Ceccon Transport Pty Ltd & Ors v Tomazos Group Pty Ltd [2017] NTSC 25

PARTIES:	CECCON TRANSPORT PTY LTD (ACN 009 595 911)
	and
	CECCON Suzanne Yoko
	and
	CECCON Antonio
	and
	TOMAZOS GROUP PTY LTD (ACN 009 618 704)
	and
	TOMAZOS GROUP PTY LTD (ACN 009 618 704)
	and
	TOMAZOS TRANSPORT PTY LTD (ACN 159 500 857)
	and
	CECCON TRANSPORT PTY LTD (ACN 009 595 911)
	and
	CECCON Antonio
	and
	CECCON Suzanne Yoko

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 108 of 2014 (21451042)
DELIVERED:	31 March 2017
HEARING DATES:	7, 8, 9, 10 & 11 March 2016, 13 & 14 April 2016, 17, 18, 19, 20, 23, 24, 25 & 26 May 2016, and 13 October 2016
FURTHER SUBMISSIONS:	27 October 2016 and 16 December 2016
JUDGMENT OF:	HILEY J

CATCHWORDS:

CONTRACTS – Construction and Interpretation of Contracts – Objective theory of contract – Use of post contractual communications – Identity of contracting party

TORTS – Negligence – Negligent misstatement – Duty of care – Realisation and intention of representor – Nature and purpose of the representation – Reliance by representee – Actionable representation not made

COMPETITION AND CONSUMER LAW – Misleading and deceptive conduct - s 18 Australian Consumer Law - Representations with respect to future matters under s 4 - Trade or commerce

ESTOPPEL – General principles - Estoppel by encouragement - Equitable estoppel not available to assist a person to enforce an agreement that would be void at law and contrary to public policy - clean hands

EQUITY – Fiduciary Obligations - Breach of Fiduciary duty – Fiduciary relationships

TORTS – Interference with contractual and other relations - Inducing breach of contract - Wrongful interference with a contract by unlawful means – Earlier agreement superceded by formal contract.

Competition and Consumer Act 2010 (Cth) Schedule 2, *The Australian Consumer Law* s 18, s 4

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65, *Air Tahiti Nui Pty Ltd v McKenzie* [2009] NSWCA 429; 239 FLR 367, *Bill Acceptance Corp Ltd v GWA Ltd* (1983) 78 FLR 171; *Agaiby (Khalaf) v Darlington Commodities Ltd* [1985] ATPR 40-535, *Concrete Constructions Group Ltd v Litevale Pty Ltd* [2002] NSWSC 670; 170 FLR 290, *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594, *Consul Development Proprietary Limited v DPC Estates Proprietary Limited* (1975) 132 CLR 373, *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; ATPR 42-004, *Daebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156; 207 FCR 220, *DHJPM Pty Ltd v Blackthorn Resources Pty Ltd* [2011] NSWCA 348; 83 NSWLR 728, *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, *Davies v Nyland* (1975) 10 SASR 76, *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640, *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, *Henville v Walker* [2001] HCA 52, *Hospital Products Limited v United Stated Surgical Corporation* (1984) 156 CLR 41, *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150, *Pethybridge v Stedikas Holdings Pty Ltd* [2007] NSWCA 154, *Pilmer v The Duke Group Limited (in liq)* (2001) 207 CLR 165, *Ricochet Pty Ltd v Equity Trustees Executors & Agency Co Ltd* (1993) 41 FCR 229, *San Sebastian Pty Ltd v The Minister* [1986] 162 CLR 340, *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, *Territory Sheet Metal Pty Ltd & Ors v ANZ Group Ltd* [2009] NTSC 31, *The Commonwealth v Verwayen* (1990) 170 CLR 394, *Thomson, Re; In re Thomson v Allen* [1930] 1 Ch 203, *Tomko v Palasty* [2007] NSWCA 258, *Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions & Ors* [2015] VSC 741, referred to

Lord Goff and Gareth Jones Law of Restitution (Sweet & Maxwell Ltd, 4th Ed, 1994) 648

REPRESENTATION:

Counsel:

Plaintiff:	B Ilkovski
Defendant:	M Crawley

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	De Silva Hebron Barristers & Solicitors

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ceccon Transport Pty Ltd & Ors v Tomazos Group Pty Ltd [2017] NTSC 25

No. 108 of 2014 (21451042)

BETWEEN:

CECCON TRANSPORT PTY LTD (ACN 009 595 911)
First Plaintiff

AND:

CECCON SUZANNE YOKO
Second Plaintiff

AND:

CECCON ANTONIO
Third Plaintiff

AND:

TOMAZOS GROUP PTY LTD (ACN 009 618 704)
Defendant

AND:

TOMAZOS GROUP PTY LTD (ACN 009 618 704)
First Plaintiff by Counterclaim

AND:

TOMAZOS TRANSPORT PTY LTD (ACN 159 500 857)
Second Plaintiff by Counterclaim

AND:

CECCON TRANSPORT PTY LTD (ACN 009 595 911)
First Defendant by Counterclaim

AND:

ANTONIO CECCON
Second Defendant by Counterclaim

AND:

SUZANNE YOKO CECCON
Third Defendant by Counterclaim

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 31 March 2017)

INTRODUCTION

Background

[1] Antonio (Tony) Ceccon and Antonios (Tony) Tomazos had been good friends since the 1970s and began doing business with each other soon after that. Following some serious health issues towards the middle of 2011, Tony Ceccon decided to close down his successful transport business. He offered to assist Tony Tomazos and his son John Tomazos to move into a similar business. Most of this litigation relates to the events that followed that.

[2] Tony Ceccon was born in Italy in 1940 and immigrated to Australia in 1970. He settled in Darwin in about 1971 and started a company, Ceccon Transport Pty Ltd (**Ceccon Transport**). He is the director and principal of Ceccon Transport. The second plaintiff, Suzanne Ceccon (**Ms Ceccon**) is Tony Ceccon's wife, and is the lessee of various mining tenements for which Ceccon Transport was the nominated operator.

[3] Tony Tomazos and his brother Michael Tomazos set up their own commercial and residential construction business, Tomazos Brothers, soon after Cyclone Tracy (December 1974). Tony Tomazos is a director and the principal of the defendant company, Tomazos Group Pty Ltd (**Tomazos Group**). His son, John Tomazos, is the General Manager of Tomazos Group and the principal of Tomazos Transport

Pty Ltd (**Tomazos Transport**) a company incorporated on 16 July 2012.

[4] Ceccon Transport's main business was extracting, transporting and supplying building materials, such as gravel, sand, topsoil, select fill, rock and rubble. The materials were extracted from various mining sites in and around Darwin and supplied to third parties, usually for use in constructing commercial and residential buildings or roads in and around Darwin. Some of those sites, including those referred to in these proceedings as the **Gunn Point Road site**, **the Scrubby Creek site** and the **Jenkins Road site**, were the subject of mining tenements held by Ms Ceccon.

[5] Ceccon Transport used to sell building materials to Tomazos Brothers from the late 1970s until 2001 when Michael Tomazos died, and continued to supply materials to Tomazos Group from about March 2009 following an approach from Tony Tomazos.

[6] In addition to extracting and removing materials from pits on the tenements held by Ms Ceccon, Ceccon Transport extracted material from pits owned by other contractors and transported the material for those contractors. One of the main contractors was Boral (Qld) Pty Limited (**Boral)**, which had pits near the Gunn Point Road site. Boral allowed Ceccon Transport to set up its site office and yard on land owned by Boral at the Gunn Point Road site.

[7] In about October 2010 Tony Tomazos contacted Tony Ceccon and requested and discussed the terms of a loan of $2 million which Tomazos Group needed in order to purchase a property at Harvey Street, which it proposed to develop. That loan did not proceed, but in April 2011 one or other of the plaintiffs agreed to, and did, lend $1 million to Tomazos Group. That loan agreement is the subject of the plaintiffs' first claim in this proceeding, referred to as the **Loan Agreement**.

[8] In about June 2011 Tony Ceccon became aware of some serious medical issues and decided to wind back his involvement in the business. Following discussions with Boral, and also with Tony and John Tomazos, he ceased operating the transport business at the end of October 2011. On about 1 November 2011 Tomazos Group took over much of that business, occupied the yard at Boral previously occupied by Ceccon Transport, and engaged some of Ceccon Transport's staff.

[9] Discussions and negotiations, mainly between Tony Ceccon and Tony and John Tomazos, included Tomazos Group taking over the work which Ceccon Transport had been doing for Boral, purchasing materials that had been extracted and stockpiled by Ceccon Transport, and purchasing machinery and other items owned by Ceccon Transport. The plaintiffs' claims for monies owing in respect of the stockpiled materials, and for machinery and other items, are dealt with under the heading **Alternative November 2011 Agreement**.

[10] Some of the other claims made by the plaintiffs have now been accepted, others have been abandoned, and a few minor claims remain.

[11] The defendant, Tomazos Group, and a related company, Tomazos Transport, have counterclaimed against the plaintiffs. The counterclaimants contend that the damages to which they are entitled under their counterclaim exceeds the amount which is payable to the plaintiffs. The main basis of the counterclaim is their allegation that prior to Tony and John Tomazos setting up their transport business Tony Ceccon told them that he would never be re-entering the transport industry. They contend that Tony Ceccon began to get back into the transport industry in about March 2012, as a result of which they suffered loss. They rely upon various causes of action including negligent misstatement, misleading and deceptive conduct and estoppel.

[12] The counterclaimants also contend that by re-entering the transport industry Tony Ceccon breached fiduciary duties owed to them, causing them to suffer damage and to be entitled to the profits wrongly derived by the plaintiffs. They also claim that the plaintiffs interfered with the performance by Boral of a preferred provider agreement which they had with Boral for the provision of general cartage work.

[13] The counterclaimants also allege breaches of an agreement referred to by them as the **Jenkins Road Pit Agreement**. They also claim a right

of set-off in relation to some sands which they say they should have been given in exchange for a float trailer.

Pleadings and submissions

[14] The proceedings were instituted by Writ filed 31 October 2014. The latest versions of pleadings[1] were filed and exchanged following the completion of the evidence and prior to final addresses. Detailed written submissions were filed and exchanged[2] and were the subject of a number of questions from the Court on 13 October 2016. Further material was received from the parties following questions raised by the Court.[3]

Parties and Witnesses

[15] Many of the matters in dispute require my assessment of the credibility of the main witnesses and an interpretation of the recording of various agreements, whether made contemporaneously or not, and whether made unilaterally or acknowledged by both parties.

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[1] Third Further Amended Statement of Claim filed 4 July 2016 (**Statement of Claim**); Defence to Third Further Amended Statement of Claim filed 5 August 2016 (**Defence**); Further Amended Counterclaim filed 5 August 2016 (**Counterclaim**); Reply to Amended Defence to Third Further Amended Statement of Claim filed 24 August 2016 (**Reply**) and Defence to Further Amended Counterclaim filed 24 August 2016 (**Defence to Counterclaim**).
[2] Submissions on Plaintiffs Claims made in the Third Amended Statement of Claim dated 29 August 2016 (**Ceccon Submissions**); Defendants' closing submissions dated 29 August 2016 (**Tomazos Submissions**); Defendants' closing submissions on Claim in Response dated 19 September 2016 (**Tomazos Response to Ceccon Submissions**); Responsive Submissions on Defendants' Further Amended Counterclaims dated 19 September 2016 (**Ceccon Response to Counterclaim**); Plaintiffs Reply Submissions on the Third Amended Statement of Claim dated 28 September 2016 (**Ceccon Reply Submissions**); Defendants' closing submissions on Counterclaim in Reply dated 29 September 2016 (**Tomazos Reply on Counterclaim**).
[3] Defendant's Supplementary Submissions and evidence references dated 27 October 2016 (**Tomazos Supplementary Submissions**);Email 16 December 2016 from plaintiffs' solicitors responding to associate's email of 1 December 2016 (**Email 16 December 2016**).

[16] Tony Ceccon and Tony Tomazos have many common characteristics. Both are immigrants from the Mediterranean, with English not their first language. Both have established successful businesses and, by virtue of their similar cultural background, both have similar characteristics of pride, desire for the perception of generosity and concern over reputation. A consequence of this is that both tended to eschew written agreements and favour oral agreements. Both pride themselves on their generosity and would seek to avoid honour debts.

[17] Both Suzanne Ceccon and John Tomazos are more commercially sophisticated in relation to contemporary ways of conducting business than Tony Ceccon and Tony Tomazos, for example in documenting things and using modern communication methods such as by use of facsimile machines and emails. Ms Ceccon was inclined to honour and respect the wishes of her husband and John the wishes of his father.

[18] As Tomazos' counsel concede, while John would honour arrangements made by his father, if the terms of the arrangements were vague he would interpret them in a way which best suited the interests of their business. If payment terms were indefinite or payment was not pressed, payment would be deferred in favour of other business uses for available funds.

Antonio Ceccon

[19] The principal witness for the plaintiffs was Mr Tony Ceccon. In the main, the relevant negotiations were conducted and agreements were made by him, generally in the absence of any supporting witness.

[20] Mr Ceccon's evidence was by affidavit, answering affidavit, and oral evidence in cross examination. His cross-examination extended over three and a half days, two days during the first tranche of the hearings in March and the other one and a half days during the April session.

[21] I accept Tomazos' counsel's contention that in a number of aspects, his oral evidence not only differed from his affidavits, but was directly inconsistent and contradictory to them. The time span between the first affidavit and the last of his oral evidence was approximately four months. There was no evidence of a change in Mr Ceccon's capacity during that time. Counsel submitted that it is not possible to assume the accuracy of Mr Ceccon's affidavit evidence in preference to oral testimony. His evidence should be viewed as an unreliable basis for findings of fact in the absence of independent supporting evidence.

[22] Counsel for the plaintiffs agrees that Mr Ceccon found giving evidence confusing and alienating. This was compounded by communication and hearing difficulties. Counsel also concedes that at times during the hearing Mr Ceccon became cantankerous and non-responsive.

[23] In reply, Tomazos' counsel submits that Mr Ceccon's oral evidence was given in a truculent, suspicious manner. This highlights the significance of admissions against interest when made, supporting the direct evidence of the Tomazos witnesses. Counsel rejects the contention that Mr Ceccon found giving evidence confusing or alienating. He was simply an uncooperative witness. If his admissions were confusing (which Tomazos denies), then the plaintiffs had the opportunity of dealing with that in re-examination, but failed to do so.

[24] Mr Ceccon has a very strong accent which made it difficult to hear and comprehend everything that he said when giving his evidence. Indeed those who attempted to transcribe his evidence had such difficulty doing so that the parties later had to listen to the audio tapes and agree on an amended transcript.

[25] Mr Ceccon's two affidavits were made with the assistance of an interpreter who was able to converse with him in Italian. At the start of the hearing I upheld an objection by the Tomazos parties to Mr Ceccon giving his evidence through an interpreter. However I indicated that if it appeared at any stage that he needed such assistance I would permit that to occur. Accordingly an interpreter was sworn in and did indeed provide valuable assistance at various stages.

[26] There were several occasions during his cross-examination when

Mr Ceccon gave answers which appeared inconsistent with what he had said in one or other of his affidavits. On many of those occasions he provided these answers reasonably spontaneously without any suggestion that he did not understand the question or required the assistance of the interpreter. He maintained his answers and embarked upon non-responsive discursions, even when contrary evidence in an affidavit of himself or his wife was put to him.

[27] A number of his other answers were clearly wrong. For example he denied making handwritten notes on documents, although the writing was clearly his. Examples include the writing of registration numbers on a list of trucks that were being sold through Ritchie Brothers in Brisbane and writing of quantities and calculations on a copy of the survey reports provided by Earl James & Associates (**EJA**).

[28] Mr Ceccon appeared very reluctant to answer a question if he thought that it would harm his position. He was also very keen to volunteer, and in some cases repeat, a lot of information that was critical of one or other of Tony and John Tomazos, but was not responsive to the question being put.

[29] Mr Ceccon still has a number of health issues, mainly following a stroke in 2014. Although he was assisted by one or more hearing

devices and an interpreter, he frequently appeared to have difficulty listening, hearing, understanding and properly concentrating on many of the questions that were asked of him. This is understandable particularly for a person of his age who suffered a stroke in 2014 and who also appears to have difficulty understanding the nuances and subtleties of questions put to him in English. Although his cross examination took much longer than it should have as a consequence of his reluctance and inability to answer questions put to him, it must have been tiring and frustrating for him. Indeed there were occasions where it was plain that he was simply agreeing to propositions put to him without properly thinking them through, in order to speed up the process. By the time his cross-examination ended, I doubt that there would have been much point in his counsel attempting to re-examine him.

[30] For the most part I think that Mr Ceccon's affidavit evidence is more reliable than his oral testimony. It was prepared with the assistance of an interpreter and in circumstances where he would have been far more comfortable than he was in the witness box.

Suzanne Ceccon

[31] Ms Ceccon was a director of Ceccon Transport between 1988 and 1997 and was employed by Ceccon Transport at all material times as Office

Manager. She was responsible for managing the financial side of the business, under the direction of Tony Ceccon. Amongst other things, she prepared and issued quotes, dockets, purchase orders and invoices. See also managed Ceccon Transport's contracts such as those with Boral. She was the holder of extractive mining permits and mineral authorisations for the Gunn Point Road site, the Scrubby Creek site and the Jenkins Road site.

[32] Tomazos' counsel contends that Ms Ceccon's evidence was mainly based upon her understanding of matters reported to her by Tony Ceccon and her recording of them. By that fact alone, as well as her obvious attempts to support her husband's evidence wherever possible, there should be reservations about her evidence. Counsel concedes that Ms Ceccon admitted errors, but only when forced to do so. The evidence requiring those concessions and admissions was clear. She tried to flavour her evidence to support the evidence of her husband, even if he was wrong. Her evidence regarding the authorship of the letter of 5 December 2012 is a prime example.[4] Having heard the evidence of Tony Ceccon that the letter was drafted by Ms Ceccon, she renounced her affidavit in favour of supporting his version, until she was compelled to admit her oral evidence was wrong, and her affidavit evidence was correct.

[4] See Transcript 14/4/16 pp 149-151.

[33] I do not think that this was a deliberate attempt to mislead the Court. I agree with Ceccon's counsel that Ms Ceccon gave her evidence in clear and direct terms. She conceded matters where concessions were necessary and admitted to any errors as necessary. She was not evasive. She was an honest and reliable witness.

Antonios Tomazos

[34] Counsel for the plaintiffs submits that Tony Tomazos' role is as the family patriarch and that he had very little knowledge of the critical claims sought to be brought by the company of which he is the directing mind, particularly in relation to the counterclaim. Counsel for Tomazos submits that Mr Tomazos genuinely attempted to assist the Court, but accepts that there may have been instances where his recall of the sequence of events was inaccurate.

[35] I think these are fair comments and concessions. Mr Tony Tomazos did his best to provide his evidence honestly. He continued to be compassionate with Tony Ceccon in relation to his health issues. However his memory was lacking in relation to important matters of detail, including dates and who said what. I have no doubt that Mr Tomazos was upset when he heard that Mr Ceccon was re-entering the trucking business. No doubt these concerns were conveyed to his son John and in turn they affected John's attitude towards the plaintiffs and Tony Ceccon in particular.

John Tomazos

[36] Ceccon's counsel contends that John Tomazos' evidence was significantly coloured by hindsight reasoning. He was dogmatic about the effect of Mr Ceccon's inducement to enter into the transport business. However, when he had the opportunity to complain or confront Mr Ceccon about this very issue, he did not. In fact, Tomazos Group competed for many years with Ceccon Transport after its re-entry into the transport and extractive mining industries without complaint. The only time a complaint was made was in these proceedings in response to claims for the payment of debts. This tells significantly against his credibility on the central issue in the counterclaim.

[37] Tomazos' counsel submits that despite the passage of time, John's recall was relatively good. As a general statement, his evidence should be accepted as a reliable basis for findings of fact. In response to the comments of Ceccon's counsel noted above, counsel submits that John's evidence was clear, firm on issues about which he was confident, and credible. The repeated references in the plaintiffs' submissions suggesting the entire counterclaim effectively was a matter of recent invention, fails to understand a realistic approach of business people: there is no point in complaining if nothing will be achieved by doing so, avoid litigation if possible, but if it is forced upon you, then respond appropriately.

[38] I do think that his memory and evidence was tainted by a number of things, in particular his perception of the events that occurred once he became aware of Ceccon's re-entry into the cartage and supply business in the second half of 2012 and its possible impact upon the Tomazos trucking business, and the fact that the plaintiffs were proceeding with legal action to recover the balance of the loan monies and other amounts outstanding.

Other witnesses

[39] Counsel for Tomazos properly conceded that Matthew Tomazos was clearly a strident supporter and defender of his family and that his evidence in some aspects was of limited assistance to the Court. I agree with Ceccon's counsel that his evidence adds very little and that nothing much turns on it.

[40] Both parties seem to accept, and I agree, that Ron Preston was an honest witness. However counsel for Tomazos contends that his evidence should be viewed from the perspective of him having been a long-term and loyal employee of Ceccon (even when subsequently employed by Tomazos), which may have flavoured his recollection of events. I have no reason to doubt the reliability of his evidence.

[41] I agree that Keith Joy generally gave his evidence in a direct, clear and cogent manner. He was not evasive.

[42] Counsel for the plaintiffs contends that Mr Hartell's evidence was of limited utility for a number of reasons, and that he seemed eager to assist Tomazos because of the longstanding commercial dealings he has had with them. Tomazos' counsel submits that his evidence was significant in refuting Tony Ceccon's evidence regarding the circumstances of Tomazos obtaining the Boral work, and confirmatory of the evidence of Tomazos witnesses. For reasons that I later express I found Mr Hartell's evidence unconvincing and of little use.

[43] Both of the witnesses who were involved with the MJHJV, Mr Neil Halligan and Mr Tim Kennedy, were independent of either party. They gave their evidence directly and clearly and are accepted as witnesses of truth.

PLAINTIFFS' CLAIMS

Outline of Plaintiffs' claims

[44] The Plaintiffs (the **Ceccon parties**) summarise their claims as follows:[5]

(a) $780,696.67 (as at 26 August 2015) being the balance of principal and interest under the Loan Agreement and, in addition, specific performance of an agreement to transfer a unit in a development being undertaken by Tomazos Group as pleaded in paragraphs 4 to 15 of the Statement of Claim;

[5] Ceccon Submissions at [1].

(b) $322,886.79 (inclusive of GST) owed under the Materials Sale and Supply Agreement pleaded in paragraphs 16 to 19 of the Statement of Claim;

(c) under the November 2011 Sale Agreement and the Alternative November 2011 Sale Agreement or Arrangement: $445,871.80 (inclusive of GST) owed for stockpiles; $60,853.98 unpaid for the purchase of miscellaneous products; $660.00 for replacements costs for a genset hut; and damages of $10,000.00 for the balance payable for the costs of constructing a wall around a fuel tank; as pleaded in paragraphs 24 to 31 of the Statement of Claim;

(d) $2,500.00 (inclusive of GST) owed for the supply and fitting of hungry boards under the Supply and Fit Agreement pleaded in paragraphs 33 to 37 of the Statement of Claim;

(e) $18,503.23 (inclusive of GST) owed as reimbursement under the Supply and Haulage Agreement pleaded in paragraphs 38 to 41 of the Statement of Claim;

(f) $142,168.08 (inclusive of GST) owed for royalties under the Validation and Accessibility Agreement as pleaded in paragraphs 42 and 44 to 47 of the Statement of Claim;

(g) Interest; and

(h) Costs.

A. Loan Agreement

[45] Paragraphs 4 to 10 of the Statement of Claim plead as follows:

> 4. On or about 3 April 2011 Tomazos requested that Ceccon loan $1,000,000.00 to Tomazos to enable Tomazos to urgently settle the purchase of a property at Harvey Street, Darwin in the Northern Territory (**Property**).
>
> **Particulars**
>
> The request was oral and was made by Tony Tomazos for and on behalf of Tomazos to Tony Ceccon at a meeting which Mr Ceccon attended at the request of Mr Tomazos on or about 3 April 2011 at the offices of Tomazos in Winellie in the Northern Territory. At the meeting Mr Tomazos was upset and said words to Mr Ceccon to the effect that Tomazos would lose the property development at Harvey Street, Darwin if it could not come up with $1,000,000.00 in 24 hours.
>
> 5. In response to the request in paragraph 0 above, on or about 3 or 4 April 2011 Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, or Ceccon as agent for either Tony Ceccon or Suzanne Ceccon, entered into a loan agreement with Tomazos whereby Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, agreed to make a loan of $1,000,000.00 to Tomazos for a term of three (3) years to enable Tomazos to settle the purchase of the Property (**Loan Agreement**).
>
> 6. There were terms of the Loan Agreement *inter alia* that:
>
> (a) Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, would loan Tomazos $1,000,000.00 for a term of three (3) years;
>
> (b) Tomazos would repay the principal amount of the

loan at the expiry of the term;

(c) Tomazos would pay interest on the principal amount of the loan compounded annually at the rate of:

(i) 7% per annum for the first year of the term, 8% per annum for the second year of the term and 9% per annum for the third year of the term; or alternatively

(ii) 8% per annum for the first year and the second year of the term and 9% per annum for the third year of the term; and

(d) in consideration of the urgency and risk associated with the loan Tomazos would transfer to Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, freehold title in an apartment, to be selected by Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, in a unit development to be constructed by Tomazos at the Property for $nil consideration.

Particulars

The terms of the Loan Agreement are partly oral and partly written.

(a) Insofar as they are oral, they comprise and/or are evidenced by the discussions which took place between Tony Tomazos and Tony Ceccon at the meeting on 3 April 2011.

(b) Insofar as they are in writing, they comprise and/or are evidenced by the document entitled "Agreement" dated 4 April 2011 which was signed on behalf of Ceccon and on behalf of Tomazos on or about 24 June 2011.

7. The document entitled "Agreement" dated 4 April 2011 was agreed by the parties in the belief that it embodied the terms of the Loan Agreement pleaded in paragraph 0 above, but does not in fact embody all of those terms.

Particulars

The document entitled "Agreement" dated 4 April 2011 does not contain or embody all of the agreed terms pleaded in paragraph 6(c) above.

8. In the premises of the preceding paragraph, as at the time the parties signed the document entitled "Agreement" dated 4 April 2011, the parties mistook its effect.

9. The parties intended the Agreement dated 4 April 2011 to conform to the matters agreed by them as pleaded in paragraph 6(c) above.

10. In accordance with the terms of the Loan Agreement, Ceccon, or alternatively Tony Ceccon or Suzanne Ceccon, advanced the principal amount of the loan to Tomazos as follows:

(a) on 4 April 2011 - $500,000.00; and

(b) on 5 April 2011 - $500,000.00.

[46] In response to paragraphs 4 to 6 of the Statement of Claim the defendant, Tomazos Group says:

4. Tomazos denies the matters alleged in paragraph 4 and says that an initial request for a guarantee of loan funds was made by Tony Tomazos (**Tony**) on behalf of Tomazos:

a. In or about November 2010;

b. To Antonio Ceccon (**Tony Ceccon**) on his own behalf and

c. As at 3 April 2011 Tony was not upset nor did Tomazos require a loan from Tony Ceccon to avoid losing its development at the Property.

5. In relation to the matters alleged in paragraph 5, Tomazos denies the matters alleged and says:

   a. After the initial offer of a loan of $2,000,000, Tony Ceccon ultimately offered to loan $1,000,000, which Tony and John Tomazos (**John**) accepted on behalf of Tomazos;

   b. The loan agreement comprising the ultimate offer and its acceptance was made orally between Tony and John on behalf of Tomazos and Tony Ceccon on his own behalf on or about 3 or 4 April 2011, to assist Tomazos to settle the purchase of the Property but no rate of interest was discussed or agreed;

   c. Due to his expressed belief that he was suffering a terminal illness, at the request of Tony Ceccon the oral agreement was subsequently included in a letter dated 4 April 2011 but prepared by John and signed by Tony and Tony Ceccon on 24 June 2011 and incorporated a rate of interest volunteered by Tomazos.

6. In relation to the matters alleged in paragraph 6, Tomazos:

   a. Save that it says the loan was from Tony Ceccon personally, admits (a);

   b. Admits (b);

   c. Denies the matters alleged in (c) and says that the loan

      i. was interest free for the first year,

      ii accrued 8% interest in the second year; and

      iii accrued 9% interest in the third year;

   d. Denies that the matters alleged in (d) were a term of the loan but says

i. it was offered to Tony Ceccon as a gift without consideration;

ii. alternatively, any such term is void for uncertainty;

iii. in the further alternative, any such term is unenforceable pursuant to section 62 of the Law of Property Act (NT) as attempting to convey an interest in land without adequate note or memorandum.

[47] Tomazos Group denies the allegations in paragraphs 7, 8 and 9 of the Statement of Claim. It admits the allegations in paragraph 10 but says that the payments were from Tony Ceccon, not from Ceccon Transport or Suzanne Ceccon.

[48] The document dated 4 April 2011,[6] was signed by Tony Ceccon and Tony Tomazos on 24 June 2011 (the **24 June 2011 document**). It was entitled "Agreement" and was as follows:

> This is to confirm that Ceccon has provided to Tomazos the amount of $1,000,000. (One million dollars). The monies are to be paid back in 3 years. Tomazos will pay interest to Ceccon at 8% per annum for the 2nd year and 9% per annum for the 3rd year.
>
> Once the development at Harvey St has commenced Ceccon is to choose an apartment in the development in which Ceccon will be given freehold title once the development is completed.

[49] It is not in dispute that:

(a) $1,000,000.00 was loaned to Tomazos Group on or about 4 April 2011; $500,000.00 on 4 April and $500,000.00 on

[6] TB 271.

