

SUPREME COURT OF QUEENSLAND

CITATION: *Christian Community Ministries Ltd (ACN 105 961 135) v Intelara Pty Ltd (ACN 093 117 232)* [2016] QSC 288

PARTIES: **Christian Community Ministries Ltd (ACN 105 961 135)**
(Plaintiff)
v
Intelara Pty Ltd (ACN 093 117 232)
(Defendant)

FILE NO/S: No 11525 of 2013

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 December 2016

DELIVERED AT: Brisbane

HEARING DATE: 18, 19, 20, 21, 22, 26 July 2016

JUDGE: Byrne SJA

ORDER:

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY — whether representations contravened s 52 of the *Trade Practices Act 1974* - whether the plaintiff suffered any loss.

TORT – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – whether the defendant breached its duty of care – whether the plaintiff suffered any loss.

Trade Practices Act 1974 (Cth), s 52

Australian Competition and Consumer Commission v Dukemaster Pty Ltd [2009] FCA 682

Delmenico v Brannelly & Anor [2008] QCA 74

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384

Minkin v Landsberg [2016] 1 WLR 1489

Tobacco Institute of Aust v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

COUNSEL: D M Logan QC, with S J Carius, for the plaintiff
D B O’Sullivan QC, with A C Stumer, for the defendant

SOLICITORS: Thomson Geer Solicitors for the plaintiff
Moray & Agnew Solicitors for the defendant

Claims

- [1] The Dalby Christian College (“the College”) is situated on crown leasehold at Mary Street, Dalby. Throughout 2009, 2010 and 2011, the lessee was Dalby Christian School Ltd (“DCS”). DCS operated the College during 2009. From 1 January 2010, the plaintiff (“CCM”) has done so.
- [2] The defendant (“Intelara”) was engaged to provide hydraulic, structural and some of the civil engineering services required for the construction of a Multi-Purpose Centre, including an amenities building (“MPC”), at the College.
- [3] The MPC had been built by August 2010.
- [4] In late December 2010 and early January 2011, the MPC was inundated with floodwater on three occasions, to depths of between 50mm and 150mm.
- [5] One of Intelara’s responsibilities was to fix the finished floor level (“FFL”) of the concrete slab of the MPC. Intelara specified an FFL of 345.90 AHD. The slab was constructed at that level.
- [6] CCM: contends that Intelara was negligent in not fixing an FFL of at least 346.26 AHD; alleges misleading conduct arising from specification of the FFL and communications by Intelara about the time the slab was poured; and claims the cost of rebuilding the MPC on the footing that CCM suffered that economic loss because it was contractually obliged to rectify the MPC.¹

People

- [7] Andrew Lennox was CCM’s Director of Planning and Development. He managed development projects at CCM schools. Typically, his role was, as he said, “one of co-ordination”: he was to ensure that appropriate process was followed, to manage the budget and to act as “client representative” in connection with the contract.

¹ DCS was de-registered in 2014. Intelara does not suggest that matters.

- [8] Mr Lennox reported to John Lyndon, CCM's Chief Executive Officer.
- [9] Mr Lyndon and Mr Lennox worked in the same building in Brisbane.
- [10] Stephen Wilson is the College Principal. He had studied civil engineering for three years. Although he did not complete the requirements for the degree, he remained interested in building construction.
- [11] CCM retained Phillips Smith Conwell Architects Pty Ltd ("PSC") in connection with the design and construction of new College buildings.
- [12] Sergio Sarri was the PSC architect primarily responsible for the MPC project.
- [13] Neil Crawford, one of Mr Sarri's assistants, was a senior technician who produced drawings.
- [14] Michael Lethlean is an engineer. As a principal of Intelara, he was responsible for negotiating its retainer and for the engineering services Intelara provided for the MPC project.
- [15] James Nation, an Intelara employee, attended to civil and hydraulic design work for the MPC.

Intelara's engagement

- [16] By April 2009, PSC had prepared a master plan for the College depicting the location of proposed buildings, including the MPC.
- [17] PSC invited Intelara to submit fee proposals concerning structures to be constructed at the College: the MPC, a science block and a library.
- [18] In April and May 2009, Intelara sent five fee proposals. One concerned the MPC; that was sent by Mr Lethlean to Mr Sarri on 12 May. It was "based upon our meeting on 21st April" and referred to drawings supplied by PSC. The "Scope of Services" proposed included civil and structural (but not hydraulic) engineering. A stipulated "exclusion" was: "Flood Studies".
- [19] Intelara proposed that its services² be "carried out" in "three main phases". The first, "Preliminary Design", was described in the proposal in this way:

"From the conceptual sketches, briefing and any DA Conditions, we will prepare preliminary sketch plans of the slabs, foundations, wall elevations, roof framing and details for coordination and to allow architectural detailing to proceed. We will liaise with Council to confirm services connection points.

² Mr Lethlean was nominated to lead the design team. Robin Wickett was to "lead all civil work".

Finished floor levels will be confirmed. Geotechnical and Land Survey work will be initiated and coordinated.”³

- [20] With the letter making that proposal, Intelara enclosed its “Standard Terms of Engagement, which would apply to this commission...” and asked that a signed copy of the Terms be returned as a “means of formalising this commission”.
- [21] Mr Lennox had been working with PSC since 2003. Mr Sarri had been PSC’s principal point of contact since 2006. The two men had worked “extensively together”, Mr Lennox said, in multiple projects across a number of CCM schools.
- [22] When experts such as engineers were to be retained to assist PSC with a building project, Mr Sarri would attract fee proposals from two or three firms and present the proposals to Mr Lennox because he managed the project budget. CCM, not PSC, would pay the chosen consultant’s fees.
- [23] Mr Lennox did not have the expertise to evaluate consultants. He relied on Mr Sarri to propose suitable ones and trusted him to decide upon the work to be performed by consultants retained for the MPC.
- [24] In late May 2009, Mr Sarri sent Mr Lennox a “Schedule of Consultant Fee Submission”, comparing proposals from several consultants in relation to projects at the College. Mr Lennox signed a copy to signify his approval of Mr Sarri’s recommendation that Intelara be retained for engineering services: hydraulic at \$3,500, and for civil and structural engineering at \$17,500: in aggregate, \$21,000.⁴

Scope of retainer

- [25] On 18 September 2009, Mr Sarri sent Mr Lethlean an email in these terms:
- “We have been given the Client’s approval to proceed with the MPC as per the attached drawings. Can we please have your hydraulic (AF), electrical (AF) and structural schematics (I) by 25 September so we can prepare our developed design documentation in time for a 23 October tender, and 01 December construction start.”
- [26] The drawings showed the location of the MPC.
- [27] That afternoon, Mr Sarri sent Mr Lethlean a further email indicating that Intelara was also to “handle the hydraulics”. Mr Lethlean responded, inquiring: “Civil, structural and hydraulics?” Mr Sarri emailed: “Yes”.
- [28] The signed Terms of Engagement Intelara had proposed had not been returned by 24 September when Mr Lethlean asked Mr Sarri: “On a contractual level – do we have a commissioning letter of some sorts? What the fee is, who to invoice etc.?”

³ Emphasis added.

⁴ The copy Mr Lennox signed was returned to Mr Sarri.

- [29] By 14 October, no commissioning letter had reached Intelara when Mr Lethlean emailed Mr Sarri to say that:

“I should also add that we have not been sent a commissioning letter.....
Just need to confirm exactly to whom we issue invoices.
Also need to confirm the fee. We ended up sending you 5 separate fee proposals (believe it or not). None of which, in my opinion, covers the scope that we are actually doing.”

- [30] With a project of the scale of the MPC, Mr Sarri’s practice was to inform the consultant that the consultant would not be working for PSC but instead for its client. Consistently with that routine, Mr Sarri expected that Mr Lennox would “sign off” on Intelara’s fee proposal, including the Terms of Engagement. For reasons Mr Sarri cannot explain, he did not press Mr Lennox to complete the Intelara form. The usual billing arrangement was, however, adopted: as Mr Sarri described it: “invoices addressed to client care of us” so that PSC could assess the consultant’s claim before submitting it to CCM with a recommendation as to payment.⁵
- [31] On 14 October, Mr Crawford sent Mr Lethlean architectural drawings. Mr Lethlean responded promptly, asking for a “meeting to go through the job”. Mr Sarri enquired about timing, adding: “We’ll discuss fees when we sit next week, but it looks like S+H=minor civil = \$21,000.”

- [32] Five days later, Mr Lethlean emailed Mr Sarri to say:

“I have reviewed the 5 fee proposals provided (none of which actually cover the job we are doing!)
I think the \$21k is OK as long as we are not drawn into too much civil work.
On this basis, we would adopt \$16k for preliminary and detailed design, and \$5k for construction phase. (All ex GST).
Can you please provide us with invoicing details ASAP?”

