IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-16-04830

Laser Bean Pty Ltd — Plaintiff

v

Opalfish Pty Ltd and Neil James Mr McLaren — Defendants

JUDGE:	His Honour Judge Woodward
WHERE HELD:	Melbourne
DATE OF HEARING:	22-24 November and 12 December 2017
DATE OF JUDGMENT:	14 February 2018
CASE MAY BE CITED AS:	Laser Bean Pty Ltd v Opalfish Pty Ltd and McLaren
MEDIUM NEUTRAL CITATION:	[2018] VCC 53

REASONS FOR JUDGMENT

Subject:	MISLEADING AND DECEPTIVE CONDUCT
Catchwords:	Sale of franchise – representations as to profitability of business – representations in financial statements – whether financial statements gave a true and fair view – whether representation by sole director made by company and director in personal capacity – "conduit defence" – accessorial liability
Legislation Cited:	*Australian Consumer Law (Victoria) ss18, 236 and 237*; *Australian Consumer Law and Fair Trading Act* 2012 (Vic) s8 and 12
Cases Cited:	*Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Houghton v Arms* (2006) 225 CLR 553; *CH Real Estate Pty Ltd* v *Jainran Pty Ltd*; *Boyana Pty Ltd* v *Jainran Pty Ltd* [2010] NSWCA 37; *Taylor v Gosling* [2010] VSC 75; *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; *Google Inc v ACCC* (2013) 249 CLR 435

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Star QC with Mr J Fetter	DST Legal
For the Defendant	Mr A Felkel	Taylor Splatt & Partners Lawyers

HIS HONOUR:

Parties, summary and issues

1 Muzz Buzz is an Australian owned and operated drive-through coffee franchise chain, originating and based in Perth. The franchisor is Muzz Buzz Franchising Pty Ltd ("MBF"). As of February 2014, Muzz Buzz had 56 operating drive-through stores in four Australian states. One of those stores was located on the apron of a Liberty petrol station at the Moorabbin airport, off Centre Dandenong Road in Moorabbin. This proceeding concerns the sale in September 2013 of that franchise business and store ("business") by the first defendant ("Opalfish") to the plaintiff ("Laser Bean"). The sale price was $230,000.

2 Laser Bean alleges that it purchased the business in reliance on representations by Opalfish and its director the second defendant, Neil McLaren, about the financial performance of the business and that those representations were misleading and deceptive in contravention of s18 of the *Australian Consumer Law (Victoria)* ("ACLV"). It further alleges that if it had not been so misled, it would not have purchased the business and would instead have used the $230,000 to purchase a profitable business. It claims damages of $405,990.26 plus interest.

3 The questions I am required to determine in this proceeding and my short answers to them are as follows:

- Were any of the representations about the profitability of the business as alleged by Laser Bean, made by Opalfish or Mr McLaren (or both)? **Answer:** Yes, both.

- Does Mr McLaren have any accessorial liability in respect of any of the representations? **Answer**: Yes.

- Were the representations false or misleading or likely to mislead or deceive? **Answer**: Yes.

- Did Laser Bean rely on the representations in purchasing the business? **Answer**: Yes.

- Did Laser Bean suffer loss because of the representations? **Answer:** Yes.

- What loss can Laser Bean claim from Opalfish and Mr McLaren? **Answer**: $317,465.26.

Background

4 Both parties have included in their written submissions a summary of the background facts. The narrative below borrows heavily from those summaries (particularly Laser Bean's), to the extent they traverse uncontroversial material. Where the facts are in dispute, I have referred to the competing submissions and made findings as appropriate.

Opalfish's Muzz Buzz business

5 Opalfish's first involvement with a Muzz Buzz franchise was its purchase of the Glen Waverley Muzz Buzz store in 2008. It added the Moorabbin business at the start of 2009. Opalfish sold the Glen Waverley business in February 2011 and began making arrangements to sell the Moorabbin business in around August 2012. Opalfish's financial statements show that in the year ended 30 June 2010 its pre-tax profit from both businesses was $21,235. Its financial statements for the following financial year show a pre-tax loss of $40,353, despite a one-off income injection from the sale of the Glen Waverley store of $98,000.

6 The financial year ended 30 June 2012 was the first full financial year in which Opalfish's financial statements covered only the Moorabbin business. Those statements show a pre-tax loss of $3,372. In the following financial year (ending shortly before the sale of the business to Laser Bean in September 2013), Opalfish's financial statements showed a profit of $2,753. Mr McLaren's evidence was to the effect that the Moorabbin business never paid him a wage for the 10 to 20 hours per week that he worked in the business, or a dividend.

It follows that the year-end financial results referred to above do not allow for any return of substance from the business to Mr McLaren as business owner.

7 I note in passing that throughout this period, and indeed for some 25 years at the time he gave his evidence, Mr McLaren's primary business interest was in a tutoring franchise called Kip McGrath Education Centres. This business tutored primarily school-aged children in reading, spelling and maths. Mr McLaren was himself a tutor in the business, and also employed other tutors. He estimated that in around mid-2013 he was spending a little bit more than 30 hours a week devoted to the tutoring franchise. Opalfish had no financial involvement in that business.

8 In around mid-2012, Mr McLaren had a discussion with his accountant, Ian Kemp, about selling the Moorabbin business. Mr McLaren asked Mr Kemp whether the business was "sellable in the state it's in"; Mr Kemp responded that if "you take out your loan payments and the manager['s wage], yes, you can show a profit". Mr McLaren later instructed Mr Kemp to prepare a "Statement by a Vendor of a Small Business" in the form prescribed by s52 of the *Estate Agents Act* 1980 (Vic).

9 The statement in evidence was signed by Mr Kemp and dated 16 August 2012 ("first s52 statement"). Mr McLaren agreed in evidence that he read and checked that statement to make sure "everything was about right" and gave it his "final approval". He also agreed that he knew it was an important document that purchasers would rely upon in order to decide whether or not to purchase the Moorabbin store.

10 The first s52 statement includes a number of sections where the party providing the statement is instructed by the use of a single asterisk to "strike out the item if it is not applicable". Relevantly for present purposes, on page 3 of the first s52 statement, the following two sentences are found:

> "(g) Members of the vendor's family or other persons *worked/*did not work in the business and *were/*were not paid wages.

…

> The figures in this Statement relate to the business being sold are prepared on an*accrual/*cash accounting basis."

The second of these sentences is followed by a short explanation of each of accrual accounting and cash accounting. In neither of these cases (nor, indeed, anywhere in the document where an asterisked option is provided) has the maker of the statement struck out an item to indicate which is "not applicable".

11 Opalfish listed the business for sale with Macquarie Business Brokers in October 2012 for $308,000. By July 2013, Opalfish had dropped the advertised price to $265,000 and agreed that the business should be listed for "urgent sale". The advertisement claimed "unforeseen circumstances" were driving the urgent sale. Mr McLaren agreed in evidence that by this time he was "extremely keen" to sell the business. In terms of interested purchasers, Mr McLaren's evidence was that "the vast majority was [sic] tyre kickers" and Mr Stinean was the "first person to show longer term interest" as a prospective purchaser.

Mr Stinean's interest in a drive-through coffee business

12 In the meantime, Mr Stinean had been working part-time at Krispy Kreme and operating his Hello Aussie Student Services business part-time, earning $55,000 per annum combined. His evidence was that by early 2013, he was looking to purchase a coffee kiosk, in which he would not need to work himself on a "day-to-day basis". He considered a number of different drive-through coffee kiosks, including the Muzz Buzz store at Moorabbin. According to Mr Stinean, his intention was to purchase a business, such as a franchised coffee kiosk, that "runs by itself" (with a manager) to provide an income stream of $50,000 to $70,000 per annum, while he continued to work in his education consultancy business.

Initial discussions

13 It is not in dispute that Mr Stinean first met in person with Mr McLaren on 20 March 2013 at the Muzz Buzz store in Moorabbin. As to what was said at this meeting, Mr Stinean's evidence was that Mr McLaren told him the Moorabbin

store was a “profitable business” and a “business that performs well”. Mr Stinean also gave unchallenged evidence that he made a handwritten note of the meeting as soon as he got home, because he wanted to show his wife what he and Mr McLaren had discussed. The note is headed “meeting Neil McLaren March 20, 2013” and commences:

> “How is business???
> – store is profitable and performing well
> – more needs to be done for store signage
> – signage to be added at main road
> – store has 7 staff all girls
> – Neil doesn’t work in the store”

14 Mr McLaren’s evidence was that he “would have said the store’s doing well”, but that he would not have used the words “profitable” and “performing well” as it’s “just not the way I talk”. However, he later accepted that he said words “to that effect”. On the use of the word “profitable”, Mr McLaren said in cross-examination that he couldn’t “categorically say I did not say that but it’s probably not the way I would have said things”.

