
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : COMMERCIAL TENANCY (RETAIL SHOPS)
AGREEMENTS ACT 1985

CITATION : GOLDBREAK HOLDINGS PTY LTD and
LENDLEASE REAL ESTATE INVESTMENTS LTD
[2018] WASAT 51

MEMBER : MEMBER T CAREY

HEARD : 13 APRIL 2018

DELIVERED : 25 JUNE 2018

FILE NO/S : CC 1893 of 2017

BETWEEN : GOLDBREAK HOLDINGS PTY LTD
Applicant

AND

LENDLEASE REAL ESTATE INVESTMENTS LTD
Respondent

Catchwords:

Landlord and tenant - Retail shops - Misleading or deceptive conduct in connection with lease - Representations made regarding turnover of existing tenant and marketing plan - Significance of representations given later assignment of lease to applicant - Reliance

Legislation:

Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), s 16C

Result:

Application unsuccessful

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : Ms A Young

Solicitors:

Applicant : N/A
Respondent : Minter Ellison

Case(s) referred to in decision(s):

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

REASONS FOR THE DECISION OF THE TRIBUNAL:

Introduction

1 On 7 October 2015 Wright Hospitality Pty Ltd (Wright Hospitality) and Lendlease Real Estate Investments Ltd (Lendlease) entered into a written lease of a shop (lease) on the first floor of Southlands Shopping and Entertainment Centre in the Perth suburb of Willetton (Southlands). The lease is a retail shop lease for the purposes of the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (CTRSA Act). Lendlease executed the lease in its capacity as trustee of the owner. The commencement date of the lease was 22 June 2016.

2 Under the lease, the lessee was permitted to operate a restaurant and bar business under the name 'The Local Shack'. On 23 October 2015, the lessee's rights under the lease were assigned by Wright Hospitality to the applicant, Goldbreak Holdings Pty Ltd as trustee for the Brown Family Trust (Goldbreak).

3 The Local Shack commenced operations at Southlands in June or July 2016. It ceased trading in October 2017, and the lease was terminated on 6 November 2017 by Lendlease on the ground of a failure to pay rent.

4 In this proceeding, Goldbreak claims that Lendlease engaged in misleading or deceptive conduct in connection with the lease, contrary to s 16C of the CTRSA Act. In particular, Goldbreak alleges, Lendlease's representative, prior to any party entering the lease, provided information in connection with the lease which was misleading or deceptive, upon which Goldbreak acted to its detriment by taking an assignment of the lease. Its amended damages claim, provided after the hearing in the form of an untested report from a chartered accountant, seeks an amount in excess of \$15,000,000.

5 Based upon the written and oral submissions of the parties, the following issues may need to be determined in deciding Goldbreak's misleading or deceptive conduct claim:

- 1) factual differences between the parties in relation to the critical discussions upon which Goldbreak relies;
- 2) the possible legal significance of the found representations, if any, having regard to the identity of representees, their respective positions with Goldbreak

or Wright Hospitality, and the legal relationship then existing between Lendlease and those companies;

- 3) whether or not the representations were, or any of them was, misleading or deceptive;
- 4) whether Goldbreak acted in reliance upon any such representation;
- 5) whether, by reason of such action, Goldbreak suffered loss or damage;
- 6) the extent, and assessment in financial terms, of any such loss or damage; and
- 7) whether, and to what extent, any such loss or damage was contributed to by Goldbreak's own conduct.

6 Before dealing with these issues, I make reference to the personal and corporate characters central to the factual matrix.

List of characters

7 Bradley Wright (Bradley) was a director of Goldbreak between 30 June 2006 and 25 November 2010, and again between 25 March 2015 and 13 October 2015. He was also a director of Wright Hospitality from 22 November 2012 until the company went into liquidation on 11 October 2016.

8 David Wright (David) is Bradley's father. He has been a director and the secretary of Goldbreak since 25 November 2010, and the sole director since 13 October 2015. He was also a director of Wright Hospitality from 22 November 2012 until 1 October 2014.

9 Nathan Brown (Nathan) is Bradley's brother. He was never a director of either company. A rigger by trade, he described his role with the Local Shack at the time of a meeting of significance on 8 April 2015 (being the event in respect of which his evidence was relevant) as helping in the kitchen cooking, training staff, maintenance, and 'sort of managing'. He also stated that he attended the Southlands site during fit out and afterwards.

10 Based on Bradley's evidence, the Local Shack has been in operation in some form since 2010. Bradley himself was the 'approved manager' of the first Local Shack outlet in the Perth CBD. He then

started his own Local Shack in Scarborough, which commenced trading in December 2013. When that occurred, another brother of his (Ashleigh Wright) took over as approved manager at the Perth branch.

11 Wright Hospitality conducted the Local Shack Scarborough outlet. Bradley was the venue manager there until mid-2014, when, as a director of Wright Hospitality, he 'stepped back' and 'put two approved managers in there'.

12 Wright Hospitality, with Bradley as its sole director, opened a branch at Lakeside Joondalup Shopping Centre (Lakeside) in April 2015. In December 2015, upon the liquor licence (and the lease) for Lakeside being transferred from Wright Hospitality to Goldbreak, he became 'General Manager of the Local Shack'.

13 Goldbreak was registered in 2005. Its early operations were not the subject of any evidence. Its role germane to this proceeding commenced in 2015, when it was brought in to replace Wright Hospitality as the company behind the Local Shack branches at Lakeside and Scarborough. As will be seen, there was a similar transfer of corporate vehicle charged with operating the Southlands venue prior to the Local Shack commencing at that venue.

14 I will outline in greater detail Bradley's and David's roles within the companies, and with respect to the businesses operated in their names, later in these reasons.

15 Ms Sally Lewis has been employed by Lendlease since 2010. She is a licensed real estate agent and holds a Master of Business (Property) from the University of South Australia. She filled the role of leasing executive with Lendlease until 2016, when she was promoted to senior leasing executive. She describes her role as having the day-to-day responsibility for negotiating deals, including leasing vacant shops and lease renewals, presenting to stakeholders and owners, liaising with centre management staff and retailers who may be in need of assistance, and dealing directly with lease administration and legal teams on all aspects of a lease. She also works with the tenancy delivery team to assist tenants to open their premises on schedule.

16 The 'Lendlease group of companies', as referred to by Ms Lewis, own and manage a suite of shopping centres in Western Australia, including Southlands, Lakeside and Armadale Shopping Centre. In her current role, Ms Lewis is responsible for leasing at all Lendlease's Western Australian shopping centres.

17 I will now deal with the issues which have been previously identified to the extent this is required.

First issue: What representations were made?

18 The alleged representations founding the complaints of misleading or deceptive conduct are said to have been made in the course of meetings on 7 October 2014, 8 April 2015 and 7 October 2015. I will set out details of the parties' various assertions in respect of each meeting in turn, followed by my consideration and findings.

The meeting on 7 October 2014

19 The context of the first of the three relevant meetings is conveniently set out in Ms Lewis' amended witness statement (Exhibit 18 at paragraphs 12 - 18). I reproduce the relevant paragraphs, the contents of which were unchallenged:

As part of my role I target certain 'usages', with a view to creating canvas lists of operators that I could contact in the future. In particular, when we are looking at food precincts we like to have a mix of complementary usages, for example, Mexican, Thai and Burger outlets. The canvas lists are developed from my general knowledge of the industry through retail journals, social media and internet searches. Before I met Bradley Wright, I had been canvassing burger operations in both the WA and national markets. This canvas list included the 'Local Shack'.

When I first became aware of the Local Shack, it had restaurants in Scarborough and in the Perth CBD. I did not know much about Mr Wright, however I was familiar with his Scarborough outlet. I understood Mr Wright to be the owner of the Local Shack.

The first time I spoke to Mr Wright was when I approached him to see if he was interested in opening a Local Shack at Joondalup[.]

I recall that Mr Wright originally turned down opening a Local Shack at Joondalup because he told me he did not like shopping centres as venues for his restaurants. However, he later changed his mind and he opened a Local Shack at Joondalup in on (sic) 13 April 2015.

Around the time of October to December 2014, Lendlease were looking for a casual dining restaurant operator for Southlands. I am not certain of that time period, but I estimate it based on the dates of the meetings between me and Mr Wright and the letter of offer eventually made to Wright Hospitality. ... Lendlease targeted the market for a variety of food usages including the Local Shack which I thought would be a good fit based on its ability to trade all day. While I had this idea, it was

ultimately for the owners of the relevant shopping centre to approve any tenant/deal.

I approached Mr Wright about opening a Local Shack at Southlands. I do not recall the exact time that I approached him.

Some time later, I met with Mr Wright. I have reviewed my calendar and I have a record that I met with Mr Wright on 7 October 2014[.]

20 Both Bradley and Ms Lewis gave evidence that the meeting of 7 October 2014 occurred at Southlands; that they walked around the shopping centre; and that Ms Lewis took Bradley upstairs onto level 1 (where the site proposed for the Local Shack was located) and showed him the existing food court tenants and the Hoyts Cinema complex (Hoyts).

