

AUSTRALIA / JUDGMENT

Spotpress Pty Ltd v Spotpress Newspapers Pty Ltd

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Supreme Court

New South Wales

Amendment notes

Medium Neutral Citation:

Spotpress Pty Ltd v Spotpress Newspapers Pty Ltd [2025] NSWSC 1094

Hearing dates:

5–20 May 2025

Date of orders:

25 September 2025

Decision date:

25 September 2025

Jurisdiction:

Equity - Commercial List

Before:

Williams J

Decision:

See determination at [374]

Catchwords:

CONTRACTS – interpretation – agreement for sale of business – sellers’ warranty that accounts give a true and fair view of the financial position and state of affairs of the business as at each of three accounts dates and of the financial performance of the business for the one-month period ending on each accounts date – where the business sold was a division of a larger business – where no separate management or financial accounts had been maintained for the division –

where sellers provided to buyer for due diligence purposes accounts for the division for a three-month period prepared by sellers after attributing parts of the revenue, costs and operating expenses of the larger business to the division in each of those three months – meaning of “true and fair view”

CONTRACTS – breach of warranty – measure of damages – difference between price paid and true value – approaches to assessing true value

Legislation Cited:

Civil Procedure Act 2005 (NSW), s 96

Corporations Act 2001 (Cth), ss 296, 297

Cases Cited:

Australian Karting Association Ltd v Karting (New South Wales) Incorporated [2022] NSWCA 188

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25

Clark v Macourt (2013) 253 CLR 1; [2013] HCA 56

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64; [1991] HCA 54

Davis v Perry O'Brien Engineering Pty Ltd [2025] QCA 18

Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7

EW Blanch Pty Ltd v Cooper [2005] NSWCA 217

Grant-Taylor v Babcock & Brown Limited (in liq) (2015) 322 ALR 723; [2015] FCA 149

Grant-Taylor v Babcock Brown Limited (in liq) {2016} 330 ALR 642[2016] FCAFC 60

H & Q Café Pty Ltd v Melbourne Café Pty Ltd (2023) 72 VR 53; [2023] VSCA 200

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2024] HCA 54

Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd [2019] VSCA 136

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 196 ALR 257; [2003] HCA 10

Ramsay v BigTinCan Pty Ltd [2014] NSWCA 324; (2014) 101 ACSR 415

Robinson v Harman (1848) 1 Exch 850; 154 ER 363

Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47

Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31

Zhong v Guan (2024) 116 NSWLR 258; [2024] NSWCA 300

Texts Cited:

N/A

Category:

Principal judgment

Parties:

Spotpress Pty Ltd (ACN 665 474 966) (First Plaintiff/Cross-Defendant)

TMA Australia Pty Ltd (ACN 114 874 690) (Second Plaintiff/Cross-Defendant)

TMA Capital Australia Pty Limited ACN 145 009 785) (Third Plaintiff/Cross-Defendant)

Spotpress Newspapers Pty Ltd (ACN 002 063 676) (First Defendant/Cross-Claimant)

Grasett Investments Pty Ltd (ACN 000 451 276) (Second Defendant/Cross-Claimant)

JG & DG Properties Pty Ltd (ACN 112 394 055) (Third Defendant/Cross-Claimant)

John Georgantzakos (Fourth Defendant)

Representation:

Counsel:

Mr D L Williams SC with Ms A Zheng and Mr D Emmerig (Plaintiffs/Cross-Defendants)

Mr J M Morris SC with Mr J M Kadar (Defendants/Cross-Claimants)

Solicitors:

Thomson Geer Lawyers (Plaintiffs/Cross-Defendants)

Jordan Djundja Lawyers (Defendants/Cross-Claimants)

File Number(s):

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Nil

Judgment

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Introduction

The first defendant/cross-claimant, Spotpress Newspapers Pty Limited, operated a printing business with three components: the "coldset business"; the "heatset business"; and the "hybrid business". The coldset business conducted printing for newspapers, and is therefore also referred to as the newspaper business. The heatset business conducted printing for magazines and catalogues. The hybrid business is a term used by the parties to describe printing for publications that require both coldset and heatset printing services, such as newspapers with catalogue inserts.

The second defendant/cross-claimant, Grasett Investments Pty Limited, owned certain assets used in the operation of the business.

The first defendant/cross-claimant operated the business from premises at 24-26 Lillian Fowler Place, Marrickville. At all relevant times until shortly after the commencement of the final hearing of these proceedings, those premises were owned by the third defendant/cross-claimant, JG & DG Properties Pty Ltd.

The fourth defendant, Mr John Georgantzakos, and his brother Mr Dimitri Georgantzakos were and remain the directors of each of the first, second and third defendants.

On 7 March 2023, the first and second defendants/cross-claimants entered into an Asset Sale Agreement for the sale of the heatset and hybrid components of the business to the first plaintiff/cross-defendant, Spotpress Pty Limited. The purchase price was \$6,000,000, of which \$2,500,000 was payable on completion, and \$3,500,000 was the subject of vendor finance under the terms of a Loan Deed between the first and second defendants/cross-claimants as lenders, the first plaintiff/cross-defendant as borrower, and the second and third plaintiffs/cross-defendants, TMA Australia Pty Limited and TMA Capital Australia Pty Limited, as guarantor and limited guarantor (respectively). Various other documents were executed on that day, including a lease of the Marrickville premises in favour of the first plaintiff/cross-defendant and an agreement pursuant to which the first defendant/cross-claimant engaged the first plaintiff/cross-defendant to provide certain services which it would require for a period after completion in order to continue operating the coldset business. Completion occurred simultaneously with execution on 7 March 2023.

Mr Anthony Karam and Ms Corriene Karam were and remain directors of each of the first, second and third plaintiffs/cross-defendants.

These proceedings involve a dispute between the parties concerning alleged breaches of Seller Warranties given by the first and second defendants/cross-claimants in the Asset Sale Agreement, other alleged breaches of contract, alleged misleading or deceptive conduct, and the first plaintiff's/cross-defendant's claim to be entitled to set off certain amounts against amounts owing by it under the Loan Deed.

In these reasons, I adopt the parties' conventions of referring to:

the whole of the business operated by the first defendant/cross-claimant using assets owned by the second defendant/cross-claimant before entering into the Asset Sale Agreement as the Original Business;

the "Business" and the "Assets" sold to the first plaintiff/cross-defendant under the Asset Sale Agreement as the Transferred Business;

the business and assets retained by the first and/or second defendants/cross-claimants following completion of the Asset Sale Agreement as the Retained Business;

the first plaintiff/cross-defendant as the Buyer;

the second plaintiff/cross-defendant as TMA Australia;

the third plaintiff/cross-defendant as TMA Capital;

the first, second and third plaintiffs/cross-defendants, collectively, as the TMA Entities;

the first defendant/cross-claimant as the Spotpress Seller;

the first and second defendants/cross-claimants collectively as the Sellers; and
the third defendant/cross-claimant as JG & DG Properties.

Salient facts

Introductory observations in relation to credit

Almost all of the factual issues in dispute as at the commencement of the final hearing of these proceedings were the subject of evidence given by Mr Anthony Karam and Ms Corriene Karam on behalf of the plaintiffs, and Mr John Georgantzakos on behalf of the defendants.

Almost all of those disputes fell away as a result of concessions made by the defendants, following their decision not to read the five affidavits of Mr John Georgantzakos that they had filed and served in the proceedings.

Notwithstanding the absence of any contest to Mr Anthony Karam's and Ms Corriene Karam's evidence from Mr John Georgantzakos, the defendants submitted that the Court should regard their evidence with caution and circumspection where it is inconsistent with contemporaneous documents or with the evidence of other witnesses. That submission relied on the conduct of Mr Karam and Ms Karam in causing the plaintiffs to enter into a Side Deed to the Asset Sale Agreement in order to negate the effect of a clause that the financier had required to be included in the Asset Sale Agreement, and concealing the existence of the Side Deed from their financier, as referred to in more detail at [112]-[114] below. In cross-examination, each of Mr Karam and Ms Karam acknowledged the effect of the Side Deed, attributed it to a recommendation made by their financial advisor, expressed regret for having entered into the Side Deed and described it as a "mistake". Ms Karam described it as a "mistake" because it would have been possible to structure the transaction in a different way that would not have resulted in the financier requiring the relevant clause in the Asset Sale Deed. Contrary to the plaintiffs' submissions, neither Mr Karam nor Ms Karam acknowledged that it had been wrong to enter into the Side Deed and to withhold its existence from the financier because this was misleading. In my opinion, that does indicate that Mr Karam and Ms Karam were willing to mislead their financier in that way at a time when they considered that it suited them, and the plaintiffs, to do so. Contrary to the defendants' submissions, I do not regard this, by itself, as indicating that Mr Karam and Ms Karam may have given untruthful evidence under oath in these proceedings, or as requiring any greater degree of testing of their evidence than would otherwise be the case against any other relevant witness testimony and contemporaneous documents in the context of any undisputed objective facts and having regard to inherent probabilities and improbabilities. I have tested and weighed their evidence in that usual manner in relation to each factual matter that remained in dispute at the conclusion of the hearing.

Negotiations for the sale and purchase of part of the Business

In about late 2019, Mr John Georgantzakos on behalf of the Sellers and Mr Karam on behalf of TMA Australia held informal discussions about a potential acquisition of the Spotpress Business by TMA Australia. In the course of those discussions, Mr John Georgantzakos propounded to Mr Karam certain potential synergies between the Sellers' business and the business of TMA Australia and its related entities that could result in cost savings and efficiencies if TMA Australia were to acquire the Sellers' business and move the Sellers' operations to TMA Australia's existing premises. However, the discussions ceased shortly thereafter in about April 2020 given the uncertainty caused by the COVID-19 pandemic.

In early 2021, Mr Karam and Mr John Georgantzakos briefly revived their discussions about a potential acquisition of the Sellers' business by TMA Australia. The discussions stalled again in about July 2021.

In July 2022, Mr John Georgantzakos proposed an alternative transaction under which TMA Australia would acquire only the heatset and hybrid printing operations of the Sellers' business, with the Sellers retaining the coldset printing operations. Although these different types of printing could be characterised as separate parts of the Sellers' business, they were part of one business that was operated by the Sellers. This is the business that I have referred to as the Original Business. The accounting systems and processes for the Original Business did not distinguish between the heatset, hybrid and coldset printing operations.

From the outset of these discussions about the potential alternative transaction, it was contemplated by Mr John Georgantzakos and Mr Karam that much of the Spotpress Seller's workforce would transfer to the purchaser entity within the TMA Group if the transaction proceeded. In discussing the position of those workers and their entitlements, Mr John Georgantzakos and Mr Karam did not differentiate between the workers employed by the Spotpress Seller and workers who were employed by Real Media Pty Limited, which then contracted its employees' labour to the Spotpress Seller. Mr John Georgantzakos was the sole director of Real Media Pty Limited.

In about late August 2022, Ms Karam began gathering some information about the business proposed to be acquired. As the Chief Financial Officer of the TMA Group, Ms Karam would be responsible for conducting due diligence in relation to the potential acquisition. During discussions leading up to the signing of a Memorandum of Understanding on 9 November 2022, Ms Karam learned that the Spotpress Seller printed newspapers and also printed magazines and catalogues. Ms Karam did not learn at this stage about the different processes and equipment used for printing those different types of products. Ms Karam understood that the newspaper printing and magazine and catalogue printing operations were conducted as one business.

On 9 November 2022, the Sellers signed a non-binding Memorandum of Understanding with TMA Australia setting out the key terms of an agreement to be entered into for the sale of the Sellers' assets (excluding the assets of the newspaper printing business) to TMA Australia or its nominee.

Clause 11(a) of the Memorandum of Understanding recorded that the parties agreed that the proposed transaction would be on terms that included a purchase price of \$6,000,000 plus a price for stock to be determined on the basis of the most recent price paid by the Sellers for the stock as quantified in stocktake to be carried out by the parties jointly after completion. Of the \$6,000,000 purchase price, \$2,500,000 would be payable on exchange (which was proposed to occur on 31 January 2023) and the balance of \$3,500,000 would be payable in 24 monthly instalments of \$145,833, each commencing on the seventh month after completion and concluding on the thirtieth month after completion. The parties refer to the \$6,000,000 component of the purchase price as the non-stock purchase price and the price to be paid for stock that was to be determined in the joint stocktake immediately following completion as the stock purchase price. I will adopt the same convention. The target date for completion was 1 March 2023.

As recorded in the draft versions of the Memorandum of Understanding that the parties had exchanged over a period of some weeks prior to 28 November 2022, TMA Australia had sought to negotiate a non-stock purchase price equivalent to a multiple of three times EBITDA for the heatset and hybrid components of the Sellers' business. TMA Australia had proposed that the price of \$6,000,000 would be reduced in the event that due diligence revealed an annualised FY2023 EBITDA of less than \$2,000,000, extrapolated from a profit and loss statement for the heatset and hybrid components of the business for the three months of September, October and November 2022 that was to be prepared by the Sellers and provided to TMA Australia during due diligence. The Sellers rejected this, and insisted on a fixed non-stock purchase price of \$6,000,000. If TMA Australia did not wish to pay that price after completing due diligence, the Sellers would simply not proceed with the transaction.

Consistently with the Sellers' insistence on a fixed non-stock purchase price, clause 11 of the Memorandum of Understanding signed on 28 November 2022 stated: "Sellers are not bound by performance metrics".

Clause 11(e) of the Memorandum of Understanding set out the key terms of a proposed lease of the Marrickville Premises to be entered into between the Sellers and the TMA Group entity nominated as the buyer, for a term of three years with two options to renew of one year each. Clause 11(e)(viii) stated:

"Electricity to be invoiced by Sellers to the Purchaser every month at cost price depending to [sic] the electricity consumed by the Purchaser."

According to Mr Karam's unchallenged evidence, Mr John Georgantzakos had said to him at some stage in the course of their discussions before the Memorandum of Understanding was signed words to the effect of: "You cannot buy the electricity as cheap as I can. I will supply the electricity". Mr Karam replied, "ok".

Clause 14 of the Memorandum of Understanding provided that TMA Australia would issue a list of required due diligence documents to the Sellers within seven days after execution of the confidentiality agreement, and that due diligence documents would be provided for the months of September, October and November 2022.

TMA Australia signed a confidentiality agreement on 28 November 2022.

On 1 December 2022, Ms Karam issued a due diligence questionnaire and established a Dropbox account as a virtual data room for the Sellers to provide due diligence documents. On 2 December 2022, Ms Karam issued a further questionnaire concerning financial matters.

On 13 December 2022, Mr John Georgantzakos sent an email to Ms Karam advising that he had uploaded to the Dropbox account all of the information that she had requested, save for two items which were to follow. Mr John Georgantzakos' email stated that their respective solicitors would need to start preparing final agreements as a matter of urgency in order to meet the target exchange date of 31 January 2023, having regard to the intervening Christmas holiday period.

The key financial information uploaded by the Sellers to the Dropbox account in December 2022 was an Excel spreadsheet titled "2022-11 Spotpress Detailed Financials v3.xlsx", which I will refer to as the Financials Spreadsheet. The Financials Spreadsheet contained information concerning the Original Business as a whole, as well as financial information for what would become the Transferred Business, for the months of September, October, and November 2022. The Financials Spreadsheet included a worksheet entitled "TB Original" which presented a profit and loss statement for the Original Business for each of those months (the TB Original Worksheet), and a worksheet entitled "TB Linked" which presented a profit and loss statement for what would become the Transferred Business for each of those three months (the TB Linked Worksheet).

The Financials Spreadsheet was prepared by Mr John Georgantzakos together with Mr Simon Allsop, an accountant who had provided "virtual CFO" services to the Spotpress Seller since about August 2018. As Mr Allsop explained in his affidavit and in cross-examination, the data in the TB Original Worksheet was extracted directly from the Spotpress Seller's accounting system, and each of the numbered worksheets within the TB Original Worksheet referred to a specific general ledger account within that system. The data in the TB Linked Worksheet was not extracted directly from the Spotpress Seller's accounting system. Rather, that data was prepared by Mr Allsop and Mr John Georgantzakos extracting from the total revenue of the Original Business for the months of September, October and November 2022 that part of the revenue which they considered to be attributable to what would become the Transferred Business, and extracting from the total expenses incurred by the Original Business during each of those three months those expenses which they considered were directly related to revenue generated by the heatset printing operations. That part of the revenue and those expenses were recorded in the TB Linked Worksheet as attributable to what would become the Transferred Business. Where Mr John Georgantzakos and Mr Allsop did not characterise a category of expense as directly related to revenue generated by the heatset operations, they divided the total expenditure incurred by the Original Business in respect of that expense category in the relevant month by the total

printing revenue generated by the Original Business in that month, and then multiplied the resulting percentage by the amount of revenue that they had attributed to the Transferred Business for that month. The amount produced by that calculation was the amount of the expense in the relevant expense category which they allocated to what would become the Transferred Business. This methodology, which I will refer to as the revenue-based expense attribution method for allocating expenses of the Original Business between what would become the Transferred Business and the Retained Business, assumed that what would become the Transferred Business incurred a proportion of the expenses of the Original Business that corresponded with the proportion of the revenue of the Original Business that was generated by the Transferred Business. The Transferred Business generated approximately two thirds of the revenue of the Original Business.

During the due diligence process, Ms Karam had a number of conversations with Mr John Georgantzakos regarding why only three months of financial data was being provided for due diligence. Ms Karam recalls that the gist of Mr John Georgantzakos's response to these queries was that he had imposed that limitation because of the large amount of work that was required to be done to separate the accounting entries relating to the Transferred Business from the accounts of the Original Business which incorporated heatset, coldset and hybrid print jobs. Mr John Georgantzakos also told Ms Karam that he was concerned that the accounts for the years where trading was affected by COVID-19 would not provide an accurate view of the financial position of the business at the time of sale. His view was that there was a 12-month recovery period for the business to return to normal trading post-COVID, and so he considered the financial information for the three months from September 2022 to be more representative of the actual financial performance of what would become the Transferred Business.

The revenue-based expense attribution method was disclosed to Ms Karam during the due diligence process at a meeting that she attended with Mr John Georgantzakos and Mr Allsop, who informed her that it was difficult to carve out with mathematical precision the expenses of what would become the Transferred Business from the expenses of the Original Business. Mr John Georgantzakos and Mr Allsop told Ms Karam that expenses which were not clearly referable to either the coldset business to be retained by the Spotpress Seller, or the heatset and hybrid businesses proposed to be sold to the Buyer, had been apportioned between what would become the Retained Business and what would become the Transferred Business in a one-third/two-thirds split, which reflected the proportion of the total revenue of the Original Business generated by the Retained Business and by the Transferred Business, respectively. It was put to Ms Karam in cross-examination that she accepted this as a valid methodology for the allocation of expenses between the Retained Business and the Transferred Business. Ms Karam denied this, adding that the due diligence material provided by the Sellers did not facilitate verification of the manner in which expenses of the Original Business had been attributed to the Retained Business and to the Transferred Business. Ms Karam said that it was very difficult to ascertain from the information on the face of the due diligence documents the part of the Original Business to which any given expense related. I accept Ms Karam's evidence about this, and I accept her denial that she agreed to the revenue-based expense attribution method. Those aspects of Ms Karam's

evidence are consistent with her analysis set out in her report to the Board of the TMA Group in February 2023 referred to at [58] below, in which she noted that the Sellers had allocated the expenses between the Transferred Business and the Retained Business, and emphasised that the Sellers had agreed to “warranty the accuracy of these numbers”. Mr Allsop’s affidavit sworn on 28 March 2024 contains the only other account of the meeting at which expense allocation was discussed with Ms Karam. Mr Allsop deposed that the methodology had been explained to Ms Karam, but did not suggest that Ms Karam expressed agreement with the methodology. As I have already mentioned, Mr John Georgantzakos did not give evidence. I therefore find on the basis of Ms Karam’s evidence that the revenue-based expense attribution method had been disclosed to, but not accepted or agreed by the Buyer.

