one month's notice in writing expiring at any time."

Amendment of the defence refused

[81] On the morning of the sixth day of the trial counsel for the defendants sought to further amend the defence. The amendment was refused with reasons to be delivered with this judgment. Reasons were not delivered at the time as it would have delayed the trial beyond the time allocated for it in the civil list.

[82] The application was said to arise out of the evidence given in-chief and cross-examination by Les Apps and to a lesser extent, Barry Apps. The defendants sought to amend the defence to include an allegation that Les Apps relied upon his relationship and conversations with the solicitor, Mr Phillips, when determining whether or not to execute the lease document. The amendment pleaded that the plaintiffs' claims against the defendants were proceedings to which the proportionate liability provisions of Part VIA of the *Trade Practices Act 1974* (Cth) ("TPA") and Chapter 2 Part 2 of the *Civil Liability Act 2003* (Qld) ("CLA") applied and that Mr Phillips was a concurrent wrongdoer within the meaning of those Acts.

[83] Mr Perry SC for the defendants submitted that any determination of the plaintiffs' claim necessarily involved findings of fact with respect to those conversations between Les Apps and Mr Phillips which should be determined as part of the trial, notwithstanding the consequence that the trial might not be able to continue.

[84] The plaintiffs submitted the amendments should not be permitted because, *inter alia*, the application was brought late in the trial, the amendments were so tenuous they ought not be entertained, the defendants would not suffer any prejudice if the amendments were not allowed because they could seek contribution in separate proceedings against Mr Phillips and the plaintiffs would suffer prejudice if they were allowed because they had not had access to Mr Phillips's entire file and there would be additional costs of delays and further court time. Ms Heyworth-Smith also submitted that the proposed amendments did not plead a sustainable defence of proportionate liability and further, were internally inconsistent.

[85] Section 87CB(3) of the TPA defines a 'concurrent wrongdoer' as a "person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim." Similarly, s 30 of the CLA provides "a person who is 1 of 2 or more persons

whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim" is a concurrent wrongdoer.

[86] In oral submissions, Mr Perry SC argued that the plaintiffs' case revolved around the execution of the sublease document and that Mr Phillips was a concurrent wrongdoer within the meaning of those provisions because the representations that Les Apps alleged he made, if established, provided an alternative basis of reliance for the decision to enter into the sublease document. In response, Ms Heyworth-Smith submitted that for the proposed amendments to succeed on this basis it would have to be pleaded, and was not, that Mr Phillips was somehow liable separately for the loss and damage suffered by the plaintiffs because of the representations said to have been made by him.

[87] In *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, the High Court considered the relevant principles for an application for leave to amend a pleading at an advanced stage in the litigation and said at [111] – [113]:

> "An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
>
> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings." [footnotes omitted]

[88] The application for leave to further amend the defence was first raised on the sixth day of the trial. Given the advanced stage in the proceedings, further delay and wasted costs were important considerations.

[89] I was referred by Ms Heyworth-Smith to two affidavits of Les Apps filed earlier in the proceedings which referred to the friendship between Mr Phillips and Les Apps and the trust Les Apps placed in Mr Phillips. I am not therefore convinced that such

an application could not have been made earlier, or indeed, before the request for trial date was filed when there would have been no requirement for leave of the court to amend the pleading.

[90] Further, I was not convinced that the proposed amendment in the form it was handed to me pleaded all the facts necessary to properly give rise to the operation of the relevant provisions on proportionate liability.

[91] Ultimately, to allow the defendants' proposed amendments would have been to cause undue prejudice to the plaintiffs given the late stage the application was made in the trial and, as was implicit in submissions by the defendants, the trial would not have been able to proceed to its conclusion in the sittings which it had been allocated for some time. For these reasons, I refused to grant leave to further amend the defence.

Problems with the slipway

[92] Evidence as to the state of the slipway was given by a number of witnesses who were familiar with it at the time of the Apps' entry into it, by those who undertook inspections later and by way of photographs and a DVD recording taken on 28 February 2010, the day that the plaintiffs vacated the premises. The inspections will be referred to later in these reasons. The photographs, taken while the plaintiffs occupied the slipway premises, graphically demonstrated the dilapidated state of the slipway: with broken and ill-fitting windows and doors incapable of being shut completely or of keeping rain out; rusting reinforcing and deep cracks and crumbling in the concrete; rusted wall panelling and supports and purlins; roof gutters rusting or rusted away completely leading to rain water coming in to the premises; and very low water pressure from the fire hose. Wharf C was extremely dilapidated with deep cracks in the concrete apron to the wharf, rotting posts above and underneath the wharf and the reinforcing in the concrete was exposed and rusting. All of these impressions were confirmed by the DVD evidence.

[93] Phillip Ashworth said that the slipway building was in poor condition when he took over management from his father in 2003. The roof was severely rusted and there was rust throughout the building including in the reinforcing in the concrete. Some of the concrete had "busted away". There were many water leaks. Power supply to the building was poor. The building deteriorated further until he vacated it in April 2006. His evidence was that the jetty on the eastern side, Wharf C, was sinking into the river and drooping and the sick bay "silted up", although during the period 2003 to 2006, "at some stages, there were boats, vessels in the sick bay." Boats would be moored on the eastern side of three pilings which were further out into the river than Wharf C.

[94] Darren Prentice was a fitter who had worked at the slipway with Ashworth Marine Engineering ("Ashworth") as leading hand or foreman. There were about a dozen staff working with Ashworth repairing fishing vessels. Mr Prentice worked there for five years until 2003 when he left and started his own business, Mooloolaba Marine Maintenance, repairing vessels wherever they were moored.

[95] Mr Prentice started working for Barry Apps at Mooloolaba Slipways in October 2006 and worked there until 28 February 2010. He said it was dirty and run down when they first moved into it. He said the structure itself was "fairly stable" but the area from the workshop out onto the slipway itself, the crib area and the shipwright

area were rusted and run down. When it rained the rain water ran down through the beams and from the slipway through the brick work and across the floors. The pipe underneath the sump drain underneath the driveway had collapsed so that all the water would come down the driveway and through the front doors of the building. Water would be about an inch deep across about a third of the floor affecting their capacity to do any work.

[96] Mr Prentice described the problems the employees experienced with electricity. They found that if they switched lights on, bulbs would sometimes explode. The circuit board was covered with silicon to try to stop the water from running inside of it. Water ran down in the boilermaker section into the power points. As soon as it rained they would have to turn the power points off and stop any electrical work. He said that the main power board looked "pretty dodgy". By that he meant that there was a lot of raw silicon sitting on top of it to try and stop the water going down through it and the door to the power board did not close properly.

[97] Mr Prentice said that Wharf C on the eastern side was in a very poor state of repair. The structure was buckled and appeared as if it was about to fall in. The sick bay was too shallow to put boats into it so they could only work on boats at the end of Wharf C, which interfered somewhat with the operation of the slipway.

[98] When Shane Miller, the tank room manager at Crabpak, was shown the slipway by Les Apps when the Apps first took over the slipway he noticed that the wharf area was "just about falling down" and the sick bay area was very shallow.

[99] Wharf C was used purely as an access to get to the boats moored near the end of it for them to be repaired. Mr Prentice said the slipway was fairly busy for the first six to 12 months because the slipway had been closed down so there was a build up of work.

[100] Kerry Hill was employed at Mooloolaba Slipways for about three months in 2007 working as production supervisor. He said they tried to diversify to get outside work because the marine side of it was "a bit quiet". He said it was a tough environment in which to obtain outside work because the premises were old and it was not a good look for new customers. He said they were in a run-down state and "a bit of an eyesore". During wet weather they had a major problem with water inundation into the rear workshop which was the fabrication shop and entailed a lot of welding and electrical work. As soon as the rain water came in on the floor they had to lift all of the electrical equipment up off the floor and get all the leads out because it was a safety hazard so work had to come to a halt. The inundation was run off from the car park and blocked up drains. So far as electrical work was concerned they had a lot of trouble with electrical surging and burnt out a couple of new welding machines as a result. The water pressure on the site was poor which would have been a problem had there been a fire. He could not recall any work being done on the site by the landlord during the period when he was employed.

[101] Alan Trickey was a customer of the slipway. He is a company director and one of his major business interests is in the fishing industry. His company, Dagenhaven Pty Ltd, owned a number of fishing trawlers at Mooloolaba at the relevant time. He recalled that there was a problem with there not being an area to work on a boat out of the slipway in the water. The area that should have been available was not up to

the standard expected of a facility of that type: the wharf appeared to have deteriorated to a point where it was unsafe.

[102] Mr Trickey's company owned a vessel called the "Miss Melissa". It could not be berthed in the sick bay because at low tide it would sit on the bottom and list on one side and therefore had to be moored further out into the river, although he was unable to give precise evidence as to where it was.

[103] Barry Apps said that the slipway was busy when they first took it over as there was a backlog of fishing vessels waiting to be slipped. It tapered out by March to April 2007 when they worked on vessels moored elsewhere. The sick bay was still unable to be used so they used the slipway side of Wharf C to a limited extent. However access along that wharf was dangerous because of the condition it was in, so work was severely restricted by the condition of the wharf and the lack of dredging of the sick bay and the fact that working on vessels on the slipway side of the wharf restricted access to the slipway. Had the sick bay been dredged, it would have been able to take two reasonably sized vessels without restricting use of the slipway at all.

[104] Les Apps said that his company improved the slipway premises. They enclosed the engineering section and put in roller doors and put structures on the western side of the building to comply with EPA requirements.

[105] The Apps employed Steve Maiden as manager of the slipway in January 2007. He remained with the slipway until June 2007 when he resigned. When he commenced work he observed that the slipway needed repairs and modifications. He was particularly concerned about the slipway winch because it was unguarded and therefore represented the greatest risk of injury. It was immediately replaced. His other concerns related to the leaking roof and the need for dredging to allow vessels to use the sick bay and keep the slipway open. He was also concerned about the wiring and rainwater running over the electrical connections and inundating the floor of the building, in particular the engineering fabrication workshop. He referred to Wharf C being in such a poor state of repair that access could only be sought from it to vessels "precariously". To his knowledge only two vessels were accessed from Wharf C during his time at the slipway, a small river cruiser and a small fishing vessel. Repairs were not carried out from the wharf because of its dangerous state but rather from the vessels themselves.

[106] In order to make the slipway financially viable, he worked towards having the facility certified for quality assurance and workplace health and safety to enable them to tender for larger government contracts. However the specific problems referred to earlier together with the general poor state of repair of the building did not enable that to happen. By the time he left in June 2007 the lack of slippings being booked in meant that the business was being supported by its engineering work.

[107] Mr Maiden is an experienced slipway manager who has obtained quality assurance certification for other slipways. Using that experience and his personal knowledge of the operations of Mooloolaba Slipways he prepared a report which was tendered as Exhibit 35. His report refers to certification to certain standards which, while not necessary to obtain private sector work, is almost always necessary to obtain

government work. At the time of his employment with Mooloolaba Slipways they were:

- AS/NZS ISO 9001:2000 – Quality Management Systems;
- AS/NZS 4801:2001 – Occupational Health and Safety Management Systems; and
- AS/NZS ISO 14001:1996 – Environmental Management Systems.