15 The defendants make no submissions directly concerning this minor conflict in the evidence. There are a number of references in both their written and oral submissions to “the meeting on 20 March 2013”, but it is clear from the context of those references that the submissions are in fact referring to the meeting on 20 July 2013 at the Pancake Parlour discussed below. For its part, Laser Bean submits that:

> “Mr McLaren did not explain why he “*probably*” would not have used the word “*profitable*” which, after all, is a common English word that would come naturally to a person in Mr McLaren’s shoes, discussing his business with a prospective purchaser. In any event, while Mr McLaren was cavilling only with the notion that he used the specific word “*profitable”*, he accepted that he said something similar in substance.”

16 I agree. There is no obvious reason why Mr McLaren would not use the word “profitable” in his discussions with Mr Stinean. It is clearly a word (and a concept) that is familiar to him – his evidence was that his accountant Mr Kemp used the phrase “show a profit” when discussing whether the business was saleable in its current state. Mr McLaren could not say categorically that he did

not use the phrase and Mr Stinean's contemporaneous note is powerful evidence that he did. I am satisfied that the note accurately records what Mr McLaren said at the meeting, including that he said the store was both "performing well" and that it was "profitable".

17 In any event, the defendants admit in their defence that Mr McLaren told Mr Stinean that the business was "profitable and secure". I am satisfied that, as submitted by Laser Bean, the admission must mean that words to this effect were spoken by Mr McLaren to Mr Stinean before the contract was signed (such as at the 20 March 2013 meeting).

18 Mr Stinean's note of the meeting on 20 March 2013 also confirms that he asked "to see figures before deciding" and Mr McLaren said he "will send [Mr Stinean] the figures via email". On 26 March 2013, Mr McLaren emailed Mr Stinean the first s52 statement and (attached to a second email two minutes later) also sent Mr Stinean a document headed "Moorabbin Store…Profit & Loss Statement From 2010 to 2012" ("2010 to 2012 P&L"). Mr Stinean's evidence was that he had a look at the first s52 statement, but that he was "mostly interested in the profit and loss statement" because he "wanted to see if the business is profitable".

Pancake Parlour meeting

19 Mr Stinean's evidence was that after the 20 March 2013 meeting, the "next meeting face-to-face with Mr McLaren" occurred on 20 July 2013 at the Pancake Parlour in Dandenong. Mr McLaren was not able to recall clearly whether this was his second meeting in person with Mr Stinean, because "we met so many times face-to-face", but he agreed that the Pancake Parlour meeting was their next meeting of substance. What occurred at that meeting represents the principal area of factual dispute in the proceeding.

20 Mr Stinean gave evidence that the meeting was arranged by a phone call to discuss the possibility of his purchase of the business if his loan from the CBA was approved. They decided to meet somewhere halfway between the

Moorabbin store and where Mr Stinean lived in Endeavour Hills. Mr Stinean said he thought that Mr McLaren was there first, and they began the meeting by ordering breakfast.

21 While they were waiting for breakfast to be served, they discussed the figures in the first s52 statement and 2010 to 2012 P&L (primarily the latter), that Mr McLaren had emailed to Mr Stinean in March that year. It is not in dispute that Mr Stinean had taken these with him to the meeting. Importantly, Mr Stinean's evidence was that he made handwritten notes on the back of a copy of the 2010 to 2012 P&L as the meeting progressed and Mr McLaren agreed that he saw Mr Stinean "writing some things down".

22 The notes that Mr Stinean made at the meeting were in evidence, and were as follows:

> "20/07/2013 meeting Pancake Parlour
> Management expenses???
> – personal expenses claim to minimise tax
> worked in business
> – NO
> $98,000 franchise fee?
> – initial franchise fee paid later
> Will keep the staff
> ~~$250,000~~ $230,000//
> no stock take
> enough stock to run for a week"

23 The first entry in the note "Management expenses" is the most controversial. It was not (ultimately) in dispute that the topic of management expenses was discussed between Mr Stinean and Mr McLaren at the meeting and that the discussion concerned the second-last line in the 2010 to 2012 P&L described as "Add Back – Management Expenses", showing entries of $41,218 for 2012, $37,503 for 2011 and $35,970 for 2010. The controversy surrounds what Mr McLaren said by way of explanation of these entries.

24 Mr Stinean's evidence was that Mr McLaren said this item related to personal expenses Mr McLaren claimed "so he minimises his tax liability". Mr Stinean said he believed this to be a true statement. He gave evidence that, based on

what Mr McLaren said about the management expenses line in the 2010 to 2012 P&L, he understood that the sums shown in the following and final line in the 2010 to 2012 P&L described as "Adjusted net Profit to present Vendor", was money available to Mr McLaren from the business – "he was making this much per year".

25 Mr McLaren's evidence-in-chief on this topic was that he could not recall the management expenses item being discussed at this meeting, but he agreed that he had talked with Mr Stinean about the "add-backs" (he said his accountant called them this) at a different meeting "outside the store":

> The only - look, I can't recall at that time talking about, you know, which is one of the most contentious items, which is the - the add backs, but we'd talked about that at - outside the store before, and it had come up - it comes up every time. I'd had, as I said, I reckon four or five, maybe half a dozen people become more serious about buying the store and if it's not the first question, it's the second or third, it is 'What's that line there?' and my answer was, 'That's Christie's'. And, you know, they might say, 'How do you mean?' I say, 'That's Christie's wages and super'".

26 Christie Keeble was Opalfish's full-time store manager. Mr McLaren explained in substance that it was his general practice to tell potential purchasers that the management expenses item represented "Christie's wages and super". When his counsel suggested he was "not sure" if that explanation was also given to Mr Stinean at the Pancake Parlour meeting, Mr McLaren agreed, but then went on to say, "I'm not sure what I'm supposed to say and not say". Mr McLaren later volunteered more detail about this meeting with Mr Stinean, which he described as taking place "outside the store" (that is, at the business premises, but immediately outside the kiosk building). He said:

> "So, yeah, we've had some time inside the store. We retire out to the - outside to have a more private conversation and he's naturally said, 'I've got some questions about the s.52', and again if not the first question, the second question was, 'What's this here?' And again I just gave the answer I gave to a number of people, 'That's Christie and that's her wages and super'".

27 Asked again whether he had a memory of also saying something to that effect at the meeting at the Pancake Parlour, Mr McLaren responded:

> "I honestly don't remember it coming up at the Pancake Parlour. I'm not saying - I cannot say 100% it didn't but I'm, you know - I can remember most of the things he was concerned about and that didn't come up again, in my recollection."

28 It had not been put to Mr Stinean in cross-examination, that a conversation of the kind described by Mr McLaren in his evidence-in-chief had occurred at a meeting between them "outside the store".

29 In his cross-examination, Mr McLaren was more forthright. In response to the proposition: "Mr Stinean asked you about management expenses", he answered unequivocally: "Yes". When it was then put to him that he told Mr Stinean that the management expenses were "personal expenses claimed to minimise tax", he answered: "No, I absolutely did not say that". Later in his cross-examination, he positively asserted (contrary to his evidence-in-chief) that he told Mr Stinean at the Pancake Parlour meeting that the management expenses were Ms Keeble's wages: "I said to him clearly that it was Christie Keeble's wages and super". This later version of Mr McLaren's evidence of what he said at the Pancake Parlour meeting (as distinct from a meeting "outside the store"), had been put to Mr Stinean in cross-examination, and denied.

30 Mr McLean's evidence about what he said to Mr Stinean concerning the "management expenses" item in the 2010 to 2012 P&L was unconvincing. It was shifting and contradictory – he initially conceded that he could not recall saying anything about it at the Pancake Parlour (and appeared to be leaning towards saying he did not identify it at that meeting as Ms Keeble's wages and superannuation), but in cross-examination confidently asserted that he did say this at the Pancake Parlour.

31 I do not accept the defendants' submission that the better view of Mr McLaren's answers in cross-examination is that he was "simply confirming that he told Mr Stinean that the management expenses were Ms Keeble's wage and superannuation (without specifying when that occurred)". It was put to Mr

McLaren unequivocally that: “You did not say anything to Mr Stinean *at the Pancake Parlour* that the management expenses were Christie Keeble’s wages” [emphasis added] and he responded: “Yes, I did say that”. Later it was put to him that: “you can’t, sitting in the witness box today, recall what you said to Mr Stinean about management expenses *at the Pancake Parlour*, can you?” [emphasis added]. He answered: “I can. I told him that that it’s Christie Keeble’s wages and superannuation”.

32 In contrast, Mr Stinean’s account of this aspect of the meeting was clear and consistent. It was also consistent with his contemporaneous file note. Mr Stinean’s evidence that he made notes during the course of the Pancake Parlour meeting was unchallenged and was supported by Mr McLaren’s evidence that he observed Mr Stinean writing things down during the meeting.

33 Further, Laser Bean has submitted that if Mr McLaren had said to Mr Stinean words to the effect that the management expenses line was Ms Keeble’s wages and superannuation, “then Mr Stinean’s decision to purchase the business for $230,000 and yet retain the store manager is illogical and inexplicable”. I agree. Mr Stinean’s evidence (which I accept), was to the effect that he was seeking an essentially passive investment that could make him $50-70,000 per annum. He said: “the intention was to purchase a business that runs by itself basically”. Thus, it makes no sense that he would knowingly buy a business if the “Add Back: Management Expenses” shown in the 2010 to 2012 P&L, could only be derived by him if he took on the day to day management of the business, in place of Ms Keeble.