The TB Linked Worksheet within the Financials Spreadsheet presented a profit and loss statement for what would become the Transferred Business for each of the months of September, October and November 2022 in the form of an Excel spreadsheet. Each entry in the worksheet was referenced to a particular account number, which corresponded to the relevant account in the general ledger for the Original Business from which Mr John Georgantzakos and Mr Allsop extracted the particular revenue or expense item after attributing it to what would become the Transferred Business using the approach that I have described at [28] above.

The TB Linked Worksheet set out total revenue from print operations for each of the three months, from which itemised costs of sales were deducted to calculate gross profit. Itemised operating expenses were then deducted from gross profit to calculate operating profit. Other revenue (bad debts recovered, insurance claim payments received, and interest income) was then added to arrive at a calculation of Earnings Before Interest, Tax, Depreciation and Amortisation (EBITDA). The TB Linked Worksheet recorded no amortisation or depreciation expenses, no interest expenses, and no taxation expenses, meaning that the Earnings Before Interest and Tax (EBIT), the Net Profit Before Tax (NPBT) and the Net Profit After Tax (NPAT) calculations shown in the worksheet were the same as the EBITDA calculation. The worksheet then deducted certain itemised expenses referable to the lease of the Marrickville Premises to calculate Net Profit After Lease.

The cost of sales entries in the TB Linked Worksheet included the following:

Account number

Account name

Sep-22

Oct-22

Nov-22

50000

COST OF SALES

...

50101

Paper Used

601,159

597,521

739,219

% based on revenue

...

50301

Sales and marketing

42,444

37,378

34,224

...

50304

Binding and printing services

73,026

73,450

45,679

...

50306

Mailing and distribution

197,614

213,465

295,214

% based on revenue

...

50397

Other graphic services

282,930

256,394

295,214

Based on actuals (Real Media)

The gross profit set out in the TB Linked Worksheet, calculated on the basis of total revenue from print operations less total cost of sales, was:

Account number

Account name

Sep-22

Oct-22

Nov-22

59999

GROSS PROFIT/(LOSS)

733,097

707,452

711,144

The operating expenses entries in the TB Linked Worksheet included the following:

Account number

Account name

Sep-22

Oct-22

Nov-22

60000

OPERATING EXPENSES

...

61410

Workers' compensation insurance

1,897

1,897

1,897

% based of Salaries

...

61803

Electricity

25,254

27,980

29,833

Linked

...

62000

Payroll tax

1,926

4,068

1,966

...

62201

Salaries and wages

75,244

61,394

66,258

Linked

62202

Superannuation

7,599

6,181

6,640

Linked

The TB Linked Worksheet calculated the operating profit as follows, after deducting all operating expenses itemised in the worksheet from the gross profit amounts referred to above:

Account number

Account name

Sep-22

Oct-22

Nov-22

70000

OPERATING PROFIT/LOSS

459,330

462,797

485,136

After adding other revenue referred to at [32] above, the TB Linked Worksheet set out the following calculations of EBITDA:

Account number

Account name

Sep-22

Oct-22

Nov-22

90300

EARNINGS BEFORE INTEREST, TAX, DEP & AMOR (EBITDA)

475,881

486,407

486,321

As I have already mentioned, the TB Linked Worksheet contained no entries that resulted in any change between the calculation of EBITDA and the calculation of each of EBIT, NPBT and NPAT. Those line items of the worksheet, together with the line items for Net Profit After Lease and “Normalisations”, read as follows:

Account number

Account name

Sep-22

Oct-22

Nov-22

90500

EARNINGS BEFORE INTEREST & TAX (EBIT)

475,881

486,407

486,321

...

90799

NET PROFIT BEFORE TAX (NPBT)

475,881

486,407

486,321

...

99999

NET PROFIT AFTER TAX (NPAT)

475,881

486,407

486,321

Less

Lease of premises Marrickville

126,167

126,167

126,167

Land Tax Marrickville

9,631

9,631

9,631

Council Rates Marrickville

3,207

3,207

3,207

Total lease exp

139,005

139,005

139,005

99999

NET PROFIT AFTER LEASE

336,876

347,403

347,316

Normalisations for consideration

Allowance for 2023 price increases on print 7.3% (1 Jan)

131,663

132,026

137,532

Allowance for 2023 price reduction on paper (est 12.5%)

75,145

74,690

92,402

Allowance for premium paid for lease due to Marrickville location

63,083

63,083

63,083

Total normalisations

269,892

269,800

293,017

NORMALISED NET PROFIT

606,768

617,202

640,333

The due diligence conducted by the TMA Group was overseen by Ms Karam and took place during the period between about mid-December 2022 and about mid-February 2023, in the context of a proposed settlement date of 1 March 2023 if the Buyer proceeded with the acquisition.

It is not in dispute that, during the due diligence process, Ms Karam and her team had access to the Spotpress Seller's Microsoft Dynamics accounting system. Despite this access, it was not possible to break down the expenses of the Spotpress Seller in order to verify whether the amount of expenses allocated to what would become the Transferred Business in the TB Linked Worksheet was accurate. As stated at [30] above, I accept Ms Karam's evidence that the due diligence materials provided by the Sellers did not facilitate verification of the manner and amounts in which expenses of the Original Business had been attributed to what would become the Retained Business and to the Transferred Business. Ms Karam gave evidence in cross-examination to the effect that she was unable to verify or test the due diligence materials by speaking with staff of the Spotpress Seller's business. Ms Karam said that the TMA Entities' due diligence team was not permitted to speak to any of the staff, or attend the Marrickville premises unsupervised. I accept that evidence, which was not challenged by the cross-examiner, and which is consistent with Mr Karam's evidence that Mr John Georgantzakos asked him to agree to limit due diligence to the information that he had provided, and to hide the due diligence process from staff, customers and suppliers of the Spotpress Seller, on the basis that the business would be destroyed if they became aware of the proposed sale and if the sale did not proceed for any reason following due diligence. Throughout the due diligence process, Mr John Georgantzakos did not permit TMA Australia to speak to or conduct interviews with key staff of the Spotpress Seller's business, customers or suppliers, or to conduct a thorough investigation and review of the

Spotpress Seller's property, plant and equipment. Mr Karam was not successfully challenged on that evidence in cross-examination, and the defendants adduced no evidence to the contrary. I also accept Ms Karam's evidence that she relied upon the fact that the Spotpress Seller would warrant the accuracy and reliability of the accounts provided. That evidence is corroborated by the report that Ms Karam and her team prepared for the TMA Group board meeting on 22 February 2023, to which I refer at [54]-[65] below.

Consistently with Mr John Georgantzakos's desire for urgency expressed in his 13 December 2022 email to Ms Karam, the parties' solicitors began preparing a draft asset sale agreement and other documents to give effect to the proposed transaction while the due diligence process was underway. Mr Marc Wyld of Thomson Geer Lawyers was the solicitor acting for the TMA Entities. Mr James Frank of Frank Law was the solicitor acting for the Sellers and their related entities. Mr Wyld was assisted by Ms Stephanie Nomikos and Ms Zoe Wu at Thomson Geer. Mr Frank was assisted by Ms Cathryn Badenhorst and Mr Rhys Lyons at Frank Law. By mid-January 2023, Mr Wyld had provided a draft asset sale agreement and various other transaction documents to Mr Frank for his review and comment.

As stated at [33] above, the costs of sales recorded in the TB Linked Worksheet included an amount described as the cost of paper used.

As Ms Karam acknowledged in cross-examination, she was aware at the time of the due diligence that the Spotpress Seller had purchased a very large stock of paper to enable printing operations to continue in the event of a shortage of paper due to feared disruptions to international supply chains during the COVID-19 pandemic. Ms Karam was aware that the Spotpress Seller had recorded the value of its paper stock in the Original Business accounts based on the prices that it had paid for the paper at the time it was purchased. According to Ms Dawna Wright, a chartered accountant engaged by the plaintiffs to give evidence in these proceedings, whose evidence I discuss in more detail at [223]-[273] below, the costs of paper recorded in the Spotpress Seller's general ledger account 50101 (paper used) were lower than: (1) paper prices during the period from September to November 2022, as recorded in various documents provided to the Buyer as part of the due diligence process; and (2) the most recent prices paid by the Spotpress Seller which were used in quantifying the stock purchase price during the stocktake that the Spotpress Seller and the Buyer undertook jointly immediately after completion of the transaction on 8 March 2023 which I discuss at [136] below. Email correspondence between Ms Karam and Mr John Georgantzakos on 31 January 2023 records Mr John Georgantzakos's view that the then-current market prices for paper were "down and coming down further" and, in many cases, materially lower than the most recent price paid by the Spotpress Seller. That view is reflected in the normalising entry included in the TB Linked Worksheet allowing for an estimated 12.5% reduction in the price of paper during 2023.

Ms Karam gave evidence in cross-examination to the effect that, after entering its paper stock in its accounts based on the price it paid to purchase that paper, it was open to the Spotpress Seller to use one of several available methods of accounting for the cost of paper used in the Original Business, including the first-in-first-out, or FIFO, method. As Ms Wright explained in cross-

examination, the FIFO method calculates the cost of the paper used on the basis of the price paid to purchase the oldest material forming part of the inventory. The Spotpress Seller's general ledger account 50101 does not identify the method that was applied. In her first report, Ms Wright noted that the prices recorded in the Original Business general ledger account 50101 for paper used in September 2022, October 2022 and November 2022 were lower than the market prices for paper at those times as recorded in other materials provided to the Buyer during the due diligence process, and noted that this may reflect the use of the FIFO method to account for paper used in the accounts of the Original Business. The expert evidence has proceeded on that basis, and no party has challenged the accuracy of that assumption.

The evidence establishes that the cost of paper used recorded in general ledger account 50101 for the Original Business for each of the months of September, October and November 2022 was allocated between what would become the Transferred Business and the Retained Business by applying the revenue-based expense attribution method. This approach was taken notwithstanding that the heatset and coldset businesses use different types of paper, so that it would have been possible to calculate and record in the TB Linked Worksheet the actual cost of the paper used by what would become the Transferred Business in each of those three months, as Mr Allsop accepted in cross-examination. The approach taken assumed that the proportion of the revenue of the Original Business that was generated by the Transferred Business would be the same as the proportion of the total paper costs of the Original Business that were referable to the printing operations of the Transferred Business. As Mr Allsop accepted in cross-examination, this approach was mathematically flawed and would understate the paper use costs of what would become the Transferred Business if the paper used in the heatset printing operations of the Original Business was generally more expensive than the paper used in the coldset operations which were to be retained by the Spotpress Seller. An analysis undertaken by the plaintiffs' legal representatives of contemporaneous documents recording prices per tonne for different types of paper, and other documentary evidence identifying paper types used in the Spotpress Seller's coldset printing operations and in its heatset printing operations, demonstrates that the price per tonne was generally higher for types of paper used in heatset printing than for types of paper used in the coldset printing operations, and that the average price per tonne of all paper types used in heatset printing was approximately 22% higher than the average price per tonne of all paper types used in the coldset printing operations. I accept that analysis, which was not disputed by the defendants.

As stated at [43] above, the cost of paper recorded in the general ledger for the Original Business, from which the cost of paper recorded in the TB Linked Worksheet was extracted, was not calculated on the basis of current paper prices at that time. Paper prices in September, October and November 2022 were higher than those reflected in the cost of paper used figures in the Original Business general ledger account 50101 and in the corresponding account of the TB Linked Worksheet which attributed a percentage of those costs to what would become the Transferred Business by applying the revenue-based expense attribution method. Although the cost of paper used recorded in the TB Linked Worksheet did not reflect current paper prices as at September, October and November 2022, the TB Linked Worksheet applied at 12.5% reduction to

the cost of paper used on the basis of the projected estimated reduction to current paper prices during 2023 recorded in the normalisation entries referred to at [38] above.

The normalising entries referred to at [38] above also included a 7.3% price increase on print from 1 January 2023. The due diligence materials uploaded to the Dropbox folder included a document entitled “Executive Summary” which was addressed to Mr Karam and Ms Karam and which stated that the questions had been answered “to the best of our abilities” but outlined “a few considerations”. I assume that the questions referred to were the questions included in the due diligence questionnaires issued by Ms Karam on 1 and 2 December 2022. The “considerations” outlined in the “Executive Summary” included that:

“January price increases

All regular customers have been given notice of a 7.3% price increase effective 1 January.

TMA will receive the benefit of these price increases.

Subject to your input, it is my wish to pass increases every 1 January at the CPI rate of the previous October or November. We can discuss this at a later stage.”

On 10 January 2023, Ms Karam sent an email to Mr John Georgantzakos requesting further information that she required to verify the data and the Spotpress Seller’s current business performance as disclosed in the due diligence materials that had been provided so far, which included the TB Linked Worksheet contained in the Financials Spreadsheet. The further information requested on 10 January 2023 included current “Customer Agreements” and “Price increases passed on to the customer” for the past five years. Mr John Georgantzakos replied promptly by email that same morning that current customer agreements were “Non available for heatset”. In answer to Ms Karam’s question about “Price increases passed on to the customer” for the past five years, Mr John Georgantzakos wrote: “1 Jan 2023 @7.3% (Oct 2022 CPI). 1 Jan 2022 negotiated increases around 15-20% to all periodical customers”.

On 30 January 2023, Mr John Georgantzakos forwarded to Ms Karam a copy of an example of an email he had sent to a customer in February 2022 advising of a temporary price increase to reflect the increasing costs of paper, being the first price increase implemented by the Spotpress Seller since 2018. The email advised that the customer’s Spotpress account manager would be in touch “to explore all options available to overcome these financial challenges and ensure you meet your budgets”. Mr John Georgantzakos’s email to Ms Karam stated that the Spotpress Seller had engaged in “a lot of back and forth” with customers after sending this email “to provide financially viable options that also retained our margins”. He wrote that, in contrast: “the most recent price increase notification was a very short and brutal email. I gave them 2 months notice and a soft, CPI only increase. I believe I have submitted a sample of this to you somewhere. My thinking was to consistently do this every 1 Jan, with a prior notice every 30 October.”

Mr John Georgantzakos has admitted that:

“... the email I sent to Ms Karam on 10 January 2023 and 30 January 2023 [was] inaccurate in that [it] suggested that all customers of Spotpress Seller had received a notice of a 7.3% price increase and that I did not clarify that increase notices had only been sent to customers with recurring publications and had not been sent to customers:

- a. who were separately quoted for each individual job; or
- b. who had only recently become customers of Spotpress Seller.”

In her affidavit sworn on 27 February 2024, Ms Karam deposed that she understood the third normalisation entry in the TB Linked Worksheet referred to at [38] above – Allowance for premium paid for lease due to Marrickville location – to be an allowance for future rent expenses of the Transferred Business to be reduced by 50% if the Buyer chose to relocate the factory and business premises to a location with cheaper rent.

The parties did not enter into any agreement by the target exchange date of 31 January 2023.

The parties’ solicitors continued to prepare and negotiate the terms of draft transaction documents throughout February 2023.

Ms Karam and her team prepared a report concerning the proposed acquisition for the purpose of a TMA Group board meeting on 22 February 2023 (the TMA Board Report).

Mr Karam gave evidence under cross-examination that there were a number of reasons why the potential acquisition of the Spotpress heatset and hybrid printing business was attractive to TMA Australia. The principal reason was that the market for magazine and catalogue printing services in Australia had effectively become a duopoly between the Spotpress Seller and another company, IVE. A third printer, Ovato, had recently gone into administration and had been acquired by IVE. There was another printer in South Australia, but it was a much smaller business which did not provide significant competition for IVE and Spotpress due to its size and geographical distance from many printing clients.

The TMA Board Report stated:

“The consolidation of Ovato and IVE presents and opportunity to service the smaller customers of Ovato which would be unprofitable to IVE due to the smaller runs but will deliver a healthy margin to Spotpress.”

The TMA Board Report continued:

“The overall strategy is to create a scalable and adaptable print business in its current market segments. The industry is mature and has gone through substantial consolidation. The acquisition of the Spotpress assets is aimed at creating additional print capacity, diversify the revenue streams and increase overall TMA Group profitability.

TMA sees the following growth opportunities in the Catalogue, Commercial and Magazine segment:

Client acquisition due to the acquisition of Ovato by IVA – due to the consolidation of the market, Spotpress will take on the client base of Ovato that will be unprofitable for IVE due to the smaller runs but perfect for Spotpress.

Other publishers are expected to outsource their printing requirements to industry firms to reduce costs and capital outlays.

Synergistic benefits using TMA's Web to print services – a print-on-demand portal to enable semi-automatic printing service (Which Spotpress currently does not have).

Additional capabilities of the upgraded M600 printing press, and the new Fuji-Xerox digital press will increase volume.

Spotpress will take on the client base and workload of smaller printers who will exit the market as they struggle to complete.”

The TMA Board report reproduced the profit and loss statement for the proposed Transferred Business (which the report describes as including the heatset and hybrid components of the Original Business, but defines simply as the “Heatset Business”) for the months of September, October and November 2022 that had been presented in the TB Linked Worksheet, up to and including the Normalised Net Profit. The report set out Ms Karam's analysis of that profit and loss statement in the following terms:

“Analysis

Spotpress operates both a Heatset and Coldset division and the financial reporting for both divisions is combined in the General ledger. There is no separate Divisional reporting.

The financials provided are for the Heatset Division only. The allocation of expenses between Heatset and Coldset has been done by Spotpress.

Due to the highly unusual and limited nature of the due diligence process insisted on by Spotpress. Spotpress' Shareholders have agreed to warranty the accuracy of these numbers.

Based on the P&L provided for 3 months:

The normalised average monthly EBITDA was \$621k.

This annualises to an EBITDA of \$7.452m.”

The TMA Board Report then set out a profit and loss statement for the Transferred Business for the months of September, October and November 2022, incorporating certain adjustments which Ms Karam recommended the Board make to the “Normalised Net Profit” in the TB Linked Worksheet, namely: (1) an adjustment described as “Heatset Material from Stock take Repriced at Open PO Price or last buy price if not on order”, to which no monetary amount was ascribed; (2) an adjustment described as “Binding and Printing Services”, to which no monetary amount was ascribed; (3) reversing the normalisation entry for a 50% reduction in rental costs; and (4) increasing the amounts allowed for certain categories of expenses (the TMA Adjusted P&L).

The TMA Board Report stated that those adjustments resulted in: (1) a downgrade of normalised average monthly EBITDA from \$621,000 in the TB Linked Worksheet to \$429,268, which should be reduced further to \$373,830 to allow for seasonality; and (2) a downgrade of normalised annual EBITDA from \$7,452,000, being the figure extrapolated from the September 2022 to November 2022 period in the TB Linked Worksheet, to \$5,151,215, which should be reduced further to \$4,485,965 after allowing for seasonality.

The TMA Board Report then set out a three-year forecast for the proposed Transferred Business based on the TMA Adjusted P&L for the three-month period from September to November 2022, incorporating Ms Karam's forecasted growth in the market share of the Transferred Business and a consequential uplift in revenue which was modelled as giving rise to an increase in annualised EBITDA from \$4,952,862 in FY2024 to \$5,920,450 in FY2025 and \$6,309,457 in FY2026. Ms Karam's analysis accompanying this three-year forecast explained that:

"Since separate Divisional reporting was not provided or was able to be scrutinised between Heatset and Coldset Divisions, expenses were provided by Spotpress as a percentage of Revenue. These percentages have been applied to the forecast along with TMA's adjustments."

In support of her recommendation that the Board approve the proposed acquisition for the non-stock purchase price of \$6,000,000, Ms Karam offered the following analysis:

"Financial Analysis:

Our forecasts factors an increase in revenue over the forecasted period as the market is a duopoly with Spotpress' current market share being approx. 4%.

The consolidation of the market (OVATO acquisition by IVE), Spotpress will be able to increase market share by taking on the smaller clients of OVATO. The revenue is expected to grow steadily over the forecasted period as Spotpress gains market share in a declining market.

The forecast has been adjusted for contingent cost increases post settlement.