- [33] Mr Sarri’s response that evening, copied to Mr Lennox, stated:

1 Can you please refer billings to Andrew Lennox care of PSC. We have attached his e-card.

2 Civil work will only involve design of MPC levels to suit the future carpark to the south, and roof drainage and overland flow result to street discharge. Sport oval reposition and drainage is not part of this Project.”

- [34] The assurance that the civil component would only “involve design of MPC levels” to suit the future carpark was intentionally comforting. Mr Sarri knew that Mr Lethlean was concerned about the civil engineering services required because of the small amount⁶ allowed as remuneration for “civil” in Intelara’s fee proposal.

⁵ On 19 October, Mr Sarri sent an email to Mr Lethlean, copied to Mr Lennox, saying that Intelara’s invoices should be directed to: “Dalby Christian School, c/o Christian Community Ministries Limited, Attention: Andrew Lennox. Forward all invoices to Andrew via PSC’s address.”

⁶ \$1,150.

[35] Mr Sarri's instruction to fix MPC levels "to suit the future carpark" related to money.

The FFL and future car park relativities

[36] Before the MPC FFL was fixed, Mr Sarri spoke to someone at Intelara, probably⁷ Mr Springalo, Intelara's structural engineer for the project, to explain the reason for the necessary relativity between MPC and future carpark levels: to avoid the considerable expense that ramps and handrails to provide access for the disabled would involve.

[37] As Mr Sarri knew, it was no part of Intelara's brief to fix levels for the future carpark. He did not tell Intelara what those levels might be. Nor did anyone else at PSC or CCM.

[38] Mr Lethlean did not inquire what future carpark levels Mr Sarri envisaged.⁸ As he saw things, Mr Sarri's instruction made no sense unless the future carpark was to be at, or close to, natural surface level. He took the instruction to mean that Intelara should achieve a "fairly common sort of level" for both MPC and carpark.⁹

Intelara drawings

[39] Intelara set about preparing drawings to facilitate the MPC tender process.

[40] On 23 October 2009, Mr Nation sent Mr Sarri "Preliminary Issue Not For Construction" hydraulic services drawings. The stormwater drainage layout plan showed proposed pipes and fittings.

[41] That day, another Intelara employee, Chris Witty, sent Mr Sarri, for his review, the structural drawings for the MPC.

[42] None of those drawings specified an FFL for the MPC.

[43] On 26 October, Mr Lethlean asked Mr Sarri "what client name...to put on the drawings?". Mr Sarri replied: "CCM c/o PSC".

[44] Intelara issued its first invoice on 30 October 2009, claiming \$14,900, plus GST. The invoice referred to an agreed fee of \$21,000. It was addressed to Dalby Christian School "C/-" PSC and marked for Mr Sarri's attention. Mr Sarri submitted it to Mr Lennox. He approved payment on 12 November 2009.

MPC FFL specified

⁷ Mr Lethlean had read the email instructing Intelara on the relationship between the levels of the MPC and the future carpark but cannot recall having discussed the reason for that relativity with Mr Sarri before 17 March.

⁸ Before Mr Lethlean's email referring to a \$21,000 being fee "okay, as long as we are not drawn into too much civil work", he and Mr Sarri had discussed the carpark. Mr Lethlean said that Intelara did not want to design the carpark with its associated levels.

⁹ Mr Lethlean's assumption is not surprising. Mr Sarri had not mentioned that earthworks might be required to raise the MPC building platform or to increase the height of the future carpark above natural surface levels.

- [45] On 16 November, Mr Nation emailed revised hydraulic services drawings to Neil Crawford¹⁰ marked “Tender Issue Not For Construction”. As Mr Sarri had requested, the drawings showed “Christian Community Ministries C/O Phillips Smith Cornwell” as Intelara’s client.
- [46] The drawings concerned site services, stormwater and sanitary drainage as well as water services details. Each specified the same FFL for the MPC: 345.90.
- [47] They are the earliest drawings to fix the FFL; and that FFL was chosen without thought having been given to a risk of regional flooding of the building.
- [48] Mr Crawford issued amended architectural drawings and asked Intelara to update their hydraulic constructional drawings accordingly so that revised drawings could be issued to tenderers. On 17 November, Mr Nation emailed his revised hydraulic services drawings to Mr Crawford.

Fixing the FFL

- [49] The evidence does not reveal who fixed the MPC FFL or why the level chosen was selected.
- [50] Mr Lethlean did not fix the FFL and does not know who did. He does, however, accept that James Nation may well have done so.
- [51] Mr Nation was the civil and hydraulic designer for the MPC project. He does not recall having chosen the FFL. Such a decision was, however, within the range of his responsibilities. And the FFL first appeared on one of his drawings.
- [52] Mr Nation seems the most likely person to have specified the FFL.
- [53] In view of Mr Nation’s responsibilities, Mr Lethlean expects¹¹ that he would have sent him Mr Sarri’s email concerning the relativity between MPC and future carpark.

Building Certification information

- [54] Certis Building Certification (“Certis”) was retained to assess the MPC for development approval for construction.
- [55] On 25 November 2009, Mr Crawford sent an email to Mr Nation, Mr Lennox and others¹² with Certis’s Schools BCA Checksheet attached. That Checksheet had to be filled out with information to facilitate certification of the development approval necessary to facilitate construction.

¹⁰ Copies were sent Mr Sarri and Mr Lethlean.

¹¹ He cannot recall having forwarded Mr Sarri’s 19 October email to Mr Nation but would be surprised if he had not. Mr Nation does not remember Mr Sarri’s 19 October direction. It seems very likely, however, that he was aware of it.

¹² The email was copied to Mr Sarri and Mr Lethlean.

- [56] One Checksheet heading was “Flooding”. Against that was typed: “Please provide a copy of the flood report”.
- [57] On its face, the Checksheet assigned the responsibility for “Flooding” to “CCM”. The accompanying email said:
- “Christian Community Ministries:*
- Andrew – Please arrange: ...
- Provide copy of flood report”
- [58] CCM had impressed on Mr Sarri that the MPC project was financially bound by the limits of Commonwealth funding and could not go over budget in any way. Concerned about the budget, Simon Tanner, Mr Sarri’s assistant, had assigned “flood report” responsibility to CCM because PSC had not allowed for such a report and additional expense would be incurred in obtaining one for Certis.
- [59] Mr Lennox, who did not discuss the request for a flood report with anyone at PSC, CCM or the College, responded to Mr Crawford’s request for a “copy of flood report”: “Flood report – not an issue”, he wrote.

Ignorance

- [60] Mr Lennox did not suspect¹³ that the MPC was exposed to flooding¹⁴, especially through rising water in Myall Creek. He was not alone in that. Mr Sarri did not appreciate until 17 March 2010 that his master plan had sited the MPC in a place where floodwater might enter with a 1-in-100 year regional flooding event. Nobody at Intelara realised that there was such a potential for inundation until the eve of the slab pour.¹⁵

Architectural adoption

- [61] On 27 November, Mr Crawford sent an email to Mr Nation¹⁶ which attached revised architectural drawings labelled “detailed site plan”. The email said:

¹³ Mr Lennox sought to explain his decision not to commission the report on the basis that it related to the prospect that the MPC, when constructed, might alter “the flooding parameters for the site”: that is, the report he claimed to have had in mind would not have concerned the susceptibility of the MPC to inundation but would instead have addressed the building’s potential to cause flooding elsewhere. He reasoned, he testified, that the MPC would not be so substantial as to affect flood volume, flow or speed on the rest of the site. But Mr Lennox, who had no advisory function in technical building matters and no expertise in connection with flood risks, knew that the Checksheet was to gather information to enable Certis to decide whether the MPC should be certified for development approval. A flood report for such a purpose would be (at least primarily) concerned with whether the building itself might flood. Completion of the project within the \$2M budget was Mr Lennox’s predominant concern. The real explanation for his decision was saving money. Incidentally, Mr Sarri conjectured that Mr Lennox may have decided against obtaining the report because a civil engineer had been retained to establish the FFL. Mr Lennox does not suggest that he decided against a flood report for any such reason.

¹⁴ Mr Lennox claims that he expected that the MPC would be designed to be immune from a 1-in-100 year flood event – the “industry accepted standard”, he thought. It is more likely that he did not think about that until the events of mid-March 2010. If he had such an expectation earlier, he did not raise the issue with anyone.

¹⁵ Like Mr Lethlean, Mr Nation had not imagined that PSC had located the MPC where it might flood. No one at PSC had adverted to possible floodwater incursion in communications with Intelara.

¹⁶ Copies to Mr Sarri and Mr Lethlean.

