SUPREME COURT OF QUEENSLAND

CITATION:	*Compass Marinas Australia Pty Ltd v The State of Queensland; The State of Queensland v Compass Marinas Australia Pty Ltd & Anor* [2020] QSC 375
PARTIES:	**In Proceeding Number 7884 of 2017** **COMPASS MARINAS AUSTRALIA PTY LTD** ACN 127 274 882 (plaintiff) **v** **THE STATE OF QUEENSLAND** (defendant) **In Proceeding Number 13008 of 2017** **THE STATE OF QUEENSLAND** (plaintiff) **v** **COMPASS MARINAS AUSTRALIA PTY LTD** ACN 127 274 882 (first defendant) **PETER VICTOR FRANCIS HARBURG** (second defendant)
FILE NO/S:	7884/17 and 13008/17
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 December 2020
DELIVERED AT:	Brisbane
HEARING DATES:	6 October 2020 to 9 October 2020; 12 October 2020. Final written submissions received 14 December 2020.
JUDGE:	Dalton J
ORDERS:	**1. Judgment for the defendant against the plaintiff in proceeding 7884 of 2017.** **2. Judgment for the plaintiff against the first and second defendants in the sum of $9,486,204.64 in proceeding 13008 of 2017**
CATCHWORDS:	TORTS – MISCELLANEOUS TORTS – DECEIT – where

the proceedings arise out of a lease and sub-lease granted to Compass Marinas by Port of Brisbane Corporation – where Compass claims in deceit – where a letter to Compass from Port of Brisbane Corporation included the words, "I can assure you that it is a commercial rental and that our policy is to have all lessees in South East Queensland Boat Harbours charged a similar rental to each other" – whether a reasonable representee would have understood the letter as representing that the rents Compass was to pay under the lease and sub-lease were similar to those paid by other boat harbour tenants – whether the representation was false – whether the representation was made fraudulently – what was the subjective state of mind of the representor at the time the representation was made – when false statement made carelessly but not dishonestly or with conscious or reckless indifference to the truth – whether it was intended that the representation be acted upon – whether the fraud case was sufficiently put to the representor

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – where the proceedings arise out of a lease and sub-lease granted to Compass Marinas by Port of Brisbane Corporation — where Compass brings a claim under s 52 of the Trade Practices Act 1974 (Cth) – where a letter to Compass from Port of Brisbane Corporation included the words, "I can assure you that it is a commercial rental and that our policy is to have all lessees in South East Queensland Boat Harbours charged a similar rental to each other" – whether a reasonable representee would have understood the letter as representing that the rents Compass was to pay under the lease and sub-lease were similar to those paid by other boat harbour tenants – whether the representation was false – whether the representation was relied upon

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – FRAUD AND DECEIT – where a claim in deceit was brought outside the six years limited by s 10 of the Limitation of Actions Act 1974 (Qld) – whether Compass discovered all elements of the cause of action (as opposed to particulars of loss) before the expiry of the limitation period within the meaning of s 38(1)(a) of the Limitations of Actions Act – whether the State fraudulently concealed Compass's right of action within the meaning of s 38(1)(b) of the Limitation of Actions Act

LIMITATION OF ACTIONS – GENERAL MATTERS – where Compass had six years to bring a claim under the Trade Practices Act 1974 (Cth) – when loss or damage

suffered

ESTOPPEL – ESTOPPEL BY CONDUCT – ACT, OMISSION OR ASSUMPTION – REPRESENTATION GENERALLY – where the State claims in debt for unpaid rent and on a guarantee – where the defendants claim that the State is estopped from recovering rent in the amount claimed – estoppel based on representation of existing fact – distinction between common law estoppel and equitable estoppel – operation of common law estoppel – whether the representation was of a kind which could be the basis for an estoppel – whether the representation relied upon was sufficiently clear to found an estoppel – whether the State is estopped from denying any element of its cause of action – whether the representation was one capable of giving rise to an assumption or expectation as to legal rights

Limitation of Actions Act 1974 (Qld)
Trade Practices Act 1974 (Cth)

Angus v Clifford [1891] 2 Ch 449
Australasian Brokerage Ltd v Australian & New Zealand Banking Corporation Ltd (1934) 52 CLR 430
Burner v Sanctuary Homes Pty Ltd and Dimov [2018] NSWCA 294
Caringbah Investments Pty Ltd v Caringbah Business & Sports Club Ltd (in liq) [2016] NSWCA 165
Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130
Clone Pty Ltd v Players Pty Ltd (in liq) [2016] SASCFC 134
Combe v Combe [1951] 2 KB 215
Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor (2016) 260 CLR 1
Derry v Peek (1889) 14 App Cas 337
Forrest v ASIC (2012) 247 CLR 486
Ghazal v Government Insurance Office (NSW) (1992) 29 NSWLR 336
Giumelli v Giumelli (1999) 196 CLR 101
Gould v Vaggelas (1985) 157 CLR 215
Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641
Hawkins v Clayton (1988) 164 CLR 539
Heath v Regina [2016] NSWCCA 24
Henville v Walker (2001) 206 CLR 459
Jorden v Money (1854) 5 HLC 185
Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563
Law Society v Sephton [2005] QB 1013
Legione v Hateley (1983) 152 CLR 406
Magill v Magill (2006) 226 CLR 551
Menegazzo v Pricewaterhouse Coopers [2016] QSC 094

Newbon v City Mutual Life Assurance Society Ltd (1935) 52 CLR 723
Nocton v Lord Ashburton [1914] AC 932
Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV [2013] NSWCA 252
Sidhu v Van Dyke [2014] HCA 19
Silovi Pty Ltd v Barbaro (1988) 13 NSWLR 466
Smith v Chadwick (1884) 9 App Cas 187
Thompson v Palmer (1933) 49 CLR 507
Waltons Stores (Interstate) Ltd v Maher (1987-1988) 164 CLR 387
Wardley Australia Ltd v Western Australia [1992] HCA 55
Whyte v Ahrens (1884) 26 Ch D 717

Contractual Estoppel, Alexander Trukhtanov, Routledge 2018
Protecting Reliance: The Emergent Doctrine of Equitable Estoppel, Michael Spence, Hart Publishing 1999
Spencer Bower, The Law Relating to Estoppel by Representation, Piers Feltham, Daniel Hochberg and Tom Leech, 4th ed, LexisNexis 2004
The Law of Estoppel, Michael Barnes QC, Hart Publishing 2020
The Law of Waiver, Variation and Estoppel, Sean Wilken QC and Karim Ghaly, 3rd ed, Oxford University Press 2012
The Modern Law of Estoppel, Elizabeth Cooke, Oxford University Press 2000

COUNSEL:

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D Kelly QC with CA Schneider for the defendant

In Proceeding No 13008/17
D Kelly QC with CA Schneider for the plaintiff
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SOLICITORS:

In Proceeding No 7884/17
Enyo Lawyers for the plaintiff
Corrs Chambers Westgarth for the defendant

In Proceeding No 13008/17
Corrs Chambers Westgarth for the plaintiff
Enyo Lawyers for the defendants

[1] These two proceedings were heard together. They arise out of a lease and sub-lease granted to Compass by the State in November 2010. Compass seeks damages, and to be relieved of its obligations under these agreements. Its case is based on deceit; alternatively, the *Trade Practices Act 1974* (Cth), and estoppel. The State sues for rent, and on the guarantee given by Compass's director, Mr Peter Harburg.

Request for Proposals to Develop Scarborough Boat Harbour

[2] In July 2007 Port of Brisbane published a request for proposals to develop part of the Scarborough Boat Harbour. It is substantial, 58 pages, together with annexures.[1] It described:

> "**2.1 Project overview**
>
> The opportunity exists for the development of a marina and associated land-based facilities, to act as supporting commercial harbour-related infrastructure. …
>
> The [Port of Brisbane] Corporation is seeking proposals from suitably qualified proponents to enter into binding agreements with the Corporation for the lease (dry) and Sub-lease (wet) of:
>
> - Part of Lot 858 on Plan SP158152 for the construction and operation of infrastructure in support of an adjacent marina and;
> - Part of Lot 859 on Plan SP158152 for the purposes of constructing and operating a floating, fully serviced marina.
>
> The lease and Sub-lease of the land offered, is for a combined period of not more than 24 years. ..."[2]

[3] The request for proposals included the following:

> "**2.3.1 Lease**
>
> The successful proponent will be required to hold a land lease based on the Corporation's standard terms, with the rent under that lease for the first year being twenty-seven dollars ($27)/$m^2$, that being 9% of its market value.
>
> …
>
> The area of the dry lease (indicated in the draft lease) available under the Request for Proposals process is 8526m^2. The proponent may utilise all of this area or nominate a smaller proportion for development under their proposal.
>
> …
>
> **2.3.2 Sub-lease**
>
> The successful proponent will be required to hold a Sub-lease of the adjacent seabed, with the rent initially being $10.00 p/$m^2$. Rent will escalate annually in line with published inflation indices or 4%

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1 Exhibit 1, Vol 8, Tab 27.
2 Exhibit 1, Vol 8, Tab 27, p 5.

> whichever is greater and never be less than the previous year's rent."[3]

[4] The proposed dry lease and wet sub-lease were annexures to the request for proposals. The lease was in registrable form and contained on its front page: "7. Rental/Consideration: $27/m^2$ – ie, 9% of Land Value - $300/m2."[4] The sub-lease was also in registrable form and contained on its first page: "Rental/Consideration: $10.00/m^2$ per annum, subject to review in accordance with the Schedule".[5] The sub-lease defined "Annual Rent" as meaning the aggregate of the Base Rent, the Crown Mooring Levy and the Dredging Contribution for each year – cl 3.2. The Base Rent was $10m^2$. The Crown Mooring Levy was any sum to be paid to the State by the Port of Brisbane in respect of each berth. The Dredging Contribution was a dollar amount calculated per berth. The document did not stipulate figures for the Crown Mooring Levy or the Dredging Contribution.[6]

Port of Brisbane Changes to make Boat Harbours More Profitable

[5] There is some important context to (1) the Port's offering the opportunity to develop the marina in Scarborough Boat Harbour, and (2) the rents stated in the request for proposals and attached lease documents.

[6] Until mid-2010 harbours in South East Queensland were managed by Port of Brisbane Corporation. As a Government Owned Corporation it had a charter to produce a return for its shareholders. From 2006 a Mr Bill Morley was responsible for reviewing Port of Brisbane's approach to renting dry land and seabed in the boat harbours, "with a view to [Port of Brisbane] receiving a commercial and more acceptable rate of return from its boat harbour leases".[7]

[7] Prior to 2006, Port of Brisbane's boat harbour tenants were paying rent calculated on a percentage of site value in respect of dry land areas and a fixed fee of about $190-$200 per berth in respect of seabed areas, together with a Crown Mooring Levy and Dredging Contribution – t 3-20. Mr Morley thought this was "problematic because the rental did not have any relationship to the type, size or location of the marina, the adjacent dry land or the underlying wet land, or the amounts that boat harbour tenants were realising from letting or selling marina berths to third parties". He swore that, "This had led to the situation where boat harbour tenants had been paying below-market rents to [Port of Brisbane] for an extended period, but had been able to lease out or sell marina berths to third parties at rates which had increased materially during that same period".[8] The origins of the low rental before 2006 may have been that many of the tenants were clubs, or charitable organisations, and had been paying what was, in effect, a concessional rent.

[8] Mr Morley identified three ways in which the Port of Brisbane could make more money from its boat harbours. First, new leases should be set on a more commercial basis, in the sense that the Port of Brisbane should charge more rent

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3 Exhibit 1, Vol 8, Tab 27, p 6.
4 Exhibit 1, Vol 8, Tab 27, p 17.
5 Exhibit 1, Vol 8, Tab 27, p 74.
6 Exhibit 1, Vol 8, Tab 27, p 81.
7 Affidavit William John Morley, Exhibit 1, Vol 5, Tab 21, paragraph 26.
8 Exhibit 1, Vol 5, Tab 21, paragraphs 23 and 28.

than it had in the past. Second, when it was possible, having regard to the terms of existing leases, Port of Brisbane should increase existing rents. Third, there were boat harbour areas which were vacant, but could be leased by Port of Brisbane. One these opportunities was to reconfigure access to the Manly Boat Harbour (create a single channel) so as to free up more space. Further, Mr Morley identified space in the Scarborough Boat Harbour alongside an existing marina which could be developed and let.

[9] Mr Morley obtained a report from Ernst & Young Accountants. He regarded the purpose, or one of the purposes, of obtaining the Ernst & Young report as providing guidance as to what would be a "fair commercial return on the marina dry and wet land areas at boat harbours" – t 3-23. Ernst & Young explained their brief:

> "[Port of Brisbane] wishes to explore alternative avenues based on market related evidence in order to provide an improved financial return to [Port of Brisbane]. …"[9]

[10] Ernst & Young recorded:

> "Traditionally the lease rents were reviewed on the basis of a percentage (3%) of site value which was a nominal rent and did not reflect the cost of establishing and providing the site (ie reclaimed land or dredged sea beds). With the opportunity to revise the rental basis for future lease agreements, [Port of Brisbane] wishes to explore alternative avenues based on market related evidence in order to provide an improved financial return to [Port of Brisbane].
> …
>
> The purpose of this report is to identify a number of land rental alternatives and to discuss the rationale, strengths and weaknesses associated with each of the alternatives, allowing for the Port of Brisbane Corporation to consider possible implementation of an alternative based on its strategic direction and imperatives. …"[10]

[11] One of the alternatives which Ernst & Young put forward was for Port of Brisbane to adopt an industrial land value over dry lands to be leased, and charge a rent of between eight to ten per cent of that land value. So far as wet lands were concerned, an alternative proposed by Ernst & Young was to charge a rate of eight to ten per cent of "50% of the adjoining dry land value".

[12] Having received the Ernst & Young report, Mr Morley finalised a Strategic Plan for the boat harbours. He noted that, "The Port of Brisbane Corporation as landholder controls the wet/dry lease areas and seeks to maximise returns in line with our corporate charter, whilst providing high quality public access areas".[11]

[13] In the Strategic Plan, Mr Morley recommended that dry land should be valued as industrial land, and wet leased areas should be valued at half dry land value. Rent ought to be charged at eight to nine per cent of land value.[12] That is, his

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9 Exhibit 1, Vol 5, Tab 21, p 13 of the exhibit bundle.
10 Exhibit 1, Vol 5, Tab 21, p 14 of the exhibit bundle.
11 Exhibit 1, Vol 5, Tab 21, p 57 of the exhibit bundle.
12 Exhibit 1, Vol 5, Tab 21, p 58 of the exhibit bundle.

recommendations were very much in accordance with two of the alternatives suggested by Ernst & Young. They were a change from the previous practice in that (1) a rate per-square-metre was charged for wet land, rather than a rate per-berth, and (2) rents for both wet and dry land were calculated to give the Port a commercial, rather than concessional, return. In the Strategic Plan Mr Morley identified additional areas of harbour as opportunities for development. His proposal for Scarborough Harbour led to the Port publishing the request for proposals in July 2007.[13]

[14] After Mr Morley finalised his Strategic Plan he presented it to an executive leadership committee within Port of Brisbane. This committee approved the plan as a basis for him to proceed.[14]

[15] It can be seen that these new views as to how rent ought to be calculated, and the rate at which it ought to be charged, were implemented in the request for proposals to develop the Scarborough Boat Harbour.[15]

[16] The Strategic Plan was implemented more widely. Mr Morley pursued the single channel reconfiguration of Manly Harbour, and by 2 October 2006 had sent the Royal Queensland Yacht Squadron (RQYS) the terms on which he was prepared to lease the resultant new area of Manly Harbour. They were a dollar-per-square-metre rate calculated at nine per cent of half of the dry land value.[16] He offered another substantial area of the Manly Boat Harbour to the Moreton Bay Trailer Boat Club on the same financial terms as RQYS.[17]

[17] These offers by Mr Morley were subject to Board approval, and on 20 July 2007 the Board of the Port of Brisbane resolved to grant leases of these new areas in Manly Harbour. In both cases the rent was lower than that initially offered by Mr Morley, and in both cases Mr Morley put a business case to the Board supporting entry into the lease at that lower rent. Eight per cent, rather than nine per cent, was used to calculate the rent[18] and each tenant received a 50 per cent discount on rent in the first year and a 25 per cent discount in the second year.[19]

[18] In late 2006 Mr Morley began implementing his plan to review existing leases with a view to charging more rent. He took legal advice and where possible sought "increased, more commercial rents, based upon increased site valuations provided by third party valuers …".[20] He aimed to, "achieve rents which were consistent

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13 Exhibit 1, Vol 5, Tab 21, pp 61-62 of the exhibit bundle.

14 Exhibit 1, Vol 5, Tab 21, paragraph 42.

15 The rate for the wet sub-lease was not 50 per cent of the market value of the adjoining dry land; it was around 41 per cent. This was because the wet sub-lease area was "much larger in comparison to the proposed dry lease area" – Exhibit 1, Vol 5, Tab 21, paragraph 82.

16 Exhibit 1, Vol 5, Tab 21, p 123 of the exhibit bundle.

17 Exhibit 1, Vol 5, Tab 21, p 125 of the exhibit bundle.

18 Exhibit 1, Vol 5, Tab 21, paragraph 66.

19 Exhibit 1, Vol 5, Tab 21, pp 138-139 of the exhibit bundle. Compass made submissions that the leases actually entered into with RQYS and Moreton Bay Trailer Boat Club were at lower rents still – see paragraph 137 of Compass's written submissions. However, the detail of this was never put to Mr Morley, even though it was inconsistent with what he had said in his affidavit. I am not prepared to act on this evidence, firstly because the failure to put it was unfair in accordance with *Browne v Dunn,* but also because in the absence of someone explaining the financial detail assumed in Compass's calculations, I am not able to understand the evidence and be persuaded by it.