5 April 2011;

(b) the principal and interest was repayable within three years;

(c) when repayment of the loan became due on 4 April 2014, Tomazos Group did not repay any of the principal or any amount for interest; and

(d) $600,000.00 of the principal has been repaid by $100,000.00 instalments on 17 September 2014, 3 November 2014, 1 December 2014, 6 January 2015, 4 February 2015 and 4 March 2015.

[50] The plaintiffs allege that Tomazos Group is in breach of the Loan Agreement by failing to repay the balance of principal and interest owing on the loan and refusing to transfer freehold title of a unit in the Harvey St development, now known as the 'Tech-1' development.[7]

[51] In response to this allegation Tomazos Group pleads that on or about 19 September 2014 an oral agreement was made that the principal together with interest (including additional interest) agreed at $271,376.00 would be paid to Tony Ceccon by instalments of $100,000.00 per month between September 2014 and August 2015 with a final payment of $71,376.00 in September 2015.[8]

[52] The oral agreement is said to be evidenced by a letter dated

[7] Statement of Claim [12].
[8] Defence [12(a)].

19 September 2014 addressed to Tony and Suzie Ceccon on the letterhead of Tomazos Group signed by John Tomazos in his capacity as General Manager (the **19 September 2014 letter**).[9] That letter stated:

> I hereby commit to make the following payments as repayment in full of $1,000.000.00 loan and associated interest of $271,376.00
>
> Principal repayments:
>
> | Month | Amount |
> |---|---|
> | Sept 2014 | $100,000.00 (Paid) |
> | Oct 2014 | $100,000.00 |
> | Nov 2014 | $100,000.00 |
> | Dec 2014 | $100,000.00 |
> | Jan 2015 | $100,000.00 |
> | Feb 2015 | $100,000.00 |
> | Mar 2015 | $100,000.00 |
> | Apr 2015 | $100,000.00 |
> | May 2015 | $100,000.00 |
> | Jun 2015 | $100,000.00 |
> | | $1,000,000.00 |
>
> Interest payments:
>
> | | |
> |---|---|
> | Jul 2015 | $100,000.00 |
> | Aug 2015 | $100,000.00 |
> | Sep 2015 | $71,376.00 |
> | | $271,376.00 |

[53] Tomazos Group concedes that it is still liable to repay the $400,000.00 principal remaining and the interest of $271,376.00.

[9] TB 331.

[54] As to the apartment in the Harvey Street development, it is not in dispute that: the Harvey Street development is a staged development; Stage 1 of the development (now referred to as 'Tech-1') commenced some time ago and is completed; and Tomazos Group has commenced to sell units in 'Tech-1' and certificates of title for units have issued to Tomazos Group. However, as to the transfer of a unit to Ceccon Transport, (or alternatively Tony Ceccon or Suzanne Ceccon), Tomazos Group:

(a) denies that the transfer of a unit in the Harvey Street development is a term of the Loan Agreement, and thus denies the failure to transfer the unit is a breach of the Loan Agreement;

(b) says that the unit was offered to Tony Ceccon as a gift without consideration; and

(c) in the alternative, says that if the transfer of a unit in the Harvey Street development is a term of the Loan Agreement, the term is:

(i) void for uncertainty; and

(ii) unenforceable pursuant to section 62 of the *Law of Property Act 2000* (NT) as attempting to convey an interest in land without adequate note or memorandum.[10]

[10] Defence [6(d)] and [12(b)].

[55] On 9 March 2016, Tomazos Group produced a document which became Exhibit P11. That document disclosed that a number of apartments in the 'Tech-1' development had not been sold. On 24 May 2016, Clayton Utz, on behalf of the Ceccon parties, wrote to De Silva Hebron, the lawyers for Tomazos Group, in these terms:

> The purpose of this letter is to notify your client that, in accordance with the Loan Agreement the subject of this proceeding, Ceccon, alternatively, Mr Ceccon or Mrs Ceccon, chooses the following apartment in the development known as Tech-1 Harvey Street Darwin by reference to the apartment numbers and prices described in the price list dated March 2016:
>
> 1. apartment 901, with a listed price of $665,000; alternatively
>
> 2. if apartment 901 has been sold as at the date of this letter, then apartment 801 with a list price of $650,000; alternatively
>
> 3. if apartments 901 and 801 have been sold as at the date of this letter, then apartment 809 with a listed price of $650,000.
>
> Could you please let us know in writing by 12.00 noon on 25 May 2016 if none of those apartments are available for selection.[11]

[56] Tomazos Group admits that it received that letter, but denies its legal effect in these proceedings because:

(a) the transfer of a unit in the Harvey Street development is not a term of the Loan Agreement, and if a term, it is void for certainty or unenforceable pursuant to section 62 of the *Law of Property Act*

[11] Exhibit P29.

(NT);

(b) the letter did not exist at the commencement of these proceedings and cannot be relied on for the purposes of section 62 of the *Law of Property Act* (NT).[12]

[57] Following from the above discussion, the issues in relation to the Loan Agreement are these:

(a) who is the true creditor?

(b) what is Tomazos Group's liability to pay interest under the Loan Agreement?

(c) is the transfer of a unit in Tomazos Group's development at Harvey Street a term of the loan agreement?

(d) if the transfer is a term of the Loan Agreement, is the term void for uncertainty?

(e) if not void for uncertainty, is the Loan Agreement a sufficient note or memorandum for the disposition of property?

(f) what legal effect, if any, does the letter from Clayton Utz of 24 May 2016 have?

[12] Defence [11].

Relevant facts

Discussions in November 2010 about a loan of $2 million

[58] In 2010 Gratis Pty Ltd (**Gratis**) (the former name of Tomazos Group Pty Ltd) was in the process of purchasing land at Harvey Street Darwin for $3.2 million. Gratis intended to develop the land by constructing units on it. Shortly before settlement was due its proposed financier declined to provide the necessary funds and Gratis had a cash flow problem pending the completion of another development in Palmerston. Tony Tomazos was aware that Tony Ceccon had funds and approached him for assistance. Tony Ceccon offered to lend Gratis $2 million. Both parties engaged lawyers to document the arrangement.

[59] After refreshing his memory from documents produced on discovery Mr Ceccon said that that arrangement included terms that:

(a) interest be paid at the rate of 7% for the first year, 8% for the second year and 9% for the final year of the loan;

(b) security was to be provided by Gratis by way of a second mortgage over the Harvey Street property;

(c) guarantees were to be provided from Tony Tomazos and his wife Despina and/or their Trust company;

(d) a top floor unit in the Harvey Street development was to be transferred to him for $nil once the building was completed by

Gratis; and

(e) Gratis was going to pay his legal fees in relation to the proposed agreement.[13]

[60] In his affidavit Tony Tomazos said that he "wanted to give [Tony Ceccon] the flat in the development in gratitude for him giving us the loan which he said would be interest free."[14] He also said that "the offer to him of a flat which I made to him was passed on to his lawyers but it was never meant to be anything more than a gift and this is how Tony understood it to be."[15]

[61] According to diary notes made by Gratis' then lawyers, Tony Tomazos telephoned Ms Papazoglou of MSP Legal on 16 November 2010 and informed her that Gratis would be borrowing $2 million from Ceccon to help with the purchase of 20 Harvey Street. The notes also said that the loan would be for a term of 12 months and would be secured by a second mortgage and that interest would be paid at the rate which Ceccon is earning on term deposit, which he thought was 6% per annum.[16] This was followed by further telephone discussions that afternoon between Ms Papazoglou and Ceccon's solicitor Mr Logonathan of Ward Keller, and then Tony Tomazos, who confirmed that an apartment in the development was to be given to

[13] Affidavit of Antonio Ceccon sworn 3 December 2015 [20].
[14] Affidavit of Antonios Tomazos sworn 27 January 2016 [44].
[15] Affidavit of Antonios Tomazos sworn 27 January 2016 [45].
[16] TB 257.

Ceccon.[17] It seems that the money was required urgently, for settlement of the purchase on 30 November.

[62] Ward Keller drafted a "Deed of Loan Agreement" which recorded that the date of the deed was to be 30 November 2010, the lender was to be Tony Ceccon, Tony Tomazos and Despina Tomazos were to be guarantors, and Gratis was to pay Ceccon's legal costs. The draft also stated interest rates of 7%, 8% and 9% respectively on so much of the principal sum as was outstanding during the first, second and third years. The draft contained an entire agreement clause. It made no reference to a unit.[18]

[63] MSP Legal drafted another deed, between Gratis and Tony Ceccon, which specifically related to the "Ceccon unit" defined to mean "a top floor unit in the [Harvey Street] Development which is to be transferred to Ceccon as consideration for the Funding Amount." "Funding Amount means $2 million loaned to Gratis pursuant to the Loan Agreement" which in turn was defined to mean "the loan agreement and ancillary arrangements entered into between Gratis and their officers … and Ceccon … for funding the purchase of the [Harvey Street] land." Under "Background" the draft stated: "In consideration of Ceccon providing the Funding Amount to Gratis, Gratis shall transfer the Ceccon Unit to Ceccon pursuant to the terms of this Deed."

[17] TB 254-256.
[18] TB 204-216. The draft also attached a 36 page memorandum containing the terms of a mortgage (TB 218-253).

Clause 2.1 of the draft stated: "In consideration of Ceccon providing the Funding Amount, Gratis agrees to transfer the unencumbered estate and interest in the Ceccon unit to Ceccon, pursuant to the terms and conditions set out in Gratis' standard contract of sale to be prepared by Gratis for the sale of units in the development to the public."[19] In a later version the words "In consideration of Ceccon providing the Funding Amount to Gratis" were removed from the Background, and also from clause 2.1, so that it began with the words "Provided that Ceccon properly executes the Loan Agreement".[20]

[64] Ms Papazoglou made diary notes of several telephone communications on 30 November. One was with John Tomazos concerning the "side deed" concerning the unit. In answer to John Tomazos' enquiry about Gratis' exposure if Gratis does not develop Harvey Street, Ms Papazoglou stated that it would be the cost of a top floor apartment.[21] Ms Papazoglou then spoke to Mr Logonathan who informed her that Mr Ceccon was concerned about the fact that the mortgage would not be registered at the time when some of the money was released.[22] She then rang John Tomazos to discuss this issue and his instructions to change the interest rates to 6.5%, 7.5% and 8.5%

[19] TB 262-270.
[20] TB 194-203. According to Ms Papazoglou this was done "so that Ceccon does not run into stamp duty issues", see TB 169.
[21] TB 177.
[22] TB 176.

respectively.[23]

[65] On 15 December 2010 Ms Papazoglou sent a detailed email to John Tomazos in relation to the two draft deeds including that Ceccon was insisting on the original interest rates of 7%, 8% and 9% for the loan and that a settlement date be inserted in the Ceccon Unit Deed. The email also informed John Tomazos that Ward Keller's fees were more than had previously been assumed.[24]

[66] On 17 December Ms Papazoglou discussed the proposed changes with John Tomazos. He said that the interest rates of 7%, 8% and 9% were acceptable.[25] There was also discussion about Ward Keller's fees and Mr Ceccon's insistence that he would withdraw his offer to lend the money if Gratis did not pay those fees. That seems to have been the end of the matter.

[67] Tony Tomazos was cross-examined about his evidence that the $2 million loan was to be interest-free,[26] and about the side deed relating to the unit.[27] He said that he promised Mr Ceccon the unit when Mr Ceccon had promised him the $2 million without interest, and that they never had any further discussions after that. Nor did he have any discussions about a side agreement. When asked whether John Tomazos had told him about a side agreement he said that the

[23] TB 175.
[24] TB 169.
[25] TB 167.
[26] See [60] above.
[27] See [64] above.

negotiations were just between him and Mr Ceccon, and that John had nothing to do with that agreement. He further implied that the lawyers must have discussed this between themselves, presumably without instructions from himself or John. He did not remember the rates of interest that he had discussed with John Tomazos.[28] Contrary to the impression created in his affidavit, at paragraphs [44] and [45], I consider that Tony Tomazos was aware in November 2010 that the $2 million loan would not be interest-free and that the interest rates would be 7%, 8% and 9%, as agreed between Tony Ceccon and John Tomazos.

Discussions in April 2011 regarding the $1 million loan

[68] Tony Ceccon says that he did not hear any further about the proposed loan until early April 2011 when Tony Tomazos rang and asked him to attend at his office in Winnellie urgently. Tony Tomazos said that they were in trouble with the Harvey Street property deal and needed to come up with $2 million within 24 hours. Mr Ceccon said that he could only lend $1 million that quickly. He said that Tony Tomazos was very upset about possibly losing the property deal and said:

> The term of the loan will be the same as what we agreed in December last year just without the mortgage. I promise I will pay you back. We will pay interest at 7% for the first year, 8% for the second year and 9% for the last year. There is no time to arrange security for the loan but we will still transfer a unit in the Harvey Street development to you as part of the loan. We

[28] Transcript 19/5/16 pp 389-392.

will transfer the unit to you because you are helping us out with the money.[29]

[69] Tony Ceccon said that he would speak to his wife and work out where the money could come from. He said that John Tomazos was also present during the discussion and he too spoke about the urgency of Tomazos obtaining this financial assistance.[30]

[70] In his affidavit, Tony Tomazos says that the settlement on Harvey Street had been delayed and that Tony Ceccon again offered a loan. He says that Tomazos no longer needed funds from him but Mr Ceccon was insistent. I do not accept that part of Tony Tomazos' evidence. Not only is it inconsistent with the evidence of Mr Ceccon and Ms Ceccon (referred to in [73] below) it does not make commercial sense. Why would a person borrow $1 million if he did not need it?

[71] Tony Tomazos also says that there was never any suggestion that the loan would be from Ceccon Transport or Ms Ceccon. He says that Tony Ceccon initially said that he did not want interest on the loan amount but, later on, Tomazos agreed to pay him interest on the second and third year of the loan and repay the principal of $1 million in three years' time. He says Tony Ceccon asked John to draft a letter recording the loan agreement. He had told John that "because of the help Tony was going to give us and because he was going to provide us

[29] Affidavit of Antonio Ceccon sworn 3 December 2015 [24].
[30] Affidavit of Antonio Ceccon sworn 3 December 2015 [21] – [25].

with his pits and a loan we should do the right thing and offer him a flat in the development Tomazos was doing at Harvey Street."[31]

[72] All that John Tomazos said about the loan agreement in his affidavit was that Mr Ceccon lent $1 million in April 2011, and that Tomazos agreed to repay the loan in 3 years, not to pay interest for the first year but to pay 8% interest for the second year and 9% for the third year.[32]

[73] Ms Ceccon says that on about 3 April 2011 her husband came home and they had the following discussion:

> TC: I have promised to lend $1,000,000.00 to Tony Tomazos. He will lose his property deal if I don't lend him the money. He needs the money tomorrow.
>
> SC: How could you lend him that much money! He won't pay it back. Did you even get it in writing? You're a bloody idiot for doing that.
>
> TC: We have to lend it. He was very upset. I gave him my word and so we have to lend it now. I can't go back on my word.[33]

[74] She said they had a big argument. Her husband told her to arrange a cheque for Tomazos Group and to deliver it to Tony Tomazos at his office the next morning. She left the house in anger.[34]

[75] Ms Ceccon went to the bank the next morning, 4 April, and again on 5 April, and purchased bank cheques from her own account. She says

[31] Affidavit of Antonios Tomazos sworn 27 January 2016 [46] – [49].
[32] Affidavit of John Tomazos sworn 19 January 2016 [10].
[33] Affidavit of Suzanne Yoko Ceccon sworn 3 December 2015 [15].
[34] Affidavit of Suzanne Yoko Ceccon sworn 3 December 2015 [106].

she then took the cheques and gave them to John Tomazos.[35]

Oral evidence

[76] Tony Ceccon was cross-examined about both loan arrangements. He was obviously confused when answering questions and referred to the difficulties with his memory on account of his stroke. He sometimes denied, and at other times said that he could not remember, certain things, for example instructing Mr Logonathan in relation to the 2010 negotiations, whether the loan was $1 million or $1.5 million and who it was who actually gave the cheques to Tomazos in April 2011. Unfortunately there appeared to be some confusion in his mind as to the focus of particular questions and conflation on his part between the discussions in late 2010 and those in early April 2011.

[77] He said that he discussed the interest rates with Tony Tomazos shortly prior to giving him the money and that Tony Tomazos wrote them down on a piece of paper that was like a receipt. He said that he took the piece of paper back to the office but does not know what happened to it. It was not the document eventually signed on 24 June 2011.[36]

[78] Ms Ceccon said that she was sure that she delivered the cheques to Tomazos. When asked about Mr Ceccon's evidence about the piece of paper Ms Ceccon said she has not seen a receipt as such "but a

[35] Affidavit of Suzanne Yoko Ceccon sworn 3 December 2015 [17] and [22].
[36] Transcript 13/4/16 pp 16-7.

schedule of payment form that I kept whingeing about".[37] She was not asked anything more about that document.

[79] In response to questions about the reference to an apartment in the 24 June 2011 document, Mr Ceccon said that topic was discussed on the same day (as the discussion about the loan and interest rates). At pp 17-18 of the transcript of 13 April 2016:

> And you'll see in that piece of paper in front of you is also reference to an apartment? --- Yeah, because they didn't have enough security for that $1 million so they said they will give me an apartment until they paid me back, otherwise the apartment would be part of the security for the money they were lending.
>
> … As I understood what you just told us, you were being given an apartment as security for … --- Yeah, because there was not enough security with the $1.5 million, so they say that they offer me another flat until they pay back the money or otherwise, a certain period, I will collect that flat from them.
>
> Right, so they offered you the flat until they paid back the money and if they didn't pay it back, you would get the flat. Is that what you understood? --- Yeah.

[80] Tony Tomazos' recollections about the discussions leading up to the two loans were also poor. He conceded that John had told him that Tony Ceccon wanted interest on the $2 million loan, but repeated that he only promised the unit when he thought that loan was to be interest-free. When he was asked about the 24 June 2011 document and the reference to Ceccon been given freehold title to an apartment in the

[37] Transcript 14/4/16 p 133.

development, he said that Mr Ceccon told John Tomazos what to put in that document and that he did not dispute that because he did not wish to destroy his friendship with Mr Ceccon.[38]

Legal principles

[81] Counsel for the plaintiffs provided the following useful analysis of relevant principles.

[82] The rights and liabilities of parties to a contract are determined in accordance with the objective theory of contract. In *Woodside*,[39] the majority of the High Court (French CJ, Hayne, Crennan and Kiefel JJ) said at p 656 [35], under the sub-heading "The construction issue":

> … this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As *reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.* Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"[40]. As Arden LJ observed in *Re Golden Key Ltd*[41], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so

[38] Transcript 14/4/16 p 397.
[39] *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640 (***Woodside***).
[40] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 350, citing *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.
[41] *Re Golden Key Ltd* [2009] EWCA Civ 636 at [28].

> as to avoid it "making commercial nonsense or working commercial inconvenience"[42].
>
> (some footnotes omitted, emphasis added).

[83] As to the determination of the identity of parties to a contract, Allsop P and Handley AJA said, at [27] of the decision of the New South Wales Court of Appeal in *Air Tahiti Nui Pty Ltd v McKenzie*:[43]

> The identity of the contracting party is to be determined looking at the matter objectively, examining and construing any relevant documents in the factual matrix in which they were created and ascertaining between whom the parties objectively intended to contract. This is, to a point, a process of construction similar to the task of identifying whether a clearly contractual document (such as a bill of lading) is made with one party or another (such as a ship owner or time charterer): .... Where the documents are silent or ambiguous, but there is undoubtedly a contract, the identity of the parties must be determined objectively from the surrounding circumstances.
>
> (some case references omitted)

[84] In *Pethybridge v Stedikas Holdings Pty Ltd*,[44] the New South Wales Court of Appeal left open the question of whether it is permissible to look at post-contractual communications and conduct in order to determine whether a contract with a particular party existed.[45]

[85] In *Tomko v Palasty*,[46] Basten JA of the New South Wales Court of Appeal (Mason P agreeing) added, at [13]:

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[42] *Zhu v Treasurer of New South Wales* [2004] HCA 56 at [82]; (2004) 218 CLR 530 at 559.
[43] [2009] NSWCA 429; 239 FLR 367.
[44] [2007] NSWCA 154 (***Pethybridge***).
[45] Ibid at [2] Per Basten JA; [59] perCampbell JA, Beazley JA agreeing).
[46] [2007] NSWCA 258.

> Except to the extent that [subsequent conduct of the parties] … constitute admissions by one or other party, they are largely equivocal."

[86] In that same case, Einstein J (Mason P agreeing) considered the *Pethybridge* case and found that "evidence of post-contractual conduct is admissible on the question f whether a contract was formed."[47]

[87] In his Honour's view (at [68]), that meant that:

> …subsequent communications may legitimately be used against a party as an admission by conduct of the existence or non-existence, as the case may be, of a subsisting contract, where an issue concerns whether a particular person was a party to that contract.

[88] However, the status of post-contractual communications in identifying the identity of contracting parties is not settled. In *Johnston v Brightstars Holding Company Pty Ltd*,[48] Beazley P (Gleeson JA agreeing) of the New South Wales Court of Appeal in obiter, noted at [56]:

> [56] Although the status of post-contractual conduct may not be finally settled, it is clear that Australian law does not recognise the subjective intentions of the parties as relevant to the construction of the contract actually formed: see *Codelfa*, *Brambles* and *Electricity Generation Corporation*. In *Administration of Papua and New Guinea v Daera Guba*,[49] Gibbs J approved a statement from *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* that:[50]

[47] *Tomko v Palasty* [2007] NSWCA 258 at [67].
[48] [2014] NSWCA 150 (***Johnston***).
[49] (1973) 130 CLR 353 at 446.
[50] [1970] AC 583 at 603.

> … it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made.
>
> [57] This statement was recently reaffirmed in *Agricultural and Rural Finance Pty Ltd v Gardiner*.[51]

[89] Also in *Johnston*, Basten JA (Gleeson JA agreeing), considered the legal principles applicable to determining whether post-contractual conduct is admissible to demonstrate that the obligation to pay the fees was merely deferred. Basten JA noted that, in the current case, the post-contractual statements provided evidence of facts only so they were admissible for determining what the parties had agreed:

> [120] There are difficulties attending the use of post-contractual statements to construe the terms of a contract. It is an accepted principle that anything which the parties said or did after a contract was made cannot be used "as an aid in the construction of" the contract. … That principle derives from the "objective" theory of contract, which provides that the legal obligations of the parties to the contract do not depend upon their subjective beliefs but upon the view of the reasonable bystander informed as to the surrounding context and circumstances, which in practice means the view of the court based on the evidence before it.
>
> [121] On the other hand, where it provides evidence of facts, the assertion of which is against the interests of one party, it may be admissible as an admission by that party. However, to the extent that the evidence reveals an opinion as to a question of law rather than fact, the admission may be irrelevant or valueless. Alternatively, the evidence may establish contextual facts in existence at

[51] [2008] HCA 57; 238 CLR 570, per Gummow, Hayne and Kiefel JJ at [35]. See also *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107 at [358], per Campbell JA (Barrett JA and Sackville AJA agreeing).

the time the contract was executed.

> [122] These principles apply to the determination of the meaning of a written document. However, in this case, as succinctly stated by Spigelman CJ in *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [7]:
>
> > The issue is not one of interpretation, because there are no words to interpret. The issue is one of fact: what did the parties agree?
>
> (some references omitted)

Who is the true creditor?

[90] As noted, the plaintiffs contend that Ceccon Transport lent the $1 million, whereas the defendant contends that the money was lent by Tony Ceccon.

[91] The following surrounding circumstances as at the date that the parties made the Loan Agreement are relevant in identifying the true creditor:

(a) There was an earlier attempt in late 2010 by the Tomazos interests to effect a loan agreement for the purpose of assisting them to purchase the Harvey Street property. The parties engaged lawyers to assist them in documenting their respective rights and liabilities under the then proposed loan agreement. The draft loan documentation that was prepared in late 2010, and the instructions given to the respective lawyers for that purpose, show that that loan was intended to be made by Tony Ceccon personally;

(b) In respect of the April 2011 loan, Tony Ceccon's evidence was that Tony Tomazos had approached him and said "Please lend me the money Tony" and Mr Ceccon replied, "The most I can lend urgently is $1 million but I will need to speak to Susie. Susie is not happy that I was going to lend you any money at all." He went on to say that Tony Tomazos talked about the arrangements being similar to those previously discussed in late 2010;[52]

(c) The monies advanced were withdrawn by Suzanne Ceccon out of her account;

(d) The written Agreement dated 4 April and signed on 26 June 2011 refers only to "Ceccon" as the lender and is signed by "A Ceccon". There is no suggestion that he signed it in any capacity other than his own;

(e) There is no evidence, for example in the nature of bank statements or financial records of Ceccon Transport, that suggests that the monies were in fact advanced by or on behalf of Ceccon Transport.

[92] Counsel for the plaintiffs submits that even though the principals of both Ceccon Transport and Tomazos Group had known each other for some years and were on friendly, personal terms, their main dealings

[52] Affidavit of Antonio Ceccon sworn 3 December 2015 [21] – [24].

were commercial dealings between their respective companies. Counsel contends that the loan effected in 2011 was a commercial dealing and not a private, personal arrangement in that monies were loaned to Tomazos Group for use in respect of a property development. However, as counsel for the defendant points out, the commercial dealings between the respective companies related to the sale and supply of building materials, necessarily involving the companies which conducted those businesses. Although the loan was to assist Tomazos Group (formerly Gratis) to purchase the Harvey Street land as part of its business, the lending of the money had nothing to do with the business of Ceccon Transport. Rather, Tony Ceccon was lending the money as a friend of Tony Tomazos.

[93] Counsel for the plaintiffs submits that there is no unequivocal post-contractual admission that can be used by the Court in identifying the creditor as a matter of fact. The question of identity remains one of law, or mixed fact and law. The fact that monies were withdrawn from Ms Ceccon's account for the loan, subsequently re-paid in part to Mr Ceccon, or endorsed over to Ceccon Transport are not determinative facts of the identity of the creditor. In particular, the repayment to Mr Ceccon is to be understood as Tomazos Group proceeding on an assumption as to who was the creditor. However, in the circumstances, the Court should infer that the Loan Agreement was another commercial arrangement between the parties, the protagonists

of which were the companies, not the individuals. Therefore, the signature of Tony Ceccon on the Loan Agreement is to be understood as being made on behalf of Ceccon Transport. Thus, Ceccon Transport is the true creditor under the Loan Agreement.

[94] I disagree. For the reasons noted primarily in [91] above, I conclude that Tony Ceccon lent the monies. He is the creditor.

Interest payable under the Loan Agreement

[95] The Ceccon parties press the alternative case on interest pleaded in paragraph 6(c)(ii) of the Statement of Claim: that Tomazos Group would pay 8% per annum for the first two years of the term of the Loan Agreement, and 9% for the third year. Counsel submits that the best evidence of this is the letter of 19 September 2014 (set out in [52] above), [53] prepared and signed by John Tomazos in his capacity as the General Manager of Tomazos Group and addressed to Tony and Suzie Ceccon.

[96] In that letter Tomazos Group declares a commitment to repay "in full" the amount of the loan, and to pay "associated interest of $271,376.00". When one considers the figure of $271,376.00 it equates to compound interest on the loan of 8% for the first year, 8% for the second year and 9% for the third year, calculated to September 2014.

[53] TB 331.

[97] The calculations are as follows:

Date	**INV#**	**Description**	**Rate**	**Amount**	**Interest**	**Total**
05.04.12	8380	Interest	8%	$1,000,000.00	$80,000.00	$1,080,000.00
05.04.13	8381	Interest	8%	$1,080,000.00	$86,400.00	$1,166,400.00
05.04.14	8382	Interest	9%	$1,166,400.00	$104,976.00	$1,271,376.00
Total Interest					**$271,376.00**	

[98] Although the 19 September 2014 letter is a post-contractual communication, the plaintiffs contend it is admissible to determine liability for interest because it is evidence of an admission against the interest that Tomazos Group is advancing in this proceeding, that the loan was interest free for the first year. The amount of $271,376.00 demonstrates that this was not the case.

[99] Further, Tomazos Group has not proved an oral agreement presupposing the 19 September 2014 letter that interest was compromised in full at $271,376.00. Both Mr Ceccon and Ms Ceccon were taken to the letter in cross examination, but it was not put to them, nor was it established, that the entitlement to interest was compromised at $271,376.00. On the contrary, Mr Ceccon denied that when he and Ms Ceccon met with Tony Tomazos at his office in

Winnellie on or about 19 September they agreed on interest in the sum of 271,376.00.[54] The most that could be said is that if Tomazos Group followed through on its intended "commitment", referenced in the letter by repaying the principal and interest, it would not have incurred more interest. However, it did not repay those amounts.

[100] Consequently counsel submitted that there is no basis for the Court to find that the amount payable for interest was compromised at $271,376.00. Interest is payable on the Loan Agreement of $271,376.00 (calculated to 4 April 2014 and continuing at a rate of 9%). Counsel submits that the rate of 9% applies from the date of default because it should be inferred that the rate of 9% agreed for the third year should continue until the loan is repaid in full.

[101] Counsel for the defendant agrees with the arithmetic set out in the table in [97] above, but contends that the plaintiffs' submission fails to take into account that the repayment proposal involves the loan being repaid over four years, not after three years as originally agreed. The repayment proposal involves three years of interest, and one year where no interest (or further interest) was to be paid.

[102] Counsel also contends that the repayment proposal cannot constitute an admission against interest. It admits nothing in relation to the original agreement. There is no evidence other than the terms of the June 2011

[54] Affidavit of Antonio Ceccon sworn 25 February 2016 [68].

document as to the interest rate originally agreed.