The Board can expect Spotpress to deliver a profit before tax (PBT) of \$1.165m for the period from March to June 2023 (expected settlement 1 March 2023).

For the financial year 2024, the board can expect a PBT of \$4.352m.

For the financial year 2025, the board can expect a PBT of \$5.320m.

The acquisition cost of \$6m represents an EBITDA multiple of 1.21 times. The purchase price of Spotpress is fair and reasonable with the EBITDA multiple within a reasonable range for a business in the declining Printing Industry.

There has been no synergistical benefits accounted in the forecast."

The EBITDA multiple of 1.21 calculated by Ms Karam appears to be based on the projected EBITDA of \$4,952,862 in FY2024 under the TMA Adjusted P&L, (being the first full financial year after completion of the proposed transaction), and is more favourable to the Buyer than the non-stock purchase price of 3 x EBITDA that TMA Australia had sought to negotiate, subject to due diligence, in the non-binding Memorandum of Understanding. [1]

At the time that they were conducting due diligence for the proposed acquisition of the Transferred Business, the TMA Entities had a contract to provide printing solutions to Australia Post, which they performed by outsourcing aspects of the work to third parties. I accept the evidence given by Mr Karam and Ms Karam under cross-examination that they did not decide to proceed with the acquisition of the Transferred Business with a view to acquiring equipment and resources that would allow the TMA Entities to print catalogues for Australia Post in-house. Mr Karam gave evidence that the Australia Post work required equipment that neither TMA Australia nor the Transferred Business owned, and that he and Ms Karam did not do any analysis before proceeding with the acquisition to determine whether or not it would be profitable to acquire the necessary additional equipment in due course in order to produce the whole of the Australia Post product in-house. Ms Karam gave evidence that she was not focused on Australia Post, and that “it made no surface in any of my due diligence or analysis”. That evidence of Mr Karam and Ms Karam is consistent with the strategic considerations discussed and the financial analysis set out in the TMA Board Report.

The TMA Group board resolved to proceed with the acquisition at its meeting on 22 February 2023.

Meeting on 7 March 2023

Following the resolution of the TMA Group board to proceed with the acquisition, the parties’ solicitors were continuing to discuss draft iterations of an asset sale agreement and various other documents to give effect to the proposed transaction. Mr Karam and Ms Karam together with Mr Wyld and Ms Nomikos of Thomson Geer attended a meeting on 2 March 2023 with Mr John Georgantzakos and Mr Dimitri Georgantzakos together with Mr Lyons of Frank Law. They discussed the latest drafts of the documents, with the exception of a lease for the Marrickville premises which was yet to be drafted, and a proposed services agreement for the Buyer to provide heatset and bindery services to the Spotpress Seller for the purpose of the Spotpress Seller servicing its coldset printing customers whose publications had heatset-printed inserts during a transitional period in which the Buyer intended to wind down its coldset printing operations. Those present at the meeting on 2 March 2023 discussed numerous changes to the documents and agreed that they should be finalised in order to be executed and exchanged at a meeting to be held at Thomson Geer’s offices at 12:00pm on 7 March 2023, with completion to occur simultaneously.

By 7 March 2023, the following transaction documents had been prepared, and the latest round of proposed amendments to some of those documents were yet to be discussed (collectively, the Transaction Documents):

an Asset Sale Agreement, which provided for the sale of the heatset and hybrid components of the Sellers' Business to the Buyer for a price of \$6,000,000, of which \$2,500,000 was payable on Completion and \$3,500,000 was the subject of vendor finance on the terms of the Loan Deed, to be repaid by the Buyer to the Sellers in monthly instalments over a period of 30 months following Completion, subject to certain adjustments to be deducted from the amount owing by the Buyer under the Loan Deed, plus an amount for stock to be agreed following a stocktake required to be carried out by the Buyer and Sellers jointly immediately after Completion;

a Loan Deed, which provided for the vendor finance referred to immediately above and pursuant to which TMA Australia (as Guarantor) and TMA Capital (as Limited Guarantor) jointly and severally guaranteed the obligations of the Buyer (as Borrower) to make the payments and perform its other obligations under the Loan Deed;

a Specific Security Agreement between the Buyer (as Grantor) and the Sellers (as Grantee) pursuant to which the Buyer granted the Sellers a security interest over the plant and equipment that was to be sold to the Buyer under the Asset Sale Agreement as security for the performance of the Buyer's obligations as Borrower under the Loan Deed;

a further Specific Security Agreement between TMA Capital (as Grantor) and the Sellers (as Grantee) pursuant to which TMA Capital granted the Sellers a security interest over the Spotpress trademark, which was to be assigned from the Spotpress Seller to TMA Capital under a Deed of Assignment to be entered into at the same time as the Asset Sale Agreement, as security for performance of TMA Capital's obligations as Limited Guarantor under the Loan Deed;

a Side Deed by which the parties agreed that a particular reduction to that part of the purchase price that was the subject of vendor finance repayable under the Loan Deed was nil, effectively overriding the clause in the Asset Sale Agreement that allowed for that reduction (the Side Deed);

a lease of the Marrickville premises from JG & DG Properties to the Buyer for a term of 3 years commencing on 7 March 2023 in registrable form (the Lease);

a Side Deed to the Lease which conferred on the Buyer (as lessee) the right to terminate the Lease on 12 months' written notice to the lessor at any time during the first year of the term, and on six months' written notice at any time thereafter (the Lease Side Deed);

a Services Agreement pursuant to which the Buyer was engaged to provide certain services to the Spotpress Seller, including "Heatset Works", on a cost-recovery basis, from the completion of the Buyer's acquisition of the Transferred Business until such time as the Spotpress Seller terminated the agreement by providing two months' written notice;

Consulting Services Agreements with each of Mr John Georgantzakos and Mr Dimitri Georgantzakos, pursuant to which each of them agreed to provide certain consulting services to the Buyer for a period of three years and six months (respectively) following completion of the Buyer's acquisition of the Transferred Business;

a licence pursuant to which the Spotpress Seller (as licensor) permitted the Buyer to occupy premises that the Spotpress Seller was sub-leasing at Kingsgrove (the Kingsgrove Licence); and various other documents connected to the Asset Sale Agreement which are not directly relevant to the issues to be determined in these proceedings.

The first draft of the Lease was prepared by Ms Badenhorst of Frank Law and sent to Mr Wyld of Thomson Geer on the evening of 2 March 2023, together with the first draft of the Lease Side Deed. Schedule 1 of the draft lease contained the following provision in clause 2:

"2. Electricity Supply

2.1 Despite any other provision of the Lease, the Lessee is not obliged to procure the provision of electricity services to the Premises.

2.2 Each month, the Lessor shall invoice the Lessee for the electricity consumed by the Lessee in the Premises during the preceding month/billing cycle at the cost price to the Lessor of such electricity.

2.3 The Lessee must pay such invoice in respect of electricity costs to the Lessor in the same manner and together with its next payment of Rent."

That draft clause is broadly consistent with the conversation that Mr Karam says Mr John Georgantzakos had earlier initiated with him about the electricity supply for the Marrickville premises. [2]

At about 8:40am on the morning of 7 March 2023, Mr Wyld circulated by email to Mr Lyons (copied to Mr Frank and Ms Badenhorst) a completion agenda for the parties to work through at the meeting later that day. Mr Wyld's email recorded the status of the various transaction documents that the parties had been negotiating. In relation to the Lease, the email stated that Thomson Geer had reviewed and discussed the draft with the Buyer and was in the process of updating the draft.

At about 9:37am on the morning of 7 March 2023, Mr Wyld sent an email to Ms Nomikos directing her to print eight copies of the marked-up versions of the Transaction Documents which were still the subject of negotiation. Those documents included the Lease.

The marked-up version of the Lease as at 7 March 2023 contained numerous marked-up amendments proposed by Thomson Geer on behalf of the TMA Entities, including an amendment to clause 2 of Schedule 1 to the first draft received from Ms Badenhorst on 2 March 2023 referred to above. Schedule 1 in the first draft had been re-numbered as Schedule 2 in the revised draft. Clause 2 of Schedule 2 had been amended as follows (bold emphasis added, underlining in original):

“2. Electricity Supply

2.1 Despite any other provision of the Lease:

2.1.1 the Lessor must at all times procure, maintain and ensure the provision of electricity services to the Premises at the cost price to the Lessor of such electricity applicable as at the Commencement Date; and

2.1.2 the Lessee is not obliged to procure the provision of electricity services to the Premises.

2.2 Each month, the Lessor shall invoice the Lessee for the electricity consumed by the Lessee in the Premises during the preceding month/billing cycle at the cost price to the Lessor of such electricity.

2.3 The Lessee must pay such invoice in respect of electricity costs to the Lessor in the same manner and together with its next payment of Rent”.

Mr Wyld did not circulate that revised draft Lease, or the most recent iterations of any of the draft Transaction Documents containing his clients’ latest proposed amendments, to Frank Law prior to the commencement of the meeting at 12:00pm on 7 March 2023.

Mr Wyld, Ms Nomikos, Mr Karam, Ms Karam, Mr Lyons, Mr John Georgantzakos, and Mr Dimitri Georgantzakos attended that meeting. There is a difference of recollection between some of those attendees who gave evidence as to whether or not a Mr Lee Barnsley, who worked for the Spotpress Seller and who was an acquaintance of Mr Karam, was also in attendance. Nothing turns on that.

It is common ground that the meeting commenced at about 12:00pm and lasted for several hours, during which time marked-up versions of the Transaction Documents yet to be finalised were displayed on a projector screen and the proposed amendments were discussed and resolved. It is common ground that the Transactions Documents displayed on the projector screen during this process included the Lease. At the conclusion of the meeting, clean copies of the Transaction Documents were prepared and executed by the parties.

I accept Mr Wyld’s evidence that he adopted his usual practice of using the “Next Change” function in Microsoft Word to move through each marked-up amendment in each Transaction Document displayed on the screen, and that he spoke to each proposed amendment as it was displayed and made final changes (which were also displayed on the screen) to reflect the outcome of the parties’ discussion of the particular amendment in the meeting. That evidence is consistent with the evidence of Mr Karam, Ms Karam, Mr Lyons, and Mr Dimitri Georgantzakos,

and was not challenged in cross-examination except insofar as it concerned the marked-up amendment to clause 2 of Schedule 2 of the Lease referred to at [72] above.

The defendants contend that Mr Wyld inadvertently failed during this process to draw to the attention of Mr John Georgantzakos, Mr Dimitri Georgantzakos, and Mr Lyons the amendment to clause 2 of Schedule 2 of the Lease that Mr Wyld had drafted shortly before the meeting on 7 March 2023, and which he had not circulated to or discussed with Ms Badenhorst or Mr Lyons prior to the meeting.

In support of that contention, the defendants rely on the evidence of Mr Dimitri Georgantzakos, Mr Lyons and Ms Badenhorst. Mr John Georgantzakos was present at the meeting, but did not give evidence.

In his affidavit sworn on 11 April 2024, Mr Dimitri Georgantzakos deposed that he did not recall any discussion about electricity charges at the meeting and that he did not agree to any changes to the Lease that involved JG & DG Properties having to bear any increase in electricity costs for the Marrickville premises. Mr Dimitri Georgantzakos deposed that he would have remembered such a significant amendment if it had been proposed, and that he would not have agreed to it.

In cross-examination, however, Mr Dimitri Georgantzakos said he had arrived at the meeting expecting to simply sign the documents and that his attention wandered during the several hours in which Mr Wyld displayed the Transaction Documents on the screen and identified the amendments which were then discussed between the parties. Mr Dimitri Georgantzakos said that Mr John Georgantzakos did all of the talking in relation to what was displayed on the screen. Mr Dimitri Georgantzakos did not participate in those discussions, and he does not recall Mr Lyons saying anything. At one point during his cross-examination, Mr Dimitri Georgantzakos said that he didn't think there were any amendments that were displayed on the screen and discussed. That was inconsistent with his own affidavit, and was plainly a lie, as the cross-examiner put to him. Mr Dimitri Georgantzakos then asserted that there were only two or three amendments, before acknowledging that Mr Wyld went through all of the contracts and spoke to the various amendments proposed as each one was displayed on the screen, briefly describing what each amendment was about. Mr John Georgantzakos spoke on behalf of the Sellers and JG & DG Properties in relation to each amendment. Mr Dimitri Georgantzakos could not remember any amendment that his brother had not agreed with. Ultimately, Mr Dimitri Georgantzakos gave evidence that he is "not aware" whether Mr Wyld failed to bring up any of the amendments on the screen, and he is "not aware" whether Mr Wyld misled him and his brother at the meeting.

I reject Mr Dimitri Georgantzakos's affidavit evidence concerning the 7 March 2023 meeting, which was exposed in cross-examination as having no basis in any recollection that he has of that meeting. I reject as untruthful his evidence in cross-examination suggesting that only two or three amendments to the Transaction Documents were discussed. Mr Dimitri Georgantzakos effectively recanted from that evidence in any event. The final iteration of his evidence of the meeting in cross-examination provides no support for the defendants' contention that the proposed amendment to the electricity supply provision in clause 2 of Schedule 2 of the Lease

was not drawn to their attention at the meeting.

Both in his affidavit and in cross-examination, Mr Lyons acknowledged that he did not have much of a memory of what happened at the meeting on 7 March 2023.

In his affidavit sworn on 3 April 2024, Mr Lyons had deposed that he recalled telephoning Ms Badenhorst during the meeting to discuss amendments that Mr Wyld had proposed to the lease, and that he recalled discussing three particular topics with Ms Badenhorst. Those topics did not include the electricity supply clause in Schedule 2 of the Lease. Mr Lyons also deposed that did not recall Mr Wyld bringing to his attention the proposed amendment to the electricity supply clause, that he would have wanted to discuss any such proposed amendment with Ms Badenhorst if it had been brought to his attention and he had no recollection of doing so, and that he would have also sought specific instructions in relation to any such proposed amendment and he had no recollection of doing so.

In cross-examination, however, Mr Lyons said that he had prepared his affidavit after trying to reconstruct for himself an understanding of the transaction as a whole. Mr Lyons recalled that Mr Wyld said during the meeting that his property partner had drafted a proposed amendment to the Lease. That was the extent of Mr Lyons' recollection of specific words being said during the meeting. He did recall that each of the Transaction Documents containing proposed amendments were brought up on the screen and that there was some discussion about them, but he had no recollection of what particular clauses were drawn to his attention during that process. Schedule 2 to the draft of the Lease discussed at the meeting contained several proposed amendments, and Mr Lyons did not recall whether Mr John Georgantzakos agreed or disagreed with those amendments. Mr Lyons gave evidence that he definitely recalled speaking with Ms Badenhorst by telephone during the meeting, but that he had no recollection (as opposed to reconstruction) of the topics he had discussed with her.

Mr Lyons' affidavit evidence to the effect that that did not recall Mr Wyld directing his attention to the electricity supply clause amendment during the 7 March 2023 meeting has no bearing on the question whether that amendment was discussed during the meeting when that affidavit evidence is understood in the context of Mr Lyons' candid evidence during cross-examination that he had no recollection of any particular proposed amendment being brought to his attention during the process of Mr Wyld displaying on screen and discussing proposed amendments to the Transaction Documents during the three-hour meeting. Similarly, Mr Lyons' affidavit evidence to the effect that he would have discussed any such amendment with Ms Badenhorst and sought instructions about it from Mr John Georgantzakos, and that he had no recollection of doing so, is irrelevant when understood in the context of his acceptance during cross-examination that he had no recollection of any of the topics that he discussed with Ms Badenhorst and no recollection of Mr John Georgantzakos's response to any of the proposed amendments. I reject the defendants' submission that Mr Lyons evidence renders it likely that the proposed amendment to the electricity supply clause was not discussed at the meeting.

Ms Badenhorst, who was not present at the meeting, deposed in her affidavit sworn on 17 April 2024 that she had ascertained from her telephone records that Mr Lyons had called her at 12:13pm and at 12:59pm on 7 March 2023. In the first call, which lasted for 24 seconds, Mr Lyons requested a copy of the floor plans for the Marrickville premises, which Ms Badenhorst emailed to him a few minutes after that call. Ms Badenhorst deposed that the second call lasted for 4 minutes and 43 seconds, that they discussed matters relating to the Lease, and that she could recall discussing during that call a proposed amendment to the definition of “outgoings” in the Lease. Ms Badenhorst deposed that she had no recollection of any discussion with Mr Lyons regarding any proposed amendment to the electricity supply clause in the Lease. Ms Badenhorst’s lack of recollection of any such discussion has no bearing on the question whether that particular amendment was brought to the attention of the persons in the meeting because Ms Badenhorst agreed in cross-examination that she had no recollection of anything that Mr Lyons said to her in their telephone conversations on that day, save that he had mentioned an amendment to the definition of “outgoings”. Ms Badenhorst has no file note of her telephone conversations with Mr Lyons.

Considered as a whole, the evidence of Mr Dimitri Georgantzakos, Mr Lyons, and Ms Badenhorst does not support the defendants’ contention that Mr Wyld inadvertently failed to bring to the attention of Mr John Georgantzakos, Mr Dimitri Georgantzakos and Mr Lyons the proposed amendment to clause 2 of Schedule 2 of the Lease during the meeting on 7 March 2023.

Ms Karam gave evidence that she recalls being taken to clause 2 of Schedule 2 during the meeting because this was the first time that she had heard that the electricity supply was to be the responsibility of the lessor, and she found that most unusual.

In his affidavit sworn on 21 June 2024, Mr Karam deposed that there was a discussion at the meeting about electricity charges in the context of amendments to the Lease, during which he understood Mr John Georgantzakos to have agreed that JG & DG Properties would charge the Buyer (as lessee) the current cost of electricity for the term of the Lease. Mr Karam deposed that he could not recall precisely what Mr John Georgantzakos had said.

In cross-examination, Mr Karam purported to give a detailed account of what had been said about the proposed amendment to the electricity supply clause at the meeting on 7 March 2023. I place no weight on that account, which I consider to be a reconstruction given Mr Karam’s sworn evidence almost one year earlier that he was unable to recall that level of detail. I do not suggest that Mr Karam’s evidence of his reconstructed memory was untruthful.

Mr Wyld deposed that he recalled discussing the proposed amendment to clause 2 of Schedule 2 with Mr John Georgantzakos, who agreed with that proposed amendment. That evidence of Mr Wyld was not successfully challenged in cross-examination, although he acknowledged that he did not recall the precise terms of that conversation.. Mr Wyld denied that his memory of displaying the schedules to the Lease on the screen during the process of discussing proposed amendments was mistaken.

I accept the evidence of Ms Karam, Mr Karam, and Mr Wyld, that the proposed amendment to the electricity supply provision in clause 2 of Schedule 2 of the Lease was discussed at the meeting on 7 March 2023 and was thereby drawn to the attention of Mr John Georgantzakos and Mr Dimitri Georgantzakos before they caused JG & DG Properties to execute the Lease at the conclusion of that meeting. The evidence of each of Ms Karam, Mr Karam and Mr Wyld on that subject corroborates the evidence of the others. Ms Karam's evidence that she recalls the discussion about the electricity supply clause because she considered it most unusual for a lessor to be taking on responsibility for the supply of electricity to the leased premises is inherently plausible. It is, indeed, most unusual for a lessor to take on that responsibility. As Mr Dimitri Georgantzakos accepted in cross-examination, it exposes the lessor to the risk of having to discharge its liability to pay the charges to the electricity supplier even if the lessee has failed to comply with its obligation under the lease to reimburse the lessor for those charges. In the absence of the amendment, the clause would have exposed the lessee to the risk of any increases in the lessor's electricity costs without the lessee having any ability to control or mitigate the circumstances that might result in such increases.