21 The site proposed for the Local Shack was to be a reconfigured area comprising in total 150m². Between that site and Hoyts lay a much larger (375m²) tenancy operating as a steak and grill restaurant under the name of Apache Spur Steak and Grill (Apache Spur).

22 Bradley said in cross-examination that he was 'concerned that there was no foot traffic up there' (a reference to what I have called level 1, to which he referred as level 2).

23 It was agreed that Bradley asked Ms Lewis as to the turnover of Apache Spur. In cross-examination, Bradley explained his enquiry in these terms:

I said to Sally, because Sally had also told us that second level at Joondalup, and we knew what Grill'd was turning over and we knew what the cinema was doing downstairs at Joondalup. We knew what basically the four or five of our nearest competitors were doing at Joondalup and Sally had continued to tell us.

(ts 42, 28 February 2018)

24 It is Ms Lewis' response to Bradley's enquiry of the turnover of Apache Spur which is the first representation upon which Goldbreak relies. According to Bradley, that response was (the first alleged representation):

[Apache] Spurs was turning over \$300,000 on a good month and \$3,000,000 a year.

25 Ms Lewis' assertion of her response is that Apache Spur 'were (sic) turning over about \$2,600,000 a year at that time'.

26 Ms Lewis' explanation for how she calculated the asserted annual figure changed during the course of the proceeding. In her original witness statement, she stated that she worked out the annual figure based on a rough average monthly turnover she had calculated in her head from the financial information for the months that Apache Spur had traded since April 2014.

27 In her amended witness statement, Ms Lewis indicated candidly that she was uncertain as to how exactly she did the calculation. In the same statement, she referred to her practice of utilising turnover information provided by the tenant (in this case, Apache Spur). The provision of turnover figures was, she said, required under the terms of a lessee's lease with Lendlease.

28 Ms Lewis referred in her amended witness statement to her belief that she took the April 2014 monthly figure of \$220,000 as a 'rough average' and projected it for a year to arrive at approximately \$2,600,000.

29 In cross-examination, having had put to her that, on the turnover figures for Apache Spur that were in evidence, the April 2014 figure was for less than a month (Apache Spur having commenced operations on 8 April 2014), she altered her evidence again, suggesting that she took the April 2014 figure as the lowest monthly figure, and annualised it.

30 The second impugned representation is alleged to have been made upon Bradley expressing his concerns that, as was the case at Lakeside, the proposal was to locate the Local Shack on the first level. He asked Ms Lewis how she was going to drive customers on the ground floor to the upper level. According to Bradley's witness statement (Exhibit 3), Ms Lewis replied (second alleged representation):

[T]his would not be a problem, marketing would activate this area and drive people upstairs to the [L]ocal [S]hack. ... upstairs would be a vibrant entertainment precinct.

31 Ms Lewis' version of what she said is contained in the following passages of her amended witness statement (Exhibit 18) at paragraphs 24 - 25):

I recall that Mr Wright asked what we would do about marketing. I told him that we were preparing a marketing plan to put to the owners of the shopping centre for their approval.

I recall that I told Mr Wright that Lendlease was looking at how to drive people upstairs to where the Local Shack would be located. The site had a few food court outlets, and Lendlease had planned to rebrand the area as an entertainment precinct. We had provisioned money in the budget for that work, however the marketing campaign was subject to the owners' approval.

32 The third and final alleged representation at the 7 October 2014 meeting relied upon by Goldbreak concerned a comparison of the relative popularities of Hoyts and the Grand Cinema at Lakeside, which was downstairs from the Local Shack located there (third alleged representation).

33 According to Bradley, Ms Lewis said that:

Hoytz (sic) was busier than the Lakeside Joondalup cinema.

34 Ms Lewis agrees that she made the third alleged representation.

The meeting on 8 April 2015

35 According to Bradley, on 8 April 2015, he and Nathan met Ms Lewis at Southlands. By that time, an offer of lease had been executed by Bradley on behalf of Wright Hospitality, although Bradley said that they were still thinking about proceeding with it.

36 Also according to Bradley:

- the purpose of the meeting was to enable Ms Lewis to demonstrate the proposed boundary line for the tenancy and to discuss its design; and
- Bradley said to Ms Lewis that he was still concerned with the location and did not think it would be 'the right fit'.

37 Bradley, in his witness statement, alleges that Ms Lewis told him:

Spurs has just done \$3,000,000 for the year. The Hoytz (sic) cinema was busier than the lakeside Joondalup cinema and there is less competition here compared to Joondalup. Lendlease marketing would drive people upstairs and activate the area and they were creating an entertainment district.

38 He also alleges that she said that there was only one other
restaurant in competition. This allegation does not form part of
Goldbreak's claim.

39 Nathan appeared as a witness. His witness statement
(Exhibit 15) confirmed his attendance at the meeting on 8 April 2015
with Ms Lewis and Bradley. Nathan described the purpose of the
meeting as being to discuss where the boundary line for the Local
Shack would be. He did not recall anyone other than Ms Lewis
representing Lendlease at the meeting. Although he said that he
thought he was there for a couple of hours, he recalls no discussion
regarding design or fit out.

40 In Exhibit 15, Nathan states that Ms Lewis made, at the meeting,
each of the first alleged representation, the second alleged
representation and the third alleged representation. He maintained the
correctness of this statement in cross-examination.

41 Ms Lewis' evidence of the same meeting was that its purpose was
to discuss design. Ms Andrea Rankin, Lendlease's retail design
manager, also attended. When questioned about this in his
cross-examination, Bradley accepted that the design manager may have
been present.

42 In her witness statement, Ms Lewis could not recall the presence
of Nathan at the meeting. In cross-examination, she was shown a text
message dated 7 April 2015 (Exhibit 19), authored by Ms Lewis,
stating that on 6 April 2015, Ms Lewis had seen Nathan, who had
indicated his intention to attend the meeting. When asked her position
in light of the text message, she refused to concede Nathan's presence at
the meeting on the day after the text message was sent. Her evidence
was:

I can't recall if he was. I don't know if he was. I saw him and said he
wanted to come. I can't recall if he was at the meeting.

(ts 217 - 218, 1 March 2018)

43 Again in her witness statement, Ms Lewis denied that she made
any comments about the turnover of Apache Spur, Hoyts at Southlands
or marketing plans. According to Ms Lewis, she could not recall
discussing anything other than design at the meeting on 8 April 2015.

44 In cross-examination, after the exchange regarding the text message and the possibility of Nathan's attendance at the meeting, Ms Lewis was clearly uncertain as to whether any of the alleged representations was repeated by her at the second meeting.

45 Ms Lewis' evidence in her witness statement is contradicted by statements contained in the respondent's amended statement of issues facts and contentions (SIFC) that Ms Lewis did meet with Bradley and Nathan on 8 April 2015, and that, in response to Bradley again asking Ms Lewis about the turnover of Apache Spur, she said that Apache Spur had turned over about \$2,600,000.

46 Although it might be said that Ms Lewis is not responsible for the documents drafted on behalf of Lendlease for the purposes of this proceeding, the disconnect between the witness herself and the formal position of the party on whose behalf she was acting is, I think, instructive. I will return to this.

The meeting on 7 October 2015

47 The third and final meeting at which any of the impugned representations is claimed to have been made occurred on 7 October 2015. The parties agree that a meeting between Bradley, David and Ms Lewis occurred at the Lakeside Local Shack on that day.

48 In their witness statements, both Bradley and David assert the reason for the meeting was to finalise the assignment of the Lakeside lease from Wright Hospitality to Goldbreak. The reason given for the assignment was that 'Goldbreak Holdings had purchased Wright Hospitality'. In cross-examination, each accepted, as another purpose of the meeting, the execution of the lease by Wright Hospitality as lessee and by Bradley and David as guarantors.

49 According to both Bradley and David, David said to Ms Lewis that he had concerns with the Southlands lease; in particular, the location did not seem to have much exposure. David went on to say that before he would agree to taking over the lease (a reference to Goldbreak taking over from Wright Hospitality), he required confirmation that the previous representations made to Bradley and Nathan were true.

50 The following exchange between David and Ms Lewis appears in both statements in similar terms (I reproduce that appearing in David's statement):

I asked Sally, 'was Spurs at Willetton still turning over \$300,000 in a good month and \$3,000,000 a year'. Sally said 'Yes, Spurs is still performing very well'.

I asked Sally if the Hoytz (sic) at Willetton was still busier than the cinema at Lakeside Joondalup, Sally replied 'Yes'.

David (sic) then asked 'Are you still implementing a marketing plan to drive people upstairs?' Sally replied 'Yes'.

51 Further comments of Ms Lewis reflecting her bullish views of the prospects of Local Shack at Southlands as compared with the Local Shack Joondalup are also attributed to her. Again, nothing arising from the additional commentary is reflected in Goldbreak's claim.

52 In her witness statement, Ms Lewis says of the 7 October 2015 meeting:

I do not recall Mr Wright or David Wright raising any concerns with me on this occasion, either about the turnover of Apache Spurs, the Hoyts at Southlands, marketing plans or any other matter.

