

DISTRICT COURT OF QUEENSLAND

CITATION: *JA & JB Boyle Pty Ltd v Major Furnace Australia Pty Ltd*
[2019] QDC 75

PARTIES: **JA & JB BOYLE PTY LTD (ACN 102 765 435) AS
TRUSTEE FOR THE BOYLE FAMILY TRUST**
(plaintiff)
v
**MAJOR FURNACE AUSTRALIA PTY LTD (ACN 116
352 759)**
(defendant)

FILE NO/S: 99 of 2012

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING
COURT: District Court at Brisbane

DELIVERED ON: 17 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 28-29 March 2019

JUDGE: Porter QC DCJ

ORDER: **1. The Court declares that the contract entered into by the parties for the supply of one HD60 cremator on or about 26 September 2011 is void;**
2. Judgment be entered for the plaintiff in the amount of \$112,271.10; and
3. The counterclaim be dismissed.

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – where the plaintiff entered into a contract to purchase a cremator from the defendant – where the defendant made representations regarding performance and delivery time – whether the representations were misleading or deceptive – whether reasonable grounds existed for making the representations – whether the plaintiff relied on the representations.
TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – OTHER ORDERS OR RELIEF – RESCISSION OR RESTITUTION – where the plaintiff entered into the contract

to purchase a cremator in preference to an alternative product – where the plaintiff communicated its desire to rescind the contract to the defendant – where the cremator is now worthless – where the defendant refused to retake possession – whether avoidance of the contract and repayment of the purchase price is the appropriate remedy.

Legislation

Australian Consumer Law, s 4, s 18, s 29, s 236, s 237 and s 243

Cases

Awad v Twin Creeks Properties Pty Ltd [2012] NSWCA 200

Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592

Cummings v Lewis [1993] FCA 149

Downey & Anor v Carlson Hotels Asia Pacific P/L [2005] QCA 199

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

Henjo Investments Pty Ltd v Marrickville Pty Ltd (No 1) 39 FCR 546

Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494

Other Material

RV Miller, *Miller's Australian Competition and Consumer Law* (41st ed, 2019, Thomson Reuters)

COUNSEL:	S Byrne for the plaintiff KW Wylie for the defendant
SOLICITORS:	Bob Bogie & Co for the plaintiff Carter Newell Solicitors for the defendant

SUMMARY

- [1] In mid-September 2011, the plaintiff (**Boyle**) contracted in writing to purchase a cremator (the **HD60**) from the defendant (**Major Furnace**). Boyle alleges that prior to the contract, the defendant made four promises about the performance of the HD60. The plaintiff alleges that those promises were representations about future matters which were misleading or deceptive. The plaintiff alleges that but for the representations it would not have entered into the contract and claims loss and damage arising out of entry into the contract. It also claims an order for rescission of the contract and restitution of the money paid to the defendant for the cremator.
- [2] With one exception, I find that the representations were made generally in the terms alleged by the plaintiff and relied upon by the plaintiff in entering into the contract. I also find that one representation, relating to the costs per cremation expected from the HD60, was made without reasonable grounds and was misleading or deceptive. Further, I find that the plaintiff relied on that representation when acquiring the HD60 in preference to another cremator it was considering acquiring. Although I do not accept the plaintiff made out the damages claimed, I am persuaded that the plaintiff is entitled to a remedy setting aside the contract and requiring repayment of the sums paid by way of purchase price.
- [3] The defendant's counterclaim on the contract for an unpaid instalment of the purchase price is also dismissed.

BACKGROUND

- [4] The plaintiff carries on business as a funeral director in the Proserpine/Whitsunday region. It has done so since about 2008. Mr Jeffrey Boyle is a director and the guiding mind of the plaintiff. In about 2011, Mr Boyle started to make inquiries about acquiring a cremator for use in the plaintiff's business. It was common ground that the regulatory regime in Queensland (and New South Wales) permits funeral directors to carry out cremations. Some other states have regulatory regimes which are more restrictive.
- [5] Major Furnace is a designer and constructor of cremators and other industrial equipment. It is a relatively small company. It has a long history. Its current managing director is Mr Andrew North.
- [6] Cremators are designed for different levels of usage. Larger machines are designed for higher volume operations and generally burn faster, but are more expensive. Smaller machines are designed for lower volume operations and generally burn slower but are cheaper. Mr Gleeson was the service manager for Major Furnace and had been for some six years. He was responsible for staffing issues and sales of smaller machinery, including cremators. Mr Gleeson's evidence was that as at July 2011, Major Furnace had two cremators known as the HD90 and HD120. They were designed to consume bodies at rates of about 90 kilograms and 120 kilograms per hour, were capable of 24 hour operation and were aimed at crematoria undertaking daily operations. Both machines were designed for the high volume market, but the HD120 was designed for use where many very large bodies had to be cremated.

However, at about this time, Major Furnace had decided to design a machine for lower volume operations directed at the funeral director market in NSW and Queensland, to be called the HD60. None of this was challenged at trial. It was in this context that Mr Boyle said he had his first relevant conversation with Major Furnace.

- [7] In July 2011, Mr Boyle contacted a number of cremator suppliers, including Major Furnace. Amongst the suppliers contacted were a US supplier known as Therm Tec. At that time, the quote from Therm Tec at \$100,000 plus freight from the US was the most competitive quote.
- [8] Mr Boyle also contacted Major Furnace. He said he spoke with Mr Gleeson on four material occasions: on about 28 July 2011 (the **First Conversation**). He also gave evidence of three other material discussions: on about 1 September 2011 (the **Second Conversation**), on about 19 September (the **Third Conversation**) and on about 20 September 2011 (the **Fourth Conversation**). Mr Gleeson did not recall the number, order or content of individual conversations, although he did recall matters which were discussed and his recollection was generally consistent with Mr Boyle's evidence. It is convenient to refer to Mr Boyle's recollections for this part of these reasons, bearing in mind that some aspects of his recollection are disputed.
- [9] Mr Boyle gave evidence that in the First Conversation in July 2011, he told Mr Gleeson that the plaintiff performed about 85 to 90 cremations per year. Mr Gleeson then told him the existing cremators (the HD90 and the HD120) would not suit Boyle's likely usage rates but that Major Furnace was designing a cremator which would suit smaller funeral homes. Mr Boyle said Mr Gleeson also told him that:
- (a) That the cost probably worked out at about \$85 to perform a cremation as compared to large machines which cost about \$40;
 - (b) The machine would have state of the art electronics so that problems could be rectified remotely by a modem;
 - (c) The machine might take about three months to be delivered; and
 - (d) The expected price was about \$180,000.
- [10] Mr Boyle said he told Mr Gleeson the price was too high. There is a brief diary note of this conversation which lists prices and suppliers. It supports the inference that the call occurred, but says nothing about the content.
- [11] Mr Boyle said that the Second Conversation occurred in early September (his diary note says 1 September). He said Mr Gleeson contacted him to tell him that Major Furnace had gone ahead with the design of the smaller cremator called the HD60. He said Mr Gleeson:
- (a) Agreed that the HD60 was a small unit for small numbers of cremations;
 - (b) Told him that Major Furnace had worked out that the cost per cremation would be about \$85;
 - (c) Told him that it would take about three months to supply the HD60;

- (d) That problems could be identified via a modem in Melbourne rather than having to wait for the US suppliers to wake up and respond to problems;
- (e) That 85 to 90 cremations a year would be fine and that the machine could handle up to five per day;
- (f) The price would be \$180,000.

[12] Once again Mr Boyle said that price was too high for him. It is not clear that he communicated that to Mr Gleeson. There is a diary note of this conversation which is generally consistent with Mr Boyle's recollection. It does add a note that the estimate of \$85 per cremation depended on the gas price.

[13] On 9 September 2011, Mr Gleeson sent Mr Boyle a quotation for supply of a HD60 cremator.¹ It relevantly stated:

...

Throughput

The HD60 cremator is engineered to operate at the rate of up to 5 cremations per 8-hour day, and can be operated continuously up to 24 hours per day without the need to shut down to increase the furnace throughput as required.

...

Automatic operation

The control system is controlled by a microprocessor based digital Programmable Logic Controller (PLC), which has been engineered to ensure optimum operation under a wide range of conditions without the need for operator intervention.

[14] The quotation then stated a price for a HD60 at \$139,680 plus GST and listed a number of inclusions and exclusions. Neither list includes the modem.

[15] It also states a price for packing and freight (\$10,900 plus GST) and for installation supervision, commissioning, training and travel expenses of \$9,868 plus GST. Again inclusions and exclusions do not refer to the modem. It contemplates installation over five days by a Major Furnace technician. The quotation provides for 16 weeks for delivery, installation and commissioning. The quotation deals expressly with after sales service support under a heading in these terms. It states: "*To assist with ongoing operation for the equipment Major is pleased to offer after sales service support via the Major service department in Melbourne*".

[16] Not surprisingly, given his dissatisfaction with the price quoted by Major Furnace, Mr Boyle continued with his inquiries with other suppliers. He appears to have focused on Therm Tec, as US company. He obtained a quotation from Therm Tec dated 9 September 2011 for supply, freight and installation for about \$120,000. The quotation

¹ Exhibit 3.

was for \$82,116 but I infer that was a US dollar figure to which GST had to be added.²

[17] I note that the machine quoted on in this quotation was ultimately purchased by Mr Boyle in December 2012 to replace the HD60 which was purchased in November 2011.

[18] On about 19 September 2011, Mr Boyle says Mr Gleeson followed up the quotation leading to the Third Conversation. Although Mr Gleeson does not specifically recall this, it would be a normal step for him to take. I find this did occur. Mr Boyle said he told Mr Gleeson that \$180,000 was too much and that he could not obtain finance for that amount. He says he told Mr Gleeson he was going to “look at” the Therm Tec unit. Mr Gleeson is said to have reiterated some of the advantages of the HD60, then said he would have to talk to Andrew North to see if they could “sharpen their pencils” and reduce the price. This is generally confirmed by Mr Boyle’s diary note for that day. It seems very likely to me that the Therm Tec price would also have been mentioned in this conversation. Mr Boyle says, and I accept, that he did not know who Mr North was at the time.

[19] Mr Boyle said he spoke again to Major Furnace on 20 September 2011, the Fourth Conversation. He said this conversation was with Mr North and Mr Gleeson.

[20] Mr Boyle said he initially spoke to Mr Gleeson. Mr Gleeson said Mr North was present but Mr North did not speak initially. His account proceeded as follows:³

He said that, “We’ve looked at the costing. We’ve sharpened our pencil significantly.” I think that’s when they told me it was coming down. It was down around 120, 130,000. ...I said to him, “Well, it’s still dearer than the Therm-Tec unit and we’ve got the issues with, you know, time and all that sort of thing, and that’s when he said to me, “Well, you know, you’re going to save \$2000 on every cremation because ours will be here a lot quicker than theirs will be,” and ... he said the modem would mean that they could log in from Melbourne at any time during when we’re working whereas America couldn’t. He said that because it’s brand spanking new design, it’s got the latest gas equipment, whereas the Therm-Tec is old technology. He convinced me, basically, to buy it.