“Need to address site drainage around building, as it look like intersection of grid A,X on site is the lowest point and if water was allowed to build up it would push back up into covered breakout area. Find attached preliminary revised arch. drawing revisions are as listed below.

- existing levels around new building indicated (ERL)
- new levels to building and swale drain shown (RL)

Can you please advise and update your drawing indicating swale drain and gully sump. Do the levels to swale and sump look ok? Also sump size.”

- [62] This new drawing adopted Intelara’s specification of 345.90 AHD for the slab FFL. It also showed an “Existing Reduced Level” of 345.75 in the northern part of the adjacent future carpark. Reduced levels¹⁷ were shown for a walkway on the southern side of the MPC and for a swale drain to the north and east of the building.¹⁸
- [63] Mr Nation made calculations to ascertain whether the pipes beneath the swale drain had enough capacity to cope with an ARI 10 rainfall event. His computations related exclusively to stormwater. Mr Nation sent an email to Mr Crawford attaching a revised hydraulic drawing showing “stormwater and sanitary drainage layout”. The MPC FFL was shown at 345.90. The swale drain proposed RLs were included.

Flooding: “not an issue”

- [64] On 3 December, Mr Crawford sent an email to Mark Leeves of Certis¹⁹ furnishing answers to the BCA Checksheet. Under the heading, “Flooding”, echoing Mr Lennox’s response²⁰, Mr Crawford wrote: “Not an issue”.
- [65] On 11 December, by email²¹, Mr Crawford informed Mr Lethlean and Mr Nation that Intelara needed to re-issue a Form 15 Design Certificate. The email attached a Certis BCA Checksheet. Next to “flooding”, the words “Please provide a copy of the flood report or confirm not applicable” had been typed on the Checksheet. Those words were struck through.

Project revision

- [66] The MPC was intended for a variety of uses, including school assemblies and official functions, indoor sports activities, performing arts and community activities. However, not all the facilities could be afforded within the \$2M funding limit. Adjustments to plans were considered.
- [67] After FK Gardner & Sons Pty Ltd (“FKG”) submitted its tender, there were discussions between its representative and Mr Sarri concerning savings that might be achieved by deletions from the works. A synthetic sports floor was, as Mr Lennox put it, “removed from the contract” because of its anticipated expense: about \$73,000. That floor was to

¹⁷ Levels on completion of the works.

¹⁸ These new levels were PSC’s work.

¹⁹ Copied to Mr Sarri.

²⁰ See para 59.

²¹ Copied to Mr Sarri.

be added when CCM got the funds to pay for its installation in a post-construction upgrade.

Contract

- [68] In January 2010, FKG contracted to construct the MPC for a price of \$1,813,342.27, plus GST.
- [69] The contract was executed by Mr Lyndon and Mr Philip Lennox, directors of CCM, on 8 January 2010. It was later executed by FKG.
- [70] The contract named Mr Andrew Lennox as the owners' representative. The owner was shown as "Dalby Christian College a ministry of Christian Community Ministries Ltd".
- [71] Mr Sarri was nominated as the Superintendent.

Certification for construction

- [72] On 13 January 2010, Certis approved the development application to construct the MPC.

More drawings

- [73] On 29 January, PSC sent Mr Nation revised MPC drawings and asked him to revise his hydraulic drawings accordingly. Those drawings showed the FFL at 345.90.
- [74] A week later, Mr Nation responded with his revised hydraulic drawings. They, too, showed an FFL of 345.90.

Starting work

- [75] Construction soon began.

Alarm

- [76] When Mr Wilson saw the footings for the slab, he was concerned that the MPC would be set lower than the rest of the College buildings. He knew that Dalby had experienced flooding in 1981 and thought that the MPC might flood.
- [77] Mr Wilson telephoned Mr Lyndon to say that it looked as though the builder was ready to pour the slab, that he was concerned that the slab was "too low", and that the MPC "will flood".
- [78] Mr Lyndon told Mr Lennox what Mr Wilson had said. Mr Lennox telephoned Mr Sarri and told him of Mr Wilson's concerns that the slab was too low and that water might enter the MPC. Mr Lennox asked Mr Sarri to check with the engineers.

- [79] Mr Lennox's call discomfited Mr Sarri. In his three decades in practice as an architect, Mr Sarri had never had a building that had been inundated.
- [80] Mr Sarri telephoned Mr Lethlean on the afternoon of 17 March and told him that the Principal was concerned that the MPC slab was too low "in respect to water coming into the building". Mr Sarri sought feedback urgently, asking Mr Lethlean to confirm, in writing, the FFL as he had to decide whether to proceed with the pour at the level proposed. Mr Lethlean said that he would confer with colleagues and call back.
- [81] Mr Sarri did not tell Mr Lethlean that Mr Wilson's concern related to regional flooding. Mr Lethlean had still not turned his mind to such a risk.
- [82] Supposing that the inquiry related to incursion from a local rainfall event, Mr Lethlean spoke to Mr Wickett. He performed calculations directed to stormwater overflow into the swale drain to be constructed to the north and east of the MPC. His computations revealed that the drain was adequate to cope with a Q100²² event: that is, a 1 in 100 year stormwater flow into that drain.

Stormwater email

- [83] At 4.50pm, Mr Lethlean emailed Mr Sarri. The "Subject", as it appears in the email heading, is: "Dalby CC – Stormwater and Hydraulic issues". The email said:

"There have been four interrelated issues which we wish to address in this email.

- (i) Discharge of stormwater from the site.
- (ii) Level of building
- (iii) Position of Hydrant.
- (iv) Discharge of sewer from the site.

The current design for the building involves a level which allows for future disabled planning (neighbouring carparks and so on). The building has been protected by a shallow swale drain which has a series of high and low points, and which drains into an underground stormwater system. This system then drains down to Jerome Street and into an assumed underground stormwater system. This entire system was designed for a Q100 flow from the north flowing towards the new building.

We have since become aware that there is no council in-ground system in Jerome Street and thus nothing to drain to. In order to protect the building, we therefore need to provide a **single swale drain** of slightly deeper proportions to protect the building and take any overland stormwater past the end of Jerome Street over to the existing open drain which runs north-south on the eastern side of the property. I.e. the philosophy is still the same – just the technical details are being modified. For these reasons we can confirm that the **slab level** is adequate as documented.

²² Q100 had been adopted because, as Mr Lethlean said, the 1 in 100 stormwater event is the "recognised criteria upon which we should be designing".

Benefits of this change include the deletion of most of the in-ground stormwater pipe and pits (saving) and increased protection of the neighbouring properties and Jerome Street (reducing risk of dispute).

In recent communication we have now agreed on a new location for the **fire hydrant** which is directly to the south of the building. It will be located in a future landscaping island, in the future carpark. We would therefore also redirect the QFRS driveway (gravel/crushed rock) to the south of the proposed swale drain and thus keep the vehicle on the “dry side” of the drain. This will avoid the necessity for any culvert spanning over the drain and improves the master planning opportunities in the future.

We have also adopted a 150 **sewer line** in lieu of the 100 documented in order to achieve the falls on the site.

Please refer to the attached 3 marked up sketches. Once these are agreed, we will redocument and reissue accordingly.”

- [84] Three revised drawings were attached. All showed the FFL as 345.90. Notations on the drawings by Mr Wickett and Mr Lethlean related to the location and capacity of the stormwater drain.

Sarri’s reaction

- [85] Mr Sarri understood Mr Lethlean’s “stormwater and hydraulics issues” email to mean that the slab was designed for a Q100²³ flow, which is what he “needed to hear to proceed with the pour”, he said.

- [86] About 5.30pm, Mr Sarri forwarded Mr Lethlean’s email to Mr Lennox and Mr Wilson²⁴, adding:

“Please review and call me to discuss. The Q100 design requirement²⁵ supports the documented slab level. Please advise if there is local knowledge in this regard that may be of interest.”

- [87] By the time Mr Sarri received Mr Lethlean’s 4.50pm email, he knew that Mr Wilson was concerned about regional flooding.²⁶ What he did not appreciate when he forwarded the email to Mr Wilson and Mr Lennox was that it was directed to flooding from a local rainwater event, not regional flooding.

- [88] Mr Sarri, who felt himself under considerable pressure over the prospect of deferment of the impending pour, misinterpreted Mr Lethlean’s email, making of it what he wanted to hear.

CCM consideration

²³ In his conception, Q100 meant that the slab “would not flood, statistically, more than once every 100 years”.

²⁴ Copying the email to Mr Lethlean.

²⁵ Mr Sarri had not specified a “Q100 design requirement”. His instruction was to set the FFL in relation to the future carpark levels. Mr Lethlean’s reference to Q100 in his email relates to stormwater.

²⁶ According to Mr Lethlean, Mr Sarri’s email “is about 10 minutes out”. The difference is immaterial.