[103] I reject the plaintiffs' alternative case on interest.

[104] I accept Mr Ceccon's evidence to the effect that during their discussion on about 3 April 2011 he and Tony Tomazos agreed that interest would be payable for each of the three years of the proposed loan at the same rates as had previously been agreed during the negotiations in November 2010, namely 7% for the first year, 8% for the second year and 9% for the third year. The requirement for interest to be paid for each year, and the particular rates agreed upon, would have been fresh in the parties' minds at the time, particularly in light of the fact that there had been some negotiation about the appropriate interest rates only four months earlier.

[105] Further, it is very clear from the negotiations in November 2010, that although Tony Ceccon was prepared to assist Tony Tomazos by lending his company a substantial amount of money, such a loan was to be on commercial terms. In addition to the need for the loan to be secured, for example by a second mortgage over the property and by guarantees, Tony Ceccon expected to be paid interest for the duration of the loan, including its first year, and interest commensurate with what his money would otherwise have been capable of earning, for example on term deposit.

[106] I find that on or about 3 April 2011 Tony Ceccon and Tomazos Group

agreed to the loan of $1 million on terms that included payment of interest for each of the three years commencing 4 April 2011 at the rates of 7%, 8% and 9% respectively.

[107] There is no evidence to suggest that an interest rate of 8% for the first year was ever agreed upon, at least prior to the agreement of 3 April 2011 or even at the time when the parties signed the letter on 24 June 2011. Even if the 19 September 2014 letter could be used as an admission, which I doubt, there is no other evidence supporting the inference sought to be drawn. Rather the only evidence is that 7% was agreed for that first year

[108] I consider that the purported recording of the Loan Agreement in the letter signed on 26 June 2011 was incomplete, in that it did not refer to the first year of the loan at all. For reasons that will emerge when I discuss the next issue, that letter was also inaccurate in relation to the apartment.

[109] I agree with counsel for the plaintiffs that the 19 September 2014 letter does not evidence or amount to a variation of the agreement or some kind of compromise. There is no evidence that such a variation or compromise was ever discussed with Mr (or Ms) Ceccon. The letter is merely evidence of a unilateral promise to repay the loan by monthly instalments of $100,000, the three years having expired in April 2014.

[110] While there was no discussion about interest payable in the event that

the loan was not repaid in full within the three year term, I would imply an agreement that the rate that had been agreed for the third and final year of the loan, namely 9% per annum, would continue to apply. I note that the loan documents drafted in November 2010 contemplated higher rates of interest payable in the event of default, as do most if not all loans made by financial institutions. However there is no evidence of any discussions about this issue in relation to the Loan Agreement. Conversely, there is no basis for inferring that the parties would have contemplated the defendant obtaining some kind of windfall by defaulting and only being obliged to pay some lower rate of interest.

[111] In summary, the plaintiff Antonio Ceccon is entitled to the repayment of the remaining principal outstanding, together with interest calculated at the rates of 7%, 8% and 9% per annum respectively for the first three years, and 9% thereafter.

[112] I also infer that the interest due was to be paid at the end of each of the three years and that the interest payable for the second and succeeding years would be calculated on the total amount then outstanding. Such an inference would be consistent with normal commercial practice, for example in relation to a term deposit under which interest is to be paid in arrears, in this case yearly, and also with the way in which John Tomazos calculated the interest payable in the 19 September 2014 letter, namely interest compounded each year.

[113] Accordingly the total amount outstanding as at the end of the first year was $1,070,000.00, at the end of the second year $1,155,600.00 and at the end of the third year $1,259,604.00. From that time interest compounded of the rate of 9% per annum.

Transfer of a unit

[114] I agree with the plaintiffs' contention that the transfer of a unit in the Harvey Street development was contemplated by a side deed in 2010 when Ceccon Transport and Gratis engaged lawyers to document an earlier proposed loan agreement approximately six months earlier. Even though that loan agreement was not carried into effect, the parties at that earlier point in time conceptualised the transfer of the unit as part of the intended arrangement.

[115] However, the likely contractual consequences of those discussions would have been difficult to discern, were that necessary. I say that for several reasons. First, one might need to attempt to reconcile the existence and terms of the "side deed" drafted by Tomazos' lawyers on the one hand, with the existence and terms of the "entire agreement" clause in the loan agreement drafted by Mr Ceccon's lawyers on the other. Second, one might also need to take into account Tony Tomazos' evidence that his offer of a unit was made at an early stage of the discussions when he assumed that no interest would be payable on the $2 million loan. Once this situation changed and

interest was to be paid at commercial rates, the provision of a unit would be an extraordinary and excessive additional term. Such a term would be disproportionate to the size of the loan, where the loan was to be secured by a second mortgage over the Harvey Street land and personal guarantees were to be given by Tony Tomazos and his wife.

[116] Accordingly, unlike the situation in relation to interest rates, such discussion as may have occurred in early April 2011, by reference to any agreement or negotiations in November 2010 about a unit, would have been equivocal. Whilst the discussion at Tomazos' offices on 3 April, about applying to the new loan the same interest rates as those which had previously been negotiated and agreed, would have been simple and uncomplicated, the same could not be said of any discussion about the unit. I say this partly because of the uncertainty about the contractual effect of any agreement that might have been, but was not, reached following the November negotiations. I also say this because of the likelihood that the participants would have had differing objectives and may well have misunderstood things that other participants said and agreed to. In addition to the fact that Tony Ceccon and Tony Tomazos are from two different Mediterranean countries and speak with accents that sometimes make it difficult to understand exactly what they are saying, the only note of the discussion was made almost 11 weeks later when the 24 June 2011 document was signed. Even then, any discussion or agreement about

the unit was not expressed in such a way as to acknowledge what, if anything, had been, or was being, agreed.

[117] I accept Tony Ceccon's evidence that the provision of a unit to him was discussed by him and Tony Tomazos at the meeting on 3 April 2011. Tony Tomazos did not deny that such a discussion took place but did deny that he said: "There is no time to arrange security for the loan but we will still transfer a unit in the Harvey Street development to you as part of the loan."[55] Tony Tomazos said in his evidence: "No, no. Was not part of security, was not part of everything. Nothing. The unit was not part of the deal."[56] John Tomazos' evidence seems to be that the provision of a unit was not discussed then, but was discussed when the Loan Agreement came to be documented in June 2011.

[118] I consider that the best evidence about the substance of what was said at the meeting is that given by Mr Ceccon during cross-examination, quoted at [79] above. At that point of his cross-examination he seemed to fully understand what he was being asked about and he was doing his best to provide accurate answers about that topic. To the extent that those answers differ from the wording in [24] of his affidavit, in particular the words "as part of the loan", I consider they more accurately convey what was discussed.

[119] Those answers convey, and I find, that Mr Ceccon's understanding was

[55] Affidavit of Antonio Ceccon sworn 3 December 2015 [24].
[56] Transcript 19/5/16 p 391.

that an apartment was to be provided by way of security for the loan, not as consideration for the loan. The intent was that Mr Ceccon would only have been entitled to an unencumbered freehold interest in an apartment if, as did not happen, an apartment was provided by way of security and if Tomazos Group failed to repay the loan.

[120] Whether or not this was also the understanding and intent of Tony and John Tomazos, the loan proceeded without any further steps being taken to formalise or otherwise proceed with such a proposal. Such a proposal or agreement could have been, but was not, documented, for example in the 24 June 2011 document.

[121] Counsel for the plaintiffs stresses the fact that the 24 June 2011 document was prepared by John Tomazos. Counsel relies on Tony Tomazos' evidence that stage 1 of the Harvey Street development was now complete, and his concession that Mr Ceccon "is free to choose a unit in the development … according to this document."[57] However, I do not consider this to be a concession concerning the legal issue at hand, namely whether the promise of a unit was part of the consideration for the loan, a gift or something else. In any event the determination of this issue turns on what was in fact agreed, if anything, not upon Tony Tomazos' opinion about the meaning and effect of those particular words.

[57] Transcript 19/5/16 pp 394-395.

[122] The wording in the second paragraph of the 24 June 2011 document is consistent with Tony Tomazos' evidence to the effect that he had promised to give a unit to Tony Ceccon. He had initially promised to give a unit to Tony Ceccon because of his readiness to assist his company when it was urgently in need of $2 million in November 2010, and when he thought that such assistance would be provided without other consideration such as interest. As things changed, both in the course of the November 2010 negotiations and in the context of the Loan Agreement, his long-standing friendship with Tony Ceccon and his desire not to upset that friendship resulted in him leaving that promise to be recorded as it was in the 24 June 2011 document.

[123] As generous as that might appear, even between good friends with their respective ethnic origins, the promise of a unit was just that. It was not a term of the loan or the Loan Agreement.

Other contentions

[124] The defendant raises a number of contentions that would arise if I had found that the transfer of a unit was a term of the Loan Agreement. These include contentions that the term would be void for uncertainty, or, alternatively unenforceable because of s 62 of the *Law of Property Act*. In view of my finding concerning this issue, it is not necessary for me to deal with those contentions.

B. Materials Sale and Supply

[125] This claim relates to the sale of building materials, the hire of equipment and the provision of waste disposal services by Ceccon Transport to the defendant Tomazos Group in the period from early 2009 to November 2011. As at that time the balance due was $322,886.79.

[126] Tomazos Group admits the amount claimed and that it has failed to pay it. Tomazos Group says that it was not called upon to pay the amount until shortly prior to the commencement of this proceeding and that it is entitled to set off against such liability the amounts owed to it as pleaded in its counterclaim herein.

[127] I find that the defendant is liable to pay the sum of $322,886.79 together with interest from November 2011.

C. Alternative November 2011 Agreement

[128] About the time when Tomazos Group took over Ceccon Transport's transport business and occupied the yard at Boral, Tony Ceccon and John Tomazos had discussions about Tomazos Group purchasing building materials that had been extracted and stockpiled by Ceccon Transport and using and purchasing machinery and other items owned by Ceccon Transport. The materials had been stockpiled at areas referred to and known by the parties as Gunn Point Road Pit 1, Gunn Point Road Pit 2, Scrubby Creek and the Boral Yard (**Stockpile**

Locations). The discussions also involved Tomazos Group's access to the Stockpile Locations.

[129] Until the close of the evidence, the plaintiffs contended that the parties had entered into an agreement (defined as the **November 2011 Sale Agreement**), whereby Ceccon Transport sold and Tomazos Group purchased:

(a) the building materials at the Stockpile Locations for $532,358.20; and

(b) miscellaneous machinery products comprising oil, fuel, grease and like products for $60,843.98

[130] The plaintiffs also contended that under the agreement Ceccon Transport would allow Tomazos Group to use a number of items at the Boral Yard for a short period, namely:

(a) a genset hut;

(b) a fuel tank and;

(c) 3 double gates and a single gate.[58]

[131] However during final submissions, the contentions regarding the sale of all of the building materials and all of the miscellaneous machinery products were not pressed. Instead the plaintiffs advanced an

[58] Statement of Claim [23].

alternative contention, that the parties agreed that Tomazos Group could take building materials from the stockpiles and use some of the miscellaneous machinery products on terms that it would pay for those materials and products in accordance with rates that had been agreed. This was referred to as the **Alternative November 2011 Sale Agreement or Arrangement**.[59]

[132] Tomazos Group agrees that when it took over the Boral Yard on 1 November 2011 Ceccon Transport had a number of stockpiles of materials which it made available to Tomazos for it to use itself or sell to others. Agreement was reached as to the rates per tonne at which the material could be purchased by Tomazos as needed and used.

[133] In relation to other items, Tomazos Group acknowledges that there were various plant and equipment left at the yard by Ceccon Transport. Tomazos contends that there was no specific agreement for them to purchase any of that plant and equipment for an agreed price. Ceccon Transport continued to have access to and remove items from the yard.

[134] Tomazos Group admits use of "some" of the stockpiles and some miscellaneous machinery products and a liability to pay for that use. It is the extent of that use that is in question.

Stockpiles

[135] Most of the stockpiles at the Stockpile Locations were the subject of

[59] Statement of Claim [24].

volume survey reports provided by Earl James & Associates (the **EJA surveys**). Those surveys are at TB pp 665-668. The reports also contain handwritten references to stockpiles and other notes and calculations including rates per tonne for various types of material.

[136] Ms Ceccon prepared a stockpile summary (the **Stockpile summary**).[60] She deposes to:

(a) preparing that document to summarise the cost of each stockpile, the cost being the volume or estimated volume of the stockpile multiplied by the rates that were handwritten on the EJA surveys (which rates are admitted by Tomazos Group);

(b) delivering the Stockpile summary and a copy of the EJA surveys with Mr Ceccon's handwritten notes on them to Peter Tomazos at Tomazos Group's office at Winnellie in late November 2011 and asking him to pass them on to John Tomazos;

(c) delivering an amended stockpile summary to John Tomazos at Tomazos Group offices in Winnellie in November 2013 to remove the amount for cracker dust, which had been used (subsequent to November 2011) by Ceccon Transport;

(d) wrongly removing from the amended stockpile summary the amount for armour rock, instead of cracker dust; and

[60] TB 669.

(e) the correct amount that she should have recorded as owing being $445,871.80.[61]

[137] It is not disputed by Tomazos Group that Ms Ceccon delivered either the Stockpile summary or the amended stockpile summary to it. Consequently Tomazos Group was aware of the stockpiles that they could access to use, and the amounts it would have to pay to Ceccon Transport for the stockpiles that it used.

[138] Ceccon Transport pleads, and Tomazos Group admits, that in or about mid-November 2011 Ceccon Transport and Tomazos Group entered into an agreement whereby:

(a) Ceccon Transport permitted Tomazos Group to take building materials from the stockpiles of materials owned by Ceccon Transport and located at the Stockpile Locations on terms that inter alia:

(i) Tomazos Group would be entitled to access the Stockpile Locations to take the building materials from those stockpiles as and when it required them; and

(ii) Tomazos Group would pay to Ceccon Transport an amount calculated at the rates (inclusive of GST) recorded on the EJA surveys and the Stockpile summary for the volume of

[61] Affidavit of Suzanne Yoko Ceccon sworn 3 December 2015 [41] – [51].

building materials taken by Tomazos Group from those stockpiles.[62]

[139] The plaintiffs plead that on and from about 1 November 2011 (when Tomazos Group moved onto the Boral Yard to commence operations as a haulage contractor), Tomazos Group accessed the Stockpile Locations and removed "substantially the whole" of the building materials from the stockpiles.[63] In response to this pleading, Tomazos Group admits that it accessed the Stockpile Locations and removed "some" of the building materials.

[140] Tomazos Group had access to stockpiles at the Stockpile Locations for its use when it commenced operations as a haulage contractor in November 2011. Therefore, the issue in respect of the use of the stockpiles under the Alternative November 2011 Sale Agreement or Arrangement is; how much of the building materials did Tomazos Group use?

Tomazos use of the stockpiled building materials

[141] The plaintiffs contend that Tomazos Group used substantially the whole of the building materials as a result of which it is liable to pay the amount shown on Ms Ceccon's amended stockpile summary, $445,871.80. Tomazos Group contends that it only used the materials set out in the summary in [143] below and is thus liable to pay only

[62] Statement of Claim [24(a)].
[63] Statement of Claim [25(a)].

$101,274.68.

[142] Tomazos Group contends that the best evidence of use by Tomazos of the stockpiles is derived from the delivery dockets, produced by Tomazos,[64] and Ceccon, for the period November-December 2011. By this time Tomazos Group say the stockpiles being used were exhausted by Tomazos and Ceccon,[65] and then possibly replenished by Tomazos and used again.[66] With their original written submissions Tomazos provided two spreadsheets purporting to summarise those documents; one relating to November 2011 and the other relating to December 2011.[67] For convenience I have marked those as MFI D22A. On the last day of the substantive hearing, 26 May 2016, Tomazos produced two boxes of invoices and similar documents (Exhibit P26) and a large document purporting to summarise them (MFI D22). Those documents and summaries show a significant number of deliveries by Tomazos not only in November and December 2011, but continuing until late June 2012.[68]

[143] In its further written submissions Tomazos provided the summary below, which is said to show "[t]he lesser of the quantities set out in the spreadsheet summarising this information [MFI D22A], or the

[64] Exhibit P26.
[65] Transcript 18/5/16 p 269.
[66] Transcript 17/5/16 pp 230-231 and 239; Transcript 20/5/16 p 443; Tomazos Response to Ceccon Submissions at [15].
[67] See Tomazos Submissions at [62].
[68] I have not attempted to read all this material. At the commencement of the hearing I indicated that in light of the substantial quantity of materials contained in the tender bundles I would only read those materials to which my particular attention was directed either in the course of the evidence or in submissions.

stockpile survey [the EJA surveys], [and] shows the maximum materials Tomazos could have used. Their actual use from Ceccon stockpiles may have been less, when materials used were sourced from other places."[69] Analysing these sources by material type claimed and surveyed, Tomazos provided the following summary:

Material type	Survey Stockpiles	Delivery dockets	Maximum possible used	Rate	Total
Fill sand (Scrubby Creek)	2839		All used[70]	$7.50	$21,292.50
Fill Sand (Area 2)	1803		All used[71]	$8.50	$15,325.50
Type 3	7317	2196.86	2196.86	$9.00	$19,771.74
Type 2	7884[72]	1124.32	1124.32	$12.00	$13,491.84
Unscreened	13995	2069.30	2069.30	$7.00	$14,485.10
Screened	1409	2145.06	1409	$12.00	$16,908.00
80mm rock	1247	0	0	$10.00	0
Rubble	15430	0	0	$3.00	0
Rock (100mm)	3150	0	0	$10.00	0
Total					$101,274.68

[69] Tomazos Response to Ceccon Submissions at [15].
[70] TB 1465 [24(c)].
[71] Transcript 20/5/16 p 423.
[72] Excluding Type 2 on TB 668.

[144] Counsel for the plaintiffs challenges the completeness of the evidence that the defendant has relied upon in putting this submission, mainly because of the defendant's late and incomplete disclosure of documents relevant to this issue. Further, the summary only purports to refer to deliveries that took place in November and December 2011, whereas other documents, such as those produced on the last day of the hearing, show numerous deliveries occurring during the following six months.

[145] Rather, the plaintiffs rely primarily upon the evidence of Mr Preston. Mr Preston, who I found to be a reliable witness, gave clear and cogent evidence about the existence and use of the stockpiles from the date Tomazos Group commenced operations from the Boral Yard on or about 1 November 2011, to the date when he ceased working as Tomazos Group's foreman about 13 months later.

[146] Mr Preston had worked as Ceccon Transport foreman up to about 31 October 2011 and started as foreman for Tomazos Group on or about 1 November 2011. Mr Preston described his role when he was foreman for Ceccon Transport as:

> Varied. I had to organise the trucks for the daily runs, I had to dispatch the drivers, tell them where to go, what to load. I had to ring the customers and find out what they needed for the next day. I had to order parts for the trucks. I had to make sure they were maintained on a regular basis, order the fuel, tires, all that sort of stuff and basically, once a week, I would do a stocktake of the fuels and the oils. Fuel was daily but the oils was weekly and all the filters and stuff were weekly as well and as they ran

low I would just have to purchase more.[73]

[147] Mr Preston stated that the majority of his work took place from the Boral Yard. He was responsible for the day-to-day operation of the Boral Yard.[74] His work day started "usually around 5:30 – 6 o'clock" and he would "leave anywhere from about 4:30 'til 6 o'clock at night depending when the last truck got back."[75]

[148] As foreman for Tomazos Group, his "duties were exactly the same as what [he] was doing with Tony Ceccon".[76] He continued to be the person responsible for organizing trucks and fulfilling orders for customers.

[149] Mr Preston was taken through the EJA surveys. He was able to identify the locations referred to in the surveys and each of the stockpiles and what happened to each stockpile during the course of his employment as foreman for Tomazos Group.

[150] Mr Preston identified the area subject of the survey entitled "Sand Quarry, Howard Springs" at TB 665 as follows:

> This is out at Sand Quarry, a stockpile, which is approximately 10 kilometres off the end of the bitumen off Gunn Point Road and you turn into your right just as you go across the bitumen causeway over a creek.[77]

[73] Transcript 17/05/16 p 218.
[74] Transcript 17/05/16 p 218.
[75] Transcript 17/05/16 p 218.
[76] Transcript 17/05/16 p 219.
[77] Transcript 17/05/2016 p 220.

[151] Mr Preston gave evidence to the following effect about each of the stockpiles on TB p 665 whilst he was employed by Tomazos Group:

(a) about 40% of the available "armour rock", estimated by Tony Ceccon to comprise 4,400 tonnes, was on sold by Tomazos Group some months after he started working with Tomazos.[78] John Tomazos deposed that this stockpile was not used by Tomazos;[79]

(b) all of the screen select fill, type 3 gravel, estimated by Mr Ceccon to comprise 540 tonnes, was sold by Tomazos Group.[80] John Tomazos deposed that this stockpile was not used by Tomazos;[81]

(c) the "Large" and the "Long" stockpile comprised sand stockpiled for Boral and was carted into Boral's yard as required by Boral;[82] and;

(d) the "Small" stockpile, 2839 tonnes, was "fill sand" that was either hauled from that location to Tomazos Group customers, or moved from that location to Gunn Point Road Pit 1 and hauled from Gunn Point Road Pit 1 to Tomazos Group customers. The stockpile was depleted entirely by the time that Mr Preston ended his

[78] Transcript 17/05/2016 pp 220-221.
[79] Affidavit of John Tomazos sworn 19 January 2016 [24(a)].
[80] Transcript 17/05/2016 p 221.
[81] Affidavit of John Tomazos sworn 19 January 2016 [24(b)].
[82] Transcript 17/05/2016 pp 221-224.

employment with Tomazos Group Pty Limited.[83] This item and quantity is conceded by Tomazos.

[152] Mr Preston was then taken to the survey entitled "Area 3, Howard Springs" at TB 666. He said that "Area 3 Howard Springs" was "…what we call pit 2 and it is approximately a kilometre, a kilometre and a half from the end of the bitumen at Gunn Point Road and it is on your left." Mr Preston said that he attended this location "sometimes on a daily basis, sometimes once or twice a week, depending on when I had to take drivers up there and show them what piles to remove product from."[84] Specifically, as to the stockpiles depicted on TB 666 Mr Preston gave the following evidence:

(a) the "screened fill large", 7317 tonnes, was type 3 gravel and was used by Tomazos Group to fulfil orders for customers until it was depleted;[85]

(b) the "screened fill small", 200 m³ (360 tonnes)[86] was used by Tomazos Group to fulfil orders for customers until it was depleted;[87]

(c) the "type 2 gravel", 7884 tonnes, was top grade gravel and was all

[83] Transcript 17/05/2016 p 224.
[84] Transcript 17/05/2016 p 225.
[85] Transcript 17/05/2016 p 225.
[86] I have converted cubic metres to tonnes by using the multiplier of 1.8 that Mr Ceccon used in relation to other materials.
[87] Transcript 17/05/2016 p 226.

used by Tomazos Group and despatched to customers;[88]

(d) the "80mm rock", 1247 tonnes, was a by-product of the screened gravel and was all used by Tomazos Group to fulfil orders for customers;[89] and

(e) the "unscreened gravel", 100 m³ (180 tonnes), was similar to gravel but of a lower quality and was all used by Tomazos Group to fulfil orders for customers.[90]

[153] Mr Preston was then taken to the survey entitled "Cracker dust, Howard Springs" at TB 667. He said that was a stockpile located on "…part of the yard where the trucks were parked, what we call our compound", and was an area where he performed work daily for Tomazos Group. He said that during the 13 months he was working with them Tomazos Group used and dispatched approximately a third to a half of that stockpile to customers under his direction.[91]

[154] Contrary to Mr Preston's estimates, Mr John Tomazos deposed that "Ceccon subsequently used virtually all of the cracker dust".[92] Mr Ceccon agreed during cross-examination that Ceccon Transport also ultimately used that stockpile.[93] The survey indicated a volume of 3120 m³ of cracker dust, costed at $14. I consider that 1250 m³ is a

[88] Transcript 17/05/2016 p 226.
[89] Transcript 17/05/2016 pp 226-227.
[90] Transcript 17/05/2016 p 227.
[91] Transcript 17/05/2016 pp 227-228.
[92] Affidavit of John Tomazos sworn 19 January 2016 [30(ii)].
[93] Transcript 10/3/16 p 252.

fair estimate of the quantity of cracker dust used by Tomazos Group.

[155] Mr Preston was then taken to the survey entitled "Area 2, Howard Springs" at TB p 668. He identified that as "…the area that we used to call pit 1. It is down the back of Boral. It's at the end of the bitumen on Gunn Point Road, just before you get to the end of it, you turn left and there's a gateway there which takes you into that area." He said he attended this area whilst he was employed by Tomazos Group "sometimes on a daily basis, sometimes a couple of times a week, depending on what I was despatching and who I had to show where to go."[94] Mr John Tomazos deposed that none of the material depicted on that survey was ever used by Tomazos.[95]

[156] Mr Preston gave evidence to the following effect in relation to those stockpiles, depicted on TB 668:

(a) The two stockpiles "screened topsoil", 1409 tonnes, comprise topsoil that has been processed so that all stones and branches are removed from it. This was used by Tomazos Group to fulfil orders for customers until it was depleted'.[96]

(b) The stockpile "sand", 1803 tonnes, was fill sand. It was present when Mr Preston started working for Tomazos Group and was used by Tomazos Group to fulfil orders for customers until it was

[94] Transcript 17/05/2016 p 228.
[95] Affidavit of John Tomazos sworn 19 January 2016 [27].
[96] Transcript 17/05/2016 pp 228-229.

depleted. After it was depleted, more sand was placed at that location to be used to fulfil orders for customers.[97] This item and quantity is conceded by Tomazos.

(c) The "unscreened stockpile", 13995 tonnes, was all screened by Tomazos Group and most of it was sold as screened topsoil to customers.[98] The survey indicated a volume of 13,995 tonnes of unscreened topsoil, costed at $7.00.[99] When asked in chief whether Tomazos Group used that unscreened top soil, John Tomazos said: "I wouldn't be able to recall 100% but, if anything, it would have been very, very little."[100] I prefer the evidence of Mr Preston and consider that 12,000 tonnes is a fair estimate of the quantity of the screened topsoil that was used by Tomazos Group.

(d) The "100mm rock heap", 3150 tonnes, was all used by Tomazos Group to fulfil orders for customers.[101] However, John Tomazos said: "I don't believe we used any of that material and if we did, it might have been very minor."[102]

(e) The "rubble", 15430 tonnes, was all used by Tomazos Group to fulfil orders for customers. As gravel was screened more rubble

[97] Transcript 17/05/2016 p 229.
[98] Transcript 17/05/2016 p 230.
[99] TB 668.
[100] Transcript 20/05/2016 p 425.
[101] Transcript 17/05/2016 p 230.
[102] Transcript 20/05/2016 p 426.

was stockpiled there for use.[103] John Tomazos said: "No, I don't think we used any of that. I believe probably that material might even still be there."[104]

(f) The two stockpiles of "T2 gravel", totalling 21,800 m³, were all used by Tomazos Group to fulfil orders for customers until they were depleted.[105]

[157] In addition to the stockpiles depicted on the EJA surveys (at TB 665-668), Mr Preston recalled that there was a stockpile of fine crushed rock that had been stockpiled by Mr Ceccon. He recalled that, after Tomazos Group commenced operations from the Boral Yard from 1 November 2011, some of that fine crush rock was used by Tomazos Group to sell to customers. However Mr Preston did not quantify either the amount of crushed rock that had been stockpiled, or the approximate amount which Tomazos Group sold.

[158] Mr Preston was not directly challenged on his recollection of these matters.

[159] Counsel for the plaintiffs also referred to concessions from John Tomazos that: from the date Tomazos Group started operations from the Boral Yard its only immediate access to materials was from the stockpiles; Tomazos Group had an interest in using the stockpiles

[103] Transcript 17/05/2016 p 230.
[104] Transcript 20/05/2016 p 426.
[105] Transcript 17/05/2016 p 231.

in commencing its business as a haulage contractor; and it in fact used the stockpiles to fulfil orders for its customers (as demonstrated by Exhibit P26A and P26B).

[160] Counsel submits that based upon Mr Preston's clear and detailed evidence, together with John Tomazos' concessions, this Court should comfortably find that Tomazos Group used substantially the whole of the building materials set out in the Stockpile summary (at TB p 669), at the rates agreed by Tomazos Group, and that Tomazos Group is liable to pay Ceccon Transport the amount of $445,871.80 claimed for the stockpiles.

[161] Counsel also stresses that despite being under a general discovery order, Tomazos Group initially produced no documents about its use of materials from the stockpiles. Its first position was that it did not use any stockpile materials except for fill sand. This was demonstrated to be false when, during the hearing of the proceedings, Ceccon Transport uncovered documents in its own archives given by Mr Preston to Ms Ceccon about Tomazos Group's use of stockpiles. Even after this was pointed out to Tomazos Group's solicitors, very few additional documents were discovered. Mr John Tomazos, during cross examination, conceded that efforts by Tomazos Group employees to locate such documents had barely commenced. It was not until the final days of the hearing that a substantial amount of documents were produced showing extensive use of the stockpiles after

November 2011. These documents did not extend beyond 30 June 2012 and were incomplete.[106]

[162] In paragraph [60] of the Tomazos Submissions, the Tomazos parties concede that: "John Tomazos accepted in oral evidence that he was mistaken over having used some of the material." Counsel for the plaintiffs submitted that this was not some small mistake. For the entire time that these proceedings were on foot, Tomazos Group denied using the stockpiles. This, it turns out, was demonstrably false, particularly given the magnitude of documents that were produced towards the end of the hearing concerning Tomazos' use of the stockpiles.