Well, could just – is that all that you recall him saying in the conversation? I recall him saying the gas usage, ...about \$85 ... per cremation of what it was going to cost us approximately. I recall him saying that their upsale [*sic after sales*] service backup system was second to none...

...And it would be delivered within 13 weeks. That was one of the crunches, you know, like, that was where he said to me, Therm-Tec is a lot more than 13 weeks, like, it was probably 15 weeks, 18 weeks, plus freight overseas on the ship. He talked about it, you know, and what would happen if it fell off the ship or something went wrong on the wharf or something to that effect where theirs is going to be in within 13 weeks. So I’ll save \$2000 on every cremation we do in that 13 week period on the difference on theirs to the Therm-Tec deal.

[21] Mr Boyle recalled that after that, Mr North came on the line and said as follows:⁴

² Exhibit 4.

³ TS1-28.10 to .35.

⁴ TS1-29.5 to .15.

“Just like Nigel’s just explained to you, you’re getting the state-of-the-art machine, brand spanking new. You’ll get it within 13 weeks, it’ll cost you around \$83 a cremation – \$85 a cremation”, he said that, “Because you’re the first person to have one of these designed cremators”, and ... I could be their referral person for them. And he reiterated that ... he’d dropped the price significantly to get into that particular market.

MR BYRNE: What did you tell them? I said, “Sure, okay, sounds good, send me a tax invoice”. He’d convinced me.

[22] Mr Boyle said he asked that a quote be faxed to him. His diary note of that conversation is brief but not inconsistent with his account.

[23] A revised quotation arrived a couple of days later, dated 21 September 2011.⁵ It refers to the telephone conversation earlier in that week but says nothing about what was said. It is otherwise in materially the same form as the first quotation. It differs in the following respects:

- (a) The prices for the HD60, freight and installation are reduced to \$110,010, \$8,890 and \$7,960 respectively plus GST;
- (b) It added a requirement that there be a minimum of two cremations per day during the trial period (that period was not directly identified, but the installation period was two days and the total period contemplated for installation and commissioning was five days, thus the trial period appears to be three days);
- (c) It provides for Terms of Payment as follows:
 - (i) 35 per cent deposit on order;
 - (ii) 50 per cent on completion of refractory installation;
 - (iii) 10 per cent prior to dispatch; and
 - (iv) 5 per cent on completion of installation and commissioning; and
- (d) It provides under the heading “Delivery”:

We have reviewed our current workshop loading and can offer a reduced [*perhaps from the 16 weeks in the original quote*] delivery, installation and commissioning of 13 working weeks from receipt of deposit.

[24] Note that the 13 weeks offered included delivery, installation and commissioning. The representation relied upon by Mr Boyle, however, is that the HD60 could be delivered in 13 weeks. The Major Furnace witnesses said that at the time of the conversation and quote, no HD60 had ever been constructed before and work had not begun on the one to be delivered to Boyle.⁶ This was the first HD60 to be manufactured. (Mr Nguyen said that a HD60 had been manufactured in 1990, but he was not working at Major Furnace at the time and this evidence was not supported by Mr North, who was. I do not accept that evidence.)

⁵ Exhibit 7.

⁶ TS1-96 to 97; c.f. Nguyen TS2-4 to 5.

- [25] Mr Boyle accepted the quotation on a date between 22 and 26 September and paid the deposit on 28 September (the **Contract**). Thirteen weeks from receipt of the deposit was 28 December 2011. That was the delivery date represented on Mr Boyle's case. Delivery was required a week or so before then under the terms of the Contract to permit installation and commissioning by 28 December 2011 (possibly two weeks before to allow for the Christmas public holidays).
- [26] Mr Boyle then spoke to Therm Tec and told them he was buying the HD60. A person from Therm Tec sounded a warning about gas usage and suggested Mr Boyle obtain reassurance in writing about that matter. Accordingly, he contacted operations manager of Major Furnace, Mr Gaetjens. Mr Boyle says he asked for documentation on gas usage for the gas suppliers so they knew what they had to supply. He gave evidence that he also said he wanted that information because he was having doubts about the usage the HD60 would achieve.⁷
- [27] He said:
- (a) Mr Gaetjens asked how much his gas would be supplied for and Mr Boyle told him \$1 per litre
 - (b) Mr Gaetjens counted the following calculation:⁸

“Doing the calculations on 1280 mega joules[”]...he calculated it out and he said, “So that works out at approximately \$50 at a dollar a litre it’d be using in gas.” He then said, “You need to take into consideration the cost of the ashes container”, which was I think \$15; “electricity” – I think he allowed \$8; and he also said that, “Maintenance, you need to allow about \$12 per cremation.” So it came up to I think it was \$85 or thereabouts. It seemed to make sense, it was fine. I asked him to send it in writing, and he said, “Sure, I’ll get that to you.”
- [28] Mr Boyle says he asked for that to be confirmed by email. He relied on an email sent on 8 November 2011 by Mr Gaetjens. That email comprised an overall report on the progress of the HD60. The only text relevant to the above alleged discussion was as follows:⁹
- During our conversation, you also asked for information on the gas supply and other information necessary for you to be able to have hour contractors make ready the applicable services.
- For the Gas
- The connection capacity required is 2500Mj/hr (net)
- Our estimate usage is 1280Mj per cremation
- [Underlining in original]
- [29] There is nothing in this email about the calculation of \$85 per cremation nor about Mr Boyle’s alternative reason for querying gas usage. There was no evidence that Mr

⁷ TS1-32.5 to .10.

⁸ TS1-34.8 to .15.

⁹ Exhibit 8.

Boyle followed up this shortcoming in the confirmation sought. However, Mr Boyle's diary note of 8 November 2011 confirms the figures he described.¹⁰

- [30] Mr Gaetjens' email also attached a Gantt chart. It is evident, from the diary note and the email, that Mr Gaetjens also told Mr Boyle that the work was on schedule to meet the delivery date. The parties seems to have acted on the basis that that date was mid-December 2011, which seems generally correct pursuant to the Contract. Mr North seemed to admit that this was the first program prepared for the HD60 construction. It was the first he was aware of in any event.¹¹
- [31] Mr Boyle says he kept chasing Mr Gaetjens about a delivery date and Mr Gaetjens kept putting it off. Ultimately, the cremator arrived on about 20 February 2012, about seven weeks late based on the represented delivery date and some nine weeks based on the Contract. It was accompanied by a Major Furnace technician called Mr Dumburs whose job was to install and commission the cremator. Mr Dumburs was not called as a witness.
- [32] Mr Boyle gave evidence about the installation and commissioning process. He said that the cremator had defective internal bricks and there were no burners attached. He also said that the machine had not been tested. That was disputed by Mr North and Mr Nguyen. The burners eventually arrived on site and the internal bricks appear to have been fixed. The cremator was then installed and run for the curing period. It then carried out some cremations. Mr Boyle's evidence was a little unclear but it appeared to be that the machine took two hours to heat up and two hours and 20 minutes for the cremations, despite the bodies being small. It took 20 minutes to reheat between cremations. That remained the situation during installation and commissioning.
- [33] Mr Boyle said that Mr Dumburs accepted that the machine was taking too long to heat up. Mr Dumburs was not called to give evidence, however, his Installation Report (which seems to be incomplete) was tendered without objection. Mr Nguyen then travelled to site at Mr Dumburs' request after Mr Dumburs had been on site for about a week. Mr Nguyen was an engineer with Major Furnace who did electrical design work. Mr Boyle said Mr Nguyen also accepted that the cremator was underperforming. Mr Boyle said Mr Nyugen told him that the cremator was struggling to get the afterburner to the full temperature to be able to make the main burner come on. He said that until the after burner chamber gets the required set limit, the main chamber will never start. He said that this was happening because the burners were too small and he was going to try to increase the burn rate.¹²
- [34] To understand this evidence one needs to understand that the cremator is designed with two chambers. The first, main chamber, burns the body. The second chamber burns the smoke and emissions from the first chamber so that no smoke is emitted. All witnesses were agreed that smoke from a cremator was unacceptable for any number of reasons, but including sensitivity about what is being burnt. It is therefore

¹⁰ Exhibit 9

¹¹ TS1-110.20.

¹² TS1-42.23 to .26.

understandable that the second chamber must be hot enough to burn off any smoke or emissions before the primary chamber will light.

- [35] The Installation Report confirms the thrust of Mr Boyle's evidence, though it ends rather suddenly on 7 March 2012.
- [36] Mr Boyle said that the machine never got any better. It took two hours to heat up and two hours to perform a cremation initially but got worse over time. The problem he identified was of the kind identified by Mr Nguyen (on Mr Boyle's account). He said he was advised by Mr Dumburs to manipulate the temperature probe (remove it) to make the cremator's burners run hotter and thereby heat the chambers more effectively.¹³ He said this worked but required constant attendance and was only effective to lessen the heat up time from three hours back to the original two hours. He says he spoke consistently with Mr Dumburs rather than Mr North, Mr Nguyen or Mr Gaetjens. He said he spoke to Mr Dumburs because when he had complained to the other Major Furnace representatives about the heat up time, they had fobbed him off.¹⁴ Mr Boyle said he also complained about some smoke and smell as well. He thought it was because of the cracks in the brick lining. These problems did not emerge until later.
- [37] Mr Boyle paid all but the last instalment of some \$20,000 due. By about May 2011, the parties were in dispute. Major Furnace has demanded the last instalment. It is evident that Mr Boyle must have made a complaint about the performance of the cremator which came to Mr North's attention by then because on 10 May 2012, Mr Tropea (the general manager of Major Furnace) wrote to Mr Boyle in the following terms:¹⁵

Dear Jeff

Major has completed a detailed review of the HD60 cremator and is confident that it can reduce the fuel consumption and reduce the heat up time. The work will require a Major commissioning engineer to attend your site.

Note, the cremator will be at its more efficient performing up to 5 cremations per day using the auto start feature. Any gas consumption figures quoted are based on long term averages at maximum throughputs.

Prior to attending site Major will require the following:

1. Immediate payment of Major invoice no. 16332 valued at \$20,931.90 incl. GST dated 29/3/12.
2. Immediate payment of Major invoice 16459 dated 7/5/12 valued at \$3,641.00 (attached) for additional unplanned time spent onsite for commissioning of the HD60 unit due to the site not being ready as specified in Major's letter of offer dated 21/9/2011 reference No. E104040 Rev. B.
3. Confirmation that the gas storage facilities on site will be the same as those intended for long term use.

¹³ TS1-43.

¹⁴ TS1-63.11.

¹⁵ Exhibit 10.

4. An installed gas meter at the LPG supply line to the cremator to monitor gas consumption.
5. Supply a copy of your EPA licence conditions.
6. A minimum of six (6) cadavers to be made available in a three day period (minimum 2 per day).

To proceed with the work Major will require a purchase order from Whitsunday for the provision of a commissioning engineer. The cost of attending site will be charged at Major's standard rates attached. It is anticipated that the work could be completed in three days plus travel time.

We look forward to immediate payment of all outstanding invoices and discussion regarding items 3, 4, 5 and 4.

Major reserves its rights.