Contrary to the defendants' submissions, the unusual nature of the arrangement, and the additional risk that the proposed amendment created for the lessor if electricity prices increased, does not render it improbable that Mr John Georgantzakos was aware of and agreed to the proposed amendment in this case. As referred to earlier in these reasons, it was Mr John Georgantzakos who proposed to Mr Karam that the lessor would supply the electricity to the Marrickville premises because "[y]ou cannot buy the electricity as cheap as I can". [3] Mr Dimitri Georgantzakos gave evidence in cross-examination that the market rate at the time was 18 cents per kilowatt-hour but JG & DG Properties had an electricity supply contract at the rate of 11 cents. Mr Dimitri Georgantzakos said that it "did not make commercial sense" for JG & DG Properties to terminate that contract, and for the lessee to enter into a new contract at 18 cents.

On the basis of the evidence of Ms Karam, Mr Karam, and Mr Wyld, and in the absence of any evidence from Mr John Georgantzakos to the contrary, I find that Mr John Georgantzakos did agree to the amendment to clause 2 of Schedule 2 of the Lease after it was brought to his attention and discussed at the meeting on 7 March 2023.

I now turn to the salient terms of the Transaction Documents executed by the parties at the conclusion of that meeting.

Asset Sale Agreement

The Asset Sale Agreement between the Sellers, the Buyer and TMA Australia (as Guarantor) provided:

"2 Sale and purchase

2.1 Agreement to sell and purchase

With effect from the Completion Date the Sellers must sell and transfer to the Buyer the Assets subject to the Buyer assuming liability for the Accrued Employee Entitlements:

- (a) free of any Encumbrance (subject to clause 5(a)(ii));
- (b) for the Purchase Price (to be paid in accordance with clause 2.3); and
- (c) subject to this agreement.”

The “Assets” were defined as including:

the “Goodwill”, which was defined as the goodwill of the Sellers attaching to the “Business”, which was in turn defined as “the heatset and other printing business including all types of print but excluding newspaper print, conducted by the Sellers as at the date of this agreement”;

the “Plant and Equipment”, which was defined by reference to numbered assets identified in a valuation report prepared by Hymans Valuers & Auctioneers which was annexed to the Asset Sale Agreement as Annexure A;

the “Stock”; and

the “Customer List”, which was defined as a list containing the information requested by the Buyer in respect of each customer of the Business in the two-year period prior to the Completion Date.

The Purchase Price payable under clause 2.1 had five components, which were set out in clause 2.3 of the Asset Sale Agreement:

a “Cash Completion Payment” of \$2,500,000 which was payable to the Sellers on Completion;

a “Borrowed Completion Payment” of \$3,500,000 which was funded by a loan made by the Sellers to the Buyer under the Loan Agreement to be entered into on Completion;

the “Encumbered Stock Value” – being the aggregate value of all stock of the Business that was subject to a mortgage, charge or any other encumbrance or security interest, as determined by the parties by jointly carrying out a stocktake in accordance with clause 6 of the Asset Sale Agreement – which was payable to the Sellers two business days after they determined that aggregate value;

the “Unencumbered Stock Value” – being the aggregate value of all unencumbered stock of the Business as determined through the joint stocktake referred to immediately above – which was also payable to the Sellers two business days after the parties determined that aggregate value, but which was funded by a loan made by the Sellers to the Buyer under the Loan Agreement; and

the “Accrued Employee Entitlements” and other Purchase Price reductions set out in clause 7 of the Asset Sale Agreement which were to be deducted from the amount owing under the Loan Agreement in accordance with clause 7.4 of the Asset Sale Agreement.

As I have already mentioned, the parties had agreed upon simultaneous exchange and completion of the Transaction Documents. Accordingly, the Asset Sale Agreement defined the “Completion Date” as the date of the agreement.

Clause 5 of the Asset Sale Agreement provided:

“5 Fundamental Seller Obligations

- (a) The Sellers must, prior to or as soon as is reasonably practicable after Completion and in no event later than the Sunset Date:
 - (i) without limiting clause 9, procure the assignment or novation of all Contracts the Buyer requires to be novated or assigned on terms acceptable to the Buyer (acting reasonably); and
 - (ii) procure the repayment of all remaining Stock Debt and the release of all Deferred Encumbrances over the Assets.
- (b) If any Asset remains encumbered as at the Sunset Date, the Buyer may by notice in writing to the Sellers:
 - (i) exclude that Asset from the sale contemplated in this agreement; and
 - (ii) deduct the value of that Asset from the Purchase Price (Encumbered Asset Deduction). The Encumbered Asset Deduction will be made in accordance with clause 7.4.”

The “Sunset Date” was defined as nine months after the Completion Date.

Clause 6 of the Asset Sale Agreement required the Sellers and the Buyer to carry out a stocktake of all Stock commencing at 6:00am on the day following the Completion Date, and to jointly prepare a statement setting out specified matters, including a description of all Stock, and the value of each item of Stock determined on the basis of the most recent price paid by the Sellers for the relevant grade of stock (excluding GST).

Clause 8.1(a) of the Asset Sale Agreement required the Buyer to procure Spotpress Web Pty Limited (defined as the “Employing Entity”) to make offers of employment to each of the “Employees” – defined as “each of the employees that are engaged for the operation of the Business” as at the date of the Asset Sale Agreement, as listed in Schedule 2 – on terms “no less favourable than their current terms and conditions of employment”.

In respect of those Employees who accepted the Buyer’s offer under clause 8.1(a) (defined as the “Transferring Employees”), clause 8.2(a) required the Sellers to accept their resignation with effect on Completion, and to release them from their employment with the Sellers (defined as the “Transfer Date”).

Clause 8.3 required the Sellers to pay to each Transferring Employee all wages, salaries and other remuneration or allowances (excluding annual leave and long service leave entitlements) accrued as at the Transfer Date, and to provide to the Buyer all payroll and personnel records of the Transferring Employee.

Clause 8.4 provided:

“The Buyer agrees to procure that the Employing Entity recognises and assumes Prior Service and becomes solely responsible for all accrued and untaken or pro rata entitlements of each Transferring Employee and Additional Transferring Employee for annual leave (including loading), long service leave and personal/sick leave as at the Employee Transfer Date or the Transfer Date (whichever is applicable).”

The Asset Sale Agreement defined “Prior Service” as meaning the period of service which a Transferring Employee “has had with the Sellers immediately before and continuous with the commencement of employment with the Buyer”.

The Asset Sale Agreement defined “Accrued Employee Entitlements” as meaning:

“Accrued Employee Entitlements means all unpaid amounts accrued in the Sellers’ accounts or which under the Accounting Standards should be accrued in the Sellers’ accounts as at the Employee Transfer Date for each Transferring Employee in respect of any unpaid annual leave, annual leave loading, long service leave and any accrued but unpaid personal, carer or sick leave as at the Employee Transfer Date and for each Additional Transferring Employee in respect of any unpaid annual leave, annual leave loading, long service leave and any accrued but unpaid personal, carer or sick leave as at the Transfer Date;”

As I have already mentioned, clause 7.1 of the Asset Sale Agreement provided for those Accrued Employee Entitlements to be deducted from the amount owing by the Buyer under the Loan Agreement.

Schedule 2 to the Asset Sale Agreement entitled “Employees” did not contain a list of Employees as envisaged in the definition of that term referred to at [103] above and as envisaged in the Schedule to the Asset Sale Agreement which included a warranty by the Seller that Schedule 2 set out a complete list of all Employees as at the date of the Asset Sale Agreement with materially accurate details of their remuneration, job title or function, period of continuous service, and other details relating to their employment. Schedule 2 to the Asset Sale Agreement executed by the parties on 7 March 2023 stated: “To be agreed between the parties as expeditiously as possible following the date of this agreement.”

The plaintiffs contend, and the defendants ultimately accepted in closing submissions, that the parties reached agreement on the list of Employees to be included in Schedule 2 after completion of the Asset Sale Agreement on 7 March 2023, and that the Buyer is entitled to deduct from the amount owing under the Loan Deed the Accrued Employee Entitlements of those employees of the Spotpress Seller and Real Media who commenced employment with the Buyer at that time. There is no longer any dispute that the Buyer is entitled to deduct from the amount owing under the Loan Deed the sum of \$1,221,972.05 in respect of Accrued Employee Entitlements.

Clause 7 of the Asset Sale Agreement provided for two other deductions from the amount owing by the Buyer under the Loan Agreement: (1) an amount equal to three times any amount by which the average annual EBITDA over the period of two years after Completion fell short of

\$2,000,000 (clause 7.2, referred to by the parties as the EBITDA Reduction); and (2) the cost to the Buyer of replacing any software licences and subscriptions for the pre-press software and for the software used to run the Plant and Equipment that were not transferred to the Buyer by the Sunset Date (clause 7.3).

The effect of the EBITDA Reduction clause in the Asset Sale Agreement was wholly negated by the Side Deed which the parties executed on the same date as the Asset Sale Agreement, but which was held in escrow for a period of six months. Clause 2 of the Side Deed provided that the EBITDA Reduction was nil.

Each of Mr Karam and Ms Karam gave evidence in cross-examination to the effect that the EBITDA Reduction was included in the Asset Sale Agreement on the recommendation of the debt advisor to the TMA Group. The TMA Group had financing arrangements in place with Australia and New Zealand Banking Group (ANZ) which required the TMA Group to obtain ANZ's consent to any arrangement under which a TMA Group entity became indebted to a third party. The Buyer therefore required ANZ's consent to enter into the Loan Deed under which it would borrow from the Seller the majority of the Purchase Price payable under the Asset Sale Agreement. Consistently with the Sellers' position recorded in the Memorandum of Understanding that they would not be subject to performance metrics, the Sellers declined to agree to the EBITDA Reduction. The Buyer then proposed, and the Sellers agreed, to include the EBITDA Reduction in the Asset Sale Agreement but to enter into a Side Deed that would negate its effect. As Ms Karam accepted in cross-examination, the Side Deed was held in escrow for a period of six months because this was seen by the Buyer at the time as a means of justifying withholding the existence of the Side Deed from ANZ. The TMA Group's debt consultant presented the proposed transaction to ANZ as including the EBITDA Reduction provision for reducing the Purchase Price if the Transferred Business failed to achieve average annual EBITDA of \$2,000,000 over the first two years following Completion.

Clause 13 of the Asset Sale Agreement provided:

"13 Seller Warranties and indemnities

13.1 Seller Warranties

The Sellers each represent and warrant to the Buyer that each of the Seller Warranties is true and accurate and not misleading at the date of this agreement and as at Completion by reference to the facts and circumstances then existing.

13.2 Reliance

The Sellers each acknowledge that the Buyer has entered into this agreement and will complete this agreement in reliance on the Sellers Warranties.

13.3 Application of Seller Warranties

Each of the Seller Warranties:

- (a) remains in full force after Completion; and
- (b) is separate and independent and not limited or restricted by any other Seller Warranty or provision of this agreement; and
- (c) will not merge on Completion.

13.4 Disclosure of breach

The Sellers must disclose to the Buyer in writing, promptly upon any of them becoming aware of the same, full details of any fact, matter, event or circumstance which does or might constitute a breach of any of the Seller Warranties.

13.5 Indemnity for breach of Seller Warranty

- (a) The Sellers each indemnify the Buyer against, and must pay the Buyer an amount equal to, any Loss suffered or incurred by the Buyer or any of its Related Bodies Corporate in connection with a breach of a Seller Warranty given by the Sellers, or arising from the facts, matters or circumstances that make a Seller Warranty given by the Sellers false, misleading or incorrect.
- (b) Any reference in this agreement to a Claim arising from a breach of Seller Warranty includes a Claim under the indemnity in this clause 13.5.

13.6 Specific indemnities

The Sellers agrees [sic] to indemnify the Buyer against, and must pay the Buyer an amount equal to, any Loss suffered or incurred by the Buyer in connection with:

- (a) any Claim by any party to ownership of any of Assets as at or in respect of the period prior to Completion;
- (b) all Encumbrances over any Asset not being properly discharged in full on or prior to Completion;
- (c) a Claim by a contractor, consultant or any other person who was engaged by the Seller or has provided services to a Seller prior to Completion that such person is or was for any or all employment related benefits, entitlements and other purposes an employee of the Sellers or the Business in respect of the period prior to Completion; and
- (d) any Claim by any counterparty to a contract, arrangement or understanding to which a Seller is party in respect of any fact, matter or circumstance which arose prior to Completion and in respect of which the Sellers' insurance is sufficient or inadequate to satisfy such Claim (in full or in part)."

The Seller Warranties were set out in Schedule 1 to the Asset Sale Agreement, including the following warranties in items 3.1 to 3.3:

"3 Accounts and Management Accounts

3.1 The Accounts:

- (a) give a true and fair view of:
 - (i) the financial position and state of affairs of the Business and the Assets as at their respective Accounts Date; and
 - (ii) the financial performance of the Business for the 1-month period ended on the relevant Accounts Date;
- (b) contain proper and adequate provisions for and disclosure of all liabilities (actual, prospective and contingent) of the Businesses as at the relevant Accounts Date; and
- (c) are not affected by any unusual, abnormal, extraordinary, exceptional or non-recurring items.

3.2 All documents disclosed in the data room including supporting data used to validate the Accounts in the month periods referred to in clause 3.1(a)(ii) give a true and fair view of the financial performance of the Business.

3.3 The Management Accounts have been prepared with due care and attention and show with material accuracy and with no material omissions the state of affairs, profit or loss of the Business as at the date, and for the period in respect of which, they have been prepared.”

It will be recalled that the Asset Sale Agreement defined “the Business” as “the heatset and other printing business including all types of print but excluding newspaper print, conducted by the Sellers as at the date of this agreement”.

The “Accounts” were defined as “each of the management accounts of the Business for the months September 2022, October 2022, November 2022 and December 2022”. The “Accounts Date” was defined as “30 September 2022, 31 October 2022, 30 November 2022 and 31 December 2022”.

The “Management Accounts” were defined as “the monthly management accounts of the Sellers for each month during the 5 year period ending 31 December 2022”.

The Seller Warranties also included the following warranty in item 5.1 of Schedule 1 to the Asset Sale Agreement:

“5.1 The Assets comprise all of the assets used by the Sellers in the Business and are the only assets reasonably necessary for the conduct and operation of the Business as currently carried on.”

It will be recalled that the Assets were defined as including the Plant and Equipment itemised in the valuation report prepared by Hymans Valuers & Auctioneers in Annexure A to the Asset Sale Agreement (the Hymans Report). The Hymans Report contained a list of 218 items of plant and equipment, stock and software. The itemised plant and equipment did not include the following assets of the Spotpress Sellers:

a Wohlenberg Guillotine;
a Shoei Machinery Folder;
a Rima Crash Folder; and
a Rima Stacker.

There is a dispute between the parties about whether those four items of equipment were reasonably necessary for the conduct and operation of the Transferred Business as carried on when the Asset Sale Agreement was entered into.

Clause 18.5 of the Asset Sale Agreement provides:

“The Sellers acknowledge and agree that the Buyer may set off and deduct any amounts owing by the Sellers to the Buyer under this agreement from any amounts owing by the Buyer to the Sellers under the Related Agreements.”

The term “Related Agreements” is defined as including the Loan Deed.

Loan Deed

The Loan Deed between the Sellers (as “Lender”), the Buyer (as “Borrower”), TMA Australia (as “Guarantor”) and TMA Capital (as “Limited Guarantor”) provided for vendor finance in respect of the \$3,500,000 “Borrowed Completion Payment” component of the Purchase Price payable under the Asset Sale Agreement. [4] TMA Australia (as Guarantor) and TMA Capital (as Limited Guarantor) jointly and severally guaranteed the obligations of the Borrower to make the payments and perform its other obligations under the Loan Deed.

Clause 4.1 of the Loan Deed provided that the amount owing was payable by the Borrower to the Lender in two series of monthly instalments (referred to as Tranche 1 and Tranche 2). However, the commencement date for repayments for each tranche was to be deferred if the Sellers had not discharged the Fundamental Seller Obligations by the time the Borrower would otherwise have been obliged to make the first payment for the relevant tranche. If the Sellers had not discharged the Fundamental Seller Obligations by the Sunset Date, the Borrower was entitled to suspend all payments under the Loan Deed until such time as those Fundamental Seller Obligations were discharged. The Fundamental Seller Obligations are the obligations under clause 5 of the Asset Sale Agreement referred to at [100] above.

Clause 4.3 of the Loan Deed records the parties’ agreement that specified amounts, including the Accrued Employee Entitlements, are to be deducted from the Tranche 1 payments.

Clause 4.6 of the Loan Deed permits the Borrower to set-off against payments otherwise required under the Loan Deed any amounts owing by the Sellers to the Buyer under the Asset Sale Agreement. Clause 4.6 refers to clause 15.5 of the Asset Sale Agreement as the source of the Buyer's right of set-off. It is common ground between the parties that this is an error and that clause 4.6 of the Loan Deed should be rectified by substituting a reference to clause 18.5 of the Asset Sale Agreement.

Lease

Pursuant to the Lease, JG & DG Properties granted the Buyer a lease of the Marrickville premises for a term of 3 years commencing on 7 March 2023. As I have mentioned earlier in these reasons, the Lease Side Deed entitled the Buyer (as lessee) to terminate the Lease on 12 months' written notice to the lessor at any time during the first year of the term, and on six months' written notice at any time thereafter.

The Lease included the electricity supply clause in the amended form agreed at the meeting on 7 March 2023. It will be recalled that the clause was in the following terms:

"2. Electricity Supply

2.1 Despite any other provision of the Lease:

2.1.1 the Lessor must at all times procure, maintain and ensure the provision of electricity services to the Premises at the cost price to the Lessor of such electricity applicable as at the Commencement Date; and

2.1.2 the Lessee is not obliged to procure the provision of electricity services to the Premises.

2.2 Each month, the Lessor shall invoice the Lessee for the electricity consumed by the Lessee in the Premises during the preceding month/billing cycle at the cost price to the Lessor of such electricity.

2.3 The Lessee must pay such invoice in respect of electricity costs to the Lessor in the same manner and together with its next payment of Rent."

Services Agreement

Under the Services Agreement, the Spotpress Seller engaged the Buyer to provide certain services, including "Heatset Works", on a cost-recovery basis, from the completion of the Buyer's acquisition of the Transferred Business until such time as either party terminated the agreement by providing two months' written notice.

Consulting Services Agreements

As I have already mentioned, the Transaction Documents executed on Completion included Consulting Services Agreements between the Buyer (as the principal) and each of Mr John Georgantzakos and Mr Dimitri Georgantzakos (as consultant).

Pursuant to the Consulting Services Agreement entered into with Mr John Georgantzakos, the Buyer engaged him to provide management and consulting services in relation to the Transferred Business as reasonably requested by the Buyer for a term of three years after Completion.

Clause 15.4 of the Consulting Services Agreement restrained Mr John Georgantzakos from, inter alia, interfering directly or indirectly with the relationship between the business of the Buyer and its customers, including by soliciting or enticing any of those customers away from the Buyer.

Completion

Completion occurred simultaneously with the execution of the Transaction Documents on 7 March 2023. The Buyer paid the Cash Completion Payment component of the Purchase Price to the Sellers by depositing the sum of \$2,500,000 into Frank Law's trust account on that date.

Stocktake

The parties carried out a stocktake on 8 March 2023 in accordance with clause 6 of the Asset Sale Agreement. Warehouse stock of 2,327 tonnes of heatset paper was valued at \$3,771,685.08. Additional heatset paper that the Spotpress Seller had ordered and paid for but not yet received was valued at \$311,708.89. Thus, the total value of the heatset paper stock determined in accordance with clause 6 was \$4,088,393.97.

Transfer of the heatset printing operations

It is not in dispute that the Spotpress Seller transferred the heatset printing component of the Transferred Business to the Buyer, and the Buyer took over the heatset printing work and received the revenue generated by that work, on and from Completion.

According to Ms Karam's evidence, the Buyer operated the Business in substantially the same way that it had been operated by the Spotpress Seller prior to Completion, save for introducing new internal reporting requirements to ensure accurate stocktaking and enhanced visibility over production, by outsourcing certain small printing services to Impress Colour Pty Limited (a subsidiary of the TMA Group) at the same rates at which those services had been outsourced to third parties prior to Completion, and by acquiring a new piece of equipment known as a "Perfect Binder" in accordance with a recommendation made by Mr John Georgantzakos during the diligence process. The Perfect Binder was installed in the Marrickville premises and commissioned in February 2024.

