SUPREME COURT OF QUEENSLAND

CITATION:	*Barboza v Blundy & others* [2021] QSC 68
PARTIES:	**JANELLE BARBOZA** (plaintiff) **v** **BRETT BLUNDY** (first defendant) **HONEY BIRDETTE (AUST) PTY LTD** ACN 117 200 647 (second defendant) **BNT HOLDCO PTY LIMITED** ACN 129 156 921 (third defendant) **BB RETAIL CAPITAL PTY LIMITED** ACN 006 175 033 (fourth defendant)
FILE NO/S:	BS 4181 of 2019
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	1 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	3, 4, 5, 6, 7 and 11 August 2020
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. There must be judgment for the defendants against the plaintiff.** **2. I will hear the parties as to costs.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP RIGHTS AND REMDEIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – WHAT CONSTITUTES – GENERALLY – where the plaintiff claimed a remedy under s 233 of the *Corporations Act* 2001 (Cth) – where a company decided to accept assignment of some leases and some staff from a company associated with its majority shareholder – where the plaintiff minority shareholder alleged that the decision to do so was imposed on the company by the majority shareholder and over her objection – where the plaintiff alleged the level of expenditure associated with the decision operated to her disadvantage because it reduced the amount she received on exercise of a call option in relation to her shares by the majority shareholder – whether there was conduct which was oppressive to, unfairly prejudicial to or unfairly

discriminatory against the plaintiff

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – UNCONSCIONABLE CONDUCT – GENERALLY – where the plaintiff claimed damages for conduct said to be unconscionable in contravention of s 12CB of the *Australian Securities and Investment Commission Act* 2001 (Cth) – where the conduct relied on in support of the oppression claim was also part of the basis for the unconscionable conduct claim – where the plaintiff also alleged that the manner of exercise of the call option in respect of her shares was contrary to the contractual terms governing it – whether the relevant defendants had engaged in unconscionable conduct

Australian Securities and Investment Commission Act 2001 (Cth), s 12CB, s 12CC, s 12GF
Corporations Act 2001 (Cth), s 232, s 233

Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd (2017) 121 ACSR 1; [2017] QSC 74, applied
Australian Competition and Consumer Commission v Medibank Private Ltd (2018) 267 FCR 544; [2018] FCAFC 235, cited
Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40, followed
Body Bronze International Pty Ltd v Fehcorp Pty Ltd (2011) 34 VR 536; [2011] VSCA 196, approved
Chase Corporation (Australia) Pty Ltd v North Sydney Brick and Tile Co Ltd (1994) 35 NSWLR 1, cited
Jenyns v Public Curator (Qld) (1953) 90 CLR 113, applied
Joint v Stephens (2008) 26 ACLC 1467; [2008] VSCA 210, cited
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199; [2015] FCAFC 50, cited

COUNSEL: N H Ferrett QC, with M Forrest, for the plaintiff
S Couper QC, with B Wacker, for the defendants

SOLICITORS: Holding Redlich for the plaintiff
Gilbert + Tobin for the defendants

Introduction

[1] The plaintiff was a member and director of the second defendant (**the Company**) from the time of its establishment in 2005 until about November 2014 when the majority shareholder (the third defendant (**BNT**)) acquired her shares by exercising a call option under a shareholders' agreement.

[2] The first defendant, Mr Blundy, is and was a highly successful retailer and entrepreneur. He was the majority shareholder of the fourth defendant (**BBRC**) which was the parent company of BNT.

[3] In this proceeding, which was commenced by claim in 2019, the plaintiff complains about particular conduct of Mr Blundy, BBRC and BNT during the last year of her involvement with the Company. Essentially, her case is that Mr Blundy imposed an accelerated domestic expansion plan on the Company over her opposition to that course. She says that the level of expenditure associated with that course operated to her disadvantage because it reduced the amount she received on exercise of the call option.

[4] She seeks to characterise the conduct of which she complains as oppressive conduct within the meaning of s 232 of the *Corporations Act* 2001, or as unconscionable conduct in contravention s 12CB of the *Australian Securities and Investments Commission Act* 2001 (**the ASIC Act**).

[5] Based on that characterisation, she pursues:[1]

(a) orders pursuant to s 233 of the *Corporations Act* 2001 that BNT pay to her the difference between the amount which it paid to acquire her shares and what she says was the actual value of those shares as at the date of acquisition; or

(b) pursuant to s 12GF of the ASIC Act, recovery of damages from Mr Blundy, BNT and the fourth defendant (**BBRC**) in the same amount, for loss suffered consequent upon conduct by them in contravention of s 12CB of the ASIC Act.

[6] For the reasons which follow, the plaintiff's claims must fail.

The facts

[7] I turn first to express my findings as to the relevant course of events leading up to and surrounding the acquisition of the plaintiff's shares.

The Company

[8] The business of the Company was the sale of women's lingerie, hosiery and sex toys. It was established in 2005 by the plaintiff and Ms Eloise Monaghan. The plaintiff and Ms Monaghan each held 50 per cent of the shares in the Company. Ms Monaghan's business partner, Mr Brookman, was a silent investor in the Company's business.

[9] In 2011, the Company came to the attention of Mr Blundy. After some discussions with Mr Brookman, Mr Blundy determined that BBRC should invest in the Company, via BNT.

[10] On 27 October 2011, BNT, the Company, the plaintiff,[2] Ms Monaghan,[3] and Mr Brookman,[4] entered into a suite of agreements to bring about that outcome. BNT became the 55 per cent majority shareholder of the Company. The plaintiff, Ms Monaghan and Mr Brookman became minority shareholders, holding 15 per cent each. The plaintiff and Ms

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1 Claims for damages for breach of contract and for damages for inducing breach of contract had been pleaded but were not pressed.

2 The plaintiff was a party in her personal capacity and as trustee of her family trust.

3 Ms Monaghan was a party in her personal capacity and as trustee of her family trust.

4 The corporate trustee of a trust associated with Mr Brookman was also a party.

Monaghan became joint managing directors. The other two directors were Mr Blundy and Ms Nicole Noye, who was an executive in one of Mr Blundy's other businesses.

The shareholders' agreement

[11] For present purposes, attention need only be paid to one of the suite of agreements, namely the "Subscription and Shareholders' Agreement" (**the shareholders' agreement**). By that agreement, the four shareholders agreed to subscribe for shares in the Company and agreed to regulate the affairs of the Company as set out in the shareholders' agreement.

[12] The Company's business was defined as "retailing lingerie, hosiery and associated toys and products in Australia and internationally": see cl 3(a)(1) and cl 1 defined term "Business".

[13] Clause 3(b) recorded the shareholders' agreement that:

> (b) Each Shareholder agrees:
>
> (1) that the business objective is to maximise the value of the Company, and that they must use all reasonable endeavours to achieve that objective; and
>
> (2) to exercise its rights and powers under this agreement as Shareholders to achieve that objective in compliance with this agreement.

[14] The shareholders' agreement also contained provisions governing the management of the Company. I observe:

(a) As joint managing directors, the plaintiff and Ms Monaghan were responsible for the day to day management of the company "subject to cl 5 [which provided for meetings and resolutions of directors] and to the instructions of the board, including (but not limited to) decisions relating to: (a) product range; (b) fitout design and style for stores; and (c) advertising copy": see cl 6.1.

(b) Decisions which were not part of the day to day management of the Company were to be made at meetings of the directors: see cl 6.2 and cl 5. Pursuant to cl 5, there were two types of decisions which could be made by the directors: "Special Majority Decisions" and all other decisions.

(c) Special majority decisions were the matters specified in schedule 3 as matters requiring "Special Majority Approval": cl 1 and schedule 3. Accordingly, and amongst other things, the following matters were matters which required special majority approval and were to be regarded as special majority decisions:

(i) approval of the annual business plan and any material departure from a current business plan; and

(ii) any expenditure or incurrence of liability which involved an amount in excess of $50,000 in a financial year and which was not specifically provided for in the current business plan.

(d) Special majority approval necessitated approval of at least 75 per cent of the directors entitled to vote: see cl 1 and cl 5.5. All other decisions required only a simple majority: cl 5.4. It is important to realise the significance of the special majority approval mechanism. I observe:

(i) Each director had one vote: see cl 5.2(a).

(ii) BNT was the majority shareholder, holding 55 per cent. It was entitled to appoint two directors: see cl 4.2(a).

(iii) The plaintiff, Ms Monaghan and Mr Brookman each held 15 per cent of the shares. However the plaintiff and Ms Monaghan were – for so long as they

were shareholders and employees of the Company – entitled to appoint one director: see cl 4.2(b) and (c).

(iv) No other directors could be appointed without special majority approval: see cl 4.2(d).

(v) If both the plaintiff and Ms Monaghan opposed a resolution, it could not achieve the requisite 75 per cent of the votes and could not therefore achieve special majority approval.

(e) The Company's obligation was set out in these terms:

> **6.3 Conduct of Business**
>
> The Company must ensure that each Company Group member:
>
> (a) **maintains property**: …;
>
> (b) **compliance**: complies with all laws, the requirements of any Government Agency and all agreements to which it is a party;
>
> (c) **insurance**: …;
>
> (d) **corporate existence**: maintains its corporate existence;
>
> (e) **Business Plan**: conducts the Business in accordance with the current Business Plan.

(f) As executives of the Company, the plaintiff and Ms Monaghan also agreed, in performing their duties, to at all times act in a manner that was consistent with the shareholders' agreement and so as to ensure that the Company complied with the shareholders' agreement: cl 3(c) and cl 1 definition of "Executive".

(g) The result was that the Company had agreed that it would ensure that it conducted its business in accordance with the current business plan, and the plaintiff and Ms Monaghan, as joint managing directors, had agreed to perform their duties so as to ensure that the Company complied with that obligation.

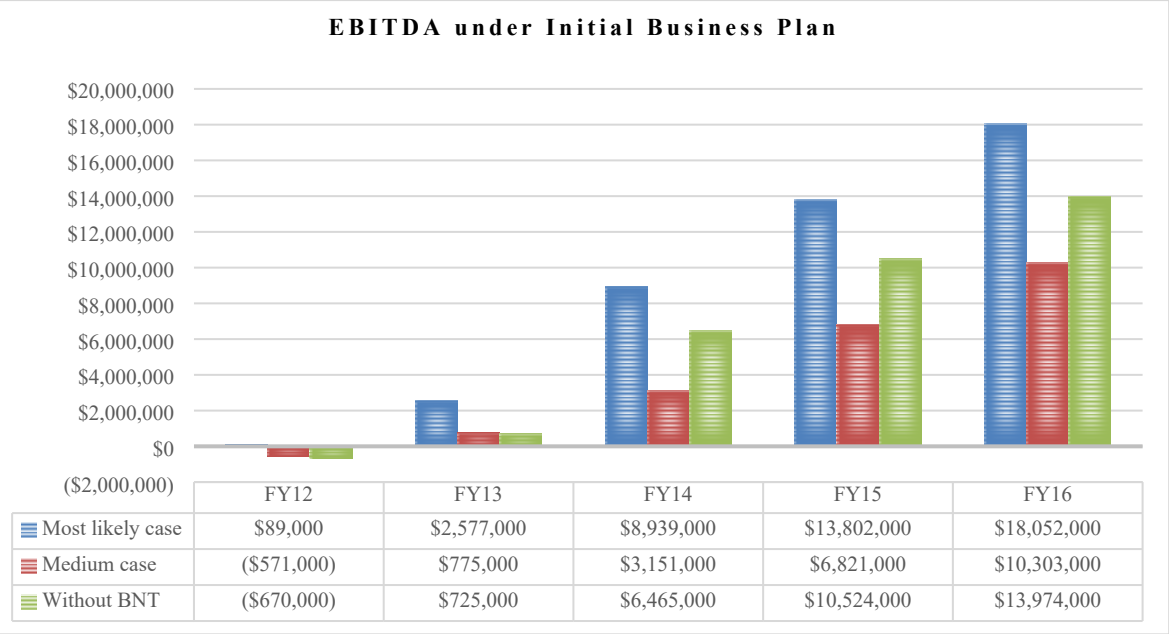
[15] The last-mentioned contractual terms necessarily had to be construed with the provisions in the shareholders' agreement which dealt with the business plan and with the terms of the business plan itself.

[16] By cl 1, "Business Plan" was defined as "the business plan and budget adopted under clause 6.5 from time to time" and "Initial Business Plan" was defined as "the initial business plan for the Company as outlined in cl 6.5(a)". Clause 6.5 then provided as follows:

> **6.5 Business Plan**
>
> (a) The parties agree that the Initial Business Plan for the Company Group is in the form set out in Attachment 2.
>
> (b) Before the end of each financial year the Company must put forward for adoption by the Board (under clause 5.5), a business plan for the Company Group which must include the following and such other or different matters determined from time to time by Special Majority Decision:
>
> (1) strategy and operating parameters of the Company Group;
>
> (2) business forecast including a balance sheet, profit and loss account and cashflow with assumptions;
>
> (3) capital expenditure plan including a plan for new stores and store closures; and
>
> (4) a marketing plan.
>
> (c) If a new Business Plan is not adopted in accordance with clause 6.5(a) before the beginning of a new financial year then the Business Plan for the previous financial year will remain in force until adoption of the new Business Plan.

[17] The attachment referred to in cl 6.5(a) (the **Initial Business Plan**) was a two-page document expressed in spreadsheet form rather than in narrative form. The first page set out three forecast business cases, namely "Most likely case with BNT"; "Medium case with BNT"; and "Most likely case without BNT". Within each of those business cases, and for each of the financial year ended 30 June 2012 (**FY12**), the financial year ended 30 June 2013 (**FY13**), the financial year ended 30 June 2014 (**FY14**), the financial year ended 30 June 2015 (**FY15**) and the financial year ended 30 June 2016 (**FY16**), the first page of the plan identified forecasts for (and the makeup of) the following: store numbers; gross revenue; EBITDA (i.e. earnings before interest, taxes, depreciation, and amortisation); net working capital movements, including for capital expenditure; cash flow; and net assets.