20 Exhibit 1, Vol 5, Tab 21, paragraph 95.

with, or as close as possible to (having regard to the confines of the existing leases), [Port of Brisbane's] commercial approach to determining rents under new leases as per the recommendations set out in [the] 2006 strategic plan …".[21]

[19] Existing tenants were not happy with this new approach. Mr Morley produced a document in 2009 entitled "Wet Land Lease Charges Review". It recommended that Port of Brisbane should start charging existing wet lease tenants on the basis of 20 per cent of the rents they achieved per marina berth, rather than on a dollar-per-square-metre rate. This basis for rental calculation was another of the methodologies discussed in the Ernst & Young report – t 3-44. The Review said that this basis for charging rent would produce "much the same outcome" as charging eight per cent of half the dry land value.[22] Mr Morley thought that charging 20 per cent of marina berth rents was a simpler concept, and also fairer to the tenants "where the size or shape of the lease created inefficiencies which limited the number of berths which could be constructed".[23] There was no agreement entered into with a lessee based on this new methodology – t 3-46 line 23 and t 3-47 line 17.

[20] Between February and August 2009, Mr Morley proposed rent reviews to Wynnum Manly Yacht Club and the existing Scarborough Harbour Marina at a dollar-per-square-metre rate, calculated at eight per cent of half dry land value, with an alternative of 20 per cent of berth rental income. It is clear that this represented increased rents in both cases.[24] Mr Morley also made an offer to ECM Aust Pty Ltd in accordance with the approach outlined in his Strategic Plan. These negotiations did not result in leases.

[21] Mr Morley's evidence was that by 2016 all existing leases would have been reviewed so as to increase the rent.[25] However, the process was never completed because in mid-2010 the State Government, by legislation,[26] transferred all Port of Brisbane's assets and obligations to itself, under the stewardship of the Department of Transport and Main Roads.

Agreement to Lease and Cancellation

[22] Compass lodged a proposal to develop the new area of Scarborough Boat Harbour as a marina. By December 2007 Compass was the preferred proponent. An Agreement to Lease dated 21 May 2008 was executed between Port of Brisbane and Compass. Mr Peter Harburg was a guarantor to this agreement. He was, and is, the sole director and shareholder of Compass.

[23] By the Agreement to Lease, Port of Brisbane agreed to lease the dry land, and sub-lease the wet land, to Compass, subject to the Tenant's Approvals being obtained. The Tenant's Approvals were defined as all government approvals necessary to enable the Tenant's Works. Tenant's Works was the defined term for the development which Compass had proposed for the marina. On the dry land were an office, a market area, restaurants, park areas, etc. On the wet land were 128

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21 Exhibit 1, Vol 5, Tab 21, paragraph 93.
22 Exhibit 1, Vol 5, Tab 21, paragraph 109.
23 Exhibit 1, Vol 5, Tab 21, paragraph 110.
24 Exhibit 1, Vol 5, Tab 21, pp 2251 ff.
25 Exhibit 1, Vol 5, Tab 21, paragraph 111.
26 *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld).

berths. The Agreement to Lease obliged Compass to apply for the Tenant's Approvals. Once the Tenant's Approvals were obtained, the agreement obliged Compass to carry out the Tenant's Works. When the first stage of those works reached practical completion, the lease and sub-lease were to commence. The tenant was then obliged to construct the remainder of the marina development. If the tenant did not obtain all Tenant's Approvals by a particular date, cl 2.3 of the Agreement to Lease provided that "this Agreement will be cancelled".

[24] The Agreement to Lease annexed the proposed dry lease in registrable form. It showed the rent of $27m^2$, just as the proposed lease attached to the request for proposals had done.[27] Likewise, the proposed wet sub-lease annexed to the Agreement to Lease specified the rent at $10m^2$. It contained the same provisions as to Base Rent, Crown Mooring Levy, and Dredging Contribution as the draft which was annexed to the request for proposals.

[25] Slightly more than a year after having signed the Agreement to Lease, Compass asked to be relieved of its obligations to develop two restaurants on the dry land adjoining the marina, and instead sought permission to develop a dry stacking facility. The Port was willing to discuss other uses for the dry land, but it refused to countenance a dry stacking facility. Ms Ryan's evidence about Compass's proposal to build a dry stacking facility was, "Compass's dry stack proposal presented difficulties for [Port of Brisbane] because dry stacks were not envisaged for the site in the [Port's] Land Use Plan … nor was dry stacking referred to in the [request for proposals] documents. Given these matters, I did not believe it was possible or appropriate for [Port of Brisbane] to allow Compass to construct a dry stack facility."[28]

[26] On the day before Tenant's Approvals were due under the Agreement to Lease (19 August 2009) Compass wrote to the Port saying:

> "The commercial rental market in the Redcliffe area is depressed. [The buildings which were to house the restaurants] are not commercially viable at this time. Compass has explored a number of possible alternative uses without success.
>
> I request that [those buildings] not be constructed and that the undeveloped area [left vacant by the non-construction] have a rental relief. The construction of [those buildings] can be revisited in 3 years."[29]

[27] Port of Brisbane responded saying, "Given the Approvals Date expires tomorrow, I suggest that the parties mutually agree to extend the Approvals Date to 21 September 2009, time to remain of the essence, so that your request may be considered".[30]

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27 Exhibit 1, Vol 8, Tab 30, pp 18 and 19 of 43.
28 Exhibit 1, Vol 3, Tab 20, paragraph 61(b).
29 Exhibit 1, Vol 4, p 1608.
30 Exhibit 1, Vol 4, p 1613.

[28] On 24 August 2009 lawyers on behalf of Compass wrote to the Port's lawyers saying that Compass had not received all of the Tenant's Approvals, "accordingly the Agreement to Lease is cancelled pursuant to the provisions of Clause 2.3".[31]

[29] The letter continues, "on a without prejudice basis", to say that Compass Marinas is "certainly interested in continuing discussions and negotiations with your client in relation to a proposed marina". It is said that after the Agreement to Lease was signed, Compass's geotechnical investigations showed that the dry land adjoining the proposed marina was "unsuitable for conventional building costs methods" and that as a result "the cost of building to the original concept makes it financially unviable". The letter continues, complaining and cajoling. It concludes by asking whether or not Port of Brisbane would be interested in negotiating with Compass on the basis that Compass would build shore-based facilities, including one office building, dry stack facilities and open spaces.

[30] On 3 September 2009 the Port of Brisbane wrote saying it would not consent to a dry stack facility. The Port had previously advised it was prepared to consider other alternate uses, but Compass had cancelled the Agreement to Lease, rather than extend it. The Port was not prepared to undertake further negotiation.[32]

[31] Undaunted, solicitors for Compass wrote to their counterparts on 11 September 2009:

> "Our client wishes to proceed immediately with the development of the Marina and associated facilities … but wishes to amend the proposed development to exclude the items …
>
> Our client wishes to then negotiate with your client to replace those deleted facilities with other Marina related facilities …
>
> We are also attaching a Plan showing the hatched area proposed to be leased by our client until other agreed facilities are built. Our client would then only expect to pay rental in respect of the hatched area until the new agreed facilities are built.
>
> We are instructed that if agreement can be reached between our respective clients, then our client would be able to finalise all approvals for the Marina within 30 days and then commence construction within 30 days. …"[33]

September Letter

[32] On 15 September 2009 the head of the Boat Harbours Division of Port of Brisbane, Ms Jenny Ryan, signed the letter which is central to Compass's case (the September Letter). It is addressed to Mr Zaphir, Compass's manager, and reads:

> "Dear Steve
>
> I refer to our meeting of 11th and confirm the points raised by you at that meeting.

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31 Exhibit 1, Vol 4, p 1622.
32 Exhibit 1, Vol 4, p 1624.
33 Exhibit 1, Vol 4, p 1625.

> Whilst the rental to be charged under the lease is listed in the Scarborough Boat Harbour Request for Proposal in clause 2-3.1 is not negotiable, I can assure you that it is a commercial rental and that our policy is to have all lessees in South East Queensland Boat Harbours charged a similar rental to each other, so that you will be able to lease out berths at the same rentals as others in the Boat Harbour.
>
> Because of our 'Commercial in Confidence' policy we cannot give you a list of rentals being charged to other lessees.
>
> We agree that the usage of the balance area of the dry lease will be agreed later and whilst we have advised that we will not agree to Dry Stacking we would be agreeable to many other usages including Tourism, Tourist Accommodation and Entertainment.
>
> …
>
> I trust this addresses your concerns and that we can proceed to finalise the agreement."[34]

Deed of Variation, Lease and Sub-Lease

[33] On 18 November 2009 Compass and Port of Brisbane signed a document entitled Deed of Variation. This reinstated the Agreement to Lease. There were changes to decrease the amount of work Compass was obliged to carry out as part of the dry land development. There were no changes to the provisions about rents.

[34] Stage One of the Tennant's Works was completed and the dry lease and the wet sub-lease were entered into on 16 November 2010. Almost immediately Compass began a contentious correspondence with the Port as to several of the terms of the lease and sub-lease, including the rent. This continued until this litigation was commenced in 2017.

[35] On 9 September 2011 Compass paid the first year's rent due under the dry lease and the wet sub-lease. It was the only rent Compass paid. Compass refused to build stage two of the marina: it never constructed more than 74 of the 140 required berths at the marina, and never occupied or developed more than 2,332m^2 of the 8,000m^2 dry land area.[35]

[36] In March 2020, at a mediation, the parties agreed to terminate the lease and the sub-lease from that time forward.

Litigation

[37] Compass caused a claim and statement of claim to issue in this Court on 2 August 2017, proceeding 7884 of 2017. The statement of claim pleaded breach of contract, negligent misrepresentation, and damages pursuant to s 52 of the *Trade Practices Act*. The State took a limitations defence.

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34 Exhibit 1, Vol 2, Tab 12, p 8 of the exhibit bundle.

35 Exhibit 1, Vol 2, Tab 19, p 6.

[38] The current statement of claim is very different. Although it does not name the cause of action, the primary claim is for deceit. There is a claim in the alternative under the *Trade Practices Act.* Both claims are based on the September Letter. It is said to falsely represent that the rents Compass was to pay under the lease and sub-lease were similar to those paid by other boat harbour tenants. The State persists with its limitation defence.

[39] Later in 2017 the State commenced a separate proceeding claiming rent from 1 January 2012 onwards, proceeding 13008 of 2017. No limitation point was taken by Compass. It relied upon the same facts as are pleaded in 7884 of 2017 to claim a set off. Alternatively, it claimed that the State was estopped from recovering rent in the amount claimed. The factual basis for the estoppel was an expectation said to be created by the same representation Compass claimed was fraudulent or in breach of the *Trade Practices Act*.

[40] That Compass's claims rest on deceit, and what must be common law estoppel by representation, is unusual in an era where the rights of those claiming to be misled by representation are routinely determined either under the *Trade Practices Act* or in proceedings for negligent misrepresentation. Compass attempts to overcome the difficulty that it did not commence litigation for more than six years after it suffered loss. What seems to have been a conventional enough s 52 claim was lost by effluxion of time as Compass conducted the contentious correspondence I have referred to above. Of this extraordinary behaviour Mr Harburg swore:

> "54. Throughout the period 2009 to 2017, I continued to believe that whatever error had occurred on the Government's part to result in the overcharging of rent would be resolved because Compass was dealing with government and we should be able to rely on government to be trustworthy, even if sometimes it might take time to sort issues out. Government had also told me on several occasions that any discrepancy would be rectified and also that they would provide documents showing the average rental amount and associated fees for wet leases and I believed them on each occasion.
>
> 55. At a meeting held in May 2017, which was for the first time attended by external solicitors for the State of Queensland, it became clear to me that [the Department of Transport] would not continue to negotiate and Compass would be forced to commence this litigation …
>
> 57. It was incredibly disappointing to me that, after years of engagement, and representations, followed by promises to investigate and remedy the situation and revert to Compass, nothing would occur. As a result, I resolved in 2017 to commence the proceeding. I didn't do so earlier as there had been continuing promises over the years to rectify the rent discrepancy and I believed that the State of Queensland could be trusted to do so. Even at that point, I did not have concrete evidence about the discrepancy in the rental that Compass was

being charged and that charged to other marina operators in South East Queensland."[36]

[41] It is perfectly clear from correspondence exhibited to Mr Harburg's affidavit[37] that he was not simply attempting to sort out a mistake over rent with the Department in the years between 2009 and 2017. Most letters written by Mr Harburg agitated for a new commencement date for the leases. He put many and varied proposals forward, including his being granted a 40 year lease, and that he be allowed to purchase freehold land at Scarborough Harbour for $3 million to develop as a ferry harbour. While Compass did not attempt to rescind or terminate the lease or sub-lease, the long and fitful correspondence is marked by an unstated assumption on the part of Compass that it need not consider itself bound by the Agreement to Lease, or the lease and sub-lease.

Structure of Judgment

[42] The structure of this judgment is to deal with the elements of the deceit claim and the Trade Practices claim first, and then to deal with the State's claim for rent. In short summary, my findings are that there is no evidence of fraud on behalf of the State, so that the deceit claim must fail. Independently, the deceit claim is out of time. So is the Trade Practices claim. Having regard to these findings, the only issue in the State's rent claim is estoppel. There are three reasons why that claim fails. The representation Compass relies upon is not sufficiently clear to found an estoppel. The State is not estopped from denying any element of its cause of action. There was no assumption or expectation by Compass that its legal rights would be any different from those which the State seeks to enforce.

Deceit and Trade Practices Claims

The Representation

[43] So far as the deceit claim and the Trade Practices claim are concerned, the question of whether any representation was made to Compass, and if so, what it was, is to be determined objectively by reference to what a reasonable person in the position of the representee would have understood.[38]

[44] As to the second paragraph of the September Letter, Compass pleads:

> "9. On its proper interpretation, the statement represented that, as at 15 September 2009:
>
> (a) the annual rent (commencing at $275,100) and other payments (dredging contribution of $47,180 and Crown Mooring fee of $42,686) totalling $364,966 to be charged under the wet lease; and
>
> (b) the equivalent 'per berth' rate (i.e. $364,966 divided by the 74 berths constructed) of $4,932;

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36 There is no paragraph 56. Exhibit 1, Vol 2, Tab 12.
37 Exhibit 1, Vol 2, Tab 12.
38 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, pp 576-577.

(c) the equivalent 'per berth' rate (ie. $364,966 divided by the maximum of 133 berths reasonably able to be constructed in the lease area) of $2,744;

were each:

(d) commercial rentals in the sense of being substantially the same as or similar to the rentals and other payments charged by [Port of Brisbane] for similar premises and facilities;

(e) similar to other rental and other payments charged by [Port of Brisbane] in the Scarborough Boat Harbour; and

(f) similar to other rental and other payments charged by [Port of Brisbane] in South East Queensland."

[45] Compass has failed to establish nearly all the matters pleaded at paragraphs 9(a), (b) and (c). As at 15 September 2009 the only information about the quantum of rent to be paid was in the request for proposals and the terminated Agreement to Lease. There had not been agreement on a final area of wet land.[39] There were no figures for the Crown Mooring Levy or Dredging Contribution. It simply was not possible to calculate an Annual Rent. There had never been any discussion between Compass and the State as to its being charged rent on a per-berth rate. There were not 74 berths constructed and no maximum of 133 berths was known at that date.[40] There had been no agreement on the final number of berths to be included in the marina.[41]

[46] That creates a problem with Compass's pleading, for paragraphs 9(d) and following have no subject. I proceed on the basis that the subject of paragraphs 9(d) and following is the rent to be paid by Compass under the proposed wet sub-lease and the proposed dry lease. So far as the wet sub-lease is concerned, I regard this as being within the pleaded case, although radically less than it. It is not a departure from the pleaded case, or a new and different case. Submissions made by Compass at the conclusion of the trial assumed the pleading was as to rent under the proposed dry lease as well. Objection was taken to this as being beyond the pleadings. It is, at least so far as Compass's proceeding is concerned. However, I think it fair to allow Compass to depart from its pleaded case, having regard to the way this case was run. My reasons for that decision are in Annexure A to this judgment.

[47] There is no case made by Compass that representations were made as to the future. I interpret the September Letter as saying that it is the present policy of Port of Brisbane to have all lessees in South East Queensland boat harbours charged a similar rental to each other. I regard the words commencing with "so that you will" to be explanatory of that presently existing policy.

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39 Harburg at t 2-43 and Ryan at t 4-24. Ms Ryan said that the precise dimensions of the dry and wet lease areas had not been finalised. She explains that the rental in the Agreement to Lease could not be inserted into the lease documents until these areas had been determined.

40 The request for proposals limited the number of berths to 140.

41 T 4-24.

[48] The State contended that the September Letter referred only to the dry land rental. It refers to a lease, and the wet land was to be dealt with by a sub-lease. Further, it refers to paragraph 2.3.1 of the request for proposals. That paragraph deals with rent under the dry lease, not the wet sub-lease. The September Letter was written when Compass had baulked at undertaking the works it had proposed for the dry land area, and was asking for rental relief for the dry land area. That context does give some support to the idea that what is being referred to in the letter is dry lease rental.

[49] However, the explanatory statement, "so that you will be able to lease out berths at the same rentals as others in the Boat Harbour" strongly suggests that rent under the wet sub-lease was also being spoken of.

[50] Both Ms Ryan and Mr Harburg were unaware that paragraph 2.3.1 referred only to dry land.[42] I think this indicates that a reasonable representee, who was not a lawyer, would not be greatly influenced by the use of the word lease, as opposed to sub-lease, and the reference to paragraph 2.3.1.

[51] In my view a reasonable representee in the position of Compass would have understood the reference to be to rent both under the dry lease and the wet sub-lease, ie, the $27 and $10 per-square-metre rates.