[Underlining added]

- [38] Mr Boyle says he called Mr Tropea and told him he wanted his money back because the cremator was not working the way it had been represented. Mr Tropea refused.
- [39] That account is consistent with Mr Tropea's follow up email.¹⁶ The tenor of that response is that the throughput is significantly less than capacity and therefore the cremator cannot obtain optimum fuel efficiency. Mr Tropea required payment of all amounts owing. Mr Tropea was not called as a witness.
- [40] Mr Boyle sought mediation in the Victorian Small Business Commission. His application was admitted. The plaintiffs relied on the last part of the application where Mr Boyle requested that Major Furnace take back their cremator, refund all monies paid and compensate for losses incurred until a new cremator can be installed. This was relied upon as comprising notice of termination of the Contract. There was no direct evidence the document was provided to Major Furnace, though it is reasonable to infer it was and I do so.¹⁷
- [41] Thereafter, Mr Boyle ordered the Therm Tec machine he had previously considered. It was installed in December 2012 and the Major Furnace cremator was put outside under tarpaulins. The plaintiff used the HD60 until it the Therm Tec machine was installed. On 10 December 2012, Mr Boyle wrote again to Major Furnace complaining about defects in operation of the HD60, however, he did not tell Major Furnace he was removing the machine.¹⁸
- [42] Mr Boyle gave evidence of his gas usage, referring to very high figures which he inferred from invoices for gas supply¹⁹ and number of cremations.²⁰ He also said it was necessary for staff to travel to and from Proserpine and to be present while the HD60 was operating so that the cremator could be managed in the manner set out in paragraph [36] above.

¹⁶ Exhibit 11.

¹⁷ Exhibit 12.

¹⁸ Exhibit 14.

¹⁹ Exhibit 16.

²⁰ Exhibit 15.

[43] He also gave evidence that cremations cost about \$2,000 each without use of a local cremator. This was apparently because of the costs involved in transporting bodies to Mackay or Townsville for cremation. There were no cremation facilities in the Whitsunday/Proserpine area.

THE PARTIES' CASES AT TRIAL

The plaintiff's case

[44] The plaintiff opened the case on the basis that Major Furnace made the following material representations in the First, Second and Fourth conversations²¹ (the **material representations**):

- (a) The cremator would be suitable for a low volume crematorium performing between 85 and 90 cremations per year (the **suitability representation**);
- (b) The cost of a cremation would be about \$85 (the **\$85 representation**);
- (c) There would be a modem supplied so that faults could be diagnosed and fixed remotely from Major Furnace's premises (the **modem representation**); and
- (d) The cremator would be delivered within 13 weeks (the **delivery representation**).

[45] This articulation of the relevant representations differs a little from the way in which the case was pleaded:²²

- (a) First, it abandons as material representations a number of other statements pleaded in the statement of claim as representations; and
- (b) Second, it slightly reformulates the way the representations were made in the statement of claim.

[46] However, Mr Wiley for the defendant did not take issue with the way the representations were opened and it seemed to me that it was an appropriate and effective narrowing of the issues.

[47] The first three representations were said to have been made in the all three key conversations. The 13 weeks representation was said only to have been made in the fourth conversation.

[48] The plaintiff pleaded that in reliance on each of these representations it entered into the Contract and paid all but the last instalment of the purchase price.

[49] The plaintiff pleaded that:

- (a) Contrary to the suitability representation, the HD60 was not suitable for 85 to 90 cremations per year because it was designed to perform five cremations per day;

²¹ There were others pleaded, but the plaintiffs confined their case to the material representations at trial: see TS1-2 to 3. These were the only representations said to be misleading in paragraph 15 of the Statement of Claim.

²² See paragraphs 3, 3A and 4 of the Second Amended Statement of Claim.

- (b) Contrary to the \$85 representation, the HD60 costs significantly more than \$85 to do a cremation and in fact the cost exceeded \$400;
- (c) Contrary to the modem representation, no modem was supplied; and
- (d) Contrary to the delivery representation, the HD60 was “not delivered, installed and commissioned at the Premises within thirteen (13) weeks of payment of the Deposit and, in fact, it took more than twenty-two (22) weeks for commissioning”²³.

[50] The last allegation is put in a form which assumes a representation in the form of the terms for delivery under the Contract. That was neither pleaded nor proved. The plaintiff’s case must be that the HD60 was not delivered within 13 weeks of payment of the Deposit properly to falsify the delivery representation. I will assume that to be the case advanced. Not much turned on the difference.

[51] The plaintiff then pleads that, but for the representations, it would not have entered into the Contract but instead would have purchased the Therm Tec machine. The plaintiff pleads that the material representations were made without reasonable grounds and that the defendant thereby engaged in misleading or deceptive conduct in breach of ss. 18 and 29 *Australian Consumer Law (ACL)*.

[52] The plaintiff pleads that Mr Boyle called on Mr Tropea to retake possession of the HD60, repay amounts paid under the Contract and compensate for loss and damage and that Mr Tropea had refused to do so.

[53] The plaintiff pleads loss and damage from reliance on the misleading conduct as follows;

- (a) Increased cost of cremations for the delay in delivery of \$16,000 based on the actual cost of cremations at \$2,000 per week for eight weeks;
- (b) Costs of installation of the HD60 thrown away of some \$10,000;
- (c) Extra gas used while using the HD60 in the amount of \$24,818.91.

[54] That last item is particularised using total gas used over the total number of cremations in that period to December 2012, less \$85 per cremation as allegedly represented.

[55] The plaintiff also sought rescission of the Contract and repayment of all sums paid.

[56] The plaintiff also pleaded common law negligent misrepresentation but abandoned that case at trial.

The defendant’s case

[57] As to the conversations alleged, the defendant denied that the First Conversation occurred, but admitted the Second Conversation (though said it occurred on 8 September not 1 September), does not admit the Third Conversation or the Fourth Conversation, but admits Mr North and Mr Boyle had a conversation on 19 September 2011.

²³ Paragraph 15(g) of the Second Amended Statement of Claim.

- [58] The thrust of the defence in relation to the material representations was as follows.
- [59] As to the suitability representation:
- (a) Mr Gleeson said in the Second Conversation that the HD60 was more suitable than the refurbished HD90 Mr Boyle was using; and
 - (b) Mr Gleeson did not otherwise make the suitability representation because the HD60 was not designed specifically for 80 to 90 cremations a year, though it was capable of doing so.
- [60] As to the \$85 representation:
- (a) The defendant denies that any such representation was ever made;
 - (b) Alleges it could not have been made because such an estimate required knowledge of gas prices and cremations per eight hour day (the **variable information**) and Mr Gleeson did not have that information; and
 - (c) Alleges Mr Boyle knew or should have known that fact.
- [61] The defendant denies the modem representation was ever made, and says if the modem was mentioned, it was as an additional item.
- [62] The defendant does not plead directly to the delivery representation but admits the contractual term.
- [63] The defendant admits delivery was after the time specified in the Contract but relies on a clause in the General Conditions attached to the Contract which provided for an extension where delay arises from events outside the defendant's control. The defendant pleaded that the delay resulted from incorrect specification information provided by the defendant's gas burner supplier in Italy, which delayed supply from 30 January to 17 February 2012. It also alleges that Mr Boyle breached its contractual obligation to provide access for installation and commissioning by refusing continued access after 8 March 2012. The defendant does not otherwise grapple with the falsity of the delivery representation.
- [64] As to the alleged falsity of the other material representations, the defendant pleaded:
- (a) The HD60 was suitable to perform 85 to 90 cremations a year because it could perform up to five per day;
 - (b) The modem representation, if made, was inconsistent with the Contract; and
 - (c) The falsity of the \$85 representation was not admitted and the plaintiff's cost per cremation was not known.
- [65] The defendant denies that the plaintiff relied on the representations (if made) in buying the HD60 and not buying the Therm Tec because of the better delivery time for the HD60.
- [66] The defendant alleged reasonable grounds, being a reasonable and genuine belief that delivery could occur in 13 weeks and that the HD60 was suitable because the plaintiff's intended use was within its design capabilities.

- [67] No reasonable grounds were pleaded for the \$85 representation. Rather it was alleged that any reliance was unreasonable because Mr Boyle knew that the cost per cremation depended on the variable information. Further, the defendant alleged that any representation that the HD60 was suitable should mean capable, not commercially viable.
- [68] Finally the defendant relied on an exclusion clause in the Contract as to liability for representations under the ACL and loss flowing from them. No submissions were made in support of that allegation.
- [69] As to the remaining issues the defendant:
- (a) Denied that Mr Boyle demanded a refund from Mr Tropea;
 - (b) Did not admit the loss claimed;
 - (c) Alleged affirmation of the Contract by the plaintiff continuing to use the HD60 after the purported rescission.
- [70] The defendant counterclaimed for the \$20,931.90 still owing under the Contract.

THE ISSUES

- [71] The following issues arise:
- (a) Where the material representations made?
 - (b) To the extent made, were they misleading or deceptive and in particular were they false and/or were there reasonable grounds for their making?
 - (c) Did Boyle rely on the representations in entering into the Contract rather than acquiring the Therm Tec machine?
 - (d) If so, what is the correct remedy?

THE WITNESSES

- [72] It is convenient to refer to the witnesses.
- [73] I have in the Background section of these reasons largely set out Mr Boyle's evidence in chief. I developed the impression that some of his evidence might have been reconstructed from his notes rather than an actual recollection. Given the time which has passed, this might be understandable. However, his account was generally consistent with the contemporaneous records and consistent with how a transaction of this type would likely progress. I thought he was trying his best to give an accurate account. He was efficiently cross examined by Mr Wylie for the defendant. In cross examination he tended to be combative and to argue his case somewhat from the witness box. However, this was in part due to his inexperience as a witness and I thought he endeavored properly to respond when corrected. He naturally had a predisposition to recalling events in a favourable light, but subject to that, I thought him a generally reliable witness, though there were some aspects of his evidence I have cause to question. Whether his evidence is sufficient to make out the plaintiff's claim is another issue.

- [74] The defendant called Mr North, Mr Nguyen and Mr Gleeson. Of these three, I found Mr Gleeson to be the most reliable. He appeared to have no predisposition to either side and did his best to give evidence despite seemingly not having had the opportunity to review the documents.
- [75] I had more reservations about Mr North and Mr Nguyen.
- [76] Mr North was evidently very proud of the history of the company which he leads, as evidenced by his detailed account of the family history starting in the early 1900s. That enthusiasm for his company, however, coloured his ability fairly to accept the prospect that it might have erred in its dealings with Boyle. That tendency was reflected for example, in his evidence about the program for construction of the HD60, which was very optimistic. Similarly, I found his evidence about how the cost per cremation could have been estimated for the HD60 to have been uncooperative at the least.²⁴ That is particularly so given that the long term data for the cost of operating the HD90 was eventually referred to by Mr North but said by him to be relevant only to the HD90. This was directly inconsistent with Mr Gleeson's evidence on the point (see paragraph [85] below). I deal with this issue further below. Similarly, Mr North's evidence that he could not estimate 1280 megajoules required about 50 litres of liquefied petroleum gas (**LPG**) was in my view at best uncooperative. He said he could not estimate that figure without knowing the calorific value of the LPG. However, as noted in paragraphs [27] to [29] above, Mr Boyle gave evidence that Mr Gaetjens was capable of doing so. No contrary evidence was led nor any contrary suggestion made in cross examination. I accept that evidence.
- [77] Mr Nguyen, I accept, was trying to give honest evidence. However, I did not find him a reliable witness at all. It was plain that he was heavily invested in his professional and personal reputation and that of his employer. He was unable in my view to reliably recall what did happen as opposed to what he thought should or would have happened if everything had been done properly. He was active in arguing the case for his employer and himself from the witness box even when given at least two explanations of the importance of giving responsive evidence based on actual recollection. His evidence as to his lack of interest in Mr Dumburs' Installation Report (which recorded problems with the cremator he says he was not told about) and his evidence that he would not necessarily have been involved in the review of the HD60 referred to in the May 2012 report was not plausible. While respecting his enthusiasm for the standards of his profession, I do not accept him as a reliable witness of fact.
- [78] That is not to say that I reject the whole of the evidence of Mr North and Mr Nguyen. I should also make clear that I do not consider they were deliberately untruthful.
- [79] Having made those general observations, I intend to consider the evidence while working through the issues.