[163] Further, says counsel, it is the context in which John Tomazos' "mistake" came to light which is important. Counsel emphasises that the mistake was only conceded during cross-examination, and, more significantly, it was only conceded after he was examined about records of stockpile use kept and copied by Mr Preston, a former employee. These records should have been, but were not discovered, by Tomazos Group. Not only does the "mistake" cast significant doubts over John Tomazos' credibility generally, it demonstrates how ineffectually Tomazos Group and its officers and employees approached compliance with the Court's order for general discovery.

[106] See Exhibit P12 and cross examination of John Tomazos in relation to Exhibit P12 at Transcript 20/05/16 pp 481-505.

[164] Despite the efforts made during the last few days of the hearing, documents were only produced up to 30 June 2012. This was also conceded by Mr John Tomazos towards the conclusion of his cross-examination. It is likely there are more documents concerning Tomazos Group's use of stockpile materials which have not been discovered.

Conclusions

[165] I consider there is much force in the submissions made by counsel for the plaintiffs. I found Mr Preston's evidence to be reliable, not only because I consider that he was honest and forthright in the witness box, but also because of his intimate knowledge of what was happening in relation to the stockpiles both before and during the period when Tomazos Group was using them. On the other hand, there are a number of matters which undermine the reliability of the testimony of John Tomazos and the summary advanced on behalf of Tomazos Group (reproduced at [143] above). These include: the clear denials in his affidavit of use of the materials, apart from the fill sand; his somewhat equivocal denials during his evidence in chief regarding use of some of the other materials; and the very late and inadequate disclosure of documents, some of which contradicted his earlier denials.

[166] I find, as the plaintiffs submit, that the defendant did use substantially the whole of the building materials set out in the EJA surveys and the

Stockpile summary,[107] at the rates recorded on the EJA surveys (at TB 665-8). I find that the defendant used all of those materials with the exception of some of the Armour rock (40%), the cracker dust (1,250 m³) and the unscreened topsoil (12,000 tonnes).

[167] Although I have found that Tomazos Group used the 21,800 m³ of T2 gravel referred to in [156](f) above, 200 m³ of screened fill small referred to in [152](b) above and the fine crushed rock referred to in [157] above, those stockpiles do not form part of the plaintiffs' claim in these proceedings.[108]

[168] I find the defendant liable to pay the following amounts in relation to the following materials, plus GST plus interest:

(a) Armour rock on TB 665 - $29, 920.00[109]

(b) Type 3 gravel on TB 665 - $5,400.00

(c) Fill sand on TB 665 - $21,292.00

(d) Type 3 gravel on TB 666 - $65,833.00

(e) Type 2 gravel on TB 666 - $94,608.00

(f) 80mm rock on TB 666 – $12,470.00

(g) 1250 m³ of Cracker dust on TB 667 - $17,500.00[110]

[107] See TB 665-9.
[108] See email 16 December 2016 [2].
[109] See email 16 December 2016 [1].

(h) Screened topsoil on TB 668 - $16,913.00

(i) Fill sand on TB 668 - $15,325.00

(j) 12,000 tonnes of unscreened topsoil on TB 668 - $84,000.00[111]

(k) 100mm rock on TB 668 - $39,600.00

(l) Rubble on TB 668 - $46,280.00

[169] This amounts to a total of $449,141.00 plus GST (plus interest) due to the plaintiffs for the sale of those stockpiles.

Sale of machinery products

[170] The plaintiffs plead, as part of the Alternative November 2011 Sale Agreement or Arrangement, that in or about mid-November 2011 Ceccon Transport and Tomazos Group entered into an agreement regarding the use of machinery products. Under this agreement, Ceccon Transport permitted Tomazos Group to use miscellaneous machinery products (comprising oil, fuel, grease and like product) owned by Ceccon Transport and located at the Boral Yard, on terms that inter alia Tomazos Group would pay to Ceccon Transport an amount for the miscellaneous machinery products which it used, at the rates and in the amounts (inclusive of GST) set out in the machinery product summary prepared by Ms Ceccon (reproduced at TB 672-3)

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[110] See [154] above.
[111] See [156](c) above.

(the **Machinery Product Summary)**.[112]

[171] Tomazos Group admits that Ceccon Transport permitted it "to use oil, fuel, grease and like products", but otherwise denies the allegations.[113] It also admits that it took possession of and used "some of the grease, fuel oil and like products but not the other miscellaneous machinery products".[114]

[172] Therefore, on the pleadings at least, Tomazos Group denies that:

(a) it was permitted to use any of the other miscellaneous machinery products;

(b) it used all of the grease, fuel oil and like products or any of the other miscellaneous machinery products; and

(c) it is liable to pay for any of the miscellaneous machinery products, even the grease, fuel oil and like products that it did use.

<u>The agreement</u>

[173] Mr Ceccon said that shortly after he and John Tomazos had inspected and discussed the stockpiles Tony and John Tomazos came to see him again at the Gunn Point Road site. They walked around Ceccon's yard and discussed items that Ceccon owned and whether Tomazos wanted to buy them. Tony Ceccon made handwritten notes of the items

[112] Statement of Claim at [24(b)].
[113] Defence at [24].
[114] Defence at [25(b)].

John Tomazos said he wanted to buy and of the price agreed upon for each item. He took the notes home and asked Ms Ceccon to type up the list of items and agreed prices. He identified the Machinery Product Summary as the document that she typed.[115]

[174] When he was responding to the assertions made by Mr Ceccon in his affidavit sworn 3 December 2015 John Tomazos did not dispute this meeting and agreement.[116]

[175] Ms Ceccon said this about the creation of the Machinery Product Summary:

(a) she prepared a summary of items and costs of machinery and materials she was told by Tony Ceccon had been the subject of discussion between him and John Tomazos;

(b) she prepared the Machinery Product Summary on or about 5 December 2011;

(c) shortly after she prepared it, she delivered the Machinery Product Summary to Tomazos Group and handed it to John Tomazos; and

(d) when she handed the documents to John Tomazos, she said to him: "This is for the machinery products."[117]

[176] In his affidavit, John Tomazos denies having that conversation with

[115] Affidavit of Antonio Ceccon sworn 3 December 2015 [52].
[116] See Affidavit of John Tomazos sworn 19 January 2016 [108].
[117] Affidavit of Suzanne Yoko Ceccon sworn 2 December 2015 [52] – [55].

Ms Ceccon and states that he did not see the Machinery Product Summary until after these proceedings commenced.[118] However, during cross examination John Tomazos accepted that he had seen the Machinery Product Summary but said he did not remember the exact date he was given it.[119]

[177] I consider Ms Ceccon was a methodical and careful person in her role with the business and I found her to be doing her best to give truthful and accurate evidence. Ms Ceccon gave clear evidence of her general practice of hand delivering documents to Tomazos Group's offices in Winnellie. I have no reason to doubt her evidence about the Machinery Product Summary and her discussion with John Tomazos.

[178] On the other hand I have some difficulty accepting the evidence of John Tomazos and the positions taken by Tomazos Group in relation to this claim regarding the miscellaneous machinery products. This flows from my concerns regarding the false denials in John Tomazos' affidavit regarding the building materials issue; the inadequate and late discovery of important and relevant documents (which may have revealed the Machinery Product Summary); and Tomazos Group's apparent reluctance to acknowledge liability to even pay for the grease, fuel oil and similar products that it did use.

[179] I accept the evidence of Mr and Ms Ceccon and find that the parties did

[118] Affidavit of John Tomazos sworn 19 January 2016 [107(h)].
[119] Transcript 23/05/16 at p 517.

agree that Tomazos Group would pay for such of the miscellaneous machinery products as it used at the rates set out in the Machinery Product Summary.

Tomazos use of the miscellaneous machinery products

[180] As with the building materials issue I found Mr Preston's evidence clear and concise in relation to the miscellaneous products. Mr Preston was able to:

(a) identify all of the miscellaneous machinery products set out in the Machinery Product Summary as being present at the Boral Yard as at the date that Tomazos Group commenced operations on or about 1 November 2011;

(b) specify the use that each machinery product was put to by Tomazos Group in its operations from the Boral Yard on and from 1 November 2011; and

(c) state that Tomazos Group did not bring in items fitting the descriptions on the Machinery Product Summary when it commenced operations on "day one" of its operations, this also being the day that Mr Preston started with Tomazos Group.[120]

[181] Mr Preston said that the various oils, coolant grease and associated pumps listed were used on Tomazos vehicles, Tomazos used the

[120] Transcript 17/05/2016 pp 232-239.

Kia Rio Van as a service van, the compressor to pump grease and inflate tyres, the welder, the genset for power, the Oxy acetylene set for cutting and welding, the Honda motor pumps and fittings to wash the trucks, the containers of steel slings for towing bogged trucks, the tyres and tyre rims for use on the trucks, the 20 foot shipping containers one for storing new tyres and the other set up as a workshop with tools, the large oil pans to hold oil drums in cases of spillage, the small shed sitting over the top of the Genset to keep it out of the weather and the 6000 L of diesel for the ongoing running of Tomazos trucks.

[182] As counsel for the plaintiffs has pointed out the challenge to Mr Preston's evidence about the machinery products was limited. First, he was asked whether he was confusing his employment with Tomazos Group with Ceccon Transport. Mr Preston said he "didn't think so". Second, he was asked whether the shipping containers, referred to in TB 672, were taken by Mr Ceccon. Mr Preston answered that he did not recall them being taken "while he was employed by Tomazos Group". He agreed that similar looking containers were at Jenkins Road, but could not say whether they were the same containers as those referred to in TB 672. Third, Mr Preston was asked whether he was aware of Mr Burgoff doing maintenance work on the trucks for Tomazos Group and whether Mr Burgoff had his own trailer with tools including a welder. Mr Preston said that he was aware of Mr Burgoff

doing maintenance works on the trucks and that Mr Burgoff had his own tools, but he was not aware of him having a welder. Mr Burgoff was not called to give and evidence about this.

[183] Counsel for the defendant also refers to the fact that some items on the list remained on Ceccon's depreciation schedule, and that no tax invoice was issued in respect of this claim until 2015. Counsel also pointed out that the Kia Rio van, although previously owned by Ceccon Transport, was then owned by Tomazos Group, having been purchased from Ritchie Brothers.

[184] None of this casts any doubt over the accuracy of Mr Preston's recollection. He was not to know that the Kia Rio van was owned by Tomazos Group by the time he saw it being used by Tomazos.

[185] I accept Mr Preston's evidence and find that Tomazos Group used all of the miscellaneous machinery products referred to in the Machinery Product Summary (at TB 672-673).

[186] With the exception of the Kia Rio van, there was no evidence to the effect that the other items on the Machinery Product Summary were not still owned by Ceccon Transport at the time when Tomazos used them. If Tomazos Group had in fact purchased any of those items itself, I would have expected it to have provided evidence of its ownership of such items. Consequently I find that Tomazos Group is liable to pay for its use of all of those products, with the exception of the Kia Rio

van.

[187] In light of my finding at [179] above, that Tomazos Group agreed to pay for those products at the rates set out in the Machinery Product Summary, I conclude that Tomazos Group is liable to pay Ceccon Transport the amount of $60,843.98 (inclusive of GST) claimed for the miscellaneous machinery products less the value of the Kia Rio van, $5,500.00. That would amount to $55,343.98.

Genset Hut

[188] A considerable amount of time was wasted on this claim for an additional $660.00. For much of the proceedings both parties were at cross purposes about the genset hut: John Tomazos believed that the genset hut was a demountable office present on the Boral Yard; and Ceccon did not seem to appreciate that it was already listed on the Machinery Product Summary and valued at $500.00.

[189] I have already found that the defendant is liable to pay that amount as part of the $55,343.98 awarded under the sale of machinery products claim. Accordingly this additional claim is dismissed.

Fuel Bund Wall

[190] When Tomazos Group commenced operations in November 2011 from the Boral Yard, present on that yard was a fuel tank and a fuel bund wall, both owned by Ceccon Transport. Mr Ceccon proposed to move

the fuel bund wall to the Jenkins Road property. As Tomazos wished to keep the fuel bund wall in situ, John Tomazos agreed that Tomazos Group would pay for a new fuel bund in the form of a concrete slab to be constructed on the Jenkins Road property.

[191] In September 2014 MCA Moil Excavations (**MCA**) provided a quote addressed to Ceccon Transport for that work to be done for $30,000.00 (inclusive of GST).[121] A tax invoice dated 29 October 2014, generated by Tomazos Group, indicates that Tomazos paid MCA $20,000.00 with the "balance $10,000.00 (inc GST) paid on completion of works."[122] Ceccon Transport is suing for the remaining $10,000.00.

[192] In his affidavit John Tomazos said:

> There was a balance of $10,000 to be paid after installation. By that time, we were in litigation with Ceccon, and the amount has not been paid. Tomazos has never been followed up for payment by the contractor.[123]

[193] It seems that MCA has not done any of the works – ostensibly according to Ceccon because MCA requires the $10,000.00 balance to be paid first. Tomazos points out that such a requirement by MCA does not appear in the quote, nor is it suggested such a requirement was ever communicated to Tomazos. Accordingly, the balance is not yet payable.

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[121] TB 281.
[122] TB 1509.
[123] Affidavit of John Tomazos sworn 19 January 2016 at [34].

[194] On the other hand, Ceccon Transport maintains that there was no agreement whereby Tomazos was entitled to withhold any of the monies pending completion of the works. Ceccon submits that the balance is due and payable as a consequence of Tomazos Group accepting the obligation to meet the costs of the fuel bund in consideration for using and continuing to use the fuel tank at the Boral Yard.

[195] I agree with this submission. Even if MCA did agree to payment of the $10,000 being deferred until completion of the works, notwithstanding that its quote does not contain such a term, the liability to pay the balance to MCA would be that of Ceccon Transport, it being the contracting party. Tomazos Group agreed to pay the cost of constructing the fuel bund wall. The only evidence of such a cost is the MCA quote for $30,000.00. Tomazos having paid only $20,000.00 is liable to pay the balance of $10,000.00, irrespective of whether or when the work is done.

D. Supply and Fit Agreement

[196] Ceccon Transport supplied and fitted equipment known as “hungry boards” to a screening plant operated by Tomazos. Tomazos admits the hungry boards were supplied and fitted. It does not challenge the amount claimed, namely $2,500.00, is a reasonable cost to do so.

[197] Accordingly the defendant is liable to pay $2,500.00 to Ceccon

Transport for the supply and fitting of the hungry boards.

E. Supply and Haulage Agreement

[198] In or about October or November 2011, Ceccon Transport agreed to allow Tomazos Group to purchase materials supplied by Boral (Qld) Pty Limited on Ceccon Transport's account with Boral. This was because Tomazos Group did not yet have its own account with Boral. Tomazos Group also agreed to reimburse Ceccon Transport for the cost of the materials supplied by Boral and to pay Ceccon Transport a fee for haulage of those materials.[124] This arrangement was referred to in this proceeding as the **Supply and Haulage Agreement**.

[199] The amount claimed and payable for the haulage is agreed to be $5,782.26.

[200] The parties also agree that the costs of the materials supplied to Tomazos and debited to Ceccon Transport's account with Boral is $12,720.97.

[201] Ms Ceccon said that she received statements from Boral in October and November 2011 which contained references to those purchases and the $12,720.26. She took them to the Tomazos office at Winnellie, gave them to John Tomazos and said: "You need to pay this, it's not

[124] Statement of Claim [38].

ours."[125]

[202] None of this was disputed by Tomazos Group. The only reference to these claims in its affidavit material was the following statement by John Tomazos:

> Tomazos have accepted liability for that, but an offset it claimed by way of counterclaim.[126]

[203] However, during the course of the hearing, Tomazos Group withdrew the admission in so far as it related to the amounts for material charged to Ceccon Transport's account with Boral.

[204] In his evidence John Tomazos said that Tomazos Group opened its own account with Boral and requested Boral to invoice it directly for the material previously charged on Ceccon Transport's account. He believes that the amount was "credited off" the Ceccon Transport account and invoiced to Tomazos Group.[127] Exhibit D17 contains a number of invoices issued by Boral to Tomazos Group which appear to relate to the same materials.

[205] There is no evidence that Ceccon Transport paid any or all of the amount of $12,720.26 that was originally charged to its account. Ms Ceccon did not say that Ceccon Transport paid it. Had Ceccon Transport paid that amount one would expect to see that reflected in a

[125] Affidavit of Suzanne Yoko Ceccon sworn 24 February 2016 [60] - [67].
[126] Affidavit of John Tomazos sworn 19 January 2016[38].
[127] Transcript 20/5/16 p 414.

document, such as in a subsequent statement. Rather Ms Ceccon's limited evidence about the topic suggests to me that once she had given the Boral statements to John Tomazos she left the matter for him to sort out, which he did by having the invoices reissued in the name of Tomazos Group. The fact that Boral re-issued the invoices on Tomazos Group's new account implies that Boral had not been paid by Ceccon Transport.

[206] The plaintiffs have not proved this part of their claim. Accordingly the only amount owing in relation to this agreement is the agreed amount of $5,782.26 for haulage.

F. Validation and Accessibility Agreement

[207] A document signed on behalf of Ceccon Transport and Tomazos Group dated 26 October 2012 was described as a "Validation and Accessibility Agreement". This document confirmed an agreement whereby Tomazos Group would have access to Lot 24730 (Jenkins Road) and extract and process material which it could then deliver to MJHJV in order to fulfil its contract with MJHJV for the supply of sub-base and hard sand material. Ceccon Transport was entitled to royalties at the rate of $2.50 per tonne.

[208] The amounts payable for the royalties are set out in two invoices:

(a) Invoice 1642 dated 12 February 2013 for $126,252.62; and

(b) Invoice 1643 dated 12 February 2013 for $6,776.88.

[209] By further agreement dated 24 March 2013, the due date for payment of the invoices was extended to 24 September 2014.

[210] Tomazos accepts liability to pay the amounts agreed of $133,029.50 inclusive of GST due 24 September 2014. At no time was liability to pay these amounts disputed. The amount due still has not been paid. John Tomazos provided the following reason for that in his affidavit:

> By the time the 18 months was up, we were in litigation and the amount has not been paid.[128]

[211] In fact proceedings had not commenced by that time, and the counterclaim had not been foreshadowed.

[212] The defendant is liable to pay the sum of $133,029.50 for this claim.

Conclusions / Findings

[213] I make the following findings:

(a) in respect of the Loan Agreement I:

(i) find that Mr Antonio Ceccon is the creditor;[129]

(ii) find that Tomazos Group Pty Limited's liability to pay interest under the Loan Agreement is calculated on a compound basis of 7% per annum for the first year, 8% for

[128] Affidavit of John Tomazos sworn 19 January 2016 [40].
[129] See [90] - [94] above.

the second year, 9% for the third year, and continuing at 9% until paid; [130]

(iii) find that the transfer of a unit in Tomazos Group Pty Limited's 'Tech-1' development is not a term of the Loan Agreement;[131]

(iv) find Tomazos Group Pty Limited liable pay Antonio Ceccon $400,000.00 for the balance of the loan under the Loan Agreement;

(v) find Tomazos Group Pty Limited liable to pay Antonio Ceccon $259,604.00 for interest under the Loan Agreement (calculated to 4 April 2014 and continuing at a rate of 9%);[132]

(b) in respect of the Material Sale and Supply:

(i) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $322,886.79 (inclusive of GST);[133]

(c) in respect of the Alternative November 2011 Sale Agreement:

(i) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $449,141.00 (plus GST) for the

[130] See [110] - [113] above.
[131] See [123] above.
[132] See [113] above.
[133] See [127] above.

stockpiles;[134]

(ii) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $55,343.98 (inclusive of GST) for the miscellaneous machinery and materials;[135]

(iii) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $10,000.00 (inclusive of GST) of the balance payable for the construction of the fuel bund;[136]

(d) in respect of the Supply and Fit Agreement:

(i) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $2,500.00 (inclusive of GST) for the supply and installation of the hungry boards;[137]

(e) in respect of the Supply and Haulage Agreement:

(i) find Tomazos Group Pty Limited liable to pay Ceccon Transport Pty Limited $5,782.26 (inclusive of GST) for haulage of the material charged to Ceccon Transport Pty Limited's account with Boral Resources (Qld) Pty Limited;[138]

(f) in respect of the Validation and Accessibility Agreement:

(i) find Tomazos Group Pty Limited liable to pay Ceccon

[134] See [169].
[135] See [187].
[136] See [193] above.
[137] See [197] above.
[138] See [206] above.

Transport Pty Limited $133,029.50 (inclusive of GST);[139]

(g) find Tomazos Group Pty Limited liable to pay interest on the amounts outstanding.

[214] I will make orders after the parties have performed the necessary calculations of monies due based on these findings.

COUNTERCLAIMS

Outline of counterclaims

Pleadings and submissions

[215] Prior to 5 August 2016, Tomazos identified and sought damages on the basis of five causes of action:

(a) negligent misstatement, based upon oral representations and statements by Tony Ceccon to Tony and John Tomazos on various dates between August and September 2011, defined as "**the Statements**", and subsequent conduct engaged in by Tony Ceccon, defined as "**the Conduct**";[140]

(b) misleading and deceptive conduct within the meaning of s 18 of the Australian Consumer Law,[141] based upon the same Statements and Conduct;[142]

[139] See [207] - [212] above
[140] Counterclaim [4] – [9] and [23(a)].
[141] **The Australian Consumer Law** is contained in Schedule 2 of the *Competition and*

(c) breach of fiduciary duty by engaging in the Conduct resulting in profits for which Tony Ceccon and Ceccon should account;[143]

(d) breaches of a number of contracts by Ms Ceccon and/or Ceccon Transport namely agreements referred to as the **Jenkins Road Pit Agreement**, the **GPR Pit 2 Agreement** and the **Scrubby Creek Pits Agreement**, which involved rights of access over and use and transfer of certain leases;[144] and

(e) misrepresentation, based upon representations said to have been made by the plaintiffs in October 2010 to the effect that Ms Ceccon and/or Ceccon Transport would be responsible for all mining approvals and authorisations in relation to the Jenkins Road Pit.

[216] On 5 August 2016, after completion of the evidence, Tomazos made a number of amendments to the counterclaim. It:

(a) claimed a right to set off the value of 30,000 m² of sand against any money owing to Ceccon pursuant to the GPR Pit 2 Agreement[145]; and

(b) introduced an allegation of estoppel in the context of the negligent misstatement pleading[146].

Consumer Act 2010.
[142] Counterclaim [10] – [11] and [23(b)].
[143] Counterclaim [12] – [14] and [23(c)].
[144] Counterclaim [15] – [19] and [23(d)].
[145] Counterclaim [20] – [22] and [23(e)].

[217] Tomazos also withdrew a number of its previous allegations. These included the allegation of the misrepresentation in October 2010 and an allegation that Tony Ceccon made an oral representation in August or September 2011 that neither he nor Ceccon Transport would pursue their interests in the transport and general extraction industries adversely to Tomazos.

[218] The Tomazos Submissions (of 29 August 2016) also allege that Tony Ceccon:

(a) attempted to obtain work from MJHJV that should have gone to Tomazos[147];

(b) attempted to obtain work from Boral that should have gone to Tomazos[148]; and

(c) interfered with the performance by Boral of its contract with Tomazos, which Tomazos says was a "preferred contractor agreement" for Tomazos to do Boral's general cartage work.[149]

[219] Although those allegations were made, somewhat obliquely, in relation to the negligent misstatement claim, they were not pleaded as giving rise to any other cause of action. Rather, it seems that they are more relevant to the alleged breach of the duty forming the basis of that

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[146] Counterclaim [8].
[147] Tomazos Submissions [97] – [103] and Tomazos Reply on Counterclaim [22] – [24].
[148] Tomazos Submissions [104] – [113].
[149] Tomazos Submissions [147] – [154] and Tomazos Reply on Counterclaim and [33] – [36].

claim, and possibly the alleged breach of fiduciary duty, and damages that might flow therefrom.

[220] Subsequent to completion of oral submissions (on 13 October 2016), Tomazos abandoned the breach of contract claims in relation to the GPR Pit 2 Agreement and the Scrubby Creek Pit Agreement, but continues with the claim in relation to the Jenkins Road Pit Agreement.[150]

[221] The assessment of damages involved in most of the counterclaim is somewhat complicated and will depend upon which, if any, of the causes of action alleged in the counterclaim are established and relevant factual findings. It was therefore agreed that further submissions and consideration in relation to such damages would be deferred until findings have been made in relation to the counterclaim.

Tomazos' summary of contentions

[222] Counsel summarised Tomazos' primary contentions as follows in the Tomazos Submissions.[151] Tomazos says it only entered the industries as a consequence of, and in reliance upon, various statements made by Tony Ceccon to the effect that he and Ceccon were quitting the industries, he was permanently retiring because of ill health, Tomazos should enter the industries and he would provide all the assistance he could to them while his health permitted.

[150] Tomazos Supplementary Submissions [16].
[151] Tomazos Submissions [24] – [28].

[223] Tomazos thereafter, with Tony Ceccon's encouragement advice and assistance, entered the industries and made a significant commitment to them both financial and in time spent on management.

[224] Subsequently, Tony Ceccon's health improved, and he not only re-entered the industries, but did so in direct competition with, and to the detriment of, Tomazos. Further, in doing so, Tony Ceccon took advantage of the confidential information he had gained from working with Tomazos, by actively encouraging one of its clients (Boral) to breach its agreements with Tomazos, and by failing to honour the agreement to allow Tomazos access to the Jenkins Road pit.

[225] Tomazos claims that as a consequence it suffered compensable loss – either the overall losses from entering the industries at all or, alternatively, loss of specific profits.

Ceccon's response

[226] In his written submissions counsel for the plaintiffs is critical of the vagueness and imprecision of Tomazos' claims.[152] The clearest example of this is the imprecision with which the central tenet in the Counterclaim is expressed: namely the inducement by which the Tomazos parties say that they spent large sums of money. At times it is stated as Mr Ceccon's statement that he would not re-enter the

[152] Ceccon Response to Counterclaim [1] – [3].

transport industry. At other times it is a statement that he would not "compete", or would not return to "the industry".

[227] Several different causes of action are agitated. They are agitated in an attempt to improve the quality of the relief because of the fundamental failing at the heart of the inducement (or encouragement) case the Tomazos parties wish to run. The Counterclaim wishes to be a claim for damages for breach of a negative covenant made in support of the acquisition of goodwill. However, no business was sold, no goodwill was acquired, and no such covenant was given. If the Tomazos parties wished to obtain some protection of their interests, they could have done so by a contract or deed in writing. Even then, such protection could only be for the minimum period and geographical reach necessary to protect the acquisition of goodwill. It is clear that the Tomazos parties were capable of protecting their interests in writing and reducing important arrangements to writing: witness the Loan Agreement, Validation and Accessibility Agreement, and the alleged altered settlement terms of repayment of the Loan Agreement.

[228] There is a recurring resonance on each cause of action. Either the Tomazos parties took the risk of getting into a new business venture without protection or, more likely, the alleged encouragement by Mr Ceccon was not made or, if made, was not discussed in serious business terms but in the context of their friendship.

[229] I agree with counsel for the plaintiffs that the main claims by Tomazos are vague and imprecise. I also agree that before investing such a large amount of money and time into a new venture one would expect matters as important and critical as Tomazos alleges would be documented if not in an agreement at least in some other form. At least one would expect to see a diary note and or a self-serving letter or email recording the making of such an important representation and proposed reliance upon it.

The Statements

[230] The Statements are said to comprise "oral representations and statements and advice" given by Tony Ceccon on behalf of himself, Suzanne Ceccon and Ceccon Transport "On various dates and at various locations between August and September 2011 the exact dates and locations of which Tomazos cannot now recall."[153] As pleaded, the Statements were that:

(a) "Tony Ceccon would cease Ceccon's operations in the Industries[154] in or about October 2011 and would not re-enter the Industries on his own behalf"[155];

[153] Counterclaim [4].
[154] The "Industries" were defined in [1(c)] of the Counterclaim as being the transport and mineral extraction industries.
[155] Counterclaim [4(a)].

(b) "Tomazos should commence work in the Industries and purchase trucks trailers and other plant and equipment required for undertaking work in the Industries";[156]

(c) "The Industries were particularly buoyant";[157] and

(d) "Tony Ceccon would assist Tomazos in the establishment and growth of its business in the Industries for as long as he was alive including by" teaching and mentoring Tomazos, John and Tony in the business of the Industries, advising of the plant and equipment required to be purchased, negotiating contracts on Tomazos' behalf and advising Tomazos on negotiations including as to price, and granting Tomazos access to the Ceccon leases.[158]

[231] In the course of oral submissions counsel for Tomazos was asked about the pleading in [4(a)] of the Counterclaim to the effect that Tony Ceccon represented that he "would not re-enter the Industries on his own behalf". Counsel stated that "the Industries" referred to in paragraph 4 of the Counterclaim should be confined to the transport industry and did not extend to the plaintiffs' involvement in the mineral extraction industry.[159]

[156] Counterclaim [4(b)].
[157] Counterclaim [4(c)].
[158] Counterclaim [4(d)].
[159] Transcript 13/10/16 p 801; See too Tomazos Submissions [83(b)].

[232] In their written submissions the Tomazos parties refer to three "key admissions", namely that Tony Ceccon told Tomazos that:[160]

(a) "with Inpex coming, he wished he was 10 to 15 years younger and had his health, because he would love to have a crack at it";

(b) "he would never be re-entering the transport industry"; and

(c) "if they got the Boral work, he would help them out if they needed, to teach them a few tricks that they didn't know".

[233] In both the "Negligent misstatement" and the "Misleading and deceptive conduct" sections of their written submissions, Tomazos refer only to "Tony Ceccon's statement that he would never be re-entering the industry".[161]

[234] Counsel for Ceccon submits that if by such a statement the Tomazos parties mean to assert that Mr Ceccon stated that he would never be re-entering the transport and extractive mining industry, then such a statement was not proved and was contrary to the way that the Tomazos parties ran their case.