34 The defendants submit that Mr Stinean’s assertion that he was told that the management expenses were “personal expenses to minimise tax” is not credible, in circumstances where the purported disclosure did not prompt Mr Stinean to request further information “or question the bona fides of the information already provided”. In my view, there is no substance to this submission. It does not necessarily follow from the words ascribed to Mr

McLaren that “there’s something crooked going on”, as was put to Mr Stinean in cross-examination. And even if it did, there is no obvious reason why Mr Stinean would need to enquire further into how Mr McLaren organised his personal affairs for tax purposes. His only concern was whether this was money available to Mr McLaren from the business. I accept as entirely plausible Mr Stinean’s evidence that nothing in the answer prompted him to enquire further.

35 The defendants did not otherwise make a direct attack on Mr Stinean’s account of the meeting (either during cross-examination or in submissions). Rather, it sought to undermine Mr Stinean’s account on this issue (and other relevant factual controversies) by a more generalised attack on his credit. As the matters discussed at the Pancake Parlour meeting are the primary areas of factual dispute in the proceeding, it is appropriate that I address these submissions now.

36 The first submission concerns Mr Stinenan’s evidence, and cross-examination by Laser Bean’s senior counsel, about ownership of the Moorabbin kiosk building. The defendants submitted that Mr Stinean had adopted inconsistent positions on the issue of ownership of the kiosk building in this proceeding, on the one hand, and in his dispute with the MBF, on the other. It also pointed to Mr Stinean’s willingness to enter into a “sham transaction” (namely, purporting to transfer the kiosk to his wife for no consideration), as relevant to his truthfulness as a witness.

37 In my view, these matters do not reflect adversely on Mr Stinean’s credit in this proceeding. Mr Stinean accepted that his purported transfer of the kiosk was a legal manoeuvre to keep the kiosk out of the MBF’s hands (and thus, it would seem, secure some traction in negotiations with MBF). It was ultimately to no avail (MBF later seized control of the kiosk from Laser Bean) and the issue was never tested in any proceedings. While perhaps ill advised, I am satisfied that the confessed “manoeuvre” does not (either by itself or in combination with other matters relied on by defendants discussed below) justify a finding at large

that Mr Stinean's evidence should be treated with caution or that, where in conflict, Mr McLaren's evidence should be preferred.

38 Similarly, in my view, the other matters the defendants point to as bringing Mr Stinean's credit generally into question, do not warrant any finding to that effect, essentially for the reasons submitted by Laser Bean. The position might arguably have been different if the questions of fact I am required to determine in this case had been more finely balanced. But even then, the better view is that they are each too ill-defined, equivocal and remote to materially impact my assessment of Mr Stinean's credit in the evidence he gave before me.

39 More relevantly for present purposes, none of the matters relied on provide a sustainable basis for preferring Mr McLaren's evidence over Mr Stinean's concerning the management expenses discussion at the Pancake Parlour. In my view, the factors referred to above supporting the accuracy of Mr Stinean's account (primarily the contemporaneous file note), point overwhelmingly the other way.

40 I accept that Mr McLaren probably did make statements to one or more other prospective purchasers outside the Moorabbin store to the effect that the management expenses item in the 2010 to 2012 P&L were Ms Keeble's wages and superannuation. And it may be that Mr McLaren genuinely believed (consistently with his evidence-in-chief) that he had such a conversation "outside the store" with Mr Stinean. However, I am satisfied that no such conversation in fact occurred between Mr McLaren and Mr Stinean either "outside the store" or during the meeting at the Pancake Parlour, and I reject Mr McLaren's evidence to the contrary.

41 Laser Bean submits that there are two other important matters that arose during the Pancake Parlour meeting. The first is not relevantly in dispute; the second is. They are described in Laser Bean's written submissions as follows [references omitted]:

> "The first matter was McLaren's role in the business. Stinean's evidence was that McLaren said he couldn't work in the business because "*he has the Kip McGrath tutoring franchise and he doesn't have any time*". This is corroborated by a handwritten note which Stinean took, as he was sitting in the meeting. The note records that Stinean asked if McLaren "*worked in the business*"; the answer was "*NO*". In cross-examination, McLaren agreed that he told Stinean in substance that he doesn't work full-time in the business and that Kristy Keeble was the store manager.
>
> The second matter was whether Stinean would work in the store, or else would retain Ms Keeble as store manager. Stinean's evidence was that he told McLaren he would be keeping the staff, as "*there's no way I'm going to run the store myself*". McLaren denied that Stinean informed him that was going to retain Ms Keeble. McLaren's evidence in chief was that he recommended that Ms Keeble be retained, telling Stinean that Ms Keeble was "*great*", that he should "*keep her on for at least a while*", and that if "*she goes and you're there then people aren't going to like it*"."

42 On balance, and notwithstanding the matters the defendants have raised concerning Mr Stinean's credit generally, I prefer Mr Stinean's evidence on this second issue. In my view, Mr Stinean had a better and more reliable recollection of what occurred at the meeting, as exemplified by my findings above concerning the discussion of management expenses. Further, a reference by Mr Stinean to his planned involvement in the business, was a natural extension of discussing Mr McLaren's current level of involvement, which both agreed was canvassed during the meeting.

The second s52 statement and contract

43 On 24 July 2013, Mr Stinean sent an email to Mr McLaren confirming that the CBA had approved his loan application, subject to the valuation of some properties, and that he would like to move forward with the purchase. The email requested (among other things) an updated s52 statement. The following day, Mr Stinean sent a further email to Mr McLaren which included the following: "would love to see an updated Section 52 if that's ok with you, as the old one is outdated and, don't get me wrong, but a lot of things can happen in 1 year with the business". After a series of further emails concerning the progress of the updated s52 statement and other logistical issues, on 7 August 2013, Mr McLaren emailed Mr Stinean the second s52 statement ("second s52 statement).

44 Mr McLaren's evidence was that he asked his accountant (Ian Kemp) to update and draft the figures for the second s52 statement, and that he met with Mr Kemp in relation to second s52 statement and gave him information for its preparation. Mr McLaren said that when he received the second s52 statement from Mr Kemp he looked at it "just to make sure it all looks in the same sort of ballpark figures I was expecting and it looks ok". Mr McLaren's covering email forwarding the second s52 statement included the sentence: "the Accountant said to note that sales were down in Jan/Fab due to major fuel tank repairs at the Service Station that restricted access for 7 weeks". Mr McLaren agreed in cross-examination that he knew that Mr Stinean would be relying on the second s52 statement in order to decide whether to buy the business.

45 The second s52 statement was in essentially the same form as the first, apart from an inclusion of updated financial information. Notably, the second s52 statement (like the first), had none of the asterisked options struck to indicate which is "not applicable", including in respect of the options: "*accrual/*cash accounting". The updated financial information comprised results for the financial year ended 30 June 2013, both in the body of the statement as well as in the profit and loss statement, by an added column headed "2013" ("2010 to 2013 P&L"). On this occasion, the 2010 to 2013 P&L was provided as an attachment to the second s52 statement.

46 On 15 August 2013, Mr McLaren on behalf of Opalfish and Mr Stinean on behalf of Laser Bean signed a short form "Agreement to Purchase", which included terms that the purchase price was $230,000, and that a deposit of 10% would be paid on the signing of that document, with the balance to be paid in full on or before 2 September 2013. Laser Bean paid the deposit of $23,000 as contemplated by the document. Mr Stinean confirmed in evidence that he based his decision to sign the document and make the payment, "on the figures that I was, I was shown and… my conversation with Mr McLaren and the presentations he made".

47 On 27 August 2013, Mr Stinean met Mr McLaren at the store, and both signed the contract of sale ("contract"). By the contract, Opalfish expressly represented that the financial statements made "full disclosure" of all liabilities, and provided a "true and fair view" of the business. Clause 2.2 of the contract relevantly provided:

> "The Vendor warrants and represents to the Purchaser, as an inducement to the Purchaser to enter into this Contract and to purchase the Business, that… each of the Vendor's Warranties specified in Schedule 6 is true, complete and accurate both at the Contract Date and on the Date of Settlement… Where the Vendor warrants on the basis of knowledge and belief as at the Date of Settlement, then the warranty is made on the basis of the Vendor's actual knowledge and belief as at the Date of Settlement and the Vendor further warrants that it has made due and careful inquiry as to the matter which is the subject of the warranty before giving the warranty."

48 Schedule 6 of the contract entitled "Vendor's Warranties" included the following express warranties:

> "Any financial statements provided by the Vendor to the Purchaser concerning the Business:
>
> (a) disclose a true and fair view of the affairs, financial position and Assets and liabilities of the Business as at the date of the preparation;
>
> …
>
> (d) contain proper and adequate provision for and full disclosure of all liabilities as at the date of their preparation."