[18] Under each of the three business cases, the Initial Business Plan contemplated earnings growth over the 5-year period provided for in the plan, as plotted on the chart below:



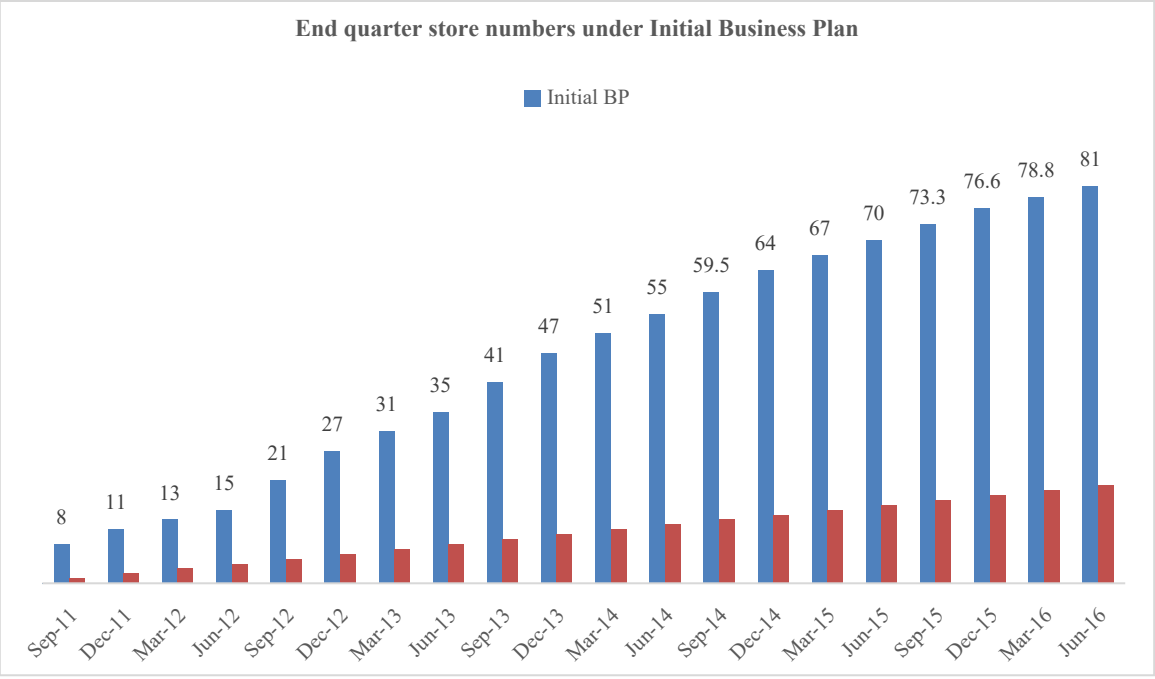
	FY12	FY13	FY14	FY15	FY16
Most likely case	$89,000	$2,577,000	$8,939,000	$13,802,000	$18,052,000
Medium case	($571,000)	$775,000	$3,151,000	$6,821,000	$10,303,000
Without BNT	($670,000)	$725,000	$6,465,000	$10,524,000	$13,974,000

[19] Under each of the three business cases, the Initial Business Plan assumed significant domestic expansion in the form of growth in store numbers over the 5-year period provided for in the plan. The plan assumed that there were five stores at its commencement. Store numbers assumed as at the end of the relevant financial years were as plotted on the chart below:

	FY12	FY13	FY14	FY15	FY16
Most likely case	15	35	55	70	81
Medium case	15	35	55	70	81
Without BNT	15	35	55	70	81

[20] It can be seen that for each of the three business cases, the plan assumed that: a further 10 new stores would be opened during FY12, so that at the end of the financial year there would be 15 stores; a further 20 stores would open in FY13; a further 20 stores would open in FY14; a further 15 stores would open in FY15; and a further 11 stores would open in FY16.

[21] The second page of the Initial Business Plan identified in spreadsheet form the operating assumptions and profit and loss assumptions applicable to only one of the business cases dealt with by the first page, namely the "Most likely case with BNT". It did so on a quarterly basis from the quarter ended 30 September 2011 to the quarter ended 30 June 2016. The chart below plots the assumed store numbers by reference to data from the end of the quarter figures as expressed in the Initial Business Plan for the "Most likely case with BNT". Since the second page of the Initial Business Plan only dealt with the "Most likely case with BNT", there were no equivalent quarterly figures specifying the store number assumptions for the other two business cases.



[22] By way of summary, I observe that the Initial Business Plan was a planning and budgeting document which set out – by reference to three possible business cases – relevant assumptions and forecasts. It did not set out promises that the assumptions and forecasts would be achieved. The Company's promise to conduct the business "in accordance with" the Initial Business Plan, could not be regarded as a promise by the Company that it would actually achieve the store numbers referred to in the plan, whether at the annual level which was an assumption common to all three business cases, or at the quarterly levels assumed for the "Most likely case with BNT".

[23] The call option to which reference has already been made, was set out in cl 16.1, which provided:

> **16.1 Call Option**
>
> (a) At any time on the following dates BNT has an option to purchase all (but not part only) of the other Shareholders' Shares at the Call Option Value (**Call Option**):
>
> (1) between 1 August 2014 and 11 November 2014; and
>
> (2) between 1 August 2015 and 11 November 2015.
>
> (b) BNT may exercise the Call Option by giving written notice to that effect to the other Shareholders and the Company.
>
> (c) If BNT exercises the Call Option, the other Shareholders must sell to BNT all of their Shares and BNT must purchase those Shares at the Call Option Value.
>
> (d) ….
>
> (e) The Call Option Value is payable to the Transferors on the closing of the purchase and sale, which must take place on the day which is 10 Business Days after the date of exercise of the Call Option under this clause 16.1.
>
> (f) …

[24] The "Call Option Value" was the price paid in the event of exercise of the call option. It was defined in cl 1 as a proportion of a multiple of the net profits after tax (**NPAT**) of the Company in these terms:

> the aggregate percentage of the Initial Shareholders' (other than BNT) or their Permitted Transferees' total Shares at the time the Call Option is exercised multiplied by the amount which is equal to 8 times the net profits after tax of the Company (as set out in the full year audited accounts to 30 June of the most recently elapsed financial year or if the audited accounts are not available at BNT's election the 30 June management accounts of the most recently elapsed financial year).

[25] There was also a put option in favour of the minority shareholders and a further call option in favour of BNT, which could be exercised within 20 business days of the fifth anniversary of completion under the shareholders' agreement: see cl 16.2. If either option was exercised, the minority shareholders would be paid an amount equal to their percentage shareholding multiplied by the amount which was equal to 5 times the Company's NPAT for FY16: cl 1 definition of "Put Option Value".

[26] The exercise of a call option pursuant to cl 16 was not the only means by which the shares held by one of the minority shareholders could be compulsorily acquired. Clause 15 provided a mechanism for mandatory transfer by either the plaintiff or Ms Monaghan, if they ceased to be an employee of the Company. In such circumstances, they would either be a "Good Leaver" as defined or a "Bad Leaver" as defined. The clause set out a mechanism by which the leaving executive could be required to make an irrevocable offer to sell their shares not by reference to a multiple of NPAT, but at a price reflective of an expert determination of the "Fair Value" of the shares, where "Fair Value" meant the sum calculated by:

(a) taking into account the amount which a wilting (but not anxious) seller would be prepared to accept and a willing (but not anxious) buyer would be prepared to pay;

(b) taking into account the total loss or damage suffered or incurred by the Company and the other shareholders as a result of the event or circumstance which gave rise to the determination of fair value under the clause;

(c) taking into account the fact that the sale would be a sale of a minority stake of shares; and

(d) ignoring any restrictions on transfer of those shares in the shareholders' agreement or the constitution of the Company.

[27] It remains to note that the shareholders' agreement also contained a provision by which BNT accepted the obligation to provide certain services to the Company on the terms set out in Schedule 6: see cl 6.6. The timing of service introduction and fees was to be mutually agreed, but the general scope and fee structures would be as specified in the schedule. These services were referred to by the Company during the course of its activities as "shared services". Amongst other things, the schedule listed the following services:

(a) product services: introducing suppliers, providing technical packs and technical fit, quality control functions and freight forwarders;

(b) warehouse services: providing warehouse facilities and functions, domestic freight and online activities;

(c) shop fit out services: providing fixtures and fittings and logistics;

(d) property services: providing lease negotiations and finalising lease documentation;

(e) people and development services: payroll bureau processing, payroll services, time and attendance / roster / award interpreters, recruitment services and training modules;

(f) finance services: accounting, accounts payable, reporting, banking and treasury services;

(g) loss prevention services: stocktakes of stores and warehouse, fraud monitoring and investigations; and

(h) IT services: systems management, help desk and new stores/ close stores / support office services.

[28] Schedule 6 also set out broad details of the basis on which BNT would charge for the specified shared services. Notably, the shareholders' agreement specified in relation to the service of providing lease negotiations and finalising lease documentation that BNT would charge the Company on the basis of $7,500 per site (new or renewal), with all direct costs such as travel and miscellaneous external fees recharged on a direct basis.

The lead up to the December 2013 strategy meeting

[29] As mentioned, the plaintiff and Ms Monaghan acted as joint managing directors of the Company. Until their relationship broke down in July 2013 (a matter to which I will return), they worked in a consultative and collaborative way in the development of the business, although they each had different focuses. Ms Monaghan was generally responsible for product design and creation, creative direction, marketing, property, retail operations and on-line (i.e. website or digital sales) and the plaintiff was generally responsible for accounts, warehouse, IT, merchandise planning, HR and administration. They got on well with Mr Blundy, regarding him very much as a business mentor. Prior to

his moving to Singapore in early 2013, they used to meet with him every Sunday to discuss business matters.

[30] Notwithstanding that the express contemplation of the shareholders' agreement was that a new business plan would be prepared for adoption by the Company's board for each new financial year, that does not seem to have happened. It was common ground on the pleadings that in or about the period of December 2013 to March 2014, all parties were bound by the Initial Business Plan and it was the only relevant business plan.[5] That does not, however, mean that there was no planning or budgeting at all. In fact, in June 2013 the Company developed a document entitled "FY14 Improvement Plan" which expressed various budgeting and planning information.

[31] In the first two years of the shareholders' agreement, the Company failed to expand as quickly as the Initial Business Plan had planned that it would. As is apparent from the chart at [19], under the Initial Business Plan, the Company had planned it would have 35 stores open by 30 June 2013, a further 20 stores by 30 June 2014 and a further 15 stores by 30 June 2015. In fact, the Company only had 11 stores as at 30 June 2013 and, as at about that date, the FY14 Improvement Plan contemplated opening only a further 9 stores by 30 June 2014. Ms Monaghan explained the variance between planned and actual in this way:

> "… we had been struggling to get signs in shopping centres, mainly because of our content. So councils didn't like it. Centre managers didn't like it. Information desks didn't like it. Obviously having [sex] toys in shopping centres was a, was a big thing ..."

[32] In or about October 2013, Mr Blundy convened a meeting for 28 December 2013 to discuss the strategy and future direction of BNT and of the Company. It is convenient to refer to that meeting as **the December 2013 strategy meeting**. At that time, the directors of the Company were the plaintiff, Ms Monaghan, Mr Blundy and Mr Scott Evans (who was also the CEO and a director of BNT). They were all invited to attend the meeting, together with Mr Ray Itaoui (who was a director and substantial shareholder of BNT) and Mr Paul Grosmann (who was BBRC's head of strategy).

[33] Mr Blundy clarified his intended purpose for the meeting by email on 11 November 2013 to the proposed attendees which asked them to email Mr Grosmann with "a list of strategic issues / opportunities [they] would like to discuss during the session". He reminded them that "being a strategic session the focus is on longer term objectives, capabilities and direction of our brands, not on operational specifics that we might discuss during some of our Board meetings …"

[34] On 20 November 2013, Ms Monaghan responded to Mr Blundy's request to provide Mr Grosmann with discussion points on behalf of both the plaintiff and herself, listing the following items for discussion at the proposed meeting:

> "*Determine number of stores Australia FY14, 15,16
>
> *C grade centres in Australia vs international locations
>
> *International opportunities, locations & when? (Singapore, South Africa, Russia, England).
>
> *Overseas company structure
>
> *Current shareholders agreement & impact of global rollout
>
> *Brand positioning: Ann summers vs Agent Provocateur
>
> *Key capabilities missing for growth which are currently shared services: Finance & warehouse.
>
> *Key capabilities missing for growth which are not: HR and Digital"

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[5] Second Further Amended Statement of Claim (**2ASOC**) at [23] admitted by the Defence to 2ASOC at [23], noting the defined term "the Decision" in 2ASOC at [13D].

[35] The first dot point was obviously an important strategic issue. The plaintiff, Ms Monaghan and Mr Blundy would all have been acutely aware that the Company had not been able to progress domestic expansion to the levels that the Initial Business Plan had contemplated. As will appear, the plaintiff later acknowledged to Mr Blundy that their "KPI's were to work to the Business Plan in the Shareholders Agreement." Indeed, that may have been to understate the position because the plaintiff's employment contract had provided that the Company could terminate her employment without notice if the Company had not achieved the EBITDA targets set out in respect of the "Most likely case with BNT" in the Initial Business Plan,[6] and on the evidence, the Company had come nowhere near achieving those targets.[7]

[36] The second, third, fourth and fifth listed items all mentioned international expansion. Although cl 3 of the shareholders' agreement had specified that the business of the Company was "in Australia and internationally", the Initial Business Plan contained no provision for international stores. Nevertheless, it is evident that the Company did seek to expand its business internationally. Indeed, during their regular Sunday breakfast meetings with Mr Blundy, the plaintiff and Ms Monaghan had conveyed to Mr Blundy their eagerness to take the Company's business internationally and to achieve global online sales. Mr Blundy shared that ambition.

[37] The sixth dot point was a reference to brands which might be regarded as competitors to the Company's business.

[38] The seventh and eighth dot points referred to the "shared services" which were the subject of Schedule 6 of the shareholders' agreement. That issue was starting to become the subject of a degree of friction between BNT and the Company. Mr Bundy explained:

> "I understood the last two items identified what Eloise and Janelle considered were key capabilities missing from the Honey Birdette business that were required for growth, at least some of which were Shared Services. I understood Eloise and Janelle to be suggesting that Honey Birdette might move away, at least in part, from the Shared Services model. In my experience, when a retail business reaches a particular size, a shared services model ceases to work efficiently and effectively. I was also aware at around this time, through various discussions I had with Janelle and Eloise and BNT's departmental heads, that each of BNT and Honey Birdette felt they were being hard done by under the Shared Services arrangement in that they were not always able to access devoted resources when they required them. Janelle and Eloise had said to me, in the lead up to November 2013, words to the effect that BNT was not providing adequate services to Honey Birdette. At around this time, BNT leaders had also said to me words to the effect that Honey Birdette was providing incorrect information to BNT often, which was making it difficult for BNT to provide services and was depleting its resources."

[39] The subject of domestic store numbers was raised in two further communications prior to the meeting: one by Mr Blundy directly to the plaintiff and Ms Monaghan and one by Mr Grosmann to the proposed attendees of the meeting.

[40] As to the first communication:

(a) Mr Blundy's email was sent on 26 November 2013.

(b) He acknowledged that he was aware that they both had made a tremendous effort to increase the size of the business and congratulated them for that.

(c) He identified two "red flag" issues which he regarded as having long term implications related to the Company's implementation of a front-end software

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6 See cl 8.2(b) of the Executive Employment Agreement between the Company and the plaintiff dated 27 October 2011. Ms Monaghan's agreement is not in evidence, but as both of the joint managing directors had signed the document, I would infer that Ms Monaghan's agreement must have contained the same clauses.

7 The "Most likely case with BNT" EBITDA targets specified in the Initial Business Plan for FY13 and for FY14 were $2,577,000 and $8,939,000 respectively, but the FY14 Improvement Plan forecast an EBITDA of $708,071 for FY13 and a best case of $2,974,663 for FY14.

system (comprising of point of sale, merchandising and inventory modules) to replace its existing system and to assist in achieving its growth objectives.