ISSUE 1: WERE THE MATERIAL REPRESENTATIONS MADE?

- [80] I find that the four conversations occurred and they occurred on or about the dates identified by Mr Boyle. They are consistent with his diary notes, and the accuracy of

²⁴

TS1-93.34 to 95.16.

those notes (so far as they went) was not effectively challenged. Further, the pattern and timing of conversations as recorded by Mr Boyle were consistent with the way such a transaction would rationally develop and with the dates of the Major Furnace and Therm Tec quotes. Mr Gleeson, not surprisingly, could not remember individual conversations. Mr North said he had two conversations on 15 and 19 September 2011, though the former was not pleaded.

The defendant's evidence on the material representations

- [81] As to what was said in the conversations, it is helpful first to summarise Mr Gleeson's evidence.
- [82] Mr Gleeson recalled that at the relevant time, Major Furnace was in fact developing the HD60 and that it was designed for the funeral director market. He said the machine was intended for use up to five cremations per day.
- [83] He recalled at least a couple of telephone calls with Mr Boyle. He recalled Mr Boyle saying he performed about 100 cremations a year. He said he believed that the HD60 was suitable for that usage in the sense of being more suitable than the HD90 which was twice as expensive (about \$350,000 it seems). This made it harder for the smaller operator to recover the cost of the cremator over a reasonable time.
- [84] He recalled that the modem was offered as an extra and its purpose but did not recall discussing it with Mr Boyle at all. He said if he'd been asked to install a modem he would have expressly noted that in the quotation.
- [85] He did not recall giving Mr Boyle an indication as to costs per cremation but said it is possible he did. He said, if asked, he would have first inquired as to the kind of gas used (natural gas is cheaper than LPG) to determine gas cost. He then said this:²⁵

...A lot of the information we ... had back then was from our existing clients. Based on 1000 cremations per year, ... had an Excel form that we would fill out, which would have the cost per cremation, and that would include things such as gas, electricity, servicing costs, spare parts, that sort of thing.

...And that would be averaged – then we would calculate that out, and that would be averaged over 1000 cremations per year over a 10-year period.

And Major had this data on-hand? For a HD90.

Yes, and is that the data that you would have used? Yeah, that's what I would have based it on, yes.

And what figure would you have given? Do you remember or is it too long ago? Around about eighty to ninety dollars.

And did it concern you ... that figure being based on HD90 data, that you were giving that for a HD60? No, because, in my view, the HD60 is smaller, so it should take less time to heat up and – but, obviously, it will take longer for a cremation.

Yes? But for the actual – once the refractory is – is warm, then you use less gas, and the body sort of helps become its own fuel. So I'm very comfortable with that figure.

- [86] He did not recall discussing the \$85 figure with Mr North but said it was a standard figure that would be used and that if he had mentioned a figure, that is the one which he would have used and that was a figure that Major Furnace would have used.
- [87] Mr Gleeson could accurately recall this information and explain his reasoning in the witness box despite the passage of time and despite no longer working for Major Furnace. That is consistent with it being generally known in the Company.
- [88] Mr Gleeson also said that he recalled being aware that Mr Boyle was using LPG and that Mr Boyle said cremations cost at present about \$1,200 each.
- [89] Mr Gleeson also accepted in cross examination the following:
- (a) That he knew in the lead up to the final conversation, that \$180,000 was too expensive for Mr Boyle;
 - (b) That in the last conversation involving Mr North (which he could not specifically recall but accepted was possible), the key issue was price as compared to the Therm Tec product. However, he thought the final discussion on price involved just Mr Boyle and Mr North; and
 - (c) He did not recall delivery time as an issue.
- [90] Mr North is the other person who dealt with the conversations. As noted above, he thought there were two conversations, one on 15 September 2011 and one on about 19 September 2011. Not much turns on whether there was one or two conversations. It is the substance of what was said which is material. However, as I have said, I accept Mr Boyle's version in that regard.
- [91] Mr North said that in the conversation he recalls occurring on 15 September:
- (a) Mr Boyle told him that the price for the HD60 was too high compared to the Therm Tec machine; and
 - (b) Mr North did not discuss cost per cremation.
- [92] He said in relation to the 19 September 2011 conversation:
- (a) He could not recall if Mr Gleeson was involved;
 - (b) He told Mr Boyle of the lowered price and that he would send a quotation;
 - (c) He said that the HD60 was suitable for up to five cremations a day so was more suitable for lower volumes, and that he had been told Boyle needed to perform about 100 cremations per year; and
 - (d) There was discussion of the modem and Mr North said that was an option but not one Mr Boyle said he wanted.
- [93] He also gave evidence that a person could not estimate cost per cremation at \$85 without a lot of information. This was followed by the unsatisfactory evidence referred to in paragraphs [76] and [85] above. As noted there, Mr Gleeson was able to do a rough estimate of the per cremation cost likely for the HD60 and that evidence was not further explored by the plaintiff. I find it difficult to accept that Mr North was

not aware of the possibility of using the HD90 data to make reasonable estimates of the likely performance of the HD60, particularly as the likely efficiency of the HD60 would surely have been analysed in the design phase. I accept Mr Gleeson's evidence that the estimate of the performance of the HD60 based on HD90 figures was generally known at Major Furnace. I find that it was possible to estimate the likely performance of the HD60 at about \$85 per cremation (at least over the long term and for LPG at about \$1 per litre) as Mr Gaetjens and Mr Gleeson did. I find that this was known to Mr North, even if he harboured reservations as to the reliability of such estimates.

The First Conversation

[94] I accept Mr Boyle's account of the First Conversation as set out in paragraphs [9] and [10]. I make the following points about this finding.

[95] **First**, as to the suitability of the proposed HD60, it is generally consistent with Mr Gleeson's evidence overall and the subsequent events.

[96] **Second**, as to the \$85 representation, it seems highly likely given Mr Gleeson's evidence and the evidence relating to the conversation with Mr Gaetjens that such a representation was made. If it was not made in this conversation it was made in the next. I note the following:

- (a) The version of the \$85 representation given by Mr Boyle did not explain the basis of the estimate being long term figures for the HD90. However, while Mr Gleeson mentioned those matters in evidence, he did not suggest that he told Mr Boyle the source of the figures. I do not find that that was explained;
- (b) However, Mr Gleeson did articulate the \$85 figure as a comparison to the \$40 figure for the larger machine;
- (c) While Mr Boyle does not refer to the LPG/natural gas issue, it seems such a fundamental point that it is highly likely the matter came up in the First Conversation.

[97] **Third**, the statement about the modem did not extend to representing that the modem would be included in the sale price.

[98] **Fourth**, it is relevant that these representations were made in the context where it was communicated to Mr Boyle that the HD60 was a new design, as yet unbuilt.

The Second Conversation

[99] I accept Mr Boyle's account of the Second Conversation as set out in paragraphs [11] and [12]. The Second Conversation took place against the backdrop of, and consistent with, the First Conversation. The points made in respect of the First Conversation apply to the Second. It is further to be noted that Mr Boyle accepts that gas price was mentioned as a variable. It is likely this took place against the common understanding that Mr Boyle was to use LPG.

The Third Conversation

[100] I accept the Third Conversation occurred as Mr Boyle described it in paragraph [18].

The Fourth Conversation

- [101] It is disputed as to which of Mr Gleeson and Mr North took the lead for Major Furnace in the final conversation. Mr Gleeson thought it unlikely he would have done so as final negotiations about price were a matter for Mr North. It seems more probable to me that Mr North took the lead in the discussion in the Fourth Conversation, though in the end it probably makes little difference.
- [102] Mr Boyle's account of the Fourth Conversation is set out in paragraphs [20] and [21] above. The discussion of price is not disputed.
- [103] The discussion of \$85 per cremation, to the extent it is attributed to Mr North, is disputed by him. I have already dealt with the very unsatisfactory evidence that he gave relating to the question of estimating cost per cremation. The question arises as to whether this is because of his reluctance to accept Mr Gleeson's statement or because of his own wish to avoid admitting to making the statement himself. However, his evidence was so uncooperative and the \$85 figure seemingly so well known in the company, that I do not accept his evidence that he did not nominate it in his conversation with Mr Boyle. Further, he had good reason to do so. He was very keen to launch the HD60 and to secure this first order. He had to persuade Mr Boyle in circumstances where there was a viable, cheaper competitor with a proven product lurking. I accept Mr Boyle's evidence in this regard.
- [104] As to the 13 week delivery period, Mr North gave no direct evidence on the matter. He accepted quoting a delivery period but did not give evidence of any discussion of that delivery period in his conversation or conversations with Mr Boyle. Mr Gleeson did not recall delivery time being discussed. However, I accept Mr Boyle's evidence about this. As stated in the previous paragraph, Therm Tec was a serious competitor and the HD60 was more expensive. It is therefore understandable that an advantageous delivery period would be raised to persuade Mr Boyle to favour the HD60. It is also reflected in the Contract.

Conclusion on the material representations

- [105] I find that Major Furnace made each of the material representations articulated in paragraph [44] above except the modem representation.
- [106] As to the \$85 representation, Mr Wiley for the defendant submitted that I ought to find that the representation, if made, was that the cost per cremation at \$85 depended on the gas price. It can be accepted that that caveat was made in at least the Second Conversation. However, in my view that caveat is covered by the statement that the cost would be about \$85. I do not think that caveat made the broad representation uncertain or materially conditional because in my view the evidence strongly supported the inference that Mr Gleeson (and Mr Gaetjens) knew that Boyle used LPG and that LPG was more expensive than natural gas. Further, the confidence with which both gave their estimates showed a general awareness of LPG at about \$1 per litre. Mr Boyle estimated that figure per litre as a working price and no witness suggested to the contrary. Further, no one suggested that about \$1 was substantially less than the cost for LPG to Mr Boyle in 2011 and 2012.