49 On 29 August 2013, Mr McLaren and Mr Stinean met again. Mr Stinean, Mr McLaren and Ms Keeble went to the Muffin Break store at the DFO shopping centre. Mr Stinean and Ms Keeble had some time alone to discuss things. Afterwards, Mr Stinean gave Mr McLaren a lift to the ANZ bank to deposit a cheque as part payment by Laser Bean for the business. Mr Stinean's evidence was that, in the car, he (Mr Stinean) asked whether Mr McLaren had ever had a problem paying his suppliers or loans. According to Mr Stinean, Mr McLaren said he had not, and had in fact had been able to repay his loans as the "business was doing so well in the past couple of years".

50 When Mr McLaren was asked in cross-examination about this conversation, he

said he could not recall having a conversation about loans, but could not categorically say it did not occur. He also said he could not remember saying that the business was doing well. However, as Laser Bean has submitted, this is not a relevant conversation in relation to the issues in dispute in this proceeding.

51 Settlement of the sale occurred on 2 September 2013 as contemplated in the short form Agreement to Purchase and Laser Bean started operating the business. In general terms, it did so with the existing staff (including the store manager), the same hours of operation and retailing the same range of products. Both Laser Bean and Opalfish sold products at the prices recommended by the MBF.

52 In around February 2014, Laser Bean leased the Rowville Muzz Buzz store from MBF.

The business fails

53 Mr Stinean's evidence was that it was not until the end of September 2014 when he first realised something was wrong with the store and he started to make investigations. Mr Stinean explained in evidence why he did not realise the store was not making money before September 2014 as follows:

> "So the cash flow was good, the money was coming in. Um, I was paying the bills. I was investing in the appearance of the store, in marketing. I took over Rowville on a lease and then focused on the Rowville store as well to bring that store to make a good profit and I didn't realise that the situation [was] as it was."

54 Mr Stinean thereafter took steps to "deal with the situation". These were:

- reducing trading hours to limit trading during unprofitable times of the day;
- working "quite heavily myself in the business unpaid…especially for Saturdays when we would pay penalty rates";
- reducing staff numbers between both the Moorabbin and Rowville stores; and

- negotiating with MBF a reduction in the franchise fees.

55 By October or November 2014, Mr Stinean had decided to "get rid of the business". In November 2014, by email, he asked Mr McLaren to explain why his figures were wrong. He met Mr McLaren in January 2015 and asked if he would take the store back. Mr McLaren agreed to get back in touch after Mr Stinean's holiday.

56 On 6 February 2015, Mr McLaren told Mr Stinean that his accountant Mr Kemp had said "cash accounting" was the answer. Mr Stinean's evidence was that:

> "I had a chat with Mr McLaren over the phone because he called me and he told me: "Look, you - you keep on calling me that I had a chat with - with my accountant and my accountant told me not even to talk to you, and he said the only thing he said to tell you was cash accounting, cash accounting." And I was like okay, well what's that supposed to mean?"

Mr Stinean said this was the first time he had heard about this, and that Mr McLaren did not provide any further information – "that was the end of the conversation".

57 In September 2014, Mr Stinean asked MBF if it would purchase the business, but it refused. Mr Stinean's evidence was that he did not try to sell the business himself because, "I didn't want to risk being sued by the [purchaser] because the figures I'm presenting him with, which would be Mr McLaren's figures, are wrong". His evidence about this was as follows:

> "Well first of all, I was convinced that the figures Mr McLaren presented me with were either fake or wrong, so I - I basically didn't have any figures to show to - to the next, to the purchaser… I only had my figures which my figures wouldn't show much, would show a loss basically so I - I just couldn't you know, I couldn't let myself find a - a purchaser for a business that's - that's failing and how much would I - would I get for it? Not much."

58 In an email sent by Mr Stinean to Mr Pynt of MBF on 8 January 2015, Mr Stinean stated: "I paid for an independent business valuator [sic] to value the business considering the new figures and apparently, the value of the store is $-9000". Mr Stinean confirmed in evidence that he had paid a valuer "that was offering their services online" to undertake this valuation. He said: "I gave him the

figures that I had and basically he generate [sic] the report for me and he said, ‘Well, look, the store is basically worthless’”.

59 On 1 September 2015, Mr Stinean served on MBF a notice of closure. On 4 September 2015, MBF terminated the franchise, and seized the Moorabbin store. Later in September 2015, Laser Bean participated in a private mediation with Opalfish. It was only at this meeting that Mr McLaren told Mr Stinean, “eyeball to eyeball”, that he would not take the store back. It was also at the mediation that Mr McLaren gave Mr Stinean a document breaking down the “management expenses”, into amounts paid to Ms Keeble, versus sums (purportedly) paid to Mr McLaren.

60 In February 2016, Mr Stinean sold his house. He used the proceeds to repay Laser Bean’s loans. Laser Bean had funded the $230,000 purchase price it paid for the business as follows:

- $107,000 was financed by a loan by the CBA to Laser Bean;
- $105,000 was financed by a loan by Bankwest to Mr Stinean and his wife which they on-loaned (at the same interest) to Laser Bean; and
- $18,000 from savings of Mr Stinean and his wife.

Legislative framework

61 Again, the relevant legislative framework is not in dispute. The following summary of the applicable provisions is drawn from Laser Bean’s written submissions. Sections 8 and 12 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic) (“ACLFTA”) apply the Australian Consumer Law[1] to Victoria, as the ACLV. Section 18(1) of the ACLV provides:

> “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

62 Pursuant to s236(1) and s237 of the ACLV[2] respectively, this court may award

[1] Contained in schedule 2 of the *Competition and Consumer Act* 2010 (Cth)
[2] Read with s223 of the ACLFTA

damages or compensation to a person who suffers loss or damage because of any contravention of s18 of the ACLV. The court can order the damages or compensation to be paid by the principal contravenor, or by any person "involved" in the contravention. Under s2(1) of the ACLV, a person is "involved" in a contravention if the person (*inter alia*):

> "(a) has aided, abetted, counselled or procured the contravention;
>
> …
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention."

Were the alleged representations made?

Concessions and matters in dispute

63 It is not in dispute that the representations as alleged and opened in the trial are those in Laser Bean's further amended statement of claim dated 8 November 2017 ("SOC") at paragraphs 7a), aa) ab), ac), b), ba) and d) – the representation alleged at paragraph 7(c) is not pressed by Laser Bean. However, the defendants in their submissions have conveniently separated the representations into three categories for the purposes of analysis and argument, and Laser Bean's submissions largely adopt those categories. I will do likewise, with some further elaboration and explanation of the content of the categories. The first two categories are:

(a) "the s52 representations", comprising representations as to adjusted profits (SOC paragraph 7a)), actual sales (SOC paragraph 7aa)), costs of goods sold (SOC paragraph 7ab)) ("COGS") and management expenses (SOC paragraph 7ac)) contained in both the first and second s52 statements and, in the case of the management expenses, as also stated by Mr McLaren to Mr Stinean at the Pancake Parlour meeting; and

(b) "the contractual representations", comprising representations that the first and second s52 statements disclose a true and fair view of the affairs, financial position and assets and liabilities of the business and

contain proper and adequate provision for and full disclosure of all liabilities as at the date of their preparation (SOC paragraphs 7b and ba)).

64 The third category is described in the defendants' submissions as "the future representation". This is the representation alleged in SOC paragraph 7d) under the heading "Representation as to future profitability", being that: "The defendants made representations to Laser Bean through Stinean that the Business was profitable and secure". The representation is alleged (among other things) to have been made orally by Mr McLaren to Mr Stinean at their first meeting on 20 March 2013. Laser Bean has submitted (and I agree) that, despite the heading, "it can be seen that the alleged representation is in truth one as to the current state of the business", and that the defendants have treated the representation this way. Thus, it is not a representation about a future matter, in the technical sense. To avoid confusion, I will therefore define this representation as "the profitability representation".

65 The defendants have conceded (correctly, in my view), that Opalfish made the s52 representations and the contractual representations. However, I do not take the defendants' concession in respect of the s52 representations as extending to the allegation that Mr McLaren made the statement at the Pancake Parlour meeting that the management expenses were "personal expenses claimed to minimise tax" ("management expenses representation"). Further, the defendants deny the profitability representation and deny that Mr McLaren made any of the alleged representations.

66 I have found above[3] that Mr McLaren did make the management expenses representation. As to the profitability representation, the defendants' concern (reflected in their denial) appears to be directed to the question of whether it is a representation as to a future matter. As noted above, both parties seem to now agree that that the representation as alleged refers to the then current state

3 At [24] to [40]

of the business, not its future profitability. Moreover, I have also found above[4] that Mr McLaren did make a statement at the meeting on 20 March 2013 to the effect that the business was profitable and performing well. In any event, the defendants admit in their defence that Opalfish in the person of Mr McLaren, said to Mr Stinean words to the effect that the business was "profitable and secure".

67 Thus the only issue left for me to determine under this head is whether any of the representations alleged were made by both Opalfish and Mr McLaren. In this regard, Laser Bean has confirmed in its submissions that it does not allege that Mr McLaren directly made the contractual representations. However, they do argue that Mr McLaren is liable for those representations as a person involved in Opalfish's contraventions.

Did Mr McLaren make any of the representations?