[52] I cannot see that a reasonable representee reading the September Letter would understand that the words "the rental" included the Crown Mooring Levy or the Dredging Contribution. It is true that under the wet sub-lease there is a defined term "Annual Rental" which includes both these charges in addition to the $10 per-square-metre "Base Rent". However, the defined term is not used in the September Letter, and in ordinary conception and parlance, outgoings, such as the Crown Mooring Levy and separate charges for services such as the Dredging Contribution, are not comprehended by the term "rental".

[53] It is true that page 6 of the request for proposals includes a statement, "the Sub-lease includes the requirement that the proponent pays, as part of the base rent, an annual crown-mooring levy (p/berth) and dredging contribution (p/berth), …". In fact this is a mis-statement of what the sub-lease provides. There is no evidence that anyone from Compass ever read this particular sentence, let alone what they understood from it, or remembered of it a year later. There is no evidence that the mistake contained in the sentence occurred elsewhere. The request for proposals was made more than a year before the September Letter. I find that the mistake on page 6 of the request for proposals would not change the understanding of a reasonable representee in the position of Compass on reading the letter of 15 September 2009.

[54] I turn to paragraph 9(d) of the statement of claim. Paragraph 2 of the September Letter made a representation that the rent to be charged under the wet sub-lease was a "commercial rental". This term might mean different things to different people, depending on context. Against the background of the significant steps the Port of Brisbane had taken to put its harbour rentals on a more profitable basis, commercial might well have meant "bringing a profitable return on the Port's assets". Compass

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42 T 1-61, Mr Harburg and t 4-26, Ms Ryan. In explaining the reference to cl 2.3.1 Ms Ryan said that she did not draft the letter and did not check the lease documentation to see what clause was referred to when she signed the letter.

received the representation without knowing that context, and I do not think that the word would be read by a reasonable representee as meaning "bringing a profitable rate of return on an asset" without that context.

[55] Apart from the lack of context, two further things incline me to that view. The first is that the part of the September Letter which states, "it is a commercial rental", is by way of assurance in mitigation of the refusal of Port of Brisbane to negotiate on the rents. In effect the sentence says, "Whilst the rent is not negotiable, I can assure you it is commercial". That structure and language is something which was liable to reassure the reasonable representee, rather than alerting the representee to the fact that not only is the rental not negotiable, it is one set to fulfil the Port's charter of producing a good economic return on its assets. Secondly, the substance of the explanatory statement, "our policy is to have all lessees … charged a similar rental to each other, so that you will be able to lease out the berths at the same rentals as others" is likely to convey to a reasonable representee that commercial is used in the sense of being substantially similar to the rent charged to others.

[56] In cross-examination Ms Ryan spontaneously offered that the September Letter ought to have said "in the boat harbours" not "in the boat harbour" in the final part of paragraph 2 – t 4-32. There was another marina in the Scarborough Boat Harbour which would obviously have been very closely competitive with Compass, so the sentence does make sense in the terms in which it is written. However, consistently with my regarding this last part of the sentence as explanatory of what preceded it, I am of the view that it would have conveyed to a reasonable representee that, because the Port's policy was to fix rents which were substantially the same for all marinas in South East Queensland, Compass would be able to lease berths in its marina at a rate competitive with them.

[57] In conclusion, I find that a reasonable representee would have understood the statement at paragraph 2 of the September Letter as meaning that the rent of $10 per-square-metre on the wet sub-lease and $27 per-square-metre on the dry lease was a commercial rent in the sense that it was substantially the same as the rent charged by Port of Brisbane to other lessees in South East Queensland boat harbours. I shall refer to that as the Representation in the remainder of this judgment.

[58] It was argued by the State that a reasonable representee would not understand the September Letter in this way because it contained the statement, "Because of our 'Commercial in Confidence' policy we cannot give you a list of rentals being charged to the other lessees". It was said that, "This express statement cannot sensibly sit alongside the making of a representation that the amount of rent that Compass would be charged (of which Compass was aware) was substantially the same as or similar to the rents that [Port of Brisbane] was then charging to others (but which [Port of Brisbane] expressly said it could not disclose)".[43] I reject this argument. While Port of Brisbane was explaining that it could not give precise rentals charged to other lessees, it was nonetheless giving Compass reassurance that they were substantially similar to those which the Port of Brisbane proposed to charge Compass.

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43 Paragraph 80 of the State's written address.

[59] Compass submitted that there was no policy of Port of Brisbane as at 15 September 2009 to have all boat harbour lessees charged "a similar rental to each other". On the basis of the facts outlined at [5]-[21], I find that there was such a policy, in the sense of an agreed approach or strategy. In any case, I note that there is no pleading that the September Letter was false because there was no such policy.

Context of September Letter

[60] Compass's case was that the September Letter was to be interpreted in the context of discussions which occurred at the meeting of 11 September 2009.[44]

[61] On the basis of what is said in the September Letter, I accept that there was a meeting on 11 September 2009, at least between Ms Ryan and Mr Steve Zaphir on behalf of Compass.

[62] It seems Mr Harburg and Mr Zaphir fell out some time ago. Mr Zaphir was not called as a witness and I do not draw any inferences against Compass for its failure to call Mr Zaphir. However, Mr Zaphir's not giving evidence does mean that the only evidence Compass has, as to what was said on 11 September 2009, comes from Mr Harburg. I am not prepared to act on Mr Harburg's evidence as to this.

[63] The meeting of 11 September 2009 occurred a long time ago. Mr Harburg had no contemporary notes – t 1-53. Ms Ryan could not remember the meeting.[45]

[64] As to the meeting on 11 September 2009 Mr Harburg says: "To the best of my recollection, Steven Zaphir … came with me, and this meeting was at [Ms Ryan's] offices at [Port of Brisbane]."[46] In terms, what is expressed is not a distinct recollection, but is qualified. He goes on to say:

> "… My discussion with Ms Ryan was that Ms Ryan told me words to the effect that:
>
> (a) the rent that Compass would be required to pay under the leases would be adjusted when final marina plans were available, and the final number and size of berths was known;
>
> (b) Compass would pay the same or similar rental as other lessees in South East Queensland (SEQ) and that this was consistent with [Port of Brisbane's] policy to charge tenants in boat harbours in SEQ the same rental;
>
> (c) after asking for further information regarding the rental … the [Port of Brisbane] would provide written assurance that Compass would pay the same or similar rental as other lessees in South East Queensland.
>
> 16. We did not discuss the individual components that were to make up the rental amount, such as the dredging contribution or other levies. ...[47]

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44 Paragraph 6(g)(iii) of the Reply.
45 Exhibit 1, Vol 3, Tab 20, paragraph 74.
46 Exhibit 1, Vol 2, Tab 12, paragraph 15.
47 The second sentence in paragraph 16 was objected to and I uphold the objection.

…

18. Although I do not recall the exact words I used, I asked Ms Ryan to provide further information as to the rental amount paid by other lessees to ensure that Compass was in fact paying the same or similar wet rental to other marina operators, in particular in Scarborough Harbour. I recall saying words to the effect that 'we need this in writing because one day you might not be here, and I might be hit by a bus and others will need to carry the tenancy forward understanding the arrangement'. Ms Ryan responded with words to the effect that that information was confidential and that she could not advise me of the information. …

19. Ms Ryan also told me at that meeting that she would give me an assurance in writing that Compass would be charged the same or similar rental as other lessees …

20. On or about 15 September 2009, I received a letter from Ms Ryan (the Letter of Comfort) addressed to Mr Zaphir. This was the written assurance that Ms Ryan had promised to send to me."

[65] There is something jarring about the difference between the first line of the September Letter, which is deliberately addressed to Mr Zaphir, and this narrative in which it was Mr Harburg who met with Ms Ryan and, to the best of Mr Harburg's recollection, Steven Zaphir who came with him; Mr Harburg's asking questions and asking for assurances, and Mr Harburg's receiving the letter from Ms Ryan (although addressed to Mr Zaphir) and thus being provided with the assurance Ms Ryan had promised to send to Mr Harburg. In light of all my other concerns about Mr Harburg's reliability (below), I am not actually persuaded he was even at the meeting on 11 September 2009.[48] Even if he was, I am not prepared to rely upon what he says he remembers of it. For the reasons given below, I do not regard his evidence as reliable.

Falsity

[66] Paragraph 10 of the statement of claim is as follows:

"10. The statement was false in that:

(a) the rentals to be charged under the wet lease were, as at 15 September 2009:

(i) not commercial rentals in the sense of being substantially the same as other similar rentals charged by [Port of Brisbane];

(ii) not similar to other rentals charged by [Port of Brisbane] in South East Queensland;

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48 This was not put to Mr Harburg, and the State did not seek to make a case that Mr Harburg was not at the meeting. However, it was Compass which bore the onus of proof in relation to this issue and I have explained my reasons for thinking that it was not discharged.

(iii) not similar to other rentals charged by [Port of Brisbane] in the Scarborough Boat Harbour; and

(iv) substantially more than the rentals charged by [Port of Brisbane] for similar premises and facilities in the Scarborough Boat Harbour and in South East Queensland; and

(b) more particularly, as at 15 September 2009:

(i) [Port of Brisbane] charged the operators of Scarborough Marina the equivalent 'per berth' rate of approximately $643 per year;

(ii) [Port of Brisbane] charged the operators of Wynnum Manly Yacht Club the equivalent 'per berth' rate of approximately $521 per year;

(iii) [Port of Brisbane] charged the operators of Moreton Bay Trailer Boat Club the equivalent 'per berth' rate of approximately $2,063 per year;

(iv) [Port of Brisbane] charged the operators of Queensland Cruising Yacht Club the equivalent 'per berth' rate of approximately $624 per year."

[67] In my view, Compass has made out the pleading at paragraph 10(a) of its statement of claim. This paragraph was denied[49] but only on the basis that the representations were not made.

[68] The pleading at paragraph 10(b) of the statement of claim is based upon calculations performed by a Mr Benjamin, in a report which was tendered as expert evidence. The report attempts to calculate what the rent under Compass's wet sub-lease would have been, had it been charged on a per-berth basis. I find the report problematic because Compass's rent was never, and was never to be, calculated on a per-berth basis. Further, for reasons explained above, I do not think the Representation concerned amounts for the Crown Mooring Levy or the Dredging Contribution.

[69] However, one needs to go no further than the evidence of the witnesses called by the State to establish the falsity of the Representation. Mr Morley's affidavit says this about the September Letter:

"125. I have read the letter and believe that the second paragraph (ie 'whilst the rental …') accurately states that Compass' rent was a commercial one. I also believe that the letter accurately states [Port of Brisbane's] policy as at the date of the letter.

126. I was the person at [Port of Brisbane] responsible for the development and implementation of that policy. [Port of Brisbane] was in the course of implementing this policy with the ultimate objective of achieving commercial rents for all leases across all [Port of Brisbane] managed harbours.

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49 See paragraph 10 of the defence.

> 127. As at 15 September 2009, [Port of Brisbane] had negotiated new leases with RQYS, Trailer Boat Club and Compass … and I had determined the rents payable by these tenants based upon the methodology in the Ernst & Young report, the recommendations contained in the 2006 strategic plan … and having regard to site valuations that [Port of Brisbane] had received around that time.
>
> 128. [Port of Brisbane] was also in the process of seeking more commercial rents under existing leases via rent reviews, and I have made recommendations as to how [Port of Brisbane] could achieve this outcome in respect of wet lease rents under existing leases as outlined in my 'Wet Lease Land Charges Review' document described in paragraph 106 above."[50]

[70] Mr Morley's evidence makes it clear that Port of Brisbane aimed to have all boat harbour tenants on the same or similar rentals, but had not achieved that aim as at 15 September 2009. This is made express in an earlier part of Mr Morley's affidavit where he dealt with Mr Harburg's evidence concerning oral representations. He said:

> "I do not recall ever telling Mr Harburg or anyone else at Compass that the rents that [Port of Brisbane] proposed to charge to Compass under the dry and wet lease were the same as what [Port of Brisbane] was then charging to other marina operators in South East Queensland; and I do not believe that I did. This is because, at that time, I had been developing and had started to implement an approach by which tenants would pay full commercial rates in the three boat harbours. However, as at January to May 2008, not all tenants were paying full commercial rates. I therefore would not have told Mr Harburg that the proposed rents payable by Compass would be the same as the rates then being paid by [Port of Brisbane's] other tenants."[51]

[71] Ms Ryan's evidence in cross-examination was to the same effect.

- "… you were telling him that Compass and its competitors would be on a level playing field, in effect?--- That's correct.

  … you were telling Compass that no marina operator would have an advantage or a disadvantage?--- At a point in time.

  Well---?--- Because it was the intention to have all leases charged on a similar basis. But at the time, not all leases were on the same basis. … But there was a process in place to move all the leases to that commercial rental. … Consistent with the policy ... of the port.

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50 Exhibit 1, Vol 5, Tab 21.

51 Exhibit 1, Vol 5, Tab 21, paragraph 87(c). This passage of Mr Morley's evidence related to a period around May 2008. However, the position did not materially change between then and 15 September 2009.

Right. So what you're saying to me is that the assurance that you're giving is that at some point in the future, there would be a level playing field?--- Yes.

But that's not actually what you say, is it? You don't say 'at some point in the future'?--- It's grammar, I guess. It says 'is to have all leases'. I didn't state that, 'I can assure you that all leases are charged a similar rental,' because that would be correct at a point in time, but that was clearly my understanding when – at the time with the boat harbours, is that they were on a clear progression that all these leases would be charged a commercial rental and they would be not exactly the same but on a similar basis and all able to compete with each other. …

Ms Ryan, when was the level playing field going to be achieved?--- My understanding was within a 10-year period, from when, you know, the first leases started to be negotiated till the end of that period, but---

So in 2019, there would be a level playing field, or thereabouts?--- Potentially, yeah." – t 4-27.[52] (my underlining).

- "Wasn't it … relevant information for you to tell Compass, 'We've got this policy, but it will take 10 years to implement'?--- I don't – I didn't think so.

  You didn't think it would bear upon his consideration of whether he should reactivate the deal or not?--- No. I – as I said, I don't – I don't really remember the meeting, but my recollection of the process and where we got to was that it was an advertised RFP; that it was commercially viable, based on the assessment that the port did of the underlying rents and the opportunity that was there; and that, in accordance with our process, everybody in the boat harbours would – would be in a position to compete with every – with each other. But at the time it was advertised, it was a commercially viable proposition. The – this letter wasn't to say it will eventually become commercially viable. It was a commercially viable proposition in itself.

  But----?--- It – It recognised that the port would have a return on its investment, and that the tenant would be able to lease out berths and make it work commercially. It wasn't – it wasn't: trust us, at some stage in the future, it will work commercially. It was – it was a commercial proposal that was put together – put to the market.

  Ms Ryan it was – if it was the case that you were saying to him the level playing field would be achieved in about 10 years time, it was important to say that, wasn't it?--- I don't – I don't know, because I don't recall or remember if that was the question that was specifically asked in the con – I just don't know. In hindsight, yes, probably, it would have been important." – t 4-28.

- "Ms Ryan, just go back to that last part of the paragraph – that second paragraph. When you say so that you'll be able to lease out berths at the same rentals as others in the boat harbour, you're assuring him that once the lease

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[52] In fact the suggested date of 2019 was not 10 years from the renegotiation of the first of the leases – see [21] above; 2016 would have been more accurate. The policy of renegotiation had been implemented from late 2006. The same inaccuracy is evident in other parts of the cross-examination.

commences, he will be in that position. Correct?--- That's what it says, yep. That's what the letter says.

From day one, not from year 10?--- It appears to be written like that, but that was not what it – that's not what I knew to be correct.

It was incorrect, wasn't it?--- It was incorrect that as at that day, that the others in that boat harbour may not have been paying the same rent.

And even in the other boat harbours they wouldn't have been paying either the same or similar rent?--- There were leases issued that I know were – or agreements for leases entered into that were at the same rates – not the same rates, the same principle applied to get similar rates. But – yeah." – t 4-29 (my underlining).

[72] Further in this vein, Ms Ryan accepted that the September Letter conveyed to Compass that it would be charged a similar rental to other harbour lessees in South East Queensland – t 4-38. She accepted that that situation would be "unlikely to be true when the lease commenced" – t 4-39.

Fraud

[73] Paragraph 11 of the statement of claim reads:

> "11. As at 15 September 2009, [Port of Brisbane]:
>
> (a) knew of, and had ready access to, the rental rates it was charging in respect of land and seabed leases in South East Queensland;
>
> (b) knew that the statement was false;
>
> (c) (alternatively) made the statement without having a genuine belief that it was true, or with reckless indifference to its truth."

[74] It was common ground that if the Port of Brisbane was dishonest, or reckless as to the truth, it was Ms Ryan's signing and sending the September Letter that was the fraudulent act. Compass sought to prove both that Ms Ryan did not honestly believe the Representation to be true, and alternatively, that it was made recklessly.[53]

[75] I find that Compass has made out its plea at paragraph 11(a) of the statement of claim. Ms Ryan conceded that information as to rent paid by harbour tenants was readily accessible to her in 2009 – t 4-18 and t 4-33. Further, the evidence is that she did not check what rents were being paid by other boat harbour lessees before she signed and sent the September Letter – t 4-31.

[76] As to paragraphs 11(b) and (c) of the statement of claim, the State's pleading is that Port of Brisbane honestly believed what was said in the September Letter to be true.[54] I find that this is so.

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53 See paragraphs 100 and 159 of Compass's final written submissions.

54 Paragraph 11(d) of the defence.

Failure to Put Fraud Case

[77] It was submitted that Compass had not put its fraud case to Ms Ryan.