The defendants adduced evidence from Mr Kieran Mannix and Mr Franco Zarfati about the manner in which the Transferred Business was operated by the Buyer after Completion.

Mr Mannix was initially employed as a sales manager by the Spotpress Seller in 2015 before being appointed as its production manager in 2019. After Completion in March 2023, Mr Mannix continued to be employed by the Spotpress Seller in a role that required him to assist in the transition of the Transferred Business to the Buyer by providing production management for both the coldset and heatset printing operations. Mr Mannix carried out this role at the Marrickville premises until about November 2023.

Mr Mannix gave evidence of changes that he says he observed the Buyer introduced to the internal processes and systems for invoicing, quoting, customer credit applications, and creation of purchase orders, which he says adversely affected the morale of employees. Mr Mannix also gave evidence that he observed problems and delays to production processes which he attributes to suppliers not being paid on time. Mr Mannix gave only one example of such a delay which involved halting production for 24 hours.

Mr Zarfati was employed as a sales manager by the Spotpress Seller in 2019. His employment transferred to the Buyer on Completion and he continued in the role of sales manager until the Buyer terminated his employment in June or July 2023. Mr Zarfati sworn an affidavit on 8 August 2024 in which he complained that Mr Tyrone O'Neill – the Buyer's General Manager, Sales – did not ever provide him with sales leads in relation to prospective customers, that Mr O'Neill failed to arrange daily informal catch-ups, formal one-on-one sales meetings to discuss new leads and prospective deals, or strategy meetings with the entire sales team. Mr Zarfati also complained that Mr O'Neill made it difficult for him to close deals because he often took more than a week to respond to his requests for information that he needed in order to answer questions raised by prospective customers about pricing and other matters.

Mr O'Neill gave evidence disputing these allegations by reference to numerous contemporaneous documents.

Mr Zarfati's complaint about Mr O'Neill never providing him with sales leads was demonstrated in cross-examination to be false. Mr Zarfati was shown a number of contemporaneous emails from Mr O'Neill referring leads to Mr Zarfati.

The cross-examination of Mr Zarfati also revealed that, in complaining about a lack of "informal catch-ups" and other meetings with Mr O'Neill, Mr Zarfati had failed to disclose that he was frequently working from Thailand or Europe.

I prefer the evidence of Mr O'Neill to the evidence of Mr Zarfati. I formed the impression based on Mr Zarfati's demeanour and tone during his cross-examination that, as the cross-examiner put to him, his complaints about Mr O'Neill were affected by the bitterness that he feels towards him as a result of Mr O'Neill having terminated his employment with the Buyer. I did not find Mr Zarfati's denial of that proposition to be convincing.

Ms Karam acknowledged under cross-examination that changes had been made to internal systems and processes, including by modifying pricing controls in the estimation system in line with inflation, introducing new customer credit application forms for credit applications to be made to the Buyer entity that was now operating the business, and requiring any rebates or refunds to customers to be signed off by Mr Karam (as opposed to Mr John Georgantzakos). Ms Karam was not aware that any of these changes had adversely affected relationships with customers, or staff morale. Ms Karam denied that the staff turnover in the period following Completion was higher than is normal for a printing business with a high proportion of unskilled, low-paid employees. Ms Karam acknowledged that ink supplies might have run low on occasions after Completion, but said that she was not aware of any instance in which production had halted.

In any event, the defendants did not submit that any of the issues raised by Mr Mannix had materially affected the financial performance of the Transferred Business in the period after Completion. Nor did the defendants adduce any evidence that would have been capable of supporting such a submission.

Sellers' failure to transfer specific assets to the Buyer

It will be recalled that the Assets that the Sellers were required to transfer to the Buyer on Completion under clause 2.1 of the Asset Sale Agreement included Plant and Equipment identified in Annexure A, and that the Seller Warranties in clause 13 of the Asset Sale Agreement included the warranty in clause 5.1 of Schedule 1 that those Assets: (1) comprise all of the assets used by the Sellers in the Business; and (2) are the only assets reasonably necessary for the conduct and operation of what was to become the Transferred Business, as carried on as at the date of the Asset Sale Agreement. [5]

It is common ground between the parties that the Assets transferred by the Sellers to the Buyer under the Asset Sale Agreement did not include:

a Wohlenberg Guillotine;

a Shoei Machinery Folder;

a Rima Crash Folder; and

a Rima Stacker referred to as "the New Stacker".

The plaintiffs contend that those disputed items of equipment were in fact used by the Spotpress Seller in the conduct of what was to become the Transferred Business, save for the New Stacker which was purchased in December 2022 and had not been used prior to completion of the Asset Sale Agreement. The plaintiffs contend that the New Stacker was reasonably necessary for the conduct and operation of the Transferred Business as at the date of the Asset Sale Agreement.

The defendants contend that none of the disputed items of equipment was indispensable to the conduct and operation of the Transferred Business, and that they were therefore not “necessary” for the conduct and operation of that business as at the date of the Asset Sale Agreement. The defendants’ submissions did not address the question raised by the first element of the Sellers’ Warranty in clause 5.1 of Schedule 1 to the Asset Sale Agreement - namely whether any of the disputed items was in fact used in the Transferred Business as at the date of the Asset Sale Agreement. Nor did they not address the question whether the disputed items were reasonably necessary for the conduct and operation of the Transferred Business.

In relation to the Wohlenberg Guillotine, Mr Mannix gave evidence under cross-examination that the Business used two Heidelberg M600 printers which were dedicated to heatset printing. A VITS sheeter attachment installed on one of those M600 printers enabled heatset printing of large, flat, sheets. That VITS sheeter fed into the Wohlenberg Guillotine, which was manually operated to cut or trim the heatset printed paper to the size required for the particular printing job.

Ms Karam gave evidence in her affidavit sworn on 23 February 2024 that the Wohlenberg Guillotine has typically been in use in the Buyer’s printing production process for between six and ten hours per day in the period since Completion. Without the Wohlenberg Guillotine, the Buyer would need to either replace it with equivalent new equipment (which Ms Karam understands could take months to source, order and take delivery of). In the meantime, the Buyer would need to send cutting work out to another company, which would increase the time taken to complete printing jobs, increase the costs of the production process, and reduce the profit margin of the Transferred Business.

The defendants did not challenge these aspects of Ms Karam’s evidence in cross-examination. The cross-examiner elicited evidence from Ms Karam that the TMA Group subsidiary Impress Colour Pty Ltd has a guillotine. The cross-examiner also put to Ms Karam that she had said during a “tour” of the factory at the Marrickville premises during the due diligence process that the Buyer did not need the Wohlenberg Guillotine. Ms Karam denied having been given any tour of the factory during which she was shown pieces of equipment, and gave evidence that she did not have any recollection of saying that the Buyer did not need the Wohlenberg Guillotine. I accept Ms Karam’s evidence, in the absence of any evidence to the contrary adduced by the defendants.

On the basis of the evidence of Mr Mannix and Ms Karam, I find that the Wohlenberg Guillotine is one of the assets that was used in the Transferred Business as at the date of the Asset Sale Agreement, that it was reasonably necessary for the conduct of that business at that time, and that it continues to be reasonably necessary for the conduct of the Transferred Business.

Mr Mannix gave evidence under cross-examination that, where heatset printing is done on large flat sheets using an M600 printer with the VITS sheeter attachment, the Shoei Machinery Folder and Rima Crash Folder are used to fold the printed flat sheets (after they have been cut to size by the Wohlenberg Guillotine) if folding is required for the particular job.

Ms Karam gave evidence to the same effect as Mr Mannix about the role of the Folders in the production process in her affidavit sworn on 23 February 2024. Ms Karam deposed that, without the Folders at the Marrickville premises, the Buyer would need to replace them with equivalent new equipment, which she understands would be costly and time-consuming, as the equipment would need to be sourced from overseas. In the meantime, the Buyer would need to send flat sheets out to another company for folding, which would increase the time taken to complete printing jobs, increase the costs of the production process, and reduce the profit margin of the Transferred Business.

Again, the defendants did not challenge these aspects of Ms Karam's evidence in cross-examination. The cross-examiner elicited evidence from Ms Karam that the TMA Group subsidiary Impress Colour has Folders. The cross-examiner also put to Ms Karam that she had said during a "tour" of the factory at the Marrickville premises during the due diligence process that the Buyer did not need the Folders. Ms Karam denied having taken any such tour, and did not recall saying that the Buyer did not need the Folders. I accept Ms Karam's evidence, in the absence of any evidence to the contrary adduced by the defendants.

On the basis of the evidence of Mr Mannix and Ms Karam, I find that the Shoei Machinery Folder and Rima Crash Folder are assets that were used in the Transferred Business as at the date of the Asset Sale Agreement, that they were reasonably necessary for the conduct of that business at that time, and that they continue to be reasonably necessary for the conduct of the Transferred Business.

Mr Mannix gave evidence under cross-examination that the final stage of the printing production process is the stacking, counting, turning and bundling of the complete printed products. The Transferred Business used at least two Rima Stackers for that part of the process (which the plaintiffs refer to as running Stackers). Mr Mannix believed that there was also a third Stacker ready to deploy in case one of the two running Stackers broke down or required maintenance. If a running Stacker breaks down or requires maintenance, the production process may be delayed if there is no back-up Stacker that can be deployed.

Mr Fraz Mohammad, a production manager previously employed by the Spotpress Seller and now employed by the Buyer, gave evidence that three Stackers have always been used in the heatset printing operations at the Marrickville premises. The running Stackers run for about 24 hours a day, five days a week, and require maintenance or repairs about once a month on average. If the repairs are unable to be conducted promptly using the stock of spare parts on site, the production process will be delayed unless a back-up Stacker is able to be deployed. Mr Mohammad identified a third Stacker that was included in the Assets transferred to the Buyer on Completion, but deposed that this third Stacker is inoperable. Mr Mohammad was not required for cross-examination.

Contemporaneous documents show that the Spotpress Seller purchased the New Stacker in December 2022 for use in conjunction with its M600 printing presses – the presses dedicated exclusively to heatset printing according to Mr Mannix's evidence referred to above.

On the basis of that contemporaneous documentary evidence and the evidence of Mr Mannix and Mr Mohammad, I find that the New Stacker was reasonably necessary for the conduct of the Transferred Business as conducted as at the date of the Asset Sale Agreement, having been ordered to replace an existing Stacker that was inoperable.

Sellers' failure to transfer the hybrid business to the Buyer and services provided by the Buyer to the Spotpress Seller under the Services Agreement after Completion

By the conclusion of the hearing, it was common ground that the Sellers were obliged to transfer the hybrid business to the Buyer, and that they failed to do so because the Spotpress Seller continued to service customers requiring hybrid printing work by outsourcing the heatset components to the Buyer under the Services Agreement and paying the Buyer for that work. The Buyer initially performed that work at cost, but the Buyer accepted a proposal from the Spotpress Seller in September 2023 that it should charge the Spotpress Seller a 25% mark-up on its cost of performing the work, including charging an additional 25% retrospectively for work already done and invoiced. Ms Karam gave evidence that, at the time, she did not realise that the work the Buyer was doing under this arrangement was work that it should have been doing on its account as part of the hybrid business. With the exception of those payments to the Buyer, the Spotpress Seller retained for itself the whole of the revenue from hybrid printing jobs. The defendants did not challenge Ms Wright's evidence estimating the quantum of the profit margin lost to the Buyer on hybrid printing jobs by reason of the Sellers' failure to transfer the hybrid business as \$400,000 per annum, or her evidence estimating the total value of that lost margin as \$600,000. [6]

It was also common ground by the conclusion of the hearing that the Spotpress Seller had not paid certain invoices issued by the Buyer to the Spotpress Seller under the Services Agreement. By the commencement of the hearing, the Spotpress Seller accepted that it was liable to pay invoices totalling \$245,168.34, but disputed that it was liable to pay the remaining invoices. The disputed unpaid invoices at the commencement of the hearing fell into the following categories, of which all had been resolved by the end of the hearing save for three invoices in the fourth category below:

Category 1 – invoices totalling \$92,760.87 issued to backdate the 25% mark-up on heatset work already performed and charged for at cost by the Buyer for hybrid jobs prior to September 2023;

Category 2 – invoices totalling \$214,763.64 issued for heatset work performed by the Buyer for hybrid jobs from September 2023, including a 25% mark up on the cost of the Buyer of performing that work;

Category 3 – invoices totalling \$16,540.37 for shared labour; and

Category 4 – invoices totalling \$2,714.61 for shared services.

January 2023 price increase of 7.3% not passed on to all customers

In her affidavit sworn on 27 February 2024, Ms Karam deposed that, in the course of investigating why the profits for the Transferred Business were lower than the profits she had forecast, she discovered in about July 2023 that Mr John Georgantzakos had not increased the prices for all customers by 7.3% with effect from 1 January 2023, contrary to her understanding during the due diligence process. [7]

Ms Karam's evidence of her understanding that the 7.3% price increase had been passed onto all customers with effect from 1 January 2023 was not challenged in cross-examination. Ms Karam's understanding was entirely consistent with the terms of the emails that Mr John Georgantzakos sent to Ms Karam on 10 January 2023 and 30 January 2023, with the admission made by Mr John Georgantzakos that is referred to at [50] above, and with the fact that normalisation entry for the 7.3% price increase in the TB Linked Worksheet referred to at [38] above had been calculated as a 7.3% increase in total print sales revenue for what would become the Transferred Business.

In her affidavit sworn on 27 September 2024, Ms Karam gave detailed evidence explaining analysis undertaken by her and her staff to ascertain which customers of the Transferred Business had been the subject of a price increase with effect from January 2023. The results of that analysis, and the underlying source data, are presented in a spreadsheet exhibited to Ms Karam's affidavit and tendered in electronic form.

Ms Karam's price increase analysis was not the subject of cross-examination. The defendants did not offer any competing analysis. In closing submissions, the defendants erroneously submitted that the data underlying the price increase analysis was not in evidence. The underlying data is embedded in the electronic price increase analysis spreadsheet exhibited to Ms Karam's 27 September 2024 affidavit. The defendants also submitted that the price increase analysis relied on a "unit price" methodology that was "not necessarily accurate". That submission carries no weight. The defendants adduced no evidence to support that submission, and the alleged potential inaccuracy was not put to Ms Karam in cross-examination.

Ms Karam gave evidence in her affidavit sworn on 27 September 2024 that, when considering the purchase of any business, she considers the normalised net profit to be the best indicator of the forward-looking profitability of the business and that, in her mind, there is a correlation between normalised net profit and the purchase price. Ms Karam deposed that, if she had ascertained before entering into the Asset Sale Agreement that the 7.3% price increase was not to be passed on to all customers from January 2023, this would have reduced her assessment of the normalised net profit of the Transferred Business and she would have sought to negotiate a reduction of approximately \$260,000 to the purchase price, reflecting the revenue that she has now ascertained through her price increase analysis was lost to the Transferred Business as a result of the 7.3% price increase being imposed on only some customers. This evidence was not the subject of any cross-examination.

Release of the Side Deed from escrow

The Side Deed was released from escrow six months after completion on 7 September 2023.

Mascot premises

It will be recalled that the Transaction Documents executed on 7 March 2023 included the Kingsgrove Licence, pursuant to which the Spotpress Seller (as licensor) permitted the Buyer to occupy premises that the Spotpress Seller was sub-leasing at Kingsgrove.

Ms Karam gave evidence to the effect that Mr John Georgantzakos discussed with her prior to Completion the possibility of cost savings to be achieved by not renewing the Spotpress Seller's lease of the Kingsgrove premises (which was due to expire on 30 June 2023) and renting cheaper alternative premises. According to Ms Karam, she had a further conversation with Mr John Georgantzakos in early May 2023 in which he told her that he had found alternative premises at Mascot and she agreed with his proposal that the Buyer take a seven-month lease of those premises until the end of December 2023, on the basis that the Spotpress Seller would occupy one-third of those premises and pay one-third of the rent. Senior counsel for the defendants conceded in closing submissions that contemporaneous documentary evidence renders it far more likely than not that an oral agreement on those terms was made in May 2023, and I find that the agreement was made.

The Buyer then signed a lease of the Mascot premises on 11 May 2023 for a term commencing on 1 June 2023 and expiring on 31 December 2023. The stock that the Buyer and the Spotpress Seller had been storing at the Kingsgrove premises was transported to the Mascot premises.

The Spotpress Seller paid its agreed one-third share of the Mascot premises rent for June and July 2023, but ceased making any contribution to the rent thereafter.

The Buyer arranged to hold over in the Mascot premises during January and February 2024. Both the Buyer and the Spotpress Seller stored material at the Mascot premises during that period.

As the plaintiffs submitted, the Spotpress Seller's unpaid one-third share of the rent for the Mascot premises for the period from August 2023 to February 2024 amounts to the sum of \$77,000 (including GST).

Buyer alleges that the Sellers have breached warranties

On 8 November 2023, the Buyer's solicitors wrote to the Sellers' solicitors alleging that the Sellers had breached the Seller Warranties in clause 3 of Schedule 1 to the Asset Sale Agreement by understating several categories of expenses of the Transferred Business, stating that the Sellers were liable to indemnify the Buyer for the losses that it had incurred in connection with the alleged breaches of warranty in an amount that the Buyer would calculate and notify to the Sellers in due course, and asserting an entitlement to set off that amount against amounts owing by the Buyer under the Loan Deed. The letter also alleged that the Spotpress Seller was indebted to the Buyer for unpaid invoices that the Buyer had issued under the Services Agreement.

The plaintiffs commenced these proceedings on 29 November 2023.

Failure to procure releases of Deferred Encumbrances prior to the Sunset Date

The Sunset Date under the Asset Sale Agreement expired on 7 December 2023, being nine months after Completion.

As was properly conceded by senior counsel for the defendants in closing submissions, the Deferred Encumbrances referred to in clause 5 of the Asset Sale Agreement had not been released by the Sunset Date.

It follows that the Buyer is entitled by clause 5(b) of the Asset Sale Agreement to exclude from the Assets that it is acquiring those Assets that are the subject of the Deferred Encumbrances, and to deduct the value of those Assets from the Purchase Price by deducting that value from the repayments made under the Loan Deed. On 22 December 2023, the Buyer gave notice to the Spotpress Seller of its election to exercise that right in respect of Assets listed in the schedule to the notice, being quantities of various types of paper.

The notice requested the Spotpress Seller to notify the arrangements by which it would re-take possession of that paper. It appears that no such arrangements were notified or made.

In closing submissions, the Buyer acknowledged that it has subsequently used part of the paper itemised in the notice, and suggested that it may continue to do so pending the delivery of judgment in these proceedings. The defendants took no issue with the Buyer's proposal that the terms of any order made in these proceedings for the return of the paper that was the subject of the Deferred Encumbrances, and the deduction of the value of that paper from the purchase price, be limited to that paper that remains available to be returned at the time judgment is delivered and orders are made, provided that the relevant paper is identified by serial number.

Increased electricity rates from 1 January 2024

From the commencement of the Lease immediately following completion of the transaction, JG & DG Properties charged to the Buyer, and the Buyer paid, 70% of the amount that Origin Energy charged JG & DG Properties for the supply of electricity to the Marrickville premises. JG & DG Properties paid the remaining 30% directly to Origin Energy. I assume this reflected an understanding between the parties that the activities of the Transferred Business operated by the Buyer accounted for approximately 70% of the electricity consumed at the Marrickville premises.

JG & DG Properties' electricity supply contract with Origin Energy expired on 31 December 2024 and was replaced with a new contract with Shell Energy. The rates charged under the Shell Energy contract were higher than under the Origin Energy Contract.