68 Laser Bean's submissions usefully summarise the relevant principles to be applied in examining this question, which are not relevantly in dispute:

> "It is trite that the same representation can be made by more than one person. Further, recognition of the distinct legal identity of a corporation has the consequence that in law the act of an individual might be both a corporate act and the separate act of the actor as an individual: *Houghton v Arms* (2006) 225 CLR 553 at [46] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
>
> It being admitted that Opalfish made the s52 representations, it is a question of fact whether McLaren also made each or any of those representations. It is to be noted that contravention of s18 does not require an intent to mislead or deceive and a person could contravene the provision even though he, she or it acted reasonably and honestly [citing *Yorke v Lucas* (1983) 158 CLR 661 at 666 (Mason ACJ, Wilson, Deane and Dawson JJ); *Google Inc v ACCC* (2013) 249 CLR 435 at [9] (French CJ, Crennan and Kiefel JJ) ("*Google case*")].
>
> The question of fact where, as in this case, a representation is made to a particular person, is to be determined having regard to [citing *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [37] (Gleeson CJ, Hayne and Heydon JJ)]:
>
> > the particular conduct of the particular agent in relation to the particular purchasers, 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.

4 At [15]-[16]

In the *Google* case, French CJ, Crennan and Kiefel JJ explained [citing French CJ, Crennan and Kiefel JJ at [15]; omitting the High Court's citations]:

> It has been established in relation to intermediaries or agents that the question whether a corporation which publishes, communicates or passes on the misleading representation of another has itself engaged in misleading or deceptive conduct will depend on whether it would appear to ordinary and reasonable members of the relevant class that the corporation has adopted or endorsed that representation. It has also been established that, if that question arises, it will be a question of fact to be decided by reference to all the circumstances of a particular case".

69 The defendants' reply submissions state:

> "The defendants agree that it is a question of fact as to whether the acts attributed to Mr McLaren were done solely as a director of Opalfish, or also on his own behalf [citing *CH Real Estate Pty Ltd* v *Jainran Pty Ltd*; *Boyana Pty Ltd* v *Jainran Pty Ltd* [2010] NSWCA 37 at [305]]".

70 In oral submissions, counsel for the defendants added in relation to the authorities relied on by Laser Bean in the passage from its submissions extracted above, that:

> "There are a number of cases referred to on this point by the [plaintiff] and the cases that they refer to are what I might call cases involving a true intermediary. What I mean by this is that the person that's sought to be put on the peg, as it were, as a principal is someone who is separate from the representor. They are all types of…cases where, for example, the conduct of real estate agents in reporting details about a property, or there was a case involving a television station and ads on that television station that were purported to be misleading and, of course, the *Google case* to which the plaintiff explicitly refers.
>
> In those types of matters, the knowledge of the intermediary is relevant because it goes to the question of their involvement. Are they just a conduit, are they passing it on, and that's the type of questions that the courts have tried to answer in those types of matters. In the current scenario, however, where the alleged joint representor is a sole director of the other representor the issue of knowledge really doesn't arise.
>
> We can safely assume, of course, that the sole director knows exactly what the company does but that doesn't mean that they are automatically liable. There's certainly no principle in Australian law [that] says that a sole company director is automatically a co-representor."

71 In my view, focusing on the capacity in which a person makes a representation, is something of a distraction. Certainly if by words or conduct a person manifests that they are acting both as a director and in a personal capacity, they will be held to be a maker of the representation. For the reasons discussed

below, I am satisfied that Mr McLaren did this at least in respect of the profitability representation and the management expenses representation. But it does not follow that the absence of an outward manifestation of dual capacity leads to the conclusion that a sole director is to be treated in all respects as acting only as an organ of the company. As the High Court in the extract from the *Google case* above makes clear, the question is whether it would appear to a reasonable representee that the putative representor has "adopted or endorsed" the representation. Further, the question is one of fact to be determined by reference to *all* the circumstances of the case.

72 I agree with the defendants that the application of the applicable principles to a sole director is in some respects more difficult, because where the putative representor is an external agent, the factors relevant to a so-called "conduit defence" have been widely canvassed in the authorities. As the defendants submit, one of those factors is the agent's knowledge that the material passed on contains the impugned representation. I also agree that knowledge of the representation alone may not necessarily be enough to attribute personal responsibility to a sole director. However, authorities examining whether a sole director and his or her company are both liable as makers of an impugned representation, lead me to conclude that cases where a sole director avoids liability for a representation on the basis that they were acting as a mere organ of their company, will be rare.

73 The decision of the NSW Court of Appeal in *CH Real Estate Pty Ltd v Jainran Pty Ltd*; *Boyana Pty Ltd v Jainran Pty Ltd ("CH Real Estate* case*")*[5] relied on by the defendants in their written submissions is instructive in this regard, because it deals both with a claim against a sole director as well as against an agent. I should note at the outset that the particular paragraph from that decision relied on by the defendants (at [305] per Young JA) when read in the context of the decision as a whole is, with the greatest respect, not a considered finding by

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5 [2010] NSWCA 37

His Honour. It was no more than a brief prelude to His Honour accepting that the issue was "one of fact for the primary judge who decided it against Mr Sgro [the sole director concerned] and this was within his mandate".[6] The issue was canvassed more extensively in the decision of Bastan JA, with whom Beazley JA agreed on this issue (noting that Young JA did not consider the claim under the *Fair Trading Act* 1987 (NSW), s42, the analogue of s18(1) of the ACLV at issue in this case).[7]

74 Bastan JA commences the examination by identifying the question as being "whether Mr Sgro was liable as a principle for a contravention of s42 of that Act",[8] in relation to the presentation by his company's solicitors to the plaintiff purchasers, of a contract of sale found to contain misleading representations. I set out in full Bastan JA's summary of the argument by Mr Sgro's counsel, because of the parallels with this case:

> "Counsel submitted, first, that there had been no suggestion that the instructions [to the solicitors] included any misleading or deceptive misrepresentations; secondly, Mr Sgro had not been responsible for the preparation of the contract; thirdly, there was nothing misleading or deceptive in the act of executing the contract, and fourthly, Mr Sgro was not responsible for presenting the contract to the purchaser. He was therefore not personally liable for any conduct which constituted misleading or deceptive conduct under s 42. Further, it was noted that to impose liability on Mr Sgro for conduct undertaken as the human agent of the corporate entity had the effect of withdrawing the protections available to an individual who sought to run a business through a corporate vehicle."[9]

75 After discussing and citing from the High Court decision of *Houghton v Arms*[10] referred to in the passage from Laser Bean's submissions extracted above, His Honour set out at some length his conclusion that the conduct of the vendor corporation in presenting the contract containing misleading representations to the purchaser, was also the conduct of its sole director Mr Sgro. It is a passage of some length, but in my view it warrants setting out in full, because of the

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6 *CH Real Estate case*, per Young JA at [306]
7 *CH Real Estate case*, per Beazley JA at [15]
8 *CH Real Estate case*, per Bastan JA at [101]
9 *CH Real Estate case*, per Bastan JA at [101]
10 (2006) 225 CLR 553

comprehensive manner in which it responds to arguments akin to those made on behalf of Mr McLaren:

> "Whilst, as the mind of the company, he directed the preparation of the contract and executed it on behalf of the company, he was not aware that the contract contained the precise representations relied upon, nor was he aware of the falsity. The latter element of ignorance is not presently relevant, there being at this stage no question of accessorial liability. The question is whether, because s 42 requires no intent, or even negligence, on the part of the person engaging in the prohibited conduct, the fact that Mr Sgro may not have been aware of the existence of the statements in the contract would relieve him of liability. Just as the corporation will be liable because it presented a contract to the purchaser containing statements which were in fact misleading or deceptive, so Mr Sgro will be liable under s 42 if he engaged in conduct of the same kind. Apart from the conduct involved in signing the contract, his conduct was engaged in through the agency of the solicitors. They, acting on instructions received from him (albeit on behalf of the vendor) prepared the contract and, after obtaining its execution by him (on behalf of the vendor), again acting on his instructions as the human embodiment of the corporation, forwarded the contract to the purchaser. Mr Sgro submitted that the acts of the solicitors were carried out purely as agent for the vendor, and not on behalf of Mr Sgro himself, who was not their client. In terms of legal analysis, that was correct; in terms of the characterisation of the conduct, it was nevertheless conduct which can be attributed to the direction of Mr Sgro, as a matter of fact. That the mechanical task of presenting the contract was delegated to someone in the solicitor's office (probably a clerk) does not prevent the conduct being properly attributed to Mr Sgro, as the person directing the affairs of the vendor.
>
> It follows that his Honour was correct at [91] in concluding that Mr Sgro was directly liable for the misleading and deceptive conduct because 'he engaged in it' and 'his liability is the product of his own conduct' and was not merely accessorial liability."[11]

76 The decision of Hargrave J (as His Honour then was) in *Taylor v Gosling*[12] is another example of a case where a sole director sought to avoid liability as a principal on the basis that he made the impugned representations as a mere "corporate organ" of his company, IBP. Among other things, Mr Gosling sought to rely on the fact that other individuals (including a Mr Pennicott) were in effective control of IBP and had prepared the presentation's slides that contained the representations. Hargrave J held that:

> "I do not accept the submissions made on behalf of Mr Gosling. In no sense can Mr Gosling's conduct at the 30 July presentation be described as "ministerial", as a mere organ of IBP. Mr Gosling was the sole director of IBP at the time. He was involved in the preparation of the slides. He

11 *CH Real Estate case*, per Bastan JA at [104]-[105]

12 [2010] VSC 75

had a choice as to whether to continue with the 30 July presentation in the unusual circumstance that Mr Pennicott left him to do so at the last minute. Mr Gosling was fully involved, on his own account, in making misleading statements at the 30 July presentation. For that, he is principally liable under s 9 of the *Fair Trading Act*."[13]

77 In my view, Mr McLaren is in much the same position as both Mr Sgro and Mr Gosling in respect of the s52 representations. Indeed, his connection to the impugned transactions is in some respects even more direct than in these cases. In my view, the issue is not whether Mr McLaren made the statements on his "own behalf" or in a "personal capacity". The question of fact I have to determine is whether (to use the vernacular), he "owned" the representations, in the sense that, by his words or conduct, he made them his own. Would a reasonable person in the position of Mr Stinean understand that Mr McLaren was endorsing or "owning" the representations? Or would they see his words and conduct as distancing himself from them or disclaiming them?