- [107] Mr Wiley also submitted I ought to find that Mr Gleeson explained to Mr Boyle the source and basis of his estimate (being HD90 figures over thousands of cremations). However, Mr Gleeson did not say that he told Mr Boyle that and I accept Mr Boyle's evidence as to what was said. I think it probable that if it was said, it would have been the subject of more inquiries from Mr Boyle considering how sensitive he was to cost and the availability of the Therm Tec alternative at a lower price.
- [108] As to the modem representation, I do not accept it was made, even on Mr Boyle's own evidence. I accept that it was said to him that the modem would be advantageous, but I do not find it was ever said that the modem would be included in the price quoted. Further, I do not consider that was implied from the discussions. To the extent it might have been, the implication is excluded by the practical effect of the provision of the two quotations, neither of which referred to the modem at all, much less did they suggest the price of the modem was included.
- [109] It is convenient also to note that even if the modem representation was made, I do not consider Mr Boyle relied upon it. It was never mentioned nor complained about on the evidence before me until the application to the Small Business Commissioner in May 2011. Further, the additional cost of the modem was only \$2,000. I do not accept that it was sufficiently material to Mr Boyle to have affected his entry into the Contract. I will not deal further with the modem issue. Hereafter references to the material representations do not include the modem representation.

ISSUE 2: WERE THE MATERIAL REPRESENTATIONS MISLEADING OR DECEPTIVE?

Relevant principles

- [110] Each of the material representations as pleaded and proved were representations as to future matters. The plaintiff did not plead any implied representations of present fact arising out of the representations as to the future. It is well known that the mere fact that a prediction does not come true does not of itself make the misrepresentation misleading or deceptive. As the Court observed in *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 88:

The non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor's intention lacked any, or any adequate, foundation. Similarly, that a prediction proves inaccurate does not of itself establish that the maker of the prediction did not believe that it would eventuate or that the belief lacked any, or any adequate, foundation. ...

An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is a basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing.

- [111] The effect of that judgment was modified by s. 51A *Trade Practices Act 1974* (Cth) now s. 4 ACL. That section relevantly provides:

4 Misleading representations with respect to future matters

- (1) If:

- (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
- (b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

- (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

- (a) a party to the proceeding; or
- (b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

- (3) To avoid doubt, subsection (2) does not:

- (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
- (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

- (4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

- (a) a misleading representation; or
- (b) a representation that is misleading in a material particular; or
- (c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

[112] The correct approach to that section in relation to the issue of evidential and legal onus of proof, has not been authoritatively determined. However, Miller has observed as follows:²⁶

Although the exact nature of the onus former TPA s 51A cast on the maker of a representation as to a future matter was not clear, an attempt has been made in ACL s 4 to clarify the position.

The Explanatory Memorandum states:

Section 4 ... places an evidentiary burden on a defendant who is alleged to have made a representation as to a future matter that is misleading. When compared to section 51A, the new provision seeks to clarify that ... the burden of proof under this section is evidentiary in nature and does not place a legal burden on defendants to prove that representations were not misleading ... The clarification of the burden as requiring only evidence of reasonable grounds to be adduced is to reverse the effect of some past court

²⁶

RV Miller, *Miller's Australian Competition and Consumer Law* (41st ed, 2019, Thomson Reuters) at [ACL.4.200].

decisions, such as *ACCC v IMB Group Pty Ltd*, that have interpreted section 51A ... as requiring a respondent to prove that he, she or it had reasonable grounds.

The position is as follows:

Unless the person making the representation as to a future matter adduces some evidence of reasonable grounds for making the representation the representation will be taken to be misleading: ss 4(1) and 4(2).

The person will not be taken to have reasonable grounds merely because such evidence is adduced: s 4(3)(a).

On the other hand, the person who adduces such evidence does not bear the onus of establishing that they had reasonable grounds for making the representations: s 4(3)(b).

Even if reasonable grounds are established, that does not mean that the conduct was not misleading: s 4(4).

It would appear that the consequence is that, if the maker of a representation as to a future matter adduces evidence of reasonable grounds and, without that person carrying the legal burden of proof that they had reasonable grounds, the court accepts that grounds were reasonable, then s 4(1) will not apply and the court will decide whether or not the representations were misleading according to general principles. If no evidence of reasonable grounds is adduced, or if the court decides that they were not reasonable, then s 4(1) applies and the alleged representation, if proven, is deemed to be misleading.

As to the interpretation of former TPA s 51A, see *Dib Group Pty Ltd v Ventouris Enterprises Pty Ltd* [2011] NSWCA 300; (2011) 284 ALR 601; *North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2010] FCAFC 60; (2010) 269 ALR 262; *North East Equity Pty Ltd v Proud Nominees Pty Ltd* [2012] FCAFC 1; (2012) 285 ALR 217; *ACCC v Universal sports Challenge Ltd* [2002] FCA 1276; *Fubilan Catering Services Ltd v Compass Group (Aust) Pty Ltd* [2007] FCA 1205; *Australian Naturalcare Products Pty Ltd v Pan Pharmaceuticals Ltd (in liq)* [2008] FCAFC 2; (2008) 165 FCR 230.

A respondent who disputes that the alleged representation was made is in a difficult position, as was noted in *Cummings v Lewis* [1993] FCA 149. In that case Sheppard & Neave JJ observed:

There are many cases ... where the principal protagonists are not dishonest or fraudulent. Each gives evidence to the best of his or her ability of conversations which took place before a transaction was entered into or other steps were taken. One party alleges inducement by misleading or deceptive conduct. The other party denies it because he or she said nothing of that kind was said. That evidence is given honestly and to the best of the witness' recollection. Yet so often a judge will find that party's evidence unreliable, but it will be rejected, not because it is dishonest but because it is mistaken. The question arises how, from a practical point of view, can a witness in that situation face up to what is to him or her a false position. Evidence needs to be given to show reasonable grounds for the making of a statement that the witness claims never to have made.

[113] I intend to adopt the approach articulated by Miller.

- [114] The plaintiff pleaded that the defendant did not have reasonable grounds for making the material representations. Whether that was strictly necessary or not,²⁷ by so pleading the plaintiff plainly flagged its intention to rely on s. 4 ACL.
- [115] The defendant has led evidence of reasonable grounds for the material representations. The question is, therefore, in the light of the evidence, whether the plaintiff has discharged its legal onus of establishing that the material representations were misleading. This will include an assessment of the reasonableness of the grounds advanced. However, the inquiry does not stop there. One must also consider other matters relevant to whether the representations were misleading or deceptive.
- [116] In determining that ultimate question regard must be had to whether the conduct was misleading or deceptive to Mr Boyle as a recipient of the conduct rather than from the perspective of a particular class of persons. It is necessary to consider the character of the particular conduct by Mr North and Mr Gleeson in relation to Mr Boyle, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.²⁸
- [117] Further, the proper approach to determining if conduct is misleading or deceptive in that context has an objective element. In *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 at [69], Keane JA²⁹ (as his Honour was then) observed that the proper approach involves an inquiry into what a reasonable person in the position of Mr Boyle, taking into account what he knew, would make of the behaviour of Messrs Gleeson and North. Whether conduct is misleading or deceptive is not determined simply by Mr Boyle establishing that he adopted an erroneous assumption. It remains necessary for him to establish that an erroneous assumption was reasonably adopted in the circumstances: see *Downey* at [72].

Was the suitability representation misleading?

- [118] The first issue to determine is whether the suitability representation turned out to be wrong. The statement of claim does not articulate why it was wrong except in one respect: it is alleged that the HD60 was designed for performing five cremations per day, that is 1,825 cremations per year.
- [119] It was not contentious that the HD60 was designed to perform *up to* five cremations per day. That was stated in the Contract and confirmed by the Major Furnace witnesses. It was also not contentious that the HD60 operated at maximum efficiency when used in that manner. However, neither matter necessarily falsifies the general proposition that the HD60 was suitable for 85 to 90 cremations a year, in the sense that the cremator could manage that level of operation.
- [120] Suitable is a word capable of a broad meaning. The Macquarie Dictionary (7th ed) defines it as “such as to suit, appropriate, fitting, becoming”. Its meaning in respect

²⁷ *Miller's Australian Competition and Consumer Law* at [ACL.4.200].

²⁸ *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592 at [36] to [37] (per Gleeson CJ, Hayne and Heydon JJ).

²⁹ Williams JA and Atkinson J agreeing.

of a piece of equipment like a cremator can take on many meanings. It is necessary to have regard to the context in which the word was used to identify the meaning reasonably communicated to Mr Boyle.

- [121] That context is identified by the evidence of Mr Boyle as to the First Conversation and Second Conversation relevant to the suitability of the cremator for Mr Boyle's intended usage, set out in paragraphs [9] to [12] above. That context shows that Mr Gleeson's statement was made in the context of his explaining that the HD60 was being designed by Major Furnace so as to be more suitable for private funeral directors than the larger HD90 and HD120. It also shows that Mr Gleeson expressly identified that it was suitable to perform up to the five cremations as day. In my view, this informs the meaning of "suitable" when used in those conversations. That is, the HD60 was designed to be more suitable for small funeral directors than larger machines Major Furnace had on offer.
- [122] Further, Mr Gleeson gave evidence that he believed the HD60 was more suitable because, though more expensive per cremation, the capital sum required to purchase the HD60 was much less than for the larger machines. This evidence, which I accept, is relevant to whether he had reasonable grounds for the suitability representation. However, it also has relevance to whether the statements he made in that regard were misleading. While there is no evidence that he expressly made this point, I think it would be implied in the context of the discussions he had with Mr Boyle about the HD90 and HD120 not being suitable and the HD60 being suitable and that a funeral director making inquiries about acquiring a machine would reasonably be expected to be aware that much larger machines were more expensive and not suitable for a smaller annual rate of cremations for that reason. That Mr Boyle was in fact sensitive to that issue is supported by the centrality of price in his negotiations with Major Furnace.
- [123] In effect, what the plaintiff submits is that, by "suitable", Mr Gleeson was communicating that the machine would be operate at a high level of efficiency compared to its maximum efficiency which occurred at five cremations a day over eight hours. I do not think the context of the discussion supports any such meaning or justifies any such assumption by Mr Boyle from the expression of the opinion that the HD60 would be suitable for the plaintiff.
- [124] Nothing which occurred in the subsequent conversations changed the context in which the suitability representation was first made. In the circumstances, I am not persuaded that the suitability representation was misleading or deceptive.

Was the \$85 representation misleading?

- [125] My finding was that the defendant represented that the cost of a cremation would be about \$85.
- [126] The plaintiff alleges by its statement of claim that this prediction was wrong because the cost per cremation was significantly greater than \$85 and in fact exceeded \$400. The \$400 figure was shown to comprise not just gas usage (estimated at \$252.35 per cremation), but also costs for Mr Boyle and later his employees to supervise the

operation of the machine for four hours each time there was a cremation, as explained in paragraph [42] above.