[78] The rule in *Browne v Dunn* is a fundamental rule based on fairness to the witness. What it requires in any particular case will depend on all the circumstances. In this case an allegation of fraud was made and denied on the pleadings.[55] Ms Ryan's affidavit of evidence-in-chief specifically addressed what she meant in writing the September Letter; it did not assist Compass to prove fraud. Compass sought a finding contrary to Ms Ryan's evidence-in-chief, as to her subjective state of mind at the time she signed the letter of 15 September 2009. The consequences of a finding of fraud would be serious for her. In my view, Compass's case should have been put to Ms Ryan squarely, and in an uncomplicated fashion, so that she had a chance to address it. In *Ghazal v Government Insurance Office (NSW)*[56] Kirby P said:

> "The duty to confront a person fairly with the suggestion that a case is false, even fraudulent, cannot be doubted. The duty arises from 'common fairness' and the proper administration of justice … In a trial, the duty arises most clearly when what is being suggested is fraud and false testimony on the part of a witness. It is a well established rule of our legal procedure that such contentions must be clearly identified and not raised accidentally, peripherally and nonchalantly in the course of litigation."

[79] In *Prepaid Services* (above) Meagher JA said:

> "In relation to the making and pressing of allegations of fraud, the position was stated succinctly by McHugh, Kirby and Callinan JJ in *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* … with respect to whether a finding of fraudulent non-disclosure was open. It was said that '[a]n allegation of fraud should be clearly and distinctly pleaded and put. This one was not'. Although it is not necessary to give a witness the opportunity to deal with an allegation that particular conduct was fraudulent if the position is 'so manifest that it is not necessary to waste time in putting questions upon it', that is not this case …" – [54].

[80] In *Prepaid Services* the pleaded case was that a fraudulent misrepresentation had been made recklessly, not caring whether it was true or false. The witness was taken to erroneous answers he gave in making a proposal for insurance. He accepted that he was not careful enough, but he denied that he did not take the task seriously. It was directly put to him that he was deliberately dishonest. He denied this. The pleaded case was not put to him; that is, it was not put to him that he did not care whether his answers were true or false. Meagher JA said, "That proposition should have been put so as to give [the representor] the opportunity to deal with it, especially in the light of his other evidence as to his state of mind. In the absence of that occurring it was not open to the primary judge to make a finding

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55 T 5-38.

56 (1992) 29 NSWLR 336, 344-345, followed in *Heath v Regina* [2016] NSWCCA 24, [41]; *Clone Pty Ltd v Players Pty Ltd (in liq)* [2016] SASCFC 134. See also *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV* [2013] NSWCA 252, [55] and the authorities cited there.

of fraud based upon conscious indifference" – [55]. The Court of Appeal was of the view that the fraud case could not succeed because it had not been put.

[81] In this case the fraud allegation was sufficiently put. At t 4-26 line 40 – t 4-27 line 7, t 4-29 lines 8-17, and t 4-38 line 45, it was sufficiently put to Ms Ryan that she made the Representation and that she meant to make it. At t 4-31 lines 12-15 and t 4-37 line 5, it was put that at the time she made the Representation, she knew that the substance of it was not true. At t 4-28 line 27 that proposition was put in substance, if not in form. At t 4-31 line 40 and following, t 4-32 lines 21-31 and t 4-35 line 5, the recklessness allegation was sufficiently put. Discussion arose at t 4-40 when objection was taken to a question putting fraudulent intention to Ms Ryan. At that stage it was indicated both by me, and by counsel for the State, that the allegation had been sufficiently put.

Failure to Prove Fraud Case

[82] Ms Ryan's state of mind is central to Compass's fraud case. I thought Ms Ryan was genuinely co-operative with the cross-examination process. Understandable difficulties were caused because she was being cross-examined about events between 2006 and 2010. I thought she was careful to say what she could in answer to questions, but also careful to delineate matters which she could no longer remember. I thought that Ms Ryan was honest and sincere in giving her evidence. I would comment that Ms Ryan had a qualification in town planning and had worked as a public servant. Running commercial negotiations for the development of a marina involved a different set of skills to following bureaucratic process. I would make all these same comments about Mr Morley.

[83] At paragraphs 78 to 83 of her affidavit[57] Ms Ryan explained her subjective state of mind in relation to the September Letter. In relation to the statement that rent was not negotiable, she explains, "This is because the proposed rental rates were clearly stated in the [request for proposals] … and it would not have been fair or appropriate to adjust the rents after the [request for proposals] process had concluded and after Compass had been selected as the preferred tenderer on the basis of its acceptance of the rents that had been advertised."[58]

[84] Ms Ryan says that her description of the rent as being a commercial rental, "reflected my understanding and belief that the rental rates in the [request for proposals] reflected market rates having regard to the market value and characteristics of the proposed lease areas".

[85] Ms Ryan explains that when referring to the Port's policy she was not referring to a particular document but "describing [Port of Brisbane's] strategy or approach to the charging of rents …".

[86] Ms Ryan says that her statement regarding the intention of the Port to have all lessees in South East Queensland charged a similar rental to each other was made on the basis of her understanding of the Port's policy at the time, which was to have all tenants paying a commercial rent tied to the market value of the land so that each tenant would be able to compete commercially with each other tenant.

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57 Exhibit 1, Vol 3, Tab 20.

58 Exhibit 1, Vol 3, Tab 20, paragraph 48(a).

[87] The harbours team within Port of Brisbane consisted of only Ms Ryan, Mr Morley and a third employee who did not give evidence. Mr Morley had begun putting the harbours' operations on a more profitable footing before Ms Ryan arrived in the harbours unit – t 4-22. She was aware before she joined the harbours team that it was implementing an approach whereby tenants would pay "a commercial rent tied to the market value of the lease areas" – t 4-7. She was aware of the history, "… in the 80s and 90s – how leases were developed, but you know, my understanding is they were – they weren't commercial, they were – you know – in the development phases of the boat harbours, so they weren't a commercial lease. [The Strategic Plan] was moving everyone towards being on commercial terms across the boat harbours." – t 4-9.

[88] Ms Ryan understood:

> "It was the general approach that, you know, we were moving from non-commercial rents to commercial rents, and all the boat harbours tenants would get there over a period of time, because they were all coming up for renewal. You know, there was a – it was the right time to be dealing with, you know, bringing the boat harbours into the, you know, commercial framework that the port operated within.
>
> … the principle [was] that everybody was moving from where they were to a commercial arrangement that better reflected the value of the asset to the government." – t 4-11.

[89] When Ms Ryan was asked whether or not commercial rent could be reflective of the range of rents:

> "Yes, it can. But – but it's also within a margin that's reflective of a reasonable return on investment or re – reasonable return on the asset. So I wouldn't classify any of the rents that the boat harbours' tenants were on prior to this strategy as commercial. They – they would be – I would classify them as community-based rents. So getting – you know, it's different but within the margins of what's a reasonable return for – for the State to – to expect and get, based on the market value of what the boat harbours' tenants can get in the market from people who own boats that moor them there or buy them – buy the berths." – t 4-13.

[90] The details of each negotiation were taken care of by those who reported to her, particularly Mr Morley.[59] Ms Ryan understood that Mr Morley and his team had determined the rents which were included in the request for proposals in accordance with the aforementioned policy.[60] Ms Ryan signed the business case presented to the Board of Port of Brisbane in order for it to make a decision as to whether or not to enter into the Agreement to Lease. It read:

> "The business case is based on receiving a dry land rental based on 9% of $300m^2$ and a wet land rental based on 8% of $125m^2$. These represent commercial leasing levels based on fair values of land.

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59 Exhibit 1, Vol 3, Tab 20, paragraph 30.

60 Exhibit 1, Vol 3, Tab 20, paragraph 35.

> Rentals escalate annually at a minimum of 4%pa and are reviewed to market every three years.
>
> This results in a strong business case …"[61]

[91] The same Board papers contain the business case made for the single channel works at Manly Harbour, also signed by Ms Ryan. It read:

> "The RQYS and MBTBC proposals involve no capital expenditure by the Corporation. Existing wet areas will be dredged at the cost of the lessees who will also build floating marinas. The Corporation charges a commercial rental based on the value of this wet land. As reported in the original board submission, these rental levels are at much higher levels than in the past reflecting the full commercial value of the land and economic value to the lessee. …"[62]

[92] Ms Ryan said that by the time she signed the September Letter, her understanding was that Port of Brisbane had begun implementing Mr Morley's Strategic Plan, in particular with the two new boat harbour leases between Port of Brisbane and RQYS and Moreton Bay Trailer Boat Club – t 4-31 and t 4-34. This is borne out by the business case quoted immediately above. Further, Ms Ryan signed the Agreement to Lease with Moreton Bay Trailer Boat Club in September 2008.[63]

[93] The tort of deceit is not concerned with negligence or carelessness, but with dishonesty.[64] To succeed in deceit, more needs to be shown than that a false representation is made. It must be shown to have been made fraudulently. That is, made by someone who intentionally made a false statement, or who made a statement recklessly in the sense that they neither knew nor cared whether it was true or false.[65]

[94] As to the first of those states of mind, while I have found that the September Letter did make a false representation, I find that Ms Ryan did not intend to make a false statement. She did not intend to make the Representation which I have found to be untrue. She intended to make true statements in the September Letter. There is a passage in *Krakowski* which is extremely pertinent:

> "When fraud is alleged against a defendant, it is not enough to prove that the representation as pleaded was false. <u>The words or conduct by which a representation is made may be understood in different senses</u>. The words or conduct may be understood by a reasonable person in the position of the representee in one sense, by the representee in a second sense and by the representor in a third sense. Or the representee may understand the words or conduct in a sense which the representor knew the representee might understand them, albeit not in the sense in which a reasonable bystander would

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61 Exhibit 1, Vol 3, Tab 20, p 404 exhibit bundle.

62 Exhibit 1, Vol 3, Tab 20, p 399 exhibit bundle.

63 Exhibit 1, Vol 3, Tab 20, paragraph 45(b) and Vol 4, Tab 20 at exhibit pages 1139-1438.

64 *Magill v Magill* (2006) 226 CLR 551, per Gleeson CJ at [17] and [21]; see also *Forrest v ASIC* (2012) 247 CLR 486, [22] and *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV* (2013) 302 ALR 732, 744-5.

65 *Magill* (above) per Gleeson CJ at [17] citing *Nocton v Lord Ashburton* [1914] AC 932, 950-955 which in turn cited *Derry v Peek* (1889) 14 App Cas 337.

> understand them. The differing senses in which words or conduct are understood must be borne in mind in determining whether the several elements of deceit are proved.
>
> The sense in which a representation would be understood by a reasonable person in the position of the representee is prima facie the sense relevant to the question whether the representation is false. The sense in which a representation is understood by the representee is relevant to the question whether the representation induced the representee to act upon it. And the sense in which the representor intended the representation to be understood is relevant to the question whether the representation was made fraudulently." – pp 576-577 (my underlining).

[95] Another relevant passage in *Krakowski* is:

> "In order to succeed in fraud, a representee must prove, inter alia, that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood. In *Akerhielm v De Mare* the Privy Council said:
>
> > The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made." – p 578 (my underlining).

[96] At the time Ms Ryan signed the September Letter, the small, three person, unit which administered boat harbours had been focussed on fulfilling the Port of Brisbane's economic objective as a Government Owned Corporation by moving leases of boat harbours from concessional rents to commercial rents. It is clear from the language of the contemporary documents from 2006 onwards, and from the way the word was used by Ms Ryan and Mr Morley in evidence, that they described rents which gave a profitable return on the Port of Brisbane's assets as commercial. I readily accept that that was the sense in which Ms Ryan understood the word used in the second paragraph of the September Letter.

[97] The boat harbours unit was not just aiming to make more money. It was aiming to implement a system where all tenants would be able to compete fairly with each other – see the evidence at [9], [12] and [89] above. Ms Ryan said:

> "… it was the approach of the corporation to have all leases in the boat harbours on a commercial rental similar to each other so that they could be competitive with each other. It wasn't that the RFP was an outlier; it was that that has been determined to be a commercial lease arrangement and that – the intention is to make everybody else similar so that everyone could compete in the market. It was not in the organisation's, or the [S]tate's, interest to have a non-competitive development. There was no benefit to anyone to have a non-competitive development. It was devised so that it could be successful." – t 4-32.

[98] From late 2006 Port of Brisbane aimed to have all harbour tenants charged rent on the same or similar basis to each other. The boat harbour tenants were in competition with each other. By adopting the same basis for rent calculation for all, the Port aimed to set rents which allowed the tenants to run commercially viable businesses. The harbours division approached that aim methodically, albeit more as bureaucrats than business people. It obtained the Ernst & Young report. It sought legal advice as to the terms of its existing leases, and Mr Morley wrote first the Strategic Plan, and then the Wet-land Lease Charges Review. Presentations were made to the executive leadership team, and business cases were written for submission to the Board.

[99] Against all of that activity, from the point of view of Ms Ryan, inside the boat harbours division, it was true to say that Compass was to be charged a commercial rent, and to say that the Port had a policy that all lessees in South East Queensland boat harbours were to be charged a similar rent. Moreover, the point of that policy was to ensure that the boat harbour tenants would be in fair competition with each other, so that each would be able to lease out berths at the same rent as each other, to paraphrase the words of the last part of paragraph 2 of the September Letter. This accounts for the following passages in Ms Ryan's evidence:

- "My knowledge in writing that letter was based on the process that was going through with all of the boat harbour tenants to bring them all on to commercial rentals, which were reflective of the reasonable rate … of return for the corporation on – on its assets, and to a level that would allow them to operate successfully in the marina market at that point in time." – t 4-31.

- "So I'm putting to you that you did not have any basis for saying that the port's policy was to have all lessees in the boat harbours charged a similar rent to each other?--- No. My – I had the basis of the corporate plan and the strategic plan, the business plan, the budgets, the practice of having multiple negotiations with multiple tenants with multiple offers being in the market at the same time, to have all boat harbours on the same or similar commercial arrangements. It wasn't a one-off; there's all this history.

  And you did not have any basis for saying, 'Compass will be able to lease out berths at the same rentals as others in the harbour'?--- …

  … <u>that wasn't intentional to say that, but again, it's in writing so I can understand somebody would have taken it to mean that</u>. …" – t 4-32 (my underlining).

- "… So let's go back to that paragraph. Think we agreed that there are three elements to it. Compass is going to be charged a commercial rental, correct?--- Correct.

  And that the port's policy is to have all lessees in South East Queensland boat harbours charged a similar rent to each other?--- Yes.

  And I want to put to you that that's either false or reckless?--- Sorry, is that a question?

> Yes?--- Yes. No. I – I – it wasn't. At the time of writing that letter that was not." – tt 4-34-35.

[100] It was put to Ms Ryan that she regretted giving Compass the assurance contained in the September Letter. She agreed, not because she thought that the assurance was misleading – t 4-33, lines 5-10 and 27-32, but because after transfer of the harbours to the State, the Department of Main Roads did not follow through with the Port's policies to put all boat harbour tenants onto commercial rents. It was clear that she did not regard the substance of the September Letter as false:

> "But wasn't it essential for you to tell Mr Harburg and Compass that it was going to take 10 years to level the playing field? The plan was relevant, wasn't it?--- I didn't believe it to be the case that it was relevant. This arrangement was a commercial lease in its own right. The RFP should have worked and should've been successful. …
>
> … The policy was to charge a commercial rent so that the boat harbours would be successful." – t 4-33.

[101] During her evidence Ms Ryan made concessions that she now understood how the September Letter read to someone in Compass's position. However, I think it was clear at these parts of her evidence that she had not intended to convey the Representation by the September Letter at the time she signed it: see the underlined parts of the extracts from Ms Ryan's evidence at [71] above and the underlined passage at [99] above.

[102] Further, I find that Ms Ryan's subjective state of mind was not recklessly indifferent as to whether what was said in the September Letter was true or false.

[103] In *Prepaid Services* (above), when speaking of the difference between reckless indifference to truth on the one hand, and carelessness or negligence on the other, Meagher JA spoke of whether or not the representor was "consciously indifferent to the truth".[66] There is a discussion in *Krakowski* as to the distinction between the fraudulent state of mind of being recklessly indifferent to the truth, and ordinary carelessness, negligence or stupidity. The High Court cited *Smith v Chadwick*[67] for the proposition that:

> "a man may make a statement which he intended to mean one thing only, but which negligently and stupidly he sends out in such a shape as to bear another meaning, and the plaintiff acts upon that meaning. … I should say it was not a fraud, though perhaps gross negligence."

[104] *Derry v Peek*[68] turned on the distinction between making a statement "without any real belief in its truth" and "an essentially different thing … making, through want of care, a false statement, which is never the less honestly believed to be true." – p 361.

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66 *Prepaid Services* (above), [51], see also [40].

67 (1884) 9 App Cas 187, 201. The High Court also referenced *Angus v Clifford* [1891] 2 Ch 449, 467 and *Australasian Brokerage Ltd v Australian & New Zealand Banking Corporation Ltd* (1934) 52 CLR 430, 438.

68 (1889) 14 App Cas 337.

[105] I do think that it was careless of Ms Ryan to sign the September Letter without considering how it would be understood by Compass.[69] Had she paid more attention to what the letter might convey to Compass, I believe she would have been very concerned to ensure that the letter did not convey anything untrue. The difficulty is that she did not advert to the possibility that Compass would understand the letter as making what I have called the Representation. Her mindset was very influenced by the fact that the small team which was the harbours division had been thinking in a particular way about the idea of commercial rents and had been very focussed on endeavouring to bring all harbour tenants onto the same or similar rents. As I mentioned above, Ms Ryan was more experienced as a bureaucrat, than as a commercial negotiator.

[106] I do not think the language of gross negligence and stupidity from *Smith v Chadwick* is appropriate to Ms Ryan's actions and thinking. However, the concept is the same. Ms Ryan wrote intending one thing. In fact, her language was apt to convey another meaning to a reasonable representee in Compass's position. This was careless or negligent, but Ms Ryan's state of mind was honest, it was not recklessly or consciously indifferent to the truth.

Intention that the Representation be acted upon

[107] At paragraph 12 of the statement of claim it is pleaded, consistently with the deceit case,[70] that the Port made the Representation with the intention that it should be acted on by the plaintiff. The State's pleading to this was a non-admission (having regard to the findings I have already made). Having regard to the last sentence of the September Letter, "I trust this addresses your concerns and that we can proceed to finalise the agreement", I think Compass has proved this part of its deceit case.

