

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R148/2014

(formerly in the Retail Tenancies List)

### CATCHWORDS

**RETAIL LEASES**-retail premises lease of motel, coupled with a contract by which the tenant's related party agreed to purchase the property subject to title being issued.

**PRACTICE AND PROCEDURE**-landlord previously obtained order from the Tribunal against tenant for *mesne profits*-tenant submits on appeal that the related party, having taken possession under the contract, is the party liable-Tribunal's order subsequently stayed by Supreme Court pending hearing of appeal and the hearing of the tenant's counterclaim and related party's cross-claim-whether pending appeal prevents a finding as to whether tenant and/or related party was in possession so as to be liable for *mesne profits* and damages for breach of bailment-held that finding not open to be made.

**CONVERSION OF CHATTELS**-whether there was evidence of the required intentional conduct on the part of the party in possession in respect of the landlord's chattels on the premises to sustain a cause of action in respect of conversion of them-landlord's claim dismissed for lack of the required intention.

**BAILMENT OF CHATTELS**-whether the party in possession failed to safeguard chattels at the property as a bailee in order that they could be redelivered to the landlord-landlord's claim dismissed-measure of damages in bailment-no "new for old".

**DAMAGE CAUSED TO PREMISES**-whether party in possession is liable for damage caused to the premises, whether the tenant in breach of the lease alternatively the related party in breach of the other contract.

**MISLEADING AND DECEPTIVE CONDUCT**-whether misleading and deceptive conduct or conduct likely to mislead or deceive by alleged express misrepresentations and misrepresentations said to arise from the landlord's alleged silence on relevant matters-claim dismissed- reliance and causation also considered.

**MISLEADING AND DECEPTIVE CONDUCT**-damages also considered-claim for expenses incurred as a result of reliance on the alleged misleading and deceptive conduct-further claim for lost opportunity-insufficient evidence of lost opportunity.

**LIMITATION OF ACTIONS**-section 236(2) *Australian Consumer Law (Victoria)*-whether cause of action in misleading and deceptive conduct statute barred.

**TENANT'S CHATTELS**-obligations of landlord following the taking of possession-no satisfactory evidence of offer of delivery up by landlord.

### APPLICANT

H Y Ting & Sons Pty Ltd (ACN 068 426 282)

Respondent by Counterclaim

First Respondent by Cross-  
Claim

### RESPONDENT

Mark MacDonald

Applicant by Counterclaim

### APPLICANT BY CROSS- CLAIM

Aussie Bush & Country Motels Pty Ltd (ACN  
138 085 453)

<b>SECOND RESPONDENT BY CROSS-CLAIM</b>	George Ting (by his administrator Eileen Chai)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	A T Kincaid, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25-28 September 2017, 11-12 December 2017.
<b>DATE OF RECEIPT OF FINAL WRITTEN SUBMISSIONS</b>	8 January 2018-On behalf of the Respondent and Applicant by Cross-Claim.
<b>OTHER MATTERS</b>	<p>The Tribunal has previously found that the party in possession of the premises between 1 November 2013 and 20 November 2014 and therefore liable to pay mesne profits for the period was the respondent, Mr McDonald.</p> <p>That finding is the subject of an appeal to the Supreme Court of Victoria, stayed by order of the Court dated 11 April 2016 pending the hearing and determination of the balance of the claim made in the proceeding, counterclaim and cross-claim.</p>
<b>DATE OF ORDER</b>	29 March 2018.
<b>CITATION</b>	H Y Ting & Sons Pty Ltd v MacDonald (No 2) (Building and Property) [2018] VCAT 477

### **INTERIM ORDERS**

#### **The Tribunal find and declares that:**

1. The party found by the Supreme Court on appeal to have been in possession of the premises between 21 November 2014 and 27 August 2015 is liable to pay \$21,940.80 to the applicant as mesne profits.
2. The party found by the Supreme Court on appeal to have been in possession of the premises between 25 September 2009 and 27 August 2015 is liable to pay to the applicant \$44,033.48 for loss and damage incurred by the applicant by reason of damage to the applicant's premises by the party in possession.
3. If it is found on appeal that:
  - (i) the applicant by cross-claim was in possession of the premises between 25 September 2009 and 28 February 2014; and that

(ii) the respondent was in possession from 1 March 2014 to 27 August 2015

then both the applicant by cross-claim and the respondent are jointly liable to pay to the applicant the amounts referred to in order 2.

4. The claims in conversion and bailment, in respect of alleged damage to the applicant's chattels and equipment caused by the party in possession, are dismissed.
5. On the counterclaim, the applicant must pay \$15,000 to the respondent. The counterclaim is otherwise dismissed.
6. On the cross-claim, the applicant must pay to the cross-claimant \$10,000. The cross-claim is otherwise dismissed.
7. Liberty to apply for final orders, following the hearing and determination of the appeal (including any order seeking the joinder of Aussie Bush & Country Motels Pty Ltd as second respondent), or earlier for consent orders.
8. Liberty to apply.
9. Costs reserved.

A T Kincaid  
**Member**

**APPEARANCES:**

For Applicant

Mr S Hopper of Counsel with Mr L Virgona of Counsel.

For Respondents

Mr K F Jones of Counsel.

## REASONS

### INTRODUCTION

1. Lake Boga is a town in Victoria with a population of about 700 people, located about 325 kilometres northwest of Melbourne, near Swan Hill. It is located next to the lake of the same name, which is popular for water sports. Regional water shortage caused by drought resulted in Lake Boga becoming completely dry in 2009, and work began in March 2010 to refill it. The surrounding area is used for agriculture, including fruit and vegetable growing and grain production. The area is popular with tourists, backpackers and fruit-pickers.
2. The *Aquatic Lodge Motel* (the “**motel**”) provides accommodation there. Transactions in 2009 between the owner of the motel and a party then interested in buying it gave rise to this dispute.
3. The applicant (“**Ting**”) purchased the property on which the motel was situated at 108-130 Murray Valley Highway (the “**property**”) at the end of 2001.
4. Ting obtained a planning permit in June 2005, issued by Swan Hill Rural City Council (the “**Council**”), allowing for a 5 lot subdivision of the property. The motel stands on what is Lot 3 of the then proposed subdivision.
5. Mr George Ting (“**Mr Ting**”) was a director of Ting until early 2010, when he retired because of ill health. Mr Ting’s son, Hoo Ngie Ting, known as Jordan became a director, although since late 2009 Mr Ting’s wife Eileen Chai (“**Ms Chai**”) has had primary responsibility for the affairs of Ting.
6. Ms Chai has been appointed administrator of Mr Ting’s estate. Mr Ting was unavailable to give evidence at the hearing, due to his ill health.
7. The respondent Mark Alistair MacDonald (“**Mr MacDonald**”) lives at Collinsville, Queensland where he is the owner of the Central Hotel. He was a schoolteacher up until 2001. He has also purchased investment properties since the 1980s, managed them, and undertaken improvements to them.
8. Mr MacDonald is also a director of the cross-claimant Aussie Bush & Country Motels Pty Ltd (“**ABC**”), and the sole shareholder of ABC. ABC was incorporated on 3 July 2009, a short time before it entered into a transaction with Ting, described below.
9. On 31 July 2009 Ting sold lot 3 of the property to ABC on a conditional sale arrangement. Mr MacDonald had earlier taken a lease of the property.
10. In brief, the various claims in the proceeding concern issues of who at law was in possession of the property from 25 September 2009, the date ABC paid its deposit to Ting, who is liable for damage claimed by Ting in relation to Ting’s chattels and the premises, damage claimed by Mr

MacDonald and ABC in respect of their chattels, and for loss and damage claimed by Mr MacDonald and ABC in relation to alleged misleading and deceptive conduct by Ting and Mr Ting.

### The Hearing

11. Mr Sam Hopper, with Mr Luke Virgona both of Counsel appeared at the hearing for Ting. Mr Kevin Jones of Counsel appeared for Mr MacDonald and ABC.
12. The hearing took place on 25 September 2017-28 September 2017. For reasons that I will explain, on 28 September 2017 I adjourned the hearing to 11 December 2017. The hearing continued on that day, and then through to 12 December 2017.
13. I subsequently received written submissions from the parties.

### THE AGREEMENTS

#### The Lease

14. Mr MacDonald entered into a lease of the property dated 10 July 2009 (the “lease”). Prior to then, Mr MacDonald had been living in Gippsland.
15. I find that Mr MacDonald occupied the motel from then to 27 August 2015, when Ting recovered possession.
16. The lease granted Mr MacDonald a 3 year term to 9 July 2012, with 4 further options of three years each.
17. Clause 2.2.1 of the lease provided that the permitted use of the property was as a “motel”.
18. Clause 19 of the lease provided:

#### Additional Provisions

The parties acknowledge that no rental shall be payable pursuant to this lease so long as the contract of sale for the Motel freehold between [Ting] and [ABC] is still current or if that Contract is not completed due to [Ting’s] inability or refusal to do so for any reason not as a result of [ABC’s] default. All repairs and maintenance on whole premises be it structural or otherwise are sole responsibility of [Mr Macdonald] at [his] own cost.

#### The contract of sale

19. On 31 July 2009 Ting and ABC entered into a contract of sale (the “contract of sale”) by which ABC agreed to purchase from Ting Lot 3 of the proposed subdivision of the property, being the Lot on which the motel was situated. It provided, in part:

PARTICULARS OF SALE	
LAND	Being Lot 3 on proposed Plan of Subdivision 544451F and being part of the land more particularly described in Certificate of Title Volume 9335 Folio 505

<b>PROPERTY ADDRESS</b>	The land together with any improvements known as 108-130 Murray Valley Highway, Lake Boga 3584.
<b>PRICE</b>	\$250,000.00
<b>DEPOSIT</b>	\$25,000.00
<b>BALANCE</b>	\$225,000.00
<b>PAYMENT OF BALANCE</b>	On 31 July 2011 (in accordance with Special Conditions 1, 2 & 3 and subject to Special Conditions 6 & 7).
<b>SETTLEMENT DATE</b>	Is the date upon which vacant possession of the property and chattels must be provided, namely, upon acceptance of title by the purchaser and receipt of the <b>deposit</b> by the Vendor ( <b>emphasis added</b> ).
<b>DAY OF SALE</b>	31 July 2009
Encumbrances	... Leases-the lease between the vendor and [Mr MacDonald]

20. Special Conditions in the contract of sale provided:

<p><b>Special Condition 1</b></p> <p>The balance purchase money (\$225,000) shall be payable on or before 31 July 2011 together with the interest at the rate of 5.35% per annum calculated and payable monthly in advance from 31 July 2009 to 31 July 2010 and thereafter at the rate of 5.9% per annum until settlement.</p>
<p><b>Special Condition 6</b></p> <p>[Ting] warrants:</p> <p>(a) that preparation of a Plan of Subdivision in accordance with the Plan annexed hereto has been commissioned.</p> <p>(b) that such Plan of Subdivision will be submitted for certification by the Swan Hill Rural City Council and approval by the Registrar of Titles.</p>
<p><b>Special Condition 7</b></p> <p>In the event that [Ting] has not registered the proposed Plan of Subdivision by 31 July 2011 the settlement date will be extended for a period of up to 12 months and if not registered by 31 July 2012 [Ting] agrees to sell the whole of the land in Certificate of Title Volume 9335 Folio 505 and [ABC] agrees to buy for a total price of \$310,000.00 which will be due and payable within 60 (sixty) days thereof.</p>

21. By notice of rescission dated 14 February 2014, Ting terminated the contract of sale from 28 February 2014.
22. Pursuant to the Additional Provisions of the lease, Mr MacDonald was under no liability to pay rent to Ting until 28 February 2014.

23. ABC paid the \$25,000 deposit required by the contract of sale on 31 July 2009. I find that Ting received it (within the meaning of the Settlement Date provision of the contract of sale) on 25 September 2009.<sup>1</sup> For reasons that follow, Mr MacDonald and ABC contend that Mr MacDonald was, in any event, under no liability to pay rent to Ting from that date.
24. Ting was not successful in registering the proposed Plan of Subdivision by 31 July 2011, and therefore the date for the payment of the balance of the purchase price by ABC was extended pursuant to special condition 7 of the contract of sale to 31 July 2012.
25. On 9 July 2012, the term of the lease ended.
26. On 31 July 2012 Ting was still unable to deliver title to ABC, but the time for performance by Ting was extended by mutual consent to 31 October 2012. After further extensions, which did not result in production of title to ABC, pursuant to special condition 7 of the contract of sale, Ting agreed to sell and ABC agreed to buy the property (being all the lots of the proposed subdivision) for a purchase price of \$310,000. This is the transaction that was contemplated by Special Condition 7 of the contract of sale.
27. ABC was deregistered on 6 June 2014 for non-payment of ASIC fees.<sup>2</sup>

### **Agreed facts**

28. The following facts are agreed:
  - (a) the lease was brought to an end on 31 October 2013, as a result of Mr MacDonald having given notice to quit dated 30 September 2013;
  - (b) the contract of sale came to an end on 28 February 2014, as a result of Ting having on 14 February 2014 served a rescission notice in respect of the contract of sale on ABC; and
  - (c) Ting recovered possession of the property on 27 August 2015.

## **THE RESPECTIVE CLAIMS**

### **Ting's Claims**

29. Ting's claims against Mr MacDonald are as follows:
  - (a) Mesne profits for the period between 21 November 2014<sup>3</sup> and 27 August 2015, the date Ting took possession of the property. This is claimed at the rate under the lease of \$2,383.34 (including GST) per month or \$78.36 (including GST) per day, amounting to \$21,940.80 (including GST);

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<sup>1</sup> TB1377-1388.

<sup>2</sup> ABC was reinstated by ASIC with effect from 6 June 2013 by operation of sub-section 601AH(5) of the *Corporations Act 2001*.

<sup>3</sup> The day after the date to which I have already ordered mesne profits, under appeal.

- (b) damages of \$157,068.84<sup>4</sup> for alleged conversion by Mr MacDonald of chattels at the motel<sup>5</sup> and/or in bailment; and
- (c) damages of \$61,030.71<sup>6</sup> for “cleaning and making good” the motel, by reason of Mr MacDonald allegedly failing to remove rubbish and return possession of the motel in a clean and repaired condition, contrary to the terms of the lease.

### **The counterclaim and cross-claim**

- 30. The total of the claims made by Mr MacDonald and ABC against Ting is \$579,490.
- 31. Included in this amount is a claim by Mr MacDonald against Ting for \$60,990 being the value of chattels that he allegedly brought to the motel after he took up occupation in 2009, for which Ting has allegedly failed to account after repossessing the property in August 2015. On the same basis, he claims another \$15,000 for kitchen equipment, tools and cash.
- 32. ABC makes a claim against Ting for the \$35,000 claimed value of a portable classroom that it claims to have brought to the motel.
- 33. Mr MacDonald and ABC’s claims that Ting engaged in misleading and deceptive conduct in failing to inform them, prior to Mr MacDonald entering into the lease, and ABC entering into the contract of sale, of the existence of certain documents then in the possession of Ting, being letters from the Council and a Building Order issued by the Council requiring certain works to be carried out.
- 34. Mr MacDonald and ABC allege that this conduct (being Ting’s silence on the relevant matters), together with two express misrepresentations allegedly made by Ting, gave rise to a wrongful assumption being made by them about the speed with which they could start operating the motel, and that they would not have otherwise respectively entered into the lease and the contract of sale.
- 35. ABC says that in the event, it was unable to obtain the required registration to operate a motel. Instead, it claims, ABC was only able to obtain a “prescribed accommodation” registration for units 1-18 (out of a total of 32 units) from 11 September 2012.
- 36. Included in their claims for damages arising from the alleged misleading and deceptive conduct, Mr MacDonald and ABC claim in respect of their losses arising from his going into and going out of the property.<sup>7</sup> In this respect, ABC claims the deposit paid under the contract of sale of \$25,000, interest paid to Ting under the contract of sale of \$73,037, the alleged cost

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<sup>4</sup> See paragraph 1 at TB 88-90, as amended by deletion of items (o), (p) and (u) (see Applicant’s Closing Submissions dated 12 December 2017).

<sup>5</sup> Described in a schedule to the contract of sale.

<sup>6</sup> See paragraphs 2-3 of TB 90-91, as supplemented by \$12,400 previously included at (u) in the table at TB 89.

<sup>7</sup> Of the type considered in *Yorke v Ross Lucas* (1982) 69 FLR 116; 45 ALR 299.



of ABC transporting the portable classroom from Gippsland to Lake Boga of \$15,000, other costs incurred by ABC in repairing the motel of \$50,500 and \$5,000 for rates paid by ABC.

37. MacDonald claims \$97,500 for the value of his own personal exertion in carrying out repairs to the motel.
38. In addition, ABC also claims \$300,000 damages for lost opportunity, being the profit it alleges it would have made on transactions it would have pursued had it not, allegedly relying on the alleged misleading and deceptive conduct, entered into the contract of sale. I accept Ting's submission that the quantum of claims brought by Mr MacDonald on the one hand, and ABC on the other, have been a little obliquely pleaded. A composite list of claims, being part of the final submissions, in which no differentiation is made between those claims brought by Mr MacDonald and those brought by ABC has created its own challenges for me. For reasons that I provide later, I regard Mr MacDonald as being the proper claimant in respect of the lost opportunity claim.

#### **HISTORY OF THE PROCEEDING**

39. One of the issues for determination is whether I am able to make a finding as to whether which of Mr MacDonald or ABC was in possession of the property for the purpose of Ting's claims. Ting contends that Mr Macdonald was the party in possession. Mr MacDonald and ABC argue that ABC was in possession. The history of the proceeding becomes relevant. I will provide a short account, before summarising the issues in the proceeding.
40. Ting issued the proceeding on 25 June 2014, seeking an order for possession against Mr MacDonald, and orders for payment of unpaid rent and mesne profits.
41. Ting alleged in its claim that from 14 February 2014<sup>8</sup> Mr MacDonald continued to occupy the premises as a trespasser. When it issued the proceeding, Ting was unaware of Mr Macdonald having earlier given notice to quit under the lease, expiring on 31 October 2013.
42. On 20 November 2014, I heard Ting's claims for possession of the property, mesne profits and for unpaid outgoings. Mr Hopper of Counsel appeared for Ting, and Mr MacDonald appeared on his own behalf.
43. Although Mr MacDonald did his best to articulate a proposed counterclaim, based on the contents of his letter to Ting dated 30 September 2013 and an undated letter received by the Tribunal on 30 September 2014, I determined that Mr MacDonald was not in a position to fully particularise his counterclaim, and prove any loss. I decided to hear Ting's claim only, informing the parties that the counterclaim would be heard in the following year, following the making of appropriate directions.

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<sup>8</sup> The date on which Ting was then alleging the contract of sale had come to an end, being the date of Ting's notice of rescission of the contract of sale.

44. In respect of Ting’s claim for possession, I understood Mr MacDonald’s submissions at the hearing to be to the effect that, on a proper construction of contract of sale, ABC was entitled to become registered proprietor of the property upon payment of the deposit. Mr MacDonald relied, for his submission, on the description of “Settlement Date” in the contract of sale.
45. Mr MacDonald also submitted that he had since taken a lease from ABC and that, in this circumstance, Ting had no right to seek an order for possession against him, but that that claim needed to be brought against ABC.
46. I rejected this argument. In summary, I found that on a proper construction of the contract of sale, ABC was not entitled to become registered proprietor of the property upon payment of the deposit and that, in any event, ABC had since ceased to exist (having been deregistered on 6 June 2014).
47. I also found that Ting had duly rescinded the contract of sale from 28 February 2014. The terms of the contract of sale could have been the only basis for an allegation that ABC was, until that date, the party in possession.
48. It also followed, and I found, that Mr MacDonald was liable for the payment to Ting of *mesne profits* from 1 November 2013, the day after the expiration of Mr MacDonald’s notice to quit.
49. Prior to orders being made on 20 November 2014, I had to adjourn the hearing to 4 December 2014. This was because Mr MacDonald was required, later in the day, to be urgently hospitalised.
50. On 4 December 2014, Mr MacDonald appeared by telephone. Mr Hopper appeared for the applicant. I made the following Orders:

1. This proceeding (including [Mr MacDonald’s] counterclaim) is listed for hearing before any Member on **5 March 2015** commencing at 10:00 a.m. at 55 King Street Melbourne, with an estimated duration of 2 days.
2. **[Ting] have possession of [the property] by 4:00 p.m. on 18 December 2014.**
4. (sic) **For the reasons given orally [on 20 November 2014], [Mr MacDonald] pay to [Ting] the sum of \$39,216.97.**
5. On [Ting] giving the usual undertaking as to damages, [Mr MacDonald] is restrained until hearing and determination of this proceeding or further order from removing from the Property any and all of the items enumerated in the attached three page schedule marked “A” (being a list of chattels attached to the contract of sale dated 31 July 2009 in relation to the Property).