(d) He acknowledged that the Company was "running hard at opening stores" and expressed concern that the Company was focussing solely on the immediate "issues and incidences arising out of the store opening process" rather than on the longer term.

(e) He observed:

> "If we want a 50 store operation and we do, and more, our mindset and actions as leaders need to be able to disseminate what are the critical tasks not just for right now, but also for our future growth. And just as importantly – what is the right way to do these critical tasks. Learning this ability early on is the only way we will become great."

[41] As to the second communication:

(a) Mr Grosmann's email was sent on Boxing Day 2013, two days before the proposed strategy meeting.

(b) It requested that the attendees read an attached one page document entitled "HB Strategic Approach" and advised that the format for the meeting was to be discussing and making decisions around many of the strategic points which had been raised in their notes to Mr Blundy.

(c) The attached document started with a statement about the importance of making a strategic assessment of the Company's overall approach. It went on to observe that CBD stores were performing better than regional stores and suggested, if the Company's business model was a better performer in CBD locations, that might have implications for the Company's expansion strategy. One implication mentioned was that "a market like Australia might meet saturation at 50-60 stores as opposed to Bras N Things for example which can work at 200."

(d) The attached document concluded with these words:

> "Some questions for discussion on Saturday
>
> - How confident are we that this is the right approach for Honey Birdette? What would we need to be more comfortable?
> - What does this all mean for where Honey Birdette is today
>   - What would we need to be doing differently?
>   - Where do we have gaps?
>   - What do we need to strengthen?"

[42] Thus far, it is clear that all the proposed participants in the meeting were aware that the Company was intensely focussed on expanding store numbers in Australia and was also interested in developing a global rollout, but that Mr Blundy had proposed that there was a need to ensure that a strategic focus be taken.

[43] Two private considerations which were playing on the mind of some of the participants before the meeting should be mentioned.

[44] First, Mr Blundy was considering closing BBRC's "Diva" business. Mr Grosmann had been working separately with Mr Blundy to identify "what to do" with Diva's 82 stores. A spreadsheet had been prepared which recorded Mr Blundy's preliminary thoughts as to the stores which might be suitable for the Company, the stores which might be suitable for the other BBRC businesses "Lovisa" and "diva Kids", and the stores which should close. Mr Blundy accepted in evidence that the spreadsheet was primarily about whether or not there

were benefits that might come to other brands, thereby solving a problem that he had with the Diva business.

[45] Second, it will be recalled that in her email of 20 November 2013, Ms Monaghan had explicitly raised for attention at the meeting the topic of international expansion, and had mentioned as topics for consideration in that regard "Overseas company structure" and "Current shareholders agreement & impact of global rollout". One can infer from the terms of an email which Mr Brookman sent to her on the evening before the proposed strategy meeting, that Ms Monaghan had raised the latter two topics at least with him. He wrote:

> "Great to catch up with you yesterday, gotta say though getting up at 4.45am was not such a treat.
>
> So happy for you that HB is taking flight you very much deserve it, with regards to your meeting tomorrow I doubt that you have will the time or be in the right frame of mind to have the chat with Brett about his thoughts on moving forward, although it is a conversation that needs to be had, I think we covered most of it yesterday, the key being your absolute passion and commitment to HB this is what will work best for Brett and its the truth, also understanding that BNT are wanting you to implement another layer of structure which is right and needed for a global rollout but will severely impact your bottom line of which potentially will be the number used to buy us out, so if you spend an extra $100K at 8 times earnings that will devalue the company by $800k spend a million and BNT can pick up the 45% balance for nothing. So at the right time this is the basis of the friendly chat with Brett, you are my spokesperson as I don't get involved as its your show and I don't want to muddy the waters, I wish to keep my 15% as I enjoy being part of something with you and Brett and it will be great to watch this thing explode, also it will be nice to enjoy a return on my investment.
>
> Regarding the other topic of office and distribution I firmly believe that with the IT systems afforded to you separating to two is very real. With a brand such as HB it needs to be hip and groovy and attract to right team, which I think would be impossible from some soulless shed in the middle of nowhere, certainly not the spot to build the cultural centre and the heart of HB, remind Brett he managed having his office at home and now halfway around the world.
>
> El it will be a big day for you tomorrow, but you will reflect on it as a massive step forward, go give them the final blow and knock em out you already have them on the ropes, its yours for the taking.
>
> Home all evening if you want to talk through any angles give me a buzz."

[46] I would conclude that Ms Monaghan at least was subjectively aware that the expenses associated with a global expansion could impact adversely on the calculation which would be applicable in the event BNT exercised its call option under the shareholders' agreement. She gave evidence to the contrary, but I reject that evidence as it was both unpersuasive and inconsistent with the documentary evidence.

<u>The December 2013 strategy meeting</u>

[47] It was in the context of the foregoing that the strategy meeting was convened on Saturday 28 December 2013. Mr Blundy was in the chair. The other attendees were the plaintiff, Ms Monaghan, Mr Itaoui, Mr Evans and Mr Grosmann.

[48] Although each of the attendees gave evidence before me, the most reliable evidence of the ultimate outcome of the meeting and what was said during it was not what the attendees said in evidence. They were talking about what was said at a meeting which occurred almost seven years ago and about which they were speaking almost entirely from memory. The most reliable evidence was contained in the contemporaneous documents and in the evidence of what they actually did after the meeting.

The strategic decisions made at the meeting

[49] As to the ultimate outcome of the meeting, the most reliable evidence was contained in an email which Mr Grosmann sent to the participants on the same day as the meeting, but after it had concluded. He wrote that he had attached "output decisions and actions coming out of today's session". He then attached three documents: one entitled "HB Actions &

Decision"; a second entitled "BnT Actions & Decision" and a third entitled "131228 – BNT – Strategic Plan REVISED". Obviously enough, the strategy meeting had addressed matters concerning the Company but also concerning BNT and its business "Bras n Things".

[50] The document relevant to the Company was in these terms:

	Action / Decision	Timing	Responsibility
1	TOYS: 80% of sales our own design (vertical)	1st October	Eloise
2	AUSTRALIA EXPANSION: we will be at 67 stores	1st January (2015)	Frzop
3	ONLINE: to be 33% of our business	Dec 2015	Eloise
4	INTERNATIONAL: trading in 2 additional countries	Oct 2014	Brett
5	SHARED SERVICES: divorced completed from BnT (excluding Property)	June 2014	Ray
6	NEW SYSTEM IMPLEMENTATION: Futura / RD	March 2014	Ray
7	ORG STRUCTURE: finalisation of org structure and job description	January 2014	Ray

[51] The two documents relevant to BNT were in similarly general terms. To demonstrate that point, it suffices to quote only the first of the two:

	Action / Decision	Timing	Responsibility
1	EXISTING STRATEGY: strategic document to be updated to reflected changes from strategy meeting (see attached doc)		
ADD the following strategic initiatives to our existing strategy (along with respective Billy Bean Action Plans andmilestones etc.)			
2	AUGMENTED PRODUCT: we need to own and in stores	Aug 2014	Scott
3	INVEST IN PRODUCT TALENT	Mid Feb 2014	Scott
4	RUTHLESS MEASUREMENT	Mid Feb 2014	Scott
5	SWING TICKETS: integrated with product info + link to online	Mid Feb 2014	Scott
6	PROMOTIONS: we do not use price discounting as lever		Scott

[52] I observe that the terms of Mr Grosmann's email and its corresponding attachments were entirely consistent with Mr Blundy's email communication of 11 November 2013, which indicated that his intention was that the focus of the meeting would be on longer term objectives, capabilities and directions of the various BBRC brands, as distinct from operational matters ordinarily discussed at board meetings. Indeed, that that was the purpose of the meeting was common ground on the face of the pleadings.

[53] I find that the strategic decisions identified in the documents were in fact made at the December 2013 strategy meeting as recorded in the documents. Importantly, I find that they were decisions as to: (1) strategic goals; (2) the timing by which the organisation would seek to achieve the strategic goals; and (3) the identification of the person responsible for driving the organisation towards the strategic goals. They were not operational decisions as to the means by which the strategic goals would be achieved. It remains to note in relation to the "HB Actions & Decision" document that "Eloise" was a reference to Ms Monaghan; "Brett" was a reference to Mr Blundy; "Ray" was a reference to Mr Itaoui; and "Frzop" was a reference to BBRC's Property Manager, Mr Anthony Frzop.

The evidence sounding upon how the Diva opportunity was addressed at the meeting

[54] Two of the strategic decisions made at the meeting in relation to the Company are notable for present purposes. First, the meeting made a strategic decision in relation to the "shared services" issue which had been causing friction between the Company and BNT, namely to bring about a "divorce" within the next six months except for the shared service of "Property". Second, the meeting made a strategic decision to pursue the goal of having 67 stores within twelve months. That would have represented catching up with and even slightly exceeding the stores numbers assumed for the "Most likely case with BNT" in the Initial Business Plan (which had specified 64 stores by the end of the December 2014 quarter). Consistently with the choice that property services would continue to be a shared service provided by BNT, Mr Frzop was given responsibility for the goal.

[55] Although the purpose of the meeting was to make strategic decisions and that purpose was fulfilled in the manner that I have found, there was at least some mention of operational matters in the course of the meeting. It was common ground on the face of the pleadings that at the meeting, Mr Blundy spoke words to the effect that:

(a) the Diva business had not been performing for quite some time;

(b) he had tried to fix it but had not succeeded;

(c) he was considering shutting down Diva;

(d) the floor area of the stores were comparable to the Company's stores; and

(e) he considered that this presented an opportunity for the Company's business and he was interested to know "Ms Monaghan's and [the plaintiff's] thoughts" on taking on Diva leases and staff.[8]

[56] The controversy concerned what happened next at the meeting.

[57] The plaintiff's pleaded case was: [9]

(a) immediately after Mr Blundy spoke, Ms Monaghan spoke words to the effect that:

(i) she was strongly opposed to transferring any retail employees from the Diva business because they were not suitable employees for the Company's business;

(ii) the reasons why that was so included that: (1) some of the Diva employees were minors whose employment would be unsuitable given the product range in the Company's stores; (2) the Company's business was pitched at a high-end market and the staff employed in the retail stores had been carefully selected to support the image cultivated for the business; and (3) Diva's retail staff did not necessarily match that image;

(b) the plaintiff then spoke words to the effect that:

(i) she agreed with Ms Monaghan's statements set out immediately above, adding "[t]hat can't happen";

(ii) if the "Proposed Transfer" happened, the Company would incur a lot of costs;

(iii) the "Proposed Transfer" would involve deviating from the shareholders' agreement;

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8 That the plaintiff must have been the source of the instructions to advance this allegation is confirmed by the reference to "my thoughts" in 2ASOC at [13(c)(v)].

9 See 2ASOC at [13A].

(iv) the Company would incur added costs in the 2013/14 financial year due to the "Proposed Transfer" (as well as by reason of a contemplated expansion of the Company's business to the United Kingdom);

(v) those matters would put Ms Monaghan and the plaintiff at a financial disadvantage in the first year that BNT was entitled to exercise the call option;

(vi) if the "Proposed Transfer" was to occur, it would have to be on the basis that the earliest date at which BNT could exercise the call option was delayed; and

(c) Mr Blundy then spoke words to the effect that he agreed.

[58] The defendants' pleaded case was to this effect:[10]

(a) at the meeting, the directors of the Company discussed their views about the future of the Company and its business;

(b) in the course of that discussion:

(i) all directors of the Company, including the plaintiff, agreed to the continuing expansion of the Company;

(ii) Mr Blundy said words to the effect that there was an opportunity, if the directors of the Company wished, for the Company to take over a number of the Diva business's retail stores, including the shop leases and Diva employees;

(iii) the directors of the Company, including the plaintiff, agreed that the Company should expand its business by taking over a number of the Diva stores;

(iv) following that decision, Mr Blundy said words to the effect that the plaintiff should visit a number of the Diva stores and meet with the staff working in those stores to determine which of the Diva stores would be suitable for the expansion of the Company's business;

(c) following the meeting:

(i) the plaintiff visited a number of the Diva stores to determine which stores would be suitable for the expansion of the Company's business; and

(ii) pursuant to the agreement of the directors of the Company at the meeting, the Company took over selected Diva stores.

[59] As I have already mentioned, I think that the most reliable evidence sounding as to what must have occurred at the meeting in response to Mr Blundy's identification of the Diva opportunity is to be found in the contemporaneous documents and in the subsequent conduct of the principal actors. I regard five matters to be particularly significant.

[60] First, in the period after the meeting, the Company in fact took over selected Diva stores with the active participation of the plaintiff and Ms Monaghan, and their active involvement with Mr Frzop, in making choices concerning the stores to be taken over. I agree with the defendants' submission that from as early as 3 January 2014, the plaintiff was taking steps to assess stores, interview staff and acquire equipment and software from Diva with alacrity and no hesitation and no qualification. That was supported by the evidence of Mr Itaoui and Mr Frzop before me and by various spreadsheets produced over time recording comments and choices made concerning stores.

[61] As part of the plaintiff's "Mr Blundy decided to impose" narrative, in argument the plaintiff's senior counsel sought to make much of an email which Mr Blundy sent on 8 January 2014 in response to one of the spreadsheets and in which he wrote "[a]lso keep in

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10 See Defence of the Defendants to the Second Further Amended Statement of Claim at [13(c)].

mind this wasn't intended as a pick and choose list." But in the same email he also wrote: "Go and see the remaining stores and lets have a discussion. It's not my intent to transfer stores where it doesn't make commercial sense. There may be things I've overlooked." In context, the email did not support the plaintiff's narrative.

[62] In fact, the documents revealed that: (1) an original suggested list of 30 or 32 stores as appropriate for transfer, was whittled down to 17 stores with the plaintiff's involvement; and (2) the plaintiff was involved in the process of the identification of appropriate staff to be transferred to the Company. The plaintiff sought to characterise her conduct as acquiescence to decisions imposed by Mr Blundy rather than her enthusiastic participation. I did not find her evidence to be persuasive in that regard. The notion that Mr Blundy was imposing decisions was inconsistent with the tenor of the evidence of Mr Frzop, whose evidence was straightforward and honest. In particular, his evidence was:

> "I remember [in January 2014] Brett Blundy calling me and saying that we'd made a decision that all the Diva stores would be closing, and that what we would be doing is working through the opportunities that presented for Honey Birdette, Lovisa and Diva Kids so some of those stores could be taken up by some of those brands. And then those stores that weren't suitable, we would have to negotiate with the landlords some form of exit."

[63] Second, if the plaintiff had in fact sought to link the transfer of Diva stores and staff to a change in the buy-out dates in the shareholders' agreement either at the strategy meeting or at all, and Mr Blundy agreed to that, it is surprising that the plaintiff did not record that fact somewhere in writing, or record her objections to the Diva transfers occurring (with her participation) without her conditions being met. No such evidence was produced. Moreover, she had appreciated at the time that any material changes to the business plan required a special majority approval at a directors meeting, and that if she and Ms Monaghan opposed such a course, then there could not be such approval. She did not take any steps towards insisting on such an approval.