Reliance

[108] Compass's statement of claim is to the effect that it acted in reliance upon the Representation by agreeing to enter into the Deed of Variation, and subsequently the wet sub-lease and the dry lease. The High Court in *Gould v Vaggelas* adopted an undemanding test as to reliance and causation in a fraud case.[71] As my findings here are that the fraud case must fail, I deal with the topic of reliance as relevant to the Trade Practices case only.

[109] Central to Compass's case on reliance was the evidence of Mr Harburg. I find that so unreliable I will not act on it unless it is corroborated. My reasons for this conclusion are in Annexure B. This means that I am not prepared to act on his oral evidence about any meetings held before 11 September 2009. As already explained, I am not prepared to act on his evidence about what was said on 11 September 2009.

[110] At paragraph 24 of his affidavit Mr Harburg swears that in reliance upon the assurances in the September Letter he "believed that the rental amount was the same

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69 One thing she might have done is check the database to see how the rent offered to Compass compared to rents charged to other tenants. But because she did not understand the September Letter as making the Representation, it did not occur to her to do so.

70 *Gould v Vaggelas* (1985) 157 CLR 215.

71 Above, p 238. See *Caringbah Investments Pty Ltd v Caringbah Business and Sports Club (in liq)* [2016] NSWCA 165, 77.

or similar to that charged to other lessees in SEQ". He says that on the basis of that belief, he chose to re-enter negotiations with the Port of Brisbane, signed the Deed of Variation, and signed the wet and dry leases. His oral evidence was to the same effect – t 2-5. The difficulty is that at exactly the same part of his oral evidence where he asserted this with certainty, he said of the Deed of Variation, "I signed that document because I had a signed document from [Port of Brisbane] saying that the rent would be adjusted" – t 2-5. That was said with equal certainty, but was false – see Annexure B. In view of all the other evidence as to adjustment and administration which I have found to be false reconstruction (again, see Annexure B), I cannot just regard this as a slip of the tongue.

[111] Mr Harburg's evidence that he relied upon the September Letter is of course self-serving and must be appropriately scrutinised. In one respect yet to be discussed, see [151] below, I thought it clear that Mr Harburg's evidence was deliberately tailored to assist his case having regard to legal advice he had received. This does not make me more confident about relying upon his evidence.

[112] Tending against Compass on the issue of reliance is that Mr Harburg was an experienced businessman, and that Compass had experience and competence in marine facilities. Consistently with what one might expect of such an organisation, Compass had prepared a series of financial spreadsheets as to cash flow and capital considerations before submitting a proposal to develop the marina.[72] This financial analysis assumed Compass's development would be on 8,500m^2 of dry land, and 18,000m^2 of wet land, at rates of $27 and $10 per-square-metre respectively. These parameters were the basis of the request for proposals, and Compass's proposal.

[113] Very significantly, the analysis showed Compass knew the prices which five other marinas charged their tenants to rent a berth – t 1-32. It showed that Compass assumed it would charge rent which was $180 less per 15 metre berth than that charged by RQYS – t 1-33. In evidence Mr Harburg agreed that these assumptions were reasonable assumptions to make in preparing the cash flow analysis, and that Compass was able to make its financial analysis without having access to the rents which the Port charged other tenants. He said he relied upon the financial analysis in deciding in 2007 that Compass would sign a binding Agreement to Lease on the terms being sought by the Port – t 1-33.

[114] Reliance upon the financial analysis does not mean that there was not reliance upon the Representation as well. Further, that Compass concluded it could operate the marina profitably at the rental rate specified in the request for proposals, does not mean that it would not seek to maximise its profits by ensuring that its rents were similar to other marina operators. Lastly, the financial analysis was made prior to Compass submitting its proposal at the end of 2007. By 2009 it was considerably less sanguine about the costs of building on the dry land, and because of the effect of the GFC on the economy at Redcliffe (see below). That is, it was more astute to difficulties in making a profit by running the marina, and therefore more likely to be concerned about rental parity than it had been at the time the financial analysis was prepared.

[115] Documents which precede the September Letter do not show a concern with rental parity. Emails sent by Compass to the Port between June and August 2009

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72 Exhibit 4, Tab 1.

complained about the economic climate in the Redcliffe area; the context of those complaints was the GFC. Compass's letter of 24 August 2009 complained about the cost of constructing buildings on the dry land. Compass said it had spent $133,535 producing a design. It said suitable construction methods for the site were so expensive that the buildings which Compass had originally proposed for the dry land were "unviable". It said that the original design would cost "millions of dollars more than the original estimate". Nothing is said about rental parity.

[116] The same can be said for the letter which Compass's solicitors wrote on 11 September 2009, the day of the meeting to which the September Letter refers. Compass's concern is clearly to reduce its financial obligations under the Agreement to Lease, but nothing is said about rental parity. It was not established whether this letter was sent before or after the meeting.

[117] I find that the terms of the September Letter do show that, on 11 September 2009, someone on behalf of Compass tried to re-negotiate the rent to be paid under the Agreement to Lease, and tried to discover what other boat harbour tenants paid by way of rent. Ms Ryan conceded this was likely having regard to the terms of the letter; she would not have raised those issues herself – t 4-23. From the terms of the letter, other concerns were raised on behalf of Compass at that meeting, including as to the use of the dry lease area. The September Letter addressed these matters and expressed the hope that Compass and Port of Brisbane could "proceed to finalise the agreement".

[118] Late in the afternoon on Thursday, 17 September 2009, the Port emailed Compass to acknowledge receipt of Compass's solicitor's letter dated 11 September 2009. Compass replied on 18 September 2009 complaining about the Port's delay and indecision, and reiterating its preparedness to reinstate the Agreement to Lease in accordance with its letter of 11 September 2009, ie., on the basis that Compass assumed a lesser obligation to construct works on the dry land. There is no mention of rent, and no reference to the September Letter.

[119] Two months later the Deed of Variation was signed, reinstating the Agreement to Lease. Compass's lawyers had had the document since early October 2009 and had looked at it before Mr Harburg signed it.

[120] Between 2011 and 2014 Compass asserted reliance on a representation similar enough to the Representation. The first of these references is in a letter of 28 March 2011, see [140]-[142] below. The second is in a letter dated 3 August 2011, see [148] below.

[121] Rent in an amount of $659,348 was paid by Compass under cover of a letter from its solicitor, Cranston McEachern, dated 9 September 2011. The letter was addressed to the Port's Solicitors, Flower and Hart. It read in part:

> "We refer to our recent meeting at your office with yourselves and [representatives from the Department of Transport]. We had understood that the purpose of the meeting was to discuss bringing the rentals in respect of the Marina of our client into line with the rentals being paid by other marina operators in South East Queensland.

> As mentioned at the meeting, at the time of the initial arrangements and discussions with regard to rental, it was represented to Mr Peter Harburg that the proposed rentals for the Marina were in line with the rentals being paid by other marina operators. It has since come to our client's attention that this was not correct.
>
> The attitude of … the Department of Transport … required payment of all rentals up to the 31st December, 2011 prior to the discussions taking place in relation to the reduction in the rentals.
>
> Without prejudice to any claim of our client in relation to the representations and to our client's claim in respect to the removal of rock, we are enclosing our client's cheque for $659,348.41 … on the strict understanding that your client will immediately enter into meaningful negotiations in relation to standardising the rentals payment by our client in relation to its Leases with the rentals payable by other marina operators in South East Queensland."[73] (my underlining).

[122] On 7 March 2012 Mr Harburg wrote to the Department of Transport saying:

> "During all discussions before and after being awarded the approval to build the Marine, Port of Brisbane at all times assured us that the rental 'comparable to other Marinas in the area'. We had no way of checking this assurance nor did we have any reason to doubt such assurances given by Company owned by the Queensland Government.
>
> We were later dismayed and shocked to find the rental being charged is considerably higher that of our competitors.
>
> It is inconceivable that we can lease out berths at a much higher price than our competitors when essentially they are the same product.
>
> We understand that the new industry rates for water leases of berths is
>
> | | |
> |---|---|
> | Up to and Including 12 metres | $448.70 per berth pa |
> | 12.01 metres to 15.01 metres | $511.13 per berth pa |
> | Above 15.01 metres | $619.52 per berth pa |
> | Multi-Hull | $709.15 per berth pa |
>
> We understand this includes Outgoings, Mooring Levy and Dredging Contributions.
>
> We accept these charges for the water lease of our berths as from commencement of lease on 1 October 2011"[74] (grammar, spelling and punctuation in the original; my underlining).

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73 Exhibit 1, Vol 2, Tab 13, PVFH-17. Incidentally, Flower and Hart did not accept the conditional payment but wrote requesting that the rent be paid unconditionally and reserving the Port's rights under the terms of the lease and sub-lease.

74 Exhibit 1, Vol 2, Tab 12, pp 16-17.

[123] On 6 May 2014 Mr Harburg wrote to the Department of Transport that, "The rent was supposedly the same as other marinas but we now know that not to be the case by a factor of 300%".[75]

[124] On 16 July 2014 Mr Harburg signed a letter addressed to the Department of Transport which included the following:

> "On the subject of rent it is our firm belief that we should be charged rental at competitive industry rates from day one of the lease. It would be unfair to expect us to pay a higher rental in the early part of the lease. All our negotiations were based on our strong belief, backed up by all correspondence, that our rental would be similar to other Marina operations.
>
> We were induced into signing the lease believing the rental amounts were similar to others. Once we were confirmed as the lessee and had access to other operations we learnt this was not the case and refused to accept the rental charged.
>
> To show good faith and under protest we paid $659,348.41 on 6 September 2011 so meaningful negotiations could go ahead."[76] (my underlining).

Conclusions on Reliance

[125] The question for my determination is whether or not there is sufficient evidence from which I can infer that the Representation was a real or substantial inducement for Compass's entering into the Deed of Variation and the dry lease and wet sub-lease.[77] Although this case is from a different area of law, I refer to a comment made in *Sidhu v Van Dyke*,[78] "Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact."[79]

[126] On the balance of probabilities I find that the Representation was a real or substantial inducement to Compass to enter into the Deed of Variation. Relying upon the terms of the September Letter, I find that the matter of rental parity was raised by Compass on 11 September 2009, and from the concluding words of the September Letter, it was raised in the context of something which was material to Compass agreeing to reinstate the Agreement to Lease. The assurance from the Port was put in writing. This is an indication that it was of significance to Compass at that point. It seems to me that the 2011-2014 letters, just discussed, are sufficiently close in time to September 2009, and sufficiently clear in their assertions, for me to conclude that the matter of rental parity was important to Compass. The September Letter and the 2011-2014 letters provide sufficient corroboration to Mr Harburg's evidence about reliance on the Representation so that I am prepared to act on it.

Limitation Point: Deceit

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75 Exhibit 1, Vol 2, Tab 12, p 24 of the exhibit bundle.
76 Exhibit 1, Vol 2, Tab 12, p 27 of the exhibit bundle.
77 *Henville v Walker* (2001) 206 CLR 459, 494.
78 [2014] HCA 19.
79 (2014) 251 CLR 505, [58].

[127] The State took the point that the claim in deceit was brought outside the six years limited by s 10 of the *Limitation of Actions Act 1974* (Qld). Compass could not be regarded as having commenced any claim for deceit until the amendments to its statement of claim to plead deceit on 6 February 2018.

[128] At paragraph 10 of its reply, Compass denies that s 10 of the Limitations Act prescribes a period of limitation for its common law action. The basis for this denial is not apparent from the pleading, nor from its submissions. I cannot see any basis for this denial. As a matter of law, a claim in deceit or fraud is a claim in tort and is governed by s 10 of the Limitations Act.[80]

[129] Compass relies upon s 38(1)(a) and s 38(1)(b) of the Limitations Act:

> "(1) Where in an action for which a period of limitation is prescribed by this Act –
>
> (a) the action is based upon the fraud of the defendant … or
>
> (b) the right of action is concealed by the fraud of a person referred to in paragraph (a); or
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or … could with reasonable diligence have discovered it."

[130] This part of Compass's case rests on an argument that it did not have sufficient information about its loss within time. Discussion of this argument is rendered somewhat difficult by reason of the fact that Compass has not proved its fraud case and never had evidence that anyone on behalf of the Port had acted fraudulently. For that reason my discussion of these s 38 points proceeds on the hypothetical basis that Compass had sufficient evidence of fraud except in relation to its loss.

Discovery of Fraud

[131] I deal first with Compass's arguments as to s 38(1)(a) of the Limitations Act. Compass argued that until it knew the precise figures paid by other harbour tenants it could not calculate its loss with particularity, and therefore could not plead fraud.

[132] The State pleads that Compass knew of the facts it relies upon for its fraud case by 2 August 2011. By 12 October 2010 a Mr Kevin Miller was working for Compass. Mr Miller was the Commodore of the RYQS. He also had a role on behalf of an association of boat harbour tenants. That role saw him very much involved in the negotiations for rent between these tenants and the State. The State's case is that Mr Miller passed on either to Mr Harburg or to Karl Morris, an employee of Compass who had replaced Mr Zaphir, sufficient information for Compass to plead loss.[81]

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80 *Law Society v Sephton* [2005] QB 1013, [109].

81 The State's case was not that Compass knew this information from the time Mr Miller became its agent to negotiate with the Department of Main Roads about the leases – paragraph 17(d)(i)(C) of the rejoinder.

[133] Mr Miller says that as early as 2008 he told Mr Harburg, on three occasions, that Compass had agreed to pay an excessive rent.[82] These statements were oral, and made in informal settings. By 12 October 2010 Mr Harburg had Mr Miller officially working for him, with the degree of trust and confidence that presupposes. Soon after, Mr Miller was putting in writing, in no uncertain terms, that the rent Compass had agreed to pay was excessive.

[134] On 23 February 2011 Mr Miller sent an email to Mr Morris, copied to Mr Harburg, about efforts to renegotiate with the Department of Transport. The email said in part:

> "Irrespective of who ends up running the marina, it will also affect the saleability to have very high outgoings as it will affect the nett trading position. It also sets a dangerous precedent to the Marina Industry to pay their rate of $\$10/m^2$ for water and $\$27/m^2$ for land from day one."[83]

[135] Mr Harburg conceded that, from this email, one could draw the conclusion that the rent Compass was to pay was unprecedented – t 2-9. He said that around this time, "From information from Mr Miller, I suspected that the rental we were being – that was on our lease was far higher than it should be. I had no actual knowledge." – t 2-9.

[136] There is a similar email from Mr Miller to Mr Harburg and Mr Morris dated 23 March 2011.[84] This email says in part:

> "In dealing with [the Department of Transport], we got to the point where they were seeking a formal submission to accept a lesser rental regime based on the community benefits you were offering. I have had that drafted and ready to go waiting for the correct rentals to come through and note that they are even higher than I thought.
>
> That opportunity stills exists and I am happy to help if you wish. It could save you many hundreds of thousands of dollars and is worth a try. I am also particularly keen for you not to go ahead and just pay their deemed rental because it will make the job that much harder in the future to get amended or worse, be used against the whole industry as the new benchmark."

[137] It was put to Mr Harburg that this email let him know that Compass was paying higher rent than any other marina operator. He replied, "It certainly suggests that, but I had no knowledge of what anyone else was paying." – t 2-11. The cross-examination continued and produced this significant concession:

> "And you knew, I want to suggest to you, from what Mr Miller told you that the rental rates Compass had agreed to under the wet and dry leases were not substantially the same or similar to the rates that any other marina operator had previously agreed to pay?--- Correct." – t 2-11.

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82 Exhibit 1, Vol 2, Tab 15, paragraphs 14 and 31.
83 Exhibit 4, Tab 19.
84 Exhibit 1, Vol 2, Tab 15, p 5 of the exhibit bundle.

[138] On 3 May 2011 Mr Miller sent Mr Harburg an email which included the sentence, "Frankly, I believe that you or anyone else can't afford to pay the rental you are currently consulted to [sic]".[85] On 15 June 2011 Mr Miller sent an email to Mr Harburg which said, "I believe that it is not a viable business under the current rental regime" – ex 5.

[139] Mr Harburg was overseas, ill, and undergoing treatment at the time of the emails referred to at paragraphs [134]-[138]. He prevaricated in his evidence as to whether or not he read and responded to the emails.[86] I am inclined to regard this prevarication as deliberate and self-serving. In the end I think Mr Harburg did accept that he had seen all the emails, and I find that that was so.[87] In any case, the emails were also sent to Mr Karl Morris. My finding is that Compass was aware of the contents of these emails.

[140] On 28 March 2011 Mr Harburg signed a letter to the Department of Transport.[88] It had been drafted by Mr Miller. It said:

> "After requesting details of the rental payments expected, we recently received details of that from Flower and Hart and to our horror find that the accounts requested are:
>
> $62,856 pa for the land area
>
> $275,100 for the water area
>
> $337,956 plus dredging levy of $337/berth pa
>
> Clearly these figures are well above the 'market' position for marinas in Queensland despite assurances at the time from [Port of Brisbane] that these were in line with the market."

[141] Mr Harburg said that the expression of horror in the letter was his. By that stage he was "quite alarmed about whether Compass was in fact paying the same or similar rentals" as other harbour tenants.[89] When asked about the last sentence in the quotation above, Mr Harburg said that the rent demanded by the State was more than Compass could charge per berth so, "clearly we were being asked to pay more than market rental" – t 2-14.

[142] The 28 March 2011 letter also included the following passage:

> "If $500-$700 per berth per annum were the market rent, then realistically the current rent for stage one should not exceed $52,000 pa rising to $90,000 pa for the completed second stage.
>
> Our suggestion is that Compass pays $100,000 pa from the commencement of the lease with CPI index annually and that within 3 years, should the Department of Transport and the industry agree a

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85 Exhibit 4, Tab 7.