[235] Further, the "key admissions" adverted to by the Tomazos parties in their written submissions depart significantly from the Counterclaim and, thus, narrow the focus of the two causes of action, misleading and deceptive conduct and negligent misstatement, both of which depend

[160] Tomazos Submissions [83].
[161] Tomazos Submissions [138] and [143].

upon actionable representations. When critically considered only one of the three "key admissions" requires any real assessment based on the case run by the Tomazos parties: namely, whether Mr Ceccon represented that he would never be re-entering the transport industry.

[236] As to the other two "key admissions", counsel for Ceccon contends that nothing adverse follows even if Tony Ceccon truly made them. There is no inducement in Tony Ceccon's statement that if he was younger and had his health he would "love to have a crack at" some of the work likely to be offered by Inpex, and nothing in such a statement that could have led the Tomazos parties into error even if they relied on it. Similarly, the "key admission" that "if they got the Boral work, he would help them out if they needed, to teach them a few tricks that they didn't know", is conditional, and if there be any inducement in it (which is not accepted), the inducement was subject to Tomazos being awarded work from Boral. Further, any such inducement could not have led the Tomazos parties into error given that it is abundantly clear that Tony Ceccon did offer and provide a significant amount of voluntary and gratuitous assistance to Tomazos Group in the period before it moved into the Boral yard and in the succeeding months while it became established. I agree with those contentions.

[237] During oral submissions counsel for Tomazos confirmed that the "statements" relied upon are the three "key admissions" quoted in [232] above, and that the "key admission" that Tony Ceccon "told

Tomazos that he would never be re-entering the transport industry"[162] is the "actionable" statement for the purposes of the negligent misstatement claim and the estoppel claim.[163] I would think that must be so also in respect of the misleading and deceptive conduct claim.

Factual background to the primary claims

[238] For some years Ceccon Transport had been involved in cartage work for a number of customers including Tomazos and Boral. As at 2011 Ceccon Transport was Tomazos Group's main provider of cartage of building materials and was Boral's preferred cartage contractor.

[239] By the middle of 2011 Tony Ceccon was suffering from major health issues, as a consequence of which he decided to cease operating the trucking business. He had undergone surgery which was unsuccessful. He was understandably upset and concerned about his future health and longevity. It was a very traumatic time for him and his wife Suzanne Ceccon.[164] He and Ms Ceccon decided to cease Ceccon Transport's transport business, sell its vehicles, lay off the staff, notify the major customers, and to cease mining, while retaining stockpiles that could be sold.[165]

[240] Tony and John Tomazos knew this. According to Tony Tomazos Tony Ceccon visited Tony and John Tomazos in May or June 2011 when they

[162] Tomazos Submissions [83(b)].
[163] Transcript 13/10/16 p 807.
[164] Transcript 14/4/16 pp 135-136
[165] Transcript 9/3/16 p 181; Transcript 17/5/16 p 184.

were working at the Palmerston Waterpark. He told them of his health problems and that his doctor had told him that he did not have long to live. He told them that he was a very sick man and that he was going to work until October and then stop. He also told them that he had commenced selling his plant and equipment to Ritchie Brothers, a Queensland dealer in heavy equipment.[166]

[241] Tony and John Tomazos then realised that Tomazos would need to find an alternative provider who would do its cartage work after Ceccon Transport stopped doing that.[167] Tony Tomazos also heard about Tony Ceccon's health predicament from other people.

[242] Tony Tomazos said that shortly after he heard these things about Tony Ceccon's health predicament Mr Hartell attended Tomazos' offices with Mr Baumgart, the Boral logistics manager who was normally based in Brisbane. The four of them discussed the fact that both Tomazos and Boral had the same concerns about transport and who both of them would use in the future. Mr Baumgart suggested that Tomazos buy trucks and Boral would then use Tomazos as a transport provider. Both parties then left to consider their options.[168] This

[166] Affidavit of Antonios Tomazos sworn 27 January 2016 [17]; See too Affidavit of John Tomazos sworn 19 January 2016 [45] – [49].
[167] Affidavit of Antonios Tomazos sworn 27 January 2016 [19]; See too Affidavit of John Tomazos sworn 19 January 2016 [49].
[168] Affidavit of Antonios Tomazos sworn 27 January 2016 [20] – [23]; See too John Tomazos sworn 19 January 2016 [50] – [51].

presented Tomazos with a significant and interesting business opportunity.[169]

[243] According to Tony and John Tomazos Mr Ceccon attended Tomazos' offices shortly after that meeting. He spoke to them about a number of things primarily to do with Tomazos entering the trucking industry and taking over the Boral work. During that meeting Tony Ceccon offered to assist Tony and John Tomazos with their entry into the transport business. This would include him providing advice on how to do the Boral work, encouraging Ceccon's customers to provide their work to Tomazos and arranging for Ceccon's foreman Mr Preston to work for Tomazos.[170]

[244] Tomazos contends that the Statements were made by Tony Ceccon during this meeting.

[245] In his affidavit Tony Tomazos said this about that meeting:

> [24] Shortly after that discussion [with Mr Hartell and Mr Baumgart] Tony came in to see John and myself. He told us that Boral wanted to give Tomazos the transport works. I had not spoken to anyone about our discussion with Boral. He also told us other companies had approached Boral to undertake the transport work but Boral preferred to use Tomazos.
>
> [25] Tony then offered us his help to enter into the transport business. He told us he would provide us with advice on how to do the Boral work and said that all his customers

[169] Transcript 18/5/16 p 296; Transcript 20/5/16 p 529.
[170] Affidavit Antonios Tomazos sworn 27 January 2016 [24] – [28]; See too Affidavit John Tomazos sworn 19 January 2016 [52] – [54].

would be Tomazos customers.

[27] Tony's offer to help us did not surprise me. He had helped us out in the past and now that he was going out of business I knew he would want to do something to do [sic] with his time. I also knew he wanted someone "friendly" doing the transport to enable him to supply building materials from his pits which meant if Tomazos did enter into the transport industry it worked beneficially for both him, his wife and Tomazos.

[28] After Tony's offer to help us establish ourselves in the Industry, John and I spoke and agreed that with Tony's help we could make it work. Tony had also told us that his foreman Ron could come and work for us and Ron was very experienced in the transport business and therefore would be of great value to Tomazos. Tony arranged for his mobile phone number to be redirected to the commenced working full us the day second ceased its operations.

[29] After these discussions we decided to invest the money to enter into the transport industry.

[246] John Tomazos' evidence about this meeting is contained in [53] of his affidavit, quoted in [311] below.

[247] Mr Ceccon's recollections about some of those matters, including relevant dates, were different in some respects. He said that he and Ms Ceccon made the decision in or about August to scale back Ceccon's business operations. Tony Ceccon went to see Mr Hartell, the Darwin manager of Boral, and told him of his health situation and that he would not be doing any more work for Boral after two months. Following that discussion he asked Suzanne Ceccon to write to Boral

confirming what he had said and giving Boral notice of his intentions.[171]

[248] By letter dated 26 August 2011 Ms Ceccon advised Boral as follows:[172]

> Due to Tony's ill health, we have been advised by his medical practitioner, that it is in Tony's best interest to cease trading.
>
> In the contract that has bound us together for the past seventeen years, we are required to give a months notice.
>
> We feel that we should give you two months notice, as [sic] September we will be working at full capacity, but due to employees seeking other employment in October it will be more than likely that we will not have enough employees to service you at full capacity giving you sufficient time to find another contractor to replace us.
>
> We will cease trading on the 31.10.2011.

[249] Tony Ceccon said that after he had told Mr Hartell of his situation someone else told him that "Tony Tomazos intends to take over the Boral contract and buy the trucks and plant you sent for sale to Brisbane."[173] He said he went to see Mr Hartell and enquired about this. He said that Mr Hartell confirmed that "Tomazos is taking over the Boral contract". Mr Hartell told him that Tony Tomazos came to see him and said Tomazos Group wanted to take on the contract, that they could do it as they are in the cement business, and that they would also buy their concrete from Boral for their own construction business.

[171] Affidavit of Antonio Ceccon sworn 3 December 2015 [30] – [32].
[172] TB 272.
[173] Affidavit of Antonio Ceccon sworn 3 December 2015 [34].

He said that Mr Hartell also told him that Tony Tomazos said they had bought the trucks that he (Mr Ceccon) had sent to Brisbane and they also have their own trucks from their construction business.[174]

[250] Mr Hartell gave evidence about a meeting with Tony and John Tomazos at Tomazos offices attended by him and Mr Baumgart. He said that Tony Ceccon also attended that meeting,[175] but I consider he was wrong about this. No other witness, in particular neither John nor Tony Tomazos said this, and it was not put to Tony Ceccon in cross-examination. Mr Baumgart and John Tomazos did most of the talking at that meeting and discussed rates, truck requirements, "projects looking forward and basically our business plan, moving forward with a contractor."[176] This would appear to be a different and later meeting than the meeting referred to in [242] above, described by Tony and John Tomazos in their affidavits. Mr Hartell said it occurred after Ceccon had sent the letter advising it would be ceasing trading. He said that he had previously had discussions with Tomazos about them doing transport work, "basically just acknowledging their interest … putting a proposal forward for us to review".[177]

[174] Affidavit of Antonio Ceccon sworn 3 December 2015 [35].
[175] Transcript 25/5/16 p 643.
[176] Transcript 25/5/16 p 644.
[177] Transcript 25/5/16 p 644.

[251] Mr Hartell was confused about the time of the meeting referred to in [250] above. He was shown an email sent by Mr Baumgart to John Tomazos on 19 September 2011.[178] It included the following:

> As per our discussion, Boral would like to give Tomazos Group the opportunity to do our cartage in and around the Darwin areas.
>
> This cartage will be made up of product transfers from Mt Bundy to Howard Springs … Mt Bundy to Darwin areas … and Howard Springs to local distribution areas.
>
> The main areas of cartage will have fixed rates as shown in the matrix below, the rates for projects will be negotiated and agreed on between Boral and Tomazos, the rates are per tonne and the GST exclusive …
>
> With regard to the screening and stockpiling that Tony Ceccon does you will have to discuss with Dick Palliser[179] as this is under his area of control.

[252] When Mr Hartell was shown that email he initially said that the email would have been sent after the meeting, but he then said that it could have been prior to the meeting. He did not recall any prior discussion with Mr Baumgart and anyone from Tomazos Group.[180]

[253] He was then shown an email that he sent on 26 September 2011 to Greg Baumgart and Lachlan Nelson, Boral's Operations Manager, which was also copied to John Tomazos.[181] It said:

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[178] Part of Exhibit P13.
[179] Dick Palliser was Boral's quarry manager.
[180] Transcript 25/5/16 p 645.
[181] Part of Exhibit P13.

I have just met with John, he has requested an agreement from Boral that Tomazos Group are the preferred cartage contractor for Boral Quarries NT, Greg I think John has already spoken to you on this.

Also he needs confirmation on the land at Howard Springs which is currently tenanted by Tony Ceccon. Lachlan both myself and Dick met with John and Tony last Friday at Howard Springs.

They would not require the whole area, but it would be beneficial to both parties to have Tomazos Group located at Howard Springs.

John advised that in two weeks he will have available 8 trailers, and more in the background should they be required.

[254] On 29 September 2011 Mr Baumgart wrote to Tomazos Group as follows:

Dear John

As you would be well aware Boral have a cartage agreement with Tony Ceccon for the cartage of quarry materials from Mt Bundy and Howard Springs to end use customers in the greater Darwin region.

With Tony withdrawing from this market Boral have had to review cartage options which included placing company trucks in Darwin or sourcing a local carrier. We have completed this review and have made the decision to use a local contractor and build a working relationship by offering Tomazos the position of prime cartage contractor. We do however reserve the right to use other carriers but this will only be if Tomazos can not supply.

Until such time as we are provided with fleet details a cartage contract can not be issued however as previously stated Tomazos will be the preferred cartage contractor and the term of the contract will be for a minimum of five (5) years.

> If further information or details are required contact either the undersigned or Mark Hartell.[182]

[255] That letter was attached to an email from Mr Baumgart to John Tomazos, which was copied to Mr Hartell.[183] The email was titled "Letter of understanding" and said:

> We can't complete a cartage contract until you can provide us with the fleet details, and I think Alison has been in touch with regard to some further information, this letter gives the undertaking that you will be the preferred cartage contractor for Boral in Darwin.

[256] Once this advice had been received from Boral Tony Tomazos, and presumably John, considered that the transport business would be a viable business opportunity.[184] In their evidence Tony and John Tomazos both insisted that they were also relying upon Tony Ceccon's assistance,[185] namely the kind of assistance that he had previously offered.

[257] It seems, and I find, that Tony and John Tomazos did not take any significant steps towards entering the transport industry until after they had received this letter advising that Tomazos would be Boral's preferred contractor. Also of importance to Tomazos, was confirmation that they could operate from Boral's land at Gunn Point

[182] Part of Exhibit P13.
[183] Part of Exhibit P13.
[184] Transcript 18/5/16 p 302-3
[185] Transcript 18/5/16 p 302-3; See too Affidavit of John Tomazos [55] – [57] reproduced below.

Road, Howard Springs, that Ceccon Transport had been using (for the previous 17 years or so), namely the Boral Yard.

[258] Mr Ceccon said that within a week or so of Tomazos Group taking over the Boral cartage contract John Tomazos asked him whether Tomazos could set up operations at the Boral Yard at Gunn Point Road. He also said that on some other occasions John Tomazos told him that Tomazos would like to buy anything that Ceccon had stored in the yard and the materials that Ceccon had stockpiled.[186] None of this was challenged by Tony or John Tomazos in their affidavits in reply.

[259] I accept that evidence of Mr Ceccon. I also accept his evidence concerning his discussions with Mr Hartell, referred to in [247] and [249] above. I do not consider that Mr Hartell had any reliable recollection about the meeting on about 19 September 2011 and in particular whether Tony Ceccon attended and in what capacity.

[260] Needless to say there is considerable uncertainty as to when the important meeting relied upon by Tomazos, namely when the Statements were made, occurred. On the evidence of Tony Tomazos, and apparently John, the meeting occurred shortly after May or June, not August or September. On the evidence of Tony Ceccon he did not offer to provide assistance until after he had been informed by Mr Hartell that Tomazos would be taking over the Boral contract,

[186] Affidavit of Antonio Ceccon sworn 3 December 2015 [36] – [41].

which would have been at about the time of Boral's letter of 29 September 2011. On all accounts, it seems that none of the Statements were made until after Mr Hartell and Mr Baumgart indicated the likelihood of Tomazos Group taking over Boral's cartage work, namely near the end of September 2011.

[261] On 6 October 2011 Tony and John Tomazos signed a letter on the letterhead of Tomazos Group addressed "To whom it may concern". It included the following:

> We wish to advise that Tomazos Group will be taking over the business of Ceccon Transport.
>
> Ceccon Transport will continue to operate until 31st October 2011. As from 1 November 2011 Tomazos Group will take over Ceccon operations providing the products and services previously supplied by Ceccon Transport.[187]

[262] Tony Ceccon had drafted the letter and recommended that it be sent to Ceccon's customers. Once it was signed John Tomazos gave it to Tony Ceccon to send out with Ceccon's invoices to its customers a month or so before it ceased trading.[188]

[263] Ceccon Transport ceased operating its transport business on 31 October and Tomazos took over occupation of the Boral Yard the next day. Tomazos continued to purchase trucks and other plant and equipment

[187] TB 1565.
[188] Affidavit of John Tomazos sworn 19 January 2016 [72].

and entered into a number of contracts associated with its new trucking business.

[264] Tony Tomazos said that Tony Ceccon was "true to his word" in a number of respects including introducing Tomazos to his finance broker and to truck and trailer vendors, providing a list of plant and equipment he had sold to Ritchie Brothers, helping "us in working out pricing and how to operate efficiently to enable us to make money in the business" and starting to train his son Matthew Tomazos in the operations of a transport company.[189] Tony Ceccon, and Suzanne Ceccon, continued to provide advice and assistance to Tomazos, including in relation to new contracts such as with MJHJV.

[265] By June 2012 Tony Ceccon's health had improved and he felt able to resume some kind of income producing work in mining, extractive or haulage work. As Ceccon Transport was still the operator in relation to the leases at Jenkins Road, Finn Road and Scrubby Creek he used to check on them at least once a week.[190]

[266] Tomazos did most but not all of Boral's cartage work. On some occasions Tomazos was not able to do work for Boral because it was "busy with other contracts as well" and Boral used other contractors. John Tomazos believed that Ceccon Transport continued to work from

[189] Affidavit of Antonios Tomazos sworn 27 January 2016 [30] – [33].
[190] Affidavit of Antonio Ceccon sworn 25 February 2016 [44].

Boral.[191] Despite Tomazos' initial expectations, the Cartage Agreement between Boral Resources (QLD) Pty Ltd and Tomazos Group, [192] dated 1 May 2012, did not confer exclusive rights upon Tomazos to do such work.

[267] John Tomazos heard rumours to the effect that Ceccon Transport had come back into the transport industry. He began to believe these rumours when Tony Ceccon told him that Boral was inviting tenders for the supply of fine sands. He said that he rang Mr Travis Potts, Boral's Northern Territory Manager, and told him that he had been expecting that Tomazos would get that job.[193]

[268] Subsequently Mr Potts called a meeting with John Tomazos and Tony Ceccon to discuss the Boral fine sands contract. This occurred at Mr Pott's office at Howard Springs in or about May or June 2012.[194] John Tomazos said that at that meeting, when it became apparent that Boral would probably be awarding the fine sands contract to Tomazos, Mr Potts said to Tony Ceccon:

> Tony, if its work you want, I can probably give you a couple of trucks to do a bit of transport work if that's what you want.[195]

[269] John Tomazos was cross-examined over whether he told Tony Ceccon then that he could not do transport work for Boral because he had

[191] Affidavit of John Tomazos sworn 19 January 2016 [78] – [79].
[192] The Cartage Agreement with Tomazos Group starts at TB 1573.
[193] Transcript 20/5/16 p 437.
[194] Transcript 20/5/16 pp 439-440.
[195] Transcript 20/5/16 pp 458, 458 and 440.

promised Tomazos that he would not come back into the transport industry. John Tomazos initially said that he could not remember whether he said that at that meeting.[196] John Tomazos later acknowledged that he had not raised any such complaint at that meeting:[197]

> So, when on Friday afternoon you told us about your meeting with Mr Potts and Mr Ceccon, where Mr Potts said to Mr Ceccon, 'I will let you have some trucks to have some work, you did not object, did you?---The reason that I could not object to that was because (1) it was Travis' decision - - -
>
> You did not object, did you, was the question?---No. But, I wasn't happy about it.

[270] Ultimately, John Tomazos said that he could not recall whether he ever raised the issue with Tony Ceccon. He also agreed that he did not say anything in his affidavit about making a complaint of this nature.[198]

[271] Boral eventually awarded the fine sands contract to Tomazos Group on 1 August 2012[199], and a general cartage contract to Ceccon Transport 14 October 2012[200].

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[196] Transcript 20/5/16 p 459.
[197] Transcript 23/5/16 p 558.
[198] Transcript 20/5/16 p 459.
[199] The "Procurement Agreement for the Provision of Earthmoving Services (Scrubby Creek Fine-Sand Stripping; Extraction; and Cartage)" with Tomazos Group dated 1 August 2012 commences at TB 1599.
[200] The Cartage Agreement with Ceccon Transport starts at TB 905.

Statements and Conduct relied upon

Tomazos contentions

[272] Tomazos contends[201] that at the time Tony Ceccon made the three statements (set out in [232] above):

(a) he knew Tomazos had no experience;[202]

(b) he knew it takes skill and experience to tender for supply and delivery of building materials;[203]

(c) he intended to return to the industry after a couple of years' rest;[204]

(d) he was the preferred cartage contractor for Boral;

(e) he undertook fine sands extraction and transport for Boral, which enabled his trucks to be kept busy and profitable;[205]

(f) he was being asked nearly every day to put in another tender for Inpex work;[206]

(g) it suited Ceccon for Tomazos to pick up Ceccon's transport work, as they had no pits of their own and were more likely to buy materials from him.[207]

[201] Tomazos Submissions [84].
[202] Transcript 9/3/16 p 206.
[203] Transcript 9/3/16 p 207.
[204] Transcript 9/3/16 p 172; if he felt better: 180.
[205] Transcript 9/3/16 p 175.
[206] Transcript 9/3/16 p 203.

[273] Unfortunately there is considerable uncertainty both in the Counterclaim, the evidence and Tomazos' submissions as to when these statements are said to have been made. See too [243] - [260] above. Although the Counterclaim alleges they were made on various dates between August and September 2011 I consider, and find, that Tony Ceccon told Tony and John Tomazos:

(a) that because of his poor health he would stop working at the end of about October, at the meeting at Palmerston Waterpark referred to in [240] above in or before August;

(b) that he would assist them if they got work from Boral, sometime after the meeting between Tony and John Tomazos and Mr Hartell and Mr Baumgart in mid September 2011.

[274] In relation to Tomazos' contentions set out in [272] above, I find that at all times material to the making of those statements:

(a) Tony Ceccon knew Tomazos had no relevant experience in the transport industry;

(b) Tony Ceccon knew it takes skill and experience to tender for the supply and delivery of building materials;

(c) Tony and John Tomazos and Tomazos Group had experience in relation to the supply and delivery of building materials having

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[207] Transcript 9/3/16 p 192.

previously had such materials supplied and delivered to Tomazos Group for the purposes of its building business;

(d) Ceccon Transport was the preferred cartage contractor for Boral;

(e) Ceccon Transport undertook fine sands extraction and transport for Boral, which enabled Ceccon's trucks to be kept busy and profitable;

(f) Tony Ceccon would have liked to be able to do work on the Inpex project and had been approached on several occasions to submit tenders for that work;

(g) it may have "suited" Mr and Ms Ceccon for Tomazos Group to pick up Ceccon Transport's transport work, as Tomazos Group had no pits of its own and may be more likely to buy materials from Ms Ceccon.

[275] I do not consider that his evidence was to the effect that "he intended to return to the industry after a couple of year's rest". He was asked about his "intention about the future" "at the time in 2011 when [he] decided to quit the transport side and sell all [his] trucks". At transcript[208] p 172.1:

> What I'm suggesting to you is you were thinking that if and when you felt better, you would come back into the industry. Is that right? --- I was 70 years old and nothing to escape and I want to go rest for a couple of years, is all, and then start again.

[276] After questions about a number of other topics, including about who would do contract work for Boral once Ceccon had sold its trucks, counsel asked another question, presumably referring back to the exchange at page 172. At transcript page 180.4:

> Well, your plan you told us, was that you'd take maybe a couple of years off and then come back into the industry, is that right? --- Yeah, if I feel better.

[277] While this evidence is to the effect that Mr Ceccon was not ruling out the possibility of returning to the industry after a number of years if he felt better, I do not construe it as him having an intention to do so.

[278] Counsel also submits[209] that the evidence of Tomazos was that they relied upon those statements to enter the transport industry, and the related extraction business, and in particular:

(a) they would not have done so without the assurance of

(i) Tony Ceccon and Ceccon Transport not being in competition, then or in the future;[210]

(ii) Tony Ceccon's assistance;

(b) they were successful business people, who knew their limitations. Transport and extraction were not businesses they knew;

[209] Tomazos Submissions [85].
[210] Transcript 23/5/16 p 556; Transcript 19/5/16 p 359.

(c) they were aware Tony Ceccon was a major player in the industries, with many contacts; and

(d) without his support (as someone with proven knowledge – and success), it would have been commercially foolhardy for them to do so.

[279] Counsel then points out,[211] and I accept, that Tony Ceccon did assist Tomazos in various ways. He:

(a) gave them his list of customers;

(b) discussed with John Tomazos which of the vehicles he had sold to Ritchie Bros Tomazos should buy and provided to Tomazos the licence plates of various former Ceccon trailers they bought from Ritchie Bros so the vehicles could be driven back from Queensland;

(c) showed Matthew Tomazos how the quarrying side of the business worked;

(d) showed John Tomazos how the office side of things worked;

(e) recommended Tristar and Mack Trucks to Tomazos;

(f) introduced Matthew Tomazos to Sandra Johnson for obtaining mining leases;

[211] Tomazos Submissions [87].

(g) in relation to MJHJV discussed with John Tomazos prices to offer MJHJV, attended a pre-tender meeting with MJHJV with John, suggested including details of his experience and agreed to be nominated as a representative of Tomazos Group on the Tomazos response to tender, and offered to allow Tomazos to mine his pits for the MJHJV contract.

[280] Counsel also contends that Tony Ceccon promoted Tomazos to Boral, and attended a meeting between Boral and Tomazos in an advisory role to Tomazos to help them enter the transport industry.[212] I reject that contention. The only evidence relied upon in support of this contention was that of Mr Hartell. I referred to various discussions between him and Tony Ceccon in [247] and [249] - [253] above and concluded that I do not accept Mr Hartell's evidence that Tony Ceccon attended the meeting.[213] I also reject his evidence that Tony Ceccon was performing an advisory role to Tomazos at that meeting.[214]

[281] Counsel submits that Tomazos were heavily reliant upon Tony Ceccon's assistance, and that he occupied the role of trusted advisor to their business. I agree Tony Ceccon provided a considerable amount of advice and assistance to Tony and John Tomazos and that they did rely upon that assistance particularly during the early stages of them entering into the transport business.

[212] Tomazos Submissions [89].
[213] See [250] and [259] above.
[214] C.f Transcript 25/5/16 p 648.

[282] Counsel contends[215] that with Tony Ceccon's guidance and support, Tomazos Group:

(a) entered into contracts with Boral and MJHJV;

(b) bought considerable plant and equipment;

(c) engaged additional staff (many of whom were ex Ceccon employees, as recommended to them by Tony Ceccon and Ron Preston, himself recommended to Tomazos by Tony Ceccon);

(d) established Tomazos Transport Pty Ltd as a separate entity, ultimately to conduct the transport and extraction business;

(e) had its key manager, John, devote considerable amounts of his time to the new businesses at the expense of its traditional business.

[283] I accept that Tony Ceccon provided Tomazos some guidance and support in relation to Tomazos entering into the MJHJV contract discussed from [290] below and facilitated the processes leading up to Tomazos' cartage arrangements with Boral from 1 November 2011. I also accept the contentions in subparagraphs (b) and (c) above. I also accept that Tomazos Group established Tomazos Transport Pty Ltd as a separate entity, ultimately to conduct the transport and extraction business, and had its key manager, John Tomazos, devote considerable

[215] Tomazos Submissions [91].

amounts of his time to the new businesses. But I do not accept that Tomazos Group did these things with Tony Ceccon's "guidance and support".

[284] Counsel contends[216] that as a consequence, Tony Ceccon well knew:

(a) the terms of Tomazos' contracts with Boral and MJHJV;

(b) the financial and management time commitment Tomazos had made; and

(c) the day to day dealings of Tomazos, including by way of information relayed back by Ron Preston.

[285] I accept that Tony Ceccon would have known of the kind of terms likely to be contained in Tomazos' contracts with Boral and MJHJV and he would have learnt about some of the day to day dealings of Tomazos for several months after Tomazos commenced its transport work in November 2011. However much of this knowledge would have been acquired by him before then, during his many years of experience with that kind of work and with those kinds of customers.

[286] Tomazos contends[217] that in early 2012, Tony Ceccon began to feel better and the doctor said he was OK. Accordingly, Tony Ceccon decided to re-enter the industries:

[216] Tomazos Submissions [92].
[217] Tomazos Submissions [93] – [96].

(a) he approached potential customers, including MJHJV;

(b) Ceccon acquired new equipment;

(c) Tony Ceccon obtained a contract with MJHJV for a “small” amount of fill material and gravel;

(d) he commenced stockpiling gravel at Finn Road with a view to trying to obtain a contract with MJHJV;

(e) he let Boral know he was available for work;

(f) Ceccon tendered (unsuccessfully – because MacMahons themselves did not win the contract) for a $10.5m CVL3 contract with Inpex.

[287] I accept the contentions in sub-paragraphs (b) and (e) above. In respect of the other contentions, Tony Ceccon’s evidence was, and I accept, that:

(a) his health had improved by about June 2012 and he was feeling stronger and felt able to resume some level of paid work;

(b) he approached potential customers, including MJHJV, to supply them with gravel from Ceccon’s existing stockpiles;

(c) it was MJHJV who approached him to enquire whether Ceccon could supply fill material and gravel for intersection work which it was undertaking for the Inpex project. MJHJV had to arrange to

transport the material because Ceccon did not have any trucks at that time;

(d) it was MJHJV who requested Ceccon to tender for the CVL3 contract;

(e) he started stockpiling gravel at Finn Road with a view to trying to obtain a contract with MJHJV for the supply of gravel;

(f) Ceccon Transport did acquire new equipment, including a truck and a wheel loader on 16 March, a CAT 972G front end loader and a D7H dozer on 29 May 2012, a precision screening plant on 25 June and a 330B excavator on 27 June 2012.[218]

[288] Tomazos contends that "in fact, Ceccon was back in business, in direct competition with Tomazos, and threatening their key customer contracts while keeping them in the dark."[219]

[289] The Tomazos Submissions then elaborated on Tomazos' claims concerning Tony Ceccon's conduct in relation to MJHJV and Boral.