51. The amount referred to in order 4 of my orders was calculated as follows:

Mesne profits	\$30,167.03 (inc GST),	Calculated from 1 November 2013 (being the day following the expiry of Mr MacDonald’s notice to quit) to 20 November 2014 (the hearing date), being 385 days at the rate of \$78.36 (including GST) per day.  The assessment of mesne profits was based on the monthly rental under the lease of
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		\$2,383.34 including GST per month, or \$78.36 (including GST) per day.
Water rates	\$5,509.08	
Council rates	\$3,540.61	
	<b>\$39,216.03</b>	

52. By his letter dated 16 December 2014 to the Tribunal, Mr MacDonald sought to appeal against Orders 2 and 4 of my orders dated 4 December 2014.<sup>9</sup>
53. By orders made on 27 April 2015, in a reserved decision, I dismissed the application by Mr MacDonald for a stay of orders 2 and 4 of my orders dated 4 December 2014.<sup>10</sup>
54. On 11 May 2015, Mr MacDonald filed an application seeking leave of the Supreme Court to appeal out of time against orders 2 and 4 of my orders dated 4 December 2014, the return date of the application being 16 June 2015. A stay pending appeal was not granted.
55. By order of Lansdowne AJ dated 16 June 2015, the application by Mr MacDonald was listed for directions before Croft J on 28 August 2015. The directions hearing before Croft J was adjourned to 18 September 2015.
56. As noted, it is common ground that Ting obtained possession of the premises on 27 August 2015.
57. On 12 February 2016, Croft J adjourned the appeal to 11 April 2016.
58. On 11 April 2016, Croft J made the following consent orders in the appeal:
1. [Mr MacDonald's] application for leave to appeal order 2 in the Victorian Civil and Administrative Tribunal's orders dated 4 December 2014 in proceeding R148/2014 ("the **VCAT proceeding**") be dismissed.
  2. The balance of appeal be stayed until further order, pending hearing and determination of the VCAT proceeding and any related proceeding.
  3. The Tribunal's order 4 made 4 December 2014 in the VCAT proceeding be stayed until further order, pending hearing and determination of that proceeding and any related proceeding
  4. Costs reserved.
  5. Liberty to apply.
59. On 6 May 2016 ABC, having been reinstated by ASIC, was on its own application joined as a party to the proceeding.
60. On 18 May 2016 I dismissed an application by ABC for an interlocutory injunction restraining Ting from selling the property.

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<sup>9</sup> See *H Y Ting and Sons Pty Ltd v MacDonald* (Building and Property) [2015] VCAT 532 for an account of subsequent events.

<sup>10</sup> *H Y Ting and Sons Pty Ltd v MacDonald* (Building and Property) [2015] VCAT 532.

61. At a telephone mention on 20 May 2016, the proceeding was set down for hearing on 29 November 2016.
62. By orders made on 28 November 2016 the hearing date was vacated due to the need of Mr MacDonald and ABC to file and serve amended pleadings and to provide further discovery, and a hearing date of 10 April 2017 was substituted.
63. The Tribunal was informed on 25 November 2016 that Ms Chai had been appointed administrator of the estate of Mr George Ting, then the second respondent by cross-claim.
64. On 6 April 2017 the hearing of the proceeding was further adjourned by consent to 25 September 2017, occasioned by Mr MacDonald being required to travel at short notice to Collinsville, Queensland to secure his property in the aftermath of Cyclone *Debbie*.

### **ISSUES FOR DETERMINATION**

65. The proceeding raises the following issues for determination:
  - (a) Having regard to the above history, does the appeal by Mr MacDonald against orders 2 and 4 of my orders dated 4 December 2014, with the subsequent stay of order 4 until further order of the Supreme Court (pursuant to order of the Supreme Court dated 11 April 2016), prevent me from making findings as to whether:
    - (i) Mr MacDonald (as contended by Ting); and/or
    - (ii) ABC (as contended by Mr MacDonald and ABC)was in possession of the property from 25 September 2009 to 27 August 2015 (the date Ting recovered possession of the property), such as to be liable in respect of any damages found to be due to Ting in respect of the claims referred to in sub-paragraphs (b)-(e) below?
  - (b) In respect of the period from 21 November 2014 (the day after the date to which I have previously made an order for mesne profits against Mr MacDonald) to 27 August 2015, are mesne profits due and payable by the party found to be in possession (whether found in this proceeding, or on appeal) and if so, in what amount?
  - (c) In the claim brought by Ting in alleged conversion, is the party or parties found to be in possession from 25 September 2009 to 27 August 2015 (whether found in this proceeding, or on appeal) liable to Ting for damages and, if so, in what amount?
  - (d) In the alternative claim brought by Ting in bailment, is the party or parties found to be in possession from 25 September 2009 to 27 August 2015 (whether found in this proceeding, or on appeal) liable to Ting for damages and, if so, in what amount?
  - (e) In the claim brought by Ting for the recovery of alleged costs incurred by Ting in making good the property, is the party or parties found to

be in possession from 25 September 2009 to 27 August 2015 (whether found in this proceeding, or on appeal) liable in damages and, if so, in what amount?

- (f) In the counterclaim and cross-claim, is Mr MacDonald and/or ABC, subject to the limitations defence relied on by Ting, entitled to damages from Ting and/or George Ting for claimed contraventions of the relevant provisions of the *Australian Consumer Law* (including misleading and deceptive conduct) and, if so, in what amount?
- (g) In the cross-claim for damages made by ABC (identifying which damages) against Ting and/or George Ting in respect of conduct alleged to have contravened the relevant provisions of the *Australian Consumer Law*, statute-barred by reason of not having been commenced at any time within 6 years after the day on which the cause of action accrued?
- (h) Is Ting liable to Mr MacDonald for the value of chattels that he claims to have brought to the motel after he took up occupation in 2009, which have allegedly not been delivered up to Mr MacDonald and, if so, in what amount?
- (i) Is Ting liable to Mr MacDonald to pay \$1,500 cash allegedly kept at the motel by Mr MacDonald at the date Ting re-possessed on 27 August 2015, and alleged not to have been returned?
- (j) Is Ting liable to ABC for the value of a portable classroom located at the property, and bar fridges, which have allegedly not been delivered up to ABC and, if so, in what amount?

## **ISSUE (A)**

### **Dispute concerning the identity of the party in possession**

#### The parties arguments concerning possession

- 66. Ting claims mesne profits from 21 November 2014. It makes other claims referred to in issues (b)-(e) described above. All of these claims require a finding as to which of Mr MacDonald and ABC is the proper respondent.
- 67. I heard argument on whether Mr Macdonald was in possession from 21 November 2014 (as contended by Ting) or, as contended by Mr MacDonald and ABC, whether it was ABC.
- 68. ABC and Mr MacDonald contend that ABC was, at law, in possession of the premises as far back as 25 September 2009 (the date that I have found Ting received the deposit from ABC), and that its possession continued to 27 August 2015 (the date that Ting recovered possession of the property).
- 69. Mr Jones on behalf of Mr MacDonald and ABC contends that:
  - (a) between 10 July 2009 (the first day of the term of the lease to Mr MacDonald) and 25 September 2009 (the date that I have found the

deposit was received, and when possession was granted to ABC according to notices of disposition sent by Ting's solicitor to the rating authorities<sup>11</sup>), Mr MacDonald was in possession;

- (b) between 25 September 2009 and 31 October 2013 (the date of the expiration of the lease to Mr MacDonald), ABC had possession of the property pursuant to the terms of the contract of sale and other contemporaneous documents<sup>12</sup>, ABC also having an equitable interest in the property as purchaser;
- (c) between 1 November 2013 and 27 August 2015 (when Ting recovered possession of the property), and notwithstanding Ting having rescinded the contract of sale with effect from 28 February 2014, ABC continued in possession of the property.<sup>13</sup>

- 70. Mr Jones further contended that from the date of ABC taking possession of the property at law on 25 September 2009, Mr MacDonald was only in possession of the caretaker's hut as a sub-lessee from ABC until 31 October 2013, when his lease came to an end.
- 71. Mr Jones's arguments, if accepted, would cast doubt on the correctness of order 4 of my orders dated 4 December 2014, which is to the effect that for the period between 1 November 2013 and 20 November 2014 Mr MacDonald (and not ABC) was in possession of the property.
- 72. Ting for its part denies that ABC went into possession on 25 September 2009. Ting submitted (consistently with my decision dated 20 November 2014, which lay behind order 4 of my orders dated 4 December 2014) that Mr MacDonald was in possession pursuant to the terms of the lease until the lease came to an end on 9 July 2012, and from that date until 31 October 2013 Mr McDonald was an overholding monthly tenant pursuant to the terms of the lease. Tings says that after 31 October 2013, Mr MacDonald remained in possession of the property as a trespasser, until Ting recovered possession on 27 August 2015.
- 73. Ting also submits that any right to possession of the property that ABC may have had as a purchaser under the contract of sale must have come to an end on 28 February 2014 when the contract of sale was, it is now agreed, duly rescinded. Ting therefore contends that Mr MacDonald's and ABC's best position, if one were to accept their arguments that ABC had possession from 25 September 2009, is that rather than Mr MacDonald being liable for mesne profits for the period between 1 November 2013 and 28 February 2014 (as I have found by order 4 of my orders dated 4 December 2014), ABC would be liable for mesne profits for that period. I was informed by Mr Hopper that if this is found to be the case, order 4 of my orders dated 4

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<sup>11</sup> Noting, however that Ting received payment of the deposit on 23 September 2009

<sup>12</sup> And notwithstanding that the contract of sale came to an end on 28 February 2014, as a result of Ting having on 14 February 2014 served a rescission notice on ABC in respect of the contract of sale.

<sup>13</sup> Respondent and Cross-Claimant's Closing Submissions tendered 12 December 2017.

December 2014 against Mr MacDonald in respect of the period 1 November 2013 to 20 November 2014 would simply be reduced by about \$10,000, being the mesne profits referable to the limited period 1 November 2013 and 28 February 2014.

74. Whether the argument put by Mr Jones or that put by Mr Hopper prevails will depend on the legal effect of the “Settlement Date” provision of the contract of sale, other provisions of the contract of sale and the contents of documents that may be argued to have come into effect contemporaneously with the contract of sale.
75. Counsel put their clients’ respective positions on the issue, and both fairly conceded in argument that the view may fairly be taken that whether or not Mr MacDonald or ABC was the relevant party in possession is the very subject of Mr MacDonald’s appeal to the Supreme Court of Victoria against order 4 of my orders dated 4 December 2014, and that the Tribunal should not now enter upon the issues. Mr Hopper went further, and submitted that given that the appeal against order 4 has been stayed pending the hearing and determination of the proceeding before the Tribunal (being the balance of the claim brought by Ting for conversion, bailment and make-good, and Mr MacDonald’s counterclaim and ABC’s cross-claim), the Tribunal should not make a decision that may affect order 4 of its orders dated 4 December 2014.
76. The extent to which I am able to make findings in respect of a particular party or parties liable in respect of issues (b)-(e) above depends on whether orders 2 and 3 of the Supreme Court orders made 11 April 2016 prevent me from doing so.
77. I consider that I am not in position to make any determination as to whether Mr MacDonald or ABC is, or both are liable in respect of Ting’s claims for mesne profits, in conversion, in bailment and for the costs of making good. This is because the proper identity of the party in possession of the property from 25 September 2009 (and from 28 February 2014 if there be any change in identity from that date) is the subject of Mr MacDonald’s appeal against order 4 of my orders dated 4 December 2014.
78. Any finding that I may now make concerning whether ABC or Mr MacDonald was in possession of the property after 25 September 2009 until 27 August 2015 will interfere with that appeal.
79. The proper identity of the party or parties liable may of course be subsequently agreed between the parties, avoiding the need for the appeal to be continued.
80. I shall therefore proceed on issues of liability that arise in respect of Ting’s claims, but without determining which party is liable.

## ISSUE (B)

### Ting's claim for mesne profits

81. Ting claims mesne profits for the period 21 November 2014 to 27 August 2015.
82. Ting's claim is made against Mr MacDonald, as the person in occupation during this time.
83. This claim is in addition to its successful claim for mesne profits of \$30,167.03 (including GST) for the earlier period between 1 November 2013 and 20 November 2014, the subject of order 4 of my orders dated 4 December 2014, and which order remains stayed pursuant to order 3 of the orders of Croft J dated 11 April 2016.
84. I find however that the further claim for mesne profits in the sum of \$21,940.80 (including GST) for the period 21 November 2014 to 27 August 2015 is reasonable, being the rental provided for under the lease.
85. I find that the party liable to pay this amount to Ting is the party who is found at law to have been in possession at law from and after 28 February 2014, being the date that the contract of sale was brought to an end.

## TING'S CLAIMS IN CONVERSION AND BAILMENT

### ISSUES (C) AND (D)

#### Ting's claims in conversion and bailment

86. Ting claims that the chattels described in the Chattel and Equipment List attached to the Contract of Sale (the "**Chattel and Equipment List**") were converted by Mr MacDonald, because it was he who was in possession both before and after the Contract of Sale was stood rescinded on 28 February 2014. Ting puts a claim in bailment in the alternative.
87. Ting relies on its common-law rights, given that there appear to be no express provisions of the lease that relate to obligations in relation to chattels.
88. For the reasons given above, I put aside the identity of the proper respondent to the claim for conversion, and instead consider whether the facts demonstrate that conversion has occurred.
89. Ting claims damages, particularised as follows:<sup>14</sup>

"All monetary amounts have been calculated by reference to the retail cost of new-for-old replacements.

Item	Total claimed replacement value based on the quotes and advertisements
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<sup>14</sup> Applicant's Further and Better Particulars of Loss and Damage dated 20 September 2016.



(a)	8 queen beds at \$859.00 each.	\$6,872
(b)	18 double beds at \$579.00 each.	\$10,422.00
(c)	13 bunk beds at \$441.00 each.	\$5,330.00
(d)	60 bunk bed mattresses at \$249.00 each.	\$14,940.00
(e)	10 single beds at \$419.00 each.	\$4,190.00
(f)	8 wardrobes at \$350.00 each.	\$2,800.00
(g)	32 bedhead tables at \$199.00 each.	\$6,368.00
(h)	14 bedheads at \$200.00 each	\$2,800.00
(i)	7 dining tables at \$199.00 each	\$1,393.00
(j)	25 chairs at \$135.00 each	\$3,375.00
(k)	18 coffee tables at \$239.00 each	\$4,302.00
(l)	20 stools at \$129.00 each	\$2,580.00
(m)	7 heaters at \$544.00 each 14 air-conditioner units at \$599.00 each	\$12,194.00
(n)	10 picture frames and pictures at \$100.00 each.	\$1,000.00
(o)	18 doors at \$250.00 each. \$4,500.00	Deleted. Included in "make good" claim for \$7,945.22 (see below).
(p)	10 windows at \$557.80 each.	Deleted. Included in "make good" claim for \$8,273 (see below).
(q)	7 vanity units at \$1,000.	\$7,000.00
(r)	8 televisions at \$278.00 each.	\$2,224.00
(s)	4 outdoor garden benches at \$329.00 each.	\$1,316.00
(t)	Linen and blankets comprising: <ul style="list-style-type: none"> <li>• 70 single bedspreads at \$59.00 each</li> <li>• 27 double bedspreads at \$65.00 each</li> <li>• 8 queen-size bedspreads at \$69.00 each.</li> <li>• 70 single blankets at \$30.00 each.</li> </ul>	

	<ul style="list-style-type: none"> <li>• 35 queen-size blankets at \$40.00 each.</li> <li>• 70 single mattress protectors at \$15.95 each.</li> <li>• 35 queen-size mattress protectors at \$19.95 each</li> <li>• 140 pillows at \$12.95 each</li> <li>• 140 pillow cases at \$3.95 each.</li> <li>• 280 single bedsheets at \$15.95 each.</li> <li>• 140 queen bedsheets at \$19.95 each.</li> </ul>	\$20,669.25
(u)	Carpet replacement in 10 rooms at \$1,240 per room.	Deleted. Added to “make good” claim (see below).
(v)	1 bain-marie	\$1,240.00
(w)	31 rooms full curtain replacements at \$1,044.00 per room	\$32,364.00
(x)	1 3-foot stove	\$6,255.60
(y)	1 worker’s cottage kitchen (comprising vanity unit, ovenstove, kitchen bench, table and 2 refrigerators.	\$5,123.00
(z)	1 3-seater couch	\$1,299.00
	<b>TOTAL</b>	<b>\$157,056.84</b>

90. Ting intends to bring these claims against ABC to the extent it may be found, contrary to Ting’s contention, that ABC was in possession of the property after 25 September 2009. Ting has not however brought a claim in the proceeding against ABC.

Relevant Facts

91. Ting purchased the property and the motel business operating under the name Aquatic Lodge in about 2001.
92. From the time Ting purchased the Property, Mr Ting and Ms Chai operated the motel until about September 2005.
93. Ms Chai’s work involved mainly managing the finances of the motel, while Mr Ting managed the day-to-day operations. From the time Ting purchased the property, Mr Ting stayed at the motel intermittently until August 2005. From then until September 2005, he stayed there full time.

94. On 13 September 2005, Ting entered into a contract by which a Mr and Mrs Nicholls purchased lot 3 of the proposed 5-lot subdivision of the property for \$300,000 on terms as to payment. It will be recalled that this is the lot upon which the motel is located. Ting and the Nicholls also entered another contract by which the Nicholls purchased the motel business for \$180,000.
95. Schedule A to the contract of sale of the motel business to the Nicholls stated:

<b>ASSETS INCLUDED IN THE PRICE</b>	
Plant, equipment, fittings and other assets as described	
Plant and equipment	<b>\$30,000 (emphasis added)</b>
Goodwill	\$150,000
Total	\$180,000

96. The Nicholls operated the motel and occupied the property until about December 2007.
97. By December 2007, the Nicholls had fallen into default of the purchase agreements and, following the service of notice of default by Ting, they abandoned the motel. I find that it remained empty until the time when Mr MacDonald took possession of it in July 2009.
98. Prior to the contract of sale being entered into, the parties signed a letter of offer and acceptance. It was signed by Mr MacDonald on 28 April 2009. It described what was to be conveyed to Mr MacDonald for the purchase price of \$250,000, as follows:

Freehold, leasehold and existing plants, equipment and chattels **as is where is** condition (emphasis added).

99. In relation to the chattels, the contract of sale provided:

<b>PARTICULARS OF SALE</b>	
<b>LAND</b>	Being Lot 3 on proposed Plan of Subdivision 544451F and being part of the land more particularly described in Certificate of Title Volume 9335 Folio 505
<b>PROPERTY ADDRESS</b>	The land together with any improvements known as 108-130 Murray Valley Highway, Lake Boga 3584.
<b>CHATTELS</b>	As detailed in the attached Chattel and Equipment List.
<b>PRICE</b>	\$250,000.00

<b>DEPOSIT</b>	\$25,000.00
<b>BALANCE</b>	\$225,000.00

100. Special Condition 12 in the contract of sale provided:

<b>Special Condition 12</b>	[Ting] sells all furniture, plant, equipment and other chattels now situated at the property <b>in their present condition</b> . Legal ownership of these items shall not pass to [ABC] until final settlement and payment of the balance purchase money, interest and any other monies owing pursuant to this Contract [ <b>emphasis added</b> ].
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101. I find from Ms Chai’s evidence that the chattels described in the Chattel and Equipment List attached to the contract of sale was the product of a joint inspection by Mr MacDonald and Mr Ting in about May 2009, compiled at Ms Chai’s request, to record what was in the motel that would shortly be occupied by Mr MacDonald. Ms Chai maintained in her evidence that there were also “heaps of items” in the motel at the time, such as linen bedspreads and crockery, and that it was naturally impossible for Mr Ting and Mr MacDonald to “go through all that”.
102. The chattels sold under the contract of sale were “in their present condition” (see Special Condition 12 of the Contract of Sale). There is no evidence to indicate what that condition was, save that the chattels were not new.
103. The provisions of the lease do not expressly refer to the goods of Ting described in the Chattel and Equipment List. I find though, from the terms of the contract of sale and the Chattel and Equipment List that those goods and chattels were also in the motel at the time of the lease. I find that Mr MacDonald, having also inspected them with Mr Ting for the purpose of compiling the Chattel and Equipment List, was aware that they belonged to Ting.
104. By a Notice of Disposition of an Interest in Land sent to the Council by letter dated 8 November 2009, Ting informed the Council that the sale price under the contract of sale was \$250,000 but did not complete the section entitled Property Details which, as sent to the Council, read as follows:

Are there any items in the transaction additional to land and improvements?	\$	Plant and machinery
If so, show approximate value	\$	Licence
	\$	Chattels, crops, livestock, etc

105. When in late 2012 after ABC had exercised its right under Special Condition 7 of the contract of sale to purchase the whole of the land contained in Certificate of Title Volume 9335 Folio 505 for \$310,000, Ting

filed a Goods Statutory Declaration. It stated that the transaction did not involve an independent sale of business goods.