86 T 2-8, t 2-10, t 2-16, t 2-17, t 2-19.

87 There is evidence that Mr Harburg was participating in the email exchange. See exhibit 5 where on 13 June 2011 he emailed Mr Kevin Miller asking for an update as to Mr Miller's efforts with the Department.

88 Exhibit 1, Vol 2, Tab 12, exhibit bundle p 13. It is misdated 2010.

89 Paragraphs 28 and 29 of his affidavit.

> standard figure per berth for rental, that at the commencement of year 4, the rental reflect the then industry agreed standard."

[143] In cross-examination Mr Harburg said that the suggested rents in this letter were based on Mr Miller's knowledge. To Mr Harburg's knowledge, Mr Miller knew the rents which RQYS and other marinas were paying.[90]

[144] Of this letter Mr Harburg said, "… no one had told me what anyone, any other marinas were paying. I suspected it was above market because it was not possible to make a profit with those figures. … The rental that was being asked was more than we could charge tenants to moor their boats. And so that was clearly we were being asked to pay more than market rental because other marinas would not be paying that much." – t 2-14. He later repeated part of that assertion at t 2-16: "… we were being charged more than we could charge our – to the public".

[145] On 11 July 2011 Mr Miller wrote to Mr Harburg, copied to Mr Morris, and to solicitors acting for Compass. The email said in part:

> "Please keep this very confidential but I believe I can get you the same deal that I have done for others, in a new lease for Scarborough Marina. … you need a whole new lease and I hope to get it for you. Obviously I am representing RQYS but also working with the Mayor of Moreton Shire and the Marina Industry to ensure that your Marina gets up and running. Members of RQYS don't have these figures yet either.
>
> If Dep't of Transport accept that you should get the same deal, you will pay $44,118.59 pa for your water lease for the first 74 berths and about another $28.000 for the next 54 berths but they may insist that you pay rent on all berths despite you not yet finishing stage two. This compares to your current lease requirement of $275,100 p.a. plus $337/berth for dredging levy, or $24,938 for the first stage. … There will be a saving though of at least $200,000 p.a.
>
> … As to the land lease, you are currently paying $27/m^2 p.a. for the area you use and there may not be much change there as the new rate will be 7% of the valuation based on 'Site Value' under the Valuation of land act. Your rate though is based on 9% of an intrinsic $300/m^2 value of land area.
>
> …"[91]

[146] Again it was put to Mr Harburg that after reading this email he was aware that other marina operators had significantly lower rent than Compass. Again he replied that, "I did suspect that that was the case, yes, but I didn't know, other than the figures that Mr Miller was telling me, exactly what people were paying" – t 2-19. The underlined qualification is very significant because Mr Harburg knew that Mr Miller knew what RQYS and other marina operators were paying.[92] When asked about this email a second time, Mr Harburg became even more technical: "No, we had no knowledge of what – we had nothing in writing from anyone or viewed any

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90 Exhibit 1, Vol 2, Tab 12, paragraphs 27 and 31.
91 Exhibit 4, Tab 8.
92 Exhibit 1, Vol 2, Tab 12, paragraphs 27 and 31.

documents that said what other marinas were paying. … There was no proof of the – what anyone is paying. We did not see any invoices or any – any---." – t 2-26. He did however, concede that the information in the email did the mathematics necessary to make a comparison between Compass's rental and the RQYS's rental – t 2-27.

[147] Care needs to be taken with evidence about the email of 11 July 2011. It shows Compass could compare its rent and RQYS's then current (not 2009) rent. However, I do think that the email shows that Compass knew the general order of the discrepancy between its rents, and others' rents.

[148] On 3 August 2011 Compass, by Mr Morris, sent a letter to the Department of Transport saying in part:

> "The major overhead in a Marina operation is the lease rental paid to the Government and we were assured when negotiating to build the Marina that the proposed lease rental was 'in line with the lease rental being paid by other Marina Operators'. This is clearly not the case and if we are to pay considerably higher rental than other Marina Operators the business cannot be viable."[93]

[149] Clearly enough, by 23 March 2011 Mr Harburg and Mr Morris knew that the rents Compass was bound to under the wet sub-lease and the dry lease were not substantially the same as, or similar to, the rates paid by other marina operators. Compass knew that it had agreed to pay more than other operators. At least by 28 March 2011 Compass knew the order of the difference between the rent it had agreed to pay and what others were paying.

[150] Not only that, according to Mr Harburg, by that stage it was evident that the rent Compass had agreed to pay was so great it could not recoup that much from its retail tenants. I must say, I doubt the truth of this last assertion by Mr Harburg. It does not fit well with the 2007 financial analysis discussed above. I suspect his conclusion is produced by applying Compass's total wet sub-lease rent to the 74 berths which Compass had constructed, rather than to the 128 or 140 which it was obliged to construct. Whatever the literal truth of the statement, I interpret Mr Harburg's evidence as showing that by 28 March 2011, he regarded the difference between the rent Compass had agreed to pay, and the rent charged to other harbour tenants, as having a very significant negative impact on the profitability of Compass's marina business.

[151] It bears negatively on Mr Harburg's credit as a witness that time and again, when taxed with what he knew from Mr Miller's communications, Mr Harburg replied, mantra-like, that while he knew or suspected that Compass's rents were substantially higher than other marina operators, he did not know what other marina operators paid. His evidence, I conclude, was crafted to ensure that it fitted the terms of the legal case he understood Compass was running – cf [153] below. In fact, at its height, it was almost submission.

[152] I will mention one further part of the evidence. At one stage Mr Miller wrote down the figures which were close to being finalised in negotiations between a group of

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93 Exhibit 4, Tab 9.

marina owners on whose behalf he was acting, and the State, and gave them to Mr Harburg.[94] They were well below the rent Compass had agreed to pay. In his affidavit, Mr Miller swears that this took place in March 2012. At times in his oral evidence Mr Miller said that he gave the information to Mr Harburg in July 2011 – t 2-57. The confusion is likely to have been deliberate. Mr Miller's evidence seemed to be most unreliable.[95] I am not prepared to find that the conversation happened any earlier than March 2012.

[153] Compass relies on the statement of Neuberger LJ in *Law Society v Sephton*[96] for the proposition that, "a claimant does not 'discover' a fraud until he has 'material sufficient to enable him properly to plead it'." In *Burner v Sanctuary Homes Pty Ltd and Dimov*[97] the New South Wales Court of Appeal said, "what must be discovered (or be reasonably capable of discovery) are the facts upon which the claim in fraud or deceit can be presented".

[154] Compass says that it could not have discovered a necessary element of its fraud claim, loss, until the loss was reasonably ascertainable on 30 June 2012.[98] This submission is outside what is pleaded in relation to the deceit case, and in any case is wrong, see [168]ff below.

[155] The other submission made on behalf of Compass was that it did not discover the fraud, or could not with reasonable diligence have discovered it, before 23 November 2017, when Mr Robertson of Scarborough Marina sent Mr Miller an email stating that in September 2009 Scarborough Marina was paying rent of "around $645 per berth/per annum".[99]

[156] Compass made reference to the professional obligations which attach to making allegations of fraud as a matter relevant to whether or not it had sufficient facts to plead before receipt of this information. In another case that might have been relevant. Allegations of moral turpitude should only be made where there are clear instructions, and clear evidence to support them. That rule would certainly apply to the making of allegations such as those at paragraphs 11(b) and (c) of the statement of claim. Further, a representation alleged to be fraudulent ought to be pleaded precisely because, "a party alleged to have deliberately misled another must know precisely how the misleading is said to have occurred".[100]

[157] These rules do not assist Compass. The details of loss and damage which Compass says it did not have are not an element of its cause of action. They are only the particulars of loss and damage. If Compass had evidence of everything it needed to plead a fraud case apart from the details of what rents were charged to other boat harbour tenants, it could have commenced proceedings and made the allegations it

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94 Exhibit 1, Vol 2, Tab 15, paragraph 46.

95 I formed the view that Mr Miller did not genuinely attempt to comply with his oath when giving evidence. He generally prevaricated and obfuscated in answering questions, but his insincerity became quite clear at t 2-62. There are other parts of his evidence which were plainly disingenuous, see for example t 2-60 lines 18-22 and t 2-63 lines 12-37.

96 [2005] QB 1013, 1014D.

97 [2018] NSWCA 294, [23], per Basten JA, Leeming JA and Sackville AJA.

98 Paragraph 265 of Compass's final submissions.

99 The email to Mr Miller is at exhibit 4, Tab 21. I rely on paragraph 269 of Compass's final written submissions to conclude that this was Compass's case.

100 *Magill* (above), [151], see also *Krakowski* (above), p 573.

currently makes at paragraph 10(a) of the statement of claim. That pleading would have contained all the material facts which were necessary to constitute a complete cause of action in deceit. Specifically, there would have been a pleading of loss.

[158] The pleading of loss would not have been as particular as is required by the UCPR – r 155. It would have been necessary to explain that these were the best particulars of loss Compass could provide until after interlocutory processes (disclosure and non-party disclosure). There is power to excuse compliance with r 155 – see r 371(1) and (2)(d), (e) and (f). There is authority exactly on point to support such a course where a claim of fraud is made, and the documents necessary to particularise that plea are in, or likely to be in, the position of the defendant.[101]

[159] I find that by 28 March 2011 Compass knew that the other boat harbour tenants in South East Queensland paid substantially lower rents that it had agreed to, and its letter of that date shows that Compass knew from Mr Miller the sort of figures other tenants were paying. At this stage it had sufficient knowledge of loss to plead a complete cause of action in deceit.

Claim for Fraudulent Concealment

[160] I accept the State's submission that my finding that Compass knew of its loss sufficiently to plead fraud by March 2011 means that it is unnecessary to consider s 38(1)(b). However, *obiter*, I turn to Compass's contention that the State fraudulently concealed Compass's right of action within the meaning of s 38(1)(b) of the Limitations Act. I accept that fraudulent concealment within the meaning of the statutory provision includes conduct that is unconscionable when regard is had to the relationship between the parties.[102] The factual matters which Compass relies upon are listed at paragraph 293 of its final submissions. I deal with them one by one.

[161] Compass relied upon the making of the Representation as effectively concealing the cause of action. The authority cited was *Hawkins v Clayton.*[103] There was no equitable or legal duty on the State to disclose any information to Compass which would correspond with the duty of the solicitor in *Hawkins.*

[162] Compass relied upon the State's failure to tell it in the September Letter what the rents for other harbour tenants were. This could not be fraudulent concealment within the meaning of s 38(1)(b). The parties were at arm's length, and at that stage were not even bound by a contract. There is nothing extraordinary in the State's refusal to reveal what rents were charged to the other harbour tenants. The refusal was express, and the reason was given: they were commercial in confidence.

[163] Mr Harburg swears that at a meeting on 1 March 2012 he asked a representative of the State for the rent and other fees paid by other marina operators. He says he was refused that information on the basis that it was commercial in confidence.[104] There is a letter written by Mr Harburg dated 7 March 2012 which refers to a previous

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101 *Whyte v Ahrens* (1884) 26 Ch D 717, 721; followed in *Leitch v Abbott* (1886) 31 Ch D 374; *Sachs v Speilman* (1887) 37 Ch D 295; *Sunlea Enterprises Pty Ltd v Pollock [No 3]* [2015] WASC 330, [19]; *Smith v Australian Executor Trustees Limited* [2017] NSWSC 1406, [123].

102 *Menegazzo v Pricewaterhouse Coopers* [2016] QSC 094, [97].

103 (1988) 164 CLR 539, 590.

104 Exhibit 1, Vol 2, Tab 12, paragraph 36.

meeting. That is some evidence that a meeting did occur. However, the letter makes no complaint, or other reference to Mr Harburg having asked for his competitors' rents, and having been refused. In keeping with my general views about Mr Harburg's reliability as a witness, I am not prepared to act on the basis that such an enquiry was made on 1 March 2012.

[164] Even if there were such a refusal, I cannot see that it was a basis for the claim of fraudulent concealment. By that stage the State and Compass were parties to contracts. Each had solicitors who continued to act for them. Compass had begun, and continued, a low-level dispute about the terms of its contracts with the State. In those circumstances, I could not see anything unconscionable in the State's refusal to disclose rents paid by other boat harbour tenants. The State expressly took the view that they were commercial in confidence.

[165] Mr Harburg swears that in December 2014 he met with a representative of the Department of Transport who promised that he would provide Compass with documents showing the average rent for a wet sub-lease in South East Queensland.[105] Mr Harburg concedes he cannot recall the words used at this meeting or who it was who made the promise he swears he received. The next day he received an email from the State which does contain a promise that by 16 January 2015 the State would provide "What the average rents in the State Managed Scarborough Boat Harbour were at the Lease commencement (Aug 2010)".[106] The email also promises to provide Compass with a list of "Independent Mediators". Mr Harburg swears that the information about rent was never provided. There is no evidence that Compass chased it up.

[166] I do not regard the failure to provide information in accordance with the email of 12 December 2014 as unconscionable. The parties were not in any fiduciary relationship to each other. They were in a contractual relationship, and they were in dispute. Compass had not paid rent for three years and had not built the marina infrastructure it was obliged to build.

[167] Lastly in support of its claim that there was fraudulent concealment within the meaning of s 38(1)(b), Compass complained about the State's disclosure in these proceedings. It does appear that the State discovered less documents than one might expect as to what rent other boat harbour tenants were paying as at September 2009. However, as Compass never made any application about the State's disclosure, the State never explained the reason for that.[107] Had Compass commenced its claim earlier than it did, it may have found there were more documents available for disclosure. I do not think there is anything in this.

Limitation Point: Trade Practices Act

[168] Compass had six years to bring its claim based on the *Trade Practices Act*. It commenced proceeding 7884 of 2017 on 2 August 2017. Compass's pleaded case is that this cause of action did not accrue until June 2012 because:

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105 Exhibit 1, Vol 2, Tab 12, paragraph 49.

106 Exhibit 1, Vol 2, Tab 12, p 28.

107 In another context, Mr Morley did give evidence as to the transfer of electronically stored documents to the Department of Transport in 2010. This certainly raises possibilities of document loss. So does the length of delay between 2009 and 2017 when Compass's proceeding was commenced.

"(i) the entry into the deed of variation and wet lease did not result in loss or damage until it could be ascertained that the marina was operating at a loss; and

(ii) such loss was only ascertainable upon the conclusion of the first year of trading of the Compass marina, namely 30 June 2012."

[169] The High Court said in *Wardley Australia Ltd v Western Australia*,[108] "By virtue of s 82(2) of the [*Trade Practices Act*], the period of limitation begins to run at the time when the cause of action under s 82(1) accrues. As loss or damage is the gist of the statutory cause of action for which s 82(1) provides, the cause of action does not accrue until actual loss or damage is sustained."[109] The High Court went on to say that, in that case, as in this case, "it may safely be assumed that the plaintiff is entitled to recover 'a sum representing the prejudice or disadvantage [the plaintiff] has suffered in consequence of his altering his position under the inducement' of the misleading conduct or 'the actual damage directly flowing from' that conduct …" – p 526.

[170] As Compass pleads, its loss dates from its November 2009 entry into the Deed of Variation which obliged it to enter into the dry lease and the wet sub-lease; its entry into both the dry lease and the wet sub-lease on 16 November 2010, as well as its spending significant amounts of money undertaking Tenant's Works pursuant to the Agreement to Lease before 16 November 2010.[110] There was nothing contingent or executory about its obligations to develop the marina under the Agreement to Lease, nor its obligations to pay rent under the dry lease and wet sub-lease. In this respect its case is factually quite different from that considered by the High Court in *Wardley*.[111] The limitations defence succeeds.

[171] Compass contends that it was not until the end of its first year's trading that it suffered loss and damage because until then it could not be ascertained that the marina was operating at a loss.[112] I reject this. Having regard to the decided cases, it is unarguable. Even if Compass had made a profit at the end of its first year's trading, on its case, that profit would have been significantly less than the profit it would have made had the Representation been true. Compass knew the order of its loss from March 2011. In any case this argument is logically inconsistent with what I apprehend to be the "no transaction" basis for loss alleged by Compass.

The State's Claim for Rent

[172] In proceeding number 13008 of 2017, the State claims in debt for unpaid rent against Compass, and against Mr Harburg under his guarantee.

[173] There was a dispute on the pleadings about whether or not the State was entitled to claim the Crown Mooring fee, but that was abandoned by Compass.[113] There is no limitation point raised by Compass. By way of defence it seeks to set off any

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108 [1992] HCA 55.
109 (1992) 175 CLR 514, 525.
110 Paragraphs 13(b)-(e) and 15(a) and (c) of the statement of claim.
111 (Above) see p 524.
112 Paragraph 298 of Compass's final written submissions.
113 See paragraph 240 of Compass's final submissions.

judgment in its favour in deceit, or under the *Trade Practices Act.* Having regard to my previous findings, that will not avail it. The other point Compass raises is estoppel.

[174] It is pleaded that in reliance on the September Letter, Compass and Mr Harburg "assumed and expected that the rentals to be charged under the Wet Lease and the Dry Lease were commercial rentals in the sense of being substantially the same as other rentals charged by the port to boat harbour tenants in South East Queensland" – paragraph 9(h)(i) of the defence. It is then pleaded that on the basis of these assumptions and expectations, Compass entered into the Deed of Variation and the wet sub-lease and the dry lease. In Mr Harburg's case, he gave the guarantee. The pleading continues that the Representation was false and that Compass and Mr Harburg will "suffer detriment if their assumptions and expectations are not fulfilled". The detriment is being bound to the wet sub-lease and dry lease at the rentals specified in those documents. It is therefore said that the State is estopped from claiming under the wet sub-lease and the dry lease in the quantum claimed in the rent proceedings.