MJHJV

[290] In January and February 2012 Tony Ceccon assisted Tomazos with its preparation of a tender for a contract to supply gravel to a joint venture known as the "Macmahon John Holland Joint Venture" (**MJHJV**) for

[218] See too Exhibit D8.
[219] Tomazos Submissions [96].

what was known as the CVL2 project. On 6 June 2012 MJHJV issued a letter of acceptance to Tomazos along with a Standard Supply Only Contract that contemplated a supply of 200,000 tonnes at a rate of $18.98 per tonne plus GST. On 30 October 2012 MJHJV issued Ceccon with a Standard Supply Only Contract for the supply of gravel at $17.00 per tonne plus GST.

[291] This was part of the conduct on which Tomazos relied in relation to its claims of negligent misstatement, misleading and deceptive conduct and breach of fiduciary duty.[220]

[292] In its written submissions Tomazos says:

> [97] Tomazos had a contract for the supply of gravel to MJHJV as a result of the tender Tony Ceccon had worked on with them, as referred to in [87] above.
>
> [98] As Tony Ceccon well knew, that contract[221]
>
> a. Was at a price of $18.98 per tonne;
>
> b. Had a potential total value of $3,760,000.00;
>
> c. Was for only part of the total supply required, with Tomazos hoping to secure further contracts;
>
> d. Required the supplier at its own cost to source supplies elsewhere, if its primary source was unavailable;
>
> e. Included a liquidated damages clause for $10,000.00 per day for any supplier default;

[220] Counterclaim [6(d)], [7(c)] and [12].
[221] Part of "JT 18"at TB 1646-1740.

f. Was the only supplier contract issued by MJHJV for the project.

[99] Tony Ceccon was approached by “Macmahon” for cheaper material. Knowing the Tomazos price, he was able to secure a contract for Ceccon Transport with MJHJV at $17.00 per tonne.

[100] Ceccon attempted to entice work from MJHJV with his gravel stockpile at Finn Road, which was effective.

[101] Tony Ceccon attempted to undermine Tomazos relationship with MJHJV by

a. reporting (falsely) that the Department of Mines required Tomazos to quit the Jenkins Road lease;

b. in fact, excluding Tomazos from Jenkins Road, requiring Tomazos to attempt to source materials from further away, at greater cost, or risk defaulting on its contract;

c. complaining to MJHJV about not being paid for materials, when Ceccon had not been pressing Tomazos for payment.

[102] Had Ceccon, in keeping with Tony Ceccon’s prior statement, not gone into competition with Tomazos, Tomazos would have been the only available supplier of gravel for the CVL2 project.

[103] While ultimately the MJHJV decided to forego natural product in favour of a quarried option, in the interim the work secured by Ceccon would have gone to Tomazos, or at least Tomazos would have had its entire contract fulfilled.

[293] Counsel for Ceccon provided detailed written submissions in response to those submissions, pointing out that it was well known that MJHJV would require at least two suppliers because of the large quantity and

particular type of gravel that would be required. Counsel also queried the true nature of the complaint being made by Tomazos in the context of these proceedings.

[294] In its response to Ceccon's submissions Tomazos says:[222]

> [22] There is no doubt MJHJV wanted more than 1 supplier – as a safeguard, and because of doubts 1 supplier could supply the quantities required. However, until Ceccon entered an agreement with MJHJV, they only had one supplier – Tomazos – and no other potential suppliers. Hence it is not fanciful to suggest that if Ceccon had not entered into an agreement with MJHJV, Tomazos would have supplied at least the full original contract and (absent a decision by MJHJV earlier to proceed to a manufactured product) additionally that which Ceccon supplied – either from Tomazos own resources, or by buying from Ceccon and then transporting itself.
>
> [23] Tony Ceccon's statement that he would not re-enter the industry was breached. It matters not whether he or MJHJV made the initial approach. Tony Ceccon invited it; Ceccon accepted a contract at the expense of Tomazos.

[295] It appears that the main focus of Tomazos' submissions about this topic is the Statement originally raised in the Counterclaim, namely that Tony Ceccon had promised not to go "into competition with Tomazos."[223] However Tomazos did not pursue this allegation at trial and, when the Counterclaim was amended in August 2016, Tomazos

[222] Tomazos Reply on Counterclaim [22] – [23].
[223] Tomazos Submissions [102] quoted above.

removed the allegation that Tony Ceccon promised that he would not be "pursuing his interests in the Industries adversely to Tomazos".[224]

[296] In [23] of its submissions, in reply, Tomazos also relied upon Tony Ceccon's alleged promise that he would not re-enter the industry. It was common ground that this allegation was confined to a promise that he would never be re-entering the transport industry, and not to something broader such as not re-entering the mineral extraction industry.

[297] In response to [99] of the Tomazos Submissions, counsel for Ceccon points out that the fact that Ceccon's rate was lower than that payable under Tomazos' contract did not influence the MJHJV's decision to award the second contract to Ceccon. This was the effect of the evidence of Mr Neil Halligan, Project Director for the MJHJV. When asked whether there was a preference to obtain the materials from Ceccon because it would be cheaper Mr Halligan said:[225]

> … We would not for the sake of a dollar difference go to one supplier only rather than the other, we wanted two suppliers.
>
> … We would continue to draw both to keep them both working for us.

[224] See [217] above.
[225] Transcript 11/3/16 pp 380-1.

[298] Mr Halligan also pointed out that the total quantity likely to be required was 550,000 tonnes, considerably more than the 200,000 tonnes which Tomazos was to supply under its contract.

[299] I reject the contentions at [100] and [101] of the Tomazos Submissions to the effect that Ceccon attempted to entice work from MJHJV and to undermine Tomazos' relationship with MJHJV. Mr Halligan and Mr Tim Kennedy, Quarry Manager for the MJHJV, gave evidence about how Ceccon became involved in the CVL-2 project. Because of the large volume of gravel that was needed MJHJV would require two or three suppliers. Having more than one supplier for the volume of gravel required would reduce the commercial risks of a single supplier being unable to provide the volumes required at any particular time or being unable to supply material of the particular quality required.

[300] Ceccon did not submit a tender to supply gravel for CVL-2 in early 2012. In about May or June 2012 the MJHJV asked Ceccon to supply the gravel for intersection work at Inpex, which Ceccon did, using trucks arranged by MJHJV.

[301] In September 2012 Mr Kennedy was undertaking conformance tests on the gravel products stockpiled by Tomazos Group. As a result of those tests it became apparent that the quality of the product which Tomazos had stockpiled would not meet the specifications required for CVL-2. MJHJV had serious doubt about Tomazos' ability to supply the product

which met specification in the required timeframe. Mr Halligan directed Mr Kennedy to look for a solution and to go back to all other suppliers. He told Mr Kennedy:

> Keep talking to Tomazos Group about how they can get their gravel up to spec but at the same time I want you to go back to all the other suppliers and find out whether they can supply large quantities of gravel that will comply. We are only weeks away from starting and we must get the product.[226]

[302] In mid-October 2012 Tony Ceccon was asked by Mr Halligan or Tony Kruger whether he would meet with them to discuss supply of gravel for the Inpex project. At the ensuing meeting Tony Ceccon was asked whether he had gravel to sell and whether he would sell it to the MJHJV. He indicated his ability to supply the product required and a rate was agreed. A standard form of contract was issued by the MJHJV to Ceccon Transport on or about 30 October 2012.

[303] I agree with Ceccon's contentions that it was MJHJV who approached Ceccon, and that it did so because of its concerns about Tomazos' ability to meet the required specifications and in order to spread commercial risk by having more than one supplier. I also agree that Tomazos could not have provided the quantity and quality required by MJHJV for the CVL-2 project. This was particularly so in November 2012 when large quantities of gravel were required for the CVL-2 project.

[226] Affidavit of Neil Halligan 24.02.16 [41]-[45],; See too- affidavit of Tim Kennedy 24.02.16 [36]-[39]

[304] In relation to [102] of Tomazos Submissions I have already noted that Tomazos did not press its previous allegation that Tony Ceccon promised not to go into competition with Tomazos, and did not press any suggestion that he promised not to continue or re-enter Ceccon's businesses associated with extracting and supplying materials. Tomazos well knew and accepted that Ceccon retained their leases and pits, and were likely to keep supplying product extracted from them and from others. For instance, when Tony Ceccon introduced persons associated with Tomazos to Sandra Johnson, he was obtaining his own leases at Middle Arm at the same time. Further, MJHJV would not have proceeded with the CVL-2 project if it only had one supplier.

[305] In response to [103] of Tomazos Submissions counsel for Ceccon contends that:

> This is a wishful claim. It ignores the MJHJV's commercial interest as outlined above to have more than one supplier, but, moreover, wilfully ignores Tomazos Group Pty Limited's performance of its CVL-2 contract. There is ample evidence to demonstrate that Tomazos Group Pty Limited's performance led to its supply being suspended. This is well set out in Exhibit P18 and admitted by both John Tomazos and Mr Joy. The Tomazos Group Pty Limited supply to the MJHJV was suspended twice in 2013.[227]

[306] MJHJV suspended Tomazos' contract on two occasions in 2013 because of Tomazos' failure to supply natural gravel which met the necessary quality specifications. By 20 January 2014 there was no

[227] Ceccon Response to Counterclaim [46].

prospect of any further supply by Tomazos of complying materials and MJHJV decided to use a manufactured form of material instead.

[307] I consider the submission in [103] to the effect that Tomazos would have obtained the work secured by Ceccon "or at least Tomazos would have had its entire contract fulfilled" speculative and unfounded. This follows particularly from the fact that Tomazos was never going to be the sole supplier, and in any event was having difficulty supplying complying materials.

Boral

[308] In relation to Tony Ceccon's conduct in relation to Boral the Tomazos Submissions state:

> [104] Tony Ceccon was fully aware of the terms of Boral's contracts, having been their preferred cartage contractor and party to a fine sands contract for many years.
>
> [105] As with Ceccon, Tomazos had been made prime cartage contractor, with other contractors only to be engaged if Tomazos could not supply.[228]
>
> [106] Tony Ceccon admits
>
> a. approaching Boral for work in 2012;
>
> b. on 23 August 2012 telling Travis Potts of Boral that Ceccon wanted their fine sands mining work;
>
> c. threatening to challenge Boral's rights to mine fine sands;

[228] TB 1571.

d. accepting cartage work in lieu.

[107] Tomazos was aware that Boral intended to "buy off" Ceccon[229] with the offer of some cartage work. Although unhappy, when faced with the only option of challenging its main customer, when still attempting to establish itself in the Industry, it had little choice but to agree.

[108] But that was not enough. Clearly Ceccon wanted more.

[109] By way of letter from Ward Keller of 14 November 2012, Ceccon demanded royalties of $5.00 per tonne.

[110] This is totally excessive, and clearly designed to obtain further work from Boral, which it succeeded in obtaining, at the expense of Tomazos.

[111] From the time it secured a cartage contract with Boral in 2012 until September 2014 (the latest information made available to Tomazos or the court), Ceccon has been paid in excess of $3,095,467.97. This is all earnings which would otherwise have been Tomazos'.

[112] At the expiration of the Tomazos fine sands contract, Ceccon obtained the new contract.

[113] Tony Ceccon asserts the approach was by Boral. However he gives conflicting versions of the negotiations, neither of which are consistent with the email from Boral. He was well aware of the terms of Tomazos contract – having been the same as his own previously. Interestingly, the price - $7.50 from Boral's lease; $8.00 from Ceccon's – indicates a royalty of $0.50 per tonne. This is in stark contrast to the $5.00 per tonne sought on Ceccon's behalf 2 years earlier by Ward Keller.

[229] This effectively means the plaintiffs. Any entitlement to the royalties claimed would be payable to Suzanne; cartage work would have been undertaken by Ceccon.

[309] The only evidence cited in relation to the assertion in [105] of the Tomazos Submissions is Mr Baumgart's letter of 29 September 2011[230] reproduced at [254] above. Presumably the cartage work referred to in [106] and [107] is the work foreshadowed by Mr Potts in about May or June 2012 (referred to in [268] above).

[310] Whilst these submissions are relevant to alleged breaches of one or more of the various duties pleaded and to the nature and extent of damages or compensation that might flow therefrom, they are particularly relevant to the allegations that Tony Ceccon engaged in conduct that interfered with Tomazos' cartage contract with Boral. I deal with those allegations later in these reasons.

The evidence concerning the actionable Statement

[311] Prior to the hearing, and indeed until the cross-examination of Mr Ceccon, the only evidence of Mr Ceccon having said that he would never re-enter the transport industry was that contained in paragraph 53 of John Tomazos' affidavit sworn 19 January 2016, in the sentence that I have underlined in the extract reproduced below.[231] To put that sentence and this important part of Tomazos case into better context I shall quote the surrounding parts of that evidence.

Counterclaim

[230] At TB 1571.
[231] Affidavit of John Tomazos sworn 19 January 2016.

45. Tomazos had a development project being the Palmerston waterpark during 2011. At the time, we had a contract with Ceccon to supply and transport building materials to the site and remove rubbish from the site.

46. My father Tony Tomazos and I were on site almost every day checking on the works and Tony was on site most days checking on his workers as well.

47. I recall on one such occasion, Tony was in tears. When (in my presence) my father asked Tony what was wrong, he said he was very sick and his doctor had advised him that he only had months to live. He said he had prostate cancer. He said he had to go to Melbourne for treatment. Apparently he had had prostate cancer before but this time it had come back very aggressively.

48. He indicated he was going to have to shut the business down and had commenced selling his plant and equipment to Ritchie Bros, a Queensland dealer in heavy equipment.

49. My father and I were saddened to hear the news. However, we became aware that what he was telling us meant we would need to look for an alternative source of transport for the building materials we continued to need.

50. It was shortly after that, that Mark Hartell and Greg Baumgart from Boral came to see my father and me at Tomazos office. They indicated the options available to them were to bring in their own trucks or engage an alternative operator. My father said “if you bring in your own trucks, we will give you our work that we had previously given to Ceccon.”

51. They responded by saying that if we needed trucks, maybe we could buy our own and they would hire them off us. Both parties then left to consider their options. We had never given any prior consideration to entering into the transport industry.

52. The precise sequence of the next 2 events after that are (sic) a little unclear to me.

53. At about that time, Tony came to see my father and me at our office. Tony indicated that he had heard that with Ceccon leaving the Industry, a number of alternative transport companies had approached Boral to obtain their work. However, he was aware that Boral wanted to give the work to us. I do not know how he knew of this because my father and I had not discussed the matters raised at this meeting with Boral with anyone else. Tony offered to help us so that we definitely would get the work rather than anyone else. He said he would ensure there was a smooth transition from Ceccon to Tomazos. He would also assist us to pick up other contracts with his existing customers and with the Inpex project. Tony told us in the most certain terms that he would never re-enter the Industry. He said that the Industry was busy and it would have been good to be 10 to 15 years younger and to have had his health because now that Inpex was here, he would have loved to have had "a crack at it".

54. Either at that time or shortly afterwards, Tony more specifically offered to teach us about the Industry including to advise us on plant and trucks, equipment and staff we would need and to advise us on contract negotiations including assisting us to get the McMahon John Holland Joint Venture for the Inpex project ("MJHJV") work and others as well. He also said he would allow us the use of Ceccon leases and we would pay a royalty.

55. At around about the same time (and I am unsure whether before or after the meeting with Tony), Tomazos received a letter from Boral. Annexed hereto and marked with the letters "JT8" is a copy of that letter. Relying upon what Tony had told us he would do for us, my father and I decided Tomazos would enter the Industry and take over from Ceccon. The decision was that, we would commence the business using Tomazos but once it was up and running, we would incorporate a new company to take over and operate the business. That company eventually was Tomazos Transport Pty Ltd.

56. Without Tony's commitment to support us, Tomazos would not have entered the Industry. Because my father and I had no experience in the Industry at all (other than as a customer), we would have required the advice and assistance of someone who not only knew the Industry but had proven to be successful in it. Realistically, Tony was the only such person that we knew.

57. Having made the decision, there were then a lot of matters that were needed to be attended to very quickly to be ready both to service Boral and also to try and attract other customers. Tony advised us in all of these things.

[312] In his affidavit of 25 February 2016, responding to those assertions in John Tomazos' affidavit of 19 February 2016, Tony Ceccon:

(a) stated he said to Tony Tomazos: "I am leaving the business because I am not well and the doctor told me that I need to stop working";[232]

(b) denied that he was going to shut down the business;[233]

(c) denied that he ever said to Tony or John Tomazos that he "would never re-enter the industry".[234]

[313] Tony Tomazos, who John says was present at that meeting (referred to in [53] of his affidavit), said nothing in his affidavit about Mr Ceccon having said anything about not re-entering the transport industry. See extracts quoted at [245] above. I infer from this that even if Tony Ceccon did say something to that effect he, Tony Tomazos, did not place any reliance on it.

[314] In footnote 2 of the Tomazos Reply on Counterclaim, counsel for Tomazos refers to p 359 of the transcript of the cross examination of

[232] Affidavit of Tony Ceccon sworn 25 February 2016 [4(c)].
[233] Affidavit of Tony Ceccon sworn 25 February 2016 [5(d)].
[234] Affidavit of Tony Ceccon sworn 25 February 2016 [8(f)].

Tony Tomazos on 19 May 2016. When asked why he was surprised when Tony Ceccon came back and did transport work he said:

> Because he is all the discussion and all this on the beginning he has tried to give us all this advice, all this help to entering into this industry, you know, he say, 'I am a sick man. I won't be able to start anything again. I have the pits.' He has promised the pits to us so we mind the pits so he sell his material but never, ever intend to get into the transport.

[315] That exchange was preceded by counsel for the plaintiffs putting to him that he did not make a complaint about Mr Ceccon resuming transport work. He said the only complaint he had was that Ceccon was interfering with Tomazos' business with Boral as its preferred contractor. He said, from page 358.8:

> We complain, we complain about Boral but we don't care if he has come back to industry again. You know he is free to do so but not to go direct opposition to us in the place we already, you know, invest the money because of that.
>
> At that time did you have an issue with Mr Ceccon buying trucks and starting to do transport again? --- We can't stop him.

[316] Following an objection, and immediately before the passage at page 359.5, now relied on by Tomazos, the following exchange occurred:

> Before you started to do transport work you did not ask Mr Ceccon not to come back and do transport work did you? --- No.
>
> And Mr Ceccon did not tell you did he that he would not come back and do transport work? --- No.

[317] Tomazos did not rely upon any of this evidence, of either John or Tony Tomazos, in its initial written submissions. Rather Tomazos relied upon the "key admission" contained in the following part of the cross examination of Tony Ceccon:

> I just want to continue on putting to you some matters which I say you discussed with them at that time. And I suggest to you that when you were speaking to John and Tony Tomazos about them getting involved in the transport industry – the transport industry of building materials that we're talking about, that you said that you would never re-enter – never be re-entering that transport industry. Isn't that correct? --- Yes. Sorry, I'm not really sure, but yes.
>
> And you said to them that ---
>
> HIS Honour: Just a moment. Sorry, did you understand that question Mr Ceccon? --- Yeah I did, did.
>
> Alright, okay.[235]

Submissions

[318] Counsel for the plaintiffs readily concedes that during the questioning quoted in [317] above, Mr Ceccon exhibited a high degree of confusion and second guessing of himself.[236] Even after the Court intervened to clarify whether Mr Ceccon understood the question, Mr Ceccon too eagerly wanted to seem sure and accommodating. There is no question that during his multi-day cross examination spanning the hearing dates in March and April, Mr Ceccon vacillated significantly between being

[235] Transcript 9/3/16 p 201.
[236] Ceccon Response to Counterclaim [19] – [20].

cantankerous, direct, too accommodating and confused. Counsel says the Tomazos parties cannot rest their entire misleading and deceptive conduct case on a snippet of a multiday cross examination of a witness who was less than clear on occasions.

[319] Further, they say, it is entirely incongruent for the Tomazos parties to put so much stock on Mr Ceccon's supposed recollection and admissions during cross examination particularly where their overall submission against Mr Ceccon is that his "evidence should be viewed as an unreliable basis of findings of fact in the absence of independent supporting evidence."

[320] Counsel submits that there is no independent evidence on this question. The only other evidence comes from John Tomazos, and his evidence should in no way be preferred to that of Mr Ceccon. On this issue, Mr John Tomazos gave his evidence in dogmatic, tendentious terms. The dogma belies the fact that for all their astuteness, the Tomazos Group's principals entered upon a venture because they were interested in the significant opportunity it presented to their business and decided to pursue that opportunity for themselves and in their own interest. This decision was confirmed once Boral offered the Tomazos Group preferred contractor status. Their tendentiousness must be seen for what it is, a means to give colour to a cause of action made for the first time in 2015, to offset liability for debts despite having for many years

operated in the transport and extractive industry and competing against Tony Ceccon and Ceccon Transport without complaint.

[321] Counsel for Tomazos responds[237] by submitting that evidence that such a statement was made is compelling. It comes from multiple sources. Being an oral statement, there was some variation in the words ascribed.[238] While the plaintiffs suggest John's evidence was "dogmatic, tendentious" in reality it was given emphatically, because John was clear in his recall.

[322] Counsel submits that in his affidavit of 25 February 2016, Tony Ceccon made a qualified concession but otherwise confidently denied making any of the statements ascribed to him, because Ceccon Transport was continuing in business; it was only him reducing his involvement.[239] The evidence in fact clearly established Ceccon Transport had ceased business. All staff had been let go (not "some" as Tony Ceccon had said in his second affidavit); all equipment sold; there was no more active mining, with only stockpiles left to sell. It was in the context of this evidence that Tony Ceccon made his admission in cross-examination (quoted at [317] above).

[323] Counsel says that admission cannot be dismissed as the product of a witness too eager to be accommodating, or a snippet of evidence. The

[237] Tomazos Reply on Counterclaim [11] – [15
[238] Eg, Affidavit of John Tomazos sworn 19 January 2016 [53]; Transcript 19/05/2016 p 359.
[239] TB 726 [4(c)]; TB 727 [6].

Court confirmed Tony Ceccon understood the question. No attempt was made to deal with the matter in re-examination. The answer was entirely consistent with the Tomazos evidence, and the surrounding facts.

[324] Accordingly, Tomazos contends that the Court can be confident the statement was made.

Consideration

[325] Regrettably this very important part of the counterclaim rests on two, possibly three, pieces of evidence:

(a) The assertion by John Tomazos in [53] of his affidavit of 19 January 2016 that "Tony told us in the most certain terms that he would never re-enter the Industry", which Tony Ceccon denied in his affidavit of 25 February 2016;

(b) the passage quoted in [317] above from the cross-examination of Mr Ceccon; and

(c) some confusing evidence of Tony Tomazos during cross-examination.

[326] I reject Tomazos' contention, summarised in [321] above, that the evidence that such a statement was made is compelling and that "John was clear in his recall."

[327] At its highest, Tony Tomazos' evidence can only be taken as reflecting his understanding that Mr Ceccon had indicated that he would not be able to start any business again because he was sick and might die. He agreed that Mr Ceccon did not tell him that he would not come back and do transport work. Although he was angry about Ceccon getting cartage work from Boral, he did not think that Tomazos could prevent Ceccon from buying trucks and starting to do transport work again. His evidence falls a long way short of implying that Tony Ceccon promised John and him that Ceccon would never be re-entering the transport industry.

[328] If such an important representation was made, particularly where its breach is said to have the significant financial ramifications which Tomazos now claims under the Counterclaim, one would have expected Tony and John Tomazos to have complained about the breach at a much earlier time. Indeed it could have been raised as early as June 2012, when John Tomazos heard rumours that Tony Ceccon was re-entering the trucking business and when Mr Potts indicated that he would give him some cartage work.[240]

[329] If the promise had in fact been made and breached, one would have expected some kind of action to have been taken then to minimise any continuing loss. If the existence of such a promise was challenged, the

[240] See [267] - [271] and [314] - [315] above.

parties would have been in a much better position to remember what in fact had been discussed, than they are now, five years later.

[330] John Tomazos' assertion was made for the first time in a lengthy and detailed paragraph in an affidavit sworn more than five years after the making of the representation and well after the time when the relationship between the parties broke down and after the plaintiffs commenced these proceedings in order to recover the substantial amount of money owing to them.

[331] My concerns about the credibility of John Tomazos' evidence in relation to a number of other matters also lead me to doubt the credibility of his evidence that Tony Ceccon told him (and his father Tony) that he would never be re-entering the transport industry.

[332] This doubt is magnified by the fact that Tony Tomazos did not say anything to that effect in his primary evidence, and there was no note, agreement or other record of such a critical representation. It is common ground that Tony and John Tomazos were experienced property developers and successful business people. As counsel for the plaintiffs pointed out, they were careful to document other agreements of a commercial nature.

[333] I also agree with what counsel for the plaintiffs have said about the evidence of Mr Ceccon. As I have said elsewhere, Mr Ceccon's oral testimony has difficulties, partly because of his tendencies to appear

evasive on some occasions and overly compliant on others. I do not consider that his answers to questions which may involve several or ambiguous concepts can be treated too literally. Indeed his answer to counsel's question: "Yes. Sorry, I'm not really sure, but yes" concerned me sufficiently to intervene at the time and enquire whether he understood the question. Despite his answer after I made that enquiry, I am still not convinced that he did properly understand the question and the potential significance of what he was apparently assenting to. Moreover his answer is directly opposite to his denial in his affidavit at paragraph 8(f).

[334] I am also conscious of the fact that the key participants are from different ethnic origins and that there would have been considerable scope for Tony and John Tomazos not properly hearing or understanding exactly what Tony Ceccon was saying to them. This would have been so particularly during this time when Tony Ceccon was obviously concerned about his health and the effect that the closure of his business might have upon he and his wife and upon customers of the business such as Boral.

[335] I am not satisfied that Tony Ceccon made the statement alleged. I consider it more likely that in the course of telling Tony and John Tomazos about his poor health and prognosis and his realisation that he would not be able to continue to operate the trucking business, which he had established over many years, with the result that he had

started to sell off his trucks, he said words to the effect that it would be very unlikely that he would ever be in a position to re-enter the business.

Negligent misstatement

Allegations

[336] In [5] of the Counterclaim, Tomazos alleges that in making the Statements referred to in [4] of the Counterclaim Tony Ceccon and thereby Ceccon Transport and Suzanne Ceccon knew a number of things, including that John and Tony Tomazos and thereby Tomazos Group were not experienced in the transport and general extraction industries (defined as the "Industries"), that Tomazos would need to borrow and or expend considerable monies to commence operations in the Industries, and that potentially they would incorporate a new entity to operate in the Industries. Tomazos also alleged that the plaintiffs understood that Tomazos would rely upon "the Statements and Tony Ceccon's advice and guidance in deciding whether to enter the Industries and operating in the Industries", and that in making the Statements Mr Ceccon did so "at least recklessly without knowing whether they were true or false or alternatively negligently."

[337] In [6] of the Counterclaim Tomazos alleged that "induced by the Statements, and in reliance thereon" John and Tony Tomazos engaged in a wide range of conduct on behalf of Tomazos Group, including

purchasing significant quantities of plant and equipment, employing people, entering into a number of contracts and incorporating Tomazos Transport Pty Ltd "to operate the business in the Industries".

[338] In [7] of the Counterclaim Tomazos alleged that each of the Statements was untrue in that "from in or about March 2012, without prior notice to or with the knowledge of John, Tony or Tomazos, Tony Ceccon engaged in" various forms of conduct, defined as "**the Conduct**". This included him pursuing his own interests in the Industries in competition with and thereby to the detriment of Tomazos , ceasing to advise and assist Tomazos in relation to the Industries, hindering and preventing Tomazos from utilising certain agreements with Suzanne Ceccon (defined as "**the Lease Agreements**") and encouraging the breach of the Lease Agreements, wrongfully using confidential information acquired by him whilst assisting Tomazos as its fiduciary and thereby securing contracts with Boral and MJHJV, and encouraging Boral to dishonour "a preferred transport provider contract" between Boral and Tomazos (referred to as "**the Boral contract**").

[339] These various allegations have been narrowed or redefined in the course of the hearing and submissions, as I have already noted in [272], [278] and [286] - [288] above. Importantly, the only one of the alleged Statements that would require consideration in relation to this

cause of action is Tony Ceccon's statement that he would never re-enter the transport industry.

[340] Although I am not satisfied that Tony Ceccon made this statement, in the event that I am wrong in making this finding and in deference to the submissions provided in relation to the causes of action that rely upon it having been made, I shall consider whether it would have given rise to a relevant duty of care.

Legal principles

[341] The relevant principles were summarised by the Full Federal Court in *ABN AMRO Bank NV v Bathurst Regional Council*:[241]

> [573] First, for there to be a duty to exercise reasonable care in making a statement or giving advice:
>
> (a) The speaker must realise, or the circumstances must be such that the speaker ought to have realised, that the recipient of the information or advice intends to act on that information or advice in connexion with some matter of business or serious consequence; and
>
> (b) The circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker.
>
> [574] In respect of the second limb, the nature of the subject matter, the occasion of the interchange, and the identity and relative position of the parties as regards knowledge (actual or potential) and relevant capacity to form or exercise judgment will all be included in the factors

[241] [2014] FCAFC 65; (2014) 224 FCR 1 (***ABN AMRO***).

which will determine the reasonableness of the acceptance of, and of the reliance by the recipient upon, the words of the speaker. It is important to recognise that the list is not exhaustive.

[575] Second, proof of the criteria at [573] and [574] above establishes an assumption of responsibility or known reliance (or the converse, vulnerability) sufficient for a duty to be imposed.

[576] Additional, but related, points about the criteria at [573] and [574] should be noted. A duty of care is imposed whether the information or advice is given in response to a request or volunteered.

[577] Further, a duty is also imposed where the information and advice is communicated to an identifiable class of people if the criteria identified in *Tepko* are established. … Next, the fact that the person making the statement or giving the advice has some special expertise is consistent with (although not always necessary for) the imposition of the duty.