The defendants did not dispute the accuracy of the following summary of the differences between the Origin Energy rates and the Shell Energy rates prepared by the plaintiffs on the basis of invoices issued to JG & DG Properties by both electricity suppliers:

Origin Rates

(7/3/2023 – 31/12/2023)

Shell Energy Rates

(1/1/2024 – 31/1/2024)

Shell Energy Rates

(1/2/2024 – 31/12/2024)

Shell Energy Rates

(1/1/2025 – 31/1/2025)

Shell Energy Rates

(1/2/2025 onwards)

Energy/Retail Charges (c/kWh)

Peak

7.8102

20.6709

20.6709

42.1800

42.1800

Shoulder

7.8102

8.1755

8.1755

42.1800

42.1800

Off-Peak

5.714

9.7545

9.7545

15.2200

15.2200

Environmental Charges (c/kWh)

LREC Charge

0.54549

0.9943

0.9615

0.8350

0.8079

SREC Charge

1.0268

0.8027

0.8419

0.7678

0.5549

ESC/NESC Charge

0.40527

0.2691

0.2691

0.2300

0.2300

Notwithstanding the electricity supply clause in the Lease, [8] JG & DG Properties contended that it was entitled to pass on to the Buyer the whole of the amounts charged by Shell Energy in respect of the electricity supply to the Marrickville premises. From January 2024, the Buyer paid the whole of those amounts directly to Shell Energy, without admissions and reserving its right to claim those amounts as damages in these proceedings against JG & DG Properties.

The plaintiffs prepared a schedule detailing all of the payments made in respect of electricity supply to the Marrickville premises during the period from January 2024 to March 2025, and calculating that they have paid a sum of \$292,811.48 during that period in excess of the costs which they would have paid if the JG & DG Properties had charged for electricity at cost price at the rates applicable at the time of commencement of the Lease. The defendants did not dispute the accuracy of that calculation up to March 2025, although they do dispute that the Buyer is entitled to be charged at the lower rate that applied at the date of commencement of the Lease.

Change in the metering of electricity consumption at the Marrickville premises and resulting increases in electricity charges

There is only one meter located on the Marrickville premises being meter NMI 4102030280 (referred to as the Old Meter).

The electricity consumption history recorded by the Old Meter shows a significant decrease in electricity consumption at the Marrickville premises in June 2022, which was sustained until January 2024, followed by a significant increase in electricity consumption in February 2024 which has been sustained thereafter. The average monthly electricity consumption metered by the Old Meter was 307,541.27 kWh during the period from 1 January to 31 May 2022, and 171,727.30 kWh during the period from 1 June 2022 until 31 January 2024. Consumption increased from 169,221.14 kWh in January 2024 to 216,818.368 kWh in February 2024. During the period from February 2024 to March 2025, average monthly consumption was 257,324.07 kWh.

The Buyer noticed the increase in the metered electricity consumption in February 2024.

According to Ms Karam's evidence, the Buyer had not conducted any electrical works since the commencement of the Lease on 7 March 2023, other than routine maintenance and monitoring, and the installation of the Perfect Binder. That aspect of Ms Karam's evidence was not challenged in cross-examination.

On 22 March 2024, the plaintiffs' solicitors wrote to the defendants' solicitors questioning why the electricity consumption would be significantly higher for the month of February 2024 than for previous months, in circumstances where the Spotpress Seller's coldset printing operations had ceased at the Marrickville premises in January 2024, and the Buyer's operations had not changed compared to previous months. The letter from the plaintiffs' solicitors also stated:

"We are instructed that, on Saturday 17 February 2024, electricians engaged by Mr John Georgantzakos, including Mr Andrew Davis, conducted substantial electrical works at the premises. The Lessee was not given notice of the intention to conduct those works or of the purpose or effect of those works."

The Lessee is concerned to ensure that any electrical works conducted at the premises have been carried out safely and in accordance with relevant electrical supply legislation and regulations. The Lessee is also concerned to understand the reasons for the anomalies in the January Invoice and the February Invoice."

There was no response from the defendants' solicitors until 2 May 2024, when they wrote to the plaintiffs' solicitors stating that the electrical works carried out at the Marrickville premises on 17 February 2024 related to the removal of the coldset printing press from the premises, rejecting the allegation that those works had resulted in the Buyer being charged for electricity that it was not consuming, and stating that the defendants could only speculate about the reasons why the Buyer's electricity usage had increased since February 2024 in the absence of visibility of how the Buyer was conducting its business in the Marrickville premises. The letter noted that the Buyer had commissioned the Perfect Binder machine in the month of February 2024.

The plaintiffs issued notices to produce to the defendants on 25 June 2024 seeking production of documents bearing on the electrical works undertaken on 17 February 2024. Correspondence concerning the defendants' alleged failure to comply with those notices followed. In the course of that correspondence, the defendants' solicitors advised that the works had been carried out by Mr Andrew Davis under the supervision of Mr John Georgantzakos, that the works "merely involved the disconnection of our client's coldset printing press", and that the defendants were unable to engage with Mr Davis or search his records concerning the works because he had been involved in a near-fatal accident which had left him with brain damage.

The defendants have not produced any document that evidences the nature of the electrical work carried out on 17 February 2024. Nor have the defendants adduced evidence or called any witness to identify or explain that work.

The plaintiffs rely on the expert evidence of Mr Mathias Dawson, a qualified engineer with 22 years' experience in the electrical field. I adopt as accurate the substance of the plaintiffs' summary of Mr Dawson's report in their closing submissions.

Based on his inspection of the Marrickville premises on 30 August 2024 during which he visually inspected the electrical layout of the premises, investigated the equipment within the warehouse, and undertook electrical testing, Mr Dawson confirmed that all equipment on the premises is presently supplied with electricity via underground consumer mains from Kiosk Substation S35079 (referred to as the Old Kiosk) by the following arrangement:

all equipment is connected to one of two Main Switchboards – referred to as the Orange Switchboard and the Grey Switchboard;

the Orange Switchboard is connected to the Old Kiosk; and

the Grey Switchboard is supplied as a sub-board from the Orange Switchboard.

However, based on his inspection of the route diagram on the front of the Grey Switchboard and his visual inspection of the underground cabling, Mr Dawson ascertained that the Grey Switchboard was, and still is, connected to a different substation S65129 (New Kiosk), and the connection between the New Kiosk and Grey Switchboard remains "active". Despite the active connection, no power is presently supplied to the Grey Switchboard from the New Kiosk as the main switch on the Grey Switchboard is in the "Off" position, and the busbar connection in the current transformer (CT) chamber has been removed, creating an "air gap". Further, Mr Dawson ascertained that there is presently no supply authority meter connected to the New Kiosk. Ausgrid connection details for the New Kiosk indicate that meter NMI4103906277 should be connected to the New Kiosk (the New Meter), and that the new meter is located at the Marrickville premises. However, Mr Dawson was unable to locate the New Meter at the Marrickville premises during his inspection. Moreover, Ausgrid records indicate that the University of Sydney is the customer for whom Ausgrid installed the New Meter.

During his site inspection, Mr Dawson ascertained that the Grey Switchboard became a sub-board of the Orange Switchboard as a result of electrical work that installed sub-mains from the Orange Switchboard to the busbar zone, and supplied power from the Orange Switchboard to the Grey Switchboard (Electrical Work). The Electrical Work, which effectively adds the load of the Grey Switchboard to that of the Orange Switchboard which is supplied through the Old Kiosk and metered through the Old Meter, occurred no earlier than January 2023 because a stamp on the cabling used indicates that it was manufactured in 2023. In Mr Dawson's opinion, it is likely that the Electrical Work occurred in February 2024 because:

there was an increased spike in electricity consumption from February 2024 recorded by the Old Meter compared to the prior 18 months, and electricity consumption has remained high since February 2024;

this occurred at about the same time that the Sellers' coldset printing equipment was decommissioned, which should have resulted in a reduction, rather than a dramatic increase, in overall power consumption at the Marrickville premises; and

that increased power consumption cannot be attributed to the Buyer commissioning and installing the Perfect Binder at the Marrickville premises in February 2024. Mr Dawson estimates that the electricity consumed by the Perfect Binder in February 2024 was about 2175 kWh (a small fraction of the 47,597 kWh increase in total consumption at the Marrickville premises in February 2024 compared to January 2024).

Having regard to all of those matters, Mr Dawson opines that the most likely explanation for the consistent increase in electricity consumption metered by the Old Meter on the Marrickville premises since February 2024 is that the Electrical Works adding the Grey Switchboard's load to the Orange Switchboard were carried out in or about February 2024.

The cross-examination of Mr Dawson was very brief.

Mr Dawson gave evidence that, in forming the opinions expressed in his report, he had taken into account power consumption data for the Marrickville premises since 2017.

It was put to Mr Dawson, and he agreed, that there were two power factor correction units at the Marrickville premises. The purpose of such units is to stabilise the electrical system, which can lead to savings in electricity costs. The extent of the savings depends on how stable or unstable the electrical system would be without the units in the particular premises. Mr Dawson said that the units at the Marrickville premises looked quite old, and he was content to assume that the units had been in place since before the commencement of the Lease. Mr Dawson agreed with the cross-examiner's proposition that, if the power factor correction units had failed or malfunctioned, that could lead to an increase in power consumption. Mr Dawson was not asked whether there was any reason to believe that the units at the Marrickville premises had failed in February 2024, causing or contributing to the increased power consumption in that month (and subsequent months) compared to the levels of power consumption since June 2022.

Mr Dawson agreed with the cross-examiner that an increase in the speed at which printing presses were run could also lead to an increase in electricity consumption. He was not able to agree with the cross-examiner's proposition that any such increase would be "exponential" rather than linear, because it would depend on the particular printing press. Mr Dawson added that he understood the printing presses had been removed prior to February 2024. The coldset printing press had been decommissioned in January 2024, as I have mentioned above.

Mr Dawson was not asked whether there was any reason to believe whether those two possible occurrences had in fact occurred at the Marrickville premises in February 2024 (and persisted during the following months). Nor were the plaintiffs' witnesses questioned about those possible occurrences in cross-examination. Mr Dawson was not asked in cross-examination whether those potential (i.e., hypothetical) occurrences changed the opinions he had expressed in his report. That question was asked in re-examination, and Mr Dawson answered: "No".

On the basis of Mr Dawson's evidence, which was not meaningfully challenged in cross-examination, I find that all plant and equipment in the Marrickville premises has been connected to either the Grey Switchboard or the Orange Switchboard at all times relevant to these proceedings, and that the electricity consumed by plant and equipment connected to the Grey Switchboard was not recorded by any meter at the Marrickville premises, and was therefore not charged to JG & DG Properties, until the Grey Switchboard was connected to the Orange Switchboard at some time after January 2023. Having regard to Ms Karam's unchallenged evidence that the Buyer did not conduct any electrical works after moving into the Marrickville premises other than routine maintenance and monitoring, and the installation of the Perfect Binder, I infer that the work connecting the Grey Switchboard to the Orange Switchboard was carried out at the direction of Mr John Georgantzakos on behalf of JG & DG Properties and/or the Spotpress Seller on 7 February 2024. I draw that inference more comfortably in the absence of any evidence adduced by the defendants explaining the nature of the works conducted on 7 February 2024, or providing any other explanation about how and when the Grey Switchboard came to be connected to the Orange Switchboard after January 2023. The defendants do not dispute that some electrical work was carried out on 7 February 2024, and I infer that any evidence that Mr John Georgantzakos could have given about those works would not have assisted the defendants' case in these proceedings. I reject the defendants' submission that the plaintiffs' evidence does not support the inference that I have drawn. The cogency and weight of Mr Dawson's evidence is not affected by the two hypothetical circumstances that were put to him in cross-examination as potentially explaining an increase in electricity consumption from February 2024. There is no evidence that either of those circumstances existed in or about February 2024. Indeed, that proposition was not put to any of the witnesses called by the plaintiffs.

On the basis of Mr Dawson's evidence, I find that the works carried out on 7 February 2024 resulted in the electricity consumed by the plant and equipment at the Marrickville premises which was connected to the Grey Switchboard being metered through the Old Meter and charged by the electricity supplier to JG & DG Properties, which then sought to pass those charges on to

the Buyer under the Lease. It is probable that this change in the metering of the electricity consumption at the premises resulted in the significant increase in electricity consumption recorded from February 2024 and the resulting increase in electricity charges, and I so find. Contrary to the defendants' submissions, the February 2024 increase in electricity consumption and cost is a significant spike, even when viewed in the context of fluctuations in electricity consumption at the Marrickville premises over many years. For example, that electricity consumption history does not reveal a pattern of similar increases occurring in or about February each year. As I have already mentioned, and as senior counsel for the defendants properly acknowledged in closing submissions, Mr Dawson had regard to the whole of that electricity consumption history in forming his opinions.

The electricity consumption metered at the Marrickville premises during August to October 2022, for which the electricity supplier invoiced JG & DG Properties in September to November 2022, was 129,784.736 kWh (August), 167,878.112 kWh (September), and 183,347.808 kWh (October). On the basis of that metered consumption, the Spotpress Seller's electricity cost for the period from 1 September to 30 November 2022 recorded in the TB Linked Worksheet was \$83,601. It follows from my findings immediately above that this understated the cost that the Spotpress Seller would have incurred if all electricity consumed by the plant and equipment at the Marrickville premises had been metered and charged for. By using power loggers to record the volume of electricity consumed by plant and equipment connected to each of the Grey and Orange Switchboards in September 2024, Mr Dawson ascertained that plant and equipment connected to the Grey Switchboard accounted for just under half of the total electricity consumed through the Grey and Orange Switchboards. As the plaintiffs submitted, it is therefore likely that the electricity cost attributed to the Transferred Business in the TB Linked Worksheet was significantly understated.

The plaintiffs have undertaken two alternative calculations estimating the Spotpress Seller's actual electricity consumption for the months of August, September and October 2022.

The first calculation (referred to as Scenario 1) is extrapolated from evidence of the total electricity consumption at the Marrickville premises in September 2024, excluding the electricity consumed by the Perfect Binder as measured through the power logger attached to that equipment. The plaintiffs have assumed that the same volume of electricity was consumed two years earlier in September 2022. The plaintiffs have also assumed the electricity consumed in August and October, as a proportion of the electricity consumed in September, was the same in 2024 and 2022. The plaintiffs have calculated the electricity consumption for August to October 2022 on that basis, and have divided the resulting figure by 70%, on the assumption that 70% of the total electricity consumed at the Marrickville premises during that period was attributable to the heatset printing operations of the Original Business.

The second calculation (referred to as Scenario 2) assumes that the proportion of electricity consumed through each of the Grey and Orange Switchboards, as measured by Mr Dawson in September 2024, reflects approximately the proportions consumed through each switchboard during the period from August to September 2022, and therefore increases the electricity

volumes invoiced for that period as referred to at [211] above by just under 100% to arrive at the estimated volume of electricity consumed. No further adjustment is made in Scenario 2 to account for any electricity consumed by coldset printing equipment in August to September 2022. In Scenario 2, the plaintiffs assume that the impact of the coldset printing presses on the overall electricity consumption was likely to have been minimal, referring to an email sent by Mr John Georgantzakos to Ms Karam in January 2023 stating that the coldset equipment used very little electricity.

The plaintiffs advanced both alternative calculations as being based on reasonable assumptions, and submitted that, in the absence of perfect evidence, the Court should take a robust approach to estimating the volume of electricity actually consumed during the period from 1 August to 30 October 2022, this being one integer in the assessment of the loss claimed by the plaintiffs as flowing from the alleged breaches of the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement.

The defendants made no submission as to whether the Court should prefer Scenario 1 or Scenario 2. Nor did the defendants advance any alternative calculation.

I prefer Scenario 2 because it is founded on assumptions supported by the evidence of Mr Dawson and Mr John Georgantzakos's contemporaneous assessment of the extent to which the coldset plant and equipment contributed to electricity consumption. In my opinion, that evidence undermines the assumption included in Scenario 1 that only 70% of total electricity consumption at the premises was attributable to the heatset printing operations. I regard as questionable the other assumptions employed in Scenario 1 to extrapolate an estimate of electricity consumption during a three-month period in 2022 from known electricity consumption in September 2024.

Consideration and determination

Buyer's claims for alleged breach of Seller Warranties in relation to the Accounts

Introduction

The Buyer claims damages against the Sellers for an alleged breach of the Warranties in clauses 3.1 and 3.3 of Schedule 1 of the Asset Sale Agreement.

It is convenient to set out the terms of those warranties again in full:

"3 Accounts and Management Accounts

3.1 The Accounts:

- (a) give a true and fair view of:
- (i) the financial position and state of affairs of the Business and the Assets as at their respective Accounts Date; and

(ii) the financial performance of the Business for the 1-month period ended on the relevant Accounts Date;

(b) contain proper and adequate provisions for and disclosure of all liabilities (actual, prospective and contingent) of the Businesses as at the relevant Accounts Date; and

(c) are not affected by any unusual, abnormal, extraordinary, exceptional or non-recurring items.

3.2 All documents disclosed in the data room including supporting data used to validate the Accounts in the month periods referred to in clause 3.1(a)(ii) give a true and fair view of the financial performance of the Business.

3.3 The Management Accounts have been prepared with due care and attention and show with material accuracy and with no material omissions the state of affairs, profit or loss of the Business as at the date, and for the period in respect of which, they have been prepared."

As I have mentioned earlier in these reasons, "the Business" is defined as "the heatset and other printing business including all types of print but excluding newspaper print, conducted by the Sellers as at the date of this agreement".

As I have mentioned earlier in these reasons, the "Accounts" that are the subject of the warranty in clause 3.1 were defined as "each of the management accounts of the Business for the months September 2022, October 2022, November 2022 and December 2022". The "Accounts Date" was defined as "30 September 2022, 31 October 2022, 30 November 2022 and 31 December 2022". The "Accounts" that are the subject of the Seller Warranties therefore include the TB Linked Worksheets, but do not include the TB Original Worksheet which formed part of the management accounts for the Original Business as a whole rather than for the "Business" as defined in the Asset Sale Agreement. [9] The "Management Accounts" that are the subject of the warranty in clause 3.3 were defined as "the monthly management accounts of the Sellers for each month during the 5 year period ending 31 December 2022". As the plaintiffs submitted, "Management Accounts" are not limited to the Transferred Business and include the TB Original Worksheet.

Although the definitions of "Accounts" and "Accounts Date" contemplated that the TB Linked Worksheets would cover the period from September to December 2022, it in fact only covered the period from September to November 2022. That was known to all parties at the time the Asset Sale Agreement was entered into and completed, and did not give rise to any claim or issue in these proceedings.

Expert evidence

The Buyer relies on the expert evidence of Ms Dawna Wright, a chartered accountant who is experienced in the provision of forensic accounting, valuation and financial investigation services. Ms Wright prepared three reports.

The Sellers rely on the expert evidence of Mr Andrew Ross, a chartered accountant specialising in forensic accounting and business valuation. Mr Ross prepared one report, responding to Ms Wright's first report. The Sellers did not engage Mr Ross to review or respond to Ms Wright's subsequent reports.

In her first report, Ms Wright was asked to address three questions:

whether the Financials Spreadsheet provided a true and fair view of the financial performance of the Transferred Business for the one-month periods ending on 30 September 2022, 31 October 2022 and 30 November 2022 (which Ms Wright defined as the "Relevant Months");

if not, what adjustments would need to be made to the Financials Spreadsheet in order for it to have given a true and fair view of the financial performance of the Transferred Business for those months; and

having regard to any adjustments made in answering question 2, what is the difference between: (a) the price paid by the Buyer for the Assets (as defined in the Asset Sale Agreement); and (b) the true value of those Assets at Completion.

Ms Wright opined that, in her experience, financial information is considered "true and fair" when it is free from material misstatements, and that a misstatement is material if it could reasonably be expected to influence decisions that the user of the Financials Spreadsheet – the Buyer, in this case – would make on the basis of the Financials Spreadsheet. Ms Wright stated that, while there is no formal auditing or accounting standard in Australia that provides a numerical definition of "material" in her experience, it is common in her experience for an item to be considered material in accounting and auditing if it represents greater than 10% of profit, and not material if it represents less than 5% of profit, with items representing between 5 and 10% of profit requiring professional judgment as to their materiality. For the purpose of her report, Ms Wright adopted a materiality standard of 10% of EBITDA, meaning that she would not consider that the Financials Spreadsheet provided a true and fair view of the financial performance of the Transferred Business for the Relevant Months if correcting any misstatements that she identified resulted in an adjustment to EBITDA greater than 10%.