- [127] While it might be debated just how much it did actually cost to perform a cremation, the evidence supports the view that it was significantly more than \$85. The average gas usage per cremation proved by the plaintiff's documents established that to be so, without recourse to the additional amounts for supervision of the operation of the machine identified by the plaintiffs. The evidence as to actual gas usage and cost per cremation was not really challenged by Major Furnace.
- [128] Rather, Major Furnace focused on seeking to establish that the excessive use was the result of the fact that the HD60 was not operating at optimal capacity and that Boyle was using the wrong kind of LPG tanks for efficient operation.³⁰ The submission seemed to be implied that the reason the prediction proved wrong lay in Mr Boyle's conduct. There seem to me to be some real problems with this submission from a factual perspective.
- [129] **First**, a significant part of the additional cost seems to have arisen from the need for over two hours of heat up time for the cremator to be ready to perform a cremation, a period which increased over time. I do not accept that that the \$85 representation was conditioned to exclude the cost of this heat up time, nor that it could be assumed a person in Mr Boyle's position would have made any such assumption.
- [130] **Second**, the evidence as to why the HD60 was not operating effectively did not favour Major Furnace. Mr Dumburs' Installation Report is consistent with the view that the machine was not operating to design expectations when installed. Further, there was no reason why Mr Nguyen would have gone to Proserpine otherwise. It was not part of the usual process of commissioning that he attend and the Installation Report made clear he was asked to come to deal with commissioning problems. I found Mr Nguyen's evidence that he would not have left unless the machine was operating properly unpersuasive. It was an example of evidence from him as to what he thought should have happened rather than an accurate recollection of what did happen.
- [131] **Third**, the defendant suggested I should find that the HD60 was operating satisfactorily at that time on the basis that Mr Boyle did not make complaints about the operation of the cremator after commissioning ended on 7 March 2011. I do not make any such finding. It is inconsistent with the terms of the letter of 10 May 2012. That letter was sent by the managing director. It refers to a detailed review of the HD60 cremator. The comment that "[Major] is confident that it can reduce the fuel consumption and reduce the heat up time. The work will require a Major commissioning engineer to attend your site" is consistent with Major Furnace being aware of problems with fuel consumption and heat up time and accepting that the cremator should be operating better than it was. Mr North tried to justify the demand for payment for this work on the basis that it was necessary for optimisation to be undertaken for the machine to operate at maximum efficiency. Even if this was an appropriate step, I do not accept that it affected the inaccuracy of the representation. There was no mention of optimization in the Contract or any conversation with

³⁰

Defendant's first written submission at paragraph 14.

Mr Boyle. It seems to me that the idea that optimisation as a justification for inadequate performance was an ex post facto idea of Major Furnace. I reject the lack of “optimisation” (to be carried out at Boyle’s expense and after commissioning) as sustaining the conclusion that the poor performance of the cremator was Mr Boyle’s fault. Further, Major Furnace’s dismissive response to Mr Boyle’s complaints in the 10 May 2011 letter tends to support Mr Boyle’s evidence that he started to contact Mr Dumburs because he was brushed off by Major Furnace management.³¹

- [132] **Fourth**, there was a suggestion in the defence that the problems with the efficiency of the HD60 were the result of inadequate gas availability and insufficient bodies for commissioning. I do not accept that. Mr Nguyen was not there for most of the commissioning and, as I have said, I do not accept his account of the commissioning process. Further, the Installation Report does not sustain that conclusion. While it refers to some gas supply issues, it does not indicate that they were the cause of the problems. Finally, the 10 May 2011 letter does not suggest that gas supply or body availability was a factor in the performance of the HD60 or causative of the need for “optimisation”. I think it highly likely that if there was any real concern about Boyle’s assistance in the commissioning phase, it would have been raised in this letter.
- [133] The more probable inference is that the HD60 was not performing to Major Furnace’s expectations (nor Mr Boyle’s of course) and that that was the result of design or installation defects, or both. The HD60 was, after all, the first of its kind built and difficulties were always possible.
- [134] In my view, the more probable inference is that the \$85 per cremation representation turned out not to be correct and the fault for that cannot be laid at the plaintiff’s door. I find it was, to a substantial degree, the result of the cremator’s failure to perform as expected by Major Furnace.
- [135] Another factor which materially contributed to Mr Boyle’s dissatisfaction with the performance of the cremator measured against the \$85 representation seems to me to have been the cost involved in heating up the cremator when individual cremations occurred (rather than successive cremations). In the former case the cremator cannot make use of ambient heat generated by previous cremations to reduce the overall average time for a cremation to occur. I will return to this matter.
- [136] If this case was a claim for breach of implied warranties of fitness for purpose or merchantable quality, or analogous guarantees under ss 54-55 ACL, the above matters might have provided a basis for contending that the HD60 did not comply with the express or implied terms of the Contract. However, of course, many other matters would have had to be considered before such a claim was brought. It may also be that they were considered and the conclusion reached that such claims were not strong. However that may be, no such claim was brought. Rather the claim is based on breaches of s. 18 ACL and similar more specific provisions. (No submission was made that the more specific provisions gave rise to additional issues.)
- [137] The first question is whether the defendant had reasonable grounds for its prediction.

³¹ TS1-63.11 to .14.

- [138] Mr Gleeson explained the basis for his prediction as set out in paragraphs [85] to [86] above. While there were some differences in the way the machines were designed, I consider that the HD90 figures were rationally probative of what was to be expected from the HD60 if adjusted to take account of the different operational specifications (as Mr Gleeson said they were). Further, it is evident that the estimate by Mr Gleeson took into account the LPG price. Finally, Mr Gleeson did say that the price was *about* \$85, which allows for some flexibility in the eventual cost. That caveat takes on particular significance in circumstances where Mr Boyle knew that the HD60 was a new product. The representation was plainly communicated in the overall circumstances as an estimate of the expected performance of a new design. His evidence sustains the conclusion that the \$85 representation was made bona fide and on rational grounds.
- [139] That conclusion is reinforced, ironically, by Mr Boyle's evidence as to what was said by Mr Gaetjens. It is evident from that evidence that Mr Gaetjens was able to demonstrate how the \$85 figure was determined by reference to specific heads of cost. It is reasonable to infer that that calculation also lay behind Mr Gleeson's figure, not least because he explained that the figure was well known in the company and because the similarity in the amount referred to by both men could not be a co-incidence.
- [140] The defendant did not plead any of the facts identified in the evidence from Mr Gleeson and Mr Gaetjens as reasonable grounds for the \$85 representation, though it did generally plead that there were reasonable grounds for any such representation if made: see paragraph 10(b)(iv) of the defence. However, that allegation was left at large without challenge and the plaintiff took no objection to that evidence being led. Mr Gleeson's evidence might have come as some surprise to the plaintiff. However, the same cannot be said for the evidence about Mr Gaetjen's advice which was led by the plaintiff.
- [141] I am satisfied that the defendant's representation was made bona fide and on rational grounds. However, whether these matters provided reasonable grounds for the representation is another matter.
- [142] It was clear in my view from Mr Gleeson's evidence that the \$85 figure was derived from a long term average cost per cremation for the HD90. Further, the increase on the HD90 figures adopted by Mr Gleeson appeared to be concerned primarily with the increased time to cremate a body arising from the lesser power of the HD60.³²
- [143] There is other evidence relevant to this. Mr Tropea, in his email of 15 May 2012, told Mr Boyle that "*Unfortunately, your current throughput is significantly less than the HD60 cremator capacity and as such optimum fuel efficiency*".³³ Similarly, Mr North confirmed that the 1280 megajoules had been verified as a long term average for another HD60. I also think it was open to conclude that heat up was taken into account based on Mr North's evidence. Indeed, his evidence was that the 1280 megajoules estimate was confirmed as the long term average of the HD60 machines which were in operation. Although I have concerns about Mr North's evidence, I do accept this

³² TS2-37.13 to .14.

³³ Exhibit 11.

part of his evidence. Indeed, the letter from Mr Tropea gives good grounds to think that the \$85 per cremation figure was calculated on the assumption that the HD60 operated at maximum capacity as identified in the Contract: i.e. five cremations conducted over an eight hour day. I see no reason not to assume that this statement was correct. It is obvious that usage at that rate would significantly reduce the contribution of heat up time to the costs per cremation.

[144] Mr Byrne, for the plaintiff, submitted that the \$85 estimate did not take account of heat up time and was therefore misleading, particularly when directed to a funeral director who notified usage of about 85 to 90 cremations a year and was likely not to be using the HD60 at capacity.

[145] I do not accept that the estimate did not take account of heat up time. For the reasons I have given, I accept that heat up time was factored into estimate on the basis of an estimated long term average cost per cremation which contemplated higher usage than notified by Mr Boyle to Mr Gleeson. However, the \$85 representation was not conditioned on it being an estimate calculated in that manner. Rather it was put forward as an estimate per cremation to Mr Boyle without any conditions or caveats as to how heat up time was worked into the figure.

[146] The question comes down to this: did the failure to condition the representation in that way make it misleading or deceptive despite there being (as I have found) a rational basis for the calculation of the figure quoted.

[147] In *Downey* at [72] Keane JA observed:

In the first place, it should be made clear that the phrase "erroneous assumption" is not a term of art. As Deane and Fitzgerald JJ observed in *Taco Co of Australia Inc v Taco Bell Pty Ltd*, in a passage quoted with apparent approval by the High Court in *Campomar*, the fact is that "no conduct can mislead or deceive unless the representee labours under some erroneous assumption". The issue is, as the High Court explained in *Campomar*, whether the erroneous assumption is extreme and fanciful or is of a kind that may be attributed to an ordinary or reasonable member of the class of person at whom the allegedly misleading and deceptive conduct is directed. It is therefore necessary to determine the true nature of the erroneous assumption held by the Downeys and then to consider whether or not the holding of this assumption was reasonable.

[148] I find that the erroneous assumption adopted by Mr Boyle was that the cost of a cremation using the HD60 would be approximately \$85 per cremation. I find he was aware of the possible impact of gas prices on that figure, and that the figure was approximate taking into account that the machine referred to was a new design. However, in my view he did not assume that the cost of cremations would be significantly different from the price quoted depending on whether he completed just one cremation a day or multiple successive cremations. The defendant's suggestion is that a reasonable funeral director in his position would have known that. I reject that submission: Mr Boyle was a funeral director, not an engineer. Further, to Major Furnace's knowledge, he had had one unsuccessful attempt at carrying out cremations and further, he was seeking a cremator to do 85 to 90 cremations a year. In that context, it was objectively reasonable for Mr Boyle adopt the assumption that \$85 per cremation was an estimate directly relevant to the kind of use he intended for the

cremator, (i.e. 85 to 90 cremations per year). I recognise that Mr Boyle did not say that these cremations would be spread out over the year, but that it the obvious inference. In my view, on the evidence that assumption can be seen to have been erroneous. The estimate of \$85 per cremation was not appropriate for use of the HD60 in the low levels notified by Mr Boyle.

- [149] The question then is whether there were reasonable grounds for the representation which resulted in the erroneous assumption that the estimate of \$85 per cremation was appropriate for the modest usage contemplated by Mr Boyle. In my opinion, there were not. The information drawn on by Mr Gleeson made it inherently improbable that the estimate would be appropriate for the plaintiff because full heat up time would be required for each cremation. An estimate based on long term averaging of heat up costs by reference to higher usage rates was not a reasonable basis for estimating the likely cost per cremation for the HD60 used as Mr Boyle intended.
- [150] Accordingly, I find that Major Furnace did not have reasonable grounds for the representation. In all the circumstances I have described, I find that the \$85 representation was misleading or deceptive or likely to mislead or deceive.