#### Ting's claim in conversion

106. Conversion occurs where a person intentionally deals with a chattel in a manner which is seriously inconsistent with the immediate right of possession of the person who has property in them.<sup>15</sup>
107. The seriousness of the dealing must be such that the converter is required to pay the full value of the chattel as damages.<sup>16</sup> Intentionally destroying or consuming another's chattel or so altering its physical condition as to change its identity is treated as conversion.<sup>17</sup> On the other hand, mere damage or minor change is not conversion, and hence does not have the drastic effect of forcing a sale on the defendant.
108. Conversion can only result from an intentional act, not from negligent loss or destruction.<sup>18</sup> The required intent is to interfere or deal with chattels by exercising dominion over them on one's own behalf or of someone other than the plaintiff.
109. Given this, I am not satisfied that there is any evidence of the required intention on the part of Mr MacDonald to damage or destroy chattels in the Chattel and Equipment List, as would support a finding of conversion, and the claim by Ting in conversion is dismissed.

#### Ting's claim in bailment

110. Alternatively to its claim in conversion, Ting says that the party in possession of the property between July 2009 the date of the lease and the time Ting took possession on 27 August 2015 was a gratuitous bailee of the chattels, that it failed to take care of them as the law requires, therefore entitling Ting to damages.
111. A duty to take reasonable care, analogous to that imposed by the law of torts, is implied at law in several classes of contract, including in every contract of bailment.<sup>19</sup> Ting relies on the modern approach, which I accept, which requires a bailee, whether for reward under a contract or gratuitously, to take reasonable care of the goods bailed.<sup>20</sup>
112. Ting also relies on the proposition that where goods are sold, as in this case, with a retention of title clause,<sup>21</sup> the title to the goods remains in the seller unless and until the purchase price is paid in full. Given that the price was not paid in full by ABC, there is no controversy between the parties that

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<sup>15</sup> See *Vout Torts-The Laws of Australia* 3<sup>rd</sup> edition (2016) at [33.8.790]-[33.8.900].

<sup>16</sup> See *Fleming's The Law of Torts* 10<sup>th</sup> edition (2011) at [4.60].

<sup>17</sup> See *Fleming's* (supra) at [4.120] and cases there referred to. See also *Torts* (supra) at [33.8.880].

<sup>18</sup> See *Fleming's* (supra) at [4.80] and [4.120] and cases there referred to.

<sup>19</sup> See *Cheshire and Fifoot's Law of Contract* (Eighth Australian Edition), at [10.53] and cases referred to in footnote 378.

<sup>20</sup> See *Halsbury's Laws of Australia* at [40-15-[40-20] and cases there referred to.

<sup>21</sup> See clause 12 of the Special Conditions of the Contract of Sale.

title remained with Ting. Ting submits that the party found to be in possession, whether it be Mr MacDonald or ABC, was under an obligation to keep the goods in the same condition in which they were received subject to fair wear and tear, and to return them to Ting upon demand or otherwise in accordance with the terms of the bailment.<sup>22</sup>

113. Ting also submits that where there is a contract between parties that has expired, whether by failure to perform or otherwise, leaving one party in possession of the other's goods, that person may still be counted as a bailee for the purpose of safeguarding and redelivering the goods.<sup>23</sup>

114. I find, in the circumstances, that a bailment occurred. The bailee was Mr MacDonald (whether pursuant to the lease, or as an overholding tenant pursuant to its terms), or ABC as a person in possession of them pursuant to the contract of sale. I find that the party in possession was bound to take reasonable care of the chattels.

115. A particular feature of the law of bailment, relied on by Ting, and which I accept, is as to which party bears the burden of proof. In *Rolfe v Investec Bank (Australia) Ltd*<sup>24</sup> the Court of Appeal stated:

Despite some divergence among Australian authorities as to which party bears the onus of proving negligence in relation to a gratuitous bailment, we think the better view to be, as it is in England, that the onus is on the bailee to show that the goods have been lost without negligence on the bailee's part.<sup>25</sup>

116. The reasoning behind the shift of the onus of proof in a bailment case is that, as the bailor was not in possession of the goods at the relevant time, the bailor is therefore unable to prove what happened to the goods. The principle has its origins in a combination of both fairness and preventing a bailee from benefiting from its own wrong.

117. It is clear from the authorities, in my view, that the onus shifts to the bailee (whether it be Mr MacDonald, as alleged by Ting or ABC as alleged by Mr MacDonald and ABC) to prove that any damage or destruction of chattels was not caused by the bailee.<sup>26</sup> Ting says that neither of these parties has discharged this burden of proof.

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<sup>22</sup> See Halsbury's *Laws of Australia* at [40-10] and *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 987. For a bailment to occur, the parties need not contemplate that the chattels should be redelivered; in certain circumstances a bailment may exist although the parties intend that the goods will remain permanently with the bailee, see *Palmer on Bailment* 3<sup>rd</sup> edition page 4.

<sup>23</sup> See *Palmer on Bailment* 3<sup>rd</sup> edition pp 35-37.

<sup>24</sup> [2014] VSCA 38 at [28].

<sup>25</sup> See also *Curtin v Meadow Holdings Pty Ltd* [2001] QCA 145.

<sup>26</sup> This principle is accepted by Mr MacDonald ABC-see their Reply to Ting's Supplementary Closing Submission.

### Whether breach of bailment

118. Ting's case concerning claimed damage to the chattels is provided in the evidence of Ms Chai<sup>27</sup> as follows:

[63] When I got to the Property, I saw that it was in a complete state of disrepair, as there was rubbish strewn everywhere, there was a great deal of damage to the buildings, and most of the bedding and furniture was destroyed.

...

[65] After Mr Jones had inspected the Property, he agreed to assist me with the most urgent repairs to the buildings, as well as to assist in clearing the damaged and destroyed chattels.

...

[68] ...There is still considerable amount of work which needs to be done replacing all of the furniture and other items which were damaged or completely destroyed in the time which Mr MacDonald was in possession of the Property.

[69] After I first went back to the Property after Mr MacDonald had finally left, I began to make a list of all of the items that had been at the motel when Mr MacDonald first took possession of the motel which were now either completely destroyed, damaged beyond repair or had gone missing. Now produced and shown to me and marked "EC-24" is a true copy of that list.

119. Putting to one side the matters in Ms Chai's Exhibit "EC-24" that relate to alleged damage to the buildings at the property and alleged left rubbish,<sup>28</sup> which I address below in the "make good" claim, Exhibit "EC-24" contains a 3 page narrative dated 15 May 2016 containing Ms Chai's general observations concerning the allegedly damaged chattels.<sup>29</sup> The exhibit also contains a 4 page "room-by-room" list, with headings respectively entitled "Chattels", "Evictee Chattels", "Portable Classroom" and "Rooms" ("**Ms Chai's List**"). I find from her evidence that Ms Chai's List contains a room by room account of what Ms Chai observed in each of them.

120. I note that the motel has 35 guest rooms. Rooms 1-8 and 9-18 are in two rows, running from east to west (with room 18 being the furthest west) along the Highway. A restaurant is located between the 2 rows, with rooms 33, 34 and 35 located above the restaurant. Rooms 19-32 are located in a separate "L" shape structure, towards the south. I find from the evidence that these rooms were not let by Mr MacDonald.

121. Mr MacDonald and ABC rely on the evidence of Mr MacDonald as follows:

69. Two Fridays before the eviction [on 27 August 2015] I left the motel for what turned out to be the last time. The motel was in good

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<sup>27</sup> In her witness statement dated 11 November 2016.

<sup>28</sup> At TB 411 and attached images.

<sup>29</sup> At TB 408-410.

condition. All doors and windows were intact, some windows had been boarded up in places where the premises were not approved by the Council for use. All vacated rooms in units 1-18 and the upstairs residence had been cleaned in preparation for future occupants. These rooms were fully equipped for occupancy. I had organised the set-up of the rear block of units 19-32 and these were tidy although some of these rooms were used for storage of my equipment and items not needed for the motel at the time. Curtains had been removed and washed and the curtain rails had been removed and repainted. These had not been put back in place. Otherwise the rooms were clean and tidy and were set up with beds, mattresses, pillows, bedspreads, mattress protectors and other items. The Council inspectors had never inspected these rooms as far as I can recall. I had just mown all of the grounds of Lot 3 and up to 20 metres around lot 3 on the other lots. I had hosed down the exterior walls, windows and pathways. The pool was drained and clean.<sup>30</sup>

122. It is common ground that Mr MacDonald travelled to Queensland to be with his ailing mother approximately 2 weeks before Ting repossessed the property on 27 August 2015. In his witness statement in reply, Mr MacDonald states:

[17] I refer to paragraph 63 of Eileen Chai's statement. When I was last at the motel it was in a clean and tidy condition. This was less than 2 weeks before the eviction. The condition of the motel at the time is as described in paragraph 69 of my statement.

[18] I refer to paragraph 68 of Eileen Chai's statement. I deny that furniture and other items were damaged or completely destroyed while my company ABC was in possession of the motel and/or while I held a lease over the motel. I had placed additional chattels in the motel as described in paragraph 39 of my statement. I had also spent money to acquire goods and chattels including plant and equipment for the motel. These included bar fridges, television sets, microwave ovens, stoves, air-conditioners, other kitchen and catering equipment and hot water services. My estimate of the cost of chattels brought to the motel by me is referred to in paragraph 75(f) of my statement and annexure 'MM-75' and the cost of kitchen and catering equipment is referred to in paragraph 75(g) of my statement.

[19] I refer to paragraph 69 of Eileen Chai's statement and to attachment "EC-24". I have examined [Ms Chai's List] and noted that it includes a numbered list of items under headings Building, Chattels, Evictee Chattels, Portable Classroom and Rooms. These item numbers match photo numbers for .jpg files that were provided as discovery on a remote computer pen drive. These jpg files are contained within folders with the same heading names. I have closely examined these photos and the comments made about them. I have made comments in reply in the same format. My comments reply to the photo image and to the typed comments. I attach my comments as annexure 'MM-90'. I have also looked at photos in a file headed rubbish. Eileen Chai has

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<sup>30</sup> Paragraph 69 of Mr MacDonald's witness statement dated 8 November 2016.



not commented on these photos in table form. I have made some comments. I attach my comments on the Rubbish photos as annexure 'MM-91'. I have also made a revised plan that more accurately represents the layout of the motel units. I have also added a more detailed plan of the downstairs and upstairs of the restaurant/office block and the manager's flat and other accommodation on the second floor. This map is an aid to an understanding of what parts of the motel have been photographed. I attach this revised plan as annexure 'MM-92'. The motel was in a far better condition when I left the premises in mid-August 2015 than when ABC under the contract and I under the lease took physical possession in September 2009. I had made significant improvements that I have described in my statement. My estimate of expenditure was set out in annexure 'MM-74' of my statement. The photos do not accurately reflect the layout of the chattels or their condition when I left the premises. The photos show that someone has removed many of the chattels and either destroyed them by burning them, or otherwise disposing of them. When I visited the motel in November 2015 to collect my motor vehicle I saw that many of the mattresses were thrown into the yard.

[20] I refer to the statement prepared by Eileen Chai dated 15 May 2016 that is part of attachment "EC-24". I have described the condition of the motel at the time I left the motel in mid-August 2015 in paragraph 69 of my statement.

123. Mr MacDonald also relied on the evidence of Ms Yoke Choo Ang. She lived at the motel from January 2015, and used to help there as a cleaner. At that time, she states, rooms 1-8 in the easterly block and rooms 9-18 in the westerly block were rented out, mainly to backpackers and fruit-pickers, but by August 2015 only rooms 1-7 were available for rent. She and Mr MacDonald had formed a personal relationship by that time, which continues to this day. Her witness statement states:

[11] When I go to Queensland all the rooms are clean. Each room was ready for new guest. Beds were made up, toilets all clean, window all clean, fridge clean and no rubbish. Walkways were tidy and clean. Grass was cut.

124. In her further statement, addressing the allegations of Ms Chai to which I have referred, Ms Ang states:

[3] I refer to paragraph 63 of Eileen Chai's statement. When I left the motel in August 2015 to go to Queensland the motel was neat and tidy. All rooms 1-8 and 9-18 clean. Rooms 1-7 had people, I was in room 8 and rooms 9-18 (not 13 Kitchen) were ready for guest. Rooms 19-32 not used for guest. Room 1-7 I clean once a week.

[4] I refer to paragraph 69 of Eileen Chai's statement. The document marked 'EC-24' has a schedule referring to photographs. I have examined these photographs. I attach a schedule that has what I say about some of the photographs as annexure 'YC-1'.

[5] I also examine some other photographs called Rubbish and one extra photograph called Building. I attach a schedule that has what I say about some of the photographs as annexure 'YC-2'.

125. Without more, Ms Chai's List would have been an unsatisfactory tool with which to assess the strength of Ting's case brought in respect of breach of bailment. However the hearing proceeded on the basis that a folder of photographs tendered by Ting on the first day of the hearing, during its opening, and accepted as having been taken by Ms Chai's son Jordan Ting, were of the items respectively described in Ms Chai's List. Mr MacDonald and Ms Ang also had an opportunity to make comment on the items in the List, having regard to these photographs. The photos were therefore accepted into evidence on this basis.
126. I do not accept the submission on behalf of Mr MacDonald and ABC that the Tribunal should be cautious about using the photographs for the purpose of establishing the state of chattels and equipment, or the motel structure generally at 27 August 2015. I am satisfied from the evidence that they were taken so soon after 27 August 2015 that they provide a fair representation of what was then found.
127. The case put by Mr MacDonald and ABC, through the evidence of Mr MacDonald and Ms Ang is that:
- (a) insofar as the relevant chattels are considered to be in a poor condition, they were in that condition when he started occupying the property;<sup>31</sup>
  - (b) many chattels were re-arranged/damaged after he left the property in the middle of August 2015 to visit Queensland;<sup>32</sup> and
  - (c) many chattels had been subjected to fair wear and tear.<sup>33</sup>
128. I have carefully reviewed the photographs, but have been unable to satisfy myself that Ting has demonstrated on the balance of probabilities that the damage I have observed was caused by a failure by the party in possession, as bailee, to take reasonable care of them. This is because:
- (a) I find from Ms Chai's evidence that the chattels and equipment the subject of Ting's claim were the same chattels and equipment that had been used by Ting from 2001 for the conduct of its motel business, and subsequently used by the Nicholls for carrying on of the business from the time that they started to operate the business in late September 2005 to when they left the property in December 2007;
  - (b) the Offer and Acceptance letter, signed by Mr MacDonald on 28 April 2009 described the chattels as being in an "as is where is" condition,

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<sup>31</sup> See Mr MacDonald's comments to images 60, 68 and 72 at TB 231-M

<sup>32</sup> See Mr MacDonald's evidence concerning images 59, 61, 62, 63, 65, 66, 70, 74, 77, 79, 97, 98 and 99 at TB 231-M.

<sup>33</sup> See Mr MacDonald's evidence concerning images at 69, 76, 78, TB 231-M.

suggesting that they were second hand, and that no warranty of quality or suitability was made by Ting;

- (c) Special Condition 12 of the contract of sale again made clear that the 9 year old furniture, plant equipment and other chattels were sold in their “present condition”;
- (d) some degree of wear and tear of the chattels and equipment could reasonably have been expected over the 9 year period;
- (e) the property stood empty between December 2007, when the Nicholls left, and July 2009 when Mr MacDonald started occupying it under the lease, being during that time subject to the acts of trespassers;<sup>34</sup>
- (f) there was no persuasive evidence given on behalf of Ting to the effect that the 9 year old chattels and equipment were in a reasonable condition at the time that Mr MacDonald entered into the lease; and
- (g) no photographic evidence of the chattels and equipment, as would indicate their condition at the time of the lease and contract of sale in 2009, was led by Ting;

129. I find that in these circumstances, the party in possession, whether it be Mr MacDonald or ABC, has discharged its onus of proof that the state of the chattels was caused without negligence on its part. The claim brought by Ting in bailment will therefore be dismissed.

130. If I am wrong, I shall proceed to make findings as to damages.

#### Damages Claimed by Ting

131. Ting claims damages in bailment in the amount of \$157,056.84 as set out above.

132. The evidence from Ms Chai on behalf of Ting was:

[70] In or around June this year, my solicitor told me that I would need to start putting together some information of how much it would cost to replace all of the items that were damaged, destroyed or missing. I began looking around in local catalogues for similar items to those that were damaged, destroyed or missing, as well as looking on the internet at different companies who sold similar items so that I could get an idea about how much the replacement value of the goods were. To achieve this, I put together a folder which has advertisements for these items and their prices. I have also obtained some quotes for replacement curtains and carpet. Now produced and shown to me and marked “**EC-25**” are true copies of the quotes and advertisements for replacement items.

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<sup>34</sup> Supported by the evidence of Mr MacDonald’s observations.

133. As a preliminary matter, I have reviewed the Chattel and Equipment List attached to the contract of sale, in order to satisfy myself that each of the goods and chattels the subject of the applicant's claim for \$157,056.84 are all referred to in that list.
134. Notwithstanding that Ms Chai gave evidence that it was impossible to have recorded all the items that are now the subject of Ting's claim in the Chattel and Equipment List, I dismiss Ting's claim in respect of chattels and equipment that are not satisfactorily referred to in the Chattel and Equipment List. I find that in respect of such omitted items there is not, on the evidence, a sufficiently reasonable basis for the relevant claim. The omission of these claimed items from Chattel and Equipment List results in a deduction of \$36,562.25 from the claim for \$157,056.84 as particularised below:

Item		Deduction from applicant's claim for replacement value.
(g)	The value of 32 bedhead tables is claimed. Only 14 bedhead tables appear in the Chattel and Equipment List	(\$3,582.00)
(m)	The value of 14 air-conditioner units is claimed. Only 2 appear in the Chattel and Equipment List	(\$7,188.00)
(t)	Linen and blankets are not referred to in the Chattel and Equipment List.	(\$20,669.25)
(y)	The worker's cottage kitchen items are not readily identifiable in the Chattel and Equipment List.	(\$5,123.00)
<b>TOTAL DEDUCTION</b>		<b>(\$36,562.25)</b>

135. I therefore find that the claim for damages in bailment, payable by the party found to have been in possession after 25 September 2009 is not supported above a maximum figure of \$120,494.59.<sup>35</sup>
136. I note that there is no record of the 7 vanity units claimed, but the photographs indicate that they are fixtures, surrounding basin plumbing works. I find it explicable that they were not referred to in the Chattel and Equipment list.
137. Given that the bailment was not for reward, the cause of action relied on by Ting arises from the obligation that attaches to a gratuitous bailment to take reasonable care of the goods bailed. The question arises as to what measure

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<sup>35</sup> \$157,056.84 less \$36,562.25.

of loss is applicable where there has been found to be a failure to take care, and whether there is any distinction in this respect between bailment for reward and gratuitous bailment.

138. *Palmer* states:

Claims against bailees are commonly framed in contract and/or tort and may lead to an award of damages calculated without reference to any special principle of bailment. That is also true of claims brought against bailors. But bailment is a relationship *sui generis* and a bailor may in principle sue the bailee for breach of bailment, either cumulatively or alternatively to a claim in contract or tort, or independently of any such claim, on facts that disclose no liability and other contract or tort.

The influence of the independent character of bailment on the assessment of damages is enigmatic. There is some support for the existence of a special principle for the assessment of damages that flow from a breach of bailment...

A modern tendency to integrate, and group under common principles, the assessment of damages in contract and tort could discourage courts from evolving fragmentary or diverted principles for bailment, at least where a cause of action in bailment lies concurrently with those other heads of claim...

...The essential principle underlying damages is that they are compensatory. In tort, the victim of the wrong is generally entitled to be returned to the position that he occupied before the tort was inflicted. In contract, subject to any consensually-derived limit on the scope of the default, the innocent party is generally entitled to be put in the position that he would have occupied had the contract been performed.<sup>36</sup>

139. Having regard to these observations, I propose to assess damages in accordance with contractual principles. This is because I am not satisfied that there is any principle applicable to gratuitous bailments that would entitle Ting to damages assessed otherwise than on the compensatory principle to which I have referred. It follows that if Ting had been successful in its claim in bailment to the effect that the party in possession failed to take reasonable care of the s and chattels, Ting would have been entitled to be put in the position that it would have been had the bailment been properly performed.
140. Ting's damages are conceded to be calculated on the basis of "new for old". It follows that I am not prepared to grant such a remedy, given my finding that the chattels under consideration were in existence at the property as far back as 2001.
141. On 13 September 2005, the chattels and equipment were valued at \$30,000.<sup>37</sup> I reject Ting's submission that because the Nicholls "put down"

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<sup>36</sup> *Palmer on Bailment* (3<sup>rd</sup> edition) (2009) at [37-002]-[37-005] with footnote references omitted.

<sup>37</sup> See Schedule A to the Nicholls' contract of sale.

this figure,<sup>38</sup> it cannot serve as an admission against Ting's interest of what it then considered to be the approximate value of the chattels at that date.