78 Mr McLaren was the sole director, sole secretary and sole shareholder of Opalfish. He instructed his accountant Mr Kemp to prepare the first and second s52 statements, which were based on financial records compiled by Opalfish's bookkeeper. The bookkeeper was in turn provided with the underlying transaction data by Mr McLaren from Opalfish's POS system and other records. Mr McLaren personally sent both the first and second s52 statements to Mr Stinean (unlike, for example, the contracts in the *CH Real Estate case*, which were sent to the purchasers by the company's solicitors). Mr McLaren's cover email for the first s52 statement stated that Mr Stinean should "call me" if there were questions. Mr McLaren checked the headline financial figures in the second s52 statement before providing it to Mr Stinean.

79 The defendants argue that the s52 statements were not McLaren's representations, as the documents are titled "Statement By a Vendor", and Mr McLaren was not the vendor, but only an agent of the vendor. As discussed above, the capacity in which the person was acting is merely one factor that

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13 *Taylor v Gosling* [2010] VSC 75 at [154]

may be relevant in examining whether the putative representor in fact made the representation. And while Mr McLaren may in one sense have been the agent of Opalfish, he was also its sole director and thus its *alter ego.* In my view, a person with that degree of connection to a company and control over a company will almost invariably fail to sustain the so-called "conduit defence".

80 There is a useful discussion of that defence in the judgment of Young JA in the *CH Real Estate case* (including whether the expression "mere conduit" is an apt tag for the defence). His Honour examined, in particular, whether an express disclaimer is properly treated as a necessary element of the defence. It is clear that the current state of the law is that it is too artificial just to examine the content of the material to determine whether there was an express or implied disclaimer.[14] However, I would venture to suggest that it is difficult to imagine a situation where a sole director in Mr McLaren's position in respect of the s52 representations, could escape liability as a principal in the absence of something approaching an express disclaimer.

81 I am satisfied that, by his conduct referred to above, Mr McLaren adopted and endorsed the first and second s52 statements and thus was a maker of the s52 representations in conjunction with Opalfish. In particular, I agree with Laser Bean's submission that his conduct in passing the documents on to Mr Stinean constituted an independent assurance to Mr Stinean that the figures were correct. There was nothing in his words or conduct to suggest that he had no involvement in the s52 statements or to displace what would otherwise be the natural assumption that he personally stood by their accuracy.

82 The position is even clearer in relation to the profitability representation and clearer still in respect of the management expenses representation. The profitability representation comprised words spoken by Mr McLaren that were clearly intended to convey his own personal experience of Opalfish's financial

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14 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592, per Gleeson CJ, Hayne and Heydon JJ at [38]-[39]

position. In the case of the management expenses representation, he was there explicitly representing that the amounts shown as “management expense” were his *personal* expenses, that were being claimed (by Opalfish) as management expenses to minimise tax. Thus a key component of the information conveyed in the representation concerned Mr McLean’s personal affairs; not company information.

Does Mr McLaren have any accessorial liability in respect of any of the representations?

83 In view of my finding above, that Mr McLaren was a co-maker of the s52 representations, the profitability representation and the management expenses representation, it is unnecessary for me to consider whether he is also liable as a person involved in those representations. Turning to the contractual representations, I agree with Laser Bean’s submission that:

> “There can be no dispute that McLaren knew of Opalfish’s conduct, as he was its *alter ego* undertaking the relevant conduct which is impugned. The key question is whether McLaren knew that the sales, COGS, management expenses or adjusted profits figures in the section 52 statements were false or misleading, or likely to be so [citing *Yorke v Lucas* (1983) 158 CLR 661 at 667]. It will suffice to establish accessorial liability if the Court accepts that he did have such knowledge for any of the financial figures.”

84 Thus, it is sufficient for me to find that Mr McLaren knew that he did not pay to himself annually sums of between $35,000 and $50,000 for personal expenses that were then claimed by Opalfish as management expenses. It is not in dispute that he did know this, and I so find. Mr McLaren’s evidence was that these sums were in fact Ms Keeble’s wages and superannuation. Indeed, as Laser Bean has submitted, Mr McLaren knew that the truth was that he did not draw profit or expenses of any substance from the store.

85 I am also satisfied that Mr McLaren had sufficient knowledge of the typical COGS for Muzz Buzz franchisees (namely 34-38% for all stores), to know that the total COGS shown in the first and second s52 statements materially understated the true COGS figure for the business. In particular, Mr McLaren agreed in cross-examination that in order to have sales of about $393,000 (the

figure for the year ended 30 June 2012), the business would need goods of about $125,000. He said: "I think that's about a third, so yeah". Thus, a simple calculation of dividing the total sales by three, would have identified to Mr McLaren that the first and second s52 statements understated the COGS by a material amount. The position in respect of the sales figures is more finely balanced, but in view of my findings in the preceding two paragraphs, it is unnecessary for me to express a concluded view on that issue.

86 For the reasons above, at least in respect of the management expenses and COGS figures, I do not accept the defendants' submission that Mr McLaren relied on the documents prepared by his accountant Mr Kemp "with whom he had a 20 year business relationship", and did not know that the figures for each of those items was materially inaccurate. Further, I am satisfied that he had enough knowledge and understanding of the financial performance of the business generally, to know that it did not make anything like the profits set out in the final row of the 2010 to 2012 P&L and the 2010 to 2013 P&L.

87 Thus, I am satisfied that from the time he provided each of the first and second s52 statements to Mr Stinean (if not earlier), Mr McLaren knew that the figures in both those statements for the "net adjusted profit to the present vendor" were materially inflated and did not, in truth, show the profits that Opalfish enjoyed. It follows that he also knew that the contractual representations were untrue, given that those representations essentially concerned the truth and fairness of both the first and second s52 statements. I am therefore satisfied that Mr McLaren was a person involved in Opalfish's contravention of s18(1) of the ACLV, within the meaning of s2(1) of that Act.

Were the representations false or misleading or likely to mislead or deceive?

88 There are extensive concessions in the defendants' submissions that many of the representations were misleading or deceptive or likely to mislead or deceive. Notably, the defendants agree that the impact of the COGS figures in combination with the sales figures upon the "adjusted profits" in 2012 and 2013

means that "the profit figures for both of those years are misleading or deceptive or likely to mislead and deceive". Laser Bean submits (and I agree) that if the court finds that Mr McLaren made the s52 representations, these admissions of falsity will apply to both Opalfish and Mr McLaren. I have so found.[15] I note in passing that these concessions obviate the need for me to become immersed in the "cash accounting" and "accrual accounting" issue that received some attention during evidence and submissions.

89 The concessions by the defendants were rightly made. The misstatements in sales figures (particularly for the 30 June 2013 financial year) are only a small proportion of total sales, but they are material as a proportion of total profits. I agree with Laser Bean that it is the latter measure that is relevant. I am also satisfied that the COGS figures were materially understated for the reasons set out in Laser Bean's written submissions.[16] Finally, I have found that Mr McLaren made the management expenses representation during the Pancake Parlour meeting. It is common ground that the management expenses item were not personal expenses of Mr McLaren claimed to minimise tax, and therefore the management expenses representation was clearly false.

90 Thus, it is not in dispute that at least the representations as to adjusted profits in each of the first and second s52 statements were misleading or deceptive or likely to mislead and deceive. And I think the better view is that each of the s52 representations was misleading or deceptive or likely to mislead and deceive. The defendants in substance accept that it follows from their admissions concerning the figure for adjusted profits in each of the s52 statements, that the contractual representations are likewise misleading.