Based on her review of the Financials Spreadsheet, the general ledger extracts embedded in the Financials Spreadsheet, the full general ledger of the Original Business, and other primary documents, Ms Wright concluded that the Financials Spreadsheet misstated the financial performance of the Transferred Business in several respects, including because primary documents indicated that paper prices in the Relevant Months were higher than those recorded in the general ledger relied on in the Financials Spreadsheet. The relevant general ledger account was account 50101 for cost of paper used. In Ms Wright's experience, such a discrepancy between current prices during the relevant accounting period and the prices recorded in the general ledger as the cost of the relevant input may occur when a company uses a FIFO inventory system and there is a pricing mismatch between the cost of older inventory that is accounted for as part of the cost of sales in a particular accounting period and the cost of new inventory purchased during that same accounting period. Ms Wright opined that:

“In my view, the financial performance of the Transferred Business should reflect the later paper prices and costs incurred in those relevant months, rather than the ‘aged’ FIFO value based on the stock purchases in prior periods, because the current prices are more relevant for the purpose of assessing financial performance in the Relevant Months as well as for the purpose of a forward-looking valuation (such as in a transaction).”

Ms Wright adjusted the TB Linked Worksheet by substituting paper prices that were current during the Relevant Months (ascertained from primary documents) for the paper prices recorded in general ledger account 50101, and by allocating to the Transferred Business the cost of all types of paper used for heatset printing (and excluding the cost of all types of paper used for coldset printing). Ms Wright then calculated the cost of paper used by the Transferred Business for the purpose of accounting for cost of sales in each of the Relevant Months. That adjustment increased the cost of paper used in the three-month period by \$205,154. The totality of Ms Wright’s adjustments to correct all of the misstatements that she identified in the TB Linked Worksheet resulted in a decrease in the calculation of the revenue, and increases in the cost of sales and operating expenses for the Transferred Business, thereby reducing the EBITDA of \$1,448,608 stated in the TB Linked Worksheet for the three-month period to \$650,533 – a discrepancy of 122.7%. Ms Wright opined that the Financials Spreadsheet therefore did not provide a true and fair view of the financial performance of the Transferred Business for the three-month period and of its financial position as at the end of each of the Relevant Months.

In relation to the true value of the Assets at the time of Completion, Ms Wright noted that “true value” is a legal concept and is not defined in international valuation standards. Ms Wright stated that market value is assessed as the price that would be paid for an asset in a hypothetical arm’s length transaction between a willing buyer and a willing seller after proper marketing and where each party has acted knowledgeably, prudently, and without compulsion. In her experience, “true value” is assessed as the intrinsic value of the asset at the date of purchase, “excluding any extrinsic or incidental characteristics arising after the acquisition, but taking into account the impact of the conduct in question”. In the present case, Ms Wright assessed the “true value” of the Transferred Business as the date of Completion as the value to the Buyer, “assuming that the misstatements are found to have occurred”. Ms Wright noted that she had not been provided with the financial information that would be required to assess the value of the Transferred Business. Nor had she been provided with information about the methodology or valuation approach adopted by the Buyer or the Sellers in negotiating the price and agreeing the terms of the Asset Sale Agreement. For example, Ms Wright had not been provided with the TMA Board Report. In the absence of that information, Ms Wright assumed that the price for the Transferred Business was derived from the Financials Spreadsheet and that, in agreeing to the non-stock purchase price of \$6,000,000, the Buyer had relied on the EBITDA of \$1,448,608 for the period from 1 September to 30 November 2022 reported in the TB Linked Worksheet as a proxy for the level of future maintainable earnings that the Transferred Business could achieve, which implied a quarterly EBITDA valuation multiple of 4.14. By applying that multiple of 4.14 to her adjusted EBITDA of \$650,533 for the three-month period from 1 September to 30 November 2022, Ms Wright arrived at a “true value” of \$2,694,529 for the Transferred Business, being \$3,305,471 less

than the \$6,000,000 non-stock purchase price.

Ms Wright had no regard to the adjustments that Ms Karam recommended the TMA Group Board make to the profit and loss account in the TB Linked Worksheet, including for seasonality, and its forecast profit and loss for the three financial years following Completion, because she was not provided with that information in the TMA Board Report. [10] I note that Ms Wright's implied quarterly EBITDA multiple of 4.14 equates to an annual EBITDA multiple of 1.04, which is lower than the EBITDA multiple of 1.21 referred to in the TMA Board Report and significantly lower than the EBTDA multiple of 3 contemplated by the TMA Group during the negotiation of the Memorandum of Understanding. [11]

Mr Ross was instructed to review Ms Wright's first report, and to state whether he agreed or disagreed with Ms Wright's adjustments to the cost of paper used. Mr Ross was instructed to assume that the Financials Spreadsheet had been prepared using paper prices allocated by the Spotpress Seller's accounting software on a FIFO basis. Mr Ross was also instructed to state whether he agreed or disagreed with Ms Wright's methodology and assumptions applied and opinions expressed about the true value of the Transferred Business.

Mr Ross opined that Ms Wright's approach of adjusting paper prices on the basis that the prices paid by the Spotpress Seller to acquire paper in the Relevant Months (as recorded in primary documents) were higher than the paper prices of the paper inventory used by the Spotpress Seller in the Relevant Months (as recorded in the general ledger account 50101) would result in the application of a last-in-first-out (or LIFO) inventory costing approach, contrary to Australian Accounting Standards and contrary to the Spotpress Seller's usual accounting practices. According to Mr Ross, Australian Accounting Standards require the cost of inventories of the kind held by the Spotpress Seller to be accounted for by using a FIFO approach or a weighted average cost formula.

On the basis of his assumption that the Spotpress Seller used the FIFO approach to inventory valuation, Mr Ross opined that it was entirely appropriate for the Financials Spreadsheet to adopt the same approach to accounting for the cost of sales. It may have been appropriate for Ms Wright to take into account changes in the cost of paper in valuing the Transferred Business, it was not appropriate for her to suggest that the Financials Spreadsheet, including the TB Linked Worksheet, misstated the cost of paper.

Mr Ross stated:

"In my experience as both an accountant and a valuer, the processes which are necessary for the preparation of monthly or annual financial statements can differ significantly from the processes which are necessary for assessing 'future maintainable earnings' for use in a valuation.

In the form case, the focus is on the recording of transactions for accounting purposes, adopting accepted accounting principles and producing amounts which reflect accounting outcomes.

In the latter case, valuers frequently begin with accounting results and then seek to adjust them by reference to various ‘normalisation’ adjustments which seek to remove the impact of matters which actually affected historical accounting outcomes, but which are not expected to affect future cash flow outcomes.”

The cross-examination of Mr Ross focussed on the fact that the cost of paper used as recorded in the general ledger of the Original Business for the period from 1 September to 30 November 2022 had been allocated between the Transferred Business and the Retained Business using the revenue-based expense attribution method. [12] The instructions given to Mr Ross had obscured that fact, and it had not come to his attention during the preparation of his report. The cross-examiner did not challenge Mr Ross’s opinion that the calculation of the cost of paper used by the Transferred Business should reflect the cost of the paper inventory used as recorded in the Spotpress Seller’s accounting system, and that any adjustment that may be appropriate in circumstances where the TB Linked Worksheet was to inform a forward-looking valuation of the Transferred Business by a potential purchaser should be made by a normalisation entry rather than by adjusting the cost of paper used so that it no longer reflected the cost of the paper inventory used. I reject the plaintiffs’ submission that Mr Ross’ opinion was based on the false premise that the Australian Accounting Statements did not apply to the preparation of the TB Linked Worksheet. It is clear from Mr Ross’s report that his opinion was based on the premise that the special purpose accounts presented in the TB Linked Worksheet should record the historical financial performance of the business operations that were to become the Transferred Business during each of the Relevant Months (as the TB Linked Worksheet purports on its face to do), and that any forecasted future matters likely to affect that financial performance should be disclosed and quantified through a normalisation adjustment rather than by purporting to change the historical financial performance. That premise recognises the difference between accounts presented as reporting the historical performance of part of a business, on the one hand, and a valuation of that part of the business by a prospective purchaser, on the other hand. The prospective purchaser’s valuation is forward-looking in the sense that it is underpinned by estimated future maintainable earnings. The historical accounts are one input into such a valuation, but that does not render the accounts themselves “forward-looking” as the plaintiffs’ submissions suggested.

Mr Ross agreed with Ms Wright that true value is a legal concept, which can be different from market value, and which is often described as the intrinsic value of the asset at the date of purchase, excluding any extrinsic or incidental characteristics arising after the acquisition, but taking into account the impact of the impugned conduct in question. However, Mr Ross disagreed with Ms Wright’s characterisation of the true value as the value of the Transferred Business to the Buyer at Completion, assuming that the misstatements are found to have been made. In Mr Ross’s experience, valuers do not typically seek to identify the value of an asset to a particular person or entity, because subjective value cannot be objectively assessed applying valuation principles. Thus, assessing true value involves the same process as assessing market value, except that the true value assessment assumes that the true position in relation to the relevant financial information was known to both the (hypothetical) vendor and purchaser as at the date

of the valuation. Mr Ross opined that, If Ms Wright did not have the financial information that would be required to assess the value of the Transferred Business, as she stated in her report, then she did not have sufficient information to express any opinion about the true value of the Transferred Business.

In addition to criticising Ms Wright for embarking on any assessment of true value absent the requisite information, Mr Ross opined that Ms Wright's assessment was not based on future maintainable earnings (or FME) for the Transferred Business, and that FME could not be ascertained from three months' trading results without at least considering whether those results were affected by seasonality and any non-recurring income or expenditure items (which Ms Wright had not done). Finally, Mr Ross criticised Ms Wright's failure to assess the reasonableness of her implied EBITDA multiple against any market-based benchmarks. In Mr Ross' opinion, Ms Wright's multiple was inconsistent with contemporaneous market-based EBITDA multiples identified through his research using S&P Capital IQ for businesses in the commercial printing industry, which indicated that a reasonable annual EBITDA multiple for the Transferred Business was not less than 3 and likely between 4 and 5. Mr Ross declined to provide his own assessment of the true value of the Transferred Business as at Completion in the absence of the requisite information.

Mr Ross acknowledged under cross-examination that he had not valued the Transferred Business and that, if he had been instructed to undertake a valuation, he would have done a lot more work in order to form a view about the appropriate EBITDA multiple. Mr Ross was asked about the nature of the work he would have done, and the sources of information he would have used. Mr Ross's answers described an approach which is consistent with Ms Wright's "Alternative Approach" presented in her second report discussed below.

Ms Wright prepared a second report in which she revised her adjustments to the TB Linked Worksheet on the basis of further information and instructions, and after responding to Mr Ross's criticism of her adjustments to the cost of paper used in her first report, and adopted three alternative approaches to the assessment of the true value of the Transferred Business at Completion.

Ms Wright disagreed with Mr Ross's criticism of her adjustments to the cost of paper used in her first report. Ms Wright characterised Mr Ross's criticism as being founded on his view that the purpose of the Financials Spreadsheet and TB Linked Worksheet was to measure financial performance using accounting principles and standards "rather than to estimate the performance of the Transferred Business for the purpose of the transaction and/or a forward-looking valuation". In Ms Wright's opinion, the Financials Spreadsheet and the TB Linked Worksheet "were not prepared using accounting principles or accounting standards, but rather were prepared for the purpose of valuation" and the normalisation adjustments in the TB Linked Worksheet "demonstrate the intent to assess forward-looking maintainable earnings rather than the statutory reporting of historical financial performance based on accounting standards." Ms Wright maintained that her adjustments to the cost of paper used to reflect current prices during the period from 1 September 2022 to 30 November 2022, rather than the prices that the Spotpress

Seller had paid for the paper inventory used in that period allocated on a FIFO basis, was an appropriate approach to “normalise” the cost of paper used in the TB Linked Worksheets prepared for the purpose of the transaction. Ms Wright added that her review of the Financials Spreadsheet indicates that the total cost of paper used in the Original Business during the period from 1 September to 30 November 2022 had been allocated between the Transferred Business and the Retained Business not by the Spotpress Seller’s accounting system, but on the basis of a percentage of revenue. [13]

Ms Wright emphasised that she had not been instructed to undertake, and had not undertaken, an exercise to assess the financial performance of the Transferred Business in accordance with the Australian Accounting Standards, and she had not made any reference to those standards in making adjustments to the TB Linked Worksheet. Had she been instructed to do so, she would have undertaken an “entirely different analysis”.

In revising her adjustments to the TB Linked Worksheet on the basis of the further information and instructions provided to her for the purpose of her second report, Ms Wright decreased the amount of her adjustment to the cost of paper used by the Transferred Business during the period from 1 September to 30 November 2022 from \$205,154 in her first report to \$110,480 in her second report. That decrease reflected further information and instructions provided to Ms Wright concerning the different types of paper used in heatset printing and coldset printing operations.

That decrease in Ms Wright’s adjustment to the cost of paper used, together with Ms Wright’s revisions to certain other adjustments that she had made in her first report on the basis of further information and instructions, resulted in Ms Wright decreasing her overall reduction to EBITDA for the Transferred Business for the period from 1 September to 30 November 2022. In her second report, Ms Wright adjusted the EBITDA of \$1,448,608 stated in the TB Linked Worksheet for the three-month period downwards by 49.97% to \$724,668 (compared to a 55.09% reduction to \$650,533 in her first report). On the basis of that 49.97% adjustment to the EBITDA in the TB Linked Worksheet, Ms Wright opined that the Financials Spreadsheet did not give a true and fair view of the financial performance of the Transferred Business for each of the Relevant Months.

As the plaintiffs submitted, it was not put to Ms Wright in cross-examination that the revenue-based expense attribution method used to allocate paper costs between the Transferred Business and the Retained Business was preferable to Ms Wright’s approach of identifying the types of paper used by the Transferred Business and then quantifying the cost of the amount of those types of paper used in the Relevant Months. However, Ms Wright’s use of current paper prices during the Relevant Months, rather than the Spotpress Seller’s cost of purchasing the paper inventory used during the Relevant Months, was challenged in cross-examination, contrary to the plaintiffs’ submissions. Ms Wright adhered to her opinion that it was appropriate to adjust the cost of paper used according to current paper prices rather than the cost of the relevant inventory, notwithstanding her acknowledgement that FIFO is an accepted method used by businesses to account for the cost of stock when assessing their cost of sales. Ms Wright did not

identify any reason why the cost of paper should be accounted for in the TB Linked Worksheet in a manner that departed from the cost of the paper inventory used as recorded in the general ledger, except to say that the TB Linked Worksheet was prepared for the purpose of a forward-looking valuation in the context of the proposed transaction.

I note that, absent Ms Wright's adjustment to the cost of paper used to reflect paper prices that were current in the period from 1 September to 30 November 2022, the normalisation entry included in the TB Linked Worksheet for a 12.5% reduction to current paper prices during 2023 misstates the impact of that forecasted price reduction on the Transferred Business, because it is calculated on the basis of the historical prices at which the Spotpress Seller purchased the paper inventory that was used during the period from 1 September to 30 November 2022.

I further note that, if Ms Wright's \$110,480 adjustment to the cost of paper used in her second report were reversed, the adjusted EBITDA in that second report for the period from 1 September to 30 November 2022 would be \$835,148 (rather than \$724,668). That would represent a 42.35% reduction to the EBITDA of \$1,448,608 recorded in the TB Linked Worksheet.

Ms Wright was not challenged in cross-examination about any other adjustments contributing to her calculation of an adjusted EBITDA for the Transferred Business for the period from 1 September to 30 November 2022, with the exception of one adjustment relevant to a matter that was no longer in dispute between the parties by the conclusion of the hearing.

In her second report, Ms Wright disagreed with Mr Ross's criticisms of her approach to assessing the true value of the Transferred Business in her first report. Ms Wright refined her approach to assessing true value in the second report by: (1) revising her calculation by applying the implied quarterly EBITDA multiple of 4.14 from her first report to the revised adjusted EBITDA of \$724,668 in her second report (referred to in the plaintiffs' submissions as the "First Wright Report Approach"); (2) by taking into account additional documents and instructions provided to her (referred to in the plaintiffs' submissions as the "Additional Documents Approach"); and (3) offering an alternative approach utilising market research and maintainable earnings derived from post-Completion performance of the Transferred Business (referred to in the plaintiffs' submissions as the "Alternative Approach").

Using the First Wright Report Approach, Ms Wright opined that the true value of the Transferred Business as at Completion was \$3,000,000. [14]

The additional documents provided to Ms Wright for the purpose of her second report included the Buyer's analysis of the Financials Spreadsheet and the TMA Board Report. [15] For the purpose of assessing the true value of the Transferred Business as at Completion under the Additional Documents Approach, Ms Wright calculated annualised maintainable revenue of \$21,384,643 by: (1) adopting the print revenue generated by heatset and hybrid sales during the 2022 calendar year as recorded in the accounts of the Original Business; (2) increasing that 2022 revenue figure by 7.3% to allow for the 2023 price increase of 7.3% referred to in the Spotpress Seller's normalising entry in the TB Linked Worksheet; (3) adding an annualised amount for non-print revenue which Ms Wright extrapolated from the revenue figures in the TB Linked

Worksheet for

the months of September, October and November 2022.

Ms Wright then calculated annualised amounts for each category of cost of sales and operating expenses by extrapolating from her revised adjusted figures for each category of cost and expense for the months of September, October and November 2022.

In relation to the cost of paper used, Ms Wright calculated the paper costs for the months of September, October and November 2022 as adjusted under the First Wright Report Approach (i.e., the cost of heatset paper used during each of those months at then-current prices) as a percentage of the heatset and hybrid print revenue for those months (as recorded in the accounts of the Original Business), and then applied that percentage to her calculation of the annual maintainable revenue in order to arrive at an annualised cost of paper used. Ms Wright then reduced that annualised cost by 12.5% to allow for the reduction in paper prices referred to in the Spotpress Seller's normalising entry in the TB Linked Worksheet.

Ms Wright calculated the annualised total cost of sales as \$13,918,333. When deducted from her annualised maintainable revenue calculation of \$21,384,683, this produced an annualised gross profit of \$7,466,310. After deducting annualised total operating expenses which Ms Wright calculated as \$5,997,775, this produced an annualised maintainable future EBITDA of \$1,470,000.

Based on the Buyer's opinion expressed in the TMA Board Report that an EBITDA multiple of 1.21 was fair and reasonable and within the reasonable range for a business in the printing industry, and based on her own market research and analysis to which I refer below in explaining Ms Wright's Alternative Approach, Ms Wright opined that it was appropriate to apply a multiple of 1.5 to that annualised maintainable future EBITDA figure in order to determine the true value of the Transferred Business as at Completion. That resulted in a true value calculation, according to the Additional Documents Approach, of \$2,205,000.

It was put to Ms Wright in cross-examination that she should have adjusted the revenue of the Transferred Business reported in the TB Linked Worksheet to include \$162,907 in revenue for work done by the Spotpress Seller in November 2022, but not invoiced to the relevant customers until December 2022. Ms Wright had rejected that proposition in her second report, and did not waver from that stance under cross-examination. Neither the evidence adduced by the defendants nor the submissions made on their behalf identified any principled reason why work for which the Spotpress Seller had not yet issued any invoice should have been reported as revenue for November 2022 in the TB Linked Worksheet.

Ms Wright's Alternative Approach to the assessment of the true value of the Transferred Business as at Completion involved the use of hindsight by: (1) using the Buyer's management accounts for the Transferred Business in the period after Completion (adjusted to exclude the effects of any material extrinsic factors arising post-Completion), rather than the adjusted EBITDA derived from the TB Linked Worksheet, as a proxy for the level of maintainable earnings that the Transferred Business could achieve; and (2) deriving the EBITDA multiple from market research

rather than the multiple implied by the purchase price of \$6,000,000 paid by the Buyer.