142. Given the lack of evidence concerning value, I find that, at the time of the lease and contract of sale in 2009, neither party had given any consideration to the actual value of the chattels described in the Chattel and Equipment List.
143. I further find that as late as 2012, when Ting filed the Goods Statutory Declaration to which I have referred, neither party had given any consideration to the value of the items referred to in the Chattel and Equipment List.
144. Given these matters, and that the chattels and equipment were 15 years old at the date of repossession on 27 August 2015, doing the best I can, I value the chattels and equipment claimed to have been damaged or destroyed at \$20,000.
145. I find that the party found to be in possession of the property from 25 September 2009 is the party that would, had I not dismissed the claim in bailment, be liable for these damages. This is because it is unlikely that damage to and/or destruction of chattels that I have observed in the tendered photographs all occurred during Mr MacDonald's 75 day occupation pursuant to the lease between 10 July 2009 and 24 September 2009.
146. If however it is found that ABC was in possession after 25 September 2009 pursuant to the terms of the contract of sale and other relevant documents, and that Mr MacDonald was subsequently in possession the day after termination of the contract of sale on 28 February 2014, then I find that those parties are jointly and severally liable to Ting for the damages found.
147. Mr MacDonald's liability (if any) arises from his obligation under the lease to take care of the premises, and in bailment. The basis of ABC's liability (if any) is in bailment, and for breach of its implied obligation to take reasonable care of the chattels and equipment, an obligation that arises in turn from an implied term granting it reasonable use of those chattels and equipment during any period during which it is found that it was a purchaser in possession.<sup>39</sup>

## **TING'S MAKE GOOD CLAIM**

### **ISSUE (E)**

#### **Ting's claim for making good the premises**

148. The lease relevantly provided:

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<sup>38</sup> See transcript T186 lines 2-7.

<sup>39</sup> An implied term entitling ABC to reasonable use is contended for on behalf of Mr MacDonald and ABC: see Mr MacDonald's and ABC's Reply dated 8 January 2018 at [8].

<b>Clause</b>		
<b>Clause 2.2.1</b>	<b>Permitted Use</b>	Motel
<b>Clause 3.2</b>	<b>Repairs and Maintenance</b>	Except for fair wear and tear and subject to clause 3.4, the Tenant must keep the Premises in the same condition as at the start of the lease and properly, repaired and maintained...
<b>Clause 3.3</b>		In addition to its obligations under clause 3.2, the Tenant must- 3.3.1 refinish all finished surfaces in a workmanlike manner with as good quality materials as previously at least once every five years during the Term and any other term. 3.3.2 keep the Premises properly cleaned and free from rubbish, keep waste in proper containers and have it removed regularly. 3.3.3 immediately replace glasses which becomes cracked or broken with glass of the same thickness and quality 3.3.4 immediately repair defective windows, lights, doors, locks and fastenings, and replace missing light-globes and fluorescent tubes, keys and key cards. 3.3.5 maintain in working order all plumbing, drainage, gas, electric, solar and sewerage installations and fire prevention, detection and control apparatus.
<b>Clause 3.4</b>		The Tenant is not obliged- ... 3.4.2 to carry out structural repairs or make payments of the capital nature unless the need for them results from- (a) negligence by the Tenant or the Tenant's Agents, or (b) failure by the Tenant to perform its obligations under this lease, or (c) the Tenant's use of the Premises
<b>Clause 5.1</b>		When the term ends, the Tenant must- 5.1.1 return possession of the premises to [Ting] in clean and repaired condition as required by this lease...
<b>Clause 19</b>	<b>Additional Provision[s]</b>	The parties acknowledge that no rental shall be payable pursuant to this lease so long as the contract of sale for the Motel freehold between [Ting] and [ABC] is still current or if that Contract is not completed due to [Ting's] inability or refusal to do so for any reason not as a result of [ABC's] default. <b>All repairs and maintenance on whole premises be it structural or otherwise are sole responsibility of [Mr Macdonald] at [his] own cost</b> (emphasis added).

149. Ting's case concerning the make-good claim is as follows:

[62] [Following Ting's re-taking possession on 27 August 2015] in or around early September 2015, I attended the Property to see what needed to be done to get the business up and running again. Just prior to this, my son had been to the Property with a locksmith to

change all of the locks, as Mr MacDonald had failed to return the keys when he was finally evicted from the Property. Now produced and shown to me and marked “EC-21” is a true copy of the invoice for the replacement of the locks.

- [63] When I got to the Property, I saw that it was in a complete state of disrepair, as there was rubbish strewn everywhere, there was a great deal of damage to the buildings....,
- [64] In or around mid-September 2015, I rang a local tradesman by the name of Martin Jones, who owns a business called Small Job’s Done, which undertakes building renovations and maintenance projects around the Swan Hill Region. I asked Mr Jones if he could attend the Property to see if he could assist in the repairs which were needed.
- [65] After Mr Jones had inspected the Property, he agreed to assist me with the most urgent repairs to the buildings
- [66] Between October 2015 and May 2016, Mr Jones attended the property on 11 separate occasions to undertake works on the Property. Now produced and shown to me and marked “EC-22” are true copies of the invoices issued by Mr Jones. I confirm that work described in those invoices was completed
- [67] During this time, I also organised an electrician to come to the Property to undertake electrical work due to broken circuit boards and a faulty oven. Now produced and shown to me and marked “EC-23” are true copies of the electrician invoices dated 31 October 2015. I confirm that the work described in those invoices was completed.
- [68] Since the time from which this dispute has been referred back to VCAT from the Supreme Court, I have not spent any further money or undertaken any further work on the Property. There is still a considerable amount of work which needs to be done replacing all of the furniture and other items which were damaged or completely destroyed in the time which Mr MacDonald was in possession of the Property.

150. In her 3 page report prepared by Ms Chai dated 15 May 2016 forming part of Exhibit “EC-24” she states:

Base building damages:

1. Office glass broken
2. Restaurant window boarded with sheets
3. Upstairs apartment window rotten, glass broken and boarded with sheets.
4. Dining door broken with sheets boarded.
5. Room[s] 1, 2, 17 front doors broken and rooms left open with broken doors.



6. Room 1-18 back doors facing the highway all rotten and some glass broken.
7. 6 windows broken between 1-18.
8. Ceilings under eaves disappeared with pillows stuffed [i]n and pigeons making home.
9. Room 1-35 full of rubbish in every rooms (sic).
10. Dining room damaged with water dripping from taps.
11. Kitchen damaged, sink taps missing, left in filthy condition full of rubbish.

151. Damages claimed by Ting are made up as follows:

	<b>Item</b>	<b>Cost</b>
(a)	On or around 27 August 2015, replacing all the locks at the motel due to Mr MacDonald's failure to return the keys.	\$1,357.00
(b)	On or around 30 October 2015, removing rubbish and a broken cupboard in unit 2, replacing the cupboard and rebuilding/repairing a collapsed verandah and verandah eaves	\$6,284.00
(c)	On or around 31 October 2015, re-wiring broken circuit boards	\$997.35
(d)	On or around 26 November 2015, removing damaged and destroyed mattresses and other rubbish, repairs to broken doors of rooms 1-18	\$7,945.22
(e)	On or around 16 December 2015, installing windows and window frames	\$8,273.00
(f)	On or around 23 December 2015, repairs to ceilings and damaged doors in rooms 33-35 of the motel	\$2,559.59
(g)	On or around 20 January 2016, installing windows and window frames	\$2,541.00
(h)	On or around 8 February 2016, installing cement cladding to upstairs rooms due to damaged walls, floors and ceilings	\$4,995.50
(i)	On or around 8 February 2016, replacing damaged tiles	\$3,514.00
(j)	On or around 9 May 2016, replacing damaged tiles, vanity units, basins and windows.	\$5,312.00
(k)	On or around 19 May 2016, replacing damaged taps	\$1,478.05

(l)	Bin hire costs	\$462.00
(m)	Labour costs for cleaners	\$2,912.00
(n)	Carpet replacement in 10 rooms at \$1,240 per room (previously claimed at (u) in paragraph 1 of the Ting's particulars of Loss and Damage at TB89).	\$12,400.00
	<b>TOTAL</b>	<b>\$61,030.70</b>

152. I have reviewed the copy invoices appearing at Exhibits EC-21, EC-22 and EC-23 to the witness statement of Ms Chai dated 8 November 2016, in order to satisfy myself that the work and materials costs the subject of Ting's make-good claim for \$61,030.70 are all referred to in those invoices.

153. In consequence, I am unable to be satisfied that the following work and materials claims are satisfactorily supported by invoices:

Item	My finding.	Deduction from applicant's make-good claim
3(d)	There is only evidence of Ting being invoiced \$5,260 on 26 November 2015, not \$7,945.22.	(\$2,685.22)
3(m)	There is no evidence of \$2,912 labour costs for cleaners. \$1,000 only allowed.	(\$1,912.00)
	<b>TOTAL DEDUCTIONS</b>	<b>(\$4,597.22)</b>

154. Ting claims that the "make good" obligations of Mr MacDonald arise from the provisions of clause 5.1 of the lease. Upon terminating his lease from 31 October 2013 by his notice to quit, Ting submits that Mr MacDonald was obliged to deliver up the property in a clean and repaired condition as required by the lease. Ting says that tendered photographs 25-57 demonstrate that this has not occurred.

155. Mr Jones submitted that:

- (a) evidence is that the motel was not registered for use as prescribed accommodation at 10 July 2009, the date of the lease;
- (b) there is considerable documentary evidence about the poor condition of the motel at the time Mr MacDonald entered into the lease, including the observations of Mr MacDonald that he noticed vandalism throughout the early part of 2009, and the letter from the council to Curwen Walker, Ting's solicitors dated 6 May 2009;
- (c) Mr MacDonald's further evidence was that in December 2008, the motel appeared to be unoccupied (see further below);

- (d) Mr MacDonald's evidence was that from October 2009 and throughout the first half of 2010 Mr MacDonald and Mr Danny Wong started to fix up the motel and to make it secure, and that after Mr Wong left in 2010, Mr MacDonald continued on fixing up units 1-8 first, and then in August 2011 rooms 9-18 on the completion of which Mr MacDonald made an application for use of the units as prescribed accommodation;
- (e) due to misunderstandings between Mr MacDonald and the council's officers over the use of the units as residential accommodation, resolution of the application took a long time, but in August 2014 the council granted a prescribed accommodation licence for units 1-18;
- (f) prior to August 2014, the council had allowed the letting of the rooms on the first floor above the kitchen/dining room/reception areas;
- (g) these registrations remained in place up to the date that Ting re-took possession on 27 August 2015; and therefore
- (h) the Tribunal should conclude that relative to the condition of the motel on 10 July 2009, the motel at 27 August 2015 was in a repaired and improved condition.

156. Given that Mr MacDonald's evidence was that he started trading at the motel from about November 2009, by letting the rooms above the kitchen/dining room/reception areas, I have concluded that those areas were in such a condition as to enable immediate operation of Mr MacDonald's motel business. I find that many of the accounts subsequently rendered to Ting, after it re-took possession in August 2015, related to the making good of those very rooms. In particular, they are invoice 313 for \$4,639 (being part of the cost of \$6,284 referred to in sub-paragraph (b) of the above summary of claim), invoice 531 for \$2,695 (being part of the cost of \$8,273 referred to in sub-paragraph (e) of the above summary of claim), invoice 536 for 2559.59 (referred to in sub-paragraph (f) of the above summary of claim) and invoice 553 for \$5,312 (referred to in sub-paragraph (j) of the above summary of claim). I find that that degradation of those upstairs areas occurred from 25 September 2009.

157. I have carefully reviewed the photographs tendered in support of the make-good claim. I am not satisfied that the replacement of 15 year old carpets in ten of the rooms was rendered necessary by reason of breach of clause 3.2 or 3.3 of the lease, and I disallow that claim.

158. I am satisfied that the cost of locksmith was reasonably incurred.

159. I am satisfied from the evidence, including my own observations drawn from the photographs, that the motel premises have been damaged by the party found to be in possession of the motel. I find that the party found to be in possession of the property from 25 September 2009 is liable in respect of the damage, it being unlikely that damage occurred during Mr

MacDonald's 75 day occupation pursuant to the lease between 10 July 2009 and 24 September 2009.

160. I find that Ting is entitled to \$44,033.48 calculated as follows:

	<b>Item</b>	<b>Cost</b>
(a)	On or around 27 August 2015, replacing all the locks at the motel due to Mr MacDonald's failure to return the keys.	\$1,357.00
(b)	On or around 30 October 2015, removing rubbish and a broken cupboard in unit 2, replacing the cupboard and rebuilding/repairing a collapsed verandah and verandah eaves	\$6,284.00
(c)	On or around 31 October 2015, re-wiring broken circuit boards	\$997.35
(d)	On or around 26 November 2015, removing damaged and destroyed mattresses and other rubbish, repairs to broken doors of rooms 1-18	\$7,945.22 Less <u>\$2,685.22</u> <b>\$5,260.00</b>
(e)	On or around 16 December 2015, installing windows and window frames	\$8,273.00
(f)	On or around 23 December 2015, repairs to ceilings and damaged doors in rooms 33-35 of the motel	\$2,559.59
(g)	On or around 20 January 2016, installing windows and window frames	\$2,541.00
(h)	On or around 8 February 2016, installing cement cladding to upstairs rooms due to damaged walls, floors and ceilings	\$4,995.50
(i)	On or around 8 February 2016, replacing damaged tiles	\$3,514.00
(j)	On or around 9 May 2016, replacing damaged tiles, vanity units, basins and windows.	\$5,312.00
(k)	On or around 19 May 2016, replacing damaged taps	\$1,478.05
(l)	Bin hire costs	\$462.00
(m)	Labour costs for cleaners	\$2,912.00 Less <u>\$1,912.00</u> <b>\$1,000.00</b>
	<b>TOTAL</b>	<b>\$44,033.48</b>

161. If it is found that ABC was in possession after 25 September 2009, and that Mr MacDonald was subsequently in possession the day after termination of the contract of sale on 28 February 2014, I find that those parties are jointly liable to Ting in respect of these damages.
162. Mr MacDonald's liability to take care of the premises arises under the lease. The basis of ABC's liability is for breach of its obligation to take reasonable care of the premises, an implied obligation that arises from any agreement that may be found by which it became a purchaser in possession.<sup>40</sup>

## **MR MCDONALD'S AND ABC'S MISLEADING AND DECEPTIVE CONDUCT CLAIMS**

### **ISSUE (F)**

#### **Alleged misleading and deceptive conduct**

##### The Law

163. I have described in my introduction the general nature of claims made by Mr MacDonald and ABC in this respect.
164. They allege that Ting engaged in conduct that contravened section 18 of the *Australian Consumer Law (Victoria)* which provides:
- (1) [Misleading or deceptive conduct prohibited.]**
- A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
165. ABC also claims that Ting engaged in conduct that contravened sections 30(1)(f), 30(1)(e) and 30(1)(g) of the *Australian Consumer Law (Victoria)* concerning respectively the use to which land is capable of being put or may lawfully be put, the characteristics of land and the existence or availability of facilities associated with land.
166. Mr MacDonald and ABC must first prove that loss or damage claimed to have been suffered by one or both of them was because of "conduct" that contravened a provision of Chapter 2 or 3 of the *Australian Consumer Law (Vic)*.<sup>41</sup>

##### Facts relevant to issue

167. Mr MacDonald and Mr Ting entered into what was referred to during the hearing as "heads of agreement" dated 23 April 2009 for the sale and purchase of the motel. It took the form of an offer which was signed by Mr Ting purportedly on behalf of Ting, and by Mr MacDonald on 28 April 2019 (the "**offer and acceptance**").

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<sup>40</sup> An implied term entitling ABC to reasonable use is contended for on behalf of Mr MacDonald and ABC: see Mr MacDonald's and ABC's Reply dated 8 January 2018 at [8].

<sup>41</sup> See section 236 *Australian Consumer Law (Victoria)*.

168. The offer and acceptance relevantly provided:

Freehold, leasehold, and existing plants, [equipment] and chattels as is where is condition at a total purchase price of \$250,000 plus GST if applicable subject to the following conditions:

...

8. The Purchaser shall be responsible for all repair and maintenance of all plants, equipments (sic) and building whether structural or otherwise and shall not require the Vendor to contribute to any such works during the term of the licence agreement.

9. **The Purchaser shall be liable for compliance with all current notices or orders relating to the property as well as all and future regulations as imposed by local Council, Government departments, fire authority or other regulatory body relating to the use of the premises as a Motel** (emphasis added).

...

169. Special Condition 11 of the subsequent contract of sale (“**Special Condition 11**”) read as follows:

**Special Condition 11**

[ABC] acknowledges that there are a number of matters requiring attention at the insistence of the local Council, CFA and other regulatory bodies to render the Motel fit and proper to operate and that the cost of attending to these matters shall be the sole responsibility of [ABC]. Also the business name Aquatic Lodge is not registered and it will be [ABC’s] responsibility to register this or any other name

170. Clause 6 of the statement by Ting as vendor to ABC as purchaser pursuant to section 32 of the *Sale of Land Act 1962* (and signed by Mr MacDonald on 22 July 2009) attached to the contract of sale (“**Clause 6**”) read as follows:

**\*6. NOTICES-**

Particulars of any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal affecting the property of which [Ting] might reasonably be expected to have knowledge-

...

\*are as follows- Nil

171. Also attached to the contract of sale was a Land Information Certificate dated 28 April 2009 issued by the Council pursuant to sections 229 and 243 of *The Local Government Act 1989* (the “**Land Information Certificate**”) which stated, in part:

**Outstanding Notices and Orders**

There are no notices and/or orders on the land that have been served by Council under the Local

	Government Act 1958 (As Amended), the Local Government Act 1989, any other Act or Regulation, or under a Local Law of the Council, which have a continuing application as at the date of this Certificate.
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### ABC's case

172. By Further Amended Points of Cross-Claim filed by leave on 26 September 2017, the second day of the hearing, ABC claimed as follows:

- [21] In the Section 32 Statement [Ting] as vendor stated that there were nil notices or orders by any public authority affecting the property of which the vendor might be reasonably expected to have knowledge.
- [22] At all relevant times [Ting] knew of the existence of outstanding notices, orders, declarations, reports and recommendations of a public authority and government or approved proposals affecting the property of which [Ting] might reasonably be expected to have knowledge.

#### **PARTICULARS**

- (i) On 7 January 2005 the [Municipal Building Surveyor of the] Swan Hill Rural City Council issued a Building Order under section 111 of the Building Act 1993 to [Ting] requiring actions within seven days, 30 days and 60 days [the “**Building Order**”];
- (ii) On 6 May 2009 the [Health Coordinator of the] Swan Hill City Council wrote to [Ting’s solicitor] identifying a number of planning matters that required attention before the Motel on the land would be issued with approval to re-open and operate [and enclosing a copy of the Building Order] [the “**Council’s third letter**”].
- (iii) The [Council’s third letter]... also dealt with health orders in that it identified the existence of outstanding health orders and that predominant non-compliant items have related to structural requirements and cleanliness. The relevant health order was recorded in a letter [from the Senior Environmental Health Officer of the Council dated 15 November 2004 [the “**Council’s first letter**”] and the follow-up letter [from the Senior Environmental Health Officer of the Council dated 5 January 2005 [the “**Council’s second letter**”]. [ABC] will rely at [the hearing] on the full content of the letter of 6 May 2009.
- [23] [Ting] told [ABC] that the previous operator of the Motel had ceased operation in December 2008.

#### **PARTICULARS**

The statement was made by [Mr Ting] during one of [Mr MacDonald's] visits to the [property] in or around the period between the beginning of April 2009 to the end of May 2009 to inspect the [property] and assess damage caused by vandalism due to the [property] being unoccupied and without a resident caretaker since the previous operator left the [property].

- [24] At all material times prior to 22 July 2009, Ting omitted to inform ABC of any of the following matters:
- (a) that on 7 January 2005 the Swan Hill Rural City Council issued the [Building Order];
  - (b) What work under [the Building Order] had been carried out, inspected and approved by the [Council] and what work remained outstanding;
  - (c) What impact the outstanding work under [the building order] would have on ABC's efforts and what expense ABC would require to meet and re-opening the [property] in compliance with the [Building Order];
  - (d) That on 6 May 2009 the [Council] wrote to [Ting's] solicitor... identifying a number of planning matters that required attention before the Motel on the land would be issued with approval to re-open and operate, together with the matters referred to in sub particular 22 (iii) above;
  - (e) What planning approvals were required from the [Council] to enable approval to be obtained from the [Council] to re-open the motel and whether any expenditure was required to undertake works to meet the requirements for obtaining planning approvals, and how much expenditure would be;
  - (f) What impact the need for further approvals would have on ABC's efforts and expense in re-opening the motel in compliance with these planning requirements;
  - (g) That the motel had not operated since December 2007;
  - (h) That there were no otherwise outstanding health orders of the kind referred to in sub- particular 22(iii).