- [89] After Mr Lennox²⁷ received Mr Sarri's email, he discussed it with Mr Lyndon. The slab was to be poured early next morning. Mr Lyndon was worried that stopping it would expose CCM to a large claim by FKG for "prolongation".
- [90] Based on Mr Sarri's email, and without responding to his invitation to discuss the issue²⁸, Mr Lennox told Mr Lyndon²⁹ that the engineers had said that the slab was fine and that there was no need to stop the pour. Mr Lyndon felt assured about the slab height and did not try to defer the pour.
- [91] Mr Lyndon and Mr Lennox³⁰ had not appreciated that Mr Lethlean's email was not directed to the regional flooding risk that worried Mr Wilson.

Regional flooding finally addressed

- [92] Before 6.27pm that evening, Mr Sarri and Mr Lethlean conversed again.³¹ Something Mr Sarri then said first made it apparent to Mr Lethlean that the issue agitating the College was regional flooding, not the capacity of the stormwater drainage system.
- [93] Mr Lethlean said that regional flooding was a different issue. Only then did Mr Sarri realise that Mr Lethlean's 4.50pm email related to stormwater incursion and that he had not considered regional flooding.
- [94] Mr Sarri asked Mr Lethlean to review the FFL to take account of regional flooding, impressing upon him that the matter was urgent because "the builder is going to pour tomorrow". Mr Lethlean assured Mr Sarri that he would get an answer as quickly as he could.

Lethlean investigates

- [95] The local authority offices were closed by the time of the conversation³² between Mr Sarri and Mr Lethlean after the 4.50pm email.
- [96] Mr Lethlean went to the Council's website, looking for information about flooding.

²⁷ Mr Wilson did not contact Mr Sarri. He considered that he had expressed his "local concern" by raising the issue earlier.

²⁸ Mr Lennox believes that he had no further communication with Mr Sarri until the following day when Mr Sarri told him that two of Intelara's directors were comfortable with the design slab height and there was no reason to stop the slab pour.

²⁹ Mr Lyndon recalls Mr Lennox saying that Mr Lethlean had spoken to a couple of his partners, that they had reviewed the level, and that it was correct.

³⁰ Mr Lennox testified that he thought that "Q100" meant a 1-in-100 event attributable to regional flooding. If that be true, presumably it is because Mr Lyndon had told him that the prospect of such flooding was what concerned Mr Wilson, Mr Lennox believed that he had relayed that anxiety to Mr Sarri, and Mr Lennox supposed that Mr Sarri's statement that the "Q100 design requirement supports the documented slab level" was responsive to Mr Wilson's particular concern.

³¹ Probably after Mr Sarri's 5.20pm email.

³² There could have been, as Mr Sarri claims to recall, another conversation with Mr Lethlean at about this time in which Mr Lethlean said that he was trying to access "some sort of flood mapping for Dalby".

- [97] He found a flood map, downloaded it and, at 6.27pm, sent the map by email to Mr Sarri “to give him confidence” that he had found something. The email said: “Please see attached downloaded from Council website just now”. The attachment was a one page map described as “1 in 100 ARI Design Flood Myall Creek Flood Study 2007”³³.
- [98] Mr Lethlean examined the flood map, looking to identify parts of the College site that were below the Q100 inundation line. He compared levels on a recent survey with the extent of inundation depicted on the map. That exercise led him to conclude that the Q100 level for the MPC revealed by the map was in the order of 345.85 AHD, which meant that Intelara’s FFL of 345.90 was at, or very close to, the Q100 “inundation line”.
- [99] Another factor confirmed that assessment in Mr Lethlean’s mind.
- [100] Mr Lethlean noticed that levels on and near a cricket pitch on an oval close to the MPC were at 345.89. This meant, Mr Lethlean reasoned, that the entire sports field, except for the cricket pitch and an area very close to it, would need to flood before water would enter the MPC constructed on a slab with an FFL of 345.90. That, however, was inconsistent with the Q100 flooding indicated on the map.
- [101] On his way home that night, Mr Lethlean telephoned Mr Sarri and told him that the RL³⁴ of the MPC was very close to the Q100 level shown on the flood map, explaining why he had reached that conclusion.
- [102] Mr Sarri then decided not to defer the pour. He did so without further reference to anyone at CCM.
- [103] As Superintendent, Mr Sarri could have postponed the pour. He decided not to intervene, influenced by Mr Lethlean’s 4.50pm email about stormwater drainage and, more significantly, by their discussion that evening concerning the potential for regional flooding and the consequences for the MPC if that risk eventuated.

Next morning

- [104] The slab pour started at around 5.00 - 5.30am and was complete, or almost so, by 8.52am.

Confirmatory email

- [105] At 8.52am, Mr Lethlean sent Mr Sarri an email³⁵ addressing regional flooding. With the subject heading “Dalby CC – Concerns About Flooding”, it said:

“We write further to our email yesterday re stormwater design and floor levels. This also confirms our conversation from late yesterday.

³³ Mr Sarri claims that when he saw that map, he was convinced that there was “science behind” the Q100 number to which Mr Lethlean had referred in his 4.50pm email. But when Mr Sarri saw that map, he already knew, from speaking with Mr Lethlean, that the email did not relate to regional flooding.

³⁴ Reduced Level – a synonym for FFL.

³⁵ Mr Lethlean describes it as a confirmation of the contents of his last phone conversation with Mr Sarri the night before.

We understand that further to our email of yesterday, there is still a concern regarding regional flooding and not necessarily that limited to the site.

Please find attached a Flood Depth Map for Dalby available from the Council web site. This is based upon the 2007 Q100 Myall Creek Flood Study. This map provides an indication of both extent and depth of flooding under a 1 in 100 year event. Please note the various disclaimers³⁶ on the document. I have also zoomed in on the site and printed out this portion in colour. This is also attached for convenience.

We have reviewed this flood map and compared it against the features and levels survey of the site (Copy attached). Things to note are as follows:

- (i) Flooding exists in a narrow band through the middle of the Dalby CC site. This is consistent with the survey as this is the low point. The width of the band would suggest that the RL of the top of the water would be in the order of 345.85. The low point in this area is in the order of 345.75. Thus the depth of water is only 100mm. This is inconsistent with the colour-contour of the map as it indicates a deeper depth.
- (ii) The sports field is generally flood free. The levels of the sports fields are typically around 345.85. Only a few isolated locations of the sports field are in fact above 345.90.
- (iii) The drain to the east has water in it for a depth of 500mm to 1000mm according to the colour contours. The water does not extend outside the confines of the drain. The survey shows that the depth of the drain ranges from 800 to 950mm.
- (iv) A number of the levels on the top embankment of the eastern drain are below 345.90, (345.86).

With the building level at 345.90, it is our opinion that the vast majority of the sports field would have to be covered with water (shallow) and it would just start to overtop into the drain on the east before any water entered into the building.

Based upon the information available and the associated level of accuracy and disclaimers, our opinion is that the building floor level of 345.90 is at, or is very very close to, the Q100 flood level. Given the nature of the building (not a habitable room) and the desire to minimise the need for any ramps etc., we believe that this is a reasonable approach.”

CCM reaction

- [106] At 9.36am, Bastiaan Kolff, a PSC employee, forwarded Mr Lethlean’s 8.52am email to Mr Lennox and Mr Wilson. A few minutes later, Mr Lennox emailed Mr Wilson to say:

³⁶ The map carried this “Flood Disclaimer”: “The flood information on the map is based on a design flood, a hypothetical event representing a specific likelihood of occurrence, of 1 in 100 years. Note: Larger flood events than the adopted 100 year standard design flood have occurred. Localised rain events can cause localised flooding not specified in the design event...Council accepts no responsibility for the accuracy of the levels contained therein.”

“I have spoken with Sergio and Intelara has undertaken detailed analysis of the whole school site and are 100% confident in what they have designed. Sergio has their full report in his inbox and will provide to us today. Sergio spoke with two of the Directors of the company last night and they said go with the slab pour today as it is right. As professional engineers they will provide a Form 15 design certificate and then once the work is done a Form 16 inspection certificate, which are the required standards in Queensland. Even if there was a flood, we have complied with all engineering requirements and our insurance would cover damage. Our insurer would be able to chase Intelara’s professional indemnity insurance if there was shown to be a design error.

Please let me know if you have any further concerns.”

- [107] At 1.00pm, Mr Lennox sent an email to Mr Sarri, stating: “The Intelara design is fine. Just please ensure that the hydrant line runs down the east of the future covered walkway...”.