91 For completeness, I am also satisfied that the profitability representation was misleading and deceptive or likely to mislead and deceive. I conclude above that this is not properly to be treated as a representation about a future matter,

15 At [68]-[82]
16 At [60]-[63]

which appears to be the defendants' primary ground of complaint about this representation. Their secondary ground is that Laser Bean did not rely on the representation. They do not make submissions as to whether the representation, if made about the current state of the business, was misleading. I discuss below the expert evidence about the financial position of the business at the time of the negotiations between Mr Stinean and Mr McLaren in 2013.[17] In my view, that evidence establishes that the business was at this time neither "profitable and performing well" or "profitable and secure".

Did Laser Bean rely on the representations in purchasing the business?

92 I refer above to the evidence of Mr Stinean that he was looking for a drive-through coffee kiosk business that would earn him $50,000 to $70,000 each year that "runs by itself".[18] Regardless of whether such a business existed (an issue I discuss below in the context of loss and damage), I accept that this was a key prerequisite in Laser Bean's decision to purchase the business. Thus, I accept Laser Bean's submission that it would not have purchased the business had Mr Stinean known the true value of the sales, the total cost of the purchases, or the fact that the "management expenses" items were only available if he worked full-time in the store himself. Each of these matters were central to the representations alleged and were relied on by Laser Bean.

93 The defendants submit that Mr Stinean is not to be believed when he said he read each of the first and second s52 statements carefully. I reject this submission. Mr Stinean's note of the meeting on 20 March 2013 confirms that he asked "to see figures before deciding" and Mr McLaren said he "will send [Mr Stinean] the figures via email". It is not in dispute that Mr Stinean had the first s52 statement at the Pancake Parlour meeting and discussed individual entries in the 2010 to 2012 P&L with Mr McLaren, including the management expenses line and the much higher franchise fee in the 2011 year. In relation to the second s52 statement, Mr Stinean sent Mr McLaren several emails

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17 At [102]-[104]

18 At [12] and [33]

following up on the updated figures, including one where he noted: "would love to see an updated Section 52 if that's ok with you, as the old one is outdated and, don't get me wrong, but a lot of things can happen in 1 year with the business".

94 While I accept that there were parts of the s52 statements that Mr Stinean may not have examined particularly closely (for example, he appears not to have noticed the absence of striking out of asterisked items), I am satisfied that he closely examined and relied on both the 2010 to 2012 P&L and the 2010 to 2013 P&L. Indeed, Mr McLaren himself accepted that he knew and intended that Mr Stinean rely on the s52 statements. In particular, I am satisfied that Mr Stinean gave particular attention to the "adjusted net profit" figures and treated these as the actual, real, profit available to him if he bought the business and ran it in the same way, including by retaining Ms Keeble as store manager.

95 The defendants' submit that Mr Stinean did not rely on the management expenses representation, as he did not make further inquiries of him. I have found above[19] that this is not a sustainable basis for disbelieving Mr Stinean's evidence to the effect that he took this explanation by Mr McLaren at face value. Similarly, in relation to the profitability representation, I accept Mr Stinean's evidence that he used the 2010 to 2012 P&L to check whether the business was profitable "as it was said it was" by Mr McLaren at the 20 March 2013 meeting.

96 Finally, the defendants submit that Mr Stinean should not be believed when he said he read "every word" of the contract, and as such, the court should conclude he did not read the warranties and so did not rely on them. Mr Stinean's evidence about this was in fact that he read through the "entire document" and that his lawyer "did a summary for him as well". I would accept that as a lay person there were some provisions of the contract that were clearer to Mr Stinean than others. However, I have no reason to doubt that he read the

19 At [34]

warranties, and had at least a general understanding that the contract included provisions by which Opalfish vouched for the truth and fairness of the financial information it had earlier provided.

97 Further, Mr Stinean's evidence was that he took advice from a lawyer in relation to the contract. The contract is a standard form sale of business contract in the form approved by the Law Institute of Victoria under s53A(1)(a) of the *Estate Agents Act* 1958 (Vic) and the relevant warranties are the standard vendor's warranties under General Condition 2 of the contract. Any crossing-out or other deletion of these clauses would have been both obvious and concerning to any competent lawyer. I therefore accept Mr Stinean's evidence that if those clauses were omitted from the contract, Laser Bean's lawyer would have advised Mr Stinean not to sign the contract in that form.

Did Laser Bean suffer loss because of the representations?

98 The defendants submit that Laser Bean has failed to demonstrate that the representations were a material cause of its losses. They say that the losses can be attributed to two factors. First, Mr Stinean's minimal involvement in the business, such that it was not until September 2014 (a year after he took control of the business) that he realised the business was losing money. The defendants also point to evidence that the fortunes of the business improved when Mr Stinean became more actively involved in the business.[20] Secondly, the conduct of MBF, relying on evidence that Mr Stinean alleged that MBF had engaged in conduct resulting in damages of $531,949.91.

99 In reply, Laser Bean submits that its loss occurred at the moment it paid $230,000 for a worthless store and nothing that occurred after that date can stand as a cause of that loss, or the consequential losses claimed. The evidence it relies on in support of the assertion that the store was worthless, is discussed below.[21] Laser Bean further explains that if it had claimed damages in the form of trading losses it suffered after the purchase, then its management

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20 Defendants' submissions at [34(b)]
21 At [102]-[103]

of the store (and any failure to mitigate losses) would have been relevant to such a claim. But it does not make that claim.

100 I agree. At its simplest, Laser Bean advances a straightforward "no transaction" case. It seeks to recover what it paid for the business (and consequential losses), not losses associated with the conduct of the business. I am satisfied that Laser Bean suffered compensable loss because of the representations.

What loss can Laser Bean claim from Opalfish and Mr McLaren?

101 Laser Bean seeks damages under s236(1), or compensation under s237, of the ACLV. Similar principles apply to both provisions. As Laser Bean submits, my task is to determine what loss and damage Laser Bean suffered "because" of the contraventions. The ACLV permits a wide range of approaches to assessing loss, provided they work no injustice.[22] Laser Bean claims its loss on a "reliance" or "tort" measure: that is, it seeks to be put in the position it would have been in had it never relied on the misrepresentations and purchased the business. Laser Bean claims that it suffered loss and damage under a number of different heads. These are:

- Capital loss, being the $230,000 Laser Bean paid for the business.
- Acquisition costs. The defendants agree that if Laser Bean is successful in its claim then it is entitled to the acquisition costs sought, being $32,465.26.
- Investigation costs of $8,525.
- Loss of profits, on the basis that had Laser Bean not purchased the business, it would have bought a similar business and derived profits of at least $80,000 for two years.

Capital Loss

102 I accept Laser Bean's submission that Mr Lom was the only expert who had expertise with business valuations. The defendants' expert Ms Dixon conceded that she did not have expertise in valuing businesses, and so I disregard her

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22 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [65].

evidence on this subject. The defendants do not submit that I should do otherwise. Mr Lom's evidence was that, at the time Opalfish sold the Moorabbin store to Laser Bean, the true value of the Moorabbin store was zero. This valuation was based on a three step process, which Laser Bean summarises in its submissions as follows [transcript references omitted]:

> First, Mr Lom was asked to assume the figures in MFI-2 page B, with certain corrections. [The corrected version was Appendix to Laser Bean's submissions]. Those figures represent the section 52 figures, but replacing the net sales figures (sales less discounts) with the Muzz Buzz sales data, conservatively increasing purchases in FY12 and FY13 by $5,000 and $14,801 respectively (in line with the experts' analysis of the invoices), and conservatively increasing the 2011 purchases by $20,000 to account for the missing coffee. Making those adjustments, Mr Lom considered that the "net profit" for FY13 was about $15,000, and for FY12 it was $24,514. Mr Lom also assumed that the purchaser would work in the business for 10 to 20 hours per week.
>
> Second, Mr Lom tried to calculate the "*real profit*" or "*return on investment*" by removing from the net profit figure the value of the owner's labour, which he calculated to be $15-20,000 per year. Once that deduction was made, the "real profit" was only $5,000-$10,000 in FY12 and zero in FY13.
>
> Third, Mr Lom sought to place a value on the business, so understood. He explained that if the "*profit is very, very small … there's a very significant risk that it would turn into losses*", and so he assigned the business "*zero value*". (Note that Mr Lom also considered the scenario where COGS were 34% of sales, and concluded that the business would be worthless under that assumption too.)
>
> Accordingly, in circumstances where the Plaintiff bought the business for $230,000, but its true value was zero, it is clear that on the "price minus value" approach to assessing capital losses, there was a loss of $230,000 for the business which the Plaintiff bought.

103 I am satisfied that the above summary is an accurate distillation of Mr Lom's evidence. Thus I am also satisfied that, at the time of the sale to Laser Bean, the profitability of the business after allowing $15,000 to $20,000 for an owner's labour, was precarious. I accept Mr Lom's evidence that where the profitability of a business is marginal and there is therefore a significant risk that any profits will turn into losses, "there are not maintainable earnings to capitalise and…I would decline to put a value on it". He later added that, if the profit to the owner was $15,000, but the owner's work is worth close to $20,000, "the owner would be better off to go and get a job and earn $20,000, than buy a business and only earn $15,000".