[108] He attached to his report the Commonwealth Procurement Guidelines, the Royal Australian Navy's Slipping and Docking Requirements and extracts from a Department of Defence Tender document and Australian Institute of Marine Science Tender document, which demonstrate the necessity to comply with some or all of those standards. He also gave examples of Federal government agencies that might invite tenders for works on slipways.

[109] He referred to the State government Procurement Policy, the Pre-qualifying Suppliers Guide published by the Department of Public Works and other State government documents from Queensland and New South Wales which amply demonstrated the necessity to comply with the aforementioned standards in order to successfully tender for government work.

[110] His report set out the reasons why to tender successfully for government work is essential to the financial viability and profitability of a facility such as Mooloolaba Slipways. He also gave examples of the various types of Federal, State and Local government vessels that a slipway at Mooloolaba could expect to service and maintain, as well as the profit to be made from such work.

[111] He identified in his report the major safety issues which prevented certification, being:

(a) the roof had holes in it and leaked water into the slipway site, where electrical equipment was in use;

(b) during rain, water ran into the slipway due to the insufficient drainage at the premises, which again created a concern due to the electrical equipment being used;

(c) the wharf was dilapidated and in need of repair; and

(d) the switchboard was in the painting preparation room and did not comply with AS/NZS 4801:2001 Occupational Health and Safety Management Systems and could be deemed a fire risk. The room was used for that purpose because it was the only dry room and therefore the only suitable area for paint mixing.

[112] In addition, the shallowness of the sick bay and the dangerously dilapidated condition of Wharf C meant that the slipway would not meet standards required under AS/NZS ISO 9001:2000 - Quality Management Systems. It reduced the number of vessels able to be serviced and thus the slipway's efficiency and productivity. In Mr Maiden's opinion, the ability to work on vessels in the water, in addition to the dry dock, is paramount to the successful operation of a slipway, particularly for government work on larger boats. In order to obtain government work the tenderer is obliged to supply details of the facilities available and a slipway without a sick bay or repair bay would not be successful in having its tender accepted.

[113] Work was carried out by Mooloolaba Slipways to the facility including:

(a) extending the fabrication shed;
(b) modifying the office area;
(c) insertion of roller doors; and
(d) insertion of a crane to enable heavy equipment to be lifted off vessels onto dry land.

[114] Nevertheless Mr Maiden remained of the view that certification could not be obtained. He said that the landlord did not provide any support to Les Apps and Barry Apps during his employment at the slipway to ensure that the facility was up to a standard that would enable certification to be obtained. Mr Maiden recalled Les Brown undertaking repairs himself to Wharf C in an attempt to reinforce the wharf, but the repairs were not effective and were simply a temporary measure.

[115] Mr Maiden summarised his opinion as follows:

> "(a) the Slipway could have been a successful commercial operation had the Slipway site been up to a sufficient standard to enable certification to be obtained so that Government tenders and contracts could be secured;
> (b) the dilapidated state of the Slipway site, the inability to effectively use the 'repair berth' to service vessels and the resulting safety concerns prevented certification from being obtained and accordingly reduced the scope of work that could be secured;
> (c) based on my experience and understanding of Government vessels in the South East Queensland area and the usual maintenance and service requirements of these vessels that with Certification the Slipway could have successfully tendered for Government work."

Attempts to persuade the defendants to act on the representations

[116] In March 2007, when Les Brown had still not attended to any of the works he had promised to do, Les Apps saw him in the car park and asked him when he was going to do them to which he replied, "When I am fucking ready." Les Apps said:

> "I also said to him at that point, 'What is this I hear about you talking to developers about selling the whole site? You can't fucking do that. We have got a 15 year lease. We need to be considered.' He told me to fuck off, and he stormed off ranting and raving as he does quite often, and that was the end of that discussion and that was when I realised we had a major problem on our hands.
>
> -- I had a discussion with Barry immediately. We realised then we had a major issue, one that could be rectified with either legal action or try to come to some commercial arrangement. We opted to try and make – come to some commercial arrangement."

[117] Barry Apps said that at about that time he saw his brother having a heated discussion with Les Brown. Barry Apps was in the office at the time so could not hear what was said but heard loud voices and swearing and gesticulating.

[118] Les Brown denied having a "blazing row" with Les Apps but then, in another long unresponsive answer, described an intense argument between them, the substance of

which had not been put to Les Apps, about Les Apps seeking to take over his lease from Queensland Transport which ended, according to Les Brown, with Les Brown telling Les Apps to, "Go to buggery." He said that Les Apps never asked him, or at any other time, to do any work on the slipway and then, added, "And if he has, he's never, ever written and asked me to do it." It was revealing that while asserting he had never been asked to do any work, felt it opportune to say that if he had, then it was not put in writing.

[119] Les Apps said in evidence that the business of the slipway then went into virtual shutdown but that they went out and actively sought other work such as general engineering to pay the bills and keep people in employment. Barry Apps said that he looked for engineering work outside marine engineering. He referred to it being in a "holding pattern". Les Brown had still not carried out the work he had said he would do. Barry Apps saw Les Brown and asked him when the dredging was going to be done and Les Brown said to him, "Don't you worry about that young fellow, that's – that's happening. I'm – I'm looking at how I'm going to cart this away." He said he had "been doing this and doing that" but Barry Apps had not seen any evidence of any work being done.

[120] The Mooloolaba Engineering Profit and Loss Statement from July 2006 to June 2009 shows that in the first few months of operation the total sales were $64,686.68. Wages amounted to $54,142.75. In the financial year ending 30 June 2008, total sales were $328,117.03 and wages $30,664.78. In the financial year ending 30 June 2009, total sales were $406,888.60 and wages $164,883. Les Apps was unable to explain the increase in wages in the year ending 30 June 2009. Barry Apps said that people were at first employed as sub-contractors and if they were happy with their work they were made employees. More money was spent on employees by the Slipways Trust than by the Engineering Trust in the year ending 30 June 2008. Wages and salaries for the Slipways Trust for the year ending 30 June 2008 was $465,734.91 and for the Engineering Trust for the same period, $30,664.78. Then the Engineering Trust started doing more outside work and thus increased its income and its workforce.

[121] On 2 January 2008 Barry Apps, as manager of Mooloolaba Slipways, wrote to Les Brown and Anthony Brown asking them to advise, further to their previous conversations, when the following situations would be rectified:

> "(1) Area adjacent to wharf C to be dredged out
> (2) Wharf C repaired
> (3) Our lease endorsed by Dept, Transport
> (4) Power and water supply to building rectified"

No answer was received. Les Brown denied receiving that letter however that seems to be quite unlikely. It is more likely that he received it and chose not to answer it. His denial seems to have been necessitated by his assertion that he had never been asked in writing to make any repairs or rectifications to the slipway site.

[122] On 10 March 2008 Barry Apps, as manager of Mooloolaba Slipways, wrote to Les Brown reminding him that both he and Anthony Brown promised to help Mooloolaba Slipways in every way possible and to attend to outstanding matters. He said that his operations manager, Steve Maiden, was trying to finalise documentation and accreditation for Mooloolaba Slipways to proceed "for navy contracts", but that without the matters mentioned in his letter of 2 January 2008

being rectified it made their task very difficult. No reply was received. In fact by that time Mr Maiden had left Mooloolaba Slipways and was no longer working on the task. Barry Apps said, however, that he kept in touch with him by telephone and by visiting him at Port Macquarie on the basis that had Les Brown done the work he represented he would do at the slipway then they would have been trying to get the necessary certification and used Mr Maiden to help them finalise it.

[123] Les Brown again, unconvincingly, denied receiving that letter.

[124] In spite of the representations having been made, the first defendant failed to carry out the works it represented it would attend to.

Redevelopment of the site?

[125] Meanwhile during 2007, Les Apps said to Les Brown that if he was going to sell to developers perhaps Les Apps could get involved and try to put some deal together. Les Apps approached Les Brown at his truck yard at Warana to ask him if he was interested in selling his property at Parkyn Parade, Mooloolaba. Les Brown said that he was not interested. Les Apps said, "Initially he told me to fuck off, but at a later stage I got a phone call saying, 'Do you want to try and find a developer to buy my property for 11 million dollars. Go ahead'." That happened in about May 2007. A business broker, Jeremy Gifford, approached Les Apps in mid 2007 and asked if he had a valid lease over the slipway. Les Apps said that he did.

[126] Les Apps then spent the twelve months from May 2007 till May 2008 trying to put together a deal to develop, first Les Brown's property, and then the site including Les Brown's property and the adjacent DeBrett Seafood's site, which was the site controlled by Steve Davis and his partner, Gary Heilmann, who is now the operator of Tasmanian Blue Fin Pty Ltd. The first meeting with Mr Heilmann from De Brett's took place in July to August 2007. Mr Heilmann, Les Brown and Les Apps met in Mr Heilmann's office and agreed to work together to try to achieve a deal on both properties. Mr Heilmann said that meeting took place at Les Brown's suggestion. Les Brown suggested that if they were going to talk to developers they should do it together "because it would be beneficial to everybody to put forward a united front." Les Brown said in evidence that he already had a "confidential" contract to sell his interest for $11,000,000. He did not disclose that information to the others, although he suggested in evidence that somehow they had found out about it by then although they did not let on that they knew. It is apparent that they did not then know that Les Brown had already signed an exclusivity agreement with regard to the sale of Cashlaw's lease.

[127] On 9 July 2007, Les Brown, on behalf of Tabuka, Nancy Brown, on behalf of Cashlaw, and Anthony Brown, on behalf of Browns Slipway (Qld) Pty Ltd ("Browns Slipways"), signed an agreement (the "exclusivity agreement") with Capital Four Pty Ltd ("Capital Four"). It had an exclusivity period of 120 days which cast obligations on the landowner, described in the agreement as Tabuka and Cashlaw, and the business owner, described in the agreement as Browns Slipways. Those obligations were set out in clause 5 of the agreement which provided:

> "**5. EXCLUSIVITY**
>
> The Landowner and the Business Owner jointly and severally agree that, for the Exclusivity Period, each will:

(a) not either directly or indirectly enter into any discussions or negotiations with any third party regarding the sale and purchase of the Business;
(b) not either directly or indirectly solicit from any third party any bids or offers for the Business or any part of it;
(c) terminate any discussions currently in progress with any person other than the Interested Party and its Agents regarding the sale and purchase of the Business or any part of it."

[128] Les Brown explained in evidence that he thought this only prevented him from selling to someone else during that 120 days. It seemed tolerably clear that he was prepared to at least indirectly solicit bids or offers from third parties, notwithstanding the exclusivity agreement.

[129] Mr Heilmann said that Les Brown stayed after the meeting and demanded to know why Les Apps had been invited to the meeting. Mr Heilmann explained that Les Apps had been having discussions with Mr Davis about redevelopment and Mr Heilmann thought he should be included as he was a leaseholder and it was important to keep him on side about any future redevelopment. Les Brown told him not to worry about it and that Les Apps did not need to be involved in it. Les Brown's evidence was that Les Apps knew from the time of that meeting that he did not want Les Apps acting on his behalf. However, what appears to have happened was that Les Brown told Mr Heilmann that after the meeting, having expressed the opposite during the meeting.