[578] As LGFS submitted, central to the analysis required by the identified criteria is the purpose for which the statement is made or the advice is given. A recipient of information or advice is owed a duty by the speaker if (a) that recipient is part of a class to whom the statement or advice is directed and (b) reliance on the statement or advice by a member of the class is consistent with the substance of the purpose for which the statement is made or advice given. It was for those reasons that an auditor was held to owe a duty to the company and possibly to its shareholders, but not to a lender.

(some references omitted)

[342] Most of these principles had previously been summarised by the High Court in *San Sebastian Pty Ltd v The Minister*[242] and applied in subsequent High Court decisions.[243] Per Gibbs CJ, Mason, Wilson and Dawson JJ at 355:

> In cases of negligent misstatement, reliance plays an important role, particularly so when the defendant directs his statement to a class of persons with the intention of inducing members of the class to act or refrain from acting, in reliance on the statement, in circumstances where he should realise that they may thereby suffer economic loss if the statement is not true.

[343] At pp 356-7 their Honours observed that most actionable cases of negligent misstatement occur where the misstatement is made in response to a request for information or advice.

> The existence of an antecedent request for information or advice certainly assists in demonstrating reliance, which is a cornerstone of liability for negligent misstatement. However, such a request is by no means essential, though it has been suggested that instances of liability for misstatement volunteered negligently will be rare … The maker of a statement may come under a duty to take care through a combination of circumstances or in various ways, in the absence of a request by the recipient. The author, though volunteering information or advice, may be known to possess, or profess to possess, skill and competence in the area which is the subject of the communication. He may warrant the correctness of what he says or assume responsibility for its correctness. He may invite the recipient to act on the basis of the information or advice, or intend to induce the recipient to act in a particular way. He may actually have an interest in the recipient so acting.

[344] At pp 357-8 their Honours expressed the proposition that:

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[242] *San Sebastian Pty Ltd v The Minister* [1986] 162 CLR 340.
[243] See for example *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 249-250, 255-257, 261 and 273-274 and *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at [47] & [78].

where a statement is made for the purpose of inducing the plaintiff, or the members of a limited class including the plaintiff, to commit themselves financially upon the basis that the statement is true, and the plaintiffs act in reliance on the statement, the law will impose a duty of care on the maker of the statement. … it is necessary not only that A intends that B or members of a class of persons should act or refrain from acting in a particular way, but also that A makes the statement with the intention of inducing B or members of that class, in reliance on the statement, to act or refrain from acting in a particular way, in circumstances where A should realise that economic loss may be suffered if the statement is not true. In cases where the defendant intends the statement to operate as a direct inducement to action, the reasonableness of the reliance will not be a critical factor, although in other cases the defendant's appreciation of the reasonableness of reliance will be relevant.

[345] Brennan J said at p 372:

A person who gives information or advice to another to induce the other to a course of action does not necessarily undertake to be careful in the information he gives or the advice he offers. Helpful information and friendly advice, even on matters of the gravest import, will often be proffered without any thought of the informant or adviser been responsible for its truth or soundness. To impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and experience for a person contemplating a course of conduct.

Where a representor gives information or advice on a serious or business matter, intending thereby to induce representee to act on it, the representor is under a duty of care in giving that advice or information if three conditions are satisfied. First … if the representor realises or ought to realise that the representee will trust in his special competence to give that information or advice; second … if it would be reasonable for the representee to accept and rely on that information or advice; and third … if it is reasonably foreseeable that the representee is likely to suffer loss should the information turn out to be incorrect or the advice turn out to be unsound.

No relevant duty of care

[346] Even if Tony Ceccon did make the statement alleged, it was not made in circumstances that created a relevant duty of care. I do not consider that he intended to induce Tomazos to rely on that statement such that they would commit themselves financially upon the basis that the statement was true.

[347] Referring to the two limbs in [573] of *ABN AMRO*, the circumstances were not such that Tony Ceccon ought to have realised that Tomazos intended to act upon that particular piece of information (ie that Ceccon would never re-enter the transport industry) and not such that it would have been reasonable for Tomazos to rely upon such a statement. As I have said, this particular statement, even if it was made, was made in the much broader context of Tony Ceccon being very upset about his health and him communicating this to John and Tony Tomazos along with a wide range of other matters, including his offers to assist them if they did embark upon the transport industry insofar as his health permitted.

[348] Moreover, Tony Ceccon's comments, particularly about his health and prospects of returning to the industry, were not made in response to any request for his advice or otherwise in circumstances whereby he should have assumed that John and Tony Tomazos might rely upon those comments as a basis for making such an important commercial

decision. He was telling them these things as a person with whom they had previously dealt including on a personal level particularly with Tony Tomazos. He was not entering into any kind of commercial dealings with Tomazos concerning Ceccon's transport business, for example involving the sale of the business or goodwill.

[349] As I have said, John and Tony Tomazos were both experienced businessmen. They had previously been involved in commercial transactions and would have known the importance of obtaining and recording important information before embarking upon a new venture such as this.

[350] Even if Tony Ceccon did make the statement alleged, or other similar statements, he did not do so for the purpose of inducing Tomazos to commit themselves financially upon the basis that such statements were true, or in circumstances where he should have realised that economic loss may be suffered by them if the statements were not true. He did not intend such statements to operate as a direct inducement to action.

Reliance by Tomazos upon a promise never to re-enter the industry

[351] Although counsel for Tomazos accepts that Boral's decision to use Tomazos as a cartage contractor was a reason why Tomazos entered the transport industry, counsel submits that does not negate reliance on the statements of Tony Ceccon. Reliance is established even if the

statements made some non-trivial contribution[244] or materially contributed[245] to Tomazos' decision to enter the industry.

[352] Whilst I accept that John and Tony Tomazos would have received a considerable amount of comfort from the various things that Tony Ceccon had told them, including his offers to assist them should they enter into the transport industry, I do not consider that they relied upon any promise that he would never re-enter the transport industry, even if such a statement was made.

[353] As I have already observed, no such promise or reliance thereon was alleged for some five years after the event and after Tomazos have been sued on the Loan Agreement, no such promise or reliance thereon was ever alleged by Tony Tomazos and no attempt was made to document the promise or the fact that it had any bearing upon Tomazos' decision to enter the transport industry. Moreover, neither John nor Tony Tomazos complained about the making of such a promise and its apparent breach when or after they became aware of Tony Ceccon's intentions to engage in transport operations in the middle of 2012.[246] Rather Tony Tomazos' only concern at that time was Ceccon's interference with Tomazos' preferred contractor status with Boral.[247]

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[244] *Ricochet Pty Ltd v Equity Trustees Executors & Agency Co Ltd* (1993) 41 FCR 229 at 235.
[245] *Henville v Walker* [2001] HCA 52 at [61].
[246] See [267] - [271] above.
[247] See [313] - [316] above.

[354] The fact that Tomazos proceeded very quickly, as soon as Mr Baumgart told Tomazos that it would be Boral's preferred cartage contractor for a minimum of five years, and put itself into a position whereby it could commence operations on 1 November immediately following the cessation of Ceccon's operations at the Boral yard, leads me to conclude that Tony and John Tomazos relied very heavily upon that promise when deciding to enter into the transport industry and not upon a promise by Tony Ceccon not to re-enter the industry.[248] Other important factors were the ability of Tomazos Group to operate from the Boral Yard, employ experienced operators and purchase materials and equipment, including from Ceccon Transport.

[355] No doubt the decision by Tony and John Tomazos to enter into the transport industry was also influenced by the fact that Ceccon Transport was obviously ceasing its operations as at 31 October, as evidenced by Tony Ceccon having written letters to that effect to Ceccon's customers and having sold its trucks. They would also have derived additional comfort from the fact that Tony Ceccon had been providing and promised to continue to provide Tomazos with a considerable amount of assistance in relation to their new venture. They must have realised however that Tony Ceccon could only continue to do this for so long as his health permitted. Conversely, they may well have assumed, without him saying so, that his health and

[248] See [254] - [263] above.

age would make it extremely unlikely that he would ever re-enter the transport industry and pose a threat to their business.

[356] Needless to say I reject the submissions summarised in [278] above. In particular I do not accept that Tomazos Group would not have entered the transport industry "without the assurance of Tony Ceccon and Ceccon Transport not being in competition, then or in the future".[249]

[357] Even if Tony Ceccon did make a promise of the kind alleged I consider that Tomazos did not rely upon it in such a way as to have caused them recoverable damage. Moreover, any such reliance would have been unreasonable. Tomazos were not entitled to rely upon such a promise made in these circumstances.

Conclusions concerning negligent misstatement

[358] As I said at [335] above, I am not satisfied that Tony Ceccon made the statement alleged. Further, even if he did make such a statement it was not made in circumstances that created a relevant duty of care.[250] Moreover, Tomazos did not rely on such a statement.

Misleading and deceptive conduct

[359] My inability to find that Tony Ceccon made the statement alleged also disposes of this cause of action. However I shall provide further

[249] Tomazos Submissions [85].
[250] See [346] - [350] above.

reasons in relation to this cause of action to cover the possibility that that finding is erroneous.

[360] Tomazos plead that:

> Further or in the alternative, in making the Statements and engaging in the Conduct, Tony Ceccon, Ceccon and Suzanne Ceccon engaged in conduct which was misleading and deceptive within the meaning of s 18 of the Australian Consumer Law.[251]

[361] Section 18(1) provides:

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

[362] Counsel for Tomazos contends that Tony Ceccon's statement that he would never be re-entering the industry would amount to misleading and deceptive conduct under s 4 of the Australian Consumer Law.[252]

[363] Section 4 of the Australian Consumer Law provides as follows:

> Misleading representations with respect to future matters
>
> (1) [No reasonable grounds for making representation] If:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;

[251] Counterclaim [10].
[252] Tomazos Submissions [143].

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

(2) [Defendant to adduce evidence of reasonable grounds] For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding: or

(b) any other person;

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

(3) [Effect of s 4(2)] To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

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

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

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

Future matter

[364] As counsel for Ceccon point, out the character of a statement said to be misleading and deceptive is to be tested at the date the statement was made, and not with the benefit of hindsight.[253]

[365] If Tony Ceccon did say words to the effect that he would not be re-entering the transport industry, I consider that he would have been referring to a "future matter" of the kind contemplated in s 4(1)(a).

[366] However Tony Ceccon did have reasonable grounds for telling Tony and John Tomazos that he would not be re-entering the trucking industry or saying words to that effect. That was his honest belief at the time, based upon his ill health at the time and his pessimism about his future. These things are further evidenced by him having sold Ceccon Transport's trucks and other plant, winding down the trucking business and making arrangements to vacate the Boral Yard, a location from which it worked for many years.

[367] Accordingly, s 4(1)(b) would not be satisfied. It has not been suggested that there is any other basis for concluding that the alleged statement was misleading or deceptive within the scope of s 18.

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[253] *Bill Acceptance Corp Ltd v GWA Ltd* (1983) 78 FLR 171; *Agaiby (Khalaf) v Darlington Commodities Ltd* [1985] ATPR 40-535.

Trade or commerce

[368] Further, I agree with Ceccon's counsel that the statement, even if it was made, was not made "in trade or commerce". In *Concrete Constructions (NSW) Pty Limited v Nelson*[254] the majority of the High Court (Mason CJ, Deane, Dawson and Gaudron JJ) said (at 604) that:

> … it is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.

[369] The alleged statement bears neither a trading nor commercial character in the context in which is was made. There was no actual trading or commercial relationship contemplated between Tomazos Group and Ceccon Transport. There was no sale of the business nor goodwill, even though it suited Tomazos Group to represent that it had taken over the business of Ceccon Transport. The alleged statement was a bare statement of intention, not converted into a binding negative covenant to protect the acquisition of goodwill for consideration. It was a statement by a person who had hitherto been in business telling a

[254] (1990) 169 CLR 594.

friendly acquaintance that he would no longer be in business. It was motivated by Tony Ceccon disclosing to Tony Tomazos and John Tomazos that he was ill and was acting on his doctor's instructions to stop working. It has nothing to do with trade or commerce.

Reliance

[370] As I have previously concluded, even if the statement was made, Tomazos did not rely upon it.

[371] I reject this part of the counterclaim.

Estoppel

[372] Paragraph [8] of the Counterclaim alleged that:

> As a consequence of the matters pleaded in [4], [5] and [6] hearof, Ceccon, Tony Ceccon and Suzanne Ceccon are estopped from
>
> (a) denying their respective obligations to give effect to the Statements; or
>
> (b) asserting an entitlement to engage in the Conduct.

[373] Although this allegation was raised in the context of the negligent misstatement allegations, Tomazos seems to rely upon some form of estoppel as affording it a separate remedy. In its written submissions[255]

[255] Tomazos Submissions [128] – [129].

Tomazos refers to "Estoppel by encouragement" and quotes the following passage in *The Commonwealth v Verwayen*:[256]

> [E]quitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise.

[374] Counsel says that a "succinct" and "cogent" formulation of equitable estoppel is that stated in *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd*:[257]

> For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.[258]

[375] Tomazos submits that: Tony Ceccon encouraged Tomazos to assume Ceccon and Tony Ceccon had ceased trading permanently; "with Tony Ceccon's knowledge, Tomazos relied upon that assumption, partly through knowing the time and money Tomazos invested in the Industry"; "the reliance of Tomazos was to its detriment, in that its level of investment was unsustainable in a market in which Tony Ceccon and Ceccon were active competitors"; "the plaintiffs profited from Tomazos entry into the industry, as providing a market

[256] *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 428-429 (Brennan J).
[257] *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 (***S & E Promotions***) at 653.
[258] *Austotel Pty Ltd v Franklins Self-Serve Pty Ltd* (1989) 16 NSWLR 582 at 610 [F].

for the sale of the stockpiles of materials it had left" and "it would be unconscionable to let Tony Ceccon or Ceccon to depart from the assumption" at all "or alternatively at least … in relation to Boral and MJHJV, in circumstances where Tony Ceccon knew of those commercial relationships through his advice and counsel."[259]

[376] The submission continued:[260]

> It does not matter that Tomazos did not assume any particular legally binding obligation, because of the close connection between the parties.

[377] Counsel then concluded with this reference to "Estoppels by encouragement":[261]

> … Most fall into one of two categories; those where the parties are in a domestic or family relationship, and those where the relationship is commercial. Parties in the latter category typically contemplate a legal relationship and frequently intend to enter into a contract or otherwise formalise their expectation.
>
> In domestic or family cases, the parties are not at arm's length and usually have no intention of entering into a contract or formalising their expectation.[262]

[378] My conclusions that Tony Ceccon did not promise that he would never re-enter the industry, and that even if he did create an impression that he would not re-enter the industry Tomazos did not and was not

[259] Tomazos Submissions [130] – [135].
[260] Tomazos Submissions [136].
[261] Tomazos Submissions [137].
[262] *DHJPM Pty Ltd v Blackthorn Resources Pty Ltd* [2011] NSWCA 348; 83 NSWLR 728(***DHJPM***) at [104]-[105].

entitled to rely upon whatever he said to create such an impression, are necessarily fatal to this claim too.

[379] Tomazos' decision to enter the transport industry was primarily influenced by the strong prospect of Tomazos obtaining the lucrative preferred contractor contract from Boral coupled no doubt with the expectation that Tomazos Group would take over most of the transport work previously conducted by Ceccon Transport. Although John and Tony Tomazos were justified in thinking that Tony Ceccon's health would not recover and that he would not be able to re-enter the transport industry there was no reason for them to assume that that would never happen just as there was no reason for them to assume that some other competitor might not take some or all of the work.

[380] To revert to the language in the passage from *S & E Promotions* quoted above, Tony Ceccon did not create or encourage an assumption that a contract would come into existence or that a promise would be performed and there was no reliance on such an assumption by Tomazos, in circumstances where departure from such an assumption by Ceccon would be unconscionable.

[381] To the contrary, if it was so important to Tomazos that Ceccon never re-enter the transport industry or otherwise engage in the kind of work that it had previously been doing, one would have expected Tomazos to

document such a condition, and to complain about its breach. As I have said, neither of those things happened.

[382] Tomazos' reference to the passage in *DHJPM* does not assist the claim of an "estoppel by encouragement". The references by Handley AJA at [104] – [105] were made in the wider context of his Honour considering whether proprietary estoppel will be recognised where the content of a contract is not known. This is not relevant here. There was no relevant contract contemplated between the parties.

[383] Further, neither the Counterclaim nor the submissions identify the particular equitable estoppel alleged to have arisen. This is problematic for the reasons expressed by Meagher JA in *DHJPM* (at [44]) that:

> Because there are separate doctrines which apply to common law and equitable estoppel and because of the different characteristics which give rise to the different species of equitable estoppel, it is necessary, as the judgments in *Waltons Stores*, *Barbaro* and *Austotel* demonstrate, to attend carefully to the identification of the assumption or expectation which the object of the estoppel is said to be estopped from denying or asserting. This also directs attention to the relevant doctrine which must then be applied in a disciplined and principled way.

[384] Counsel for Ceccon points out that the position is further confused by paragraph [130] of the Tomazos Submissions which refer to Tony Ceccon having encouraged Tomazos Group to assume Ceccon Transport and Tony Ceccon had ceased trading permanently. There is nothing promissory in such a statement. If, however, the promise was never to return to the transport industry, then such a promise would be

an invalid restraint of trade or negative covenant and unenforceable at common law. Such a promise would have been unlimited in both temporal and geographical scope, and made in circumstances where there was no acquisition by Tomazos of the goodwill of Ceccon Transport or Tony Ceccon and no consideration paid for any part of the Ceccon business.

[385] The validity of a promise at common law is directly relevant to any collateral claim for relief in equity based on the promise. In *Cream v Bushcolt Pty Ltd*,[263] the Court considered whether equity would come to the aid of a person to enforce a restraint of trade agreement that was void at law and contrary to public policy. Malcolm CJ stated at [104 - 105]:

> [104] In my opinion, there is a complete answer to the application of these principles in the present case. There was no room for the operation of a doctrine of estoppel in this case because the conclusion which I have reached that the covenant in restraint of trade was void as being contrary to public policy constituted a complete obstacle to the grant of any relief in equity which would be contrary to public policy. In this case Bushcolt would not be entitled to invoke the doctrine of estoppel in equity by reason of the equitable maxim that "He who comes into equity must come with clean hands"… In the present case, Bushcolt as a party to a contract in unlawful restraint of trade would not be entitled to any relief or equity which would have the effect indirectly of enforcing a contract otherwise void or being contrary to public policy.
>
> …

[263] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82; ATPR 42-004.

> [105] Alternatively, had Bushcolt sought to enforce the agreement in equity, it would have been met with a defence that the agreement was unenforceable as being entered into in unlawful restraint of trade.

[386] Applying the observations of Malcolm CJ in *Cream v Bushcolt Pty Ltd*, any contention that the Ceccon parties are estopped from either trading and operating in the transport industry or denying that they must cease trading and operating in the transport industry or both must similarly fail.

[387] In reply, counsel for Tomazos confirms that Tomazos' case on estoppel is based upon the promise by Tony Ceccon not to re-enter the industry. It was never understood that a contract to that effect would be entered into. Hence the claim is not based upon, nor dependent upon, the ability to have created an enforceable contract. There was no assumption that the parties would enter into a particular legal relationship, but rather there was a confident expectation that Tony Ceccon would do the proper thing. Accordingly, they submit, *Cream v Bushcolt Pty Ltd* is distinguishable.

[388] I disagree with this contention. Tomazos is attempting to enforce a purported promise that would have constituted a restraint of trade of the kind that would be unenforceable at common law, as was the clause the subject of *Cream v Bushcolt Pty Ltd*. A promisor's failure to satisfy a mere expectation that he would "do the proper thing" does

not, without more, amount to unconscionable conduct of the kind that will support an estoppel.

Breach of Fiduciary Duty

Pleading

[389] In [12] of the counterclaim Tomazos pleads:

> By virtue of the matters alleged in paragraphs 4d, 5a, 5c, 5d, 6d and 6j hereof, Tony Ceccon owed a fiduciary duty to Tomazos and subsequently Tomazos Transport.

[390] Those paragraphs are all part of the pleading of the negligent misstatement claim. Paragraph 4 is the pleading concerning the Statements allegedly made by Tony Ceccon on various dates and various locations between August and September 2011. The Statement alleged in [4(d)] is that:

> Tony Ceccon would assist Tomazos in the establishment and growth of its business in the Industries for as long as he was alive including by:
>
> (i) teaching and mentoring Tomazos, John and Tony in the business of the Industries;
>
> (ii) advising of the plant and equipment required to be purchased;
>
> (iii) negotiating contracts on Tomazos' behalf and advising Tomazos on negotiations including as to price;
>
> (iv) granting Tomazos access to the Ceccon leases.
>
> (underlining mine)

[391] Paragraph 5 pleads that Tony Ceccon knew certain things when he made the Statements, including that alleged in [4(d)]. Relevantly it is alleged that he:

(a) "knew that John and Tony Tomazos and thereby Tomazos were not experienced in the Industries" ([5(a)]);

(b) "understood that John and Tony Tomazos and thereby Tomazos would rely upon the Statements and Tony Ceccon's advice and guidance in deciding whether to enter the Industries and operating in the Industries" ([5(c)]); and

(c) "knew that potentially John and/or Tony would incorporate a new entity to operate in the Industries" ([5(d)].

[392] Paragraph 6 pleads that "induced by the Statements, and in reliance thereon, John and Tony Tomazos through Tomazos and subsequently through Tomazos Transport commenced and thereafter conducted business in the Industries by", relevantly:

(a) "Allowing Tony Ceccon to assist in the negotiations for, and thereafter entering into, contracts with former customers of Ceccon including a preferred transport provider contract by Tomazos and subsequently Tomazos Transport with Boral (collectively the Boral contract), agreement by Tomazos with

MJHJV, and Wagners both of which agreements were not assigned to Tomazos Transport" ([6(d)]); and

(b) "Following the general advice and guidance of Tony Ceccon as to the operation of business in the Industries" ([6(j)]).

[393] There is no evidence in support of the critical contention in paragraph 4(d) of the Counterclaim that Tony Ceccon promised to provide such assistance "for so long as he was alive". Nor is there any evidence as to how long Tony Ceccon might have expected to provide assistance to Tomazos. At the time when he offered to provide advice and assistance to Tony and John Tomazos he was in poor health and he did not know how long he had to live or what the future held for him. Clearly he was prepared to assist Tony and John Tomazos if they were to move into the transport industry and give them the benefit of his considerable experience. This would have included him assisting both his existing customers and Tomazos so as to ensure a smooth transition, including in discussions and negotiations with Boral and other important customers. Much of that assistance would have been expected to occur during the period leading up to 1 November 2011 when Tomazos would commence operations and for the few months after that while Tomazos was finding its way. By then, particularly with the assistance of Mr Preston and other experienced employees, Tomazos would not have needed Tony Ceccon's advice so much.

[394] John and Tony Tomazos could not have assumed that Tony Ceccon's health would have permitted him to continue to provide assistance much beyond 1 November 2011, let alone "for so long as he was alive". Nor should they have assumed that in the event that his health did improve he would consider himself permanently bound to them and Tomazos and unable to work again in the industry with which he was so familiar. As I have already noted in other contexts, there was never any suggestion that he should enter into any kind of contract with Tomazos, whether it be for the sale of the business, his ongoing employment or a lawful restraint of trade agreement.

[395] In relation to the allegations in paragraphs 5(a), (c) and (d) of the counterclaim I agree that Tony Ceccon knew that Tony Tomazos and probably John Tomazos were not experienced in the transport cartage industry. I also agree that he offered to assist them by teaching and mentoring them, advising them about plant and equipment to be purchased, advising them on negotiating some contracts including in relation to pricing and facilitating Tomazos access to leases over which Ceccon had control. He understood that Tomazos would rely, at least to some extent, upon those offers and such assistance, in establishing the business. I do not accept that he knew that John and Tony Tomazos would incorporate a new entity to operate in the Industries.

[396] In relation to the allegations in paragraph 6(d) and (j) of the counterclaim, I accept that Tomazos allowed, indeed requested,

Tony Ceccon to assist in the negotiations for the contract with MJHJV, and that Tomazos followed the general advice and guidance of Tony Ceccon in relation to the operation of the transport business. I also accept that Tony Ceccon's earlier offers to provide advice and assistance to Tomazos was an important factor which Tony and John Tomazos took into account when they were considering entering the transport cartage business.

[397] However Tony and John Tomazos would not have expected Tony Ceccon to continue to provide ongoing and particular advice and assistance once Ceccon ceased and Tomazos began operating the transport business, particularly in light of his poor health and the possibility that he might not live long enough to provide them with further assistance at all. Moreover Tomazos was assisted by many other people with considerable experience in the cartage business some of whom, such as Mr Preston, had been working for Ceccon for some time, and others such as Mr Joy who were subsequently engaged. There was no basis for Tomazos to rely on Tony Ceccon's ongoing advice and assistance.

Submissions

[398] Tomazos' contentions on liability are brief and vague. They are:

> [155] Tony Ceccon was in a trusting relationship to Tomazos. They trusted him and relied upon his advice and counsel. He assumed the role of mentor and advisor.

[156] Accordingly, he was a fiduciary to Tomazos.

[157] As such, he was not permitted to enter into transactions with third parties which conflicted, or possibly might conflict, with his fiduciary duties.[264]

[158] Competing at all with Tomazos at all was such a conflict. Contracting with Boral and MJHJV certainly was.[265]

[399] Counsel for the plaintiffs points out that the basis of the relationship referred to in [155] of the Tomazos Submissions is significantly narrower than what is pleaded in paragraph [12] of the Counterclaim.

[400] Counsel for Ceccon provided the following assistance concerning the fundamental question as the existence of a fiduciary relationship.

[401] In *Hospital Products Limited v United Stated Surgical Corporation*[266] Mason J (as he then was), in a now often quoted passage, stated (at p 96-97) that:

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v. Boardman* [1966] UKHL 2; (1967) 2 AC 46, at p 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the

[264] *Thomson, Re; In re Thomson v Allen* [1930] 1 Ch 203 at 215-216.
[265] Lord Goff and Gareth Jones *Law of Restitution* (Sweet & Maxwell Ltd, 4th Ed, 1994) 648.
[266] (1984) 156 CLR 41 (***Hospital Products***).

interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

[402] In *Pilmer v The Duke Group Limited*[267] *(in liq)* (2001) 207 CLR 165, the High Court stated that:

> [71] It is important also to recognise the distinct character of the fiduciary obligation, which sets it apart from contract and tort. In *Norberg v Wynrib*,[268] McLachlin J said
>
> > The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.
>
> In the same case, Sopinka J observed:[269]
>
> > Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy.

[403] As counsel for Ceccon submits the relationship between Tomazos and Tony Ceccon is not one referable to the accepted categories of fiduciary relationship. Moreover there was no express or implied

[267] *(in liq)* (2001) 207 CLR 165.
[268] *Norberg v Wynrib* [1992] 2 SCR 226 at 272
[269] Ibid at 312

contract or other agreement between the parties concerning their relationship which may otherwise give rise to a co-extensive fiduciary obligation. Tomazos did not point to any authority where, in similar circumstances, a role of mere mentor or adviser in someone else's commercial endeavour has specifically given rise to a fiduciary relationship.

[404] Tony Ceccon had a personal regard for Tony and John Tomazos and visa versa. Tony Ceccon and Tony Tomazos had been good friends for some time and had provided each other assistance of various kinds during that period. The assistance that Tony Ceccon offered on this occasion was also of a personal nature. He offered help, freely and voluntarily and for no particular benefit, apart from the possibility that Tomazos might source building materials from one or other of Ceccon's leases if Tomazos obtained contracts that involved the supply of such materials. There is no basis for a conclusion that because Tomazos accepted his help he was required to subordinate his interests in unspecified ways and for an indeterminate period, indeed "for as long as he was alive".

[405] As Ceccon's counsel submits, Tomazos was not, and is not a commercial minnow. It had resources available to it to protect its interests. Indeed it hired a very experienced person in Mr Joy to manage its transport and mining operations. "They were not babes in the woods."

[406] Counsel also submits that "the assertion of a fiduciary obligation is a benighted attempt to transform voluntary, gratuitous and valuable assistance into a legal justification to restrict commercial activity in lieu of a negative covenant which, if obtained by Tomazos Group Pty Limited, would not have been enforceable. It is no more than a naked attempt to improve the nature or extent of a remedy where enforceable legal obligations could have been bargained for but were not."[270]

[407] Counsel also points out that "even if Mr Ceccon could be considered a fiduciary, it would be extraordinary that there could be a breach of any fiduciary duty he owed to Tomazos Group Pty Limited when the directing mind of the beneficiary, Mr Tony Tomazos, freely expressed his true belief that he could not complain to Mr Ceccon because he believed Mr Ceccon was free commercially to do as he wished. From this it is clear, the beneficiary did not see the alleged fiduciary as a fiduciary. This is because the alleged fiduciary was not a fiduciary."[271] This is a reference to Tony Tomazos' evidence when asked why he did not complain about Tony Ceccon resuming transport work.[272]

[408] By way of response counsel for Tomazos submits that "it is not possible to make a statement of applicable criteria that determines whether a fiduciary relationship exists."[273] Counsel refers to a decision of this Court in *Territory Sheet Metal Pty Ltd & Ors v ANZ Group*

[270] Ceccon Response to Counterclaim [119].
[271] Ceccon Response to Counterclaim [120].
[272] See [314] - [316] above.
[273] Tomazos Reply on Counterclaim [38].