53 Once again, Ms Lewis' evidence contrasts with the formal position of Lendlease in its amended SIFC, where the following assertion is made:

Ms Lewis did not tell Bradley Wright that Apache Spurs were (sic) turning over \$300,000 a month and \$3,000,000 a year. Bradley Wright again asked Ms Lewis about the turnover of Apache Spurs, and in response, Ms Lewis told Bradley Wright that Apache Spurs had turned over about \$2,600,000[.]

54 On this inconsistency being drawn to her attention in cross-examination, Ms Lewis said:

... I clearly remember telling you it was 2.6 million.

55 When it was pointed out that her statement denied that she had said anything about Apache Spur's turnover at the third meeting, Ms Lewis responded:

Well, the dates are muddled. But I do have a clear recollection of what I actually said with regards to the turnover, as I said.

56 The cross-examination continued:

So you did actually mention a turnover of Spurs? - - - *Well, I don't recall it, Brad. I just know I recall telling you it was 2.6 million.*

(ts 229 - 230, 1 March 2018)

57 A little later in Ms Lewis' cross-examination, the following exchange occurs:

[H]ow many times do you think you mentioned an Apache Spurs turnover figure? - - - *To who?*

To David Wright, Nathan Brown, myself? - - - *When you asked, I told you what it was. That's how often.*

How often? - - - *I don't know, Brad. When you asked me, I told you what it was.*

Was it over six months, a year, 18 months? - - - *When you asked me, I told you at the point in time what it was, when you asked me, which was 2.6 million.*

(ts 231 - 232, 1 March 2018)

My consideration and findings regarding the first issue

58 The evidence of witnesses regarding the incidence and content of two of the alleged representations (the first and the second, in a particular respect) made by Ms Lewis is differentiated along party lines - a not uncommon occurrence.

59 Let me say at the outset that I do not regard either party as successfully establishing that the witnesses relied upon by its opposing party demonstrated a general proclivity to knowingly tell untruths. Having said that, I am critical of some aspects of the evidence of all of the most important witnesses, for reasons I will come to.

60 Each of the witnesses called by Goldbreak was clear in his evidence that each of the three alleged representations was made at each of the three meetings. Bradley gave evidence in relation to all three meetings; Nathan's evidence was limited to the second meeting, and David's evidence was in respect of only the third meeting.

61 Each of Goldbreak's witnesses is strongly aligned with the applicant. They are also related familiarly. The contents of their written statements dealing with the same subject matters are almost or completely identical. This is despite each witness giving evidence of his own separate preparation of his statement. There are examples of

obvious 'cutting and pasting', such as the reference in David's statement where he describes himself as 'David', when the first pronoun had been used elsewhere in his statement.

62 Goldbreak's witnesses, and particularly Bradley, were forthright to the point of obstinacy. And, as these reasons reveal, Bradley engaged in exaggeration and reconstruction of certain facts where acceptance of the exaggerated or reconstructed facts would have advanced the prospects of the claim. The same can be said for David, in respect of a lesser number of instances.

63 Ms Lewis holds a senior position with Lendlease. Generally, her evidence was given upon what appears to have been proper investigation and reflection. However, her evidence was confusing about two important matters, namely, at which of the three meetings she made representations as to Apache Spur's turnover figures, marketing and the custom of Hoyts Cinema, and the basis upon which her asserted turnover figure for Apache Spur was made. On occasions, she gave evidence of matters without qualification, only to retreat from her unqualified stance after her evidence was exposed to scrutiny.

64 I accept that many of the matters the subject of unsatisfactory evidence in the manners described above generally concerned events and conversations which occurred some three or four years ago, and that the witnesses, generally, were unassisted by contemporaneous documents to assist their recollections to any great extent. Nonetheless, when giving evidence under oath or affirmation, it is incumbent on witnesses to be as truthful as possible, including to qualify their evidence appropriately whenever they are unsure of its accuracy.

65 Given the significant differences between accounts of the same conversations, it is incumbent on me to find in favour of one account in preference to the other.

66 I have considered and dismissed the possibility of each of Goldbreak's witnesses lying about the quite specific matters they allege Ms Lewis said relating to the turnover of Apache Spur in order to ground Goldbreak's application, in light of problems with Ms Lewis' evidence on the subject I am about to identify. Ms Lewis accepted Bradley to be a good businessman, and as such, he can be relied upon to accurately recall turnover figures mentioned in discussions of the type that occurred in this case.

67 I cannot accept that Nathan did not, as he said he did, attend the second meeting. Ms Lewis could not recall him doing so despite her having spoken with him shortly prior to the meeting when he indicated his intention to attend. My impression of Nathan, who gave his evidence by telephone by reason of work commitments, is that he gave his evidence carefully and honestly.

68 Nathan was unequivocal as to the turnover figure given by Ms Lewis as being the higher amount. He was also insistent that Ms Lewis made each of the second and third alleged representations. Lendlease's ultimate denial that any of the alleged representations was made at that meeting is contributed to by Ms Lewis' lack of recollection of Nathan's presence at the second meeting. As I am satisfied he was present, there is no proper basis to reject his clear evidence of what Ms Lewis said, with one exception that I will come to.

69 David is, apparently, a person suffering from the stresses involved with the failed business, to the point where he initially sought to be excused from giving evidence on medical grounds. However, when he did so, I found his evidence to be essentially credible, subject to some degree of exaggeration and reconstruction of facts referred to earlier. He firmly adhered to his version of the conversation with Ms Lewis in the face of the suggestion of error.

70 Although I have, for the sake of drafting convenience, characterised the representation made by Ms Lewis to David, in response to his questioning regarding Apache Spur's turnover, as a repetition of the first alleged representation, the excerpt from David's statement reproduced earlier demands careful consideration. Unlike the representation attributed to Ms Lewis at the two earlier meetings, the representation at the third meeting omits particular turnover figures. Rather, it confirmed the proposition being put (namely, that Apache Spur was still turning over \$300,000 in a good month and \$3 million in a year) with a 'yes', to which was added 'Spurs is still performing very well'.

71 Ms Lewis, too, was forthright as to her belief of the amount of the annual turnover figure. However, as I have said, her evidence was confused about the meetings at which she made the first alleged representation, and as to how she arrived at her asserted turnover figure.

72 Ms Lewis' employment keeps her very busy. She estimates negotiating about 55 deals per year, which increases to closer to 70 in

the case of a centre being redeveloped. She said that she attended anything from two to six meetings in a day. In cross-examination, in response to an invitation to accept that Nathan attended the second meeting in the light of the text message evidence, she said:

This deal was done in - - - like, in 2014, which is three years ago.

73 The questioning went on:

So your memory is not the best?

74 To which Ms Lewis answered:

I can't remember every detail. I speak to so many people on a daily basis, Brad.

(ts 220, 1 March 2018)

75 Ms Lewis' confusion over the calculation forming the basis of her estimate (whatever the figure was) is, in my view, more surprising. One would have thought, given the proceeding had been on foot now for many months, and Ms Lewis having prepared her original witness statement and amended witness statement before giving evidence, that her apparent certainty as to the turnover figure uttered by her would be easily reconciled with the reasoning underpinning her calculation. However, having altered her position about that matter twice, in cross-examination she changed her mind for a third time.

76 There is force in the proposition put by Goldbreak that at least one of the calculation methods advanced by Ms Lewis accords with the higher turnover figure they assert.

77 In my view, acceptance of Ms Lewis' recollection as to both the annual turnover amount and that she did not refer to a monthly figure, in the face of her marked lack of clarity surrounding the first alleged representation, would run counter to normal human experience.

78 The uncertainty is exacerbated when Lendlease's position regarding the second and third meetings is considered. Its amended SIFC suggests that Ms Lewis' made the representation regarding Apache Spur's turnover in the annual amount of \$2,600,000 at each of those meetings. In the normal course of events, the draftsman of a party's SIFC relies upon the primary witness of events to which the statement makes reference. At the very least, the disconnect between

the two versions regarding the second and third meetings heightens the sense that Ms Lewis' recollection is to some extent unreliable.

79 In all the circumstances, I find that Ms Lewis made the first alleged representation in the terms claimed by Goldbreak (with the noted variation when made in response to David's questioning), at each of the three meetings.

80 Bradley's evidence was that Ms Lewis made the second alleged representation in the terms contended by him, at each of the three meetings. David gave evidence to support the making of the second alleged representation at the meeting attended by him, without the qualification concerning owners' approval.

81 Ms Lewis, in her amended witness statement (Exhibit 18 at paragraph 25), said, in relation to making the second alleged representation at the first meeting:

I recall that I told Mr Wright that Lendlease was looking at how to drive people upstairs to where the Local Shack would be located. The site had a few food court outlets, and Lendlease had planned to rebrand the area as an entertainment precinct. We had provision money in the budget for that work, however the marketing campaign was subject to the owners' approval.

82 There is little of substance in the dispute between the parties regarding the second alleged representation. The principal difference between them is that Lendlease alleges that Ms Lewis told Goldbreak that any marketing was subject to owners' approval, which Goldbreak denies. A slight further variation is that Bradley ascribes a representation that the upper level of the shopping centre would be 'a vibrant entertainment precinct', compared with Ms Lewis' version that Lendlease planned to 'rebrand' the area as an entertainment precinct. I do not attach any significance to this variation, as the theme of an intention to promote the area as an entertainment precinct prevails in both cases. In addition, Ms Lewis denies having made the second alleged representation at either the second or third meetings. David's description of the second alleged representation is confined to references to a 'marketing plan' and 'driving people upstairs', without mentioning an 'entertainment precinct'.