[130] Les Apps and others involved met with representatives of local government and of the Department of Transport who gave them positive feedback as to their ideas for alternative uses for the site for more retail or marina type developments in line with the tourism-related nature of the area.

[131] Exhibit 5 was a schedule prepared by Les Apps setting out the time he spent on the development project between August 2007 and May 2008. He prepared if after this litigation commenced in 2009 from memory and rough notes which he has not retained.

[132] On 1 March 2008 two agreements were signed with Jeremy Gifford (on behalf of JW Gifford Investments Pty Ltd) after a number of meetings had taken place with Mr Gifford. Mr Gifford was introduced to Mr Heilmann by Les Apps as a representative of a number of developers and as someone who was keen to try to put together a deal to buy the two sites together and act as a intermediatory to negotiate an arrangement with a suitable developer. The owners of De Brett's Wharf agreed to pay JW Gifford Investments Pty Ltd $100,000 as a consulting fee in the event of a sale to any party introduced by Jeremy Gifford. The purchase price of the sale was to be $11,000,000, the deposit five per cent, with a 30 day payment of $3,500,000, with a 120 day payment of $5,950,000, and with the 12 month balance payment of $1,000,000. The agreement was signed by Jeremy Gifford, Gary Heilmann and Steve Davis. Les Apps (on behalf of Mooloolaba Slipways) and Mr Gifford signed a handwritten document whereby Mooloolaba Slipways agreed to pay JW Gifford Investments Pty Ltd a consulting fee of $200,000 in the event of a sale of the slipway to any party introduced by Jeremy Gifford. The purchase price

was noted as $2,000,000, the deposit as 10 per cent, settlement as 60 days and due diligence as 30 days.

[133] Les Apps subsequently found out that Les Brown had signed a confidential commercial agreement with a developer to enable him to sell the entire complex without reference to the Apps or their interest in the slipway and without any reference to Mr Davis, who referred to Les Brown in his evidence as acting like "a snake". Mr Heilmann said he also found out that soon after the meeting in August 2007, Les Brown had signed an agreement for an option over his property without reference to the others involved which put them in a weak bargaining position. In fact when it was disclosed during the trial, it became apparent that it had been signed on 9 July 2007.

[134] Mr Heilmann arranged for Jeremy Gifford to speak to the developer with whom Les Brown had signed the confidential agreement but they were unable to make any progress. Mr Heilmann and Les Apps decided to seek other buyers. Both of them contacted various developers. Mr Heilmann said they spent many hours drawing up plans and doing things for the entire site as they knew that Mr Brown was a willing seller and it seemed logical to attract a developer based on the entire site to attract a higher price for all of them. Mr Heilmann said that he met with Les Apps probably every day for an hour or two over many months from about August 2007 for the following twelve months. Les Apps lined up meetings with developers for himself and Gary Heilmann and they had many meetings with Jeremy Gifford.

[135] Les Apps said that he was starting to realise that putting together a deal to sell the sites was very difficult and so he attempted to try to get Mr Brown to do the things he had promised. Les Apps said that by early 2008, the slipway was continuing to operate in "semi-shutdown mode". Barry Apps was trying to do whatever work he could to pay the bills including non-marine engineering work so they could keep their workforce employed.

[136] By May 2008, Les Apps realised he was not going to be able to find a developer to buy the whole development because the $11 million asked by Les Brown was above what the market was prepared to pay.

Boat stacker?

[137] In the course of looking for a developer Les Apps realised that the development of a "boat stacker" on the site was a realistic possibility. He then approached Les Brown and said, "We're getting nowhere with a developer. You're not going to do the work. There's interest in a boat stacker. Are you interested?" A boat stacker is a multilevel building which can house hundreds of boats out of the water in cradles.

[138] Mr Brown at first said he was not interested but then rang Les Apps and instructed him to proceed with a presentation about the development of a boat stacker. Les Apps put a proposal to Les Brown in writing about relinquishing their 15 year lease and fabricating the boat stacker. Les Apps prepared two documents, "Proposal for Mooloolaba Slipways Pty Ltd to relinquish a 5 x 5 x 5 lease with Cashlaw Pty Ltd and terminate all associated operations at the property in relation to the slipway" (Exhibit 9) and "Proposed boat stacker on existing slipway site" (Exhibit 10), which he gave to Les Brown. The drawings for the boat stacker as well as an estimate of the number of boats it could house and income it could generate were prepared by Barry Apps for inclusion into the proposal which was given to Les Brown. Les

Apps had formed the view by then that Les Brown was not going to do the works he had represented he would do and so they were looking for a commercial solution or, to put it in legal terms, they were seeking to mitigate their loss.

[139] Les Brown said in evidence that he received Exhibit 9 but not all of Exhibit 10. That seems unlikely since there was no reason not to provide Les Brown with all of that material.

[140] Les Apps then wrote to Les Brown, with a copy to Anthony Brown, on 1 July 2008 with regard to four possible options for the site:

> "**Option (1)**
> I would be asking you to give me approval to demolish the existing slipway facility and construct a multi story boat stacker on the site. The lease would need to be extended to the same as what you currently hold in the site in order to cover the capital costs, and obviously, there would need to be some discussions regarding what the new rent should be.
>
> **Option (2)**
> We would relinquish our 5x5x5 lease on the slipway site and construct a boat stacker for you at a cost fully completed of $2.75m, including our exit costs. Plus Flaherty's would be prepared to take over your fish shop area, if it were to become available.
>
> **Option (3)**
> We would relinquish our 5x5x5 lease on the slipway site for a negotiated amount that would be less than our book losses, and you can proceed to do whatever is best for the current environment we are now in. (As a matter of interest, current book losses which would not be recoverable if we exit short term are well in excess of $1m.)
>
> **Option (4)**
> If none of the above is acceptable, I would then be asking for your approval to transfer the balance of the 5x5x5 lease on the slipway to a local entity, and I would move on."

[141] Les Brown admitted to having received that letter.

[142] Les Apps said that he had an understanding with Les Brown that from May 2008 the boat stacker would proceed and that all rent would be suspended from May 2008 pending the approval to build the boat stacker. Mooloolaba Engineering would build the boat stacker. He said he was instructed by Les Brown to engage a draftsman, Eddie Baden. He went to meetings with Les Brown and sometimes Anthony Brown and with various statutory bodies such as, "fire protection people, council and so forth." Initially Les Apps was going to pay the costs involved but then Les Brown decided he wanted to do that and they proceeded down that track to get all the appropriate approvals.

[143] In August 2008, Barry Apps put together some figures for the construction of the proposed boat stacker for $2,880,000. Les Apps engaged Eddie Baden from Baden

Design and Drafting Service to prepare a quote to design a boat stacker. They had a number of meetings to discuss what needed to be done.

[144] On 4 November 2008, Les Apps received a quote addressed to Mooloolaba Engineering from Mr Baden for the design of the proposed boat stacker. He passed that on to Les Brown who told him that the quote was unacceptable. Les Brown denied having seen that. A second quote was provided by Baden Design and Drafting Service addressed on this occasion to Cashlaw, care of Mooloolaba Engineering. The second quote reduced the overall price from $74,250 to $33,000. The quote was passed by Les Apps to Les Brown under cover of a handwritten note dated 14 February 2009. Also enclosed was a Client and Designer Agreement which had been signed by Eddie Baden and witnessed by Les Apps. Les Apps also witnessed the signature of Les Brown on behalf of Cashlaw on 24 February 2009 accepting the quote on that Client and Designer Agreement. The Client and Designer Agreement was signed by Les Brown during a meeting on Brown's wharf at Mooloolaba between Les Brown, Les Apps and Mr Baden. When cross-examined about this, Les Brown rather begrudgingly said, "Well, I suppose you'd call it an agreement. I paid the bill that he run up there, yes."

[145] On 17 December 2008 Les Apps wrote to Les Brown and Anthony Brown setting out the matters on which they had reached agreement on and those matters which were still to be resolved. Those matters on which they had reached agreement were as follows:

> "(1) The slipway operation is not a viable proposition to continue under the present structure and presents a major hurdle for any prospective purchaser of the site. I have advised you previously that it cannot and will not continue under the current structure after 31st January, 2009.
>
> (2) The best possible long-term usage for the slipway site is for there to be a boat stacker built on the site.
>
> (3) The current wharf structure where 4Seas are at the moment should be extended out to a similar length as De Bretts/Pinzones wharves.
>
> (4) Any monies owed by Mooloolaba Slipways for rent to be offset through construction of the wharf extension."

[146] Unresolved was the question of who would operate the boat stacker. There was a proposal that the Apps' companies build it and lease it themselves. Les Apps set out a number of disadvantages for both parties of that proposal. His preferred scenario was for Les Brown to contract the Apps' companies to build the stacker for $3,000,000 and for the Apps' companies to lease the stacker back on terms set out in the letter. Les Apps said that in response the Browns said that Mooloolaba Engineering should build the boat stacker for Cashlaw. That response was not in writing but made orally by Les Brown. As Les Apps said, "Les Brown never responded in writing". Discussions ensued about having the agreement reduced to writing but that was never done.

[147] Many months later, in a letter dated 27 August 2009, Cashlaw's solicitors in this litigation, Barclay Beirne Lawyers, asserted that they were instructed that in about May 2009 Les Brown made an oral offer to the plaintiffs at Brown's Slipway transport depot at Warana as follows:

> "1. In consideration of your client's proposal to press on with the boat stacker proposal and in consideration of our client's significant expenditure in the order of $50,000.00 to $60,000.00 by way of applications for Council approval and the like, our client proposed that accrued rent and outgoings due from your client over and above $150,000.00 be suspended;
> 2. That rent and outgoings which accrued from time to time from 1 June 2009 be paid as and when they fell due;
> 3. That your client apply the suspended rent and outgoings in the sum of $150,000.00 referred to above to the construction of the boat stacker provided construction commence within a reasonable time of Council approval being obtained;
> 4. In the event that Council approval was not obtained or the construction of the boat stacker did not proceed within a reasonable time of Council approval being obtained that the rents and outgoings suspended in the sum of $150,000.00 would become due and payable by your client to our client without interest."

Their instructions were that the plaintiffs said they would let Les Brown know but did not revert to him.

[148] Included with that letter was a Cashlaw statement showing that Mooloolaba Slipway paid the monthly rent of $11,220 and outgoings of $5,133.23 due in respect of March 2008 in July 2008; and rent in respect of April 2008 on 30 October 2008. It also paid for outgoings accrued on 12 September 2008 on 23 September 2008 and outgoings accrued on 29 April 2009 on 1 June 2009. The statement showed $196,699.89 outstanding on 3 August 2009 for rent due from May 2008 (together with some lesser amounts for outgoings). Barry Apps said that the payments in July and October 2008 were to make up for payments he had missed. During cross-examination on that statement Les Apps asserted that the arrangement to suspend rental payments was to operate from July 2009.