Was the delivery representation misleading?

- [151] That brings us to the last representation: the delivery representation. It is not in dispute that this prediction did not come true. I have found it was delivered seven weeks late (see paragraph [31] above). That does not appear to be in dispute.
- [152] The defendant contends, however, that it had reasonable grounds for that prediction. It relies on three pieces of evidence.
- [153] The first is the evidence of Mr North. He gave evidence as to how he calculated the 13 working weeks at the time. He said he allowed three weeks to fabricate the furnace casing, three weeks to fabricate the brick lining, two weeks to assemble the combustion system, a week to dry out, a week to do testing, a week to transport and two weeks on site.³⁴ He said that at the date of Contract the workshop design was complete.³⁵ He also explained that the HD60 was significantly different from the HD90 in its manner of operation.³⁶
- [154] Two other witnesses gave relevant evidence. Mr Gleeson gave evidence in cross examination that he thought the cremator could be constructed in three to four months, and three months if the work was prioritised. He thought far more complex furnaces had been constructed “very quickly”. Mr Nguyen also gave evidence that the work could have been done in that time, though his evidence was affected by his general unreliability, demonstrated in this case by his reference to the time taken to construct a similar furnace in 1990, at a time when it appears he was not working for Major Furnace.
- [155] In assessing this question, it must be kept in mind that the delivery representation differs from the contractual term. The Contract provided for the HD60 to be delivered

³⁴ TS1-96.40 to .45.

³⁵ TS1-97.26.

³⁶ TS1-97.4 to .13.

and commissioned within 13 weeks. That was not the representation made. I have found that the representation made was delivery within 13 weeks. The consequence of that is that Mr North's estimate had an additional two weeks to spare when assessed against the representation.

- [156] That is of significance. The HD60 was a new machine. It differed in some key respects from the HD90. It was reasonable to expect that there might be delays to the planned work schedule. Mr North said there was very little contingency in the schedule he described. In fact, I found his evidence on this point evasive and I do not accept that there was any contingency in the 13 weeks. However, compared to the delivery representation, there was two weeks to spare.
- [157] The plaintiff did not challenge the evidence of any of the witnesses on this point. That does not mean I must accept their evidence. However, I consider Mr Gleeson to have given impartial evidence and he was in a good position to judge the reasonableness of the time allowed for delivery. By 2011, he had worked at Major Furnace for some years. Further, he was an engineer involved in the work done; he did not work solely in sales. Further, the HD60, while different from the HD90 in some respects, was not a complex furnace for Major Furnace to construct and had been fully designed at the time the representation was made. Finally, given that there was two weeks extra time for compliance with the delivery representation, I do not think the lack of a contingency makes the representation unreasonable.
- [158] There is no doubt that the delivery period was a selling point for Major Furnace over its competitor, Therm Tec. It might even be thought that the representation was a little on the optimistic side for that reason. However, the plaintiff led no evidence of its own on the matter nor did it seriously challenge the defendant's evidence, especially that of Mr Gleeson. I am satisfied that the plaintiff had reasonable grounds to make the representation at the time it was made and further that the plaintiff has not made out that the delivery representation was misleading or deceptive.

Conclusion on the material representations

- [159] The plaintiff has made out the \$85 representation. However, it has failed to make out the suitability representation or delivery representation. The claim in respect of those latter representations must therefore be dismissed.

ISSUE 3: RELIANCE AND CAUSATION

- [160] Mr Boyle alleged that the plaintiff relied on the material representations when deciding to enter into the Contract in preference to the Therm Tec contract. With the exception of the modem representation (which if made, I do not accept was material to Mr Boyle for the reasons in paragraph [109] above), I agree.
- [161] However, only the \$85 representation was misleading or deceptive. That is the operative representation from the perspective of causation and loss.
- [162] The defendant submitted that only the price of the cremator was material in Mr Boyle's ultimate decision to buy the HD60 in preference to the Therm Tec machine. I reject that submission. Mr Boyle's evidence was that, following reiteration of the \$85 representation, along with the delivery representation and the

reduction in price, Major Furnace had convinced him. Thereafter he promptly executed the Contract. The effect of this evidence is that the representations made, taken with the price, convinced him to buy the HD60.³⁷

- [163] His evidence makes sense. Price was obviously a factor but as Mr Boyle logically said, it was not his only consideration because the price was still higher than the Therm Tec machine. Further, the \$85 representation was of its nature itself likely to persuade a buyer and was made plainly for that purpose.
- [164] It is a related but distinct point to consider whether the loss flowing from entry into the Contract was suffered because of the \$85 representation. I find that it was. It was undoubtedly correct that the \$85 representation was a material cause of entry into the Contract. Mr Boyle said so and I have accepted his evidence. I do not think that the fact that there are other contributing causes is sufficient prevent the conclusion that entry into the Contract was because of the misleading conduct. All that is required is that the \$85 representation was a material cause of that event. In my view, it plainly was. That is particularly so given that while the price had been lowered, it remained more expensive than the Therm Tec product. It is understandable that Mr Boyle would have placed weight on what it would cost to operate the cremator in ultimately making his decision. The fact that he had no other operating costs to compare the \$85 representation against is not to the point. Cost of operation was a factor which any business person would work into an assessment of whether to buy a machine of this kind, whether there were comparators or not.
- [165] I also find that, but for entry into the Contract, Mr Boyle would have bought the Therm Tec machine. It was accepted by the defendant that in the end it was down to whether to buy their machine or the Therm Tec machine. Further, in fact Mr Boyle did buy the Therm Tec machine to replace the HD60. That is good evidence of what he would have done if not persuaded to buy the HD60 instead in the first instance.

ISSUE 4: REMEDY

Claim for damages

- [166] The damages claimed by the plaintiff were articulated by reference to the position the plaintiff would have been in if the predictions made in the material representations turned out to be correct: i.e. the HD60 was delivered within 13 weeks and cost about \$85 per cremation to operate. This is an expectation measure. Such a measure will not be ordinarily be recoverable for breach under s. 236 ACL unless it is pleaded and proved that some alternative contract conferring those benefits would have been entered into but for the misleading conduct.³⁸ Such an alternative contract was pleaded and proved: the Therm Tec contract. However, the loss and damage claimed was not articulated by reference to that alternative contract. I raised this matter with counsel for the plaintiff a number of times at trial. However, the case was persisted

³⁷ TS1-29.15; TS1-55.25 to .32.

³⁸ See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 13; for the measure in tort, see *State of South Australia v Johnson* (1982) 42 ALR 161 at 169 to 170; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, per Gummow J at [110].

with in address without any explanation as to how that measure could be claimed. I dismiss that part of the claim.

[167] It is worth noting in addition that Mr Boyle said that cremations were costing up to \$2,000 per cremation (or perhaps \$2,000 per week) without the availability of any local cremator. That means that, unless the Therm Tec case was pleaded and proved, the plaintiff might have been better off with the HD60, for all its faults, than without it. However, I make no specific finding about this counterfactual proposition because the evidence of the precise basis of that figure was incomplete and ambiguous and never properly examined at trial.

Claim for rescission

[168] Boyle also sought “Rescission of the Contract” and restitution of the sums paid to purchase the HD60 in the amount of \$112,271.10.

Relevant principles

[169] This relief was apparently sought in reliance on s. 237(1) or perhaps s. 243(a) and (d) ACL. Section 237(1) provides:

- (1) A court may:
- (a) on application of a person (the *injured person*) who has suffered, or is likely to suffer, loss or because of the conduct of another person that:
 - (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
 - (ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term; or
 - (b) on the application of the regulator made on behalf of one or more such injured persons;
- make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

Note 1: For applications for an order or orders under this subsection, see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

[170] Section 243(a) and (d) provide:

243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a person (the *injured person*) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

- ...
- (d) an order directing the respondent to refund money or return property to the injured person;

[171] Regardless of which section is relied upon, Mr Boyle sought orders analogous to rescission of the Contract and repayment of sums paid under it. Use of the word rescission, however, should not obscure the fact that the orders being made, while analogous to orders for rescission at common law, are being made in the exercise of the statutory powers conferred under the ACL.

[172] The Court has an extremely broad discretion when awarding remedies for misleading or deceptive conduct. McHugh, Hayne and Callinan JJ in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 stated at [38]:

It can be seen, therefore, that both ss 82 and 87 require examination of whether a person has suffered (or, in the case of s 87, is likely to suffer) loss or damage "by conduct of another person" that was engaged in the contravention of one of the identified provisions of the Act. That inquiry is one that seeks to identify a causal connection between the loss or damage that it is alleged has been or is likely to be suffered and the contravening conduct. But once that causal connection is established, there is nothing in s 82 or s 87 (or elsewhere in the Act) which suggests either that the amount that may be recovered under s 82(1), or that the orders that may be made under s 87, should be limited by drawing some analogy with the law of contract, tort or equitable remedies. Indeed, the very fact that ss 82 and 87 may be applied to widely differing contraventions of the Act, some of which can be seen as inviting analogies with torts such as deceit or with equity but others of which find no ready analogies in the common law or equity, shows that it is wrong to limit the apparently clear words of the Act by reference to one or other of these analogies.

[Footnotes omitted]

[173] Additionally in *Marks*, Kirby J at [151] said:

The broad ambit of "loss or damage" has already been the subject of comment in this Court. This case provides a further reminder that an ample approach for the provision of relief under s 87 is that which conforms to the policy of the TP Act. In granting relief under s 87 courts are not restricted by the limits which were conventionally applied under the general law, for example, in actions of tort to recover damages for misrepresentation. Thus, not only is the language which enlivens the application of the section very broad, but the discretion conferred when the section attaches could not be expressed in more generous terms. And while the discretion which is enlivened must be exercised judicially, there is nevertheless an unusually wide range of powers extending well beyond those available in courts of the common law or of equity. Judges should not narrow or confine what the Parliament has so amply provided.

[Footnotes omitted]

[174] More recently, in *Awad v Twin Creeks Properties Pty Ltd* [2012] NSWCA 200 Allsop P (with whom Macfarlan JA and Sackville AJA) analysed a case which has some relevance both factually and in principle to this. His said:

40. ... The question of the availability of rescission was dealt with by the primary judge at [51]-[57] of his reasons. I will not set these out. He accepted that the place of Peppers was a significant selling point, there to influence buyers. He was satisfied that the Awads relied on the Peppers representations as one of a number of matters which contributed to their decision to purchase the

property, at the price they did. His Honour examined the evidence of Mr Awad, in particular paragraph 43 of his affidavit set out at [25] above.

41. His Honour said at [57] of his reasons:

Evidence of this type, on the other hand, is in my view inherently unreliable. It is well known, for example, in medical negligence cases, that a plaintiff patient's views or evidence as to what he or she would have done, had he or she been warned of a minor risk of the operation, may be given with all due honesty after the event, but is very much coloured by what has happened in the meantime. Conscious as I am of the risks of rejecting unchallenged evidence, it seems to me that when it comes to reliance in the context of a *Trade Practices* claim of this type, a court is much better assisted by examining objectively the indicia as to what a party would or would not have done, rather than relying on the party's subjective assertion. I do not doubt that Mr Awad's affidavit contains what he now believes would have been the position. But, looked at objectively, considering his reasons for visiting Twin Creeks in the first place, and examining his description of what it was he was looking for, a neighbouring resort hotel simply does not feature in the picture, and I am unpersuaded that, but for the Peppers representation, he would not have purchased the land.