173. ABC therefore says that, by Ting's omission to inform it of the above matters (combined with the alleged express representations referred to in paragraphs 21 and 23 of the Further Amended Points of Cross-Claim), Ting represented to ABC that:

[25]

- (a) there were no outstanding building orders and the building complied with the [Council's] building standards;



- (b) that all works to comply with the building orders were complete to the satisfaction of, and had been approved by, the [Council] and any other relevant authority;
- (c) that the motel could easily [be] repaired and obtain [Council] approval to re-open [pleaded to be a “future matter” within the meaning of the *Australian Consumer Law (Victoria)*];
- (d) that there were no requirements to comply with [Council] planning approvals before obtaining approval to operate the motel;
- (e) that the costs of preparing the property to re-open and to obtain the approval to commence operating were minimal [pleaded to be a “future matter” within the meaning of the *Australian Consumer Law (Victoria)*];
- (f) that the motel had operated in compliance with all the [Council] requirements including planning and building regulation requirements up until December 2008;
- (g) that non-compliance with [Council] requirements, including planning and building regulation requirements had not been a factor in the motel ceasing to operate, including when it ceased to operate in December 2007; [and]
- (h) that there were no otherwise outstanding health orders of the kind referred to in sub-particular 22(iii).

174. ABC pleads that it concluded that each of the alleged representations was true and, induced by them to do so, it entered into the contract of sale.

175. ABC pleads that each of the alleged representations was false and untrue, thereby contravening section 18 of the *Australian Consumer Law (Victoria)*.

176. Mr MacDonald, often during his evidence put his situation metaphorically. When a car is issued with a defect notice by the police, he stated, it cannot be used on the highway, and certain rules apply in respect of the purposes for which it may then be driven. Such a defect notice, he continued, is colloquially known as a “yellow canary”. Mr MacDonald contends that he did not realise that he was buying a car to which was attached a “yellow canary”. He thought that he was buying a car which only had bald tyres, that he could readily replace, not a car that would need a host of repairs before it could be driven.

#### Ting’s case

177. Ting submits that there was no misleading and deceptive conduct.

178. Ting says that even if there was, Mr MacDonald did not rely on anything said or unsaid by Ting.

179. Ting says that Mr MacDonald is therefore not entitled to recover the profits that he alleges that he would have made on alternative business ventures

that he alleges were feasible at the time, and that in any event, ABC's evidence of these alleged ventures is not sufficient to discharge its onus of proof.

The alleged express misrepresentation-whether the representation to ABC in clause 6 was "false and untrue", therefore contravening section 18 of the Australian Consumer Law (Vic), as contended by ABC.

180. ABC submits that the representation in Clause 6 was false, because it failed to particularise:

- (a) the Building Order, that "remained outstanding, and ...prohibited the intended use of the property as a motel unless and until prescribed works were undertaken";
- (b) the Notices...[constituted by the Council's letter dated] 4 August 2004 [referred to in the Council's first letter] and the Council's second letter after a health inspection of the kitchen...remained outstanding, [and which] prohibited the use of the kitchen to prepare and serve food to the public unless and until substantial structural works were undertaken; and

which were<sup>42</sup> respectively an "order" and "notice[s]...of a public authority" affect[ing] the property" within the meaning of clause 6, of which Ting had actual knowledge.

181. I disagree. By letter dated 24 April 2009 solicitors for Ting wrote to the Council, as follows:

We act for [Ting], the owners of the above property at 108 Murray Valley Highway Lake Boga. We understand that there may be orders on this property with respect to building and health matters.

We request that you provide details of any orders in these matters [a]ffecting the above motel.

182. The Council's third letter, in response, stated:

**OUTSTANDING BUILDING AND HEALTH ORDERS  
AQUATIC LODGE, LAKE BOGA.**

[The Council] acknowledges receipt of your letter dated 24 April 2009, requesting information regarding [the motel]. Council provides the following response:

Currently, this premises is not a registered premises with Council's Public Health Services as the business is not operational. **An inspection would be required to ascertain current outstanding items...** In the past, predominant non-compliant items have related to cleanliness and structural requirements that have not complied with the provisions of the *Health Act 1958* and *Food Act 1984*. A

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<sup>42</sup> I take it that ABC also intends to rely for this submission on Ting's failure to disclose Council's first letter itself and Council's third letter, both referred to in the Amended Points of Cross-Claim.

significant number of non-compliant items have previously been identified.

Please find enclosed, information provided by Council's Building Department. These orders may also require review.

If the business is to become operational again, appropriate approval, consultation and registration must be [sought] from Public Health Services and the Building Department...

183. Attached to the Council's third letter were copies of a CFA Fire Safety Report dated 31 March 2005 and the Building Order.
184. I also find that it was in the context of what the Council informed Ting by the Council's third letter that the statement had been made a week before by Council in the Land Information Certificate. In other words, as far as the Council was concerned, because the motel was not registered at the time of the Council's completion of the Land Information Certificate, neither the Building Order nor any of the Council's first letter, the Council's second letter and the Council's third letter were regarded as having "continuing application".
185. I find that Clause 6 was then completed by Ting consistently with the advice received from the Council in the Land Information Certificate.
186. I also find that at the date of the contract of sale, each of the Building Order, the Council's first letter, the Council's second letter and the Council's third letter, did not respectively amount to an "order" and "notice[s]...of a public authority" [then] affect[ing] the property" within the meaning of Clause 6, because the motel was no longer regarded by the Council as a registered motel premises. The Council stated in the Council's third letter, in effect, that if it was desired to continue the motel business, and given the passage of time since the Building Order, the Council's first letter and the Council's second letter, a further inspection would be required in order to ascertain what items were then outstanding.
187. To find otherwise would be, in my view, to construe Clause 6 as giving rise to an obligation on the part of a vendor to provide particulars of "any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal" that not only "*affect[s]* the property of which the vendor might reasonably be expected to have knowledge", but of any such notice, order, declaration, report or recommendation of a public authority or government department or approved proposal which may have "*previously* affected the property". I do not accept that in the absence of express words to this effect, Clause 6 imposes any such obligation.
188. Clause 6 must also be construed having regard to Special Condition 11. Special Condition 11 expressly adverts to the fact that there *are* a number of matters requiring attention at the insistence of the Council, CFA and other regulatory bodies to render the motel fit and proper to operate. This disclosure by Ting is, in my view, entirely consistent with it having

previously been served with the Building Order, the Council's first letter, the Council's second letter and the Council's third letter, the requirements of which, although having no application at the time, could reasonably be expected to be imposed upon ABC wishing to make the motel "fit and proper to operate".

189. It follows, I find, that notwithstanding the existence of the Building Order, the Council's first letter, the Council's second letter and the Council's third letter, Ting did not, by Clause 6, expressly misrepresent to ABC that there was no "notice, order, declaration, report or recommendation of a public authority or government department or approved proposal affecting the property of which [Ting] might reasonably be expected to have knowledge".

The alleged misrepresentation by silence-whether Ting failed to disclose the Building Order, and the Council's first, second and third letters (paragraphs [22], [24] (a)-(f) and (g) of the Further Amended Points of Cross-Claim)

190. In addition to the alleged express misrepresentation in Clause 6, which I have found to have been unproven by ABC, ABC submits:
- (a) that there was an obligation at law to provide the Building Order, and the Council's first letter, the Council's second letter and the Council's third letter to ABC; and
  - (b) that ABC failed to do so.
191. It is well accepted that silence may amount to misleading and deceptive conduct, if it induces or is capable of inducing error, assessed objectively by the Court in light of all the relevant surrounding circumstances.<sup>43</sup>
192. Having regard to the relevant authorities, I accept Mr Jones's submission, relying on *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*<sup>44</sup> that the question is whether in the light of all the relevant circumstances, constituted by acts, omissions, statements or silence, there has been conduct which is, or is likely to be, misleading or deceptive. It is whether there has been conduct that has the tendency to lead the reasonable person into error, or induce an erroneous assumption on the part of the reasonable person.
193. It follows from my foregoing analysis of the meaning and effect of Clause 6, when read with Special Condition 11 that Clause 6 is not an express statement capable of amounting to misleading and deceptive conduct, and that there was no obligation on Ting to disclose in Clause 6 the existence of the Building Order, the Council's first letter, the Council's second letter and the Council's third letter.

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<sup>43</sup> See *Vouzas v Bleake House* [2013] VSC 534; see also *Campbell v Backoffice Investments Pty Ltd* [2009] HCA at [102] approving McHugh J in *Butcher v Lachlan Realty Pty Ltd*; See also *Miller's Australian Competition and Consumer Law Annotated* (2017) at [18.30].

<sup>44</sup> (2010) 241 CLR 357 at [14]-[23].

194. If it should be found, contrary to my view, that there was an obligation to disclose the existence of these documents to ABC, I will now consider whether ABC has demonstrated, on the balance of probabilities, that Ting failed to do so.

#### Mr MacDonald's Evidence

195. Mr MacDonald first had dealings with Mr Ting in about June 2007 when he went to the London Bridge Motel at Stawell to obtain from Mr Ting the keys to the Charlton Motel at Charlton, Victoria. The Tings owned both the London Bridge Motel and the Charlton Motel. The following day he visited the Charlton Motel and inspected it.

196. He then travelled to Lake Boga at the suggestion of Mr Ting. Mr MacDonald made inquiries at the property including looking at a room, and asked some questions about how trading was going and what the state of the lake was in terms of water levels. He discovered that the water level was so low that motor boats were banned and yachts had issues with the rudder and keel in the low water. Because of this, the room occupancy at the motel was low.

197. After visiting Lake Boga, Mr MacDonald then went to the Pioneer Station Motel in Swan Hill, a motel that Mr Ting had told him he owned. The next day he went back to the Charlton Motel to take another look. When he had finished, he went back to Stawell and dropped off the keys. While returning the keys he told Mr Ting that he had observed genuine trading problems at the property. He then returned to Gippsland. About a month later Mr MacDonald made an offer to purchase the Charlton Motel. This offer was oral. He heard nothing back. He later discovered the Charlton Motel was sold to another person for a higher price. He does not recall having any other contact with Mr Ting following this until 2009.

198. In December 2008, Mr MacDonald received a phone call from Ms Chai concerning the property. He said that he would be interested in buying the property. He agreed to inspect it, and let her know if he wished to take it further. He had been given to understand that George Ting, who lived at the property, was then in Malaysia attending to family business, so then there was no one at the property, but that the office and some rooms were open. Mr MacDonald also then understood that the Council valuation of the property was around \$250,000.

199. Mr MacDonald gave evidence that on about 23 December 2009, he visited the motel. When he arrived he could find no-one on site. He inspected the motel as best he could, and stayed overnight in one of the open rooms. He did not see evidence of any manager, he observed that some of the doors to rooms had been kicked in and the rear rooms 19-32 were mostly unlocked. There was no electricity or running water. The room he stayed in was made up and had linen, a bar fridge and bedside cupboard with drawers, and his impression was that it had recently been vacated. After dark, he thought that he saw a flickering light, like a candle in the rear rooms. He investigated,

called out but no one answered.

200. The next morning, he rang Ms Chai and told her that the reception area had been vandalised, that several motel doors-about 6 in the front 2 blocks of rooms were kicked open-and that he thought that he saw candle light in a rear room where he assumed, someone was squatting.
201. In January 2009 Mr MacDonald made a verbal offer to purchase the property for \$225,000. The offer was rejected.
202. I find from Ms Chai's evidence that Mr Ting returned to Australia in late February 2009. Mr MacDonald contacted him then, and explained to him what had happened to his Gippsland properties in the January 2009 bushfires.
203. Mr MacDonald asked Mr Ting if the motel was still on the market. Mr MacDonald thought this property was a good prospect for a mixed use, including establishing a school camp there. The property was opposite Lake Boga where the museum for Catalina boats was located. There was also a telescope located at Lake Boga that could be used for sky-watching. He also considered that Ballarat and Bendigo offered attractive stop over locations for school groups travelling to Lake Boga. He considered Lake Boga ideal for a school camp, run in conjunction with a motel business and lettings to workers who needed seasonal accommodation.
204. Mr Ting explained that the motel was on a larger piece of land that was being subdivided, and he had a quote for \$50,000 for the subdivision work. He said that he had to pay 50% of this quote upfront for the work to proceed. He said he was looking for \$250,000 for the motel and this was why Mr MacDonald's earlier offer was rejected. He told me he needed the deposit on the sale of the motel in order to use it to go ahead with the subdivision. Mr MacDonald said to him that the maximum he would pay was \$250,000. This could be around \$225,000 plus GST or they could take it as \$250,000 inclusive of GST but that I was not paying any greater amount than \$250,000. Mr Ting agreed in principle with the \$250,000 but said it would need to be framed in terms of the deal.
205. Mr Ting invited Mr MacDonald to accompany him on a visit to the motel. Mr MacDonald accepted, and drove Mr Ting to Lake Boga in March 2009 I find from Mr MacDonald's evidence that on that occasion, Mr MacDonald collected Mr Ting from his home in Glen Waverley, and met Ms Chai there for the first time ("**Mr MacDonald's first visit to the Tings**").<sup>45</sup>
206. On this trip to Lake Boga, Mr MacDonald says that Mr Ting informed him that the Nicholls had fallen behind in repayments, and had subsequently stopped making payments when the lake had dried out, that he had since taken over the operation of the motel and that in mid-December 2008 he

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<sup>45</sup> Mr MacDonald's witness statement dated 11 November 2016 at [16] and supplementary statement dated 14 February 2017 at [4].

had to go to Malaysia on urgent family business. Mr MacDonald gave evidence that Mr Ting informed him that he tried to arrange for a relative of his to operate the motel in his absence, but he had been let down by this relative, and that he had asked Ms Chai to contact Mr MacDonald to see if he was interested in buying the motel.

207. According to Mr MacDonald's evidence, "about a month [after Mr MacDonald's visit to Lake Boga with Mr Ting]<sup>46</sup> a further meeting took place at the Tings residence in Glen Waverley.
208. Mr MacDonald states that following his visit to Lake Boga with Mr Ting in March 2009, in April 2009 Mr Ting contacted him and said that he had a "draft contract" for him to look at. Mr MacDonald visited Mr Ting at his house in "Blackburn South", since accepted as being in Glen Waverley, Melbourne. Mr MacDonald's evidence about this meeting was that it was then that the motel purchase proposition was discussed. ("**Mr MacDonald's second visit to the Ting's**").

[17] About a month later, in April [2009] [Mr Ting] contacted me and said that he had a draft contract for me to look at. I visited him at his house at [Glen Waverley]. When I arrived he gave me a 3 page document. On reading the document I noted that it was a letter of offer. [Mr Ting] and I went through the offer and I made changes to it.

He wanted to change from a lease to a licence as this was less onerous. George then left the room and then came back with the letter of offer that he had signed as Director of [Ting] as well as a copy of the document. I noticed that he had signed the document and he must have then copied the signed document. He invited me to sign the document but I was not prepared to sign it.

I was not happy with a licence and straight away **I rang [Ms Chai] and spoke to her about this while I was there with [Mr Ting] As a result of the conversation I thought that my requirement for a lease and a contract would be okay** as this would cover ongoing use and therefore the purchase price would not be subject to GST.

George and I did not resolve this issue so I did not sign the letter of offer. I took the copy of the document with me when I left George's house (emphasis added).<sup>47</sup>

209. Mr MacDonald says that immediately after Mr MacDonald's second visit to the Ting's, he and Mr Ting travelled again to Lake Boga to inspect the motel.<sup>48</sup> He states that between March and September 2009 he had "many trips" with Mr Ting to the property.<sup>49</sup>
210. Mr MacDonald's evidence is that Mr Ting did not provide a copy of the Building Order or the Council's first letter, the Council's second letter or

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<sup>46</sup> Mr MacDonald's witness statement dated 8 November 2016 at [17].

<sup>47</sup> Mr MacDonald's witness statement dated 8 November 2016.

<sup>48</sup> Mr MacDonald's witness statement dated 8 November 2016 at [20].

<sup>49</sup> Mr MacDonald's witness statement dated 8 November 2016 at [22].

the Council's third letter during Mr MacDonald's second visit to the Ting's.

211. Mr MacDonald's evidence was that he did not receive a copy of the Building Order until his meeting with the Council on 11 May 2010,<sup>50</sup> that he received a copy of the Council's third letter as an enclosure to the Council's letter to him dated 5 December 2012,<sup>51</sup> and that he did not receive a copy of the Council's first letter and the Council's second letter until 27 February 2017, when he was shown a series of documents discovered by Ting in the proceeding, in respect of which he says he had no previous knowledge.<sup>52</sup>

#### Ms Chai's evidence

212. Ms Chai's evidence concerning an April 2009 meeting, on the other hand, was as follows:

- [21] I first met with Mr MacDonald in or around early April 2009, when he came to visit George and me at our house in Glen Waverley. Mr MacDonald had come over to our house to discuss Mr MacDonald purchasing Lot 3. He informed George and me that he had previously run a hotel business in Queensland and that he was confident that he could get the motel on Lot 3 up and running again and make it successful.
- [22] Once Mr MacDonald arrived, he, **George and I all sat down at the table to go through all of the various documents** that we had which related to the Property. I had with me a folder which had all of these documents. Mark also had with him a folder.
- [23] **During the course of the meeting**, George and I went through all of the documents which we had in our possession, showed them to Mr MacDonald, and checked to see if he also had the same document in his possession. This part of the meeting was conducted over a few hours, as we made sure that the respondent had seen everything, and that he had his own copy of them. The folder included the January 2005 Building Order.
- [24] **As I went through the folder and the documents, I showed each of them to Mr MacDonald** and said to him each time "have you seen this one, do you have a copy of this", or words to those effect. On each occasion, Mr MacDonald said to me that he had seen it and he was aware of it.
- [25] **As we were getting to the end of going through all of the documents**, Mr MacDonald said to me that he had spoken to a member of the Council about what was required to make sure the business was operational. I said to him words to the effect that *"I can see that there are a lot of things to be done before you can open, are you sure that you can manage these?"*

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<sup>50</sup> Mr MacDonald's witness statement dated 8 November 2016 at [45].

<sup>51</sup> Mr MacDonald's witness statement dated 8 November 2016 at [45].

<sup>52</sup> Mr MacDonald's witness statement in reply dated 28 February 2017 at [8].



- [26] Mr MacDonald responded to me [**at the meeting**] that he was a very experienced motel operator, that he had inspected the motel a number of times and that he knew the Council requirements for operating a motel. Both George and Mr MacDonald said that the Council had also provided them with orders at the times that they had gone together to the Council offices.
- [27] **Mr MacDonald said to George and me** that due to all the work which would need to be done to get the motel up and running again, he could only pay \$225,000.00 for it. George had wanted a minimum of \$250,000.00 for it, so we all eventually decided at the meeting that the purchase price would be \$250,000.00, but that we would include all of the chattels at the motel as part of the purchase price.
- [28] At this stage, neither George nor I had spoken to a lawyer about drawing up any documents for the sale of the motel and the business. **At the meeting**, I was taking notes as we discussed what terms should be in the heads of agreement which we were going to sign before having a lawyer draw up a formal contract of sale. **Mr MacDonald was reading the notes as I was writing them down**, and was making suggested edits to the wording of the terms and conditions as I was writing them. I no longer have a copy of those notes.
- [29] **At the end of the meeting**, Mr MacDonald said to George and me that he had a friend who was arriving soon from overseas, and that he would tell his friend that he could move into one of the apartments at the motel while everything was being put in place for the formal sale of the Property. Mr MacDonald said that his friend would be able to keep an eye on the motel until Mr MacDonald took it over properly. Mr MacDonald had originally said at the meeting that he wanted to take over the motel immediately, which George and I refused until we had a contract of sale in place. Mr MacDonald was very insistent about having his friend move into the motel in the meantime, which we eventually agreed to.
- [30] After the meeting in April, **I took the notes which I had written up at the meeting** and typed them up into a heads of agreement. About two weeks after the meeting, I gave George two sets of the typed heads of agreement for George to bring to Lake Boga and give to Mr MacDonald. After some more negotiations during phone conversations I had with Mr MacDonald, I emailed a final amended copy of the heads of agreement to Mr MacDonald on 23 April 2009. On or around 28 April 2009, a copy of the signed heads of agreement was faxed to me by George...
- [31] After I had received the signed copy of the heads of agreement, I faxed the signed copy of that document to our solicitors, Curwen

and Walker, so that they could start preparing the formal contract of sale (**emphasis added**).<sup>53</sup>

213. In her reply statement dated 20 November 2016, Ms Chai confirmed that a draft form of the offer and acceptance signed, subsequently sent by her to Mr MacDonald by email, and signed by Mr MacDonald on 28 April 2009 was the document that she, Mr MacDonald and Mr Ting “discussed in detail [at a meeting] in early April 2009”.<sup>54</sup>
214. In his further witness statement dated 14 February 2017, Mr MacDonald stated, in effect, that his first visit to the Tings was for the purpose of collecting Mr Ting for their trip to Lake Boga. I find that that was the trip in March 2009. Mr MacDonald states that whilst waiting for Mr Ting, he met Ms Chai for the first time (although he had previously spoken with her by telephone). He says that he was not provided with a copy of the Building Order on that occasion.<sup>55</sup>
215. Mr MacDonald concedes in his first statement dated 8 November 2016, that Mr MacDonald’s second visit to the Tings occurred about a month after his first visit to the Tings, when he again collected Mr Ting for the trip to Lake Boga. Mr MacDonald did not address in his further statement dated 14 February 2017 Ms Chai’s detailed statement to the effect that when his second visit to the Tings occurred, when the Lake Boga proposition was discussed, she was also there and that the matters to which she refers were jointly discussed.
216. Mr MacDonald filed a further witness statement dated 28 February 2017, in which he responded to paragraphs 21-30 of Ms Chai’s witness statement dated 11 November 2016. He stated:

[7] I refer to paragraph 21 of [Ms Chai’s] statement. My recollection is that I went to the house [in Glen Waverley] twice in April 2009. I agree that I first met [Ms Chai] early in April 2009 at the house [Mr Ting] was living at with his son Jordan. My recollection is that this happened when I went to the house in early April 2009. I was on my way to Tullamarine airport to pick up Danny Wong who was flying down from Brisbane. I collected George Ting as he was coming with Danny and I on this trip to Swan Hill. Danny’s wife travelled with him on the plane and came to Swan Hill with George and [me] in my car. We all stayed the night at the Pioneer Station Motel in Swan Hill. I wanted Danny to act as caretaker of the Aquatic Lodge motel until the deal was settled to protect the property from vandalism and theft. I had discussed this possibility with [Mr Ting] when I visited the motel with him in March 2009 as I was concerned about the motel being further damaged by vandalism or theft. I was at the house for no more than around 10 minutes. Apart from meeting [Ms Chai], I was at the house only for the time it took for [Mr Ting] to gather his things so that he could come with me

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<sup>53</sup> Ms Chai’s witness statement dated 11 November 2016.