[149] Les Apps appears to have been mistaken in this evidence and it was corrected by him in re-examination by reference to the period before the notice to remedy breach was served. This error did not suggest to me that he was being untruthful. It appeared to be an honest mistake by a witness endeavouring to be truthful and accurate in his evidence. During the period when rental payments were suspended Cashlaw did not issue any demands for payment. The requirement to make those rental payments was suspended but not forgiven. They accrued and were shown in the profit and loss statements of Mooloolaba Slipways.

[150] Les Apps continued to work on the boat stacker proposal. It was arranged that he Les Brown, Les Apps and Eddie Baden would visit a boat stacker on the Gold Coast; but only Les Apps and Eddie Baden went. In about June 2009 Les Apps was rung by Eddie Baden who told him that he had been instructed by Les Brown not to have any more dealings with Les Apps. Prior to that Les Apps had had regular meetings with Eddie Baden, fire people and town planners and travelled to the Gold Coast, Sydney and Stradbroke Island to look at other boat stackers.

[151] Les Brown agreed in his evidence that he had instructed Mr Baden not to send any plans to Les Apps. Les Brown expressed frustration at Les Apps changing the plans. He said he said to Mr Baden, "You are not to send Les Apps any more of our plans because he's changing them all the time, and he's only going to build the damn thing if we build it." By that I take it that Les Brown was intent on having plans submitted to council, which would if approved, allow him to construct a boat stacker. He was also expressing what was his understanding with Les Apps, that is if Les Brown (or one of his companies) received council approval to build the boat stacker, it would be constructed by Les Apps (or one of his companies).

[152] After Les Brown instructed Mr Baden "to keep Les Apps out of it" and he received plans from Mr Baden, Les Brown employed town planners, Dillon Folker Stephens, to prepare the plans to lodge with the council. The plans were lodged on 30 June 2009 and given council approval on 24 November 2009.

Recovery of loss suffered by attempts to mitigate loss

[153] The plaintiffs worked diligently at attempting to mitigate their loss by endeavouring to find a financially rewarding use for the site when the defendants failed to do the works they had represented they would do. They are entitled to recover their losses in pursuing their reasonable attempts to mitigate their loss. Not all reasonable attempts to mitigate loss bear fruit. Samuels JA observed in *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322 at 356:

> "… the principle is that stated in *McGregor on Damages*, 13th ed., p. 167, par. 237, namely that recovery is allowed 'for losses and expenses reasonably incurred in mitigation even although the resulting damage is in the event greater than it would have been had the mitigating steps not been taken'. That statement (from the 12th ed. of *Mayne & McGregor on Damages*, par. 161) was quoted with approval by Edmund Davies J in *Lloyds and Scottish Finance Ltd v Modern Cars & Caravans (Kingston) Ltd*, where his Lordship said: ' … it is well established that a plaintiff may recover expenses incurred in an effort to mitigate the damage resulting from a defendant's wrongdoing.' The learned authors of *Halsbury's Laws of England*, 4th ed., vol 12, p 477, par. 1193 state the law in the same terms as *McGregor*. Direct authority is scanty, perhaps because the principle admits of no argument to the contrary, it being a direct corollary of the undoubted policy by which the law 'seeks to encourage the avoidance of loss … by denying to the wronged party a recovery for such losses as he could reasonably have avoided, …': *McCormick's Handbook on the Law of Damages*, p 127. I refer, however to *Gardner v The King*; *Wilson v United Counties Bank Ltd*, per Lord Atkinson; *The World Beauty*, per Winn LJ, and, of course, to *Waterlow's* case.
>
> It would seem to follow that, once the plaintiffs' conduct is found to have been reasonable, the defendants are bound to make good the loss thereby sustained." [footnotes omitted]

[154] The plaintiffs are entitled to recompense for the time reasonably spent by Les Apps and Barry Apps in attempting to mitigate the loss suffered by the plaintiffs.

[155] Les Apps prepared a schedule of expenses spent on the development project and the boat stacker project which was tendered as Exhibit 17. It covered the expenses of both Les and Barry Apps. The schedule set out that between mid 2007 and mid 2009, Les and Barry Apps attended an average of three to four meetings a week with consultants, contractors and developers with regard to the development project and the boat stacker project. Most of those meetings were attended by Les Apps rather than Barry Apps. Evidence was given by Wayne Johanson from Job Placement Services that the average salary for positions advertised for persons with Les Apps' experience as at 30 March 2010 was $120,000 plus benefits per annum. For Barry Apps the range was $90,000 to $120,000 per annum, which gives a mean of approximately $105,000 per annum. Les Apps estimated that he and his brother spent between them 30 hours per week over 110 weeks at $40 per hour which appears to be a reasonable estimate both as to time and to cost. The total cost of that time is $132,000.

[156] Les Apps also claimed fuel at $150 per week and catering at $100 per week. I am not satisfied that those expenses can be reasonably justified. Travel expenses were only incurred occasionally and the catering appears to cover meetings over coffee that would have been consumed in any event. I am not prepared to allow more than a nominal amount of $500 for travel expenses. The office expenses listed in the schedule for telephone calls, stationery, photocopying and office supplies would appear to be reasonable for the work that was being done so should be allowed in the sum of $2,000.

[157] The losses and expenses reasonably incurred in the plaintiffs' attempt to mitigate their loss therefore can be quantified as $134,500.

Notices to remedy

[158] On 25 June 2009, Klooger Phillips Lawyers on behalf of Cashlaw served a notice to remedy breach of lease on Mooloolaba Slipways for arrears of rental.

[159] On 30 June 2009, Cashlaw applied to the Sunshine Coast Regional Council for a material change of use for the site at 29-31 Parkyn Parade, Mooloolaba (Lot W SP164167, Lot X SP164167 and Lot 1 SP143293) for a "Vehicle Depot – Boat Storage Facility". The designs enclosed were those prepared by Mr Baden. They were dated 24 June 2009. The application was approved on 24 November 2009.

[160] Les Apps replied to the letter from Cashlaw's lawyers which enclosed the notice to remedy breach on behalf of Mooloolaba Slipways on 13 July 2009. He referred to their entering into the 5 x 5 x 5 lease in good faith, expenditure of over $1.2 million and employment of "the best management available to get the operation properly certified" to tender for lucrative government contracts relating to the marine industry. He said, "Various key things were not done by various people, as promised" and that subsequently he had found out that the area had been subject to a confidential option to sell and redevelop it without reference to the Apps. Since then he had spent much time with potential developers to obtain a deal that would protect the Apps' position and provide the best possible result to Cashlaw. When that proved not to be possible he had suggested a boat stacker to be built by the Apps. He said that lease payments were suspended by Cashlaw in May 2008. He said the arrangement was as follows:

> "Cashlaw suspended the payment of lease payments from about May 2008, knowing that there was no long term future for the slipway, on the basis that if a developer went ahead we would be paid an amount of money to relinquish our lease, (various offers were made to us by potential developers ranging from $1million to $2million) and then out of those funds, Cashlaw would be paid. When a developer was not forthcoming the understanding was we would build the boat stacker and pay the suspended lease payments out of the monies received to build the stacker."

[161] Barry Apps took some more photographs of the premises showing their state of dilapidation. There was further decay in the walls leading to their being unstable. Les Brown and some of his employees had tied chains and ropes over the wall beside the front entrance to prevent it from falling over. Les Brown admitted in his evidence that "of course it's falling down." Photographs of Les Brown and his employees doing that work were taken. It does not appear that any of them was wearing appropriate safety gear for working at height such as a safety harness, safety helmet, fluorescent vest or work boots. The man shown working on ground level has bare feet or thongs. Les Brown suggested in his evidence that the explanation for the lack of safety gear was because the men did not want to use it. He insisted that the men were wearing work boots and said the man shown in thongs could just have been a passer-by who helped out.

[162] On 3 August 2009, Klooger Phillips replied to the letter of 13 July 2009. With regard to the boat stacker, the letter said, *inter alia*:

> "3. Our client never agreed to suspend monthly lease payments and had accepted your statement made on several occasions that the lease payments would be paid;
>
> 4. At this stage there is no final agreement in relation to the stacker as our client is still awaiting Council approval after which plans will be prepared upon which you would be able to submit your quotation for the construction of the stacker;
>
> 5. It has never been agreed that the lease payments would be deducted from the costs of building the stacker, although this had been the subject of discussions previously and would be resolved when the final agreement in relation to the construction of the stacker was settled."

[163] Barry Apps replied on behalf of Mooloolaba Slipways on 7 August 2009 proposing that the parties draw up and sign a letter of understanding setting out "what has been the deal for some time now." The letter should contain:

> "(1) Mooloolaba Slipways P/L gets the first option to build the boat stacker for a price, at this point of time, estimated not to exceed $3 million dollars.
>
> (2) Mooloolaba Slipways P/L continues to operate the slipway up to the time of approvals to build the stacker are obtained and any accrued rent is deducted from the total cost of the stacker.
>
> (3) If the stacker is not commenced to be built by the 1st March 2010. Then this agreement would need to be reviewed."

[164] This was rejected by Cashlaw by letter of 12 August 2009 and a modified proposal put forward. On 18 August 2009, Les Apps replied saying they stood by the agreement that any payment of rent, suspended from about May 2008, must be offset against the cost to build the boat stacker "as we all agreed to."

[165] On 19 August 2009, Schultz Toomey O'Brien Lawyers, on behalf of Mooloolaba Slipways, set out the legal situation with regard to the slipway as understood by the plaintiffs:

> "We are instructed that:
>
> - Our client was approached by your client to:
>   (a) take a sub-lease over your client's premises at Parkyn Parade, Mooloolaba ("the slipway site"); and
>   (b) take over the business of a slipway conducted at the slipway site.
> - The approach was made by your client after the previous sub-lessee vacated the slipway site;
> - Our client initially declined your client's offers (there were a number of them) to take the sub-lease and operate the slipway but, in about August 2006, was induced to do so on the basis of a number of representations and promises that were made by your client;
> - The representations were made in the course of trade and commerce and included terms that if our client agreed to take a sub-lease and operate the slipway business:
>   - They would be provided with reduced rent for the first 6 months of the lease;
>   - The rent would then revert to a rental of only $10,000.00 per month plus outgoings;
>   - Our client would receive a 5 x 5 x 5 year lease;
>   - your client would repair Wharf C so as to make it safe for work to be carried out on vessels moored adjacent to that wharf;
>   - the lease would not commence (and accordingly our client would not be required to pay rent) until the slipway site and wharf were in a usable and workable condition;
>   - your client was aware of a need to upgrade the power supply to the premises at your client's expense to facilitate the safe and efficient use of engineering equipment;
>   - your client agreed to provide a better supply of water to the site to ensure fire safety and the ability to effectively fight fires;
>   - your client agreed to return the overall building to a useable state of repair and to repair all damaged and run down structures;
>   - your client agreed to dredge the area adjacent to Wharf C at your client's expenses so as to facilitate larger vessels to be moored there so that work could be undertaken whilst the vessels were in the water;