[64] Third, the proposition that the plaintiff had in fact sought to link the transfer of Diva stores and staff to a change in the buy-out dates in the shareholders' agreement at the December 2013 strategy meeting and that Mr Blundy agreed to that proposition is in fact gainsaid by the terms of an email exchange which occurred on 16 January 2014, only a few weeks after the meeting. On that day, the plaintiff had an email exchange with her friend, Mr Jenkins, which she forwarded to Ms Monaghan. Mr Jenkins had enquired of her "did things go ok in your strategy meeting" and the plaintiff responded in these terms:

> "Strategy meeting went well. The below is what BB wants to do
>
> Outcomes:
>
> 2014
>
> - 50 stores
> - 2 international locations
> - 80% sale of own toys
>
> Diva is shutting down and we are taking approx. 20 of their stores.
>
> The shareholders agreement was kind of skimmed over but BB did get back to us about changing it. Still not bedded down.
>
> Eloise is on holidays and I go tomorrow so it's crazy times here."

[65] The plaintiff could not have written the second last paragraph if events had transpired in the way which had been pleaded.

[66] Fourth, the proposition that the plaintiff had in fact sought to link the transfer of Diva stores and staff to a change in the buy-out dates in the shareholders' agreement is also gainsaid by a consideration of what the objective evidence reveals about the possibility of

changes to the shareholders' agreement. After the December 2013 strategy meeting, there were communications between the principal actors touching upon the possibility of such changes. However, contrary to the plaintiff's case and her evidence, they were not occasioned by any concerns she had about the impact of expenses associated with domestic expansion on the call option value and the need to postpone the call option dates. Rather, they were occasioned by: (1) the fact the plaintiff and Ms Monaghan had become aware that BNT did want to buy-out Mr Brookman and they were concerned as to their own position; and (2) their concerns about the impact of international (as opposed to domestic) expansion on the shareholders' agreement.

[67] To explain why I reach that conclusion I must address those communications in some detail.

[68] It is necessary to recapitulate some considerations which reveal the negotiating position in which the plaintiff and Ms Monaghan found themselves. As I have mentioned, the plaintiff, Ms Monaghan and Mr Blundy would all have been acutely aware that: (1) the Company had not been able to progress domestic expansion to the levels that the Initial Business Plan had contemplated; and (2) under the watch of the plaintiff and Ms Monaghan as joint managing directors, the Company had grossly underachieved in relation to the EBITDA targets identified in the Initial Business Plan. In that context, they could hardly have been heard to argue to Mr Blundy that the shareholders' agreement needed to be changed if domestic expansion was to try to catch up with the Initial Business Plan. In my view, neither the plaintiff nor Ms Monaghan would have had any negotiating leverage with Mr Blundy in relation to the impact of expenses associated with domestic expansion. I observe that the plaintiff in oral evidence (and contrary to the agreed position on the pleadings concerning the Initial Business Plan) advanced a rationale, namely that "[w]e'd redone the budget, so the business plan had changed, and we were on track that year to hit our targets on the revised plan". Her evidence in this regard was most unpersuasive and I reject it.

[69] The plaintiff also argued that: (1) one could discern from the second page of the Initial Business Plan (which, it will be recalled, presented quarterly store numbers for one of the three business cases presented in the plan) the rate of change to store numbers contemplated by the plan; and (2) the rate of domestic expansion achieved by acting on the Diva opportunity was a higher rate than might be so discerned. But, even if this was the correct construction of the contemplation of the Initial Business Plan, there was not the slightest hint in the contemporaneous evidence that the plaintiff, Ms Monaghan or Mr Blundy had that view at the relevant time, let alone expressed it. The argument does not change my view of the negotiating position in which the plaintiff and Ms Monaghan found themselves. I note also that the observations I have made at [17] to [22] above, provide good reason for doubting that this is the correct construction of the Initial Business Plan.[11]

[70] Consistently with my conclusion that neither the plaintiff nor Ms Monaghan would have had any negotiating leverage with Mr Blundy in relation to the impact of expenses associated with domestic expansion, Ms Monaghan's email of 20 November 2013 (see at [34] above) raised the shareholders' agreement, but only in connection with the impact of the global rollout, not the impact of domestic expansion. The plaintiff appreciated at that time that neither the shareholders' agreement nor the Initial Business Plan made any reference to overseas stores.

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[11] Because the plaintiff abandoned her breach of contract case it became unnecessary to reach a conclusion as to the proper construction of this part of the shareholders' agreement.

[71] On 3 January 2014,[12] Mr Blundy emailed the plaintiff and Ms Monaghan in these terms on the subject matter of "Option in September", and copied the email to Mr Itaoui and Mr Evans:

> "Partners,
>
> As always, I want to thank you for your dedication, commitment and ambition to drive a wonderful business. We are well on our way.
>
> From my point of view, the partnership works well with you both of you as an important combination to ensure we have a successful global business that is big, beautiful, powerful profitable and something we can be proud of.
>
> To put your mind at ease, my intent is to adjust the agreement, in whatever way appropriate, to give you peace of mind that we will go forward to invest and develop Honey Birdette appropriately, without the distraction of the 'deal' hanging over us. I have instructed Nico and Paul to find a commercial solution that can be legally ratified through an adjustment to our current agreements.
>
> With 30 new stores coming online quickly and two new global territories plus turbocharging online it will be some time to adjust your salaries, not only is the business going rapidly grow both of you have grown personally and continue to show the willingness and ambition and as such we should adjust your salarles to better recognise your contribution and the market. Ray and I will think about that shortly
>
> Please put your mind at rest!"

[72] On 3 January 2014, the plaintiff and Ms Monaghan had an email exchange in which Ms Monaghan asked the plaintiff whether she would "start sourcing advice about the shareholder's agreement."

[73] On 3 January 2014, Mr Blundy instructed Mr Grosmann to work with Mr van der Merwe, BBRC's CFO, to:

> "…read the agreement and buy out of Mel Brookman and leaving the girl's in."

[74] On 6 January 2014, Mr Grosmann confirmed Mr Blundy's instructions to Mr van der Merwe:

> "Re the honey Birdette agreement. See two notes below I have forwarded … Probably not a whole lot more for him to say though other than finding a commercial solution to buying out Mel and leaving the girls in.
>
> Could you kick off these discussions with the lawyers?..."

[75] On 7 January 2014, Mr van der Merwe advised Mr Blundy that:

> "Recommend that commercial negotiations start with Mel to advise that the option will be exercised in August and he will be bought out.
>
> …
>
> If the option is exercised and all three are bought out then a portion sold back to Eloise and Janelle, there will be tax implications for them on the transaction."

[76] On 3 February 2014, Mr Blundy emailed Ms Monaghan, copied to the plaintiff, Mr Itaoui, Mr Evans and Mr van der Merwe on the subject of the option in September and advised:

> "A further update, I have Nico trying to find a solution, this is proving more challenging than we originally thought but there will be away.
>
> Stand by."

[77] On 15 February 2014, the plaintiff emailed Mr Blundy advising him that she had not forgotten about "London & Shareholders Agreement", that she was thinking about it further and would email something through to him.

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12 The order in which the 3 January 2014 emails were sent is unclear because they appear to have been sent from people in different time zones.

[78] On 17 February 2014, Mr Blundy forwarded to the plaintiff and Ms Monaghan under the subject "Honey Birdette – Option to purchase equity from Mel Brookman" a proposed deed to amend the shareholders' agreement. He described it as "[t]he solution … for discussion tonight." The effect of the attached deed would have been to make it permissible that the call option could be separately exercised in relation to all of the shares held by any one of the minority shareholders.

[79] On 17 February 2014, Ms Monaghan responded with an email and attachment setting out "possible discussion points for tonight's meeting" which she had framed "so it reflects the actions out of the meeting on the 28th December". The first page of the attachment was as set out below. For clarity, I have shaded the changes which it made to the document circulated after the December 2013 strategy meeting.

ACTION	TIMING	RESPONSIBILITY
TOYS: 80% of sales our own design (vertical)	October (2014)	Eloise
AUSTRALIA EXPANSION: We will be at 67 stores – amended to 50	January (2015)	Tony
ONLINE: to be 33% of our business	December (2015)	Eloise
INTERNATIONAL: trading in 2 additional countries	October (2014)	Eloise
SHARED SERVICES: divorced completed from BnT (excluding Property)	June (2014)	Ray
NEW SYSTEM IMPLEMENTATION: Futura / RD	March 2014 *Now April (2014)*	Ray
ORG STRUCTURE: finalisation of org structure and job description	January (2014)	Ray

[80] That email was followed on that day by an intemperate private email exchange between the plaintiff and Ms Monaghan. The former said she thought the proposed deal was the same deal as before (which she described as a "bum steer") and suggested it was not what was best for them. The latter suggested that she could not work with the plaintiff but would be raising the "whole UK action plan conversation as well" at the meeting. The result was that the plaintiff emailed Mr Blundy asking for a chat before the meeting and stating: "Basically, [Ms Monaghan] is not happy about London and even less so since I told her I sent you a plan on the way forward with London. This has had a knock on effect."

[81] On 21 February 2014, the plaintiff emailed Mr Blundy and Mr Itaoui in these terms:

> "Eloise and I spoke about this last night and I thought I would shoot a quick email before I leave for New York on our thoughts.
>
> I think there seems to be a small misunderstanding with regards to our thoughts on the buy out dates because it has been decided that BNT will buy Mel out. Eloise and I understand the commercial reasons, along with the reasons for which Eloise and I won't be bought out.
>
> Our level of comfort shifted when there were plans to go international as this is initially an expensive process which delays dividends (potentially for years) and affects buyout price. Although the buyout price is important it is more the shift in dividends that will affect Eloise and I financially in the near future.
>
> Our KPI's were to work to the Business Plan in the Shareholders Agreement. International Expansion deviates from the plan, and along with it, our immediate financial security.
>
> Eloise and I have had a think, and to compensate for the above, we would like you to consider the following:
>
> - Early payback of Janelle and Eloise's personal loans to the business.
> - Increase in wages.
> - Buyout dates/minimum buyout amount/NPAT multiple.
> - Incentive plan

> On a separate note (and one for the lawyers), I think it would be prudent to look at the shareholders agreement and update the Business Plan and Funding Model to incorporate our international expansion."

[82] I observe that it is not explicable how the plaintiff could have expressed herself in the way she did if she had already obtained Mr Blundy's agreement to postponing buy-out dates because of the expenses associated with domestic expansion in the way her pleading claimed she had. Indeed, the fact that she connected her argument up with international and not domestic expansion is significant. I observe that there is not the slightest hint of objection to the steps which were being taken towards domestic expansion. If her previously expressed concerns truly had been that the proposed scale or rate of domestic expansion was somehow inconsistent with the Initial Business Plan and the expenses of domestic expansion necessitated postponing buy-out dates, she could not have written that email. As she noted, and consistently with the point I have made about an absence of negotiating leverage in relation to domestic expansion, "[o]ur KPI's were to work to the Business Plan in the Shareholders Agreement. International Expansion deviates from the plan … ."

[83] The fifth of the five matters I have found to be particularly significant is that, after BNT exercised the call option over her shares, and when one would imagine that the plaintiff would have advanced a complaint consistent with the pleading, if events had actually happened as pleaded, the plaintiff did not do so. Instead, on 9 November 2014 she sent an email which complained that:

> "… the Call Option Value in respect of my shares is less than it would have been had the Diva business (and its financial losses) not been rolled into the Honey Birdette (Aust) Pty Ltd business. This was done without the proper approvals from the shareholders and despite objection from me."

[84] In truth there was no sense in which the Diva business or any of its financial losses were rolled into the business of the Company. Nor had there been any contemporaneous objection from the plaintiff in relation to the increased rate of domestic expansion which was enabled by the fact that the Company was able to take a transfer of some Diva stores and some Diva staff. In particular, despite being pressed to do so by me on a number of occasions, senior counsel for the plaintiff was unable to identify any contemporaneous documentary support for the proposition that the plaintiff raised any objection to the company taking advantage of the Diva opportunity. Indeed, as senior counsel for the defendants pointed out, in her cross-examination the plaintiff conceded that she said nothing at the December 2013 strategy meeting, or at any time before her shares were acquired in 2014 which suggested that the acquisition of Diva stores by the Company was a bad idea from the Company's perspective.

[85] It will have become apparent from my discussion of the five matters I have identified that it seems to me that the contemporaneous documents and the subsequent conduct of the principal actors do not tend to support the plaintiff's case. I should note that my focus on those considerations does not mean that I regard the oral evidence to be of no value at all.

[86] Each of the attendees at the December 2013 strategy meeting gave evidence before me. No one supported the version of events advanced by the plaintiff's pleading. I make the following observations.

[87] Mr Blundy had no real present recollection of the meeting, but what he did state (and I find to be true) was:

> "I cannot recall Janelle saying at the Strategy Meeting that the transfer of diva stores would deviate from the original Shareholders Agreement, would result in added costs and would put Janelle and Eloise at a distinct disadvantage in the first year that BNT was able to exercise its call option. However:
>
> (a) I believe I would have recalled Janelle saying to me that a proposal that I had put forward deviated from the original Shareholders Agreement, as it would have concerned me that it was being suggested that I was breaching my contractual obligations, and I cannot recall her doing so; and

(b) as the initial business plan in the Shareholders Agreement contemplated Honey Birdette having 55 stores by the end of financial year ending 30 June 2014 and 70 stores by the end of financial year ending 30 June 2015, I do not think that a proposal for Honey Birdette to have either 67 or 50 stores in Australia by January 2015 would be contrary to the Shareholders Agreement."

[88] Mr Itaoui also gave evidence of the meeting. I accept his evidence, which, relevantly was to this effect:

(a) His recollection of the topics discussed at the meeting concerning the Company was:

> "Well, I mean, our time and energy was focused on Honey Birdette's growth and its future. Specifically, we spent time on Australian store rollout as well as potentially international. We spent time on online and growing our loan business. We spent time on toys and how to make that a bigger part of our business. We spent time on separating the shared [services] that the two – I mean, Honey Birdette at the time was having shared services with Bras N Things. And separating the shared services as well as we were going to grow, implementing new systems. And we spent some time on the org structure, you know, to support the growth."

(b) He recalled Mr Blundy suggesting that there was an opportunity to move some of the Diva stores to the Company but also to other brands within the group.

(c) His recollection was that the response to Mr Blundy was that everyone was genuinely excited about the opportunity. He did recall that Ms Monaghan voiced her concern about potentially picking up Diva store staff. He said that no one at the meeting expressed any objection to the idea that the Company might take Diva stores or suggested that there should be any conditions imposed upon that occurring. He was confident that there was no discussion of the shareholders' agreement in the context of the idea of Diva stores going to the Company. He said that something as important as that would have registered with him if it had happened.

[89] Mr Evans was called. Unfortunately, he was unable to recall any helpful detail about the discussion at the meeting.