Regional flooding conversation

- [108] When the last pre-pour conversation between Mr Sarri and Mr Lethlean took place, both men were troubled. Mr Wilson was anxious about a regional flooding risk to the utility of the MPC which neither architect nor engineer had previously considered. And Mr Lethlean’s 4.50pm email had reminded Mr Sarri that the MPC design “involves a level which allows for future disabled planning (neighbouring carparks and so on)”, consistently with his instruction to Intelara five months earlier.
- [109] On the night of 17 March, Mr Lethlean spoke with Mr Sarri about his investigations into the chances that floodwater from Myall Creek might enter the MPC. He referred, among other things, to the significance of the 2007 flood map. He gave his reasons for concluding that the FFL was at or near the “Q100 flood level”. The two of them discussed what that meant for the building.
- [110] Mr Lethlean recalls that Mr Sarri said that, in the unlikely event of a flood, “the building could easily be squeegeed out”. Mr Lethlean says that he took that as “the client saying the freeboard does not need to be there”: in other words, to indicate that CCM would accept a slab set at a level at which the MPC might occasionally flood.
- [111] Mr Sarri denies having made the “squeegee” reference; and that word does not appear in Mr Lethlean’s confirmatory email.³⁷

Assessing reliability of testimony

- [112] Neither Mr Sarri nor Mr Lethlean made a contemporaneous note of their conversations. Mr Sarri scarcely recalls the one that led him to allow the pour to proceed next morning.

³⁷ Mr Lethlean’s explanation for that omission is: “I didn’t use the squeegee comment in the email for fear of embarrassing Sergio”.

- [113] Recollections are bound to have been affected by the passage of time. Other factors deserve consideration in assessing the reliability of the accounts of Mr Sarri and Mr Lethlean.
- [114] Mr Lethlean has a reputational interest in the outcome of this litigation, and a relatively small amount of his own money is at stake.
- [115] There is more than one reason to be cautious about Mr Sarri's evidence.
- [116] Mr Sarri presents as keen not to be seen as blameworthy and wants to distance PSC from what happened and the decisive role he played. Yet he knows that: PSC's master plan sited the MPC where it was flooded three times within months of construction; to keep costs³⁸ down, he instructed Intelara to fix the MPC level to "suit" the future carpark; PSC had informed Certis that flooding was "not an issue" in response to its request for information to enable certification of the MPC for construction; PSC remained unaware of a regional flooding problem until CCM raised the issue on the eve of the pour; he did not explain Mr Wilson's anxiety about flooding to Mr Lethlean, with the consequence that Mr Wickett and Mr Lethlean addressed only stormwater incursion; he misread Mr Lethlean's 4.50pm email as relating to regional flooding; in his about 5.30pm covering email, he conveyed that misconception to Mr Lennox, leaving Mr Lennox and Mr Lyndon with an impression that, before the night was out, he knew to be mistaken but which was not corrected; and, without reference to CCM, he chose not to defer the pour.
- [117] Other aspects of Mr Sarri's evidence have relevance in evaluating his reliability.³⁹
- [118] Mr Sarri testified that he expected that Intelara would have had regard to regional flooding in selecting the FFL for the MPC.⁴⁰ He did not.
- [119] Mr Sarri did not suspect that the MPC might be inundated. If he had, he would not have instructed Intelara to set the MPC levels to suit the adjacent future carpark⁴¹. Instead, he would have invited Intelara to consider regional flooding.
- [120] Mr Sarri attempted to avoid the ramifications of his prescription of the relativities between MPC and carpark by claiming that no ramps and handrails for the disabled would be needed were the FFL set higher than the 345.90 Intelara specified: had Intelara adopted a higher FFL, "the carpark would follow the MPC levels" up, he said.⁴² That is not what he told Intelara.
- [121] Mr Sarri pretends that he did not intend his instruction to fix MPC levels to "suit" the carpark to influence Intelara in selecting the FFL. The point, however, was to save money: mainly, by avoiding the ramps and handrails. His instruction could not have been

³⁸ Mr Sarri was focused on avoiding ramps and handrails between future carpark and MPC. But raising levels would necessarily involve earthworks.

³⁹ See also fn 13 and fn 33.

⁴⁰ He does not suggest that he conveyed such an expectation to Intelara.

⁴¹ Mr Sarri knew that Intelara was not fixing the future carpark levels. And he did not expect those levels to be specified before Intelara decided upon the FFL.

⁴² "Whatever level the MPC was at, the carpark would follow...it would chase the floor level of the MPC up".

designed to encourage Intelara to set an FFL that necessitated additional earthworks on the site, coupled with the inevitability of more expense in years to come in placing fill on the carpark to raise it as well.

Acceptance of some risk?

- [122] The best indication of what passed between them just before Mr Sarri decided not to defer the pour is Mr Lethlean's 8.52am email next morning.
- [123] Mr Sarri did not respond to the email – which suggests that he found no fault with it as a record of the substance of what had been discussed the night before – and promptly arranged for it to be sent to Mr Lennox.⁴³
- [124] The contents of that email – in particular, the last paragraph – are consistent with the two men having discussed the acceptability of a degree of risk that floodwater might enter the MPC in a rare, major flood. The reference to “non-habitable”, for example, seems related to a perception that the College could accept a slight risk of floodwater incursion in a building that was to be put to the various uses envisaged for the MPC.
- [125] Whether “squeegeed” was said or not⁴⁴, Mr Sarri must have realised that Mr Lethlean was telling him, in effect, that there was a risk of floodwater incursion in a statistically rare event.
- [126] That Mr Sarri did not contact anyone at CCM after learning of Mr Lethlean's evaluation indicates that he believed that the risk would be acceptable.⁴⁵

Contract disavowed

- [127] CCM's claims for compensation are not based on any contract CCM may have concluded with Intelara.⁴⁶

Section 52

- [128] CCM's pleading concerning contravention of s.52 of the *Trade Practices Act* 1974 makes a multiplicity of allegations.

Old case

⁴³ Mr Lethlean expected that his email would be sent to CCM.

⁴⁴ CCM does not propound a case founded on what Mr Lethlean said in conversation on the 17th. So, it is unnecessary to decide whether Mr Sarri did acknowledge the reduced amenity that would be involved if the MPC had to be “squeegeed” out occasionally. However, Mr Lethlean's evidence about their conversations is generally distinctly preferable to Mr Sarri's.

⁴⁵ Mr Sarri testified that, if Mr Lethlean had told him that the MPC could flood from time to time, he would have phoned the builder and stopped the pour. This claim, which does not accord with the exchanges on the night, should not be accepted.

⁴⁶ Presumably because Intelara's Terms of Engagement contained a limitation of liability provision.

[129] Intelara’s drawings, preliminary and for construction, and Mr Lethlean’s communications⁴⁷ on 17 and 18 March are said to have “represented” to CCM:

- “25.2 expressly, that in respect to the possibility of regional flooding the specified FFL of 345.90 m AHD was a reasonable approach;
- 25.3 impliedly, that if the Multi-Purpose Centre is constructed in accordance with the Preliminary and/or For Construction Drawings with an FFL of 345.90 m AHD it would be able to withstand a 100 year Average Recurrence Interval (ARI) flood event, without flooding;
- 25.4 impliedly that if the Multi-Purpose Centre is constructed in accordance with the Preliminary and/or For Construction Drawings it would be suitable for use by students for a multitude of sporting and recreational purposes as well as full school assemblies; and
- 25.5 impliedly, that if the Multi-Purpose Centre was constructed in accordance with the Preliminary and/or For Construction Drawings, the Multi-Purpose Centre would not be damaged as a result of flooding as the FFL was to be at 345.90 m AHD which was at, or very close to the Q100 flood level,

(collectively the **Design Representations**).”

[130] That conduct is also alleged to have “further represented” to CCM:

“The following implicitly, that:

- 26.1 the Design Representations were based on reasonable grounds;
- 26.2 the Design Representations were the product of the exercise of due care and skill;
- 26.3 the Design Representations were safe to rely on and not outside the range of latitude property to be allowed to them.”

[131] That “conduct” is alleged to be “misleading or deceptive, or likely to mislead or deceive, within the meaning of s.52”, in reliance on these allegations in an Amended Statement of Claim:

- “28 The representations pleaded in paragraphs 25.3, 25.4 and 25.5 were as to future matters within the meaning of s.51A of the TP Act, on which the plaintiff relies herein.
- 29 Acting in reliance on the Design Representations, and induced thereby, the plaintiff:
 - 29.1 accepted the Preliminary Drawings;
 - 29.2 accepted the Forms 15;
 - 29.3 accepted the For Construction Drawings;

⁴⁷ The reference is to Mr Lethlean’s emails. No reliance is placed on any conversation.