<sup>54</sup> Ms Chai’s reply statement dated 20 November 2016.

<sup>55</sup> Mr MacDonald’s supplementary witness statement dated 14 February 2017 at [3]. It appears that although Ms Chai’s witness statement dated 11 November 2016 had been served by that date, Mr MacDonald did not reply to it until his witness statement in reply dated 28 February 2017.

in my car. [Ms Chai] was doing some household work, tidying up papers from the kitchen table and doing washing. While I was there and after being introduced my recollection is that she took up the papers she was tidying and went into the laundry and emptied a washing machine and went out into the back yard. Any conversation I had with [Ms Chai] was purely social. I do not recall having any meeting with [Ms Chai] and [Mr Ting] together at this house, or anywhere else about the purchase of the Aquatic Lodge Motel, Lake Boga.

The only dealings I recall having at the time with [Ms Chai] were by phone calls as described in my [earlier] statement... I made the offer [of \$250,000] to [Ms Chai] in a phone call that I made. Apart from these conversations my dealings were with [Mr Ting].

On the second occasion in April 2009 when I went to the house I met with George Ting. The only other person at the house was Jordan Ting who was at his computer. I have described this meeting with [Mr Ting] in paragraph 17 of my statement. After this meeting I drove [Mr Ting] to Swan Hill as I say in paragraph 20 of my statement. We stayed at his Swan Hill motel, the Pioneer Lodge Motel. I think it was on this trip that I took [Mr Ting] to the Swan Hill hospital emergency department as he was having heart trouble. He stayed in hospital for at least one night. It was only later that I started to have business contact with [Ms Chai] rather than [Mr Ting]. My recollection is that around November 2009, because of [Mr Ting's heart condition and bypass surgery, [Ms Chai] began to deal with me directly. This change of contact followed an attempt by me to contact [Mr Ting] using his mobile number and then his home phone number.

- [8] I refer to paragraphs 22 to 28 of Eileen Chai's statement. I deny that the conversation and events as alleged took place... I say in reply that the circumstances of my [only] meeting with [Ms Chai] and what took place are as described in paragraph 7 above.
- [9] I refer to paragraph 29 of Eileen Chai's statement. I deny that I said I had a friend who was arriving soon from overseas. My recollection is that Danny Wong was arriving from Brisbane on that day. Danny Wong is a Chinese national and was in Australia on a 457 visa. I was on my way to collect him from Tullamarine, after I collected [Mr Ting] from his house in Blackburn South. My recollection is that [Mr Ting], Danny, Danny's wife stopped in Bendigo at Hungry Jacks to eat and that we arrived in Swan Hill later in the day. I deny that Danny Wong moved into the motel before the property settled on or around 25 September 2009. When we went to Lake Boga [Mr Ting] was unable to provide access for Danny to stay so Danny and his wife came back to Moe with me. My recollection is that Danny Wong then worked for me on other projects for around 4 weeks. Once this work was finished Danny Wong returned to Brisbane. It was not until after the September settlement that Danny Wong came back to Victoria and I put him into the motel as caretaker. My recollection was that Danny Wong first stayed at the motel as caretaker in early October 2009. Danny Wong's activities at the motel are as described in my witness statement at paragraph 39. Danny finished up working at the Aquatic Lodge motel with me around April 2011.

[10] I refer to paragraph 30 of Eileen Chai's statement. I accept that I signed the [offer and acceptance]. I do not have a copy in my records of this document and I do not recall this document being disclosed to me in the discovery process. I have said in my statement at paragraph 20 that I did not sign the letter of offer. I was referring to the letter dated 16 April 2009. This was the letter that I took away with me from my meeting with [Mr Ting] at the house in [Glen Waverley] as described in paragraphs 17 and 18 of my statement. I accept that I must have heard back from [Mr Ting] and been given a copy of the amended document dated 23 March 2009. I have been unable to locate my copy in my records and [Ting] has not been able to provide me with the original so that I can view it. I must have signed the document on 28 April 2009. I say this because I see from the copy document that I have not altered the typed date above my signature. I do not remember signing the document, but I must have done this in Swan Hill. This means that I must have travelled back up to Swan Hill and I would have stayed at the Pioneer Lodge Motel. [Mr Ting] was already in Swan Hill as he had not come back with me due to his heart problems the previous week...

217. On 26 September 2017, the second day of the hearing, Ms Chai stated under cross-examination that as a result of her meeting with Mr MacDonald in Glen Waverley in April 2009, she “[knew] he had copies of [the Building order, the Council’s first letter and the Council’s second letter]”, all of which were contained in her “records”, contained in a folder. It became clear that this was the folder of documents to which she had referred in her witness statement dated 11 November 2016. In response to a further question concerning the location of the folder, she responded that it was at her home in Lakes Entrance, about 3-4 hours drive from Melbourne. Cross-examination of Ms Chai continued, without the folder being called for. I expressed my concern later that day, to the effect that a folder, the contents of which would tend to prove or disprove Ms Chai’s version of events of the Glen Waverley meeting had neither been produced, nor, it appeared, discovered in the proceeding. The existence of the folder was also subsequently mentioned during evidence on 27 September 2017. I also indicated to Mr Hopper after the luncheon adjournment that day that, in the interests of my addressing the substantial merits of the case, I would be disposed to him re-opening Ting’s case upon the folder’s production.
218. In the event, on the morning of 28 September 2017, prior to Mr MacDonald’s cross-examination resuming from the evening before, Mr Jones on behalf of Mr MacDonald and ABC called for the folder of documents that Ms Chai said she had in Lakes Entrance. I subsequently adjourned the hearing to 11 December 2017, to allow this to occur.
219. Upon the resumption of the hearing on 11 December 2017, I received a supplementary witness statement from Ms Chai concerning subsequent events.

- [3] [Ting] owns-and has owned for more than 15 years - a number of investment properties, including the former Aquatic Lodge situated at 108-130 Murray Valley Highway, Lake Boga.
- [4] [Ting] had also owned and operated a number of motel businesses in the Swan Hill region, including the Charlton Motel which I had referred to as paragraph 13 of my Witness Statement.
- [5] Prior to 2009, [Mr Ting] was largely responsible for the day-to-day operations of our other businesses, as well as the management of our investment properties.
- [6] It has always been the business practice of both [Mr Ting] and me that we would maintain a folder in respect of each business and property we owned, into which all documents relating to those businesses or properties would be placed as they were received.
- [7] The folder in respect to Aquatic Lodge (Aquatic Lodge Folder) was originally prepared by [Mr Ting], but I have maintained it since [Mr Ting] was diagnosed with dementia.
- [8] The Aquatic Lodge Folder including an incomplete copy of the building order dated 20 September 2004, an original building order dated 10 November 2004, a copy of the building order dated 7 February 2005, as well as all past correspondence and reports from Council inspections.
- [9] Between the period January 2008 to October 2008. I had made photocopies of all of the documents in the Aquatic Lodge Folder for George at his request while he was in the early stages of negotiation of the deal with Mr MacDonald.
- [10] When George and I met with Mr MacDonald in April 2009, I brought the Aquatic Lodge Folder with me. This is the folder I have referred to as paragraphs 22 to 24 of my Witness Statement. One of the main reasons we were meeting on this occasion was to ensure that there was nothing in our records which respect to the Property which Mr MacDonald was not aware of. Although I had photocopied all of documents contained in the Aquatic Lodge Folder and George had provided them to Mr MacDonald during the negotiations to which I have referred, George asked me to bring the whole folder to ensure that Mr MacDonald had everything.
- [11] During the meeting there were detailed discussions on the orders and Council's letters, negotiation and drafting of the terms and conditions mutually agreed by both parties on that day.
- [12] After the meeting had ended, I took the Aquatic Lodge Folder and drove back to my house in Lakes Entrance. I placed the Aquatic Lodge Folder in a large metal lockable cabinet which is kept in the study. The Aquatic Lodge Folder has since then always remained at the Lakes Entrance property, and I have filed in it all documents which I have received in relation to the Property.
- [13] Shortly before the hearing in this proceeding commenced on 25 September 2017, I removed the original of the building order dated 7 January 2005 from the folder for the purpose of making a copy for that

hearing. I replaced the original document with a photocopy I had made to ensure that every document was still in there.

[14] This was the only document which I removed from the Aquatic Lodge Folder, as it was my understanding that this was the only document which Mr MacDonald had been claiming he had never received.

[15] On the fourth day of the hearing, on 28 September 2017, I was informed that the hearing was going to be adjourned and that I needed to go back to Lakes Entrance and meet with Glenn Hodges, my solicitor who has his offices in Lakes Entrance, and get the Aquatic Lodge Folder.

[16] I remained in Melbourne until 7 October 2017, when I then returned, together with my son Jordan Ting, to Lakes Entrance. Prior to my returning, I had made arrangements with Glenn to meet at my house at 62 Point Road, Lakes Entrance immediately upon my return so that the folder could be retrieved.

[17] During my return trip from Melbourne, I kept in contact with Glenn via text messages. Jordan and I arrived at my house at 5.30, and remained waiting in our car. Glenn arrived at 5.32.

[18] ...Glenn and I entered the house and went through to the study area. I opened the cabinet and located the folder.

[19] Glenn and I then did a “page turn” through the folder but no documents were removed from the folder or inserted into the folder.

[20] Glenn then took the folder with him and left.

220. I subsequently received the folder into evidence. It contains correspondence going back to 2001, the time when Ting purchased the property. I find that it also contains the original Building Order<sup>56</sup>, a copy of the Building Order,<sup>57</sup> the original of the Council’s first letter,<sup>58</sup> and a copy of the Council’s second letter.<sup>59</sup> It does not contain either the original or a copy of the Council’s third letter.

221. The evidence given by Mr MacDonald and Ms Chai, contained in their respective first witness statements, exchanged at about the same time, differ markedly: Mr MacDonald states that he met only with Mr Ting at Glen Waverley to discuss in detail the Lake Boga proposition (and from there made a phone call to Ms Chai). Ms Chai states that she was at a meeting in Glen Waverley when the Lake Boga proposition was discussed and moreover, had specifically drawn to the attention of Mr MacDonald the Building Order and the first and second letters contained in the folder of documents that she said related to the property.

222. Mr Hopper challenged Mr MacDonald on his ability to recall accurately the events of March and April 2009. In late January 2009, shortly before the

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<sup>56</sup> Tagged with a red sticker “4”.

<sup>57</sup> Tagged with a red sticker “1”.

<sup>58</sup> Tagged with a red sticker “3”.

<sup>59</sup>

April 2009 meeting in Glen Waverley, Mr MacDonald's 16.5 acre property at Mirboo North in Gippsland, on which was erected a 150 bed school camp was burnt in the "Delburn fires". Most of the building structures were affected, but reported as being able to be saved by fire fighters. Mr MacDonald detailed in his evidence the significant personal and financial trauma which followed, including the break-up of his marriage and estrangement from his children.

223. In addition, Mr MacDonald has been prosecuted by the Council in relation to the property, has had the burden of this litigation since 2014, litigation arising out of his father's estate, and also against rating authorities concerning rates sought in respect of his other properties.
224. Mr MacDonald also concedes that he has had a considerable degree of health issues, including a number of heart attacks. Since the bushfires, Mr MacDonald has been treated by a number of health specialists.
225. Under cross-examination on 27 September 2017,<sup>60</sup> Mr MacDonald continued to maintain that he had never had the Building Order nor the letters, that his evidence ought to be preferred over Ms Chai's, also saying that her own further suggestion that he brought with him his 4 and 8 year old children to the "2 hour" meeting was "absurd". The suggestion was firmly put to him that external events would have affected his memory about these matters. Mr MacDonald maintained his position that they had not. Part of the exchange was as follows:

Mr Hopper:

The reason I've walked through this background, Mr MacDonald, is not because we are in any way unsympathetic to your circumstances or hostile. The reason I've had to walk through it is this: at the conclusion of this trial I will be putting to the Tribunal that the amount of stress and the amount of trauma that you have been under affects your memory of events over this-over the ensuing seven or eight years, and that the stress of the combination of the health issues, the financial issues, and the personal issues together mean that Ms Chai's evidence-to the extent it is inconsistent with yours, should be accepted over your evidence?

Mr MacDonald:

I disagree strongly... My mother passed away four weeks ago on Monday, and yet you can see me here before the court, ah, quite lucid and able to directly answer your questions, though that was a distressful event in my life, now having lost both my parents. In regard to my relationship with my wife and the divorce, it was unfortunate, but now I have a beautiful partner of my life. She is younger than my wife, and I am honoured by that fact, that I have a person who adores me despite my age, and she is very helpful with me and all of my activities, and we have a good personal bond. In regard

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<sup>60</sup> At transcript pp. 292-298.

to my property settlement with my wife, though it was difficult when my assets were frozen, they have since been unfrozen, and I have, as I've indicated to the court in excess of half a million dollars' worth of property to that extent. Following the issue with my father, I received the inheritance of \$115,000 which I put towards the purchase of a property in Collins. Collinsville is a mining town which closed down and it had massive unemployment, and several of the businesses went bankrupt. Collinsville is now revived. It is building 4 solar farms, two are currently in construction and there is an influx of over 500 contract workers now living in the town. So my assets there have substantially increased. Following the death of my mother, as these things happen, my sister, who was my mother's trustee in the will and her power of attorney, has been in touch with me and we've spoken, and these things sort of bring you closer together, and so there aren't any ongoing issues that have been permanent as a result of those years.

226. I have considered carefully the evidence of Mr MacDonald and Ms Chai. Mr MacDonald was not swayed from his account that he never met with Ms Chai for the purpose of discussing in detail the Lake Boga transaction. Ms Chai was equally emphatic that he had done so.
227. I do not accept the submission by Mr Jones on behalf of Mr MacDonald and ABC, based on a forensic analysis of the contents of the folder, that Ms Chai was mistaken in her belief-confusing the Nicholls transaction with the ABC transaction.
228. Neither Ms Chai nor Mr MacDonald resiled from their respective recollections. I also find that there is no basis for the credit of either having been impugned.
229. This being the case, I am unable on the evidence to find a basis for preferring Mr MacDonald's or Ms Chai's account over the other. This results in my not being satisfied, on the material, that Mr MacDonald has proved on the balance of probabilities that he was not shown by Ms Chai at a meeting at Glen Waverley the Building Order, the Council's first letter and the Council's second letter, contained in the folder tendered by Ms Chai.
230. I therefore find that Mr MacDonald and ABC are not entitled to rely on Ting's alleged failure to inform them of the Building Order, the Council's first letter and the Council's second letter, set out in paragraph 24(a)-(f) and (h) of the Further Amended Points of Cross-Claim filed 26 September 2017, as the basis for the alleged representations in paragraph 25 of the Further Amended Points of Cross-Claim.



The alleged express representation-whether Ting told ABC that the previous operator of the motel had ceased operation in December 2008 (paragraph [23] of the Further Amended Points of Cross-Claim)

231. Mr MacDonald's evidence was that on his trip with Mr Ting to visit the motel in March 2009 (not April 2009-May 2009 as pleaded in paragraph 23 of the Amended Points of Cross-Claim), Mr Ting informed him that the previous purchasers, the Nicholls, "left [the motel] in December 2008", when the case is that the Nicholls only traded to December 2007.
232. I note that Mr MacDonald failed to refer to this important matter, relating to one of the alleged misrepresentations, in his first statement dated 8 November 2016 but only by way of addendum in his supplementary statement dated 14 February 2017, conceded in cross-examination;
233. Also, Mr MacDonald conceded in cross-examination that:
- "based on what Mr Ting said to me [during the visit], I believe the assumption could have been drawn [by me] that the motel had to be trading [until December 2008]. That was the inference [Mr Ting] had given me."<sup>61</sup>
234. On the same day, in March 2009, Mr MacDonald visited the Council offices, after which he was informed by a Council officer that the motel had been registered for prescribed accommodation "until August 2008". Mr MacDonald conceded in cross-examination that this may have been when he inferred that the motel had traded until late 2008, rather than being informed of this by Mr Ting
235. Although it is fair that I should receive the evidence of the alleged representation, given that Mr Ting is not available to give evidence, I cannot be satisfied, having regard to these matters, that the alleged representation was made.
236. I therefore find that ABC is not entitled to rely on Ting's alleged express representation set out in paragraph 23 of the Further Amended Points of Cross-Claim filed 26 September 2017, as the basis for the alleged representation in paragraph 25(f) of the Further Amended Points of Cross-Claim.

## **ISSUE (F) CONCLUSION**

### **Claims in respect of alleged contraventions of the Australian Consumer Law dismissed.**

237. It follows from my findings that the claims made by Mr MacDonald against Ting, and by ABC against Ting and Mr Ting in respect of alleged conduct contravening sections 18, 30(1)(e), 30(1)(f) and 30(1)(g) of the *Australian Consumer Law (Victoria)*, as giving rise to the alleged representations in

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<sup>61</sup> Transcript page 289.

paragraph 25 of the Further Amended Points of Cross-Claim, must be dismissed.

Whether, assuming there was conduct on the part of Ting contravening sections 18, 30(1)(e), 30(1)(f) and 30 (1)(g) of the *Australian Consumer Law (Victoria)*, giving rise to the representations in paragraph 25 of the Further Amended Points of Cross-Claim, Mr MacDonald and ABC relied on any such representations.

238. I shall now consider Ting’s further submission that, even if, contrary to my finding, Ting engaged in misleading and deceptive conduct, giving rise to the alleged representations alleged in paragraph 25 of the Further Amended Points of Cross-Claim, Mr MacDonald and ABC did not in any event rely on the alleged representations as to lead either into error.
239. In this respect, Ting places primary emphasis on the terms of Special Condition 11, as negating reliance. Ting submits that ABC knew it was buying a business that was not operating, and received a discount on the purchase price accordingly. To extend Mr MacDonald’s analogy, Ting submits, the contents of Special Condition 11 of the contract of sale reflect a situation where ABC “knew that it was buying an unregistered car, without a roadworthy certificate, and had agreed to obtain the roadworthy certificate itself”. Put another way, Ting submits that ABC, “went into the transaction with [its] eyes open, having decided to take on a renovator’s delight”.
240. Ting also relies on the following matters as negating reliance by ABC on any representation by Ting that there were no outstanding Building Orders and that the motel otherwise complied with the Council’s building standards:
- (a) ABC was legally represented at the time of the contract of sale;
  - (b) Mr MacDonald previously inspected the motel on behalf of ABC;<sup>62</sup>
  - (c) Mr MacDonald on behalf of ABC knew that the motel was not operating, and that there was a substantial amount of work required before it could operate;<sup>63</sup>
  - (d) Mr MacDonald on behalf of ABC was aware that the motel was not registered for the purposes of the Council’s health services;<sup>64</sup>
  - (e) Mr MacDonald on behalf of ABC made his own enquiries of the local Council;<sup>65</sup>
241. Ting also relies on the limited scope of the Building Order, which I find relates primarily to fire safety-the installation of smoke alarms (within 7 days), provision of fire extinguishers and a fire evacuation plan including

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<sup>62</sup> Transcript page 305 ll.1-23.

<sup>63</sup> TB 459, paragraphs 4-5; TB 463 paragraph 22; TB 464.

<sup>64</sup> Transcript page 319 ll.7-20.