[90] Mr Grosmann was called. With one reservation, I found his evidence to be credible and reliable. He had no existing connection with the plaintiff or any of the defendants. As mentioned, he had been a BBRC executive at the time of the meeting, but as at the time he gave evidence he had not been employed by BBRC for almost 5 years. He was still in retail, as he was employed by the Nike organization as Vice President and General Manager with responsibility for Nike Direct Stores in Greater China. He had, as the defendants' submitted to me, no "skin in the game". His evidence was to this effect:

(a) The intention of the meeting was to focus on longer term strategy, the future of the Company and to determine the priorities to be pursued to help support the growth of the business.

(b) The document recording the decisions relating to the Company (namely the document referred to at [50] above) reflected his recollection of the decisions made and the actions agreed at the meeting.

(c) He did have a present recollection that store expansion in particular was discussed. He recalled the meeting talked about where the stores would expand, not in terms of specific locations, but general CBD versus regional areas, international locations and what sort of support would be required to get there.

(d) He recalled that the topic of Diva stores was raised by Mr Blundy towards the end of the meeting and that Mr Blundy conveyed that he was thinking of closing the Diva business and potentially using some of the Diva stores for several of the brands in the portfolio, including the Company. He did not recall the question of taking over Diva staff being discussed at the meeting, but acknowledged it was possible that the subject was raised, but that he could not presently recall it.

(e) He was confident that no final decision was made at the meeting as to whether any Diva stores or staff would be transferred from Diva to the Company. However, he was unable to recall the details of the discussion which resulted in his specifying 67 stores in item 2 of the document. He thought that the mention of 67 stores was a strategic outcome "agnostic of the Diva closure itself". By that remark he meant that it was not necessarily related to the specifics of whatever was said about Diva.

(f) He was confident that the shareholders' agreement was not discussed at the meeting. He also expressed a degree of confidence that there was no mention at the meeting concerning buy-out dates or the call option in the shareholders' agreement.

[91] The only reservation which I have about Mr Grosmann's evidence is that I think that the fact that a strategic target of 67 stores was set at the meeting could not have been entirely unrelated to the Diva opportunity. Without that opportunity having been mentioned, I doubt that the store numbers target would have been set as high as it was, even as a strategic goal. Mr Blundy's evidence was to that effect.

[92] Ms Monaghan gave evidence. Her evidence was somewhat unsatisfactory because it was difficult to differentiate between what she recalled as being said, and her articulation of what she says she thought about it. She often went beyond answering the question into an editorial comment, placing her own thoughts into the context of the subject matter of the answer. And some of the things she said struck me as plainly false (e.g. despite the content of her communication with Mr Brookman, she professed never to have read the shareholders' agreement; never to have been concerned with it, never to have had any concern about being bought out; and not even to have known what a call option was). I got the impression that she was couching some aspects of her evidence to suit a rejection of the plaintiff's case. I would not rely on her evidence as to what discussions occurred at the meeting except to the extent that it was corroborated by other witnesses or the documentary evidence. However, that would suggest I should accept and rely on these aspects of her evidence:

(a) The discussion at the meeting was in relation to big picture items.

(b) Mr Blundy made the announcement of the Diva closure and the associated opportunity.

(c) She and the plaintiff were enthusiastic about that opportunity for expansion.

(d) No mention of the shareholders' agreement was made at the meeting.

[93] The plaintiff gave evidence in her own case. I also found her evidence to be unsatisfactory as to what was said at the meeting and when it was said. I would reject the plaintiff's evidence in that regard.

[94] First, I have already explained that I regard contemporaneous conduct and documents to be more reliable indicators of what was likely said at the meeting than what the plaintiff might say she recalled so long after the events occurred. I have explained that the version of the meeting pleaded by the plaintiff strikes me as inconsistent with important aspects of her subsequent conduct and with the contemporaneous documents.

[95] Second, it is notable that the plaintiff's oral evidence in chief before me did not support the pleaded version of events, despite the fact that her instructions were plainly the source of the pleaded allegation. In her oral evidence in chief, she said that she did not recall anyone actually saying anything in response to Mr Blundy after he exposed the Diva opportunity at the meeting. When asked whether anyone expressed a view on it, she said "[n]ot really". She then suggested that it was during a break in the meeting when people were having "more conversations amongst [themselves]" and stated the following: "When I saw that

there was a break with Mr Blundy, I turned to him and I did say to him, with regard to – to the potential decision, that we would need to change the buyout date from the shareholders agreement, because it wasn't part of the business plan, and then obviously, you know, this – this sort growth costs money." She did not assert in her oral evidence that Mr Blundy agreed to that proposition, and as to whether the Company would take up the Diva opportunity, she said: "There wasn't really a lot of discussion, as in to give the go ahead. There was no go ahead. He basically left it hanging for us to decide as to what – what we wanted to do with that." In cross-examination she denied that she had said she had expressed her remarks to Mr Blundy during a break, but that denial was false.

[96] Third, the plaintiff's version of events has, inexplicably but clearly, altered over time. In evidence before me, the plaintiff insisted that it had always been her recollection that a decision was not made at the meeting that the transfer of Diva stories to the Company would proceed. She was then cross-examined on the form of two previous (now superseded) versions of the pleading (dated 7 May 2019 and 26 March 2020) for which she obviously was the source of instructions. Indeed, she referred to having written the version of events pleaded in the relevant paragraph of those pleadings. The allegation was the same:

> "In the course of [the December 2013 strategy meeting], Mr Blundy spoke words to the effect that he had decided ("the Decision") that
>
> (i) the Diva Business was to be closed; and
>
> (ii) the various obligations of that business (including shop and office leases, and employee contracts) would be transferred variously to the Company, and to other companies operated by Mr Blundy (specifically, those operating the Lovisa and Diva Kids businesses) and that the Company would thereafter take over those ongoing obligations."

[97] Fourth, I did not find the plaintiff to be a reliable witness. I had the clear impression that she was couching her evidence to suit the case she was advancing at trial rather than attempting to recite an actual recollection of what was said.

Findings as to how the Diva opportunity was addressed at the meeting

[98] What findings should be made concerning how the Diva opportunity was addressed at the December 2013 strategy meeting?

[99] I find that there was no announcement by Mr Blundy at the meeting that he had made any decision about the Diva stores and how they should be dealt with. Rather he referred to Diva in the manner recorded at [55] above. There was no imposition of an outcome on the Company. Rather there was the identification of an opportunity.

[100] In response, although Ms Monaghan may have expressed some reticence about some Diva staff, she and the plaintiff were enthusiastic about the opportunity identified by Mr Blundy in relation to taking over Diva locations. There was no imposition of an outcome on the Company over the objection of the plaintiff.

[101] The meeting made the strategic decision which Mr Grosmann recorded. What were essentially operational decisions concerning which particular staff and which particular Diva stores might be taken up by the Company were matters left for another day.

[102] I am not persuaded that there was any discussion at the meeting concerning the shareholders' agreement or the call option for which it provided.

<u>The Company acts on the Diva opportunity</u>

[103] It was not controversial that, in fact, BBRC's Diva business was shut down and the Company acted on the expansion opportunity thereby created by taking on some Diva staff and some Diva leases. I have summarised how that happened at [60] above.

[104] There was no formal decision by the Company's board of directors that that course should occur. Although all the Company's directors were present at the December 2013 strategy meeting, I do not think it is appropriate to regard that meeting as a meeting of the board. It is, however, true that all the directors of the Company agreed with the Company taking the course which it did take in relation to Diva stores and staff. Although the course taken also partially solved a problem for other businesses with which Mr Blundy, Mr Evans and Mr Itaoui were involved, it was a course which all directors of the Company regarded as being taken in the best interests of the Company, viewed from the Company's perspective.

[105] The strategy was set at the December 2013 strategy meeting, and the Company, under the management of the plaintiff and Ms Monaghan, simply went about the business of implementing that strategy, with the assistance of Mr Frzop. The other two directors knew that that was happening and at least Mr Blundy had some involvement in discussions concerning the choices which were made.

[106] The difficulties which the Company had previously been experiencing in domestic expansion (which Ms Monaghan had described as recorded at [31] above) were avoided because the standard form of the BBRC lease contained clauses which permitted the lessee to transfer to other brands in the BBRC portfolio. Ms Monaghan put it this way:

> "… this was just everything that we'd ever wanted, quickly, easily, we didn't have to go through leasing agents. We didn't have to, you know, sort of, book RDMs, retail design managers. It was a moment where we just went, wow. We are literally gifted 20 plus stores on a plate in great locations with the right size, without the fight with the leasing agents over our [sex] toys, content, placement of signage, et cetera."

[107] The upshot was that the Company was enabled to make real headway towards meeting the domestic expansion goal set at the December 2013 strategy meeting and real headway towards catching up with the Initial Business Plan. Thus, instead of the 9 further stores which as at 30 June 2013 the Company had contemplated opening by 30 June 2014,[13] it actually opened 23 further stores by that time: 6 in the six months prior to the strategy meeting and 17 in the six months after it. Of the 17 stores opened in the six months after the strategy meeting, 14 were former Diva stores. Thus from 11 stores as at the end of FY13, the Company expanded to 34 stores as at the end of FY14.

[108] The table below compares what had been contemplated under the Initial Business Plan in the shareholders' agreement, with what was actually achieved, up to the end of FY14, including consequent upon the extent of the uptake of former Diva leases.

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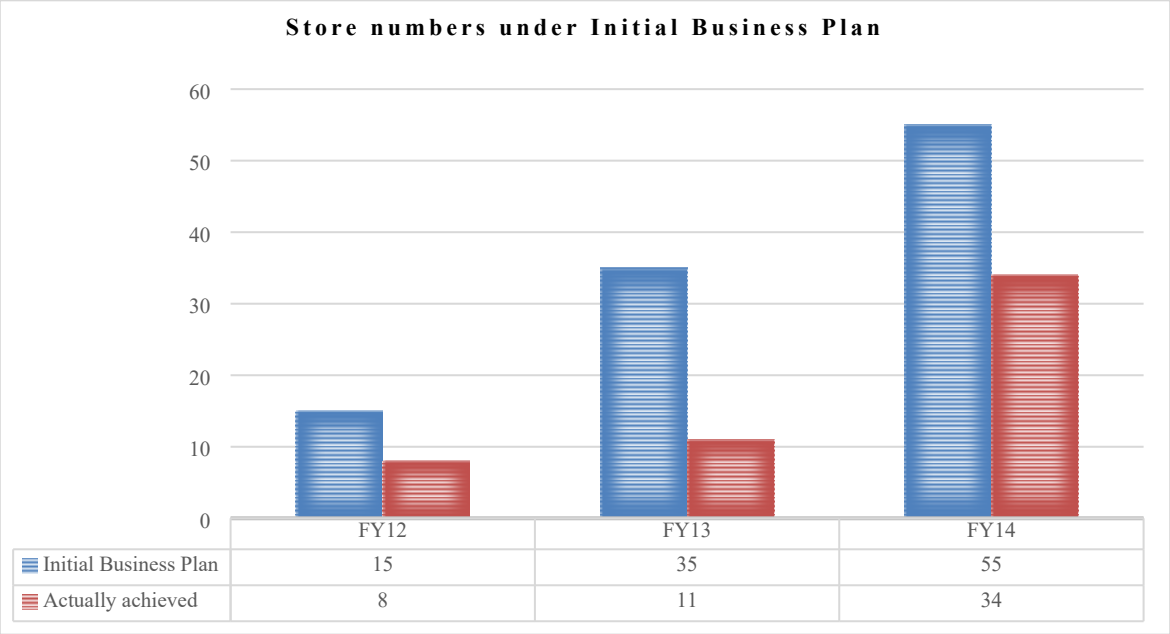
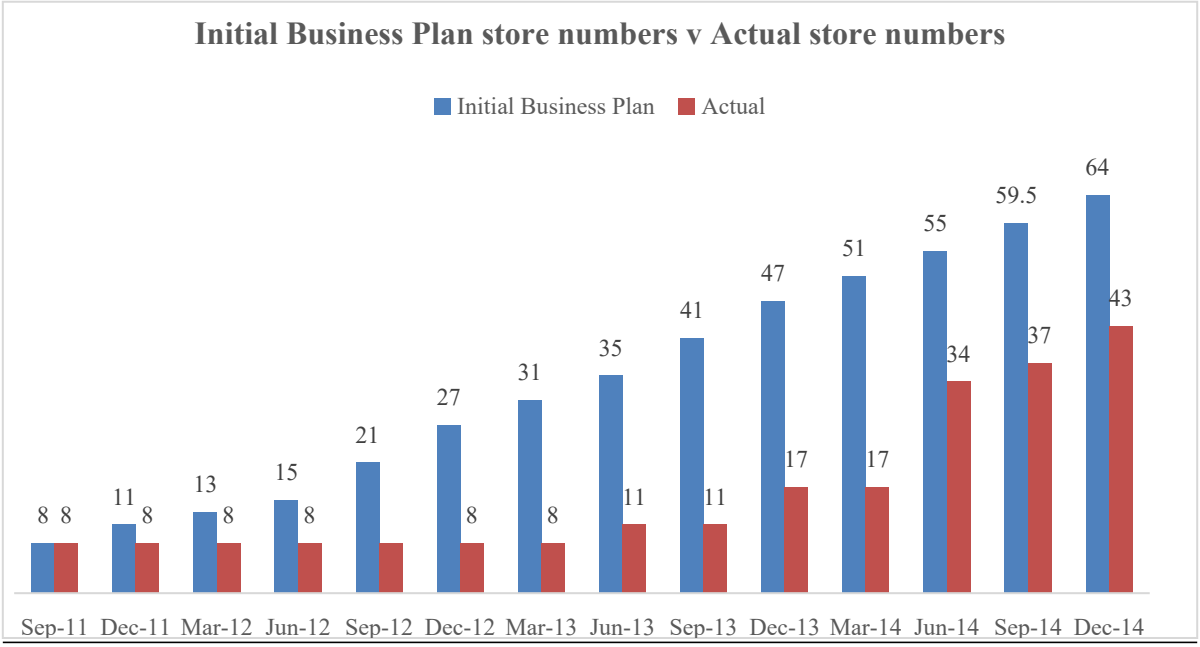
13 See the FY14 Improvement Plan.



[109] It can be seen that the Initial Business Plan had assumed 20 new stores would be opened during FY14, but that actually 23 new stores were opened. I have previously described how the second page of the Initial Business Plan identified in spreadsheet form and on a quarterly basis the operating assumptions and profit and loss assumptions applicable to the "Most likely case with BNT". The table below compares the quarterly store numbers so specified, with what was actually achieved, up to the end of December 2014 (namely half way through FY15), including consequent upon the extent of the uptake of former Diva leases.[14] Because this table expresses quarterly information, it can be seen that the major part of the 23 new stores opened in FY14 occurred in the final quarter of that financial year.