- 29.4 entered into the contract with FKG for the constructions of the Multi-Purpose Centre; and
- 29.5 allowed FKG to commence construction of the slab for the Project with an FFL of 345.90 m AHD, despite the top level of the slab being noticeably lower than the surrounding buildings.
- 30 Further, and alternatively, the natural and direct result of the defendant's conduct, in making the Skilled Representation and the Design Representations, was to cause the plaintiff to:
- 30.1 approve the Architect retaining the defendant to provide the Services; and
- 30.2 authorise construction of the Multi-Purpose Centre in accordance with the For Construction drawings issued by the Defendant,
- and there is a sufficient causal connection between the defendant's conduct and the plaintiff's loss or damage suffered by the plaintiff (which is pleaded with more particularity in paragraphs 38 to 40 hereof).
- 31 The Skilled Representation and the Design Representation were false, and misleading or deceptive, or likely to mislead or deceive, in that:
- 31.1A the defendant was not suitably skilled, experienced and competent to perform the Services;

Particulars

The defendant designed the FFL of the project at 345.90 m AHD in circumstances where a reasonable engineer would have specified a minimum FFL 346.26 m AHD being the 100 year Average Recurrence Interval water level of 346.11 m AHD plus a freeboard of at least 150mm. The plaintiff relies on the expert hydrologist report of MRG Water Consulting Pty Ltd dated 2 November 2011.

- 31.1 with respect to the possibility of regional flooding the specified FFL of 345.90 m AHD was not a reasonable specification;
- 31.2 the Multi-Purpose Centre, despite being constructed in accordance with the Preliminary and/or For Construction Drawings with an FFL of 345.90 m AHD, was not able to withstand a 100 year ARI flood event, without flooding;
- 31.3 the Multi-Purpose Centre, despite being constructed in accordance with the Preliminary and/or For Construction Drawings, was not for use by students for a multitude of sporting and recreational purposes as well as full school assemblies;
- 31.4 the Multi-Purpose Centre, despite being constructed in accordance with the Preliminary and/or For Construction Drawings, was damaged as a result of flooding;

31.5 the Design Representations alleged in paragraphs 25.2, 25.3, 25.4 and 25.5 were misleading by virtue of s.51A of the TP Act.”

New case

[132] By the closing addresses, CCM’s s.52 case had narrowed considerably. No longer was it maintained that a “design representation” had resulted in any of the acts pleaded in paragraphs 29.1 – 29.4. The case became confined instead to a contention that the “design representations”, in combination, had the consequence pleaded in para 29.5: in short, that CCM allowed the slab to be poured with Intelara’s 345.90 FFL.

Express design representation

[133] The only representation alleged to have been made “expressly” is that, “in respect to the possibility of regional flooding”, the 345.90 FFL Intelara specified “was a reasonable approach”.⁴⁸

[134] The email Mr Lethlean at 8.42am on 18 March does express the opinion⁴⁹ that a floor level of 345.90 AHD was a “reasonable approach”, given the uses to which the MPC would likely be put.⁵⁰ That email, however, did not influence the decision that the pour should proceed: it was not sent until after the slab was already poured or almost completely so.

[135] None of the other communications relied on, separately or in combination, contains any express representation in relation to the reasonableness of the 345.90 FFL “in respect to the possibility of regional flooding”.

Implied design representations

[136] CCM’s case that Intelara contravened s.52 depends upon establishing that the drawings and Mr Lethlean’s 17 March email “impliedly” made one or more of the “design representations”⁵¹.

Drawings

[137] Nobody testified to having understood the drawings as conveying any of the “design representations”. As none does, that is not surprising.

[138] Relevantly, the drawings - preliminary and for construction - merely contain the digits “345.90”. On their face, they imply nothing about flooding, sporting or recreational

⁴⁸ Para 25.2.

⁴⁹ As that email cannot have caused loss, it is unnecessary to consider whether it was likely to mislead or deceive. But such a contention looks unpromising: the email states, with reasons, an opinion that Mr Lethlean held on grounds not shown to be without adequate foundation.

⁵⁰ “The nature of the building (not a habitable room) and the need to avoid ramps etc.” for disabled access between MPC and future carpark.

⁵¹ Those pleaded in paras 25.3-25.5.

purposes, or school assemblies. And there are no extrinsic facts to indicate that the drawings were, or might have been, understood as making some representation about the capacity of an MPC built on an FFL of 345.90 AHD to withstand a regional flood or the suitability of the building for any of the uses the College had in mind.

17 March email

- [139] In these circumstances, Mr Lethlean’s email at 4.50pm on 17 March⁵² is critical to the attempt to establish that a “design representation” was made and, if so, involved a s.52 contravention.
- [140] The complaint is centered on what the email is alleged to represent concerning exposure to regional flooding.⁵³
- [141] That email does not convey any of the alleged representations either: instead, it states Mr Lethlean’s views on the capacity of the MPC to cope with a 1-in-100 year *stormwater* event.
- [142] The email is, on its face, directed to stormwater incursion, not regional flooding.
- [143] The stated subject matter points in that direction: the email is headed: “Stormwater and hydraulic issues”.
- [144] The body of the communication also reveals that it is not about regional flooding.
- [145] The text refers to the design reflecting a relationship between MPC levels and those of the future carpark before mentioning that the building is to be protected by a swale that drains into an “assumed underground stormwater system”. That is not about a mechanism to cope with regional flooding. Next, the “entire system” is said to have been “designed for a Q100 flow from the north flowing towards the new building”. “System” refers to gutters, pipes and swale drain. None of those addresses a regional flooding potential. Thirdly, a flow “from the north” must relate to overland flow downhill towards Myall Creek, which was to the South. Any regional flooding would have moved from Myall Creek towards the College from the South.
- [146] At first, Mr Sarri mistook the email as relating to regional flooding. Mr Lethlean, however, had no reason to anticipate that⁵⁴ and did not do so.
- [147] The email did not contravene s.52 because Mr Sarri’s own misconceptions⁵⁵ led him astray.

⁵² Perhaps reliance is also placed on the 6.27pm email. Nothing in it implies anything about the appropriateness of the slab height.

⁵³ The email is not alleged to contravene s.52 because of what it says about stormwater.

⁵⁴ Still less that Mr Sarri would misrepresent its effect when transmitting the email to CCM.

⁵⁵ cf *Tobacco Institute of Aust v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, 49. See also *Delmenico v Brannelly & Anor* [2008] QCA 74, [34]; *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, [91].

- [148] Mr Lethlean's 4.20pm email was not misleading or deceptive or likely to mislead or deceive.

Causation

- [149] In any event, no loss resulted from Mr Sarri's initial misunderstanding of the email.
- [150] By the time Mr Sarri chose not to stop the pour, he already knew that Mr Lethlean's 4.20pm email did not concern regional flooding. Discussion with Mr Lethlean had by then disabused him of his earlier misconception that it did.
- [151] In their last conversation on 17 March, Mr Lethlean persuaded Mr Sarri that the prospect of regional floodwater incursion and the predictable consequences for the MPC were that to happen were not so serious as to warrant postponing the pour. Hence, Mr Sarri's decision to allow it to proceed next morning.⁵⁶

Negligence?

- [152] CCM pleads that Intelara owed it:

“A duty of care to provide the design services which were the subject of the project with a degree of care, skill and diligence that would reasonably be expected of a reasonably competent practitioner:

35.1 In the professional disciplines which were the subject of the project;

35.2 Who was retained for the construction of a Multi-Purpose Centre suitable for use by students for a multitude of sporting and recreational purposes as well as full school assemblies;

35.3 Who was experienced in the provision of professional services in its disciplines for a project involving construction of a Multi-Purpose Centre suitable for use by students for a multitude of sporting and recreational purposes as well as full school assemblies.”

- [153] CCM contends that Intelara breached that duty of care. The particulars are:

“The defendant designed the FFL of the project at 345.90 m AHD in circumstances where a reasonable engineer would have specified a minimum FFL 346.26 m AHD being the 100 year Average Recurrence Interval water level of 346.11 m AHD plus a freeboard of at least 150mm. The plaintiff relies on the expert hydrologist report of MRG Water Consulting Pty Ltd dated 2 November 2011.”

- [154] MRG Water Consulting's 2 November 2011 report was prepared by the hydrologist, Mr Gibson. In it, Mr Gibson did express the opinion that:

⁵⁶ Mr Sarri's email at 5.30pm did influence Mr Lennox and Mr Lyndon not to press him to halt the pour. Their silence does not account for Mr Sarri's decision not to intercept the pour.

“...the minimum Finished Floor Level (FFL) that a reasonable engineer would have specified for the Dalby Multi-Purpose Centre (before the 2010-2011 flood events) would include:

- I. The 100 year ARI water level as provided by the Western Downs Regional Council (346.11 m AHD); plus
- II. A freeboard of at least 150mm (as discussed in Section 4.7).

Therefore the minimum Finished Floor Level (FFL) that a reasonable engineer would have specified for the Dalby Multi-Purpose Centre would be 346.26 m AHD.”