83 For the same reasons as finding that Ms Lewis made the first alleged representation at each of the three meetings, I find that she

made the second alleged representation, or a statement akin to it, at each meeting.

84 I turn to the stated differences between the parties' respective versions of the second alleged representation.

85 I am satisfied that Ms Lewis possesses (and did so at the material times) the formal and experiential skill set to amply qualify her as a leasing executive. As such, the limitations on her in terms of marketing plans and the need to secure necessary approvals would have been obvious to, and impressed upon her.

86 Each of Bradley, Nathan and David was interested in what Ms Lewis had to say regarding marketing. They were told, as I have found, that a marketing plan was being prepared. The significance of the words 'to put to the owners of the shopping centre for their approval', appearing in juxtaposition with the preparation of the marketing plan in Ms Lewis' version of her conversation with Bradley in the first meeting, would have been greater for Ms Lewis than for Bradley, who, no doubt, was gratified to hear of the existence of such a plan. The same can be said for Nathan and David. I am satisfied Ms Lewis uttered those words, whenever she spoke about marketing plans, to any of Bradley, Nathan or David.

87 For reasons which will become apparent, the only occasion of the making of the second alleged representation or something similarly capable of grounding Goldbreak's claim was when made to David at the third meeting. Because David himself omitted any reference to level 1 becoming an entertainment precinct in his recollection of the representation, my finding of its contents makes the same omission.

88 I find that Ms Lewis made a variation of the second alleged representation which omitted reference to 'entertainment precinct' but which included reference to the need for the owners' approval.

89 Ms Lewis admits that she told Bradley that Hoyts was busier than the Grand Cinema at Lakeside (see witness statement of Ms Lewis, Exhibit 18 at paragraph 23).

90 I find that the third representation was made as alleged, again at each of the three meetings.

Second issue: What was the legal significance of the representations?

91 In its amended SIFC, Lendlease seeks to minimise its exposure to liability based upon Bradley's non-directorship position with Goldbreak on 7 October 2014 at the time of the first alleged representation, and again in October 2015 when Goldbreak was assigned the leasehold interest by Wright Hospitality. According to Lendlease, in taking the assignment, Goldbreak could not have been relying upon any representation alleged to have been made to Bradley.

92 In addition, Lendlease submitted, if any of the representations induced Wright Hospitality to enter into the lease, Wright Hospitality would be the proper party to bring the application. That company was placed in liquidation on the petition of the Deputy Commissioner of Taxation on 11 October 2016.

93 It is not necessarily the case that only representations made to the director of a company can give rise to a liability for misleading or deceptive conduct towards that company. Given Bradley's central role in the day-to-day operations and strategic direction of both companies (I will come back to this), the fact that representations made to him may have been at a time when he was not a director of one of them - the application having been brought in the name of the company of which he is not a director - is by no means an automatic answer to the claim. It could be expected by Lendlease that an actionable representation made to Bradley would be communicated to the Goldbreak's sole director and relied upon in the company's decision-making.

94 As will be discussed in my consideration of the next issue, Goldbreak does not argue that the first alleged representation, when made at the meeting is on 7 October 2014 and 8 April 2015, was misleading or deceptive. Therefore, in respect of the first alleged representation, the only instance of its making relied upon is at the meeting on 7 October 2015.

95 On 7 October 2015, Wright Hospitality entered into its lease of the Southlands premises. Bradley was sole director of Wright Hospitality when this occurred. As Lendlease correctly asserts, Goldbreak is unable to make a claim for loss flowing from action taken by Wright Hospitality allegedly in reliance upon the first alleged representation. This applies equally to the same action allegedly in consequence of either the second or third alleged representations. Moreover, once Wright Hospitality entered the lease, that company became subject to the obligations of lessee under the lease.

96 In order for Goldbreak's claim to succeed, it must demonstrate that it took some action in reliance upon representations made to it by Lendlease. The principal action asserted is taking an assignment of lease from Wright Hospitality.

97 Goldbreak's submissions fail to display any appreciation of the need for the strict delineation between Goldbreak's right of action and the notional claim of its assignor. Rather, they reflect an assumption that Goldbreak is entitled to the fruits of a claim under the CTRSA Act upon the vindication of its essential elements, without regard to the identity of the corporate entity impacted from time to time.

98 Serious questions for Goldbreak's case arise from its relationship with Wright Hospitality. Each company has, at different times, been the corporate vehicle operating the Local Shack enterprises. There appears little doubt that the main reason for the assignment was Wright Hospitality's solvency issues. Those issues would have concerned Bradley as the director, exposing him to possible personal liability if the company traded while insolvent. However, clearly, his desire to continue with the enterprise was unabated. The solution struck was to transfer the Lakeside business from Wright Hospitality to Goldbreak, and to assign the lease to the same company, thereby enabling a Local Shack branch to open at Southlands. David, Bradley's co-director of Goldbreak, was amenable to this.

99 The significance of these matters will become apparent in discussing the remaining issues, in particular, reliance.

Third issue: Were the representations misleading or deceptive?

100 The test of whether conduct is misleading or deceptive is an objective one. A person engages in misleading or deceptive conduct if they engage in conduct that might lead a reasonable person in the position of the recipient of information conveyed by the conduct into error.

101 The court or Tribunal must consider the effect of a fair reading or viewing on 'reasonable' or 'ordinary' members of the target audience, having regard to the relevant surrounding facts and circumstances: ***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*** (1982) 149 CLR 191 (***Parkdale***), at 199 and 209. Legislation to protect against misleading or deceptive conduct is not designed to protect people who failed to take reasonable care to protect their own interests: ***Parkdale***, *ibid*.

102 It is not necessary that the respondent intended to mislead or deceive. Dealing with conduct comprising representations, even though the respondent acted honestly, his or her representation may still be objectively misleading. Whether this is so will depend upon what was conveyed to the intended audience. Precise identification of the representations is essential.

103 With these principles in mind, I will consider each of the alleged representations in turn.

The first alleged representation

104 In its closing submissions, Goldbreak accepted that the first alleged representation was correct when made at both the first and second meetings. According to the submissions:

Spurs opened on 8 April 2014 (first meeting). On the day of the meeting Spurs at (sic) been trading for 6 months. Spurs had turned over \$1,600,000 and was on track for the \$3,000,000. ... On the 8th of April 2015 (second meeting) Spurs had been trading for exactly 12 months and had turned over \$2,977,900 in the first year of trading.

105 Therefore, it is only the iteration of the first alleged representation made at the meeting on 7 October 2015 upon which Goldbreak can rely.

106 Goldbreak's case for liability in respect of the first alleged representation is set out in its closing submissions as follows:

On the 7th October 2015 (the third meeting) Spurs was into the second year of trading. At the time of this meeting Spurs had been trading for six months into the second year. Spurs had only turned over \$1,192,000, a 40% drop year on year from the same time period. Compared to the first year, from 8th April 2014 to 8th October 2014 it was \$1,661,935. Under cross examination, Sally Lewis confirmed she was furnished with turnover figures from Spurs monthly. Sally Lewis knew Spurs turnover was down 40% by \$470,000 for the first 6 months of the second year and failed to disclose this information to Goldbreak[.]

107 Leaving aside the irrelevance of Ms Lewis' state of knowledge, the gravamen of the claim is that at the third meeting, in her response to David's questions, Ms Lewis conveyed incorrect information in representing that Apache Spur was, as at 7 October 2015, still turning over \$3,000,000 per year and \$300,000 in a good month. The facts, drawn from the figures for the second year (then approximately half

way through) were that the turnover figures were substantially lower than the figures represented, which had been achieved during the first year of Apache Spur's operation.

108 Before dealing with the correctness or otherwise of Ms Lewis' response, I will touch upon the variation in the form and content of the first alleged representation when made to David. Her representation, as found by me, was conveyed by the words 'Yes, Spurs is still performing very well'. In my view, the representation so conveyed is concerned less with specific turnover figures than a general appraisal of current performance. Without a follow-up question of Ms Lewis, or further enquiry, I am not satisfied that Goldbreak's directors would have reasonably been entitled to interpret her response as a firm commitment to the \$300,000 and \$3,000,000 amounts. However, in the context of previous discussions involving Bradley, David's co-director of Goldbreak at the time, the statement that Apache Spur continued to perform very well will be misleading or deceptive if the facts indicate a significant downturn had occurred by the time of its making.

109 Despite Goldbreak's attempt to rely upon unaudited turnover figures for Apache Spur, the provenance of which was open to question, Goldbreak ultimately accepted the accuracy of turnover figures appearing as Exhibit 17.5. Described in her witness statement as 'a document extracted from Lendlease's internal records in July 2017', Ms Lewis indicated that this document was the source of her information as to Apache Spurs turnover, upon which she based her response or responses to requests made for information on that subject.