42. His Honour then at [58] dealt with relief:

That conclusion is very important when it comes to relief. As I have said, the plaintiffs seek an order under *Trade Practices Act*, s 87, avoiding the contract. Alternatively, they seek damages under s 82. It would not be appropriate to avoid the contract if the impact of the representation would not have been that the purchase was not undertaken, but only that any purchase would have proceeded at a lower price. In my view, this is a case in which it cannot be concluded that the purchase would not have proceeded, but I can conclude that the Peppers factor added something to the price at which the Awads were prepared to purchase.

43. I have some difficulty with this approach. Relief under the TPA, s 87, should be viewed not by reference to general law analogues but by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct: *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 494 at 503-504, 510 and 528-529; *Henville v Walker* [2001] HCA 52; 206 CLR 459; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388 at 407; and see generally *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259 at [64]- [72] and *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 364-367. Involved in that rule of responsibility is the public policy of protection of people in trade and commerce from being misled, and the width of the powers given by the TPA that are apt to be employed in a manner conformable with the just compensation or protection of the representee. Whether or not to grant a form of rescission under s 87, or to limit a plaintiff to damages under s 82, is a question in the nature of a discretion to be approached by reference to the facts of the particular case, the policy and underpinning of the TPA and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of, loss or damage "by" the conduct: see *Kizbeau Pty Ltd v WG & B Pty Ltd* [1995] HCA 4; 184 CLR 281 at 298; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 at 117-120 [19]- [29], 127-128 [52]-[57] and 142 [106]; and *Akron Securities v Iliffe*. An approach that is limited mechanically around a but for causation enquiry will be likely not to involve a full evaluative assessment of the appropriate relief.

44. If a defendant has contravened the norm of the statute and made misleading or deceptive representations that are operative to induce the representee to enter a contract, many factors may influence the question of relief. One of them could be the weight of the influence of the impugned conduct. It is not, however, a determinative factor upon which relief under s 87 turns. To view the matter thus is to constrict the exercise of power contemplated by the TPA. This is how the primary judge appears to have approached the matter. With respect, that was an error.

Analysis

- [175] The defendant contended that an order setting aside the Contract and repaying the money paid should not be made for the following reasons.
- [176] **First**, the plaintiff did not seek to rescind the Contract as soon as it became obvious that the machine was delivered late and continued to use the cremator despite calling on the defendant to take it back. This was said to be analogous to affirmation of the Contract.
- [177] **Second**, the plaintiff's delay in prosecuting the proceedings resulted in the machine becoming worthless. Thus, by its own fault, the plaintiff cannot make restitution of the cremator. Where practical justice cannot be done between the parties, rescission and restitution of the purchase price is not appropriate: *Henjo Investments Pty Ltd v Marrickville Pty Ltd (No 1)* 39 FCR 546 at 564-5, where Lockhart J (dealing with sale of a business said to have been induced by misleading conduct) observed that "*the longer the time elapsed since the agreement, and the more substantial any deterioration in the intervening period as a result of the purchaser's management of the business, the more difficult it will be to secure restitution in a manner which does 'practical justice'.*" While rescission can be ordered in such a case as this, it requires a reasonable opportunity for the defendant to retake the cremator and no such opportunity was given in this case because the demand to retake possession was also conditional on payment of damages and there was no express statement to Mr Tropea to take the machine back.
- [178] The defendant buttressed this submission by contending that because rescission under s. 237 relies on Court order, the defendant was not obliged to retake possession despite the demand that it do so by the plaintiff (if indeed such a demand could be construed from the dealings with Mr Tropea presumably).
- [179] **Third**, Mr Boyle continued to use the cremator after it was obvious that it was not meeting a performance standard consistent with the \$85 representation, and that failure was not part of the reason for demanding repayment in May 2012 in any event. Thus, it was said, rescission is not appropriate because the \$85 representation was not an operative cause of the plaintiff deciding to abandon the Contract. Further, there seemed to be an argument that it would not be proper to award rescission because the plaintiff also sought damages, and to give relief analogous to rescission would reward the plaintiff for its inadequate approach to damages.
- [180] I do not accept that these matters justify refusal of the relief sought. In my view, an order to avoid the Contract and repay the sums paid under it is an appropriate remedy

to address the loss suffered because of the misrepresentation. Some further findings of fact need first to be made.

- [181] I refer to paragraphs [37] to [40] above. Based on those matters, I find as a fact that the discussion between Mr Tropea and Mr Boyle communicated as a matter of substance that Mr Boyle wanted to terminate the Contract and get the purchase price back and that he wanted that as a result of the cremator “not working as represented”. I think that also communicated by necessary implication that Boyle did not want to keep the machine. Even if that were in doubt, Mr Boyle make an express demand that the defendant retake possession of the HD60 in the application. I also reject the defendant's suggestion that the \$85 representation was not relied upon in that application. A fair reading of the application shows that it was.
- [182] I also reject the proposition that the demand that the defendant repay the purchase price *and* pay damages somehow qualifies or negatives the effectiveness of the communication that the plaintiff wanted the defendant to take back the machine. There is no suggestion that Mr Boyle would not have returned the machine if the purchase price was repaid (or at least that part which had been paid) because of his demand for damages as well. That inference seems unlikely and was not suggested to him.
- [183] I find that it was made clear in substance by mid-May 2012 that the plaintiff wanted to rescind the Contract, return the HD60 and get back the money it paid. I find that Major Furnace chose to ignore those demands and to adopt the position of refusing any liability arising out of any representations alleged by Mr Boyle. It adopted that position in May 2012 and maintained it consistently thereafter. The position of Boyle was also articulated in the pleading filed on 13 November 2012. Additionally, Major Furnace defended on the basis of denying any liability. While there was no evidence that Mr Boyle told Major Furnace how the cremator was being dealt with while the proceedings were on foot, neither did Major Furnace make any inquiry. It seems both parties were content to take the chance that they would be vindicated in the proceedings.
- [184] Those findings (together with other matters to be identified) sustain the conclusion that an order setting aside the Contract and requiring repayment of the money paid is an appropriate remedy. I explain my reasons.
- [185] **First**, as I have found, the \$85 representation did induce entry into the Contract in substitution for entry into the Therm Tec contract. Thus the consequence of the misleading conduct was that the plaintiff was burdened with a cremator it only acquired because of misleading conduct rather than a cremator it otherwise would have purchased (and which it subsequently did purchase and operate satisfactorily thereafter). Where a misrepresentation is made in commercial negotiations which has the outcome identified, the real loss to the plaintiff is being saddled with the unsatisfactory machine it would otherwise not have bought in place of the satisfactory machine it would have bought. In that circumstance, it seems to me that orders to avoid the Contract and repayment of the purchase price paid give effect to the considerations identified by Allsop P in *Awad*. I hold that view even if it could not be concluded that, but for the \$85 representation, the Contract would not have been

entered into (see the discussion by Allsop P in *Awad* at [45] to [46]). In my view, the role of that representation was so rolled up in the overall economic case for the HD60 over the Therm Tec, it would be difficult to separate out the effect of the \$85 representation from other inducing factors.

- [186] However, given the centrality of the representation to the economics of the acquisition, I consider on the balance of probabilities that without that representation, Mr Boyle would not have been persuaded to contract for the HD60 over the Therm Tec machine.
- [187] **Second**, the plaintiff acted fairly promptly to communicate its wish to terminate and have its money back once it emerged that the HD60 was not performing as Mr Boyle understood it had been promised to perform. No criticism can fairly be leveled at Mr Boyle on this front. Very little time passed between the Contract and an unequivocal demand for the setting aside of the Contract: c.f. *Henjo Investments* where it was nearly a year before any clear demand for rescission was made.³⁹ Further, Major Furnace by its letter of May 2011 made clear that it did not intend to assist further with the operational performance of the machine unless Mr Boyle paid for that assistance. Similarly, Mr Boyle commenced proceedings to vindicate that position relatively promptly. Despite those matters, Major Furnace took no steps to find out how the machine had been dealt with. In my view, in those circumstances, Major Furnace adopted the position that Boyle had no justified complaint and took the chance on the outcome of the trial. I do not think Major Furnace can now be heard to say that rescission would not be a fair remedy because of the consequences for the machine resulting from the position it adopted.
- [188] The defendant places considerable weight on the delay in the conduct of the proceedings. No evidence was placed before me by either side as to the reason for that delay, though I accept it was considerable. However, the delay was of less significance in my view in circumstances where Boyle had initially acted promptly and Major Furnace chose to assume the plaintiff was wrong in its contentions. Questions of delay might be relevant, however, to interest awarded.
- [189] **Third**, I do not think that the plaintiff is disqualified from the remedy it seeks because it continued to use the HD60 in the period between when it tried to abandon the Contract and when the Therm Tec machine arrived. Given the first matter set out above, the use of the HD60 in the intervening period contributed somewhat to addressing the loss suffered from the decision not to acquire the Therm Tec machine in the first place. A fortiori where Major Furnace had refused to retake possession in the manner I have described.
- [190] **Fourth**, and most important, I do not think the fact that the HD60 was ultimately worthless disqualifies the plaintiff from a remedy of rescission. As I have said, Boyle called on the defendant to retake possession and the defendant chose to take the chance that it did not have to. It was plainly not interested in the fate of the machine and was content to assume it would succeed in its proceedings. By its attitude, it elected to carry the risk of devaluation by abandoning any responsibility for the machine:

³⁹ *Henjo Investments Pty Ltd v Marrickville Pty Ltd (No 1)* 39 FCR 546 at 563.

Munchies Management Pty Ltd v Belperio (1988) 84 ALR 700 at 714; *Squibb & Sons Pty Ltd v Tully Corp Pty Ltd* (1986) IPR 489 at 512. Further, there was no suggestion in cross examination that Boyle had any reasonable alternative to placing the machine where it did when the Therm Tec machine was delivered and installed. Nor was it suggested that if Mr Boyle had told Major Furnace that he was moving the machine outside, Major Furnace would have collected it.

[191] I have given some thought to whether some adjustments should be made to the order for repayment of the purchase price to reflect contribution of Mr Boyle to the ultimate demise of the HD60 in Cyclone Debbie. However, I was not persuaded that I should do so. As I have said, both parties gambled on being vindicated at trial and neither took steps to secure the HD60 in the meantime. Major Furnace having lost, I see no reason to adjust the order for repayment.

THE COUNTERCLAIM

[192] The plaintiff gave no reason why the counterclaim should succeed if it lost on its claim. Accordingly I dismiss the counterclaim.

ORDERS

[193] The substantive orders are as follows:

- (a) The Court declares the Contract void;
- (b) The judgment be entered for the plaintiff in the amount of \$112,271.10; and
- (c) The counterclaim be dismissed.

[194] I will hear the parties as to interest and costs.