<sup>65</sup> Transcript page 302 ll.15-22.

the clearing of paths of travel to exits and appropriate signage and lighting (30 days), and the installation of fire hydrants or extinguishers (60 days). Ting says that these are all matters in respect of which Mr MacDonald had assumed the risk of compliance. In this respect, Ting relies on:

- (a) Special Condition 11 having put ABC on notice that there were CFA requirements, and ABC therefore voluntarily assumed the risk of compliance;
- (b) Mr MacDonald having had CFA training and experience of fire safety requirements in other motels, so he knew what the CFA requirements were and how onerous they could be;<sup>66</sup>
- (c) Mr MacDonald conceded in cross-examination that he knew about issues concerning fire safety compliance as early as the first draft of the offer and acceptance letter, and that this caused him on behalf of ABC to make his own enquiries of the CFA;<sup>67</sup> and
- (d) as a result of those enquiries, he satisfied himself, based on his fire training and experience in motels that he could make the premises compliant.<sup>68</sup>

242. In relation to the Council's notices concerning health, contained in the Council's first letter, the Council's second letter and the Council's third letter, Ting submits:

- (a) Clause 11 having put ABC on notice that there were health related requirements, and ABC therefore voluntarily assumed the risk of compliance;
- (b) Mr MacDonald on behalf of ABC inspected the kitchen prior to purchase, and knew that it needed significant repair work;<sup>69</sup>
- (c) Mr MacDonald on behalf of ABC knew that the motel was not trading prior to purchase;
- (d) Mr MacDonald knew that the premises generally need work-he saw that doors had been removed, and would have been suspicious of squatters living there having seen what he thought was a candle in one of the rear rooms;<sup>70</sup> and
- (e) Mr MacDonald knew, from his enquiries with the Council, that the motel had not been registered for prescribed accommodation, or even any accommodation, since 6 August 2008;<sup>71</sup>

243. I also note that there is no evidence that in late 2012, when ABC exercised its right under Special Condition 7 of the contract of sale to purchase the

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<sup>66</sup> Transcript page 304 ll.8-29.

<sup>67</sup> Transcript page 306 l.24-page 307 l.2; Transcript p 307 ll. 3-21 and TB 484.

<sup>68</sup> Transcript page 307 l.22-page 311 line 24; see also Mr MacDonald's evidence at TB 724 paragraphs 7-8.

<sup>69</sup> Mr MacDonald's evidence at TB 767, paragraph 8.

<sup>70</sup> Mr MacDonald's evidence at TB 459.

<sup>71</sup> Transcript pp. 299-301.

property for \$310,000, ABC sought any reduction in the purchase price on account of the alleged failure by Ting to divulge the existence of the Building Order.

244. I therefore find from these matters that assuming, contrary to my above finding that there was conduct on the part of Ting contravening sections 18, 30(1)(e), 30(1)(f) and 30(1)(g) of the *Australian Consumer Law (Victoria)*, that gave rise to the representations in paragraph 25 of the Further Amended Points of Cross-Claim, Mr MacDonald and ABC have not proved on the balance of probabilities that they relied on any such representations.

Was the loss and damage incurred by Mr MacDonald and ABC caused by the alleged misleading and deceptive conduct?

245. Ting submits that Mr MacDonald and ABC's claimed damages were not incurred "because of" the alleged misleading and deceptive conduct, as required by section 236(1) of the *Australian Consumer Law (Victoria)*.
246. In this respect, Ting first relies on its submissions, which I have accepted, that Mr MacDonald and ABC have not demonstrated in the circumstances that each of them relied on any of the representations said to have been made by the alleged misleading and deceptive conduct.
247. Ting also relies on evidence given by Mr MacDonald that following his becoming aware of the Building Order on 11 May 2010, compliance with it (which, as I have described, related to fire safety), did not prove to be difficult. In fact, in about August 2010, about 4 months after he became aware of the Building Order, Mr MacDonald wrote to the Council:
- ...the previous building orders issued to the Tings have now been attended to.<sup>72</sup>
248. Mr MacDonald conceded in cross-examination that this was so. I find in this respect that any difficulties encountered by Mr MacDonald during safety compliance process arose from a disagreement between Mr MacDonald and Council's fire safety officer concerning the need to install fire hydrants as opposed to fire extinguishers.
249. Ting relies on other material upon which it says the conclusion can reasonably be drawn that Mr MacDonald's allegedly not being told about the Building Order or the alleged health notices was not the real cause of the business failing at the motel. The competing reasons, Ting submits, include:
- (a) Mr MacDonald and ABC were in a state of financial distress throughout the period of his occupancy, shown by ABC not being able to settle on the purchase, and Mr MacDonald's admission in September 2014 that he had by then lost most of his assets, and was on a disability pension having lost part of his finger;<sup>73</sup>

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<sup>72</sup> TB 1356.

<sup>73</sup> TB 26.

- (b) Mr MacDonald's life was also emotionally difficult at the time, particularly affecting him in the immediate wake of the fires that had destroyed his properties in Gippsland;<sup>74</sup>
- (c) Mr MacDonald had various diagnosed psychological and psychiatric disorders, including PTSD on account of the fires;
- (d) Mr MacDonald had severe health issues, including bladder cancer and heart problems;
- (e) the existence of a number of charges brought against Mr MacDonald by the Council, all of which were unrelated to the Building Order;<sup>75</sup> and
- (f) the installation of the portable classroom without a permit, resulting in a Building Notice dated 6 December 2011 being served by the Council upon Ting, and subsequently pursued against ABC.<sup>76</sup>

250. The applicable principles concerning causation are summarised in *Miller*:

The relevant question is whether or not there is a sufficient connection between the conduct and the damage suffered for the latter to be regarded as "because of"... the conduct. References to reliance must not be permitted to obscure the need to identify contravening conduct and a causal connection between that conduct and the loss and damage allegedly suffered.

Whether or not that connection exists is essentially a question of fact to be determined by common sense and experience and one into which policy considerations and value judgments necessarily enter.<sup>77</sup>

And further:

As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage...the relevant test for causation is the "material contribution" test; rather than the "but for" test that applies at common law...It is sufficient for a person claiming damages to establish either that they have been induced to do something or refrain from doing something which gives rise to damage...by the conduct contravening [*section 18 of the Australian Consumer Law (Vic)*].<sup>78</sup>

251. Given these considerations, Mr MacDonald has failed to persuade me that there is a sufficient connection between the alleged misleading and deceptive conduct and the failure of the business. The alleged misleading and deceptive conduct did not materially contribute to the failure of the business, such as to be regarded as causative. On balance, I accept Ting's

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<sup>74</sup> See generally TB26 and TB 254 relating to the freezing of Mr MacDonald's assets in the context of Family Court proceedings;

<sup>75</sup> See TB 1403, TB 1405, TB 1409, TB 1412, TB 1415, TB 1416, TB 1418

<sup>76</sup> TB 1425, TB 1427.

<sup>77</sup> *Miller* (ibid) at 236.40 (omitting authorities).

<sup>78</sup> *Miller* (ibid) at 236.40 (omitting authorities).

submissions that the motel project turned out to be too big for Mr MacDonald at the time.

## **Damages**

252. I have found that there was no conduct on the part of Ting that contravened sections 18, 30(1)(e), 30(1)(f) and 30(1)(g) of the *Australian Consumer Law (Victoria)*. Mr MacDonald and ABC therefore fail in their respective claims for damages allegedly caused by conduct of Ting in alleged contravention of the relevant provisions of the *Australian Consumer Law (Victoria)*.
253. I have also found that if there was such conduct, there was no reliance by Mr MacDonald or ABC on any representations said to have been made as result of such conduct. I have also found that if there was such reliance, there was no sufficient causation as to attract any liability.
254. If I am mistaken in these various findings, I shall also make findings in respect of damages claimed by Mr MacDonald and ABC.
255. Mr MacDonald and ABC claim damages pursuant to section 236 of the *Australian Consumer Law (Victoria)*, which provides as follows:
- (1) [Recovery of loss or damage]**
- If:
- (a) a person (the **claimant**) suffers loss or damage because of the conduct of another person; and
- (b) the conduct contravened a provision of Chapter 2 or 3;
- the claimant may recover the amount of the loss or damage by action against the other person, or against any person involved in the contravention.
256. ABC also claims that Mr Ting was involved in the alleged contraventions of Chapter 2 or 3 of the *Australian Consumer Law (Victoria)*.

## **Damages sought by Mr MacDonald's counterclaim**

257. Mr MacDonald commenced his counterclaim by application dated 27 August 2014, and filed on 28 August 2014.
258. He says that but for the alleged misrepresentations, he would never have entered into the lease.<sup>79</sup>
259. Mr MacDonald also seeks a declaration that he is not liable to pay rent, by reason of the legal effect of the Additional Provision which, according to the Counterclaim, is the effect that:
- No rental is payable under the Lease because the contract of sale for the Motel freehold terminated because [Ting] as vendor was unable to complete the sale which inability occurred through no fault of ABC.

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<sup>79</sup> Counterclaimant's and Cross-Claimant's Closing Submissions dated 11 December 2017 at [5].

260. He counterclaims in the amount of \$97,500,<sup>80</sup> being the alleged amount of time Mr MacDonald personally spent carrying out repairs to the front rooms of the motel in order to bring them up to a standard so that the Council could issue a registration for the use of the units as prescribed accommodation. Mr MacDonald estimates that he spent 3,900 hours on this activity, and that adopting an hourly rate of \$25, a total claim of \$97,500 is arrived at.<sup>81</sup>
261. By his counterclaim, Mr MacDonald seeks “compensation” for loss and damage. No particulars of damages, beyond \$97,500, have been provided, save a claim in the amount of \$579,490 referred to in a schedule contained in paragraph 25 of the opening written submissions dated 24 September 2017 tendered on Mr MacDonald’s and ABC’s behalf by Mr Jones. It is also attached as a Schedule to his Closing Submissions dated 11 December 2017 (“**Schedule of Claimed Loss and Damage**”). The Schedule of Claimed Loss and Damage is a composite schedule of losses containing amounts claimed by both Mr MacDonald and ABC
262. The Schedule of Claimed Loss and Damage, supplemented by Mr Jones’s reference to the evidence, reads as follows:

Description	Amount Claimed	TB reference
Items brought by Mr MacDonald to the property from his property at Mirboo North, “still located at the property, disposed of or treated as rubbish by Ting upon retaking possession.”	\$60,990	TB 466, 477, 700-717
Kitchen and catering equipment	\$10,000	TB 478, 702 (calculation)
Cash	\$1,500	TB 478, 702 (calculation)
Loose tools	\$3,500	TB 478, 702 (calculation)
Cost of purchasing portable classroom building in May 2010	\$35,000	TB 467, 477
Cost of transporting portable classroom building to the property	\$15,000	TB 467, 477
Motel repair costs	\$50,500	TB 477, TB 697-699 (calculation) <sup>82</sup>

<sup>80</sup> Respondent’s Opening paragraph 25.

<sup>81</sup> TB 478.

<sup>82</sup> See also paragraph 30 of the Amended Points of Cross-Claim dated 29 September 2016.

Interest paid under the contract of sale	\$73,037	TB 477, TB681-696
Deposit paid	\$25,000	TB 477
Rates paid	\$5,000	TB 477
Tarraville, Gippsland lost opportunity. Profit from developing 4 building blocks allegedly worth \$200,000 undeveloped, developed at a cost of \$300,000 and sold for \$600,000 total. \$600,000 sale price -\$300,000 development costs <u>-\$200,000</u> cost \$100,000	\$100,000 lost profit	TB 467,476, 674
Mirboo North, Gippsland, lost opportunity. Profit from developing 6 blocks allegedly worth \$386,000 as sold, but if developed at a cost of \$164,000 would have been sold for \$750,000. \$750,000 sale price <u>-\$164,000</u> development costs \$600,000 say <u>-\$386,000</u> actual return on sale \$214,000	\$200,000 lost profit.	TB 476, 675-680.
<b>TOTAL</b>	<b>\$579,490</b>	

263. One cannot discern from the Schedule which of the individual items of alleged loss and damage is claimed by Mr MacDonald on the one hand, and ABC on the other hand.

264. In respect of the claim for misleading and deceptive conduct, I find, from the evidence, that the following items are claims properly brought by Mr MacDonald by his Counterclaim:

Description	Amount Claimed	TB reference
Mr MacDonald's claim for his own work and labour	\$97,500	



<p>Tarraville, Gippsland lost opportunity.</p> <p>Profit from developing 4 building blocks allegedly worth \$200,000 undeveloped, developed at a cost of \$300,000 and sold for \$600,000 total.</p> <p>\$600,000 sale price</p> <p>-\$300,000 development costs</p> <p><u>-\$200,000</u> cost</p> <p>\$100,000</p>	<p>\$100,000 lost profit</p>	<p>TB 467,476, 674</p>
<p>Mirboo North, Gippsland, lost opportunity.</p> <p>Profit from developing 6 blocks allegedly worth \$386,000 as sold, but if developed at a cost of \$164,000 would have been sold for \$750,000.</p> <p>\$750,000 sale price</p> <p><u>-\$164,000</u> development costs</p> <p>\$600,000 say</p> <p><u>-\$386,000</u> actual return on sale</p> <p>\$214,000</p>	<p>\$200,000 lost profit.</p>	<p>TB 476, 675-680.</p>
<p><b>TOTAL</b></p>	<p><b>\$397,500</b></p>	

265. I have found that Mr MacDonald's counterclaim is the proper repository of the claimed lost opportunity damages. It was only at the start of the hearing that Mr Jones for Mr MacDonald and ABC formally abandoned ABC's claims, as previously formulated, for "loss of opportunity to earn rent from Mr MacDonald, loss of opportunity to pay the final settlement amount due under the contract of sale and loss of opportunity to make a profit on the sale of the motel as a going concern".<sup>83</sup> Instead, Mr Jones submitted that Mr MacDonald would be making a claim for his lost opportunity as a result of relying on Ting's misleading and deceptive conduct.

266. I find in respect of these claimed lost opportunities, that they would not have been pursued by ABC, had it not entered into the contract of sale. ABC was first registered as a company on 3 July 2009. This was, of course, only 7 days before Mr MacDonald entered into the lease and 28 days before ABC entered into the contract of sale dated 31 July 2009.

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<sup>83</sup> See particulars to paragraph 34 of the Amended Points of Cross-Claim.

267. I find that ABC, having only been incorporated on 3 July 2009, was for the sole purpose of entering into the contract of sale and carrying on the motel business. I therefore find that, to the extent that there is some ambiguity as to which entity is asserting the lost opportunity damages claim, and I consider that there is, the party suffering loss and damage in respect of any lost opportunity was Mr MacDonald himself, and that they are properly the subject of the Counterclaim brought by him.
268. In other words, I regard the lost opportunity damages claim as only capable of being put on the basis (and this accords with the evidence of Mr MacDonald) that had the alleged misrepresentations not been made, Mr MacDonald would have caused ABC not to have entered into the contract of sale, and that he himself would have pursued the alleged lost opportunities.

Mr MacDonald's claim for \$97,500 for work and labour

269. I find that there is insufficient evidence to support this claim, and so it is dismissed.

Mr MacDonald's claim for damages for lost opportunity

270. The background to these claims is set out in Mr MacDonald's witness statement dated 8 November 2016. In late 2008, at about the time he first visited the property, Mr MacDonald owned a school camp at Mirboo North, known as Camp Jaclock. He purchased this property in 2004. He was then married, and his then wife had been in charge of a school camp on Phillip Island known as Anglicare Discovery Centre. The address of this camp was Boys Home Road, Newhaven. He purchased the Mirboo North property in consequence of the Anglican Church resolving to sell the Anglicare Discovery Centre. Because Mr MacDonald and his wife had had experience in the operation of school camps, and it was close to their other investments in the La Trobe Valley, he thought the Mirboo North property would be a good investment. They already had a small 8 room motel/lodge for group accommodation where they occasionally placed overflow camp bookings that could not be catered for at the Anglicare Discovery Centre. Mr MacDonald and his wife purchased bunk beds, beds, linen, furniture and catering equipment at an auction conducted by the Church to dispose of unwanted chattels at the Anglican Discovery Centre.
271. Camp Jaclock was accredited with the Victorian Camping Association. The Mirboo North property had cabin accommodation for 150 people, teacher accommodation in 1 of 2 single bedroom flats, a dining hall and games/meeting hall as well as a ropes course and nearby activities for visiting groups. Mr MacDonald used the other flat as personal accommodation for himself and his family. The last group to use Cape Jaclock before the fires was a church group from an outer Melbourne suburb. He and his then wife had a number of bookings for groups including from the Boolara Primary School, a local Church, the Mirboo

North secondary college and from an agricultural school associated with TAFE.

272. Mr MacDonald also had stored on the Mirboo North property 3 relocated homes. They were sitting on pallets, supported off the ground by timber. He had intended to install the houses on the property but the local council required a complete new sewerage system that he estimated would cost more than \$80,000 to install. As a consequence, he purchased the old Moe Police Station instead as he could see the possibility of that property being used as a base for his Mirboo North camp and Balook Group Retreat, as it was located diagonally opposite the Moe Railway Station with a direct link to Southern Cross Station. This property also had a separate AV Jennings style brick veneer 3 bedroom house in which his family could live comfortably.
273. Shortly after, on 7 February 2009, a day now known as “Black Saturday”, a fire known as the “Churchill fire” passed over Mr MacDonald’s “bed and breakfast” premises at Balook in the Tarra-Bulga National Park, while he was in the premises. Many of Mr MacDonald’s neighbours also perished in that fire. Mr MacDonald had been serving as a fire lookout observer at the Blackwarry fire tower that day.<sup>84</sup> There is little doubt, from his evidence before me at the hearing on 20 November 2014, that these events understandably had a profound personal effect on Mr MacDonald.
274. On 28 January 2009, a month or so after Mr MacDonald’s first visit to Lake Boga, Camp Jaclock suffered extensive damage from a fire system known as the Delburn fires. The buildings had smoke and water damage, the dining hall roof was destroyed, several small sheds had been burnt, all of the bush area was burnt out and the ropes course was destroyed. Most of the perimeter fencing was also lost. All bookings were cancelled after the fires.
275. Mr MacDonald also had to defend his property at Balook when it was threatened in the Black Saturday bushfires at Churchill on 7 February 2009.
276. During March 2009, Mr MacDonald gave evidence that during March 2009, he was reassessing what to do with the Mirboo North property in the aftermath of the fires. He spoke with a real estate agent from the Mirboo North office of Stockdale and Leggo, who also visited the property at Mirboo North. After consulting with him, his evidence went, Mr MacDonald understood his options were to rebuild the camp, but the investment required would make it uneconomic relative to other alternatives. He thought that a better option in the circumstances was to sell the Mirboo North property “as is”. The third and his most attractive option, according to his evidence, was to remove some of the buildings, and subdivide the Mirboo North property into 6 separate lots, and sell them.
277. As he determined that the Mirboo North property was now unsuitable to use

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<sup>84</sup> Source: “Beneath Dark Skies”, article annexed to Mr MacDonald’s undated letter received by the Tribunal on 30 September 2014.

as a school camp, Mr MacDonald was looking for a place to relocate or re-establish a school camp. One of the properties that he inspected was a property at Tarraville. He was considering purchasing this property as at that time it had the potential to be divided into 7 separate lots, and had planning permits that would allow him to install the relocated houses stored at Mirboo North.

278. In December 2009 Mr MacDonald sold his property at Mirboo North by auction, with settlement to take place on 13 March 2010.
279. Before settlement of the Mirboo North sale, in early 2010 he purchased the Tarraville property. By this time one of the blocks had already been sold so, he gave evidence, when he purchased the Tarraville property, it had the possibility for 6 separate blocks. He relocated 2 of the houses stored at Mirboo North to the Tarraville property. He placed these houses on the Tarraville land so that he could install them after he obtained building permits. The property had planning permits that allowed up to 6 separate dwellings. The existing planning approvals in place were current until 3 June 2011 for installing the relocated houses. Prior to the expiry he applied for and paid fees to obtain an extension to the planning approvals.
280. When he purchased the Tarraville property, there was an existing farmhouse on one of the blocks, and a relocated house was also stored on the property. He renovated the farmhouse. He gave evidence that later, in or around May or June of 2011, he sold the farmhouse block for \$165,000. He also sold the empty block for \$50,000.
281. In May 2010 he used the money from the sale of the block at Tarraville to purchase and relocate a portable classroom building to the motel. It was not attached to the land, but sat on pads, and he placed it near the back units behind the motel. He was then planning to use the 2 classrooms as part of the proposed school camp, with one a recreational room and the other a seminar/TV lounge room.
282. The way in which Mr MacDonald put his counterclaim for lost opportunity is described in paragraphs 73-74 of the his witness statement dated 8 November 2016, as follows:

**Lost opportunities-Tarraville and Mirboo North**

73. I estimate that I have lost the opportunity to make \$100,000 because I purchased the Aquatic Lodge Motel instead. I have estimated this loss by comparing my estimate of the current value of the [Tarraville] blocks of \$200,000 in total with an estimate after spending a further \$300,000 in permanent installation of the relocated houses, 3 that I already had plus the purchase and transport of another. With approved houses on each block my estimate of current market value of the four blocks is \$600,000. I attach a copy of a landmark Harcourt's printout of details of the Tarraville property marked as Annexure "M-66".
74. I would also have chosen to clear some of the buildings from the land at Mirboo North and undertaken the work to achieve a subdivision of this land

into 6 blocks of land and I would have sold these blocks. I estimate that I have lost the opportunity to make \$200,000 because by purchasing the Aquatic Lodge Motel I decided instead to devote my energies to that property and consequently made a decision to sell the Mirboo North school camp property as a whole lot. I have estimated this loss by comparing the proceeds I received from the sale by auction of \$386,000 with the likely proceeds from the sale of separate lots. After selling expenses I estimate the proceeds at \$750,000 and I estimate the costs of clearing, fencing, road development and other costs of developing individual lots at \$150,000. After making allowance of \$14,000 for other incidental expenses my estimated loss is \$200,000. I attach six brochures from Stockdale and Leggo showing these blocks and the prices currently being asked for each lot...