[14] Store numbers at the end of the June 2012 quarter were 8 and by the end of the June 2013 quarter they were 11. However, I was not able to identify in the evidence when numbers increased in the intervening quarters, so I have just allowed the table to depict store numbers to stay at 8 in those quarters. That detail does not presently matter. The figures for store numbers at the end of the September 2014 and December 2014 quarters come from Monthly Business Reports for those quarters.

[110] In an absolute sense, although the actual number of stores opened represented an increase from what had been contemplated as at 30 June 2013 as described in the FY14 Improvement Plan, that increase operated only to reduce the extent of variance between the actual number of stores opened and the number of new stores opened which had been contemplated by the Initial Business Plan. Although it did not achieve the 67 stores goal set by the strategic decisions made at the December 2013 strategy meeting (or even the 50 stores goal set when that number was revised downwards in February 2014), it made real headway towards those numbers.

[111] Mr Blundy's evidence before me was that the course of action which the Company took in acting on the Diva opportunity as it did was in the best interests of the Company. I accept his evidence and the correctness of his view. He observed, and I accept, that:

> "With the benefit of hindsight, I remain of the view that it was in the best interest of Honey Birdette (and Lovisa) to take certain stores, staff and assets from diva. The financial performance of Honey Birdette and Lovisa has continued to improve year on year since December 2013."

[112] His view in this regard was not challenged in cross-examination. It finds support in the fact that the Company's financial statements reveal that its profits increased considerably in the years following the decision:

Financial year	**Net profit (loss) after tax (rounded)**
Year ended 30.06.12	($572,200)
Year ended 30.06.13	$583,375
Year ended 30.06.14	$766,964
Year ended 30.06.15	$1,067,944
Year ended 30.06.16	$3,549,585
Year ended 30.06.17	$4,495,440
Year ended 30.06.18	$7,416,999
Year ended 30.06.19	$5,419,224

[113] I have recorded that during the course of the Company acting on the Diva opportunity, there were discussions between the plaintiff, Ms Monaghan and Mr Blundy on the possibility of making some alterations to the shareholders' agreement: see at [66] to [82] above. Ultimately, no agreement was reached on any alterations to the shareholders' agreement. One of the options which the plaintiff suggested in her email of 21 February 2014 was acted on. On that same day, the wages of each the plaintiff and Ms Monaghan were raised from $185,000 per year to $250,000 per year. At some stage shortly thereafter, Mr Blundy conveyed to the plaintiff and Ms Monaghan that there would be no alteration to the shareholders' agreement. Although no agreement was reached on any alterations, it is important to appreciate that that was not because Mr Blundy had an intention to exercise the call option over either the plaintiff's or Ms Monaghan's shares. To the contrary, he had no intention in late 2013 or in the first half of 2014 that BNT should exercise the call option in relation to the shares of either the plaintiff or Ms Monaghan.

<u>International expansion plans</u>

[114] I have mentioned that at the December 2013 strategy meeting, a strategic goal was set that the Company would be trading in two additional countries by October 2014.

[115] On 2 May 2014, the plaintiff emailed many of the staff in the Company advising:

(a) it was her last day at Honey Birdette Australia; and

(b) she was going to the United Kingdom to oversee the expansion of the Company, stating:

> "Some of you may not know but part of Honey Birdette's rollout plans includes opening stores in the UK this year. Our plans are to have 50+ there in the not too distant future. It's a big opportunity to see Honey Birdette grow in the international market and I have put up my hand up to go and oversee this expansion.
>
> It's been 8 years and a long way from the our first West End store in Brisbane, but by the end of the year Honey Birdette should have 45+ stores in Australia and a few in the UK. Very Exciting!!"

[116] The plaintiff travelled to the UK for a month, returning in June 2014. Unfortunately, that part of the expansion of the Company's business encountered problems. She had also had visa difficulties.

[117] On 28 July 2014, the plaintiff emailed Mr Blundy explaining that opening stores in the UK before Christmas 2014 was then at a "standstill". There is no evidence of any international stores having been opened by October 2014.

<u>The circumstances which gave rise to the exercise of the call option in relation to the plaintiff's shares</u>

[118] In addition to the business relationship which I have described, the plaintiff and Ms Monaghan had been in a personal relationship since 2001. That personal relationship had broken down in July 2013. The breakdown in their personal relationship led to an acrimonious working relationship, which played out in front of staff and to the detriment of the Company's business. It caused great concern to the other directors of the Company and, as will appear, proved to be the catalyst for Mr Blundy making a decision which led to the plaintiff's exit from the Company consequent upon the acquisition of her shares and the termination of her employment as one of the joint managing directors.

[119] On 27 April 2014, just before her scheduled departure to the UK, the plaintiff emailed Mr Blundy in these terms:

> "Hi Brett,
>
> I am just writing to let you know that I will actually finish up with HB (Aust) at the end of this week, instead of next week.
>
> The attached email is the catalyst for this decision. I have tried to go about implementing Futura and trying to be in the background as much as possible so as to not let the team let on with what is going on between Eloise and Myself.
>
> Unfortunately, I spent 12 years with a person I no longer recognise and never thought she would end up treating me this way. I try to understand and sum it up to her being hurt over my decision to walk away from our relationship and then leave for the UK. Regardless it is still hard to accept. What is evident is that she now she not only completely excludes me from everything with regards to the business, but I have found out that she has also been undermining me behind my back. Hence, even though I know when I look back on this time I will be proud of how I behaved, it is for the sake of the business and the team, that I leave ASAP.
>
> I hope I am not out of line, but I do ask that you do not encourage her bullish attitude with the team. I say this because she told me you encouraged it when she told you what she said to Travis about how she treats the staff. She shows you one side of her personality, but the team and I see another and it isn't a very nice one to work with.
>
> Although, I am extremely sad to be going, I leave with high hopes for the UK. It will be my chance to stand on my own and make it fire.
>
> Lastly, I ask that you not mention the new end date to anyone, including Eloise. I will let the team know at the end of the week and tell them something came up in the UK that resulted in me needing to leave earlier.

Thanks for understanding."

[120] Mr Blundy thought, correctly, that the email and the attachments showed that:

(a) the breakdown in the personal relationship between the plaintiff and Ms Monaghan had become acrimonious; and

(b) the breakdown was impacting the Company's performance, with staff becoming involved in, and he presumed distracted by, the acrimony between the two managing directors.

[121] On 2 May 2014, Mr Itaoui – who had replaced Mr Evans as a director of the Company in March 2014 – wrote to Mr Blundy in these terms:

"I met with her and Eloise and spoke to them individually how they are destroying their brand with how unprofessional they are both being … Spent a lot of time with them about stepping up and being more professional and how to act as leaders … They both seem to get it.

Each one blames the other…A few things have happened this week which led me to step in today."

[122] By 16 July 2014, Mr Itaoui continued to be highly critical of the conduct of the plaintiff and Ms Monaghan. On that date, he was moved to provide a formal letter to each of them addressing his concerns in these terms:

"Dear Eloise & Janelle,

It is no secret that [the Company] has had much success to date and deserves much congratulation. You should both be very proud of what you have established and achieved together over the last few years. As a business, [the Company] is now going through the most important period of its life cycle and its future success and longevity relies on the two of you.

I am currently very nervous about the future of the business. You have both equally allowed your personal issues to impact your work, your professionalism and in addition to this, you are allowing the entire business to see what is happening in your personal life. This behaviour is totally unacceptable and cannot continue as executives and shareholders of the business.

To assist with above, I thought it imperative I outlined some boundaries in regard to how you both work with each other. It is really disappointing that the situation has reached this point, but the above is essential so we can move forward.

Responsibilities

Eloise Monaghan	Managing Director – Australia. Responsible for the running of the Australian business reporting directly to me with access to Brett Blundy as required.
Janelle Barboza	Managing Director – United Kingdom. Responsible for the running of the UK business reporting directly to me with access to Brett Blundy as required.

Boundaries

- Each of you is responsible for the running, decision making and results of your own territory. Questions/comments/suggestions regarding the intricate daily running and processes of each other's territory are to be directed to me and I will address accordingly.
- As shareholders of the business, you are both entitled to know what is occurring in each territory. To address this, you are both required to complete a Monthly Business Report and a more detailed Quarterly Business Report to increase visibility for all. You are both entitled to question/make comments regarding results, but should be limited to this forum if possible and done so in a professional manner.
- Any questions/queries from a shareholder of the business must be responded to within 48 hours in a professional manner. All communication between the two of you is to be CC'd to me. You should not text/contact each other if you cannot do so in a professional manner. You are to treat each other with the respect you both deserve as shareholders as the business.
- The team need to see you as a united front at all times. Speaking about each other to other team members is completely unacceptable and strictly prohibited.

- If a team member outside of your territory approaches you to discuss an issue they are unhappy with, you are first to direct them to the appropriate Managing Director and if they do not feel comfortable with that, then they are to be directed to me. Under no circumstance are you to undermine each other's management of their own team.
- Your personal issues need to remain outside of work and are not to be addressed during work hours, work events or in front of any team members.

Eloise and Janelle, you are both equally talented, passionate and hard working people and I know that your goal is common, to make the Company as successful as it has the potential to be.

Please ensure that the above boundaries are adhered to and then we can all get back to business.

If you have any questions regarding the above, please let me know."

[123] Mr Itaoui recalled that each of the plaintiff and Ms Monaghan agreed to adhere to the boundaries specified in his letter, but that matters between the plaintiff and Ms Monaghan did not improve.

[124] On 28 July 2014, after the plaintiff had advised Mr Blundy that the prospect of opening stores in the UK was at a standstill, Mr Blundy raised with Mr Itaoui the question of whether the Company should "jump in faster" or "take [the plaintiff] out." Mr Itaoui pointed out that, on the one hand, buying her out would slow the international launch and, on the other, "[w]ith everything going on between her and [Ms Monaghan] though.. if we buy her out now it won't be a bad thing either." Although Mr Blundy thought that the plaintiff represented the best chance for success in the UK, Mr Blundy expressed concerns to Mr Itaoui as to whether the plaintiff and Ms Monaghan would "ever be able to get their shit together personally."

[125] In his written evidence before me, Mr Blundy put it this way:

"I had not experienced anything of this kind in my professional life before (or since), with two such senior business people – in this case, the founders and co-managing directors of a successful and growing business in which I was a majority investor – going through a public and bitter personal separation and in-fighting in the workplace. I had grave concerns about the impact it would have on [the Company]. I had hoped that Janelle's move to the United Kingdom and the distance between Eloise and Janelle would allow things to improve, however, things had not improved."

[126] In September 2014, Mr Blundy made a decision that BNT should exercise the call option over the plaintiff's shares. He had hoped that the UK move would allow things between the plaintiff and Ms Monaghan to improve, but it had not. Although he held each of them in high regard, he felt that their relationship was toxic, was having an effect on their performance, and ultimately was having an adverse effect on the Company. He felt that their behaviour was such that they had put him in a position in which he had to choose between them, in the best interests of the Company. His judgment was that because the Company was a products business and Ms Monaghan had always been the products person and had been continuing to run the Australian side of the business successfully, the call option should be exercised over the plaintiff's shares rather than Ms Monaghan's shares.

[127] Consequent upon Mr Blundy having formed those views, on 23 October 2014, BNT gave notice exercising the call option over the plaintiff's shares. And on 7 November 2014, BNT transferred the plaintiff's shares to itself in exercise of a power of attorney under the shareholders' agreement. BNT paid the plaintiff the purchase price calculated pursuant to the "Call Option Value" specified in the shareholders' agreement, which required payment of 15 per cent of the amount which was 8 times the NPAT for FY14.

[128] I pause to observe that the plaintiff did not seek to give any evidence which challenged the truth of the facts related by Mr Blundy and Mr Itaoui in their written or oral evidence concerning the behaviour of the plaintiff and Ms Monaghan and its impact on the Company. Nor was any such challenge advanced in cross-examination of Mr Blundy or Mr Itaoui. It was not suggested to either of them at any time that the views they held were

not genuinely held by them on reasonable grounds. It was not suggested to Mr Blundy that there was any other motive, ulterior or otherwise, for the decision which he made in relation to the plaintiff. I find that Mr Blundy's decision to cause steps to be taken with a view to taking the plaintiff out of the Company's business was taken for the reasons he related.

[129] By letter sent on 17 November 2014, the Company confirmed advice orally given to the plaintiff on 14 November 2014 that the plaintiff's position as joint managing director had become redundant as of 14 November, given that her position was no longer required. The letter advised the plaintiff that she was entitled to receive an 8-week redundancy payment and a 6-month payment in lieu of her entitlement to receive 6 months' notice upon being made redundant. It is significant to note that in this proceeding, the plaintiff does not make any complaint about the termination of her employment as managing director.

[130] By email dated 21 November 2014, solicitors on behalf of the plaintiff wrote to Mr Blundy and others and contended that the shareholders' agreement only authorized the exercise of the call option in respect of all of the shares held by all of the minority shareholders, namely the plaintiff, Mr Brookman and Ms Monaghan. It was implicit in their email that they suggested the call option would not have been validly exercised unless that had occurred. They requested confirmation that the call option had been exercised in respect of all minority shareholders or an explanation as to why that had not happened.

[131] In fact, BNT had not exercised the call option over all three minority shareholders. BNT had only exercised it in respect of Mr Brookman's shares and the plaintiff's shares. After the plaintiff's email, BBRC (in conduct which must be assumed to have been on behalf of BNT) offered to reverse the transfer and re-issue a share certificate if the plaintiff returned the payment which had been made for the shares. The plaintiff did not accept that offer.

[132] I pause to observe that it did not, however, form any part of the plaintiff's case to challenge the legal validity of BNT's acquisition of her shares, notwithstanding the argument which had been advanced on her behalf in the email of 21 November 2014. Indeed, the acquisition of the shares was not pleaded to be part of the conduct which the plaintiff characterised as oppressive conduct. However, as will appear, the exercise of the call option without exercising it against all minority shareholders was suggested to be part of the plaintiff's unconscionable conduct case.

[133] On 4 December 2014, the plaintiff challenged the Company's termination of her employment by an application to the Fair Work Commission which sought reinstatement of her role with the Company. That proceeding did not result in the plaintiff's reinstatement.

[134] In 2019, the plaintiff commenced the present proceeding.

The oppression case

The applicable law

[135] Sections 232 and 233 of the *Corporations Act* 2001 are in these terms:

> **Part 2F.1—Oppressive conduct of affairs**
>
> **232 Grounds for Court order**
>
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of company;
>
> is either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

233 Orders the Court can make

(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

[136] Both the plaintiff and the defendants accepted, so far as it went, the summary of applicable general principles which I expressed in *Allways Resources Holdings Pty Ltd v Samgris Resources Pty Ltd* (2017) 121 ACSR 1 at 9–10 [20]–[25]:[15]

"**First**, the language and history of these sections indicate that they are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution.

Second, the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members" is to be regarded as a compound expression, which calls for a single overall judgment about the conduct of the affairs of the company in relation to a person.