110 The turnover figures described a total turnover for the 2014/15 financial year as \$2,702,666.63. For the 2015/16 financial year, the total turnover was \$2,136,511.64. This is a significant decrease. But what was the situation in the period leading up to the third meeting on 7 October 2015?

111 The table below sets out the five month window of our turnover figures commencing May 2014 and May 2015 respectively:

Month	2014	2015
May	\$301,756.00	\$174,706.54
June	\$290,193.00	\$219,874.55

July	\$324,790.13	\$208,044.00
August	\$262,506.30	\$206,899.00
September	\$281,567.07	\$175,719.02

112 In cross-examination, Bradley focussed upon the differential between the earlier and later figures. He described the earlier figures as being 'roughly' \$300,000. He asked Ms Lewis to accept that a significant drop from the earlier figures had occurred. Using the respective May figures as an example, he suggested that a drop from \$300,000 to \$174,000 was significant. This suggestion is plainly correct. Ms Lewis deflected the question based on her position that the only occasion upon which she mentioned turnover figures was at the first meeting.

113 Given my finding upholding the making of the first alleged representation at the third meeting in the manner described, Ms Lewis' response to David akin to the first alleged representation may reasonably have led David (and Bradley) to an erroneous belief regarding the turnover being achieved by Apache Spur in the period immediately preceding 7 October 2015. On the information available to Ms Lewis at the time, her response to the question she was asked should have been to the effect that the turnover figures were at a consistently and significantly lower level compared with the previous year's figures, and that Apache Spur was not performing as well. Her actual response was accordingly misleading or deceptive.

The second alleged representation

114 I have found that Ms Lewis represented that a marketing plan was being prepared aimed at driving people upstairs to the second level. As I have also found, Ms Lewis stated the marketing campaign was subject to the owners' approval.

115 Goldbreak's broad allegation that the second alleged representation was misleading or deceptive, contained in its amended SIFC, is:

There was no marketing plan to drive people upstairs and no effort to activate the top floor. Goldbreak Holdings operated the Local Shack in Willetton from June 2016 to September 2017. In this time, we are not aware of any marketing plans that were submitted to the landlords for approval.

116 I note, as an aside, the incongruity of the reference in the final sentence to marketing plans being submitted for landlords' approval, given Goldbreak's denial that the need for such approval formed part of the second alleged representation.

117 In its closing submissions, Goldbreak makes the following somewhat convoluted submission:

- The representation of a marketing plan to drive people upstairs induced a belief that Ms Lewis 'was liaising with marketing to ensure the representations she made to Goldbreak holdings was being conveyed';
- Taking 'the marketing plan representation' into account, together with a number of other factors, a comparison with the Lakeside Local Shack performance resulted in a projection for a future Southlands branch in 2016/2017 of 90,000 customers and \$2,000,000 turnover; but
- The 'marketing plan did not eventuate, instead Sally Lewis put more competitors downstairs in 2016 in the form of Jamaica Blue'.

118 This submission posits a quite different construct of the second alleged misrepresentation from that formally relied upon by Goldbreak. Rather than confining itself to a representation of action aimed at increasing foot traffic on the first level which failed to materialise, it asserts a failure by Ms Lewis to 'liaise' with marketing in relation to such a representation, and contrasts her conduct in leasing premises on the ground floor to a new competitor.

119 Bradley cross-examined Ms Lewis on her knowledge of Lendlease's marketing plan intended to drive people upstairs. I reproduce part of the cross-examination:

Do you remember the marketing plan? - - - *Well, I don't get directly involved in the marketing plan. It's not done by me. It's done by Samantha.*

Did you ever view the marketing plan? - - - *No. Not for that final one, no.*

How do you know there was a marketing plan? - - - *Well, we're a business and we always have a marketing plan, a leasing plan. It's - every piece of the business does their section for the budget.*

So you said there's a marketing plan to drive people upstairs but you never viewed this marketing plan? - - - *Well, it would have been discussed but, no, I haven't viewed the final marketing plan, no. As I said, it's not my direct report. I just do the leasing and Samantha does the marketing.*

How do you know that marketing plan had anything to do with people upstairs and not downstairs? - - - *Because we would sit in meetings all together and Sam would discuss what she's doing.*

So you knew about the marketing plan? - - - *I said I knew about the marketing plan but I don't know the exact - that was signed off on it.*

So you have no idea if that supposed marketing plan that needed owner's approval had anything to do with The Local Shack or the tenancies upstairs because you didn't view the final marketing plan? - - - *No. I didn't view the final marketing plan, no, but I believe it would have, yes.*

You believe it would have? - - - *But I didn't view the final document, no, because I'm not the marketing manager.*

So how did you know it was going to drive people upstairs? - - - *Well, everybody has a part of the business to play and I don't get involved in marketing on a day-to-day basis, it's done by Sam. So she does that side of the business obviously liaising with you and the retailers.*

(ts 238 - 239, 1 March 2018)

120 Bradley picked up the same issue at the end of his cross-examination of Ms Lewis:

I just want to very quickly touch on the marketing plan that was done at Southlands *do you remember who was the head of marketing at that stage?*

...

From 2014 to 2015, when the representations were made? - - - *Sam Simpson was the marketing manager.*

And when you said they were working on a marketing plan to drive people upstairs ... did Samantha, at any stage, engage your thoughts on how you could drive people upstairs? - - - *Well, we all discussed that, like, as a business. So centre manager, ops managers - when we go into business meetings, we discuss things like that.*

And what do you remember were the ideas to drive people upstairs? - - - *I honestly don't recall, Brad, because so many things get discussed in those meetings.*

Did - do you remember if you contributed to that marketing plan? - - -
I don't remember.

...

Did you or Samantha - did you discuss with Samantha any representations you made to me about marketing and driving people upstairs? - - - *I know we definitely discussed driving people upstairs. Whether I discussed it with Sam or (indistinct) broader centre team I don't recall.*

And the broader team would consist of whom? - - - *So you've got a centre manager, ops manager, leasing, finance, you've got our regional manager Malcolm and then it goes, obviously, up to our owners.*

Malcolm had been present at that meeting? - - - *No, he wouldn't have been. He more oversees the functions of all the centres.*

...

And generally in the financial year what date is that put to the owners for approval? - - - *Normally about March they start doing them.*

To the owners for approval? - - - *Yes. Talking about it, yes, but it can take a while to get signed off.*

Ready for June - to begin June, the start of - the end of the financial year? - - - *Well, sometimes they're looking potentially to get the funds so it depends when it gets approved or if it gets approved. It's all subject to the owners anyway, all those plans (indistinct) up there.*

There is no guarantee you could drive people upstairs, is there? - - -
Well, no, you can't guarantee anything.

...

Were you aware of any of those specifics to drive people upstairs? - - -
... *Well, I - as I said, I didn't sign off a final marketing plan, it's done by the marketing manager.*

So how can you make that statement? - - - *I - as I said, I definitely talked about rebranding the precinct but what I say doesn't always reflect what's in a marketing plan. I don't do the final sign off, as I said.*

(ts 262 -264, 1 March 2018)

121 Ms Samantha Simpson was called as a witness by Lendlease. She was marketing manager for Southlands from March 2016 until the end of 2017. Ms Lewis was therefore mistaken in her evidence that

Ms Simpson was head of marketing at the times the alleged representations were made in 2014 and 2015.

122 Ms Simpson's witness statement (Exhibit 20) provides some insight into the role of Lendlease's marketing department in relation to its centres. According to her statement:

In my role as marketing manager I am responsible for creating and executing a marketing plan for each of my shopping centres each year. The plan must fit within the budget that I am given and accord with Lendlease's business plan.

[A]t the beginning of the financial year, Lendlease releases a marketing calendar to its retailers providing a high-level overview of the planned marketing activity, promotions and seasonal campaigns along with free and paid retail marketing opportunities available throughout the year. When a retailer opens a new store, I offer complimentary marketing, such as a social media post, uploading a grand opening special to the centre's website and e-newsletters advertisement, subject to the relevance and strength of the content. Sometimes Lendlease arranges and pays for advertising for a category of retailers, such as a marketing campaign for fresh food centres in a centre[.]

123 Although she was not marketing manager at the time of any of the alleged representations, Ms Simpson's evidence describing a marketing plan assists with an understanding of Ms Lewis' reference to the plan being proposed to drive people to the first level.

124 The submission of Goldbreak that Ms Simpson's evidence undermined Ms Lewis' statements that she discussed the alleged representations with marketing representatives of Lendlease (in particular, Ms Simpson), and that she attended weekly meetings with marketing 'to ensure the representations made to the Local Shack were discussed', may be correct, but is not to the point. It is of no moment whether or not Ms Lewis raised the second alleged representation, once made, with the marketing department. Having been made, the relevant question is whether or not the second alleged representation was misleading or deceptive. It may well have been, had Ms Lewis made it in the absence of any knowledge of facts to justify it. It may also have been if the marketing department disbanded any intention to devise and implement a marketing plan designed to inject life into the first level, and no such plan was ever implemented.

125 When the Local Shack commenced at Southlands in June 2016, Ms Simpson had been marketing manager for Southlands for about

three months. Her evidence as to the existence of a marketing plan and its implementation is therefore highly relevant.