[175] Both parties in this case concentrated on the deceit claim and tended to assume that the result of the estoppel claim would follow. While the same facts were relevant to both claims, the legal framework for analysis of an estoppel claim is different from a deceit or misrepresentation claim. Compass claimed to rely on both "estoppel by representation (in law) and equitable estoppel". In my view it could not rely on both.

[176] There is no general acceptance of a "single, unified doctrine of estoppel" in Australia.[114] Underlying principles and approaches are common to various types of estoppels in much the same way that, say, the principle of unjust enrichment is common to various restitutionary causes of action. So much is express in the statement of Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*:[115]

> "The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no

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114 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* (2016) 260 CLR 1, at [139] per Keane J and at [36] and [37] per French CJ, Kiefel and Bell JJ. See also *Giumelli v Giumelli* (1999) 196 CLR 101, 112-113 cited by Keane J at [139] of *Crown Melbourne.*

115 (1937) 59 CLR 641, 674.

> misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it." (my underlining).

[177] Over centuries, the case law has produced various different estoppels. Various names and groupings have been allocated to the estoppels, which are more or less accurate, having regard to their history. Proprietary estoppel and promissory estoppel are often grouped together and called equitable estoppel, to distinguish them from common law estoppel, sometimes called estoppel by representation or estoppel in pais.[116] The fundamental differences between equitable estoppel and common law estoppel were discussed by Brennan J in *Waltons Stores v Maher.*[117] He put one difference very succinctly, "Equitable estoppel … does not operate by establishing an assumed state of affairs. Unlike estoppel in pais, an equitable estoppel is a source of legal obligation."

[178] As to proprietary estoppel, Keane J explains in *Crown Melbourne,* "In *Giumelli,* this Court explained the doctrinal basis of relief by way of proprietary estoppel as involving the recognition of a constructive trust of property whereby the legal title of the owner of property is subjected by order of the Court to limitations necessary to meet the requirements of good conscience" – [150]. There is nothing pleaded or proved in this case which could amount to proprietary estoppel.

[179] Promissory estoppel was adopted as part of Australian law in *Legione v Hateley,*[118] some considerable time after Lord Denning's famous judgment in *Central London Property Trust Ltd v High Trees House Ltd.*[119] The present case is not a case of promissory estoppel. There was no promise made to Compass by the September Letter. There was no representation as to the future. The Representation was a representation as to existing fact.

[180] The difference between the facts of this case and the facts in a promissory estoppel case is neatly illustrated by the case of *Caringbah Investments Pty Ltd v Caringbah Business & Sports Club Ltd (in liq).*[120] There a lease was drawn up. The lessee protested that it could not pay the rent named in the lease. The lessor promised that, if the lessee took the lease, it would only have to pay a lesser amount. The lease was executed in reliance upon that promissory statement. Bathurst CJ, writing the judgment in the Court of Appeal, found that the trial judge was right to conclude that the lessor was estopped from asserting that "the rent payable was that set out in the lease rather than as stated in the representations" – [86].

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116 See *The Law of Estoppel,* Michael Barnes, Hart, 2020, 1.12-1.14 and 3.2. Some differences between proprietary estoppel and promissory estoppel were discussed by Keane J in *Crown Melbourne* at [145]-[146].

117 (1987-1988) 164 CLR 387, 413ff.

118 (1983) 152 CLR 406.

119 [1947] KB 130.

120 [2016] NSWCA 165.

[181] If there is any estoppel upon which Compass can rely, it is a common law estoppel, estoppel by representation. This was described in *Waltons Stores* by Brennan J:

> "The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to …" – p 413.

[182] The novelty in the decision in *High Trees House* was that the representation there was promissory, that is, it went to the future. Prior to that it was generally understood that to found an estoppel there had to be a representation of existing fact. One of the important cases to that effect was *Jorden v Money.*[121]

[183] The development of common law estoppel is summarised by Elizabeth Cooke in *The Modern Law of Estoppel*.[122] The summary seems particularly pertinent to Compass's case in these two proceedings, based as it is on deceit and estoppel, rather than the more modern causes of action:

> "*Jorden v Money* does of course leave open the question what happens when a representation of fact is made and relied on, and is then found to have been false. … In the context of the commercial expansion of the nineteenth century the courts had to decide when such statements could be the basis of liability … The courts' answer in the nineteenth century was, of course, given in *Derry v Peek*: the maker of a statement could be made to compensate the representee for his loss only when he made the statement '(1) knowingly, or (2) without believing in its truth, or (3) recklessly, careless whether it be true or false'. That is what we now know as the tort of deceit.
>
> … And that raised the question of the status of the estoppel cases, which rested, of course, on representations of fact, which turned out to be false, but which need not have been made fraudulently; yet *Derry v Peek* purported to leave the law of estoppel unchanged. The position was made clear in *Low v Bouverie.* In that case the claimant was going to lend money to the beneficiary of a trust, on the security of his life interest in the trust fund. He therefore asked the trustee to confirm that the beneficiary was still entitled and that his interest was unencumbered. The trustee disclosed some small existing charges on the interest, but forgot about several others whose existence made the interest insufficient to secure the loan. When the beneficiary failed to pay the debt and the lender found the security to be inadequate he sought to make the trustee liable for the debt, because he had relied on the lender's false statement of fact. The claimant succeeded at first instance on the authority of a number of decisions that pre-dated *Derry v Peek;* but the Court of Appeal held that the latter decision

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121 (1854) 5 HLC 185.

122 Oxford University Press 2000, p 23.

precluded liability in damages for mis-statement, since the trustee had not been fraudulent. As for estoppel, it was explained:

> 'Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.'

Estoppel, it was insisted, was not a cause of action; ie, if the defendant had been estopped from denying the truth of what he had said, that in itself was not a legal basis for a claim in damages." – pp 23-24.

[184] Oddly, given that estoppel by representation was an established part of the law before the development of promissory estoppel, it is the subject of few modern decisions.[123] Amongst the decisions cited by Brennan J for the statement I have quoted at [181] above, were the two decisions of *Grundt v Great Boulder Pty Gold Mines Ltd*[124] and *Thompson v Palmer*[125] where Dixon J examined and analysed the law.

[185] At first instance, and in the New South Wales Court of Appeal,[126] *Waltons Stores* was decided on the basis of common law estoppel: the representation of existing fact was that there was a lease in existence which bound the parties. Maher was successful in claiming estoppel on that basis. The authority referred to was *Grundt* and *Thompson v Palmer,* as well as a joint judgment of Rich, Dixon and Evatt JJ in *Newbon v City Mutual Life Assurance Society Ltd*.[127] When *Waltons Stores* was decided in the High Court, Deane and Gaudron JJ also decided the case on this basis, and on these authorities. The remaining members of the Court treated the case as one of promissory estoppel because, at a factual level, they found Mr Maher knew that there was no extant lease, but relied on Walton Stores' promise to sign one. While Brennan J analysed the case as one of promissory estoppel, he also gave his view that if there had been a representation that there was an existing lease, the case would succeed on the basis of common law estoppel.

[186] As foreshadowed earlier in my judgment, I think there are three reasons why the common law estoppel claim made by Compass must fail. In my view each of the three reasons is related. I think they are all aspects of the notion that the Representation was not of a kind which could be the basis for an estoppel. I will deal with each of these three aspects in turn.

Representation Insufficiently Clear

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123 Michael Spence gives some idea of this, cataloguing that *Grundt* and *Thompson v Palmer* were referred to only seven times in the Australian Case Citator in the 45 years prior to 1980. There were 16 references between 1981 and 1986: *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel,* Michael Spence, Hart Publishing, 1999, p 16. No doubt legislation such as the *Trade Practices Act* accounts for some of the later lack of attention, but it does not explain the former.

124 (1937) 59 CLR 641, 674.

125 (1933) 49 CLR 507, 547.

126 *Waltons Stores (Interstate) Ltd v Maher* (1986) 5 NSWLR 407.

127 (1935) 52 CLR 723, 734.

[187] The Representation was sufficiently clear and precise so far as a cause of action under the *Trade Practices Act,* or deceit, or for negligent misrepresentation was concerned. However, I do not believe the Representation, or more correctly, the expectation or assumption it gave rise to, was clear enough to found an estoppel.

[188] The relevant difference manifests when the different types of relief which follow in each case are considered. On a Trade Practices or a deceit claim, the enquiry is as to what the plaintiff did because it was misled, and how that differed (in its monetary effect) from what it would have done had it not been misled. Damages are assessed on that basis. The misrepresentation in such a case is relevant to establishing that the plaintiff was misled. It is not relevant to calculating the damages. Damages are calculated on a tortious basis, not a contractual, or promissory, basis. However, in a claim for estoppel based on a representation of existing fact, the consequential enquiries as to compensation or loss are quite different. The estoppel, "establishes a state of affairs by reference to which the legal relation between the parties is to be decided. This estoppel does not itself create a right against the party estopped. The right flows from the Court's decision on the state of affairs established by the estoppel. … The remedy granted … will be what is necessary to prevent detriment resulting from the unconscionable conduct."[128]

[189] Compass wants to argue that the state of affairs by which the legal relations between it and the State were to be decided was that Compass would be charged the same or similar rent to other boat harbour tenants in South East Queensland. But just as this state of affairs is not precise enough to be a term of a contract, it is not precise enough to allow the Court to make a decision about what the parties' legal rights should be. What does it mean to say that rent will be similar to other harbour tenants in South East Queensland over the course of a 24 year lease? What expectation could Compass have had as to what the rent would be?

[190] The Representation was false in two respects. Not only was Compass's rent not similar to other boat harbour tenants in South East Queensland, the rents paid by other boat harbour tenants in South East Queensland were not similar to each other. The difficulty is illustrated by the contrasting submissions as to what rent I should order Compass to pay if the estoppel defence succeeded. The State submitted that rates in relation to the Moreton Bay Trailer Boat Club lease should be used as a comparator to show what detriment Compass had suffered. It was said that this lease was the most contemporaneous with Compass's lease. Using that comparator produced an amount of $4.487 million owing as rent under the wet sub-lease. Compass argued that the other (original) Scarborough Harbour Marina lease should be used as a comparator; if so, $1.246 million would be owing under the wet sub-lease. Compass advocated for this lease to be used on the basis that it was most geographically relevant.

[191] There is a passage in *Crown Melbourne* which I think is applicable here even though *Crown Melbourne* was a promissory estoppel case, and even though the passage is in terms of promissory estoppel:

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128 Priestley JA in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472, cited in *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel*, Michael Spence, Hart Publishing, 1999, pp 26-27.

> "Crown relied upon the proposition affirmed by Mason and Deane JJ in *Legione v Hateley* that a representation must be 'clear', 'unequivocal' and 'unambiguous' before it can found a promissory estoppel. Nothing in the subsequent decisions of this Court has detracted from that requirement, which addresses the concern that a doctrine which is apt to preclude a party to a contract from relying upon its terms should not be so broad in its operation as to deny the party the benefit of its bargain by dint of representations which are so equivocal or ambiguous that they could not be given effect as terms of a contract. This concern was acknowledged in *Legione* by Mason and Deane JJ, who cited with approval the speech of Lord Hailsham of St Marylebone LC in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*:
>
> > 'it would really be an astonishing thing if, in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract. I share the feeling of incredulity expressed by Lord Denning MR in the course of his judgment in the instant case when he said: "If the judge be right, it leads to this extraordinary consequence: A letter which is not sufficient to *vary* a contract is, nevertheless, sufficient to work an *estoppel* – which will have the same effect as a *variation*."'
>
> It would tend to reduce the law to incoherence if a representation, too uncertain or ambiguous to give rise to a contract or a variation of contractual rights and liabilities, were held to be sufficient to found a promissory estoppel. Practical considerations such as the need of commerce for certainty, both as to the terms to which parties have agreed to be bound, and as to whether their bargaining process has concluded, also provide strong support for this approach." – [142]-[143], (footnotes omitted, my underlining).

[192] The reason I think the passage is apt to apply in this case of estoppel by representation is that in *Crown,* as in this case, what was sought was to preclude a party from relying on the terms of a contract. Therefore, the concern with incoherence and inconsistency with the law of contract is equally applicable. Both in *Crown,* and in this case, the expectation or assumption sought to be relied upon was one which was not precise enough to be substituted for, or modify the operation of, a term of the contract.

[193] At the time it signed the Deed of Variation and the lease and sub-lease, Compass could have had no assumption or expectation as to what amount of rent it would pay, other than the rent stated in those contracts. Again, the case of *Caringbah Investments* provides a useful contrast. There the representation was specific enough to define the party's rights. It was specific enough to give rise to an expectation on the part of the lessee as to what rent was to be paid in each of the

three years of the lease.[129] There was a basis for the Court to adjust the party's contractual rights in accordance with the lessee's expectations.

State Not Estopped from Asserting any Element of its Cause of Action

[194] The weight of authority favours the view that:

> "… estoppel by representation is a rule of evidence rather than of substantive law. The doctrine does not, in itself, amount to a cause of action. Once the constituent elements of the estoppel are established, the Court will not allow the representor to adduce evidence which contradicts the truth of the representation that it has made. The legal relationship of the parties is then assessed according to the facts as represented and not according to the true state of affairs. In other words, estoppel by representation operates only to set up a state of facts. The result of the case will be determined according to the legal consequences flowing from that state of facts. Hence it is the facts set up, and not the estoppel, which are the source of the substantive legal obligation."[130]

[195] The fourth edition of *Spencer Bower, The Law Relating to Estoppel by Representation*,[131] is to the same effect: "… The representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto." – p 4. And, "By contrast, the relief granted on a promissory or proprietary estoppel is tailored, in the discretion of the court, with respect both to the terms of the representation and to the detriment the estoppel raiser has suffered …" – p 131. So is Cooke, above at [183].

[196] Lastly, Michael Barnes QC, *The Law of Estoppel,* (above), makes the same point, and in a way very relevant to this proceeding. Of estoppel by representation he says:

> "3.1 … it depends on a statement or representation of some existing matter intended to be acted on and in fact acted on by the person to whom the statement was made. … the law ordains that in certain circumstances the maker of the statement cannot in legal proceedings to which it is a party deny the truth of what has been stated. …
>
> …
>
> 3.3 The brief statement of the nature and effect of an estoppel by representation just given shows that the estoppel, when established, will operate against the maker of a representation in legal proceedings to which he is a party. This statement

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129 $150,000, not $170,000 in the first year of the lease; $160,000, not $180,000 in the second year of the lease, and $170,000, not $190,000 in the third year of the lease – see [6] and [13].

130 Wilken & Ghaley, *The Law of Waiver, Variation and Estoppel,* 3rd ed, Oxford University Press 2012, p 137. See also *Contractual Estoppel,* Trukhtanov, A, Routledge, 2018, p 27. See *Smithkline Beecham Plc v Apotex Europe Ltd* [2006] EWCA Civ 658 CA 103-12, cited in Wilken and Ghaly.

131 Feltham, Hochberg and Leech, LexisNexis 2004.

> goes to the heart of the estoppel as a principle of law. … The most that an estoppel, such as an estoppel by representation, can do is to assist in asserting or resisting a cause of action in that the estoppel may prevent a party to a legal proceedings … from denying the truth of a statement which that party has made and this inability, … may prevent that claimant from succeeding in his cause of action. … Of course, the making of an untrue statement of fact may have other consequences in law beyond the law of estoppel, including the creation of a cause of action. Such a statement if made negligently may give an action in tort for the breach of a duty of care, or such an untrue statement may enable a contract to be rescindered for misrepresentation … None of this has anything to do with estoppel. …" (my underlining).

[197] This limited operation of estoppel by representation was accepted by Brennan J in *Waltons Stores*. He referred to the rule that common law estoppel was "merely a rule of evidence and not a cause of action" – p 415. The estoppel operates by establishing an assumed state of affairs, and the parties' rights are determined in accordance with that assumed state of affairs – pp 415-416. The same point was made by Deane J in that case at pp 444-445.

[198] To recover rent under the lease and sub-lease the State does not need to make an allegation that the rent payable under those documents is commercial, or similar to any other harbour tenant's rent. The State simply needs to assert the terms of its lease and sub-lease with Compass, and rely upon the guarantee which Mr Harburg gave. An estoppel could not assist Compass and Mr Harburg.

Representation not as to Legal Rights

[199] This third aspect is again based on statements from cases of promissory estoppel. Again, I think them applicable in a case where Compass wishes to contend that the State is estopped from asserting its rights under a contract.

[200] In both *High Trees* itself, and in *Combe v Combe,*[132] Lord Denning described promissory estoppel as founded on "a promise … which was intended to create legal relations" or "a promise or assurance which was intended to affect the legal relations between them". This phraseology was adopted by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*.[133] He said:

> "In all cases where an equity created by estoppel is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation … Though the party raising the estoppel may be under no mistake as to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party who induced the assumption or

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132 [1951] 2 KB 215, 220.

133 (1987-1988) 164 CLR 387, 420 and 421. See also p 424, "A non-contractual promise can give rise to an equitable estoppel only where the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations …"

> expectation. … But, if the party raising the estoppel is induced by the other party's promise to adopt an assumption of expectation, the promise must be intended by the promisor and understood by the promisee to affect their legal relations." (my underlining).

[201] Brennan J concluded, "It follows that an assumption or expectation by one party which does not relate to what the other party is bound to do or not to do gives no foundation for an equitable estoppel …" – p 422, (my underlining). The importance to Brennan J of the need for the person asserting the estoppel to assume legal relations were created or affected by the promise is evident in his statement of the first of five elements he considered necessary to establish an estoppel, "… the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; …" – p 428.

[202] The Representation here was not one which gave rise to an expectation or assumption as to the legal relations between Compass and the Port. Contracts – the Deed of Variation, Agreement to Lease, lease and sub-lease – were to create and govern their legal relations. The Representation could not have induced an expectation or assumption in Compass that its rent would be any different from what was in the lease and sub-lease: $27 and $10 per-square-metre. The September Letter said that rent was not negotiable. That rent was what Compass expected to pay before and after the September Letter. Both before and after receipt of the September Letter, Compass expected that the Port would be able to enforce its contractual rights under the lease and sub-lease. To paraphrase the words of Brennan J above, the assumption or expectation which Compass wishes to rely upon was not one which related to what it or the State was bound to do.