Third, the different aspects of the compound expression are concerned with the essential criterion of "commercial unfairness". The test is whether, objectively in the eyes of a reasonable commercial bystander, there has been unfairness, namely, conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair. Fairness is not the same as legality. Conduct which is legal because, for example, it involves an exercise of power consistently with the company's constitution, may still be oppressive. In *Re Spargos Mining NL* (1990) 3 WAR 166 at 189, Murray J held:

> … it is certainly clear that the opinion required of the court is that objectively viewed, the conduct of those in control of the company is in all the circumstances to be regarded as unfair to a particular member, a group of members, perhaps a minority group, or the members as a whole and I conclude that that unfairness may lie in the harm suffered as a result of the conduct of management, the prejudice caused, the lack of reasonable commercial justification for the course taken, or simply in the decision making processes within the company.

Fourth, the task of deciding whether there has been commercial unfairness is to be undertaken in the context of the particular relationship which is in issue. It will not infrequently involve a balancing exercise between competing considerations. There is no fixed rule that an applicant must have clean hands, but the conduct of an applicant may be relevant, for example, because it may either render the conduct on the other side not unfair or may affect the relief which the court thinks fit to grant.

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15 Footnotes and paragraph numbering omitted. An appeal from my judgment was dismissed: see *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd & Ors* [2018] 3 Qd R 520. The Court of Appeal disagreed (see at 538 [52]-[53]) with my rejection of the use of the language "last resort" in relation to the possibility of exercising the discretion to wind up a solvent company (see my judgment at [26], not reproduced above), but did not express any criticism of the summary I have reproduced above.

> **Fifth**, authority suggests that the better view is that s 232(d) is separate and distinct from s 232(e). Conduct may be 'contrary to the interests of members as a whole' without necessarily involving commercial unfairness. The task of deciding whether there has been such conduct involves an objective assessment of whether the conduct adheres to accepted standards of corporate behaviour or is in accordance with how reasonable directors would act in attending to the affairs of the company.
>
> **Sixth**, in selecting the nature of the remedy concerned when a finding of oppression has been made, the discretion should be exercised with a view to ending the oppression. If there was no continuing oppression when a case came to trial, the weight of authority presently supports the view that the Court would retain power to make the orders for which s 233 provides; the fact that claimed relief was founded on conduct which was no longer continuing would be regarded as relevant but not necessarily determinative of the exercise of the discretion."

[137] For present purposes it suffices to note one further proposition of law, namely that the question of commercial unfairness is to be judged having regard to the facts known to the parties at the time of the conduct complained of, and not by reference to what subsequently transpires or facts which subsequently become known: see *Chase Corporation (Australia) Pty Ltd v North Sydney Brick and Tile Co Ltd* (1994) 35 NSWLR 1 at 26 (per Cohen J) and *Joint v Stephens* (2008) 26 ACLC 1467 at 1497–8 [138] (per Nettle, Ashley and Neave JJA).

The case advanced

[138] The plaintiff pointed to the proposal to transfer staff and leases from Diva to the Company which Mr Blundy made at the December 2013 strategy meeting and to the steps subsequently taken to implement the proposed transfer.

[139] The plaintiff's pleading turned on the proposition that Mr Blundy made a decision (defined in the pleading as "the Decision") to impose "the Proposed Transfer" as defined in the pleading, on the Company regardless of the plaintiff's opposition. By "the Proposed Transfer" the plaintiff meant only the proposal that the Company could take on some Diva leases and some Diva staff.

[140] As pleaded, the oppression case was advanced in this way:

(a) at the December 2013 strategy meeting, Mr Blundy mentioned the Diva opportunity in the terms which I have recorded at [55] above;[16]

(b) at the December 2013 strategy meeting and immediately after Mr Blundy mentioned the Diva opportunity, Ms Monaghan and the plaintiff responded in the manner recorded at [57] above, culminating in the plaintiff stating (and Mr Blundy agreeing) that if the transfer was to occur it would have to be on the basis that the call option dates were delayed;[17]

(c) in January and February 2014, steps were taken to implement transfers of some Diva stores and employment of some Diva staff;[18]

(d) Mr Blundy told the plaintiff in March 2014 that there would not be any amendment to the shareholders' agreement regarding call option dates;[19]

(e) in or about the period of December 2013 to March 2014, Mr Blundy decided (this decision was the pleaded "Decision") to impose the proposed transfer of some Diva staff and some Diva leases on the Company regardless of the plaintiff's opposition;[20]

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16 2ASOC at [13].
17 2ASOC at [13A].
18 2ASOC at [13B].
19 2ASOC at [13C].
20 2ASOC at [13D].

(f) the "Decision" by Mr Blundy was made on behalf of BBRC and BNT and imposed on the Company and the minority shareholders in reliance on BNT's position as the majority shareholder;[21]

(g) the "Decision" by Mr Blundy:

(i) was contrary to the interests of the Company inasmuch as it imposed on the Company the burden of the failing Diva business without bestowing any benefit;

(ii) was in fact imposed on the Company for the benefit of BBRC and Mr Blundy;

(iii) was imposed in a manner contrary to the shareholders' agreement;

(iv) devalued the Company and, correspondingly, the shareholdings of its members including the plaintiff's shares in particular;[22]

(h) each of those matters constituted oppression under both limbs of s 232 of the *Corporations Act* 2001, namely:

(i) contrary to the interests of the members as a whole; or

(ii) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity,

and therefore constituted grounds for making an order under Part 2F.1 of the *Corporations Act* 2001.[23]

[141] That case had narrowed somewhat by the end of the trial.

[142] First, in closing submissions, the plaintiff's senior counsel conceded that Mr Blundy's decision benefitted the Company "incidentally and in the long run" and that the focus of the oppression case should be on the second limb of s 232, namely that the "Decision" was oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

[143] Second, I was informed on the last day of trial that the plaintiff had determined that the breach of contract case was no longer pursued, that is, it had been abandoned. Senior counsel for the plaintiff told me that the plaintiff no longer advanced the case that the "Decision" of which they complained was a decision made in breach of the shareholders' agreement. It is appropriate to identify the nature of the breach of contract case which was abandoned. As pleaded, it had these elements:

(a) Properly construed, cl 6.3(e) of the shareholders' agreement obliged each of the parties to the shareholders' agreement to take such steps as were reasonably necessary to permit the Company to conduct its business in accordance with the agreed business plan and to refrain from taking any step that would prevent the Company from doing so.

(b) Alternatively, there was, by reason of the need to give efficacy to the shareholders' agreement, an implied term to like effect.

(c) In or about the period of December 2013 to March 2014, Mr Blundy made the "Decision", namely the decision to impose the proposed transfer of Diva staff and leases on the Company regardless of the plaintiff's opposition.

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21 2ASOC at [16].
22 2ASOC at [22](a) to (e).
23 2ASOC at [22](f) and (g).

(d) By that decision, BNT caused the Company to depart from the business plan in breach of cl 6.3, alternatively the implied term because the Initial Business Plan did not contemplate the merging of the Diva business (or part of it), or any business, into the Company's business.

(e) In the premises each of BNT and the Company undertook that breach.

[144] Third, the plaintiff's senior counsel clarified that where references were made in the pleading to the "Decision" having devalued the plaintiff's shares, the plaintiff was not referring to any objective conception of the value of the plaintiff's shares, but rather that the "Decision" had an adverse effect on the calculation of the call option value under the shareholders' agreement. He contended that that had always been the pleaded case. Certainly the loss claimed was measured as the difference between what was the amount of the call option value actually paid to the plaintiff and the amount which the call option value would have been if, but for the "Decision" and its implementation, the plaintiff had achieved the NPAT budgeted for in the FY14 Improvement Plan referred to at [30] above.[24] However, in my view, counsel's proposition was not accurate. In fact:

(a) the pleading had advanced a case that the fair value of the shares had been diminished and justified claiming the loss as calculated by asserting that "[t]he basis for calculation of the Call Option Value as set out in [the shareholders' agreement] constituted [the parties'] agreement as to the fair method of valuation of shares in the Company from time to time";[25]

(b) it was only on the pleaded basis of "that being so" that the plaintiff asserted the loss so measured was the proper measure of loss claimed consequent upon the alleged oppressive conduct;[26] and

(c) in the pleaded prayers for relief, the plaintiff claimed:

> "1. Orders pursuant to section 233 of the *Corporations Act* 2001 that [BNT] pay to [the plaintiff] the difference between the amount paid to acquire her shares and the actual value of those shares as at the date of [BNT's] acquisition of them.
>
> …
>
> 3. Further and alternatively, damages pursuant to section 12GF of the ASIC Act from [BNT], Mr Blundy and BBRC in the same amount."

Discussion

[145] It is appropriate to recapitulate what seem to me to be critical findings of fact which I have made adverse to the plaintiff's case.

[146] First, I have rejected the plaintiff's version of what happened at the December 2013 strategy meeting after Mr Blundy explained that he was considering closing the Diva business and that he thought that presented an opportunity to the Company.

[147] Second, I have rejected the plaintiff's characterisation that what occurred at the meeting and in the months afterwards was Mr Blundy deciding to impose the proposed transfer of some Diva staff and some Diva leases on the Company regardless of the plaintiff's opposition.

[148] Third, I have found that the opportunity of taking over some Diva staff and some Diva leases was thought by all the directors of the Company at the time (and found to be in hindsight) a good opportunity for the Company and in the best interests of the Company.

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24 2ASOC at [21], [22](d) and (e) and [22B].
25 2ASOC at [22A].
26 2ASOC at [22B].

[149] Fourth, I have found that the plaintiff did not oppose the uptake of some Diva staff and some Diva leases. To the contrary, she and Ms Monaghan were enthusiastic participants in the steps which the Company took to take advantage of the Diva opportunity.

[150] Fifth, Mr Blundy made a decision in September 2014 consequent upon the continuation of the acrimonious working relationship between the Company's joint managing directors that the best interests of the Company required a choice to be made between them and required the choice to favour Ms Monaghan and not the plaintiff.

[151] Sixth, Mr Blundy's choice in September 2014 between the Company's joint managing directors was a genuine choice made for the reasons he gave.

[152] The pleaded oppression case rests on the characterisation of events which occurred at and after the December 2013 strategy meeting as Mr Blundy having made the pleaded "Decision". But the essential problem is that the "Decision" did not occur. The plaintiff's pleaded narrative that Mr Blundy imposed on the Company a decision to take over Diva leases and Diva staff over the plaintiff's objection was a false narrative.

[153] What really happened was that Mr Blundy correctly identified that the problems being encountered by his Diva business presented an opportunity to the Company. All relevant decision makers agreed. In particular, the plaintiff and Ms Monaghan were enthusiastic. The Company proceeded to take advantage of the opportunity so identified and it did so by a process in which it identified the particular leases and particular staff suitable to it. Based on the facts known to the parties at the time they were so conducting themselves, the Company's decision to take on Diva leases and Diva staff to the extent it did was embraced, correctly, as a decision properly taken in the Company's best interests.

[154] The plaintiff's concerns arose later and for different reasons: see the fifth and sixth critical findings I have identified at [150] and [151] above. It is true that the expenses associated with having expanded in the way the Company did operated to reduce the NPAT and, accordingly, the calculated call option value and the payout which the plaintiff received. But none of that makes the conduct which the plaintiff complains of commercially unfair as at the time the conduct occurred.

[155] The oppression case must fail because there are no grounds for making an order under Part 2F.1 of the *Corporations Act* 2001.

[156] In light of the factual findings I have made, there is no occasion to examine in any detail the evidence which the plaintiff placed before me on the question of loss.

[157] Nevertheless, two insuperable problems with the plaintiff's case on loss should be noted.

[158] First, there was no evidence before me from which I could determine whether there was any difference between the amount paid to the plaintiff to acquire her shares and the actual value of those shares as at the date of acquisition. Mr Box was the expert jointly appointed to examine certain questions asked of him in relation to the quantum of the plaintiff's claim. But he had not been instructed to undertake a valuation of the Company as at 30 June 2013 or 30 June 2014 or as at the date of acquisition of the shares. If he had been asked to value the shares, his core methodology would have been the capitalisation of future maintainable earnings. As to that, the relevant passage of cross-examination was:

> "If you had been asked to undertake [the valuation exercise], there would have been a number of potential different methodologies to be employed; is that right?---Valuation methodology or work that would be conducted by me in the conduct of doing a valuation?
>
> Well, valuation methodology, as a starting point?---Well, I think the valuation methodology itself would be the same as what's employed under the shareholders agreement broadly, you know. The question might be whether we look at earnings before interest and tax or, as in this case, we've looked at earning after interest and tax, so we might make differing decisions there. So the – the core methodology, being the application,

> essentially, of the capitalisation of future maintainable earnings – I am comfortable that would be the approach that we would adopt. But the intricacies of what particular components we might use or calculate in applying that approach, it might differ from the numbers used, say, in the shareholders agreement.
>
> And one thing you've give no consideration to is what the appropriate means of – firstly, what [indistinct] in a company which is ex – which experienced significant growth in stores, how you would go about deciding an appropriate figure for future maintainable earnings; correct?---That's why I haven't assessed future maintainable earnings.
>
> All right. And you've given no consideration to what the appropriate capitalisation rate would've been once you derive future maintainable earnings; correct?---That's correct.
>
> What you certainly couldn't do is say because the shareholders agreement says eight times NPAT, that's the appropriate method for valuing the company; correct?---I couldn't say that, no."

[159] Second, even if one ignored the prayer for relief and assessed the plaintiff's claim on the basis of the spin placed on it at the end of the trial (see at [144] above), the plaintiff could not be regarded as having proved the loss she claimed. As to this, the plaintiff's case was that, but for "the Decision and the implementation of it", the Company would have achieved the NPAT referred to in the FY14 Improvement Plan. I have found that there was no such "Decision" and the narrative that there was is a false narrative. But even if there had been some element of imposition by Mr Blundy, I would not find that the financial circumstances experienced by the Company would have been any different if the element of imposition had not occurred. All the directors of the Company were in fact motivated vigorously to pursue the strategic goal of domestic expansion. Even before the December 2013 strategy meeting, all the directors were *ad idem* on the goal of becoming a 50-store operation. The opportunity which Mr Blundy presented was a good opportunity. All the directors had that view at the time and all the directors (including the plaintiff) embraced it. The plaintiff and Ms Monaghan had been comforted by Mr Blundy's assurances that, as was then the fact, BNT had no intention of seeking to acquire their shares. As the joint managing directors, they appreciated that their "KPI's were to work to the Business Plan in the Shareholders Agreement." They and the other directors would have, in fact, still vigorously pursued the goal of domestic expansion. They would not have wound the Company's domestic expansion plans back to the extent assumed by the FY14 Improvement Plan. The plaintiff has not proved the hypothesis on which she advanced the calculation of her loss claim.

Conclusion

[160] The plaintiff's claims for orders pursuant to s 233 of the *Corporations Act* 2001 that BNT should pay monies to her fails.