126

In her witness statement, Ms Simpson said:

I commenced marketing for the Local Shack the end of May 2016, prior to the Local Shack opening. I have detailed the marketing done for the Local Shack in a report[.]

The quantity of marketing I did for the Local Shack far exceeded that which we would normally do for a retailer. This was prompted by the fact that the opening of the Local Shack *formed part of an overall dining promotion, in line with the marketing plan* (My emphasis).

... I also have a record I met with Mr Wright on 29 August 2016. I recall that this meeting was to discuss marketing activities with him, along with two members of the Lendlease Pop-Up team. The Pop-Up team organises a space for opportunities to sell or promote business outside our complimentary retailer marketing opportunity. I recall that together with the Pop-Up team we discussed running some promotions of the Local Shack in the pop-up space. While I do not recall exactly what said (sic) Mr Wright in response, he indicated he did not want to accept those opportunities.

I also have a record that I met with the Local Shack's Marketing Manager, Thomas Matthew, on 24 August 2016 and 14 September 2016 to discuss marketing activities. No-one else attended those meeting. I discussed with Mr Matthew complimentary marketing opportunities for the Local Shack, what marketing Local Shack was doing for itself and how we could assist. From time to time, Mr Matthew and I spoke by telephone and we would also see each other at Southlands and discuss how things were going.

... in November 2016, I arranged for and Lendlease paid for the cost of a letterbox drop of the Local Shack's A5 flyer and new takeaway menu to 14,000 homes. On 3 May 2017, wayfinding signage directing customers to retailers on level I was installed on the bulkhead towards the Coles end of the centre. Additionally, wayfinding posters were installed inside each centre entry.

Sometimes Mr Wright would have marketing ideas that were inconsistent with constraints of a marketing fund. There were times that Mr Wright approached me with marketing ideas, and after reviewing the budget, I would have to tell him that they would not be possible. For example, I did not agree to Mr Wright's request for Lendlease to pay for and arrange the 'skinning' of the entry doors (that is, by placing advertising decals for the Local Shack on the entry doors) and for Lendlease to pay for and erect large external signage.

I suggested alternatives such as Mr Wright hiring trailer signage. I am not aware whether this was done.

127

Ms Simpson's report of marketing initiatives is Exhibit 17.7. For the sake of brevity, I reproduce, as a summary of those efforts, the following excerpt from Lendlease's closing submissions. Neither Bradley in cross-examination nor Goldbreak in its written reply challenged the contents of the report nor the summary:

- the marketing program commenced on 31 May 2016, when the Local Shack did not even commence trading until 11 July 2016, promoting the 'New Tastes' at Southlands;
- from May 2016, posters were placed around Southlands, and decals placed on the entry doors and on the floors (which remained until December 2016);
- banners were placed outside the supermarket specifically advertising the Local Shack;
- announcements were made over the Southlands PA system for three months from June to September 2016;
- the respondent's use of the internet to promote the Local Shack was prolific. In early June 2016, an email was circulated to 872 contacts, and posts were placed on social media, including a competition for a \$200 voucher to spend at the Local Shack. From July to August 2016, a competition and promotion were on the Southlands website, and another on social media. From August to September 2016, events at the Local Shack were promoted on the Southlands website and in their e-newsletter. From September 2016 to May 2017, posts were made on social media promoting the Local Shack on 10 occasions;
- in November 2016, the respondent funded a letterbox drop of the Local Shack's menu and a flyer to 14,000 homes within a three kilometre radius of Southlands;
- in early 2017, the respondent marketed the Southlands retailers, including the Local Shack, through the Lunar New Year season;
- wayfinding and bulkhead signage was installed in April to May 2017.

128

This uncontroverted evidence represents a significant marketing effort, both of the attractions on level 1 generally, and the Local Shack in particular. An illustration of the marketing more generally is the 'New Tastes' posters and decals, which read:

HOYTS CINEMAS, LASER TAG
& 17 FOOD OPTIONS

NEW TASTES

OPENING

SOON

NOW OPEN

- Apache Spur Steak & Grill
- Boost Juice
- Pepper Lunch
- Bon Bons

OPENING SOON

- The Local Shack
- Nene Chicken
- Jesters Pies
- Plus more!

129 In its closing submissions, Lendlease contends:

The applicant has not anywhere in its evidence or submissions pointed to anything that it alleges that the respondent should have done in respect of marketing that they did not do. Rather, Bradley accepted that it was unusual for the respondent to specifically market one retailer, at the respondents cost, as they did for the Local Shack. Mr Prinsloo agreed that the marketing was extensive, and the things that he asked the respondent to do were done.

130 Lendlease's contention is broadly accepted. When being cross-examined regarding Lendlease's marketing efforts, Bradley was unaware of some aspects of the marketing effort (such as the New Tastes campaign). He was also critical of certain actions of centre management to veto two of his own initiatives. However, the sole objection raised by Goldbreak in its written reply emanates from the fact that Ms Simpson was not in the marketing manager's role until after the second alleged representation was made. It asks rhetorically, '[h]ow could she intend to follow through with marketing representations if she is not aware of them?' For reasons I have explained, this question and the answer to it are irrelevant.

131 Lendlease's reference to Mr Prinsloo is to Nicolas Prinsloo, the manager of Apache Spur. He has been the restaurant manager since 29 July 2016.

132 The witness statement of Mr Prinsloo (Exhibit 11) is confined to matters relevant to the first alleged representation.

133 In cross-examination, Mr Prinsloo was questioned regarding the marketing of both his business and level I generally. Although he could

not recall the New Tastes campaign, he remembered signage in the shopping centre to direct people to the first floor; that the posters directed people to the first floor dining and entertainment area; and internet publications specific to Apache Spur. In cross-examination, he agreed that the marketing campaign by Lendlease for Apache Spur and the first floor dining area was extensive.

134 Mr Prinsloo's evidence was that Ms Simpson met with him on only three occasions in the past two years. Bradley attempted to conflate this minimal personal contact with the marketing manager with the issue of the extent of the marketing of level 1. Mr Prinsloo's evidence of comprehensive marketing and his satisfaction with it remained intact.

135 I am satisfied that a marketing plan for Southlands with the objective of driving people upstairs to level 1 was approved by Lendlease and implemented under the management of Ms Simpson. Opinions may differ as to the respective benefits of different forms of marketing, as they may about aspects of implementation of the plan. The second alleged representation was in general, not specific terms. It promised a marketing plan with a particular purpose in mind, and delivered on the promise. It did not guarantee outcomes, as Bradley appeared to accept in one of his questions to Ms Lewis.

136 In its closing submissions, as I have indicated, Goldbreak's position in relation to the second alleged representation moved away from the argument that Lendlease failed to honour its commitment concerning a marketing plan designed to drive people upstairs. Instead, it criticised Ms Lewis for her alleged failure to inform marketing of the nature of the second alleged representation and her leasing of a ground floor premises to a competitor. Neither claim forms part of its misleading or deceptive conduct case and can for this reason be discounted. In any event, neither criticism has merit. Ms Lewis explained in broad terms how the marketing representation came about; it cast no onus upon her to undertake any liaison or other communication with the marketing team subsequent to its making. Nor did it require her, in her continuing leasing activities, to quarantine the ground floor from any new potential competitors for the upstairs tenants.

The third alleged representation

137 This representation concerned the respective performances of the cinemas at Southlands and Lakeside, which was, or was to be, in close

proximity to a Local Shack outlet. Lendlease accepts it made the third alleged representation, which it asserts was correct at the time, and therefore, not misleading nor deceptive.

138 In its amended SIFC, the only reference to Hoyts, apart from the content of the third alleged representation, suggests that it is the 'worst performing Hoytz (sic) in Western Australia' - a different thing from a comparison of its performance with the cinema at Lakeside. Neither the closing submissions nor written reply of Goldbreak referred to the third alleged representation at all. Goldbreak adduced no evidence of turnover figures or customer numbers for the cinemas concerned. Lendlease led evidence disclosing that the turnover figures of Hoyts were higher than those for the Grand Cinema at Lakeside.

139 In these circumstances, it is not open to find that the third alleged representation was misleading or deceptive.

Fourth issue: Did Goldbreak rely on the representation?

140 Having regard to my findings as to the content of the alleged representations, their possible legal significance and whether any was misleading or deceptive, consideration of the reliance question will be limited to Ms Lewis' response to David's enquiry whether Apache Spur was still turning over \$300,000 in a good month and \$3 million a year: 'Yes, Spurs is still performing very well'.

141 The principal question to be answered is: what, if any, actions were taken by Goldbreak in reliance, to at least some extent, upon Ms Lewis' response?

142 It is necessary, in order to address the principal question, to examine the events pertaining to the leasing of the Southlands premises for the purposes of a Local Shack branch in the period preceding the third meeting on 7 October 2015, as well as the events following that meeting. Before doing so, I will further examine Bradley's claims of the importance of the turnover figures of Apache Spur, the Local Shack's future neighbour and competitor, to any decision to open up at Southlands.

143 Perhaps the clearest explanation of the connection between the two appears in the following exchange in the course of Bradley's cross-examination:

Can you explain to me why [the Spurs turnover] was important? What did you think the Local Shack could turn over based on what was told to you about the Spurs turnover?