- your client acknowledged that the reason that previous operators of the slipway had not been able to operate it successfully included the run down nature of the Wharf, building and waterway;
- your client was aware that the only basis upon which our client believed that the business could be operated profitably was to secure Government and other large contract work and that such work could not be secured with the slipway and wharf area in its then condition;
- The representations and promises were made by persons including Mr Les Brown and Mr Anthony Brown and were knowingly concerned with their truth or otherwise and whether they would be fulfilled.
- As a result of these issues:
    - Our client subsequently expended significant sums of money to set up the slipway business which included capital and non-capital costs of approximately $1.25 million;
    - Your client has, however, failed, neglected or refused to honour the promises that were made to induce our client to accept a sub-lease of the slipway site;
    - As a consequence, the business has not been able to run profitably and in fact our client has experienced an operating loss to date of approximately $500,000.00;
    - Your client has acknowledged this and in or about May 2007 had discussions with our client regarding the redevelopment of the site. Your client encouraged our client to meet with developers which our client did at its own cost, however, an interested developer could not be located by our client.
    - In or about May 2008 your client discussed with our client, our client's proposal to enable the redevelopment of the site for the benefit of both parties (so that our client could re-coup capital costs and possibly achieve a small profit) through the construction of a boat stacking facility. The boat stacking facility which would enable pleasure and commercial vessels to be moored out of the water was identified as a more viable option than selling to a developer;
    - As a consequence of the progress of these discussions between our respective clients, your client agreed in about May 2008 to suspend any obligation on the part of our client to make further rent payments whilst the boat stacking redevelopment was being pursued;
    - Our client in fact spent many hours (and in fact days, weeks and months) working on the boat stacking redevelopment which would ultimately benefit both of our clients;

- Our client engaged a designer for the stacker and attended various meetings with authorities some of which your client attended;
- Because of the reality that the boat stacking redevelopment would preclude the slipway business continuing, our client has not actively sought to grow the slipway business and in fact has not been able to do so whilst your client refuses to honour its promises to undertake the capital and maintenance works that it promised. The failure of your client to undertake these works is precluding our client from securing the larger and more profitable contracts;
- The sole reason that our client is in arrears of rent is because of the collateral agreement that was subsequently reached between our respective clients to suspend the obligation to pay rent because of the boat stacking redevelopment being pursued;
- Our client has suffered ongoing economic loss whilst the redevelopment has been investigated and pursued because it has not been able to operate the slipway business profitably (for the reasons outlined above) yet there has been no point in our client seeking to enforce your client's obligations to undertake the necessary works if the (mutually beneficial) boat stacking redevelopment was to eventuate;
- Our client has only been placed in the present position as a result of the actions of your client. It has relied upon your client's assurances, representations and warranties and has done so to its detriment. It has entered into a collateral agreement with your client that it now seems to be trying to avoid.
- Now, it seems that your client is attempting to secure the site for redevelopment without any consideration of our client's interests by attempting to evict our client (contrary to all previous discussions and agreements) and to do so in circumstances in which your client knows that the arrears of rent have only been generated by the agreement of the parties and for the reasons outlined above, which your client has responsibility for."

[166] On 25 August 2009 Mooloolaba Slipways commenced this proceeding by originating application seeking relief against forfeiture of the sublease document. That application was adjourned on its return date upon the undertaking of the defendant "not to take a step to terminate the Lease or evict [the plaintiff] pending the hearing of [the plaintiff's] Application to be adjourned to a date to be fixed not less than approx 1 week from Friday 28.08.2009." That undertaking was offered by Cashlaw in an email dated 26 August 2009 from Michael Beirne of Barclay Beirne Lawyers, who were then acting for Cashlaw. By letter sent by facsimile transmission on that day, the plaintiffs' solicitor said, "As we discussed on the phone, if your client is prepared to give the undertaking that it will take no steps to

evict our client prior to the determination of our client's Application and damages claim, we are happy to seek our client's instructions to adjourn Friday's hearing to give you more time to investigate the dispute."

[167] On 27 August 2009, Barclay Beirne Lawyers wrote to Schultz Toomey O'Brien saying that their client denied the allegations contained in their letter of 19 August 2009 to Klooger Phillips and that their instructions were that "the Lease entered into by your client dated 15 November 2006 was not procured by the representations particularised in your letter". On the same date the parties requested a consent adjournment to 5 October 2009.

[168] On 28 August 2009, the defendants' solicitors wrote to the plaintiffs' solicitors saying:

> "… on the strength of a letter delivered by your office to Messrs Klooger Philips Lawyers you have an undertaking from our client not to proceed to terminate the Lease or alternatively attempt to obtain possession pending the further hearing of this matter for a period of 7 days. It appears to us that our client's undertaking has now merged in the consent order made today whereby this matter has been adjourned to 5 October 2009 with liberty to apply on 7 days notice."

[169] On 9 September 2009, Cashlaw served two further notices to remedy breach. They were signed by Les Brown as manager of Cashlaw. One alleged the same failure to pay rent and the other, various breaches of covenants. In his evidence Les Brown blamed the solicitors acting for him in this litigation for making a mistake by serving those notices without his instructions. On re-examination, he conceded he had in fact instructed the solicitors to send the notices to remedy breach which he had previously signed. This was just another, and perhaps the most egregious, example of Les Brown's tailoring his evidence to suit his own purposes. He was entirely careless with the truth and blamed others rather than accepting responsibility for his own actions.

Inspections and reports

[170] On 15 September 2009, Shane Miller, who was then a director of Australian Independent Rental Inspections Pty Ltd, undertook an inspection of the premises with a licensed plumber and drainer, Wayne Dow. Mr Miller wrote a report which was signed by his partner in the business, Mark Butcher. The report was to examine the water supply problem at the slipway premises. It found:

> "… that the water pipe coming into the building was only 13mm and is not sufficient to supply two fire hoses plus the water supply for the rest of the building. The second part of the problem is at the main where there is no water meter and the valve is partly shut from corrosion. A further inspection was carried out to determine whether the water supply was coming from the point with no meter or from a point on the other side of the property that has a meter. This was done by closing the valve on the mains and was found to be supplied by the water main with no meter, located on the north west corner of the property. It is recommended that a new valve and water meter and a minimum 40 – mm water pipe be installed to obtain adequate water supply to the fire hoses and building."

[171] Mr Dow reported:

> "1. Water stop tap at street is almost totally ceased.
>
> - To solve this problem ring council and have them install a water meter, repair and upgrade connection.
>
> 2. Although the original water main appears to be sufficient size, the lack of and poor maintenance on the water supply in past years has grossly compromised its ability to service the building and has no hope of giving adequate pressure or flow to service the fire reels, in the eventuality of fire. At this moment it appears that several businesses and 1 Fire Reel are operating on a 15mm damaged water supply pipe.
>
> - This section of water supply needs immediate repair and upgrading, I would deem this a major risk. …"

[172] The damage to the water supply pipe to which he referred was denting to that pipe. Mr Dow conducted a water-flow test which showed that there was water coming out of the taps but not at much pressure. As a result the water supply was limited.

[173] A report was prepared by Peter Morris, an inspector who has a BSA licence for building inspection and termite management, on 3 November 2009 as a result of an inspection by him on 3 November 2009. Mr Morris is the principal of Focus Building and Pest Inspections.

[174] Mr Morris examined the building, the slipway and the two concrete finger wharves. His observation was that the building was in extremely poor condition and in need of urgent repair in numerous areas. He concentrated on the five major defects on and within the building in order to provide a general appraisal overall of how seriously dilapidated the building had become. Those five areas were the finger wharves, the external cladding, the roof, plumbing and fire fighting and termite damage.

[175] Mr Morris conducted his inspection in the context that the building is primarily a place of work and therefore subject to the normal workplace health and safety regulations which mandate adherence to various aspects of that particular legislation. Those requirements included the installation of appropriate fire-fighting equipment which must be maintained and serviced in working condition with periodic inspection tabs connected to the relevant equipment. He took numerous photographs to demonstrate and exemplify the matters about which he spoke in his report.

[176] With regard to Wharf C and Wharf D, Mr Morris reported:

> "It was noted that both these structures are in extremely poor condition with major subsidence to the support piers in places and excessively serious cracking and degeneration of the concrete itself. Sections of the concrete show advanced signs of 'concrete cancer' where serious rusting of the reinforcing steel can be observed which has caused a blow-out of surrounding concrete.
>
> It is considered that these structures, particularly the one on the eastern side, to be extremely unsafe and no longer fit for the purpose that they were originally designed."

[177] As with photographs earlier referred to, the photographs taken by Mr Morris graphically demonstrated the matters referred to in his report and showed that there was no level of exaggeration in the report. He recommended that those fingers wharves be demolished and rebuilt. He said it was not possible to repair and reinstate the existing jetties. When asked about it in cross-examination, he said it would cost approximately $200,000 to $300,000 and would take a couple of months with a large barge having to be put in the vicinity of the entrance to the slipway for three to four weeks for the purpose of driving piles for the new structures.

[178] The next major problem which he addressed concerned problems with the building itself. The first of those was the external cladding. He agreed in cross-examination that the extent of rust penetration on the external cladding varied extensively. However that did not derogate from what he said about the cladding in his report which was supported by many photographs. His report said:

> "As can be seen from the photos, there are numerous faults and defects with the external cladding, the most serious of which is the excessive rust corrosion to external metal cladding and both metal panel framing and steel support posts. The extent of the damage is wide spread and examples of it can be seen in nearly every section of the metal walls. It is recommended that all damaged metal wall cladding and framing be repaired or replaced as necessary.
>
> In addition there are block work walls which also show signs of serious rust and corrosion damage particularly in steel reinforcing and window lintels, etc.
>
> There are virtually no windows that remain with glazing still intact. Most windows are insecure with only very badly cracked Perspex sheets substituted for glass."

[179] The second aspect of the building that he looked at was the roof. Once again his observations and opinions were supported by many photographs. Mr Morris said with regard to the roof:

> "Upon inspection it was revealed that there is serious corrosion damage to large sections of both the roof sheeting and the roof metal support framing. This damage is in an advanced stage and will require major repair in order to rectify the problem. Although not raining on the day of inspection the inspector is in no doubt that the roof must leak profusely in numerous locations. Indeed holes can actually be seen in the roof sheeting and it is understandable why the occupier has found it necessary to drape tarpaulins over equipment and machinery that is installed in various locations within the building to protect against water damage.
>
> It is important to note that the major electrical installations and metering are housed within this building directly under faulty and damaged roof sheeting which could possibly result in rainwater infiltrating these electrical installations causing possible major electrical damage and potentially unsafe workplace.
>
> The damage to the roof and associated support framing has reached the point where it is considered that a major repair/replacement work

> to be necessary. Again we see a combination problem of both physical damage to the building through lack of maintenance and repair and also potential unsafe workplaces as a result."