283. I am not satisfied from this limited evidence presented by Mr MacDonald that, on the balance of probabilities, Mr MacDonald would have successfully developed the Tarraville and the Mirboo North properties, had he not, in alleged reliance on the alleged misleading and deceptive conduct by Ting, taken on the lease, and caused ABC to enter into the contract of sale. I shall provide my reasons.
284. First, I cannot be satisfied that Mr MacDonald would have chosen to pursue these developments had he known about the Building Order and the Council's letters. His evidence under cross-examination was ambivalent in this respect:

Mr Hopper:

Whereas your case is that had you been told about the building order you would not have entered the contract?

Mr MacDonald:

That's correct. Well, not that I wouldn't have entered the contract. I would have either not entered the contract, entered the contract differently or performed different tasks within the contract i.e. withholding deposits, not making interest payments until such time as the issues that I subsequently became aware of and I worked at the time of preparing the contract.<sup>85</sup>

...

Mr Hopper:

Your case is that had you been shown the letter of 9 July 2009 you would have been alerted to health act and food act issues?

Mr MacDonald:

...in addition to the building issues.

Mr Hopper:

which you say would have caused you not to enter the contract of sale?

Mr MacDonald:

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<sup>85</sup> Transcript page 303 ll.23-31.

or to have entered it differently or done different things in regard to deposits and...<sup>86</sup>

285. Secondly, there is, in my view, no satisfactory valuation evidence of the value of the Mirboo North and the Tarraville properties as undeveloped, or as developed nor evidence of opinion concerning the likely development costs required in each case;
286. Thirdly, I consider that there is no satisfactory evidence of Mr MacDonald's finances in early to mid-2009 as to demonstrate that *at that time*, had he not entered into the lease and ABC had not entered into the contract of sale, he would have had the \$464,000 funding that he says would have been required to develop the Mirboo North and the Tarraville properties, given also:
- (a) his inability to settle on the purchase of the motel; and
  - (b) the statutory charges over Mr MacDonald's properties at Balook and Tarraville;<sup>87</sup>
287. Fourthly, there is no satisfactory evidence such as to demonstrate, on the balance of probabilities, that Mr MacDonald would have been able satisfactorily to arrange his affairs to have undertaken these developments, and the claim for lost opportunity damages is dismissed.

#### Conclusion on MacDonald damages

288. It follows that Mr MacDonald has failed to establish that he is entitled to any damages if, contrary to my finding, he relied on the conduct of Ting in contravention of the relevant sections of the *Australian Consumer Law (Victoria)*.

#### Damages sought by ABC's cross-claim

289. In respect of ABC's claim for misleading and deceptive conduct, ABC's Amended Points of Cross-Claim claims the following damages (taken from the composite described in the Schedule of Claimed Loss and Damage):

[ABC's] loss and damages include:

Payments made [by ABC] relating to Motel at Lake Boga		
1	Deposit	\$25,000
2	Interest	\$73,037.50
3	<b>Rates</b> SHRCC estimate Water estimate Other estimate	\$5,000
4	<b>Transport of Chattel</b>	

<sup>86</sup> Transcript page 322 ll.20-26.

<sup>87</sup> TB 236, 242

	Transport and installation of portable classroom	\$15,000
5	<b>Fixtures [taken to be a reference to motel repair costs]</b> Tradesmen expenses and equipment estimate	\$50,500

290. I consider that ABC's claim in respect of the portable classroom, in addition to being one of the claimed items of cost form "going in and out of the property" in reliance on the alleged misleading and deceptive conduct, it is also put on the basis that it is an asset of ABC's that has not been delivered up by Ting to ABC. I consider this in my discussion of issue (j) below.

291. I now consider each of these claims.

#### Deposit

292. I am satisfied on the evidence that ABC paid the \$25,000 deposit claimed.

#### Interest

293. I am satisfied on the evidence that ABC paid the \$73,037.50 interest claimed.

#### Rates

294. I am unable to be satisfied on the evidence that ABC paid the \$5,000 rates claimed, and so it is dismissed.

#### Transport and installation costs-portable classroom

295. I am unable to be satisfied on the evidence that ABC paid the amount of \$15,000 claimed, and so it is dismissed.

#### Motel Repair Costs.

296. Mr MacDonald's evidence is as follows:

[75] The costs of making improvements to the Motel in an attempt to obtain the necessary approvals to operate including tradesman expenses altogether estimated at \$50,500. I attach a copy of a hand written schedule that records my estimate of this amount as annexure 'MM-74'.

297. I am unable to be satisfied on the evidence that ABC paid the amount of \$50,500 claimed, and so it will be dismissed.

#### Finding on ABC's damages

298. It follows that damages to which ABC would be entitled if, contrary to my finding, it had established that it suffered loss and damage because of the conduct of Ting in contravention of relevant sections of the Australian Consumer Law (Victoria) , is assessed at \$78,037.50.

## Issue (g)

### Damages Claimed by ABC-Ting's limitations defence

299. I now consider Ting's further submission that if, contrary to my finding, Ting engaged in misleading and deceptive conduct that induced ABC to enter the contract of sale, ABC's right to claim damages is, in any event, barred by force of the applicable limitation provision.

300. Section 236(2) of the *Australian Consumer Law (Victoria)* provides:

**[6 years to commence action.]**

An action under subsection (1) [in respect of conduct contravening a provision of Chapter 2 or 3 of the *Australian Consumer Law (Victoria)*] may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

301. Ting submits, correctly I find, that the relevant statutory limitation period for ABC's claim in respect of any misleading and deceptive conduct on the part of Ting is 6 years.<sup>88</sup>

302. ABC did not file its application to be joined to the proceeding until 4 May 2016. By order dated 6 May 2016, ABC was joined to the proceeding pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*. ABC filed its Points of Cross-Claim on 13 May 2016.

303. Ting relies on the proposition that where an applicant, claiming for misleading and deceptive conduct inducing the applicant to enter into obligations under a contract, points to a series of losses of various kinds flowing from the transaction, there is not a cause of action relating to each kind of loss. The cause of action accrues when the applicant entered into the relevant transaction.<sup>89</sup>

304. Ting submits that the relevant transaction was the contract of sale dated 31 July 2009, and therefore ABC's claim must have been brought by 31 July 2015.<sup>90</sup>

305. ABC submits, on the other hand, that time should only begin to run from the date when the contravening conduct is identified by the applicant, which is when loss and damage is suffered by ABC. ABC says that not only was it misled by the actions of Ting in failing to disclose the Building Order (a copy of which it received during Mr MacDonald's meeting with Council on 11 May 2010), but in failing to disclose the existence of outstanding matters referred to in the Council's third letter, which Mr MacDonald did not receive until it came as an attachment to the Council's letter dated 5 December 2012 when, it says was the latest date that ABC's cause of action

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<sup>88</sup> See section 82(2) *Trade Practices Act 1974 (Cth)* as amended by *Trade Practices Amendment Act (No 1) 2001* and Section 236(2) *Australian Consumer Law (Vic)*.

<sup>89</sup> See *Keen Mar Corp Ltd v Labrador Park Shopping Centre Pty Ltd* [1988] ASC 55-564.

<sup>90</sup> Ting concedes though, that it is open to find that the transaction was still being negotiated until as late as 21 September 2009, and therefore the proceeding should have been commenced no later than 21 September 2015.



accrued.

306. In support of its proposition, ABC relies on *Wardley Australia Limited and Anor v The State of Western Australia* as follows:

When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities that exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But...detriment in this general sense has not universally been equated with the legal concept of “loss or damage”. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust.<sup>91</sup>

307. ABC also relies on the observations of Deane J in *Hawkins v Clayton*<sup>92</sup> to the effect that it could not have been the legislative intent that the effect of the provision such as [the *Limitation Act*] should be that a cause of action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of the proceeding. The date from which time should run, ABC contends, should be no earlier than the date that ABC discovered that there had been misleading and deceptive conduct on the part of Ting.

308. I tend to agree with the submissions made on behalf of ABC. If correct, I observe that given ABC’s allegation that it first became aware of the Building Order on 11 May 2010, and commenced its proceeding against Ting on 6 May 2016, the proceeding against Ting has arguably been commenced within time.

309. The limitations issue was not argued before during closing submissions, but was the subject only of written submissions. Given my finding that ABC has not proved any misleading and deceptive conduct on the part of Ting, I express no final conclusion on the merits of Ting’s limitations defence.

**MR MACDONALD’S OTHER CLAIMS NOT RELYING ON ALLEGED MISLEADING AND DECEPTIVE CONDUCT**

310. The balance of Mr MacDonald’s claims, and the evidence supporting them is as follows:

Items brought by Mr MacDonald to the property from his property at Mirboo North, “still located at the	\$60,990	TB 466, 477, 700-717
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<sup>91</sup> [1992] HCA 55 per Mason CJ, Dawson, Gaudron and McHugh JJ at [16].

<sup>92</sup> (1987-88) 164 CLR 539 at 590.

property, disposed of or treated as rubbish by Ting upon retaking possession.”		
Kitchen and catering equipment	\$10,000	TB 478, 702 (calculation)
Cash	\$1,500	TB 478, 702 (calculation)
Loose tools	\$3,500	TB 478, 702 (calculation)

### Issue (h)

#### **Mr MacDonald’s claim for \$60,990 being the value of items allegedly brought from his property at Mirboo North, and “still located at the property, disposed of or treated as rubbish by Ting upon retaking possession”**

311. This claim is made independently of Mr MacDonald’s claim for loss and damage in reliance on alleged conduct of Ting.
312. The amount claimed is supported by a schedule of items and claimed values tendered by Mr MacDonald in the proceeding.<sup>93</sup>
313. In essence, for me to find Ting liable at law for damages in respect of the chattels the subject of this claim, I would need to be satisfied that in the absence of evidence of abandonment, Ting has converted them by failing to deliver up possession of them or to make them available for collection by Mr MacDonald.
314. On 28, 29 and 30 December 2015 Mr MacDonald attended at the motel for the purpose of removing personal items that were at the motel on Ting re-taking possession on 27 August 2015.
315. By an affidavit sworn 13 May 2016, in support of an application to the Tribunal for access, Mr MacDonald stated:

[19] Also there are many items of mine still located at Lake Boga including air-conditioning units in some rooms, hot water services, a portable classroom (cost installed \$45,000), as well as tools and equipment and bar fridges, microwave ovens, TV sets and other items.

[20] When I was allowed to return to the motel [on 28, 29 and 30 December 2015] to collect some personal items from the caretaker residence I wasn’t given access to the motel so that I could record a list of chattels and improvements that I have made to the property.

[21] I wish to have access to all rooms at the property for the purpose of identifying items that I claimed belong to me, and improvements that I have made to the motel through time materials and use of my equipment. I estimate that I would be

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<sup>93</sup> TB 700-702.

able to complete this task in six hours, from 10 am until 4 pm and I have no objection to being supervised. I understand that I am not able to remove any of my claimed items from the property.

316. As a result of Mr MacDonald's application Mr MacDonald returned to the property on 30 May 2016, a visit supervised by an employee of Ting's solicitors. The employee's report appears as an exhibit to Ms Chai's witness statement dated 2 November 2016. It states:

I advised Mr MacDonald that my instructions were that nothing was to be removed from the premises today but that he could make a note of it to be collected at a later date. Mr MacDonald advised that he lives in Queensland now and that he did not want to have to come back again to collect the items. He advised that he was told that he could collect items of a personal nature. I advised that the purpose of today's inspection was just to allow him to make an inventory of items that he claims an interest in and repeated that I was instructed that nothing be removed from the premises that day.

317. Mr MacDonald's evidence was as follows:

[39] I had bunk beds, linen and crockery and cutlery at my property at Mirboo North where I had operated the school camp. Danny [Wong] helped me to relocate some of these chattels to the Aquatic Lodge Motel as part of reinstating the rooms and setting the motel up in the way I wanted to operate it.

...

[68] During the appeal process from the VCAT orders, the sheriff's office evicted me from the property whilst I was absent in Queensland. This happened on 26 August 2015. I have never been provided the opportunity for me to retrieve all my personal belongings. During my supervised inspection of the property in May 2016 the solicitor representative of the Ting's refused to allow me to take some of my personal items that I had identified.

[75] The costs of items brought to the Lake Boga property and which are either still located there or have been disposed of or treated as rubbish by [Ting] upon retaking possession. [I estimate the] value at \$60,990. I attach a handwritten schedule that records my estimate of this amount as annexure 'MM-75'. I also attach a typed schedule of items as annexure 'MM-76' and a handwritten inventory list that I made from my visit to the motel in May 2016 as annexure 'MM-77'. I also attach copies of photographs taken by me during this visit as annexure 'MM-78'. These photographs record the disposal by [Ting] and Sons Pty Ltd of chattels that I identify as belonging to me including mattresses and a pillow.<sup>94</sup>

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<sup>94</sup> Witness statement of Mr MacDonald dated 8 November 2016.

318. Ms Chai's evidence in reply concerning what occurred after Ting took possession on 27 August 2015 was as follows:

[5] ...I also placed any other items which I had found which did not belong to the motel in boxes and bags ready for Mr MacDonald to collect. On 28, 29 and 30 December 2015, Mr MacDonald attended the property with members of the Swan Hill Police for the purpose of removing any of his personal items which he had left behind when he was evicted. As had previously been arranged, Mr MacDonald was also given an opportunity in May 2016 to go through the property as part of a supervised inspection. Now produced and shown to me and marked "ECR-26" is a true copy of the report which was provided by the solicitor who had conducted the supervised inspection with Mr MacDonald in May 2016.

[6] During the three days in December 2015 when Mr MacDonald was at the property to remove the last of his belongings, I attended for most of the time to make sure he removed all of his things as quickly as possible and didn't leave anything behind. There were a couple of boxes of items which belonged to Mr MacDonald, but that he did not want to take. I said to Mr MacDonald that I would not be storing any of his goods at the property, as the reason why he was there was to make sure that he took everything that he owned. I made it very clear to him that anything he did not take would be thrown out.<sup>95</sup>

319. Mr MacDonald's further evidence is as follows:

[18] ...I had placed additional chattels in the motel as described in paragraph 39 of my statement. I had also spent money to acquire goods and chattels including plant and equipment for the motel. These included bar fridges, television sets, microwave ovens, stoves, air-conditioners, other kitchen and catering equipment and hot water services...

[19] I refer to paragraph 69 of Eileen Chai's statement and to attachment "EC-24". I have examined the attachment and noted that it includes a numbered list of items under headings Building, Chattels, Evictee Chattels, Portable Classroom and Rooms. These item numbers match photo numbers for .jpg files that were provided as discovery on a remote computer pen drive. These .jpg files are contained within folders with the same heading names. I have closely examined these photos and the comments made about them. I have made comments in reply in the same format. My comments reply to the photo image and to the typed comments. I attach my comments as annexure 'MM-90'. I have also looked at photos in a file headed rubbish. Eileen Chai has not commented on these photos in table form. I have made some comments.

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<sup>95</sup> Ms Chai's witness statement dated 22 November 2016.

320. Mr MacDonald claims that both he and ABC are largely unable to provide business records as would support their damages claims, because they were kept at the motel, and never returned to Mr MacDonald.

321. Mr MacDonald's evidence is as follows:

[68] I have never had my business records returned to me. This includes my original records for other properties including the Mirboo North and the Tarraville properties [relevant to my lost opportunity claim]. I can see copies of some of my records that were left at the property, being mainly receipt books, have been included in the discovery copies provided by Hibbert & Hodges. I have made the best efforts I can in the circumstances to provide accurate details of ownership and transactions, and proposed transactions for the Mirboo North and Tarraville properties.<sup>96</sup>

322. Ms Chai's response to this is as follows:

[5] As to paragraph 68 [of Mr MacDonald's statement], after Mr MacDonald was evicted I first went back to the property to begin the clean up process in early September 2015. At that time I found some documents and papers strewn around the restaurant area and office floor and desk. I took all of those papers and placed them in some of the cabinets which Mr MacDonald had left behind.<sup>97</sup>

323. I find from the evidence that Mr MacDonald kept his and ABC's business records at the motel, but that many of them were lost between the date of Ting re-taking possession of the property on 27 August 2015 and late December 2015, when Mr MacDonald was first granted access for the purpose of removing items of a personal nature.

324. I find that there is no evidence that Mr MacDonald abandoned the goods and chattels the subject of his claim. I also find that as late as Mr MacDonald's inspection on 30 May 2016, Ting was insistent that Mr MacDonald not make arrangements to remove chattels belonging to him. I am also not satisfied that there is any evidence demonstrating that Ting subsequently extended an offer to Mr MacDonald for him to remove the chattels. In these circumstances, I am satisfied that Ting is liable to pay damages to Mr MacDonald in conversion, assessed at May 2016.

325. In assessing damages, I therefore accept that Mr MacDonald has done the best that he can firstly to catalogue the chattels claimed by him to have been destroyed or lost, and to ascribe values to them.

326. I have reviewed Exhibit "MM76" prepared by Mr MacDonald entitled "List of Additional Chattels brought to Aquatic Lodge by Mark McDonald"<sup>98</sup>, together with Exhibit "MM-77" being the handwritten inventory of chattels

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<sup>96</sup> Mr MacDonald's witness statement dated 8 November 2016.

<sup>97</sup> Ms Chai's witness statement dated 22 November 2016.

<sup>98</sup> The first page of which in fact appears as the last page of Exhibit "MM75".

that Mr MacDonald claims to have recorded during his subsequent visit to the motel on 30 May 2016. I find that they fairly describe the chattels that he inspected that day. Mr MacDonald has valued them, as best he can, at \$60,990 as appears from Exhibit “MM-75”.

327. I do not accept Mr MacDonald’s valuation, which is broadly stated, provides no information as to the age of each claimed item, nor the basis upon which Mr MacDonald estimated his claimed values. Mr Jones submits that if I do not accept Mr MacDonald’s estimates of values, I should use Mr MacDonald’s estimates as a base, and adjust the base to an acceptable figure. Doing the best I can, I value the damages payable on 30 May 2016 at \$15,000.

Mr MacDonald’s claim for \$10,000 being the claimed value of kitchen and catering equipment

328. I am unable to be satisfied on the evidence that Mr MacDonald has established his claim, either in respect of liability or quantum.<sup>99</sup> It is dismissed.

Mr MacDonald’s claim for \$3,500 being the value of loose tools

329. I am unable to be satisfied on the evidence that Mr MacDonald has established his claim, either in respect of liability or quantum.<sup>100</sup> It is dismissed.

#### **Issue (i)**

##### **Liability of Ting to Mr McDonald in respect of \$1,500 cash allegedly left at the motel**

330. I am unable to be satisfied on the evidence that Mr MacDonald has established his claim, either in respect of liability or quantum, and it is dismissed.<sup>101</sup>

#### **ABC’S OTHER CLAIMS, NOT RELYING ON ALLEGED MISLEADING AND DECEPTIVE CONDUCT**

#### **Issue (j)**

##### **Liability of Ting to ABC in respect of the portable classroom valued at \$35,000**

331. I am not satisfied on the evidence that Ting has extended an offer to Mr MacDonald to remove the portable classroom, and that ABC is entitled to damages assessed at 30 May 2016.

332. There is no evidence of the purchase price claimed to have been paid by Mr

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<sup>99</sup> See TB 702, containing Mr MacDonald’s “1 line” calculation.

<sup>100</sup> See TB 702, containing Mr MacDonald’s “1 line” calculation of \$5,000 including the \$3,500 claim.

<sup>101</sup> See TB 702, containing Mr MacDonald’s “1 line” calculation of \$5,000 including the \$1,500 cash claim.

MacDonald, or its condition in May 2010 when, I find, it was purchased by ABC.

333. I have reviewed the photographs of the portable classroom,<sup>102</sup> and Mr MacDonald's observations concerning its condition.<sup>103</sup> I find that the portable classroom is in a poor condition. There is no evidence as to its condition in May 2016. I find that it was in a similar condition to what is apparent in the photographs.

334. Having regard to these difficulties, and doing the best I can, I fix damages payable by Ting at \$10,000.

**Liability of Ting to ABC in respect of bar fridges valued at \$1,800**

335. I am unable to be satisfied on the evidence that ABC has established this claim, either in respect of liability or quantum, and so it will be dismissed.

336. I make the orders attached.

A T Kincaid  
**Member**

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<sup>102</sup> Photographs 111-115, referable to the Schedule attached at TB 413 to Ms Chai's witness statement.

<sup>103</sup> At TB 23P