104 The defendants challenge the assertion that the business was worth zero, and submit that the "value" part of the "price minus value" equation should be assessed as $160,000, or alternatively $100,000. The $160,000 is based on the asserted sale price of the Hamilton Hill Muzz Buzz store. The $100,000 is based on the asserted value of the Moorabbin kiosk. The defendants also assert that Laser Bean failed to mitigate it loss, and should have done so by an orderly return of the store to MBF for sale, or by selling the business itself. However, the defendants did not seek to adduce any evidence on what purchase price might have been achieved on those scenarios, except for the sale price of the Hamilton Hill store.

105 As to the Hamilton Hill store, the evidence about this store and the circumstances of its sale was scant, to say the least. For example, as Laser Bean has submitted, there was no evidence as to whether the sale included land and buildings. Further, Mr Pynt's evidence was that this store was in Western Australia and that, while its sales might have been comparable, "you've got to look at rent and other factors". According to Mr Pynt, one of these was that Hamilton Hill had scope for improvement which (as Laser Bean submits) may have attracted a premium. On the evidence, I am unable to reach any conclusions about the value of the business based on the Hamilton Hill store. Certainly it does not justify rejecting Mr Lom's expert valuation evidence leading to a value of zero.

106 In relation to the value of the kiosk building, I agree with Laser Bean's submission that "the argument assumes that ownership of the building passed to Laser Bean: but as a matter of law, it probably did not, as the building is not listed as one of the assets under schedule 1 of the contract". This is reinforced by the fact that the 2010 to 2013 P&L (among other financial information) shows rent as a major expense of the business. As discussed above,[23] Mr Stinean's contrary assertions as part of his dispute with MBF were a legal manoeuvre.

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23 At [37]

They have no bearing on the true legal position. I also accept Laser Bean's submission[24] that the basis for the $100,000 value attributed to the kiosk is unsustainable.

107 So far as the more generalised failure to mitigate is concerned, Laser Bean again submits (and I agree) that the loss occurred at the moment of the purchase. Nothing that occurred afterwards is causally related to the loss Laser Bean suffered by reason of the misrepresentations. Thus, in the absence of a provision in the ACLV equivalent to s137B of the *Competition and Consumer Act* 2010 (Cth) providing for a reduction of damages where a claimant fails to take reasonable care, the only question is whether Laser Bean nevertheless secured an asset of value. For the reasons above, the better view of the evidence is that the asset it secured had no value, with the result that Laser Bean's capital loss should be assessed at $230,000.

Investigation costs

108 Laser Bean submits that it incurred $8,525 in costs "connected with its investigation into why it was losing money, and whether it was misled" by the defendants. It breaks down the costs as follows [omitting citations]:

> "The costs comprise $5,500 spent on forensic accountants (Korda Mentha), $1,925 paid towards a private mediation with the Defendants and $1,100 paid to access the Defendants' documents. It was reasonable for the Plaintiff to have spent these moneys on these investigations, and they flow directly from the misrepresentations."

109 The defendants submit that these costs will be recoverable as part of Laser Bean's legal costs. In my view, despite being incurred before the proceedings were formally commenced, these categories of costs are not properly characterised as losses incurred because of the contraventions within the meaning of s236(1) of the ACLV. Rather, they formed part of a process leading to and informing Laser Bean's decision to commence the proceeding. Whether they properly form part of the legal costs recoverable in the proceeding is a matter for others to determine. For my part, I am satisfied that they are

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24 At [86]

sufficiently connected to the decision to commence these proceedings to remove them from the categories of losses recoverable under the ALCV.

Loss of profits

110 Laser Bean's submission on this component of its damages claim commences as follows:

> "The law recognises that one kind of loss and damage is the loss of an opportunity to obtain a future benefit. The future benefit might be a flow of income or profit [citing eg, *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299 (***La Trobe***) [81]-[90], [97]-[104] (Finkelstein J), [116] (Jacobson & Besanko JJ); *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (***Sellars***)]. If the Plaintiff had not purchased the Moorabbin business, it would have bought another business of the same kind, spending up to $230,000. According to Mr Lom a business costing $230,000 would likely have earned the Plaintiff $80,000 in profits per annum."

111 Laser Bean's summary of the law in the above passage is unimpeachable. However, in my view the balance of the passage is less so; particularly the last sentence. I am satisfied that if Laser Bean had not purchased the business, "it would have purchased a business of the same kind, spending up to $230,000". But it is important to note that "a business of the same kind" based on the criteria Mr Stinean had set, was in quite a narrow range. His evidence was that he was looking to purchase a coffee kiosk, in which he would not need to work himself on a "day-to-day basis". He considered a number of different drive-through coffee kiosks and said in evidence that he was interested in these because, "we were looking for a business that's simple and doesn't require us to attend on a day-to-day basis". He later added that "we were looking at franchises because franchises were turnkey operations so we didn't want to invest time in setting up shops and looking for places".

112 Against this background, the evidence of Mr Lom relied on by Laser Bean is problematic. It is derived from a table in Mr Lom's second report listing a total of 8 businesses identified as "sold by Lloyds Brokers" ranging in price from $950,000 to $96,000. Mr Lom did not undertake any market investigations beyond sales by Lloyd Brokers revealed by this table. His calculations excludes the first two sales, because they significantly exceed the $230,000 available to

Mr Stinean. This leaves sales of six businesses, only one of which is described as a "coffee lounge". The others are a food store, a "waterfront café", an "island kiosk", a salad bar and an ice cream kiosk. There is no information about where in Australia these businesses were located nor when the sales were completed. Importantly, there is no suggestion that any of them is a drive-through coffee kiosk in Melbourne (or even Victoria), franchised or otherwise.[25]

113 Laser Bean relied on the decision in *La Trobe*[26] in support of a contention that it was not necessary to establish a particular alternative transaction in order to prove a lost commercial opportunity of some value. So much may be accepted. But *La Trobe* was a case involving alternative lending opportunities, and the evidence established that:

> "[I]t was likely that another loan would be made: there were more potential borrowers than money available and La Trobe could not satisfy the demand of potential borrowers."[27]

114 In oral submissions, Laser Bean added:

> "Just like the lending example, your Honour, in *La Trobe*, we would say in Victoria, the second largest state in Australia and probably the coffee capital of Australia - it's no big stretch, there's coffee shops everywhere. There is real evidence about transactions in Mr Lom's expert report and there is the evidence that Laser Bean would have purchased a different business if it didn't get this one. It wasn't this business or no business at all."

115 On balance, I am prepared to conclude for the purposes of first stage of the two stage test in *Sellars*, that Laser Bean lost a commercial opportunity of real value when, in reliance on the defendants' contraventions of the ACLV, it paid $230,000 for the business. I also find that the opportunity lost was to earn an income from the purchase of a drive-through coffee franchise or similar business, in suburban Melbourne. However, in circumstances where evidence of the existence of that opportunity is not what it could be, the second stage of the *Sellars* test is more elusive. On the other hand, the authorities are clear that where damages are difficult to assess because the plaintiff has produced

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25 Defendants' reply submissions at [10]

26 Per Jacobson and Besanko JJ at [113]

27 Per Finkelstein J at [96]

evidence which, while establishing loss or damage, does not permit the court to make as reliable an assessment as should have been possible, the court must do the best it can.[28]

116 I propose therefore to take the figure of $80,000 per annum profit proposed by Mr Lom for two years, as sought in Laser Bean's submissions, but apply a heavy discount. That discount needs to allow for the real uncertainty as to whether a business existed in suburban Melbourne that both met the criteria identified by Mr Stinean and was capable of generating profits of the $50,000 to $70,000 per annum. I also take into account the defendants' submissions concerning the evidence about the viability of Muzz Buzz coffee franchises. In my view, the discount should be 50%. Accordingly, I assess Laser Bean's potential lost profits as $80,000 in total and deduct a further $25,000 in acquisition costs as proposed by Laser Bean.

117 In summary therefore, I assess Laser Bean's total damages as $317,465.26, comprising $230,000 in capital loss, $32,465.26 in acquisition costs and $55,000 representing its loss of opportunity claim.

Judgment and orders

118 I will order that there be judgment for Laser Bean against the defendants in the sum of $317,465.26. On the question of interest, I accept Laser Bean's submission that it is entitled to interest on this sum from the commencement of the proceeding on 26 October 2016, pursuant to s60 of the *Supreme Court Act* 1986 (Vic) as applied in this court by s50 of *County Court Act* 1958 (Vic).

119 I would also propose to order that the defendants pay Laser Bean's costs of and incidental to the proceeding (including reserved costs) on the standard basis in default of agreement, unless the parties are able to bring to my attention any matters that might justify a departure from the usual order on costs.

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[28] *Howe v Teefy* (1927) 27 SR (NSW) 301 at 306 per Street CJ (Gordon and Campbell JJ concurring) (approved *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 125; 104 ALR 1 at 43; 66 ALJR 123 per Deane J

120 I will hear further from the parties on the final form of the orders, including the calculation of the interest figure and on costs.

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Certificate

I certify that these 41 pages are a true copy of the reasons for decision of His Honour Judge Woodward delivered on 14February 2018.

Dated: 14 February 2018

Simone Karmis
Associate to His Honour Judge Woodward