[180] The third problem area in the building was that concerning plumbing and fire-fighting. Again his observations and opinion were supported by a large number of photographs. His report revealed:

> "As earlier stated, the fire fighting capability and associated equipment is in extremely poor condition and in gross contravention of existing regulations as they apply.
>
> As can be seen from the photos, no examination tags are in evidence let alone an indication of any recent inspection for operational condition. Further, it can be seen that the hose reel water supply connections have been tapped into in order to provide a water supply to various parts of the building for ordinary amenity purposes whereas normally this type of equipment would require the appropriate sized and dedicated water supply exclusively.
>
> The general state of the plumbing in all its aspects is extremely poor and run-down and damaged in places. Excessively rusty waterlines are in evidence; gutters and downpipes completely rusted out. In order to provide a water supply to various parts of the building it can be seen where numerous meters of poly-pipe water line has been loosely attached and draped through the building in places. It is doubtful that this installation has been performed by a licensed plumber, let alone that it complies with relevant plumbing regulations.
>
> Stormwater drainage from the roof is seen to be wasted directly to the ground adjacent to the building, without being connected to a dedicated underground stormwater line. The result of this is that there is water inundation to the interior of the building on every occasion when it rains. This again is a workplace safety issue which needs to be addressed forthwith.
>
> The type of damage and degradation in evidence here indicates to the inspector that there has been no preventative maintenance undertaken to the various plumbing aspects of this building for many years; in the opinion of the inspector, in excess of ten years."

[181] The final problem with the building on which he reported was the question of termite damage. Mr Morris reported:

> "In the areas where there are some internal timber framed walls and timber deck walkways, it was revealed that there has been excessive termite damage sustained by the building. This is an indication of neglect and complete absence of any viable termite control installation and it is necessary to replace all structurally compromised timber wall framing.
>
> The majority of this damage can be found in the paint shed section of the building."

[182] Mr Morris reached a conclusion, unsurprisingly, that the building was in extremely poor condition. He said that areas of the building are in need of major repair, particularly the rooftop and some of the external areas of the building where major damage was evident. His evidence on cross-examination was that the repairs to the building would take one to two months. He said it would be a lengthy and exhaustive process because, "You're virtually redoing the whole building." He considered that the building was in such extremely poor condition that major repair was required as soon as possible. Additionally, due to some aspects of some parts of the building that were damaged, he was of the view that there was a real prospect of the building being considered a dangerous workplace. In cross-examination he conceded that he was not talking about the structural integrity of the building, but rather its serviceability as a safe workplace.

[183] Evidence as to the structural integrity of the building was given by Gregory Woffinden, a structural engineer from Cardno (Qld) Pty Ltd ("Cardno"), who was called by the defendants. His report was dated 20 May 2010. He was of the view that the building was repairable and did not require demolition.

[184] Mr Woffinden agreed that the finger wharves appeared to be structurally degraded due to movement of supports and corrosion within the reinforced concrete and were not able to be repaired. With regard to the particulars set out in paragraph 4(ii) of the representations pleaded in paragraph 7 of the statement of claim, he agreed in his report with the matters set out in subparagraphs A, B and C: that is that the wharf was collapsing and had a "wave like" appearance; the wharf had buckled due to decay and had an uneven surface; and that the reo bars in the pylons were blowing out the sides of the columns themselves due to decay. In his written report he said that he had not noted, as was pleaded in subparagraph D, that there was a gap of about two inches at the abutment due to decay of the wharf. However during cross-examination, on reviewing the photographs, he agreed that there was a gap in the abutment.

[185] Mr Woffinden said in his report that the matters itemised in paragraph (4)(iii) of the particulars to paragraph 7, the problems with the building, such as broken windows, non-locking doors, holes in the roof, rusted clips that hold on to roof sheeting, decay to the concrete and reinforcing bars of the concrete slab and concrete supports, position of the main switchboard inside the paint room, inadequate water supply to the building and poor drainage in the workshop were not structural defects. He did not dispute that those problems were present but said that was not the focus of his report.

[186] With regard to subparagraph C of the particulars referred to in paragraph (4)(iii), that is that the main building beams were rusted and decayed and needed to be replaced to make the premises safe, Mr Woffinden said in his report, "Some rust on beams is surface and light spalling, structural adequacy is not reduced." In cross-examination Mr Woffinden agreed that if rust continues it does get to the point where structural adequacy is compromised. Mr Woffinden said that when he undertook his inspection the spalling to the beams was being chipped away and being treated with a zinc rich paint which would slow down future erosion.

[187] Mr Woffinden's report of 20 May 2010 was done following the carrying out of repairs as set out in a report by Barry Cromar, a senior structural engineer from Cardno, dated 2 March 2010. Those repairs were carried out in about March 2010

under Cardno's supervision. It appears that many of the repairs that were required to be done were being or had been undertaken before the facility was inspected by Mr Woffinden. The wall which had been secured by chain and rope, for example, had been repaired prior to its being inspected by Mr Woffinden. Broken beams had been replaced.

[188] On 8 April 2010 Mr Woffinden had written to Les Brown saying:

> "Further to our report dated 2/3/2010 we have inspected the remedial works undertaken on our site direction and confirm as follows:
>
> **Item 1: Primary Structural Elements – Columns and Rafters**
> Corroded base plates cleaned and treated with zinc primer.
>
> **Item 2: Secondary Structural Elements – Purlins and Girts**
> Severely corroded elements replaced.
> Surface rusted elements cleaned and primed.
>
> **Item 3: Roof and Wall Sheeting**
> Fixings cleaned and treated where necessary.
>
> We also noted some skylights in the roof sheeting are leaking stormwater and should be repaired, however this is not a structural defect.
>
> It is our opinion that the building has not been structurally compromised by these repairs and the structural integrity has not been significantly reduced from its original 'as built' condition. We would expect no significant change to the present structural condition over the next 2 years."

[189] Mr Woffinden's report of 20 May 2010 therefore dealt with the condition of the slipway and its buildings after repairs had been carried out by the defendants after the plaintiffs had quit the premises.

[190] Tom Lacina, from Gregory's Fire Services, gave evidence in a report dated 12 November 2009 that seven fire extinguishes which he inspected at Mr Brown's premises had not been regularly maintained. As there was no admissible evidence that those fire extinguishes were at Mooloolaba Slipways during the time the plaintiffs were in occupation or as to what other fire extinguishes were at the premises, that report had no evidentiary value.

[191] A desktop audit of the premises was undertaken by NCS International to provide an opinion on whether or not the slipway premises was certifiable to ISO 14001, ISO 9001 and AS/NZS 4801 standards. The audit was undertaken on 8 and 9 July 2010 and was based on documentation provided to NCS International and photographs and video footage of the slipway facility. The members of NCS International who carried out the work were Ratna Pullela who is the team leader (environment and quality auditor) and Noel Gurney who is the lead auditor (quality and safety auditor). A report from NCS International dated 12 July 2010 reviewed the documentation against requirements of the ISO standards and reviewed the video footage and photographic evidence. Based on those findings the auditors expressed their opinion as follows:

"**Organisations preparedness:**
It appears that the organisation (Mooloolaba Slipways Pty Ltd) has the ability and capacity to develop a system for certification. The organisation's ability to identify appropriate quality, safety and environmental risks is demonstrated by the commentary provided with the Video footage and the procedures developed as part of management system. The organisations understanding of legal and other requirements for quality, safety and environment were demonstrated by the manner in which the photos were presented and supportive documents provided with affidavits. The legal requirements were well identified under OHS legislation and regulation. The organisation has demonstrated their understanding of emergency preparedness and its legal implications through the photographic evidence, video footage and appropriate procedures. Whilst the organisation has demonstrated their understanding of systems requirements, the management system documentation is primarily focused towards Quality and Safety system certification. Environmental management system documentation requirements were not addressed in the management system documentation. The organisation has not developed any environmental system documentation required for certification like environmental policy and risk assessment procedures, emergency preparedness procedures, etc specifically addressing ISO 14001 requirements. Nonetheless with the help of a, management systems professional, the organisation can easily fill this gap in documentation to comply with the ISO 14001 requirements. Already provided documentation for quality and safety management systems demonstrate, the organisation's understanding and ability to develop appropriate procedures to comply with relevant ISO management system standards.

It appears that the organisation (Mooloolaba Slipways Pty Ltd) has the ability and capacity to develop management system procedures for certification to AS 4801 – Safety, ISO 9001 – Quality and ISO 14001 – Environmental standards."

[192] The report also deals with the condition of the site which appears to have been the reason that notwithstanding the capacity of Mooloolaba Slipways to develop management system procedures, certification would still not be gained. The report says with regard to the condition of the site:

"Based on the evidence through video footage and photographic evidence, the site appears to be requiring considerable upgrading to bring it to an acceptable working condition to conduct operations in safe and environmentally compliant manner. The building inspection report from Focus demonstrates that the Wharf and building requires considerable repairs before it can be made fit for intended purposes.

Due the followings reasons, the auditors consider that the slipway site is not fit for certification to nominated AS 4801 – Safety, ISO 9001 – Quality and ISO 14001 – Environmental standards. Although there are numerous other factors which could effect the certification

of the site, this list concentrates on some of the critical issues which could influence certification decision.

- The uneven and undulating surface of the Wharf makes it unsafe for using as a work platform for vessels.
- The uneven subsidence of the supporting piers for Wharf jetties and highly degraded/deteriorated concrete for piers make the Wharf jetties structurally unsafe.
- Exposed electrical leads and potential rain water intrusion into switch board could potentially cause a fire or safety hazard to the site.
- Rain water intrusion into workshop making it an unsafe work area for (electrical) machines and potential water contamination due to oil spills.
- Sheet metal partition wall restrained with chains and ropes to a stair case is structurally unsafe and could cause major accident.
- Integrity of emergency preparedness infrastructure like fire fighting equipment was compromised and was tapped to provide water supply to various other parts of the building. Tapping of fire fighting water is not legally compliant and unsecured water meters are not a standard plumbing practice."

[193] With regard to environmental compliance the auditors reported:

"Whilst the photos and video footage provides an in-appropriate work environment and house keeping for the slipway site, the auditors could not come to a conclusion about the environmental compliance of the site for certification as the following evidence was not available for review during this assessment:

- Report on EPA's requirements for the site to be environmentally compliant.
- A report from a qualified professional on the dredging requirements for mooring bigger vessels near Wharf Jetties and its environment implication.
- Report on local council environmental requirements."

[194] On 5 May 2010 Professional Valuation & Auction Services ("PVAS") prepared a valuation of the assets of Mooloolaba Slipways on a market value in continued use or forced liquidation value. The inspection of the premises was carried out 4 May 2010. The report was written by Mark Griffiths who is a certified practising valuer. The valuation was of the equipment that was not sold before, at or after the auction that was carried out of the assets of the business. He certified the market value of the assets in continued use at $23,970 and their forced liquidation value as $13,290.

Termination

[195] On 28 January 2010, Mooloolaba Slipways served a notice terminating the sublease document. The plaintiffs carried out an auction of the capital assets that were at the slipway on 18 February 2010. They reduced the quantum of their claims by the amount received as a result of that auction.