[203] For the above reasons I conclude that Compass and Mr Harburg have no defence to the State's claim on the lease, the sub-lease and the guarantee and give judgment in favour of the State, together with interest. I will hear the parties as to costs.

ANNEXURE A

[1] This annexure deals with the pleading point which arose when Compass's submissions at the end of trial asserted that the representation made by the September Letter was as to the dry lease as well as to the wet sub-lease. The State took the point that this submission was beyond the pleadings. It is certainly beyond the pleadings in Compass's proceeding. The pleadings in the State's rent claim are inconsistent, internally, and with the pleadings in Compass's proceeding. I turn to examine the pleadings in each proceeding, and the way the trial was run.

Pleading in the Deceit Case

[2] Paragraph 9(a) of Compass's statement of claim only related to the wet sub-lease. Not only is it express, but it is clear that the wet sub-lease is being spoken of: only it had an Annual Rent which included a Crown Mooring Levy and a Dredging Contribution. As well, paragraphs 9(b) and 9(c) of Compass's statement of claim could only relate to the wet sub-lease. There could be no per-berth rate in relation to the dry land lease, and the figure of $364,966 used in all three sub-paragraphs is pleaded to be the charge under the wet lease.

[3] That the pleader meant to confine Compass's case to the wet sub-lease is evident also from paragraph 10(a) of Compass's statement of claim which expressly pleads only in relation to, "the rentals to be charged under the wet lease". Paragraph 10(b) of Compass's statement of claim is expressed to be particulars of paragraph 10(a). Further, it could only relate to the wet sub-lease because per-berth rates could not relate to the dry sub-lease. Further, as Compass's opening submissions make clear, the figures pleaded at paragraph 10(b) of Compass's statement of claim are taken from its expert report. In the expert report, the paragraph containing these figures sits under the heading "Wet leases".134

[4] Paragraph 6 of Compass's reply also makes it very clear that Compass's case is only concerned with the wet lease. There are numerous references to the wet sub-lease, and none to the dry lease.135 As well, Compass pleads that the September Letter contained a mistake in referring to cl 2.3.1, and in fact meant to refer to cl 2.3.2 of the Request for Proposals, "being a reference to the wet lease".136

[5] Further in the reply, Compass pleads that the September Letter is to be interpreted in the context that, at the meeting of 11 September 2009, Mr Harburg on behalf of Compass, "said words to the effect that he was concerned that he did not know what rent Compass would be charged"137 and significantly, "said words to the effect that he wanted an assurance from the [Port of Brisbane] that the rent that [Port of Brisbane] would charge under the wet lease would be the same as the rentals charged by [Port of Brisbane] for similar premises and facilities".138 It is pleaded that in response to Mr Harburg's seeking this assurance, "The letter of 15 September 2009 from [Port of Brisbane] to Compass expressly confirmed that the

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134 See paragraph 21 of Compass's written opening, and see Exhibit 1, Vol 2, Tab 19, p 6 of Mr Benjamin's expert report.

135 See paragraph 6(b)(i), 6(c)(i), 6(c)(iii)(B), (D) and (E), 6(d)(ii), (iii) and (iv), 6(e)(i), (ii), (iii) and (v).

136 See paragraph 6(c)(iii)(D).

137 Paragraph 6(g)(iii)(B).

138 Paragraph 6(g)(iii)(C).

rental to be charged under the wet lease, including all components thereof, was or would be of the nature pleaded in sub-paragraphs 9(d) to 9(f) of the statement of claim".139

[6] Compass pleads that in reliance upon the representation in the September Letter it entered into both the wet lease and the dry lease. Obviously enough, for the purpose of operating a marina at the site, it was necessary to take both leases. However, the case Compass makes as to what it did in reliance on the representation is not relevant to whether Compass pleaded that the representation related to the dry lease as well as the wet lease.

[7] That Compass's pleaded case is that the September Letter made representations in relation to the wet sub-lease only is confirmed in Compass's written opening:

> "17. The assurance is a representation that the rental set out in the wet lease was similar to the rentals that were being paid to [Port of Brisbane] by Compass's competitors.
>
> 18. That is the plain and ordinary meaning of the assurance."

[8] There was nothing in oral opening to contradict this.

Pleading in the Rent case

[9] Paragraph 9(f) of Compass's defence to the State's rent claim pleads the equivalent of paragraph 9 in Compass's proceeding. That is, expressly, and in substance, the pleading is that the representation is in relation to the wet sub-lease. Further, paragraph 9(j) of Compass's defence to the State's rent claim pleads in the same terms as paragraph 10 of Compass's statement of claim. That is, it is confined to allegations that the September Letter made false statements about the wet sub-lease. Furthermore, paragraph 12 of the particulars provided by Compass in the rent action is confined to rent charged under wet sub-lease.140

[10] However, there are parts of the defence to the State's rent claim which are inconsistent with all the pleadings so far outlined, and which are also internally inconsistent. At paragraph 9(h) Compass pleads that in reliance on the statement as to what rent would be charged under the wet lease, "The defendants assumed and expected that the rentals to be charged under the wet lease and the dry lease were commercial rentals …" (my underlining).

[11] Paragraph 10 reads as follows:

> "The defendants will suffer detriment if their assumptions and expectations are not fulfilled, namely by:
>
> (a) being bound to the Wet Lease and the Dry Lease at the rentals specified therein; and
>
> (b) having to pay the rentals for the Wet Lease and Dry Lease in circumstances where the rentals for the Wet Lease

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139 Paragraph 6(g)(iii)(E).

140 Court Document 17, paragraph 12.

substantially exceeds commercial rentals as represented in the statement." (my underlining).

[12] Paragraph 11 reads as follows:

> "By reason of the matters pleaded in paragraphs 1(b)(ii), 9 and 10 above, the plaintiff is estopped, as against either or both of the defendants, from:
>
> (a) claiming under the Wet Lease and the Dry Lease (including the guarantees therein) in the quantum claimed in these proceedings;
>
> (b) demanding or otherwise claiming for payment of rental under the Wet Lease and the Dry Lease in any amount exceeding that which would be payable if calculated in accordance with the representations conveyed to the defendants in the statement; …" (my underlining).

State's Pleading as to September Letter

[13] Complicating these matters further is the State's pleading in relation to the second paragraph of the September Letter. The State contended that the paragraph ought to be read as only relating to the dry lease. This pleading was made in both proceedings.141

[14] Thus, on the pleadings in the deceit case, Compass contended that the September Letter representation was in relation to the wet lease and the State contended it was in relation to the dry lease. No party contended that the representation was in relation to both the dry lease and the wet sub-lease. In the rent case, Compass's pleading was inconsistent. While it expressly confined the representation it relied upon to the wet sub-lease, the later parts of its pleading were consistent only with it claiming that the representation also related to the dry lease.

Conduct of the Proceedings

[15] In his affidavit of evidence-in-chief Mr Harburg used the word "leases" at paragraphs 15(a) and 16 in talking about oral representations made by Ms Ryan on 11 September 2009. The importance of that is that Compass's case was that the September Letter was confirming those representations. Oddly, when he was taken to those parts of his affidavit in cross-examination he volunteered that he was referring to the wet sub-lease – t 1-56. Although it was implicit rather than explicit, this is also the effect of his evidence at t 1-57, line 25ff. It was also implicit that Mr Harburg was talking about the wet sub-lease in those parts of his evidence where he asserted that he was told that the rent would be adjusted according to the number or sizes of berths. When the State's case that the September Letter referred only to the dry lease was put to Mr Harburg he rejected it and asserted that he had had discussions and negotiations as to the wet lease because "that was the most important one" – t 1-61.

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141 Paragraph 9 of the defence in the deceit proceeding and paragraph 11 of the reply in the rent proceeding.

[16] When the State's case in relation to the oral representations was put to Mr Harburg, care was taken to confine the question to wet lease rentals – t 1-59 lines 40-47.

[17] When Ms Ryan was in the box, questions were asked of her as to whether or not the September Letter related to the wet and dry leases and she accepted that it did – tt 4-22, 4-23, 4-24 and 4-25.

[18] Mr Benjamin, Compass's expert, was briefed to compare rents payable by Compass under the wet sub-lease and the dry lease with rents paid by other boat harbour tenants. He did so in his report dated 15 May 2020. No objection was taken to that part of his report which showed that the rent which Compass paid on the dry lease was higher than the rent of all other boat harbour tenants.

[19] Fraud must be pleaded distinctly, and with particularity so far as the representation said to be fraudulent is concerned.142 In this case I am critical of the pleadings filed on behalf of Compass because they were inconsistent. I am also critical of Compass's conduct in running a case and making submissions which are outside its pleadings in the deceit case, at least.

[20] However, despite the problems with Compass's pleadings and the way it ran its case, the scope of factual controversy raised by this pleading point is very narrow. The September Letter is in evidence; the question is what representation is made by it. While neither party contended that the letter made a representation both as to the dry lease and the wet sub-lease, the State did contend that the representation related to the dry lease. That is, it was an issue in the proceedings whether the September Letter did make a representation in relation to the dry lease. There was evidence from both Mr Harburg and Ms Ryan that the letter related to both the dry lease and the wet sub-lease. The September Letter was quite capable of being interpreted as referring to the wet sub-lease and the dry lease. Without objection, Compass tendered a report showing that insofar as the Representation was made in relation to the dry lease, it was false. I think in all the circumstances, the just result is to allow Compass to make the case that the Representation related to both the dry lease and the wet sub-lease, despite the difficulties caused by its pleadings.

142 *Krakowski* (above) at p 573 and *Magill* (above) at [151].

ANNEXURE B

[1] Mr Harburg was approaching 70 years old in 2009.[143] He was soon to suffer a major illness. At the time he gave evidence he was approaching 80 years old. It was evident on the afternoon of day one of trial that he was less cognitively able than he had been that morning. I adjourned the Court early. By the next morning Mr Harburg had seemingly recovered. However, the impression that he was struggling with the demands of giving evidence remained.

[2] I formed the view that there were times when Mr Harburg could not remember sufficiently to properly answer questions. Rather than reveal these difficulties, I thought he was inclined to give innocuous answers, which at times did little more than reflect the content of the question, in order to have the cross-examination progress.144 Similarly, there were times when Mr Harburg gave inconsistent answers to the same question within a short space of time. I formed the view that he had simply given answers he thought were likely correct without any real memory.145

[3] Mr Harburg swore to information based on reconstruction of events, rather than actual memory.146 He swore that there was a meeting on 21 May 2008 at which representations were made to him causing him to sign the Agreement to Lease. In fact he signed the Agreement to Lease on 7 May 2008.147 The State signed on 21 May 2008, and the document bears that date.

[4] More significantly, Mr Harburg gave evidence that representations were made to him that rent would be adjusted, and in particular adjusted so that it was the same "per berth" as other marinas. This was clearly false reconstruction in my view. His evidence was:

- At paragraph 10 of his affidavit, Mr Harburg swore that before he signed the Agreement to Lease Ms Ryan told him that:

  "(a) Compass's rental amount was not negotiable, and Compass would pay the same rental amount as [Port of Brisbane's] other lessees in South East Queensland …

  (b) If necessary, the rental amount would be 'adjusted', to ensure that Compass paid the same amount as other lessees;"

- At paragraph 15(a) of his affidavit, Mr Harburg swore that at the meeting of 11 September 2009, Ms Ryan had told him that Compass's rent would be adjusted when final marina plans showed the number and sizes of berths to be constructed.

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143 Exhibit 4, Tab 4.

144 Eg, t 1-45 lines 6 and 11; t 1-49 line 34; t 1-67 line 7.

145 Eg, this happened in relation to evidence about the area over which Compass sought rent relief in 2009 – tt 1-40-41; the reasons behind Compass's cancellation of the Agreement to Lease in August 2009 – tt 1-43, 1-45, 1-49 and 1-52; whether Mr Harburg ever discussed allowing Mr Miller to invest in the marina – tt 2-9-10, 2-16 and 2-17.

146 See eg. t 1-41 line 37;

147 Tt 1-34-36.

- Mr Harburg said that on 11 September 2009 Ms Ryan "talked about adjusting the rental to be on a level playing field with other marinas" – t 1-45, line 29.

- He said that he had an understanding that Compass's rent "would be adjusted so it was the same or similar – our cost was the same or similar per berth, taking into account the size of the berth, as other marinas in South East Queensland" – t 1-57.

- In cross-examination as to the meeting of 11 September 2009 he said:

  > "… You knew precisely what those rents would be, $27 per square metre for the dry lease and $10 per square metre for the wet lease?- - - Sorry. I – I'll have to get my dates – yeah. I understood the rental would be adjusted so that on a per berth rate, apples for apples, we would have the same rent as other marinas in the area in South East Queensland, and I didn't know what that rental was, but it would be adjusted to be that." – t 1-59.

- Cross-examination as to reliance elicited this answer:

  > "And the short proposition I want to put to you is you never sought to have included in the deed of variation any term that reflected anything said by you orally or in writing by Ms Ryan in relation to the rentals to be charged under the leases?--- I signed that document because I had a signed document from [Port of Brisbane] saying that the rent would be adjusted." – t 2-5; see also t 1-25 to the same effect.

[5] The idea that rent would be adjusted is inconsistent with the pleaded case as to the meaning of the September Letter. It is inconsistent with the terms of the September Letter: rent was "not negotiable". There is nothing in the written material passing between Compass and the Port which referred to rent being adjusted. There is nothing in the written material before September 2009 as to rent being on a per-berth basis. Rent had only been spoken of as a rate per-square-metre. I find that before the Deed of Variation (at least), there were never any statements made on behalf of the Port that rent would be adjusted; administered in some way differently to the contracts, or that rent would be on a per-berth basis.

[6] I think Mr Harburg's evidence about meetings before the Deed of Variation is confused by reconstruction and therefore so unreliable that I will not act on it. Compass's pleaded case was based only on the September Letter, and the context provided by the 11 September 2009 meeting. However, Mr Harburg's affidavit was to the effect that between January and May 2008 he attended two or three meetings with Port of Brisbane and enquired whether or not the rent to be paid by Compass was "the same amount that other marina operators in South East Queensland were paying to [Port of Brisbane] under their leases".[148] Mr Harburg's affidavit says that he was assured of this and "came away from those early meetings feeling comfortable that the rental amount would be the same or at least competitive with that charged to other marinas".[149]

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148 Exhibit 1, Vol 2, Tab 12, paragraph 7.

149 Exhibit 1, Vol 2, Tab 12, paragraph 8.

[7] In his oral evidence this extended even to saying that he had had similar meetings with representatives of the Port of Brisbane before Compass put in its proposal in 2007. In its proposal Compass accepted the terms of the lease and sub-lease, including rent. When this was drawn to his attention in cross-examination Mr Harburg swore he had asked for clarification as to how the lease and sub-lease "would be administered" and had received assurances which made him willing to accept the terms of the lease and sub-lease which were annexed to the request for proposals.150 That is, not only had Mr Harburg's concern with rental parity shifted back in time to 2007, but so had the false ideas about rent being adjusted or administered differently to the documented agreements.

[8] Mr Harburg had no contemporary notes of these meetings. There was no contemporary correspondence which corroborated his evidence.

[9] It is curious that on Mr Harburg's evidence he was reassured three or four times before the meeting of 11 September 2009; felt comfortable after that reassurance; signed the Agreement to Lease before the meeting of 11 September 2009, but still had anxiety about rental parity on 11 September 2009. Another curiosity is that, according to his oral evidence, he had been assured as far back as 2007 that whatever the documents said, the lease and sub-lease would be administered in some different way, or rental would be adjusted in some way, differently to the written terms of the documents, yet he was only satisfied and willing to desist from his enquiries as to rental parity when he received the September Letter which could not by any stretch be interpreted to mean that rent would be adjusted or administered differently to what was in the documents.

[10] Mr Harburg was attached to the idea that had Compass been charged the same rent as other harbour tenants, it would have provided a better service than other marinas, and therefore made a success of its marina venture.151 The venture was unsuccessful and, certainly by the time he swore his affidavit in these proceedings, his belief was that this was due to his having been misled about the rent. It was clear from some parts of Mr Harburg's evidence that he could no longer attribute a source to his belief, but merely insisted on his belief:

- "So can I go back to where I was in terms of asking the question. I said to you clause 2.3.1 concerned the dry lease rental. As I understand your answer, you resisted that by saying no, it provided that the rental was not negotiable?--- I don't know where it came from. It's back in – 12 years ago. But I always understood the rent was not negotiable because it was going to be the same for all lessees, all marina operators." – t 1-55.

- "And I want to put to you that Ms Ryan never said to you that the port's policy was to charge boat harbour tenants the same rental?--- I don't recall if they were her exact words, but I certainly understood that it would be a level playing field and people would have much the same rental or similar rental. I don't know exactly what words she used." – t 1-56, lines 20-24; see also lines 37-40 and t 1-57, lines 5-9.

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150 Tt 1-24-25, where Mr Harburg accepted that he had not included details of these discussions in his affidavits of evidence-in-chief.

151 See paragraph 8(b)(iv)(A) and paragraph 8(b)(vi)(B) of the reply; and see Exhibit 1, Vol 2, Tab 12, paragraph 8. The idea also surfaced in his oral evidence.

- "Well, until this point, that's what the documents had said, it was just a square metre rate per area, wasn't it?--- Yes, because – well, I don't know why because, but ultimately it was important to us that we paid the same rent per berth as other marinas in South East Queensland." – t 1-58.

- "So at the end of this part of my cross-examination of you, your evidence to this Court is that all of those words were used for sure?--- No. I can't remember exactly, but I can only remember what the impression I had – or what I left believing, and the same, similar to me are very much the same – had the same meaning." – t 1-59.