Okay. So the Spurs turnover is a number of factors that we take into account. So when we compare it to another site, for example, Joondalup, that's turning over 2 million a year, we take into account what turnover, for example, the Germans - the German place next door what they do, what the Asian place across the road which is 1.4, what the German place does which is 1.3, what Spurs - what Grill'd downstairs does is 3 million, and we take into account the number of people going there, which is Joondalup at 11 million. So when we look at who our nearest competitor is, and our nearest competitor is Spurs obviously - a licensed restaurant as you said before - when we're told that they're turning over 3 million a year we try to take in as many familiarity or is all links to another premise that is very similar. So at that stage the other shopping centre that we had was Joondalup. Southlands was a shopping centre as well. So the reason that it's important is we use that to prepare cash flow forecasts based off another successful model as close to that one as possible. Joondalup was as close to Southlands as possible.

(ts 64 - 65, 28 February 2018)

144 The proximity attributed to the link between Apache Spur's turnover figures and the projected turnover for the Local Shack at Southlands is revealed from the following passage in Goldbreak's closing submissions:

Sally Lewis had told Goldbreak Holdings Grill'd at Joondalup was turning over \$3,000,000 a year and this was the nearest competitor at Joondalup. Bradley took into account the \$2,200,000 the Local Shack did in Joondalup for 2014/2015 and again came up with a conservative figure of \$2,000,000 expected earnings for the cash flow.

145 In his witness statement, Bradley states that it took him nearly three months to complete the cash flow projection. He referred to a number of matters which, in his research, he took into account in addition the respective turnovers of Apache Spur and the Lakeside Local Shack and its competitors. Those matters included demographics of both Lakeside and Willetton, number of visitors to both, number of competitors at both, Ms Lewis' advice that the cinema at Southlands was busier than that at Lakeside and the marketing plan designed to drive people upstairs.

146 Bradley denied the suggestion in cross-examination that the \$2 million figure for projected turnover was a 'guesstimate' and not the

subject of mathematical calculation. He failed however to provide the particulars of any such calculation. Bradley said that his research entailed replicating the already successful model (Local Shack at Lakeside) and applying the factors he had identified. His unscientific response to a question as to the relative significance of Apache Spur's turnover figures compared with the various other factors identified by him that 'it's probably the biggest one' is consistent with the explanation given in Goldbreak's closing submissions for how the \$2 million figure was arrived at.

147 The lack of a cogent, mathematically based explanation for deriving a particular projected turnover figure is at odds with Bradley's assertion of the validity of the methodology undertaken and results obtained. It is clear that the exercise was not simply a case of comparing like with like; Bradley conceded that he failed to take account of the distinctive character of Joondalup as a satellite city, and (despite his reference to them in his witness statement) the different demographics of Joondalup and Southlands. The cash flow forecast exercise undertaken appears to have been dominated by an assessment that the Southlands branch could be expected to perform in the same manner relative to its nearest competitor as the Lakeside branch does in relation to its nearest competitor. Whether such a simplistic analysis was valid might be a question on which a business valuer or an accountant would be qualified to offer an opinion. Bradley, even accepting his experience as a businessman involved in establishing and running restaurant businesses, lacks the expertise and objectivity required to accept his opinion about that matter.

148 Bradley commenced the cash flow exercise in mid-May 2015. He had, some five months earlier, accepted a written offer to lease the premises on behalf of Wright Hospitality. He gave evidence that he remained uncertain, well into 2015, whether to proceed with the lease, although he did not indicate upon what basis it would be possible to extricate his company from the agreement to lease.

149 Bradley sought to involve Ms Lewis in the cash flow exercise. The evidence discloses a number of attempts he made by text and telephone. He asserts in his statement that Ms Lewis telephoned him upon receipt of his text of 25 May 2015 indicating that he had a question for her about cash flow, when, according to Bradley, she commended him on undertaking the cash flow based on a comparison with Joondalup and the annual Apache Spur's turnover figure.

150 Ms Lewis' evidence is that she failed to respond in any substantive way to these attempts. To quote her witness statement:

I had stopped answering Mr Wright's calls at this time because he continued to ask me about the Local Shack's cash forecasts. They were a matter for him and I did not want to become involved in them. It was not my job to do so.

151 I accept Ms Lewis' evidence. Bradley's attempts at the time to involve his future landlord's employee in a due diligence exercise designed to assist in determining whether or not to proceed with the lease seem curious and inappropriate. So far as the documentary record discloses it, Ms Lewis adopted the entirely understandable course of ignoring them.

152 Goldbreak's closing submissions go so far as to assert that the cash flow forecast undertaken by Bradley was 'vetted' by Ms Lewis. Save for Bradley's evidence of a telephone conversation between Ms Lewis and himself following the text of 25 May 2015, which I have rejected, there is absolutely no evidence to support this claim. The documentary evidence is quite to the contrary. In any event, if true, the assertion is irrelevant to a claim of misleading or deceptive conduct. It might be relevant to a claim for negligent advice, to which Goldbreak's closing submissions make a number of references, but which is distinct in character from the claim being made.

153 According to Bradley, in late August 2015, he phoned Ms Lewis and told her that Goldbreak had purchased Wright Hospitality and the Lakeside lease needed to be assigned to Goldbreak. He also said his father was not convinced on Willetton (Southlands), and that it was not likely to proceed under Goldbreak's name. Ms Lewis' response, according to Bradley, was that she would prepare the documents for Lakeside and let him know when they were ready. She recommended that they catch up to discuss Southlands.

154 The documentary record casts doubt upon Bradley's version of any such telephone call so far as it relates to the Southlands lease. On 30 September 2015, Lendlease's solicitors, Clayton Utz, sent Bradley an email attaching the draft Southlands lease in the name of Wright Hospitality. On 6 October 2015, Ms Lewis emailed Bradley to advise that she had the leases at centre management Lakeside and invite him and David to sign off on them. On 7 October 2015, at the third meeting, the lease was executed by Wright Hospitality as lessee and Bradley and David as guarantors. No response indicating David was

considering his position, nor that Wright Hospitality was not appropriate long-term as the lessee, was forthcoming.

155 If, as I do, one accepts Ms Lewis' version of the antecedents to the third meeting, her evidence that shortly after the third meeting, Bradley requested that the lease be assigned to Goldbreak is also to be preferred. On 23 October 2015, Clayton Utz sent Bradley a deed of assignment for his approval. Bradley confirmed his receipt of the deed of assignment, which he printed off, and signed on behalf of Wright Hospitality and as guarantor of Goldbreak. He also arranged for David to sign the deed on behalf of Goldbreak and also as guarantor before delivering it to Lendlease. For reasons which are irrelevant for current purposes, the lease and deed of assignment were not executed by Lendlease until 9 November 2016.

156 Prior to the third meeting, Bradley had already decided to sign the lease document on behalf of Wright Hospitality. His evidence in cross-examination made this clear. He also signed in the knowledge of the provisions in the lease restricting the representations made by the lessor which influenced the lessee's decision to enter the lease to those nominated in a schedule to the lease, and none was nominated. Bradley sought to explain this (as he had for signing the disclosure statement accompanying the offer to lease document to similar effect) on the basis of avoiding trouble for Ms Lewis in divulging the turnover figures of a competitor, which he argued was in breach of the CTRSA Act. However, he indicated that the third meeting was an opportunity for David to consider Ms Lewis' responses to his (David's) questioning before committing Goldbreak to an assigned lease. Bradley was about to relinquish his directorship of Goldbreak.

157 What, then, did Goldbreak do, in reliance upon the representation concerning Apache Spur's turnover, differently from what it would have done had the true position - that the turnover was significantly lower in the past six months than previously - been disclosed?

158 David says in his witness statement:

Had Sally Lewis told Goldbreak Holdings the truth and that trade was in fact down 40% by \$470,000 in the first 6 months year on year I would not have entered into this lease.

I relied on cash flow projections based off he (sic) following facts:

- A stable trading business.

- Grill'd and Spurs were doing very similar numbers, \$3,000,000 a year.
- Grill'd is located right next to the Cinema at Joondalup.
- The Local Shack would be located right next door to the cinema at Willetton.
- The cinema at Willetton was busier than Joondalup.
- The lack of competition at Willetton.
- I took into account 11,000,000 people attend the Joondalup shopping centre with over 20 restaurants within 100 meters (sic).
- Willetton has 4,000,000 people attend the shopping centre with only 1 restaurant within 100 meters (sic).

159 Not unexpectedly, David's list of factors bears a striking resemblance to that referred to by Bradley in his preparation of cash flow figures.

160 David's cross-examination regarding the third meeting included:

You said you recalled signing the lease as a guarantee - as a guarantor, rather? - - - *Yes.*

Yes. And you knew before going into that meeting that you were going to go in and sign that lease as a guarantor, didn't you? - - - *Yes.*

And that was one of the purposes for which you went to the meeting, was to sign as a guarantor? - - - *Yes.*

And to have the lease signed too, wasn't it? - - - *Yes.*

And prior to that meeting, you had made those decisions that the lease was going to be entered into? - - - *No. No, I had to - I had to discuss - one of the reasons I went to that meeting was to talk to Sally and I wanted to - her to tell us more about Spurs and also the market she had - she was going to get us going, to get more traffic upstairs, and also the Hoyts.*

In terms of signing the guarantee, though, you know that before going into that meeting, that you were going to sign as a guarantor (indistinct) - - - *Yes, I knew that. Yes.*

...