[155] Mr Gibson changed his mind.

[156] After considering the views of Mr Collins, another hydrologist, Mr Gibson accepted that, allowing an additional 150mm as freeboard⁵⁷, the FFL might appropriately have been set at 346.20. And there is no other evidence to sustain Mr Gibson’s initial opinion.

[157] No application was made to amend the particulars to bring them into conformity with Mr Gibson’s final conclusion.

[158] Accordingly, the negligence case, as particularised, fails.⁵⁸

Alternative?

[159] CCM suggests that the two sentences of the particulars should be read distributively⁵⁹ so that CCM may rely on any part of Mr Gibson’s report that implicates Intelara in any negligence concerning the FFL: as, for example, omitting to take into account a risk of regional flooding.

Adverting to regional flooding

[160] Mr Gibson’s report proceeds on unexpressed assumptions that a “reasonable engineer” would have considered whether the architect might have sited the MPC in an area potentially affected by regional flooding and, with that possibility in mind, before setting the FFL, have obtained the information that Mr Gibson procured from the local authority and the Bureau of Meteorology.

[161] Until shortly before he testified towards the end of the trial, Mr Gibson was not asked whether an engineer in Intelara’s position should have turned his mind to regional flooding. His report does not address that fundamental issue. So it does not support a case that Intelara’s omission to investigate regional flooding bespeaks negligence.

⁵⁷ Freeboard is a safety margin that allows for circumstances in which designated design conditions would be exceeded: see Exhibit 21, Report of Mr Collins, p 27.

⁵⁸ Intelara contends that it did not owe CCM a duty *in tort* to exercise reasonable care to avoid causing CCM economic loss. It is not necessary to decide the matter.

⁵⁹ That is not a fair reading. However, it makes no difference whichever interpretation is correct.

[162] Even reading the particulars as CCM proposes, the pleaded case fails.

Broader case

[163] CCM's negligence case ranged beyond the boundaries of the litigation as defined by the particulars.

[164] In opening CCM's case, Mr Logan QC spoke of the "essence" of the negligence case as being that an engineer, before specifying the FFL, would first have "made relevant enquiries that would have enabled him to determine that the ARI 100 level...was not 345.90 but 346.11".

[165] In closing, CCM contended⁶⁰, on the basis of Mr Gibson's report, that Intelara failed to: exercise the care to have been expected of a "reasonably competent practitioner" by not having specified a minimum FFL of 346.26 AHD; consider regional flooding when setting the FFL; correctly ascertain the Q100 flood level and then set the FFL at a minimum height of that level; and allow a minimum of 150mm freeboard.

Assumption

[166] CCM's case assumes that Intelara was at liberty to fix the FFL at the ascertainable ARI 100⁶¹ level plus a 150mm freeboard.

[167] But it appears not to be in contest⁶² that an FFL at that level would have conflicted with Mr Sarri's instruction that the FFL must "suit"⁶³ the future carpark. If so, Intelara should not have adopted it: at least not without Mr Sarri's fresh direction to do so.

[168] There are other impediments to CCM's success.

Testimony

[169] The only evidence of a civil engineer concerning whether Intelara should have recognised that regional flooding might be a problem emerged in Mr Lethlean's cross-examination.

[170] Taxed with the suggestion that, before fixing the FFL, an engineer would have obtained information concerning whether a 1-in-100 year regional flood event might affect the MPC site, Mr Lethlean did not agree with it, mainly because the architect had located the MPC and Intelara's retainer involved the "tiniest bit of scope possible" for "civil".

[171] Two hydrologists commented on what was to be expected in the design phase.

⁶⁰ See Plaintiff's Closing Submissions (Exhibit 31), para 113.

⁶¹ ARI 100 and Q100 are synonymous for present purposes.

⁶² CCM did not try to show that the FFL for which it contends was consistent with Mr Sarri's instruction.

⁶³ The location of the future carpark had an ERL (or ground level) of 345.75m AHD, which makes it look as though someone set the MPC level by reference to the ground level of the future carpark to make the elevation between the two as small as possible to avoid the need for ramps and handrails.

- [172] Mr Gibson would have expected a civil engineer to talk to the client about the intended uses of the building and to seek out flood level information from a local council before setting the FFL.
- [173] Mr Gibson’s evidence, however, was not directed to Intelara’s situation: engaged for “minor” civil, presented with an MPC sited on PSC’s master plan, with no hint of a regional flooding risk from PSC or anyone else, and limited by Mr Sarri’s instruction to fix the FFL to suit the future carpark.
- [174] Evidence of Mr Collins was more to the point.
- [175] Mr Collins testified that a flooding risk is normally dealt with by the principal consultant – in this instance, PSC – not a secondary consultant like Intelara.
- [176] Asked whether it was reasonable for Intelara not to inquire into a flood risk before fixing the FFL, while accepting that others⁶⁴ were probably more qualified than an hydrologist to say what a civil engineer ought to have done, Mr Collins answered: “I don’t think it was in their scope. I really don’t”; and:

“If his scope was tightly bound to just some basic structural engineering and ancillary works and hydraulic works, I don’t really think it is his job to go looking for flood levels...”

Mr Collins’s evidence about what was to have been expected in Intelara’s circumstances is to be preferred to the more general views of Mr Gibson. His perspective accords with the limited scope of Intelara’s retainer⁶⁵, Mr Sarri’s future carpark constraint and other surrounding circumstances,⁶⁶ including that Intelara had no reason to suspect a risk of regional floodwater incursion if the FFL specified suited future carpark levels.

No Negligence

- [177] CCM has not established that an engineer in Intelara’s position should have expended time and effort in investigating the possibility of a regional flooding risk before fixing the FFL⁶⁷.
- [178] Neither Mr Gibson’s report nor any other evidence proves a departure from the standard of care to have been expected of an engineer in Intelara’s position.

Causation problems

⁶⁴ Mr Collins was referring to a civil engineer.

⁶⁵ The terms of the retainer matter to duty of care issues in tort whether (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, 402-403) or not (*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, [28]) CCM contracted with Intelara. As it happens, through its agent for the purpose, Mr Sarri, CCM, not PSC, retained Intelara.

⁶⁶ The “Flood Studies” exclusion (see para 18) is not germane. “Flood Studies”, Mr Lethlean accepts, connotes a fairly significant undertaking with computer modelling such as the 2007 Myall Creek Flood Study.

⁶⁷ cf *Minkin v Landsberg* [2016] 1 WLR 1489, 1498.

[179] Difficulties beset the notion that Intelara's omission to investigate regional flooding caused CCM loss: in particular, it is not self-evident that CCM, if appropriately advised, would have decided upon an ARI 100 compliant FFL, with or without freeboard.

Predictions

[180] What might have happened if Intelara had investigated a regional flooding issue risk in the design phase?

[181] Intelara would have obtained the 2007 Myall Creek Study from the local authority and interpreted it as revealing a risk of incursion in a major, rare flood event.

[182] As Mr Collins would have expected of an engineer, Intelara would have alerted Mr Sarri to the problem.

[183] What would Mr Sarri have done?

[184] The incompatibility between Mr Sarri's instruction to suit the future carpark and an FFL based on an ARI 100 standard probably would have persuaded him to propose to Mr Lennox that advice be sought from an hydrologist.

[185] What would Mr Lennox have done?

[186] When asked to approve a flood report, Mr Lennox had declined to do so. But if money to engage an hydrologist could have been found⁶⁸, presumably Mr Lennox would have been prevailed upon to engage an hydrologist.

[187] What might the hydrologist have said?

[188] Mr Collins's evidence reveals that the hydrologist would likely have advised⁶⁹ CCM that:

- the ARI 100 standard was in the range 346.00 – 346.05;
- Intelara's 345.90 FFL met an ARI 50 standard;
- the risk of flooding could not be eliminated by adopting the ARI 100 standard;
- with an FFL set at the 100 year standard, there was about a 40% chance of floodwater incursion within an anticipated 50 year economic life;
- if constructed on a slab designed to withstand a 1-in-50 year event, there was about a 64% chance that the building would flood during 50 years.

⁶⁸ None of this was explored. There is no evidence about the cost of engaging an hydrologist or whether there was enough money in the budget to do that.

⁶⁹ Using the information available by March 2010.