[196] On 28 February 2010, Mooloolaba Slipways ceased to occupy the premises which included the engineering shop. An auction was carried out and whatever could be sold was sold. Those items sold and those not sold, together with the prices achieved at or after the auction, are set out in Exhibit 40. The sale of equipment raised $154,552.73.

[197] As has already been discussed, the approval of Queensland Transport and the relevant Minister to the sublease document was subsequently wrongfully obtained by Cashlaw on 8 November 2010.

[198] Since May 2010, the slipway has been operated by Mr and Mrs Cuthbert who operate it for Cashlaw. Mr Cuthbert gave evidence that there is no "legal arrangement" between Cashlaw and the Cuthberts. He was able to describe the terms of an oral agreement between Cashlaw and Doug Cuthbert Pty Ltd. There is no written agreement between them. Mr Cuthbert's occupation of the premises appears to operate without his having any legal protection.

Counterclaim

[199] The defendants alleged in their counterclaim that Mooloolaba Slipways failed to remove certain of its fixtures, fittings and chattels or did so in a way that caused damage to the premises. The defendants alleged that the first plaintiff removed a switchboard and other plant and equipment and that wiring and electrical cables were cut off, disconnected or left hanging loose. Barry Apps denied that that occurred. He said that the plaintiffs removed wiring from the switchboard to their equipment but that no cables or wires were left hanging loose or cut. The cables and wires depicted in the photographs shown to Barry Apps were in the same condition they were in when they entered the premises. Les Brown said he took the photographs but was unable to say whether the conditions depicted were any different from what they were when the Apps moved in to the premises. This allegation does not sound in damages.

[200] The defendants alleged that the first plaintiff failed to remove a disabled motor vessel stored in the premises and that Cashlaw incurred an expense in removing that vessel and disposing of it. Barry Apps conceded that a prawn trawler was left behind called the "Rexandra". It came to the slipway after it had been involved in a collision at sea. The plaintiff in fact took the vessel from the insurance company on an "as is where is" basis. Exhibit 41 is a tax invoice from Mooloolaba Slipways to Sunderland Marine Mutual Insurance Co Limited. The tax invoice showed that the "Rexandra" had been at the slipway since 1 December 2007. The charges that had been incurred until 3 January 2008 were $32,665.60. There was commercial value in using various parts from the vessel. When they left the premises the main keel section and parts of the hull remained. A marine company had expressed an interest in buying the keel for $30,000. Les Brown agreed that he had taken no steps to ascertain its value. No evidence was given as to the cost of removing it. I am not satisfied that any loss was caused to the defendants.

[201] It was also claimed by the defendants that the first plaintiff moored the motor vessel the "Dallis" on guide posts adjacent to Wharf C for the period from 1 October 2008 to 31 March 2009 for which it charged a third party the sum of $10,010 for mooring. It was alleged that this was in breach of the terms of the sublease document and the headlease as Mooloolaba Slipways purported to let, hire, occupy

or otherwise used an area forming part of the demised premises in respect of which the first defendant Cashlaw had an exclusive right of possession pursuant to the head lease and which did not form part of the demised premises pursuant to the sublease document. Barry Apps said that the "Dallis" was a luxury motor vessel that was at the slipway for substantial repairs. They worked on it while it was on the slipway and when it was afloat in the water between Wharf C and Wharf D on the eastern side of Wharf D towards Wharf C. A final invoice was sent to the owner of that vessel on 27 March 2009 for $19,342.79 including a mooring fee. The mooring fee was not in fact paid. It was put into the invoice to encourage the owner to take the vessel. When it came time for him to pay the invoice they did not require him to pay the mooring fee. The defendants' allegation in the counterclaim for $10,010 for monies had and received by the first plaintiff for mooring fees for the "Dallis" must fail.

[202] It was also alleged that Mooloolaba Slipways moored the motor vessel the "Miss Melissa" on guideposts adjacent to Wharf C for the period from 26 October 2007 to 1 March 2010 for which it charged a third party the sum of $28,700. Barry Apps said that vessel had been grounded and was under an insurance claim. At first it was moored as far into the sick bay as they could get it. They inspected it and put it back in the water as far as they could without the wharf and the sick bay being available. They had to moor it further out in the water stream from the slipway until there was a clearance from the Department of Transport to allow the vessel to be moved. It was not the responsibility of Mooloolaba Slipways to move the vessel but it could not be moved from that point until it was cleared. Barry Apps thought they charged about $20,000 for the mooring of the "Miss Melissa." Invoices from Mooloolaba Slipways showed that $50 a day mooring fee was charged totalling $25,025 (including GST). However there was no claim with regard to this in the counterclaim.

[203] The counterclaim also made a claim against Les Apps pursuant to the deed of guarantee and indemnity. Unsurprisingly this was not pressed in argument so I will deal with it briefly for the sake of completeness. The guarantee and indemnity was entered into in reliance on the same misrepresentations which infected the entry into the sublease document and, because of the failure of Cashlaw to obtain the valid consent of the Minister and Queensland Transport, the sublease document never became a valid lease. For both reasons, Cashlaw could not rely on the guarantee and indemnity to pursue a claim against Les Apps.[5]

[204] The claim for unpaid rent will be dealt with later in these reasons to reduce the amount of damages awarded to Mooloolaba Slipways in respect of compensation for its loss.

Liability

[205] The pleadings support two legal bases for the claims by the plaintiffs against the defendants: damages for negligence and damages for misleading and deceptive conduct pursuant to s 82 of the TPA.

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[5] See *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.

Negligence

[206] The negligence claimed in this case is negligent misrepresentation causing economic loss. As the law of negligence initially developed from *Donoghue v Stevenson*,[6] tortuous liability was restricted to those cases where the loss suffered included damage to person or property rather than pure economic loss. However the law developed "incrementally", to quote Brennan J's justifiably cautious nostrum in *Sutherland Shire Council v Heyman*,[7] so that now there are criteria for the imposition of liability on a tortfeasor for pure economic loss caused to another.

[207] In *Perre v Apand*,[8] McHugh J posed the questions which were relevant to that case which must be answered in each case where the loss suffered is pure economic loss:

1. Was the loss suffered by the plaintiffs reasonably foreseeable?
2. If yes to question 1, would the imposition of a duty of care impose indeterminate liability on the defendants?
3. If no to question 2, would the imposition of a duty of care impose an unreasonable burden on the autonomy of the defendants?
4. If no to question 3, were the plaintiffs vulnerable to loss from the conduct of the defendants?
5. Did the defendants know that their conduct could cause harm to individuals such as the plaintiffs?

[208] Each of those questions should be answered favourably to the plaintiffs in this case. For the reasons set out herein, the loss suffered was reasonably foreseeable, there is no indeterminate liability upon the defendants[9] and the imposition of a duty of care upon them does not cause an unreasonable burden on their autonomy. The plaintiffs were particularly vulnerable to loss from the conduct of the defendants and the defendants must have known that their conduct could cause harm to a person in the position of the plaintiffs.

[209] The liability to the plaintiffs is independent of and additional to any liability which arises under the TPA.

Misleading and deceptive representations under the TPA[10]

[210] Section 52 of the TPA provides a comprehensive statement prohibiting misleading or deceptive conduct. Section 52(1) provides:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

[211] Section 51A was introduced in 1986 to facilitate proof in misrepresentation cases involving representations as to future matters. It provides:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for

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6 [1932] AC 562.

7 (1985) 157 CLR 424 at 481.

8 (1999) 198 CLR 180 at [133].

9 Cf *Fortuna Seafoods Pty Ltd as trustee for The Rowley Family Trust v The Ship "Eternal Wind"* [2005] QCA 405 at [17].

10 The *Trade Practices Act 1974* (Cth) has now been replaced by the *Competition and Consumer Act 2010* (Cth) which came into effect on 1 January 2011.

making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead."

[212] In this case the major conflict was as to whether or not the representations were made. There was little contest, nor could there be, that if the representations were made, as I have found they were, they were misleading and deceptive and, so far as they concerned future matters, Cashlaw did not have reasonable grounds for making the representations. There is no doubt that the plaintiffs relied on the misleading representations that were made to them and thereby suffered loss and damage. The first plaintiff would never have entered into the sublease document, occupied the premises and commenced business and the second plaintiff would not have entered into the premises and commenced business had they not relied on the false and misleading representations made by the defendants.

[213] Enforcement and remedies are set out in Part VI of the TPA. Section 82(1) provides that:

> "a person who suffers loss or damage by conduct of another person that was done in contravention of Part … V … may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

[214] As Gummow J held in *Marks v GIO Australia Holdings Ltd*,[11] s 82 has at least five discrete elements:

(1) it identifies the legal norms for contravention of which the action under the section is given;
(2) it identifies those against whom the action lies;
(3) it specifies the injury for which the action lies as the suffering of loss or damage;
(4) it stipulates a causal requirement that the plaintiff's injury must be sustained by the contravention; and
(5) it provides the measure of compensation is the amount of the loss or damage sustained.

[215] His Honour referred at [99] to the TPA's being a "fundamental piece of remedial and protective legislation" which gives effect to what Lockhart J in *ICI Australia Operations Pty Limited v Trade Practices Commission*[12] referred to as "matters of

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11 (1998) 196 CLR 494 at [95].
12 (1992) 38 FCR 248 at [32].

high public policy". Accordingly, it is to be construed so as "to give the fullest relief which the fair meaning of its language will allow."[13]

[216] In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, Gaudron, Gummow and Hayne JJ set out at [42] – [46] some basic propositions with regards to the remedies found in Part VI of the TPA:

> "42. It is necessary to approach the principal issue in this case with some basic propositions well in mind. First, Pt VI of the Act, and, in particular, ss 82 and 87(1), have operation in many different kinds of case. Section 82 entitles a person who suffers loss or damage by conduct of another that was done in a contravention of any of a very large number of provisions – ranging from contravention of any of the restrictive trade practices provisions of Pt IV to the so-called consumer protection provisions of Pt V – to recover the amount of that loss and damage. Section 82 can, therefore, be engaged in cases in which the contravener's conduct is intentional or even directed at harming the person who suffers loss and damage. It can be engaged in cases, like the present, in which the contravener can be said to have fallen short of a standard of reasonable care as well as contravene the Act, and in cases in which there was neither want of care nor intention to harm, but still a contravention of the Act.
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> 43. Secondly, s 82 entitles a person who suffers loss or damage by conduct done in contravention of a relevant provision, to recover not only from the contravener but also from any person involved in the contravention. Persons involved may have acted intentionally or carelessly; they may have acted with or without intention to harm. …
>
> 45. Fourthly, s 82 is concerned only with the position of a person who *has suffered* loss or damage and only that person may rely on the section." [footnotes omitted]

[217] Section 75B of the TPA empowers the court to make an award of damages under s 82 against any person knowingly concerned in the contravention of the Act by the corporation: see *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 4 FCR 450. Section 75B(1) provides that a reference in Part VI to a person involved in a contravention of a provision of Part V shall be read as a reference to a person who:

> "(a) has aided, abetted, counselled or procured the contravention;
> (b) has induced, whether by threats or promises or otherwise, the contravention;
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
> (d) has conspired with others to effect the contravention."