And you knew the effect of signing a guarantee was that you were guaranteeing a lease that had been entered into, didn't you? - - - *I went guarantor, yes.*

Yes? - - - *But the lease had not been so and there was no intention until - I could have still pulled out.*

But you knew that you could only sign up as a guarantor to the lease if the lease itself was signed. Correct? - - - *No. I didn't know that.*

You know that the only purpose of being a guarantor on the document is to guarantee an agreement between the parties? - - - *Yes. Yes.*

And so the only thing that you could be guaranteeing was a lease that had been formulated? - - - *If I had have found out that Spurs was making less money than what we were told, we would not have gone into it.*

But you said prior to going to that meeting, you had made a decision to go guarantee - guarantor on the - that lease? - - - *Yes, that's right.*

(ts 186 - 187, 1 March 2018)

161 David acknowledged the provisioning in the lease for any representations made by the lessor inducing the lessee to enter the lease to be stated, and that none was in the Southlands lease. He also accepted in cross-examination that he signed as guarantor appreciating that if the tenant was in default of his obligations under the lease, this would have significant financial implications for him.

162 Before considering the impact of the third alleged representation on Goldbreak's decision-making, I digress to analyse David's role in determining strategic outcomes affecting the Local Shack businesses.

163 David's responses to cross-examination regarding his directorship role with Goldbreak and interactions with Bradley are reproduced in the following passage:

Did you set up Wright Hospitality? - - - *No.*

But you were, from time to time, involved in Wright Hospitality as a director? - - - *Only for a short time.*

How much experience did you have in the hospitality industry before getting involved in Wright Hospitality? - - - *Zero.*

Whose idea was it to establish Goldbreak holdings? - - - *I can't - I don't know who it was.*

You didn't establish Goldbreak holdings? - - - *I might have established it. It wasn't at - I don't know whose idea it was.*

All right. You didn't become a director of Goldbreak, though, until 2010; is that right? Does that ring a bell? - - - *No. I couldn't tell you for sure. I couldn't say honestly.*

Do you agree that the level of your involvement in Goldbreak's business activities is minimal? - - - *No. I'm actually the maintenance supervisor there, and I - I am at all the shops all the time, and any problems, I solve, as far as mechanical.*

So your role is primarily on site and helping out with the day-to-day work of Goldbreak Holdings? - - - *Yes. And also, if any discussion my son wants to have with me about anything else. Yes.*

But you don't have involvement in the financial decisions of Goldbreak Holdings, do you? - - - *Yes, I do.*

What about business decisions for Goldbreak holdings in terms of what it's going to do? You don't have a role in that, do you? - - - *Yes.*

...

It's fair to say that your son, Bradley Wright, is really the driver of the financial and the business making decisions for Goldbreak Holdings? - - - *Yes and no. We discuss it. We don't just leave everything to him. It's a family - it's a family affair.*

In terms of the future plans for the Local Shack, though, that's really a decision to be made by Bradley, isn't it? - - - *No. It's not.*

Is it fair to say he's really running the show and giving you advice about what Goldbreak Holdings should be doing? - - - *He's the general manager of the shop.*

But prior to today, he wasn't the company officer and he wasn't the company secretary until - to today, was he? - - - *That's correct.*

And there was a period of time where you were just the director of Goldbreak Holdings? - - - *There was. There was also a time when he was a director of it as well.*

...

And when you were the only director of Goldbreak Holdings, you took a load of advice from your son, Bradley? - - - *A lot of technical advice, yes, on the running of the company. Yes.*

Yes. And what Goldbreak should be doing? - - - *He had an input; I had mine.*

In terms of the business of Goldbreak Holdings, it's just involved in restaurant trade, isn't it? - - - *Yes.*

And it was always Bradley's idea as to where to open restaurants? - - - *As I said, we discussed where we were opening. It's me just to make the idea, it isn't - make the decisions. It's discussed.*

But you never suggested opening a restaurant? - - - *I always making - opening restaurants. That's what we're here for.*

But it was Bradley's idea as to where branches should be opened and when branches should be open? - - - *Yes and no.*

He would come up with the ideas first, or didn't - - -? - - - *No, not necessarily. No.*

(ts 182 - 184, 1 March 2018)

164 There is a number of revealing answers in the above passage. In response to a question concerning his involvement in Goldbreak's business activities, David described his role as maintenance supervisor. Apart from this day-to-day role, David engages in 'any discussion [Bradley] wants to have with me'. He answered 'yes and no' to Bradley being the driver of Goldbreak's business decisions; the explanation given for the negative response being the concern of the family not to leave everything to Bradley. He tacitly accepted that Bradley advised him on what Goldbreak should be doing, both before and after David became the sole director.

165 Although I accept that David acts as an independent director in the discharge of his duties on behalf of Goldbreak, it is obvious that the decisions he makes are the result of discussions with his son, Bradley, and generally initiated by Bradley. In this way, Bradley had been able to oversee the realisation of a number of Local Shack outlets during the past eight years. And Bradley was intent on opening a new branch at Southlands.

166 As at 7 October 2015:

- Wright Hospitality had entered an agreement to lease the Southlands premises;
- Bradley, the sole director of Wright Hospitality, had undertaken the research he considered appropriate and necessary for a final decision to proceed with the lease;

- Bradley had formed an intention to execute the lease on Wright Hospitality's behalf and as guarantor; and
- David had formed an intention to sign the lease as guarantor.

167 Despite the fact that David raised the issue of Apache Spur's turnover with Ms Lewis, Wright Hospitality was committed to entering the lease, with David as one of the guarantors, regardless of Ms Lewis' response. Two inferences can be drawn:

- a) Apache Spur's turnover figures for the period since those used by Bradley in preparing his cash flow forecasts were irrelevant to Wright Hospitality proceeding with the lease.
- b) The assertion that the same information would have been sufficient to intervene in the decision for Goldbreak to assume the role of Wright Hospitality, including taking an assignment of its lease, demands careful scrutiny.

168 The first inference undermines Bradley's evidence of the importance he attached to the turnover figures in preparing his cash flows. His evidence, or lack thereof, of the methodology he employed in obtaining projected turnover figures for the Southlands Local Shack based upon the Lakeside Local Shack's figures, Apache Spur's turnovers, and a myriad of other factors, in the absence of any supporting expert analysis, fails to vindicate the asserted close linkage between the projected figures for the new business and the turnover figures of the neighbouring competitor. Bradley committed Wright Hospitality to enter the lease regardless of Apache Spur's most recent turnover figures. Both he and David had resolved to, and did, guarantee the lease.

169 As for the second inference, how likely is it that David would have acted any differently had Ms Lewis disclosed the true trading position of Apache Spur when asked? In my view, most unlikely given the circumstances, especially Bradley's influence with David, and Bradley's determination for the leasing to proceed.

170 Between 2012 and 2015, the Local Shack branches were operated in the name of Wright Hospitality. By 2015, Wright Hospitality was encountering financial difficulty. In order for the businesses to

continue, it was necessary for Wright Hospitality to divest itself of them and for an alternate company to fill the breach. That company was Goldbreak. It was determined that the Scarborough and Lakeside branches would be transferred to Goldbreak, and that the Southlands Local Shack would be opened in Goldbreak's name. All these decisions were made when both Bradley and David were directors of Goldbreak, but with the intention that David would become sole director, which occurred on 13 October 2015.

171 Although I have found that David enquired after the turnover figures of Apache Spur, I cannot be satisfied to the degree necessary to allow Goldbreak's claim that the disclosure of the actual reduction compared with the previous year would have been sufficient to interfere with the proposed solution of Wright Hospitality's liquidity issue whilst achieving the goal of opening another branch of the Local Shack at Southlands.

172 I reject Goldbreak's claim that in entering into the assignment of lease of the premises, it acted in reliance upon the first alleged representation, or a representation similar to it, on the basis that it would still have proceeded with the assignment had it been apprised of the correct position.

Fifth, sixth and seventh issues

173 In light of my conclusions regarding the first, second, third and fourth issues, it is unnecessary for me to deal with the remaining issues. I will, however, make one observation in relation to the fifth issue (whether, as a result of relying on a misleading representation, Goldbreak suffered any loss or damage).

174 If I am wrong, and Goldbreak did act in reliance upon the first alleged representation in taking the assignment of lease, it then needed to establish, by appropriate evidence, the extent to which the misstatement of the turnover figures contributed to the shortfall of the Local Shack's actual performance compared with a verifiable projected performance. The closest Goldbreak gets is Bradley's explanation of the significance he attached to Apache Spur's turnovers figures, which falls well short of this.

Conclusion

175 The Tribunal shall issue an order dismissing the application and managing the respondent's costs application anticipated in such an event through to resolution.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MR T CAREY, MEMBER

25 JUNE 2018