The unconscionability case

The case advanced

[161] The plaintiff's pleaded case was:

> 27. The entry into the Agreement, the Decision, implementation of the Decision, and the Call Option Exercise were, when taken together, conduct ("**the Conduct**") by Mr Blundy, [BNT], and BBRC within the meaning of the *Australian Securities and Investments Commission Act* 2001 ("**the ASIC Act**"):
>
> (a) in trade or commerce;
>
> (b) in relation to financial services;
>
> (c) undertaken in circumstances where Mr Blundy and, by him, [BNT] and BBRC, knew, or ought to have known, at the time of engaging in the Conduct that:
>
> (i) the Conduct was contrary to the interests of the Company and thus of its shareholders;
>
> (ii) the Conduct would devalue the shares of the shareholders;
>
> (iii) the other shareholders could not prevent the Decision from being implemented given [BNT's] majority shareholding;

(iv) the Agreement Parties had, by clause 6.3(e), expressly contemplated the business of the Company being conducted according to an agreed business plan, rather than at the whim of the majority shareholder;

(v) the Call Option Exercise provided expressly that BNT Holdco was bound, in exercising that option, to purchase the shares of all other shareholders, and that it was not entitled to exercise it only against [the plaintiff] and not all the other shareholders; and

(vi) the Decision would have the effect of reducing the Call Option Value;

(d) unfair to the Company and to its other shareholders given the devaluation of the Company occasioned by the Decision and the implementation of it;

(e) exploitative in that Mr Blundy and, by him, [BNT] and BBRC:

(i) took advantage of those matters to purchase [the plaintiff's] shares at a price significantly below that which would have obtained but for the Conduct; and

(ii) took the Decision and implemented it for the Decision Purpose; and

(f) therefore unconscionable in contravention of sections 12CA and 12CB of the ASIC Act.

28. [The plaintiff] has suffered loss and damage within the meaning of section 12GF of the ASIC Act, that being the Loss Amount.

[162] At trial, the plaintiff abandoned reliance on s 12CA.

The applicable law

[163] Section 12CB provided that:

12CB Unconscionable conduct in connection with financial services

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

(5) In this section:

listed public company has the same meaning as it has in the *Income Tax Assessment Act* 1997.

[164] Section 12CC of the ASIC Act sets out a list of considerations to which the Court may have regard in considering whether impugned conduct is unconscionable within the meaning of s 12CB. Those are expressly identified as examples rather than an exhaustive list. They include relative bargaining positions, use of unfair tactics and want of good faith.

[165] Assessing whether conduct in all the circumstances is to be characterised as unconscionable involves an evaluative judgment by the Court.[27] However, the evaluation is not a mere personal intuitive assertion by the Court.[28] Rather the evaluation of conduct must be made by the judicial techniques of the courts of equity, as referred to in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113.[29] In *Jenyns*, Dixon CJ, McTiernan and Kitto JJ observed at 118–9 (emphasis added):

> "**The jurisdiction of a court of equity** to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee **is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition**. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: "A court of law works its way to short issues, and confines its views to them. **A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case**": *The Juliana* [(1822) 2 Dods. 504 at 522 [165 ER 1560 at p 1567]]."

[166] The considerations which must be examined and the degree of gravity involved in a finding of unconscionable conduct were recently identified in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40. In that case, the Full Court of the Federal Court stated (at [87]–[89], per Allsop CJ, Besanko and McKerracher JJ):

> "… As the Full Court said in *National Exchange* 148 FCR at 140 [33], unconscionable conduct "on its ordinary and natural interpretation, means doing what should not be done in good conscience". The words "unconscionable" and "conscionable" may not be frequently used in everyday parlance, but they have an ordinary meaning, derived from the inner human sense of doing right. At least some of the human values that inform an Australian *business* conscience were set out in *Paciocco* 236 FCR at 274 [296]. Some of these, and not limited to protection of the vulnerable from victimisation or predation, were adopted by Kiefel CJ and Bell J in *Kobelt* 267 CLR at 17 [14].
>
> As the Full Court said in *Unique* 266 FCR at 667 [155], an allegation of unconscionability is a serious allegation. It is sufficient to warrant censure for the purpose of deterrence by the imposition of a civil penalty. Being penal in character tends against too loose or diffuse a construction: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; 224 CLR 193 at 210–211 [45]; *Paciocco* 236 FCR at 275 [300]. That assists in recognising an element of seriousness of the finding and the quality of the departure from the relevant standards of conduct that is required. As the Full Court said in *Unique* at [155]:
>
> > … **To behave unconscionably should be seen, as part of its essential conception, as serious**, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worth of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various

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27 *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at 603 [236] per Beach J, with whom Perram and Murphy JJ agreed.

28 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 274 [296] per Allsop CJ.

29 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 274 [296] per Allsop CJ.

> definitions including "having no conscience, **irreconcilable with what is right or reasonable**". The *Macquarie Dictionary* (1985) gives the definition "unreasonably excessive; not in accordance with what is just or reasonable". (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco* at [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. **It is a serious conclusion to be drawn about the conduct of a business person or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances**. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden on proof.
>
> (emphasis added)

As the Chief Justice sought to explain in *Paciocco* 236 FCR 199 especially at 274–276 [296]–[299] and [304]–[306] the values and considerations that inform the answer to a question whether conduct is against business conscience will be drawn from the values and considerations that one finds in the text, structure and context of the statute, in particular those in s 22, from statutes relevant to consider in the context of the conduct in question: *Lux* (2013) ATPR 42-447 at [23] and *Medibank* 267 FCR at 605 [241], and from the informing norms of equity and the common law, many of which need no restating by any Parliament, nor by any honest business person to another in their dealings. The Chief Justice sought to set some of these out in *Paciocco* 236 FCR at 274–75 [296]–[298]. These are not considerations outside the statute. They are basal values and considerations of equity and the common law in which the statute sits. Most are matters which honest business people understand and do not need expressly to require of each other (*Paciocco* [296]):

> The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing…"

Discussion

[167] The defendants noted that the plaintiff's pleaded case bundled together the entry into the shareholders' agreement, the "Decision" (as defined in the pleading), implementation of the "Decision", and the exercise of the call option as conduct in relation to financial services. They contended the allegation was misconceived. Although they acknowledged that the exercise of the call option might be regarded as conduct in relation to a financial service because:

(a) by s 12BAB(1)(b) a person provides a financial service if they deal in a financial product, and sub-section (7) defines dealing in a financial product to include acquiring a financial product;

(b) s 12BAA(7)(a) defines a security as a financial product and shares in a company constitute a security; and

(c) the exercise of the call option constituted acquiring a financial product and therefore dealing in a financial product and therefore providing a financial service,

they contended that the other matters referred to in the pleading were not properly characterised as conduct in relation to the provision or acquisition of a financial service.

[168] In my view, it is not necessary to resolve this debate. Even if one or all of the other matters could be regarded as conduct in relation to the provision or acquisition of a

financial service, the argument that they should be evaluated as unconscionable must fail on the facts.

[169] First, although the pleaded case was that the fact the shareholders' agreement itself was part of that which was said to constitute unconscionable conduct, senior counsel for the plaintiff told me that the plaintiff did not contend that there was any suggestion that consent to enter into the contract was somehow vitiated or that there were any unfair terms in the shareholders' agreement *per se*.

[170] Second, for reasons I have expressed in relation to the oppression case, I have rejected as false the plaintiff's contention that in or about the period of December 2013 to March 2014 Mr Blundy decided to impose the transfer of some Diva leases and some Diva staff, regardless of the plaintiff's opposition. That means the "Decision" as defined in the plaintiff's pleading was not made, nor was the "Decision" implemented.

[171] Third, it is appropriate to consider each of the various ways in which the plaintiff has sought to impugn the conduct of Mr Blundy, BNT, and BBRC.

[172] As to the allegation that Mr Blundy knew or ought to have known that "the Conduct" was contrary to the interests of the Company and thus of its shareholders:

(a) The allegation is contrary to the findings I have made at [104], [111], [112] and [148] above.

(b) The allegation was not put to Mr Blundy.

(c) The allegation was effectively abandoned by the concession made in relation to the oppression case: see at [142] above.

(d) I reject the allegation.

[173] As to the allegation that Mr Blundy knew or ought to have known that "the Conduct" would devalue the shares of the shareholders (and also the allegation that "the Conduct" was unfair to the Company and to its other shareholders given the devaluation of the Company occasioned by the "Decision" and the implementation of it):

(a) I do not accept that any of Mr Blundy, BNT or BBRC had that belief or should have had that knowledge.

(b) In fact the unchallenged evidence of Mr Blundy was that he believed then and in hindsight that the extent to which the Company took up Diva leases and staff was in the best interests of the Company.

(c) I reject the allegations.

[174] As to the allegation that Mr Blundy knew or ought to have known that the other shareholders could not prevent "the Decision" from being implemented given BNT's majority shareholding:

(a) An approval of a material departure from a current business plan or any expenditure by the Company which involved an amount in excess of $50,000 in a financial year which was not specifically provided for in the current business plan required special majority approval under the shareholders' agreement, and that special majority approval required 75 per cent of directors' votes.

(b) Accordingly, if they acted together, the plaintiff and Ms Monaghan could have prevented the "Decision", if in fact there had been an attempt by Mr Blundy to impose his will as had been alleged. The proposition alleged to have been actually or constructively known is false. However, it was not put to Mr Blundy that he knew or ought to have known the proposition.

(c) The plaintiff was aware of the provisions of the shareholders' agreement to which I have referred.

(d) I reject the allegation.

[175] As to the allegation that Mr Blundy knew or ought to have known that the parties to the shareholders' agreement had, by cl 6.3(e), expressly contemplated the business of the Company being conducted according to an agreed business plan, rather than at the whim of the majority shareholder:

(a) It is true that the shareholders' agreement contemplated the business of the Company being conducted according to an agreed business plan, rather than at the whim of the majority shareholder.

(b) It may be assumed that Mr Blundy knew or ought to have known that proposition.

(c) But the business was not conducted at the whim of the majority shareholder.

(d) This allegation is an untenable rhetorical flourish, which in light of my other findings is an irrelevance. I reject it as a basis to impugn Mr Blundy's conduct.

[176] As to the allegation that Mr Blundy knew or ought to have known that the shareholders' agreement provided expressly that BNT was bound, in exercising the call option, to purchase the shares of all the minority shareholders:

(a) Mr Blundy had known since January 2014 that that was how the shareholders' agreement operated: see the events referred to at [71] to [78] above.

(b) The draft amending deed produced in February 2014 was an attempt to address that issue.

(c) I agree that at the time he gave instructions to exercise the call option in relation to the plaintiff's shares, Mr Blundy must have known that BNT was not entitled to do so without also exercising it also in relation to the shares of the other minority shareholders.

[177] As to the allegation that Mr Blundy knew or ought to have known that the "Decision" would have the effect of reducing the call option value calculated under the shareholders' agreement:

(a) At the time the Company was acting on the Diva opportunity, Mr Blundy did not contemplate the acquisition of either of the plaintiff's or Ms Monaghan's shares.

(b) He knew that the Initial Business Plan had contemplated the Company having 55 stores by the end of FY14 and 70 stores by the end of FY15 and would have appreciated that the Diva opportunity permitted steps towards those goals, so he may not have turned his mind to the question of the impact on the call option value when the Company took steps to act on the Diva opportunity.

(c) On the other hand, he did contemplate taking steps to acquire Mr Brookman's shares, so it is possible that he did turn his mind to that subject.

(d) However, the allegation was not put to Mr Blundy that he must have appreciated at the time it was happening that the effect of taking up some of the Diva leases and some Diva staff would have the effect of reducing the call option value.

(e) I am not willing to make the finding sought.

[178] As to the allegation that "the Conduct" was exploitative in that Mr Blundy and, by him, BNT and BBRC took advantage of those matters to purchase the plaintiff's shares at a price significantly below that which would have been obtained but for "the Conduct":

(a) The allegation is contrary to the findings I have made at [118] to [128], [150] and [151] above.

(b) There was no taking advantage at all.

(c) I reject the allegation.

[179] As to the allegation that "the Conduct" was exploitative in that Mr Blundy and, by him, BNT and BBRC and took "the Decision" and implemented it for "the Decision Purpose":

(a) The conception of "the Decision Purpose" found meaning in the plaintiff's allegation that the fact that the Diva business was declining was the principal purpose of each of Mr Blundy, BBRC and BNT motivating them to make "the Decision".

(b) That allegation is contrary to the findings I have made at [104] and [148].

(c) I reject the allegation.

[180] The upshot of the foregoing is that the only part of the conduct of Mr Blundy, and by him BNT, of which the plaintiff could legitimately complain was the mode by which BNT exercised the call option. As I have found, Mr Blundy must have known that BNT was not entitled to do so under the shareholders' agreement without exercising it also in relation to the shares of the other minority shareholders.

[181] The conduct of failing to comply with the contractual call option procedures might have given rise to an argument that the acquisition of the shares was invalid, but no such case was pursued. Such a case might have led to the plaintiff having to accept a position in which her shareholding was restored, but then (because her employment had been terminated) her shares were subject to compulsory acquisition pursuant to the mechanism specified in cl 15 of the shareholders' agreement discussed at [26] above. The plaintiff was conscious of that because her unwillingness to place herself in that position formed part of the reason why she rejected BNT's offer to restore her shares.

[182] The conduct of failing to comply with contractual call option procedures might also have given rise to a claim for damages for breach of contract, but no such case has been pursued in this proceeding and would, in any event, have had to grapple with the question of whether the plaintiff would have been in any better position if the shareholders' agreement had been performed according to its terms. There is no material before me which suggests that she would have been better off in such circumstances.

[183] Although I am conscious of the central importance of the faithful performance of bargains and promises freely made, I am also conscious that in *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536, Macaulay AJA said:[30]

> "There may be nothing offensive to conscience in a commercial participant taking [a commercial decision to breach a contract] in given circumstances. Whether or not it amounts to unconscionable conduct does not simply flow from it being a deliberate breach; it must be evaluated in "all the circumstances"."

[184] To my mind, the conduct of failing to comply with the contractual call option procedures could not, without more, be evaluated as unconscionable in the present circumstances, in particular the circumstances I have identified at [118] to [128], [150] and [151] above. No doubt that is why, as pleaded, the plaintiff has always relied on more, namely the myriad of ways in which she has sought to impugn the conduct of Mr Blundy, BNT and BBRC. But I have rejected all of those ways, so there is nothing more.

[185] Accordingly, the plaintiff's unconscionable conduct case must fail.

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30 At 556 [92], Harper and Hansen JJA agreeing. The passage was subsequently cited with approval in *Director of Consumer Affairs Victoria v Scully and Gilfillan* (2013) 303 ALR 168 at 182–3 [47] per Santamaria JA, Neave and Osborn JJA agreeing.

[186] In light of the factual findings I have made, there is no occasion to examine in any detail the evidence which the plaintiff placed before me on the question of loss.

[187] I should observe that because the damages claim was advanced in the same way as claimed in the oppression case, the same two insuperable problems with the plaintiff's case on loss should be noted.

Conclusion

[188] The plaintiff's claim for damages pursuant to s 12GF of the ASIC Act fails.

Orders which should be made

[189] There must be judgment for the defendants against the plaintiff.

[190] I will hear the parties as to costs.