- [189] What would CCM have done?
- [190] There had not been a major flood in the area since 1981, and Dalby had experienced drought conditions for years. The risk which eventuated when the MPC flooded would not have loomed large – in the minds of Mr Lyndon, Mr Lennox and Mr Sarri at any rate.⁷⁰
- [191] There is another, slight indication that CCM might have decided against an FFL of 346.00 or higher, plus freeboard: Mr Lennox’s 18 March email⁷¹ shows that he was aware of, and not averse to, some risk of incursion.
- [192] Budgetary considerations, however, would, it seems, probably have been decisive.
- [193] CCM presumably would have posed for itself a question along these lines: given the uses envisaged for the MPC and the diminished amenity that floodwater incursion would mean, is the additional expense of a higher slab warranted?
- [194] The cost of raising the slab to 346.26 AHD would have been about \$40,000. To reduce the flooding risk by raising the slab, CCM would have looked to save \$40,000 elsewhere. There is, however, no evidence about how, if at all, that might have been achieved. In view of the deletions from the works during the tender phase⁷², it is not obvious that another \$40,000 could have been found.
- [195] Then there is the additional expense that would be incurred in connection with access for the disabled to and from the future carpark. There is no evidence about the cost of placing fill on that site to raise it or of the alternative of installing ramps and handrails. Even assuming that those unquantified future costs would not be charged against the MPC budget, still the money would have to be found eventually. That prospect would have weighed against the higher FFL.
- [196] Perhaps other factors could have influenced CCM’s attitude.
- [197] The paucity of evidence concerning matters likely to have been influential makes it hard to evaluate the chances that CCM would have decided to raise the FFL to the ARI 100 compliant standard, with or without freeboard. However, as the negligence case fails for other reasons, it is not necessary to decide the causation question.

Basis of claim for compensation

- [198] The amended statement of claim recites that CCM is, and at all material times has been, “responsible for the construction, maintenance and repair of buildings for and at the” College.
- [199] The particulars of that allegation are that:

⁷⁰ Mr Wilson, if asked, would have pressed for the higher slab. But he was not the decision maker.

⁷¹ See para 106.

⁷² See para 67.

- “(a) The plaintiff relies upon the following facts, matters and circumstances in support of the allegation that the plaintiff is responsible for the construction, maintenance and repair of building for and at the Dalby Christian College (the College):
- (i) The buildings of the College are located on land described in paragraph 2A of the statement of claim (the land) owned by Christian Community Ministries Property Ltd (CCMP), and of which Dalby Christian College School Ltd (DCS) was formerly the registered lessee;
 - (ii) By resolution of the board of directors of DCS on 6 November 2009, it was resolved that from 1 January 2010 the business of the College would be conducted by the plaintiff as the new governing body, and DCS thereby granted a perpetual licence to the plaintiff to use its name in its future operation of the College and approved the transfer of its business name;
 - (iii) At a meeting of the plaintiff’s board of directors on 11 November 2009, it was resolved that the directors of the plaintiff would also become directors of CCMP;
 - (iv) CCMP presently, and at all times material to this proceeding:
 - (A) does not trade;
 - (B) has no income;
 - (C) has no expenditure; and
 - (D) has no liquid assets;
 - (v) From on or about 1 January 2010, the plaintiff has:
 - (A) relevantly traded as Dalby Christian College;
 - (B) assumed control of the finances of the College, including the payment of all staff; and
 - (C) paid the outgoings for the College, including the cost of building maintenance and repair for all buildings located on the land;
 - (vi) By a deed of novation having effect from 1 January 2010, the plaintiff and DCS relevantly agreed that the plaintiff be substituted as the approved authority with responsibility for administration of funds received from the Commonwealth Government for the construction of the Multi-Purpose Centre on the land;
 - (vii) On or about 9 August 2013, CCMP became the registered lessee of the land (then being Crown Leasehold land);
 - (viii) By a deed of licence dated 24 January 2014 (the deed of licence), CCMP granted a licence to the plaintiff to (inter alia) enter, use and occupy the land;

- (ix) By clause 4 of the deed of licence, the plaintiff agreed to pay the agreed proportion of “outgoings”, relevantly defined to include CCMP’s reasonable expenses directly attributable to the operation, maintenance or repair of the property (including the land);
- (x) By reason of the facts set forth in subparagraphs 1(a)(iii)-(v) hereof, by its agent John Lyndon, it was agreed between the plaintiff and CCMP:
 - (A) that, upon CCMP becoming the registered lessee of the land, the plaintiff would continue to operate the College in the manner set forth in subparagraph 1(a)(v) hereof, and
 - (B) that the plaintiff would pay 100% of CCMP’s outgoings;
- (xi) On 31 January 2014, CCMP became the registered owner of the land; and
- (xii) In the premises set forth in subparagraphs 1(a)(i)-(xi) hereof, from on or about 1 January 2010, it was agreed, partly in writing and partly by the course of conduct of the parties, between the plaintiff and DCS, and from on or about 9 August 2013 between the plaintiff and CCMP, that in consideration for the transfer of the business of the College to the plaintiff and licensing the plaintiff to conduct its business on the land, the plaintiff would be legally obliged and responsible for the construction, maintenance and repair of buildings at the College.”

[200] CCM’s claim to have suffered loss through Intelara’s alleged negligence and s.52 contraventions is founded on the notion that CCM is contractually obliged⁷³ to rectify the MPC. As CCM’s case was litigated⁷⁴, the fundamental question is whether it contracted with DCS⁷⁵ to do so.

Contract with DCS?

[201] CCM was incorporated in 2003. Before 1 January 2010, it functioned, Mr Lyndon said, as a “service organisation” for a few schools, including the College, providing financial, employment and payroll services.

[202] After the Global Financial Crisis, the several entities which operated the schools experienced funding difficulties. The reluctance of banks to lend was addressed by arrangements under which CCM would operate the schools.

⁷³ It is not suggested that CCM falls to be compensated because it has some other special relationship with DCS.

⁷⁴ See, for example, CCM’s Closing Submissions, Exhibit 31, paras 126-127.

⁷⁵ CCM does plead that it sustained loss by assuming a contractual liability to CCMP to rectify the MPC. If CCM did assume such a liability (which looks unlikely), that cannot have happened before August 2013. By then, CCM had a full appreciation of the pertinent issues concerning the MPC, including Intelara’s role in specifying the FFL. If CCM chose to contract with CCMP to rectify the MPC, Intelara’s conduct did not occasion CCM any resulting loss. In that event, CCM will have exercised a free, appropriately informed, choice to incur that obligation, which would mean that its own – not Intelara’s – conduct will have caused the loss.

- [203] In November 2009, DCS's Board of Directors resolved: from 1 January 2010, the College "will be conducted by" CCM "as the new governing body"; and to grant CCM a perpetual licence to use the names Dalby Christian College and Dalby Christian School in its operation of the College.
- [204] That month, CCM's Board discussed the restructure. The minutes of that meeting record that: CCM had been approved as the reporting authority for the Non-State Schools Accreditation Board; financial documentation and large financial issues would be handled centrally; staff at the schools would be employed by CCM; and CCM's directors would become directors of Christian Community Ministries Property Ltd ("CCMP"), which was to be incorporated as an associated property holding entity.⁷⁶
- [205] Before 1 January 2010, performing its service organisation role, CCM paid invoices relating to maintenance and repair of College buildings. From that time, CCM has operated the College, paying all College outgoings.
- [206] From 1 January 2010, DCS had but one function in relation to the College: to remain registered as lessee of the College land pending the transfer to CCMP⁷⁷ of its leasehold interests.
- [207] No form of contract was created to record the arrangements under which CCM replaced DCS as College operator. And there was no oral assurance to DCS that CCM would do any act or assume any liability in connection with the College.⁷⁸
- [208] In short, there was no express promise by CCM to DCS concerning the College.
- [209] No relevant commitment is to be implied as necessary to give business efficacy to the restructure or from the conduct of CCM and DCS.
- [210] CCM would protect its own interests by maintaining the buildings properly. DCS lost its income from student fees when CCM started to operate the College. So it must have been anticipated that CCM would continue to pay for the upkeep of College buildings. That DCS and CCM will have shared such an expectation does not mean that CCM should be taken to have made DCS a promise, apparently intended to be legally enforceable, to maintain or repair the buildings.
- [211] DCS had no need to extract a binding promise from CCM to protect its interests, especially as their common expectation was that DCS would soon be replaced by CCMP as the registered lessee.
- [212] CCM's assumption of practical responsibility for the buildings does not justify an inference of a contractual promise to DCS concerning them.⁷⁹ Rather, it was in CCM's discretion to decide how College buildings would be cared for.

⁷⁶ CCMP was incorporated in December 2009.

⁷⁷ In August 2013, CCMP became the registered lessee of the land.

⁷⁸ CCM was in control of the situation and some directors were common to CCM and DCS.

⁷⁹ This conclusion makes it unnecessary to undertake the challenging task of working out what the terms of the promise may have been.

- [213] The evidence concerning relations between CCM and DCS does not establish that those organisations concluded an agreement by which CCM was “legally obliged” to construct, maintain or repair College buildings.

Disposition

The Claim fails.⁸⁰

⁸⁰ Other issues were agitated. It is not necessary to determine them.