[218] I am satisfied that at the time Les Brown made the representations to the plaintiffs on behalf of Cashlaw with Anthony Brown's concurrence, neither Les Brown nor Anthony Brown intended to cause Cashlaw to undertake any of the matters referred

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[13] *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 at 384; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44*; Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

to in paragraph [7] of the statement of claim. They were directly and knowingly concerned in Cashlaw's breach of s 52 of the TPA.

Loss and damage

[219] Evidence was given on behalf of the plaintiffs of the loss and damage they suffered by Peter Haley, the director of forensic accounting and litigation support at Vincents Chartered Accountants. Mr Haley is a member of the Institute of Chartered Accountants of Australia and a member of the Financial Services Institute of Australasia. He is a very experienced forensic accounting expert and gave his evidence fairly without any apparent bias towards the plaintiffs who called him.

[220] He assessed the economic loss suffered by the plaintiffs as a result of the alleged conduct of the defendants. He did not include a calculation for the loss of time claimed in the statement of claim. He calculated the economic loss suffered by the plaintiffs as a result of entering into the sublease document, undertaking capital works to enable their business operations and operating their slipway and engineering businesses. He did so on the basis of the allegation in the statement of claim, which I have found to be proved, that had the representations not been made, the plaintiffs would not have entered into the sublease document; incurred expenditure in performing capital works to the site necessary to be able to conduct the operation of a slipway; operated the slipway; incurred expenditure in performing capital works to the site necessary to be able to conduct the business of an engineering firm at the slipway site; and commenced to operate its engineering business.

[221] He also took into account the allegation, which I have also found to be proved, that the works the subject of the representations not having been performed, the plaintiffs were unable to obtain relevant accreditations, the effect of which was to render the plaintiffs incapable of tendering for State and Commonwealth government work at the slipway and unable to service larger vessels at the slipway.

[222] From the profit and loss statements and movements in the balance sheet Mr Haley was able to calculate that the capital outlays of the Slipways Trust were $230,576 and the capital outlays of the Engineering Trust were $363,425. He deducted from this the net capital value of the outlays at the end of the business, being the price received for the assets at auction minus the incidental costs and advertising of the auction, which was $116,250. He allocated this amount equally between the plaintiffs at $58,125 each. The total borrowing costs for the Slipways Trust until 28 February 2010, when the business ceased, was $98,733 and for the Engineering Trust to the same date $86,488. Mr Haley then calculated trading losses: excluding financing charges such as borrowing costs and interest expenses which had already been addressed under the separate head of damage "borrowing costs"; depreciation was excluded so as to not double count the amounts in respect of the loss under capital outlays; non-trading items such as management fee expenses, trust distributions and commissions received were excluded; and an extra two months of trading profits/losses were included in respect of the months January and February 2010, calculated as one-third of the loss suffered in the six months ended 31 December 2009. The trading losses of the plaintiffs were $366,222 for the Slipways Trust and $419,423 for the Engineering Trust.

[223] These trading losses included that amount payable or paid in rent. It would therefore be double compensation to compensate the first plaintiff for outstanding rent payable and not require the first plaintiff to pay that rent. The amount of rent outstanding as at 28 February 2010 when occupation of the slipway ceased should be deducted from the loss otherwise awarded to the first plaintiff. The defendants identified the unpaid rent (and outgoings) in the counterclaim at $318,066, although I have not been able to tell from the evidence provided whether that figure is correct.

[224] In Mr Haley's opinion the economic loss suffered by the plaintiffs in respect of their respective businesses as a result of the conduct of the defendants was as follows:

Heads of Loss	**The Slipways Trust (first plaintiff) $**	**The Engineering Trust (second plaintiff) $**
Capital outlays	$230,576	$363,425
Net current capital value	($58,125)	($58,125)
Borrowing costs	$98,733	$86,488
Trading (profits)/losses	$366,222	$419,423
Net loss sustained	**$637,406**	**$811,211**

[225] The total net loss sustained was therefore, in Mr Haley's opinion, $1,448,617. These figures are fully supported by his detailed analysis.

[226] To answer that analysis and opinion, the defendants called Norbert Calabro from Calabro SV Consulting Pty Ltd. Like Mr Haley, Mr Calabro is a very experienced forensic accounting expert. The principal objectives of his report were said to be to make an independent assessment of the report prepared by Mr Haley and to determine the loss, if any, suffered by the plaintiff.

[227] Mr Calabro criticised Mr Haley's approach which was to assess the losses suffered by the plaintiffs as a result of entering into the sublease document, undertaking capital works to enable their business operations and operating the slipway and engineering businesses. Mr Haley did that, as I have said, on the basis that had the representations not been made, the plaintiffs would not have entered into the sublease document and incurred expenditure in performing capital works on the site necessary to be able to conduct the operation of a slipway and operated the slipway and engineering businesses. As I have said, I have found those allegations proved and I accept that Mr Haley adopted the correct approach. The approach adopted by Mr Calabro would only be correct if I had made a finding that the plaintiffs would only have suffered the loss of profit which would have been derived from State and Commonwealth government work had they relied on the representations. That is not a correct approach because in fact the plaintiffs would not have entered the business at all had the representations not been made.

[228] Unfortunately Mr Calabro's report suffered from its tendency to advocate in favour of the defendants who had retained him rather than being scrupulously objective. This impression was confirmed by his oral evidence.

[229] His conclusion was that in respect of Mooloolaba Slipways:

"(i) In my opinion [Mooloolaba Slipways] has been insolvent and unable to pay its debts as and when they fell due since 2007;

(ii) The poor operating performance of [Mooloolaba Slipways] does appear to relate to the management and poor funding of the entity; and

(iii) Taking all of this into account and giving also consideration to my comments in paragraph 6(d) it is my view that any losses suffered are the consequence of poor management decisions rather than the failure of the alleged misrepresentation."

[230] In respect of Mooloolaba Engineering, Mr Calabro concluded:

"(i) In my view [Mooloolaba Engineering] has been a border line case from its very beginning.

(ii) The poor operating performance does also appear to be a reflection of management and poor funding of the entity.

(iii) Taking all of this into account and giving also consideration to my comments in 6(d), it is my view that any losses suffered are the consequences of poor management decisions rather than the failure of the alleged misrepresentations."

[231] Paragraph 6(d) is as follows:

"**Actions by plaintiffs**

The plaintiffs allege that in or about August 2006 Cashlaw and/or its directors made certain representations, yet:

(i) In November 2006 they were prepared to enter into a lease, with no conditions, even though none of the work required by the alleged representations had been carried out.

(ii) Further, in January 2007, the Plaintiffs took up an option to renew the lease for a further five years, even though the lease had no conditions attached to it and no work had been undertaken as, allegedly, required by the alleged representations.

(iii) My instructions are that the Plaintiffs waited until January 2008 and March 2008 to make a request in writing requiring the works to be done. I understand that the Defendants claim they never received the letters.

(iv) The Plaintiffs spent $252,782 acquiring plant and equipment in September 2006 that is before they signed the lease and at a time when no work had been undertaken. This expenditure represented 45 % of the total capital expenditure on the project.

(v) The Plaintiffs spent a further $168,104 in December 2006, that is before the plaintiffs exercised the option of 5 years. Again at that time no work had been undertaken by the Defendants. This represented a further 30% of the total capital expenditure."

[232] In oral evidence Mr Calabro said that a prudent person would never expend a lot of money based on oral representations which had not had been reduced to writing or

had not in fact been carried out. While that might be a wise attitude, it can not be the case that no business person should be able to rely on the word of another, or that if they do so, that it must be considered imprudent. The Apps had had previous business dealings with Les Brown, the representations were made repeatedly and in the presence of others and the problems with the site were obvious. They had no reason to doubt his word. As Barry Apps also said in his evidence, it was necessary to set up the equipment on site as soon as possible so that it would be ready for work to commence and some of the equipment had a long lead time for delivery so it was necessary to order it as promptly as possible.

[233] Apart from reliance on oral representations, other matters which Mr Calabro said showed poor management were the cost of sales and wages left too little excess for other costs for the business to be profitable. The businesses were highly geared and current liabilities were increasing over current assets. He formed the view that Mooloolaba Slipways was unable to pay its debts as they fell due from 2007 and therefore was insolvent from the very beginning. He doubted the reliability of the accounts because of the low and decreasing amount of stock on hand at the end of each succeeding financial year and work in progress was not brought into the accounts which, he said, was "highly unusual" for a business of this type.

[234] The businesses had high costs but those overheads were necessary to run the slipway and engineering businesses. The problem with the income of the business was not caused by poor management but by the defendants' not carrying out the work the subject of the representations the plaintiffs relied upon in entering into the business which meant that the plaintiff companies were not able to attract the business and derive the income they would otherwise have achieved. As Mr Haley said in cross-examination, Mr Calabro rather overstated the current liabilities by including the overdraft which, although probably payable on demand, did not in fact have to be repaid immediately. In any event, Mooloolaba Slipways was not insolvent because it paid its creditors as and when debts fell due. It had support from its owners and their companies who could inject cash whenever needed so it was not insolvent. Mr Haley said that it is not at all unusual for a business of this size not to account for work in progress or stock on hand. Barry Apps' evidence was that they acquired whatever consumables they needed for each job as it occurred and so their stock on hand was minimal. When taking an overall financial snapshot of the businesses from commencement to end, stock on hand and work in progress at the end of any particular financial year makes no difference to the overall result.

[235] I have accepted the reliability of Mr Haley's report and nothing in Mr Calabro's evidence led me to doubt it.

Calculation of the plaintiffs' loss

[236] The net loss sustained by the plaintiffs was $1,448,617, being $637,406 by the first plaintiff and $811,211 for the second plaintiff. From that should be deducted the correct amount for rent owing by the first plaintiff to the first defendant. The amount of unpaid rent (and outgoings) claimed by the first defendant was $318,066. I shall hear further submissions as to the correct amount owing for rent and any outgoings accounted for in the balance sheets but still owing. To that should be added the total sum of $134,500 as compensation for the plaintiffs' attempt to mitigate their loss, attributed equally to each plaintiff.

[237] Interest should be added on the conservative basis sought by the plaintiffs of five per cent per annum from 1 September 2006 to 12 August 2011, the date of judgment, a period of approximately five years. The interest component on the first plaintiff's loss can not be determined until the amount of rent and outgoings owing, if any, is deducted from the loss of $637,406.

[238] The loss suffered by the second plaintiff was $811,211. The interest which should be added on the same basis is approximately $202,803.

Conclusion

[239] Subject to submissions about the amount owing by Mooloolaba Slipways to Cashlaw in respect of unpaid rent and outgoings and interest owing on the net amount, judgment should be entered in favour of the first plaintiff against the defendants in the sum of $704,656 (being $637,406 + $67,250). Judgment should be entered in favour of the second plaintiff against the defendants in the sum of $1,081,264 (being $811,211 + $202,803 + $67,250). In the circumstances it is not necessary to make any orders under the counterclaim.

[240] I shall hear argument as to costs and the correct calculation of the precise judgment sum to be awarded to the first plaintiff.