Ltd[274] at [1425] to [1441] where Olsson AJ summarised relevant principles. These include that:

(a) the categories of fiduciary relationships are not closed;[275]

(b) "a fiduciary relationship exists where the facts of the case in hand establish that, in a particular matter, a person has undertaken to act in the interests of another and not his own";[276]

(c) "where a fiduciary relationship is found to exist then, as to matters to which that duty attaches, it is said that the fiduciary must not place himself in a situation in which his duty and his interest conflict";[277]

(d) "the notion underlying all the cases of fiduciary obligation is that, inherent in the nature of the relationship itself, is a position of either disadvantage or vulnerability on the part of one of the parties that causes that party to place reliance upon the other and requires the protection of equity acting on the conscience of that other";[278]

(e) "the critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests

[274] *Territory Sheet Metal Pty Ltd & Ors v ANZ Group Ltd* [2009] NTSC 31 (***Territory Sheet Metal***).
[275] Ibid at [1426] citing *Hospital Products* at 68 and 96.
[276] Ibid at [1429] citing *Hospital Products* at 68 and 69.
[277] Ibid at [1430] citing *Consul Development Proprietary Limited v DPC Estates Proprietary Limited* (1975) 132 CLR 373 at 393.
[278] *Territory Sheet Metal* at [1431] citing Dawson J in *Hospital Products* at 142.

of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense";[279]

(f) "The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is, accordingly, vulnerable to abuse by the fiduciary of the latter's position."[280] and

(g) "Wherever two persons stand in a relationship that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relationship existed."[281]

[279] *Territory Sheet Metal* at [1432] referring to Mason J *Hospital Products*.
[280] Ibid at [1433].
[281] Ibid at [1440], referring to Brennan J in *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 384-385 citing a proposition expressed by the Lord Chancellor in *Tate v Williamson* (1866) 2 L. R. Ch. App. 55 at 61.

Consideration and conclusions

[409] I do not consider that a fiduciary relationship existed between Tony Ceccon and Tomazos. In addition to the points that I have already made, including that there was no attempt by either party to enter into any relevant agreement with the other and no promise or expectation as to the likely duration or precise nature of Tony Ceccon's assistance, the kind of indicators referred to in *Hospital Products* and summarised in *Territory Sheet Metal* are not present here. Tony Ceccon did not undertake to act in the interests of Tomazos and not his own, there was no confidential relationship between Tony Ceccon and Tomazos, Tony Ceccon did not have a special opportunity to exercise a power or discretion to the detriment of Tomazos, who was, accordingly, vulnerable to abuse by Tony Ceccon of Tomazos' position, and Tomazos was not in a position of disadvantage or vulnerability such that it requires the protection of equity acting on the conscience of Tony Ceccon.

[410] I reject this claim.

Interfering with Tomazos' cartage contract with Boral

What is the claim?

[411] In paragraph [7] of the Counterclaim Tomazos pleads that in breach of Tony Ceccon's promises contained in the Statements pleaded in paragraph [4] Ceccon engaged in a wide range of conduct from in or

about March 2012. Part of that conduct is that he encouraged Boral to dishonour "the Boral contract". The Boral contract had been defined in paragraph 6(d) of the Counterclaim as "a preferred transport provider contract by Tomazos and subsequently Tomazos Transport with Boral".

[412] Although these pleadings are part of the negligent misstatement cause of action there is no pleading elsewhere in the Counterclaim that identifies a separate cause of action of the kind raised for the first time in [147] – [154] of the Tomazos Submissions under the heading "Interfering with the performance by Boral of its contract with Tomazos".

[413] Those submissions are as follows:

> [147] Tomazos had a preferred provider agreement with Boral for general cartage work.
>
> [148] Under that agreement, Tomazos were to perform all of Boral's cartage work, except to the extent that it was unable to do so.
>
> [149] That agreement was a binding undertaking.
>
> [150] The subsequent signing by Boral and Tomazos of a contract containing an "entire agreement" clause is not conclusive of the terms of the contract.[282]
>
> c. The undertaking was clearly a matter of importance and pursuant to which Tomazos undertook work;
>
> d. The subsequent contract was a standard form

[282] *Concrete Constructions Group Ltd v Litevale Pty Ltd* [2002] NSWSC 670; 170 FLR 290 at [81] per Mason P.

document.[283]

[151] Accordingly, the preferred provider undertaking remained a binding term of the contract between Boral and Tomazos.

[152] By his conduct referred to previously, Tony Ceccon, knowingly and intentionally, directly interfered with the performance by Boral of that agreement.

[153] Accordingly, the plaintiffs are liable to Tomazos for damages which reflect the loss it suffered as a result of that interference.[284]

[154] This is the loss of profits from performing the work given to Ceccon.

[414] The reference in [152] to "his conduct referred to previously" is presumably a reference to the conduct described in [104] – [113] of the Tomazos Submissions set out in [308] above, namely cartage work offered by Mr Potts on or soon after 23 August 2012, the cartage contract obtained by Ceccon Transport on 14 October 2012 and a fine sands contract obtained some time after 14 November 2012.

[415] It seems that the "preferred provider agreement" referred to in [147] of the Tomazos Submissions is based on Mr Baumgart's letter of 29 September 2011, and the signed "contract containing an 'entire

[283] In the same terms as that provided to Ceccon: compare TB 1573 & ff with TB 822 & ff.
[284] *Davies v Nyland* (1975) 10 SASR 76 at 98 per Bray CJ; *Ansett Transport Industries (Operations) Pty Ltd v Australian federation of Airpilots (No 2)* [1991] 2 VR 636 at 646.

agreement' clause" referred to in [150] of the Tomazos Submissions is the Cartage Agreement dated 1st May 2012.[285]

[416] Unfortunately neither Tomazos' pleadings nor its submissions (including its submissions in reply[286]) properly define the particular contract said to have been "dishonoured", for example by reference to documents or other conduct of Boral and Tomazos said to constitute the Boral contract. Nor do they further identify the cause of action, for example whether it is alleged that Ceccon induced Boral to breach the contract or that Ceccon wrongfully interfered with the contract by unlawful means, notwithstanding that Ceccon complained about these inadequacies in its detailed submissions in response to the Tomazos Submissions.[287]

[417] I agree with the primary position advanced on behalf of Ceccon that this purported claim should be dismissed on the basis that it was not pleaded as a cause of action, and remains so vague as to render it unfair for Ceccon to have to meet it well after the hearing has concluded.

Consideration

[418] I also agree that Tomazos has not proved the elements of either cause of action. The major problems for Tomazos concern the nature and

[285] TB 1575.
[286] Tomazos Reply on Counterclaim [33] – [37].
[287] Ceccon Response to Counterclaim [101] – [111].

content of the relevant contract and the nature and timings of the alleged breaches or interference.

[419] As to the so called contract, whilst it seems that Boral did give most of its cartage work to Tomazos from about 1 November 2011 this was not always the case.[288] Indeed Tomazos did not express any concern about Ceccon being given some work during or after the meeting with Mr Potts in about May or June 2012. I am not able to conclude that there was a contract in exactly the same terms as were suggested in Mr Baumgart's letter of 29 September 2011 or alleged by Tomazos in [105] of the Tomazos Submissions. In particular it is not clear what is meant by the expression "prime cartage contractor".

[420] In any event, the Cartage Agreement dated 1 May 2012[289] clearly contemplated that Boral was free to give cartage works to others.[290] In that important respect, and others (such as the term of the agreement),[291] it differed from the expectations that John and Tony Tomazos may well have had following the receipt of Mr Baumgart's letter of 29 September 2011. The fact that Tomazos entered into and executed that agreement, without any protest about the fact that it did not confer exclusive cartage rights upon Tomazos, also

[288] See [266] above.
[289] TB 1573.
[290] See for example clauses 1.4 and 1.5.
[291] The agreement could be terminated by Boral upon giving 60 days written notice to Tomazos. See clauses 3.1 and 19.4.

supports my conclusion that there never was a contract of the kind apparently relied upon by Tomazos for the purposes of this claim.

[421] There can be little doubt that any previous contractual relationships in relation to cartage between Boral and Tomazos were superseded and replaced on 1 May 2012 when the Cartage Agreement commenced. This would be so even if one ignored the entire agreement clause,[292] or took into account John Tomazos' explanation that he did not properly read the document when he reviewed it and arranged for his father Tony Tomazos to sign it. If a contractual right to exclusivity was so important to Tomazos at that time, one would have expected both John and Tony Tomazos to have looked for the expression of such a right in the document, particularly in clause 1 headed "Cartage Works".

[422] In relation to the tort of inducing a breach of contract, the Full Federal Court in *Daebo Shipping Co Ltd v The Ship Go Star*[293] set out the following elements (at [88]):

(a) there must be a contract between the plaintiff (or applicant) and a third party;

(b) the defendant (or respondent) must know that such a contract exists;

[292] Clause 21.4
[293] *Daebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156; 207 FCR 220 per Keane CJ, Rares and Besanko JJ.

(c) the defendant must know that if the third party does, or fails to do, a particular act, that conduct of the third party would be a breach of the contract;

(d) the defendant must intend to induce or procure the third party to breach the contract by doing or failing to do that particular act; and

(e) the breach must cause loss or damage to the plaintiff.

[423] The Full Court then went on to state (at [89]):

> The gravamen of the tort is the defendant's intention to induce or procure the breach in the knowledge that such a breach will interfere with the plaintiff's contractual rights. As Lindgren J explained, the defendant must have "a fairly good idea" that the contract benefits another person in the relevant respect. He said that knowledge of the contract may be sufficient for the purpose of grounding the necessary intention to interfere with contractual rights, even though the defendant does not know the precise term that will be breached. Reckless indifference or wilful blindness can amount to knowledge for this purpose.
>
> (some references omitted)

[424] As to knowledge and intention, Almond J in *Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions & Ors*[294] (at [25]-[26]) stated:

> The principles relating to knowledge and intention in the context of inducement of breach of contract are considered in further detail in the relevant sections below. For present purposes, however, it is sufficient to note that:
>
> (a) It is not necessary to prove that the defendant knew the

[294] *Traffic Calming Australia Pty Ltd v CTS Creative Traffic Solutions & Ors* [2015] VSC 741.

precise terms of the agreement;

(b) Actual knowledge is not required; reckless indifference or wilful blindness is sufficient to satisfy the requirement of intention (though negligence, even when gross, will not suffice); and

(c) Simply because a breach of contract is a foreseeable consequence of conduct, this will not of itself constitute intention.

In addition to proving intention, it is necessary for a plaintiff to establish that the defendant's actions actually procured or induced the breach of contract. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Corke Instrument Engineering Australia Pty Ltd*, Finkelstein J said:

> It is, however, necessary to show that the breach of the contract has been "procured" or "induced". Sometimes the cases have noticed a distinction between "procuring" or "inducing" which is said to be unlawful, and "advice" which is said not to be unlawful. The prevailing view is that to induce a breach of contract means to create a reason for breaking it; to advise a breach of contract is to point out the reasons that already exist. The former is actionable while the latter is not.

[425] On the question of whether Tony Ceccon wrongfully interfered by unlawful means in the cartage contract, Tomazos cites the general propositions referred to by Bray CJ in *Davies v Nyland*[295] :

1. A knowing and intentional interference by the defendant with the plaintiff's contractual rights without justification is an actionable tort.

2. Such an interference may be, inter alia, the procuring of a breach of a legally binding contract not yet fully performed

[295] (1975) 10 SASR 76.

between the plaintiff and the third party or preventing the performance of such a contract.

3. The interference in question must be unlawful but "where it is direct, the persuasion, procurement, inducement, or other form of interference is regarded by the law as wrongful in itself; where it is indirect, the means by which the interference is effected must be, or include, an unlawful act, that is, an act which the defendant is not in law at liberty to commit".

4. The defendant must have knowledge of the existence of the contractual relations interfered with…

5. The interference must be intentional.

[426] To succeed in respect of either cause of action, the Court must be satisfied that there was a contract of the kind alleged by Tomazos, namely a contract obliging Boral to give all of its cartage work to Tomazos except to the extent that it was unable to do so.[296] For the reasons stated at [419] - [421] above, I am not so satisfied.

[427] Further, if even if there was such a contract, it was superseded before any breach of the kind alleged by Tomazos occurred. By the time Ceccon obtained its own cartage contract with Boral and the other events alleged in [109] to [113] of the Tomazos Submissions occurred, Tomazos had already been operating under the non-exclusive Cartage Agreement of 1 May 2012. Even if Ceccon did a small amount of cartage work following Mr Potts' proposal in May or June 2012, not only would that have been after any previous contract had been

[296] Tomazos Submissions [148]

superseded, any perceived breach was waived by Tomazos as a result of its apparent acquiescence to that occurring. In any event it seems that at that time Tony Ceccon was interested in the fine sands mining work, rather than cartage work. He was not attempting to interfere with Tomazos' cartage contract.

[428] Further, even if there was a breach, it did not cause loss or damage of the kind alleged by Tomazos, namely loss of the earnings Tomazos says it would have received but for Ceccon doing cartage work for Boral between October 2012 and September 2014 under its own cartage agreement dated 14 October 2012.[297]

[429] I dismiss this claim.

Jenkins Road Validation and Accessibility Agreement

[430] I have already referred to this agreement in Part I of these reasons at [207] - [212] and recorded that Tomazos was liable to pay $133,029.50 inclusive of GST (as of 24 September 2014) for royalties in relation to materials which Tomazos extracted from Lot 24730 (Jenkins Road) in 2012 and delivered to MJHJV. Lot 24730 was subject of a lease, MA24730, held by Suzanne Ceccon.

[431] The agreement is recorded in a single page document entitled "Validation and Accessibility Contract between Suzanne Yoko and Tony Ceccon (Ceccon Transport Pty Ltd) and John Tomazos and

[297] Tomazos Submissions [111].

Tony Tomazos (Tomazos Group Pty Ltd)".[298] It is in the form of a letter dated 26 October 2012 and signed by or on behalf of those parties. It bears the heading "Site: Lot 24730 (Jenkins Road) - South East Portion". It says:

> This letter is to ensure that the agreement between Tony Ceccon and John and Tony Tomazos in regards to Lot 24730 (south east portion) of Jenkins Road is clear and validated for both parties.
>
> The agreement is Tomazos Group has access to Lot 24730 south east portion for 24 hours a day (as long as the mining department allows for extra time), seven days a week for the duration of but not inclusive of the MJHJV project.
>
> This agreement allows Tomazos Group to extract and process and deliver material in order to fulfil their contract with MJHJV for sub base and hard stand material.
>
> Tomazos Group agrees to ensure payments of royalties to Ceccon for all sellable products; this rate has been agreed at ($2.50 per tonne) for all materials.
>
> Ceccon Transport Pty Ltd holds all responsibility for mining approvals and authorisation to work on all sites required for this project.

[432] In its Defence and Counterclaim Tomazos referred to this agreement as the Jenkins Road Pit Agreement.[299] Tomazos pleads that Suzanne Ceccon and/or Ceccon through the agency of Tony Ceccon wrongly denied Tomazos access to Lot 24730 (which it defined as **the**

[298] TB 1742.
[299] The relevant pleadings are at [42] – [48] of the Statement of Claim, [42] of the Defence and [6(h)], [7(c)], [15(a)], [16], [17] and [19] of the Counterclaim.

Jenkins Road Pit)[300] in order to access building materials.[301] It seems that some but not all of the "building materials" were materials which Tomazos intended to supply to MJHJV for the CVL-2 project.[302]

[433] Tomazos contends that Ceccon breached the Jenkins Road Pit Agreement on 5 December 2012 when Ceccon "excluded further mining."[303] This is based upon a letter dated 5 December 2012 addressed and sent by fax to Tomazos Group signed by Suzanne Ceccon at Tony Ceccon's request.[304] It said:

> Dear John and Tony,
>
> The Mines Department have demanded that you remove all plant and machinery from MA 24730 by 4.00pm today the 5.12.12.
>
> We will be notified by mail as to when we are permitted to enter this pit again.
>
> Should you fail to comply with the above further action will be taken.
>
> Tim Kennedy of MJHJV has been notified of the situation.
>
> Ceccon Excavator is ready to do the rehab.

[434] The first sentence of that letter was false. In fact the Department of Mines had written to Mr Ceccon on 23 November 2012 requiring Ceccon Transport to attend to a number of matters regarding MA 24730

[300] Defence [42(a)].
[301] Counterclaim [16] – [17].
[302] Tomazos Submissions [119].
[303] Tomazos Submissions [120].
[304] TB 1744.

by 21 December 2012. John Tomazos responded to Suzanne Ceccon's letter of 5 December later that day, requesting a copy of the letter from the Mines Department and reasons why all plant was to be removed that day at such short notice and accusing Suzanne and Tony Ceccon of being in breach of the agreement of 26 October 2012.[305]

[435] The following day Sandra Johnson, who often assisted Ceccon and Tomazos in relation to their dealings with the Department of Mines, spoke to an officer at the Department and then emailed Suzanne and Tony Ceccon passing on the officer's concern about having been misquoted. She added that the rehabilitation that had been requested by the Department was nearly complete and would be completed by 14 December. She copied John Tomazos and Matthew Tomazos into that email.[306]

[436] The Tomazos Submissions about this claim were as follows:

> [117] Tony Ceccon's evidence as to the area available to Tomazos, and mined by Tomazos, is clearly wrong and must be rejected.
>
> [118] Lease MA24730 is a narrow lease, running North West to South East. The lease falls into 2 distinct areas: the North West portion, and the South East portion. The agreement permitted mining by Tomazos of the South East portion, which it was undertaking progressively, as Ceccon allowed it access to new areas of that portion.
>
> [119] The duration of the agreement was to be for the length of

[305] TB 1748.
[306] TB 1746.

the MJHJV contract, but not exclusively for extracting materials for that contract.

[120] In breach of that agreement, Ceccon excluded further mining from 5 December 2012 – when supplying under the MJHJV contract had barely begun.

[121] The letter from Suzanne of 5 December 2012 was patently false. Despite her willingness to accept responsibility for it, clearly the person responsible was Tony Ceccon.

[122] Quite apart from the express terms of the letter being untrue, so too was his claimed underlying justification for its issue: that Tomazos conduct was the cause of the letter from the Department of Mines of 27 November 2012. As previously noted, the Department's complaints related to conduct by Ceccon.

[123] In these circumstances, the obvious inference is that the decision to exclude Tomazos was to cause them financial harm, and/or to put their MJHJV contract at risk. Either way, Ceccon would look to pick up more work at Tomazos' expense.

[124] Additionally, Ceccon was able itself to access the materials from the lease, which it did and continues to do even to the date of trial.

[125] There is no doubt that being shut out of gravel supplies from Jenkins Road, Tomazos had to source its gravel from further afield – at greater expense to itself.

[437] Counsel for Ceccon contends that there was no breach of the Validation and Accessibility Agreement as at 5 December 2012. That agreement had either been performed by December 2012 or the only remaining aspect for performance was to allow Tomazos to access that area to remove gravel stockpiles and its equipment. Some time before

5 December 2012, Tomazos had ceased production of gravel at Jenkins Road and had moved production of gravel to its own pit at Finn Road. What remained at Jenkins Road was Tomazos' equipment and some gravel stockpiles, which were removed by Tomazos progressively after December 2012 without hindrance from Ceccon.[307]

[438] Tomazos Transport employed Mr Keith Joy as Operations Manager in May 2012. He had previously worked for Boral, including at Howard Springs for about three months. One of his main roles was to manage Tomazos' contract to supply gravel for the Inpex project, and in particular the MJHJV contract. He knew that Tomazos was already extracting and stockpiling some material from a small part of Ceccon's leased area at Jenkins Road and he was anxious to ascertain and agree on exactly what part of that area Ceccon would allow Tomazos to keep accessing and using.

[439] By the end of June Tomazos had extracted and stockpiled gravel from the first three lots on the south-eastern portion of MA24730. They are lots numbered 1 to 3 on the bottom half of the Site Plan entitled "Middle Arm Project MA24730 and MA29405" (Exhibit D3) and are on the eastern side of the gas pipeline. Tomazos had also crossed over the gas line and started working on lots 4 and 5. Mr Joy said that Tomazos wished to then move on to lots 6 and 7, the remaining lots in the south-eastern portion of MA24730, and then be able to access and

[307] Ceccon Response to Counterclaim [66] – [67].

mine from MA29405. MA29405 was a large area immediately adjacent to the western boundary of the south-eastern portion of MA24730, and was the subject of an application by Tony Ceccon. Mr Joy was also hoping that Ceccon would agree to allow Tomazos to access and mine the northern part of MA24730. Although Tomazos had submitted applications for rights to extract materials from other sites including at Sunday Creek, Scrubby Creek and Finn Road, Mr Joy considered it important to reach an agreement with Ceccon in relation to the Jenkins Road areas so as to secure supply until such time as those other applications had been processed. The Jenkins Road areas were also attractive because they were closer to the Inpex site than were the other sites.

[440] Mr Joy and John Tomazos were fully aware of the need to have Ceccon's permission to access and use any of its lease areas. Accordingly on 25 June 2012, following an email from John Tomazos, Mr Joy drafted an agreement, which became Exhibit P10 in these proceedings. The document was not discussed with Tony Ceccon and was never executed or signed. It was in terms of or similar to those in the agreement that was signed on 26 October 2012, but contemplated access over areas not confined to the south-eastern portion of Lot 24730. Rather, it referred, in both the heading and content, to Lot 24730 "and/or additional sites in the Middle Arm area".

[441] Mr Joy did not see or have any involvement in the preparation of the 26 October 2012 agreement. Contrary to Tomazos' desires to obtain rights to access and use other areas leased by Ceccon, in particular MA29405 and the northern part of MA24730, the agreement only allowed access and use of the south-east portion of MA24730, most of which would have already been mined by then. When he was asked why he wanted a written agreement at that time John Tomazos said: "That's probably because we already had material in this pit by then and we needed an agreement to be able to take the material out."[308]

[442] Tomazos commenced mining operations in its pit on Finn Road in about September 2012. It had prepared its Mining Management Plan for Finn Road[309] early in 2012 with the express purpose of extracting gravel for supply to the Inpex project.

[443] Mr Joy said that by about 5 December 2012 Tomazos had ceased production at Jenkins Road Pit. It had commenced production from its lease at Finn Road. Stockpiles were still there, at Jenkins Road Pit, awaiting quality testing for Inpex, before they were removed and supplied to MJHJV, the last batch being removed late in January 2013. There were no difficulties getting access to those stockpiles for that purpose.

[308] Transcript 24/4/16 p 592.
[309] Exhibit P19.

[444] I agree with Ceccon's submissions that although Ceccon permitted Tomazos to access the Jenkins Road Pit to mine gravel, access was restricted to the south-eastern portion. Tomazos wanted access to other parts of the Jenkins Road Pit outside of the south-eastern portion of MA24730 and into the adjoining lease, but Ceccon never agreed to that. They were not bound to give access at all, and that is why Tomazos sought to have a formal agreement in the form of Exhibit P10 entered into in June 2012 and then again in October 2012.

[445] By 5 December 2012 Tomazos Group had ceased mining operations at the Jenkins Road Pit and had commenced operations at Finn Road on its own lease. Ceccon did not prevent Tomazos from removing the stockpiles it had mined and stockpiled on the lease.

[446] Therefore, there is no breach of the Validation and Accessibility Agreement.

[447] There was some confusion on the part of Tony Ceccon and others as to the extent of the south-eastern portion of MA24730, largely because Tony Ceccon and others present such as Mr Joy did not have maps with them when they were on site. This is not relevant. It is clear when one looks at Exhibit D3 that the south-eastern portion of MA24730 is the area depicted as lots numbered 1 to 7 on the bottom part of that document.

[448] I agree with Tomazos' submissions that Ceccon's letter of 5 December 2012 was misleading and inappropriate. However John Tomazos' reply later that day and Sandra Johnson's clarification the next day made it abundantly clear that Tomazos was not at any risk of Ceccon pursuing its threat.

Set off

[449] This claim was pleaded by Tomazos after the completion of the evidence by inserting paragraphs [20] to [22] into the Counterclaim.

[450] Tomazos pleads that in late 2012 Tony Ceccon and John Tomazos "verbally agreed" that Ceccon would give to Tomazos 40,000 square metres of sand in exchange for a float trailer. Tomazos alleges that in breach of that agreement Ceccon only supplied approximately 10,000 square metres of sand. Tomazos claims a set off "for the value of the sand not supplied as against any money due and owing by Tomazos to Ceccon pursuant to the GPR Pit 1 agreement."

[451] Tomazos submissions[310] in relation to this claim are simply:

> [126] Fill sand
>
> [127] Tomazos relies upon the evidence of John by affidavit at [26][311]

[310] Tomazos Submissions [126] – [127].
[311] TB 1466.

[452] It is not readily apparent what Tomazos contends to be "the value of the sand not supplied".

[453] In answer to this claim the Ceccon parties pleaded that:[312]

(a) Tony Ceccon and John Tomazos agreed to exchange a float trailer for sand;

(b) Tony Ceccon and John Tomazos jointly agreed a value for the float trailer of $25,000.00;

(c) Tony Ceccon identified a particular stock pile of sand at Gunn Point Road Pit 2 to John Tomazos;

(d) John Tomazos agreed to take the stockpile identified in exchange for the float trailer;

(e) Ceccon Transport took possession of the float trailer; and

(f) Tomazos Group loaded and hauled the sand.

[454] Ceccon denies the breach and the entitlement to set off.

[455] In [26] of his affidavit sworn 16 January 2016[313] John Tomazos deposes that:

> Tony offered if Tomazos gave him a float trailer it had, he would give Tomazos 200 x 200 m of sand which at that stage Tomazos needed. I therefore agreed on behalf of Tomazos, however when the sand was mined, what is given to us by

[312] Defence to Counterclaim [19] – [21].
[313] TB 1466.

> Ceccon was only 100 x 100 m2. The shortfall would have been approximately equivalent in size to the stockpile of Ceccon's that we had used and we therefore seek to offset the difference.

[456] Those matters are specifically denied by Tony Ceccon. In [73] of his affidavit sworn on 25 February 2016[314] Mr Ceccon deposes to the following:

> In respect of the float trailer referred to in paragraph 26 of the John Tomazos affidavit, I recall that:
>
> (a) Tomazos Group had a truck and low loader which was worth, in my estimate about $25,000.00;
>
> (b) Ceccon, who had sold its plant and machinery, was looking to purchase new plant and machinery;
>
> (c) I had a discussion with John Tomazos in which I said to him that: I would like to buy that float trailer. It is about $25,000.00. I can give you that much worth of sand if you would like to sell it to me;
>
> (d) either during the discussion I had with John Tomazos in which I made that offer of a very short time subsequently, John Tomazos said to me "I can give you the float trailer for the sand;
>
> (e) at or about the time John Tomazos said the words in the preceding paragraph, I recall that he and I, and I believe Tony Tomazos as well, but I am not certain about that, visited an area in Ceccon's pit at Gunn Point where there was a stock pile of sand which was about 100m x 100m x 6m of sand, which I pointed out and said: That looks to me to be more than $25,000.00 worth of sand";
>
> (f) at that time I also pointed out a smaller pile of sand which was about 150m x 6m x 3m and said: You can also take that pile of sand as an added bonus;
>
> (g) John Tomazos agreed to take those stock piles;
>
> (h) I took possession of the float trailer;

[314] TB 751.

(i) Tomazos Group collected the sand;

(j) Except when I read it in the John Tomazos affidavit, at no time did Tomazos Group, or any person associated with it, notify me or complain that there was a shortfall of 100m x 100m of sand.

[457] As counsel for Ceccon points out the matters in John Tomazos' affidavit were not put to Tony Ceccon in cross examination. Consequently, the matters in Tony Ceccon's affidavit were not put to John Tomazos during his cross examination. It was only after the final hearing that the Tomazos parties further amended their Counterclaim to plead the set off. There is, therefore, no basis or justification to prefer one witnesses' account over the other.[315]

[458] Counsel for Ceccon contends that irrespective of whose evidence is preferred, it is clear that the parties are referring to a location to be mined or collected rather than quantities to be supplied. This would explain why there is no evidence adduced by Tomazos that when the sand was mined an alleged shortfall was not brought to Ceccon's attention, or any complaint made. The inference that Tomazos was satisfied with the quantity of sand as mined in exchange for the float trailer is inescapable. The set off, therefore, has no merit.[316]

[459] Moreover, there is no proof of quantities. In this regard, it should be noted that Tomazos' evidence speaks of "200 x 200m" and the Counterclaim speaks of "40,000 square metres". It is not clear how

[315] Ceccon Response to Counterclaim [79].
[316] Ceccon Response to Counterclaim [80].

much sand is truly meant and how that amount is derived. The parties do not refer to quantities (for example by reference to cubic metres), but rather refer to the size of an area to be mined. This leaves open the question of quantities based upon useable yield.[317]

[460] Regardless, there is no proof of:

(a) the total quantity of sand in question;

(b) the quantity of sand allegedly not supplied by Ceccon Transport; and

(c) the value of the sand allegedly not supplied.[318]

[461] Thus, on the balance of probabilities, there is no basis for the asserted set-off. Even if there was a basis for the set off, the essential elements to enable a proper quantification of it are absent.[319]

[462] Tomazos did not respond to any of these points in the Tomazos Reply on Counterclaim.

[463] I accept the submissions on behalf of Ceccon and find that Tomazos has not made out this claim. This finding is further supported by my concerns about the reliability of the evidence of John Tomazos particularly in the circumstances where it is raised for the first time in his affidavit made several years after the occurrence of the alleged oral

[317] Ceccon Response to Counterclaim [81].
[318] Ceccon Response to Counterclaim [82].
[319] Ceccon Response to Counterclaim [83].

agreement and was not raised as an issue in this complicated counterclaim until after completion of the hearing of the evidence.

Conclusions and disposition

[464] I dismiss the allegations in the Counterclaim. Accordingly there is no need for further submissions or consideration in relation to damages and other consequential relief sought by Tomazos.

[465] I will hear the parties further on costs and orders to be made consequential upon my findings and conclusions.