Ms Wright was instructed to assume that the Spotpress Seller continued to carry on the hybrid business, and failed to transfer it to the Buyer, after Completion. [16] Ms Wright therefore prepared her Alternative Approach analysis on the basis that the Buyer's post-completion financial information related to the heatset component of the Transferred Business only.

Ms Wright summarised the Buyer's profit and loss statement for the heatset business during the period from 7 March 2023 to 29 February 2024, and noted that it recorded an operating loss and EBITDA of \$36,220 over that period. After making certain normalising adjustments that she considered appropriate, Ms Wright assessed annual future maintainable earnings of the heatset business (rounded) as \$350,000. Ms Wright applied a capitalisation multiple of 1.5, which she assessed as appropriate based on her detailed analysis of publicly available information concerning transactions involving six listed companies providing printing services broadly comparable to the Transferred Business and the EBITDA multiples implied in those transactions, and industry research surveying transactions involving small businesses in the manufacturing industry. That resulted in an assessment of the true value of the heatset component of the Transferred Business as at the date of Completion as \$525,000.

Ms Wright then addressed the loss arising from the Sellers' failure to transfer the hybrid component of the Transferred Business to the Buyer on and following Completion. Based on the information provided to her, Ms Wright calculated the annualised contribution margin lost to the Buyer as a result of the Sellers' failure to transfer the hybrid business (rounded) as \$400,000. Ms Wright did not consider it reasonable to value the hybrid business, as it is an add-on service of the heatset or coldset business, rather than a stand-alone business. However, Ms Wright considered it reasonable to ascribe value to the lost contribution margin from the hybrid business by adding it to the future maintainable earnings of the heatset business to arrive at an annualised figure for future maintainable earnings of \$750,000 for the heatset and hybrid business (that is, for the Transferred Business as a whole). Applying the capitalisation multiple of 1.5, Ms Wright assessed the true value of the Transferred Business according to the Alternative Approach as \$1,125,000, of which \$525,000 is attributable to the heatset component and \$600,000 is attributable to the hybrid component of the Transferred Business. That is to say, in Ms Wright's opinion, the Buyer suffered a loss of \$5,475,000 as a result of paying \$6,000,000 for the Transferred Business, and \$600,000 of that total loss is attributable to the Sellers' failure to transfer the hybrid business.

As I have already mentioned, Mr Ross was not instructed to review or respond to Ms Wright's second report. Save for the questions concerning her adjustments to the cost of paper used to which I have referred above, the cross-examination of Ms Wright did not challenge her assessment of the true value of the Transferred Business under the First Wright Report Approach, the Additional Documents Approach or Alternative Approach.

For the purpose of her third report, Ms Wright was asked to make two alternative assumptions about electricity consumption at the Marrickville premises for the months of August, September and October 2022 – Scenario 1 and Scenario 2 referred to at [212]-[217] above – and to review electricity supply contracts and invoices in order to calculate the charges that would have been rendered for electricity usage under each of those scenarios in the following month (August 2022 usage invoiced in September 2022, etc.). Ms Wright was then asked to determine whether the difference between those charges for the assumed electricity consumption under Scenarios 1 and 2, and the electricity charges that were recorded in the TB Linked Worksheet, affect her opinion about whether the TB Linked Worksheet provides a true and fair view of the financial performance of the Transferred Business for each of the months of September, October and November 2022. Ms Wright was also asked whether any adjustment needed to be made to her assessment of the true value of the Transferred Business as at Completion, on the basis of the electricity charges for the assumed electricity consumption under each of Scenario 1 and Scenario 2.

The TB Linked Worksheet recorded electricity charges of \$83,067 for the Marrickville premises in the three-month period from 1 September 2022 to 30 November 2022 based on general ledger account 61803.

Ms Wright calculated that the charges for that three-month period would have been \$156,966 for the consumption level assumed under Scenario 1 and \$129,301 for the consumption level assumed under Scenario 2.

Ms Wright calculated that, for Scenario 1 electricity consumption:

her adjusted quarterly EBITDA based on the First Wright Report Approach (as modified in her second report) would be reduced from \$724,668 to \$650,768 (to allow for the approximate understatement of electricity charges in the TB Linked Worksheet by \$73,900), and her assessment of the true value of the Transferred Business would therefore be reduced to \$2,700,000 after applying the implied multiple of 4.14; and

her adjusted annualised maintainable earnings based on the Additional Documents Approach in her second report would be reduced from \$1,470,000 to \$1,170,000 (to allow for the approximate understatement of electricity charges in the TB Linked Worksheet by \$73,900 in respect of the period from 1 September to 30 November 2022, which equates to an understatement of approximately \$300,000 over a one-year period), and her assessment of the true value of the Transferred Business would therefore be reduced to \$1,755,000 after applying the multiple of 1.5.

Ms Wright calculated that, for Scenario 2 electricity consumption:

her adjusted quarterly EBITDA based on the First Wright Report Approach (as modified in her second report) would be reduced from \$724,668 to \$678,434 (to allow for the understatement of electricity charges in the TB Linked Worksheet by \$46,234), and her assessment of the true value of the Transferred Business would therefore be reduced to \$2,810,000 after applying the implied multiple of 4.14; and

her adjusted annualised maintainable earnings based on the Additional Documents Approach in her second report would be reduced from \$1,470,000 to \$1,280,000 (to allow for the understatement of electricity charges in the TB Linked Worksheet by \$46,234 in respect of the period from 1 September to 30 November 2022, which equates to an understatement of approximately \$190,000 over a one year period), and her assessment of the true value of the Transferred Business would therefore be reduced to \$1,920,000 after applying the multiple of 1.5.

Ms Wright's electricity charge calculations in her third report do not affect her assessment of the true value of the Transferred Business derived from the Alternative Approach in her second report, as that Alternative Approach did not incorporate costs and expenses reported by the Sellers or any adjustments to those reported costs and expenses.

As the plaintiffs submitted, under the First Wright Report Approach as adjusted for electricity, Ms Wright's adjusted EBITDA of \$650,768 for Scenario 1 represents a 55.08% reduction to the EBITDA recorded in the TB Linked Worksheet for the period from 1 September to 30 November 2022. Ms Wright's adjusted EBITDA of \$678,434 for Scenario 2 represents a 53.17% reduction to the EBITDA recorded in the TB Linked Worksheet for that same period.

I note that, if Ms Wright's \$110,480 adjustment to the cost of paper used were reversed, [17] the Scenario 1 and Scenario 2 adjustments to EBITDA under the First Wright Report Approach in her third report would be \$761,248 and \$788,914 (respectively), representing a reduction of 47.45% and 45.54% (respectively) to the EBITDA recorded in the TB Linked Worksheet for the period 1 September to 30 November 2022.

As I have already mentioned, Mr Ross was not instructed to review or respond to Ms Wright's third report. No challenge was made to the substance of Ms Wright's third report in cross-examination.

In a letter dated 12 May 2025, Ms Wright calculated the effect on her conclusions in her second and third reports if a price increase of 4.34% (rather than 7.3%) was adopted in her calculation of annualised maintainable revenue under the Additional Documents Approach. [18] The change from 7.3% to 4.34% is based on Ms Karam's unchallenged price increase analysis evidence. [19] After explaining the adjustment that she had made to her model in order to make this change to the price increase incorporated into her calculations, Ms Wright explained that the change would decrease her assessment of the true value of the Transferred Business as at Completion under the Additional Documents Approach in her third report from \$1,755,000 to \$960,000 in Scenario 1, and from \$1,920,000 to \$1,125,000 in Scenario 2.

Mr Ross was not instructed to review or respond to Ms Wright's letter dated 12 May 2025. The cross-examination of Ms Wright raised no challenge to the substance of that letter.

In summary, assuming only a 4.34% increase in the revenue of the Transferred Business as a result of a price increase to customers from 1 January 2023, Ms Wright has assessed the true value of the Transferred Business as at the date of Completion, and the loss which the Buyer submits is represented by the difference between that true value and the non-stock purchase price of \$6,000,000, is as follows:

First Wright Report Approach (as modified in second and third reports)

Scenario 1 –

True Value: \$2,700,000

Loss: \$3,300,000

Scenario 2 –

True Value: \$2,810,000

Loss: \$3,190,000

Additional Documents Approach (as modified in third report)

Scenario 1 –

True Value: \$960,000

Loss: \$5,040,000

Scenario 2 –

True Value: \$1,125,000

Loss: \$4,875,000

Alternative Approach

True Value: \$1,125,000

Loss: \$4,875,000 (or \$5,475,000, of which \$600,000 represents the loss attributable to the Sellers' failure to transfer the hybrid business)

The parties' submissions

The plaintiffs submit that the Court should reject the defendants' contention that \$162,907 of revenue in respect of work that was done by the Spotpress Seller in November 2022, but not invoiced to customers until December 2022, should be notionally included in the November 2022 revenue for the Transferred Business for the purpose of determining whether the Sellers breached the warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement and, if so, assessing the Buyer's loss. [20]

The plaintiffs submit that all of Ms Wright's adjustments to the costs and operating expenses, including her adjustment to the cost of paper used by applying current paper prices during September, October and November 2022 (rather than the cost of paper inventory used by the Spotpress Seller in those months) and her adjustment to the cost of electricity by increasing it in accordance with Scenario 1 or Scenario 2, are necessary in order to provide a true and fair view of the financial performance of the Transferred Business during September, October and November 2022 and the financial position of the Transferred Business as at the end of each of those months.

In relation to Ms Wright's adjustments to the cost of paper used, the plaintiffs submit that those adjustments are consistent with the terms of the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement properly construed, because the TB Linked Worksheet was a "forward-looking" set of accounts which would not otherwise give a true and fair view of the financial performance of what was to become the Transferred Business. The plaintiffs relied on the parties' agreement to determine the stock purchase price on the basis of the most recent price paid by the Sellers at the time of the stocktake on the day following Completion. [21]

The plaintiffs submit that the total costs and expenses attributable to the Transferred Business were understated, and the EBITDA attributable to the Transferred Business was overstated, by between 53.17% and 55.07%, in the TB Linked Worksheet. [22] The plaintiffs submit those understatements were material, being significantly greater than Ms Wright's materiality threshold of 10% of EBITDA. The plaintiffs submit that the Sellers therefore breached the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement.

The defendants submit that the revenue attributed to the Transferred Business in the TB Linked Worksheet for the period from 1 September to 30 November 2022 should adjusted upwards by \$162,907 to include revenue in respect of work done by the Spotpress Seller in November 2022 that was not invoiced to its customers until December 2022.

The defendants submit that the Court should not adopt Ms Wright's adjustment to the cost of paper used because the FIFO method is a recognised and acceptable method of accounting for the cost of paper used, and the revision of that cost by applying paper prices that were current during September, October and November 2022 (rather than paper prices paid by the Spotpress Seller to purchase the stock of paper used) would not result in a true and fair view of the financial position and state of affairs and performance of what was to become the Transferred Business as at the Accounts Dates of 30 September 2022, 31 October 2022 and 30 November 2022. Contrary to the plaintiffs' submissions, the accounts in the TB Linked Worksheet were not "forward-looking", save for the normalisation entries.

The defendants submit that Court should not adopt the adjustments to electricity costs made by Ms Wright in her third report because the plaintiffs failed to discharge their onus of establishing the very serious allegation that the electrical systems at the Marrickville premises for a period prior to February 2024 had been configured in a way that resulted in electricity consumed by plant and equipment connected to the Grey Switchboard not being metered and charged, and that the electricity charges were therefore understated in the TB Linked Worksheet. [23]

The defendants submit that all of Ms Wright's adjustments to correct alleged understatements in the TB Linked Worksheet of the costs and expenses attributable to the Transferred Business reflect a methodology that is inconsistent with the revenue-based expense attribution method which they contend was agreed between the parties, [24] and do not rise above the materiality threshold. The defendants submit that, properly construed in the context of the alleged agreement concerning the revenue-based expense attribution method, clauses 3.1 and 3.3 of Scheule 1 to the Asset Sale Agreement was a warranty that the "Accounts" presented a true and fair view of the performance of the Transferred Business in the months of September, October and November 2022 using the agreed revenue-based expense attribution method.

For all of those reasons, the defendants submit that the plaintiffs have failed to establish any breach of the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement.

As both parties submit, the general principle according to which damages for breach of contract are assessed is that a party who has sustained loss by reason of a breach of contract is to be placed in the same situation, so far as money can do it, as if the contract had been performed. In the case of the alleged breaches of the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement, the inquiry is directed to the position the Buyer would have been in if the Accounts had complied with the warranty in clause 3.1 and the Management Accounts had complied with the warranty in clause 3.3. [25]

The plaintiffs submit that if the alleged breach of those warranties is established, those damages should be quantified as the difference between the non-stock purchase price that the Buyer paid for the Transferred Business and the "true value" of the Transferred Business as at the date of the Asset Sale Agreement. The defendants do not dispute that any damages should be quantified in accordance with this well-known rule of practice. [26]

I note that it is well established that the "true value" of an asset may differ from its market value for several reasons, including if the market value at the time of the transaction in question is operating under a mistake by reason of some improper conduct on the part of the vendor. Thus, matters that are inherent in the asset itself, but which were not known to the purchaser or the market at the time of the transaction and came to light only after completion of the transaction, may be taken into account in determining the "true value" of the asset at the time of the transaction. Where the asset in question is a business, the post-completion performance of the business may be taken into account to the extent that it illuminates the true value of the business at the time of the transaction. This recognises that estimates of future maintainable earnings are inherent in the assessed true value at the date of acquisition, and that an examination of actual

post-completion performance may therefore be a reliable means of deriving or testing estimated future earnings at the time of the transaction in question. [27]

The plaintiffs submit that none of Ms Wright's approaches to determining the true value of the Transferred Business as at Completion were challenged in cross-examination as inappropriate, and Ms Wright was not asked to express a view about whether she regarded one approach as preferable to the others. The plaintiffs submit that it is therefore a matter for the Court to assess loss by reference to the difference between the true value and the \$6,000,000 non-stock purchase price paid for the Transferred Business, doing the best it can on the basis of the available evidence. The plaintiffs submit that the difference in the result of the Additional Documents Approach (as varied in Ms Wright's letter of 12 May 2025) and the Alternative Approach is immaterial, and that this means that each of those approaches provides some corroboration for the reliability of the other approach.

In the event that the Court assesses the loss on the basis of the First Wright Approach or the Additional Documents Approach to determining the true value of the Transferred Business, the plaintiffs submit that it is a matter for the Court to determine, doing the best it can, whether Scenario 1 or Scenario 2 is the preferable approach to quantifying the estimated actual electricity usage attributable to the heatset and hybrid printing operations in the months of August to October 2022, which would have been invoiced to the Spotpress Seller in September to November 2022. The plaintiffs submit that either approach is appropriate.

In the event that the Court assesses the loss on the basis of Ms Wright's Alternative Approach, the plaintiffs acknowledge that this includes the loss resulting from the Spotpress Seller's failure to transfer the hybrid business to the Buyer on and following Completion.

As explained at [278]-[282] above, the defendants challenge Ms Wright's opinion that the Accounts failed to give a true and fair view of the financial performance of what would become the Transferred Business during each of the months of September, October and November 2022, and its financial position and state of affairs as at the end of each of those months. The defendants did not otherwise challenge Ms Wright's approaches to assessing the true value of the Transferred Business at the time of Completion, other than to submit that each approach disregarded "synergistical benefits" which enhanced the value of the Transferred Business to the Buyer. The defendants did not identify the alleged synergistical benefits referred to in that submission. Nor did the defendants identify how, and to what extent, those synergistical benefits were said to affect the true value of the Transferred Business as at Completion.

The proper construction of the Seller Warranties

The proper construction of the Seller Warranties in clauses 3.1 and 3.3 of Schedule 1 to the Asset Sale Agreement is relevant to my consideration of the parties' competing submissions in relation to whether or not the Sellers breached those warranties. [28]

The terms of those warranties are set out at [219] above.

I repeat my observations at [220]-[222] above. For the reasons there explained, the Seller Warranty in clause 3.1 applies to the financial accounts created for what was to become the Transferred Business, for the purpose of the transaction. Clause 3.1 does not apply to the management accounts for the Original Business presented in the TB Original Worksheet of the Financials Spreadsheet, or any other management accounts for the Original Business that were provided to the Buyer during the due diligence process.

In *Grant-Taylor v Babcock & Brown Limited (in liq)*, [29] Perram J considered the meaning of “true and fair view” in the context of s 297 of the Corporations Act 2001 (Cth), which applies to disclosing entities, public companies, large proprietary companies, registered schemes and registrable superannuation entities, and which also applies to small proprietary companies in specified circumstances. Section 297 relevantly provides that the financial statements and notes for a financial year must give a true and fair view of the financial position and performance company, entity or scheme. As his Honour noted, s 297 applies to such companies and entities in addition to s 296, which requires their financial reports for a financial year to comply with accounting standards.

After characterising the question as a legal one to which evidence of accountancy practice may be relevant, Perram J said: [30]

“I do not think ‘true and fair’ is a composite expression. Rather it reflects the reality that financial accounts not only deal with ascertainable facts but also with matters of opinion and impression. A financial statement will not be ‘true’ when it contains facts which are incorrect or where material facts are omitted. It will not be ‘fair’ where the opinions it contains are not reasonable in the context in which they appear. What is material to the former inquiry or contextual in the latter will usually include issues of accountancy but they are not determinative.”

Perram J’s construction of “true and fair view” in the context of s 297 of the Corporations Act was referred to with approval by the Court of Appeal in *Australian Karting Association Ltd v Karting (New South Wales) Incorporated*, [31] a case involving accounts of entities to which s 297 of the Corporations Act did not apply.

Section 297 of the Corporations Act does not apply to the Accounts that are the subject of the alleged breach of the Seller Warranty in clause 3.1 of Schedule 1 of the Asset Sale Agreement. However, I consider that Perram J’s construction of the words “true and fair view” accords with the ordinary meaning of those words in the context of financial accounts which, as his Honour said, record ascertainable facts in a manner that is infused with matters of opinion and impression. That ordinary meaning is the starting point for construing those words in clause 3.1 of Schedule 1 to the Asset Sale Agreement according to what a reasonable businessperson, with knowledge of all of the circumstances surrounding the agreement that were known to all parties to that agreement at the time it was entered into, would have understood those words to mean in the context of clause 3.1 and in the context of the agreement as a whole. [32]

The surrounding circumstances informing the construction of clause 3.1 of Schedule 1 of the Asset Sale Agreement are that: [33]

the parts of the Original Business which the Buyer was proposing to acquire, and which would become the Transferred Business if the acquisition proceeded, were parts of the Original Business which the Sellers had operated as one integrated business, and which had not historically been segregated from that Original Business in the management accounts and financial statements of the Sellers;

those accounts and statements therefore provided a view of the historical financial position and performance of the Original Business as a whole, but did not on their face present any view of what would have been the historical financial position and performance of the Transferred Business if it had been operated as a stand-alone entity distinct from the Original Business;

the TB Linked Worksheet which was included in the Accounts (as defined in clause 1.1 of the Asset Sale Agreement), and which showed revenue and expenses, and profit and loss, for what would become the Transferred Business for the months of September, October and November 2022, had been created by the Sellers for the purpose of the Buyer conducting due diligence, by apportioning the revenue and expenses of the Original Business between what would become the Retained Business and the Transferred Business, using the revenue-based expense attribution method in respect of certain categories of expenses, in the TB Linked Worksheet;

the revenue-based expense attribution method had been determined by the Sellers and disclosed to the Buyer. Contrary to the defendants' submission, that method had not been accepted or agreed to by the Buyer, as I have found at [30] above; and

it was not possible for the Buyer, based on the information available to it during due diligence, to verify whether the amount of expenses allocated by the Sellers to what would become the Transferred Business in the TB Linked Worksheet was accurate.

In my opinion, a reasonable businessperson knowing all of those surrounding circumstances at the time the parties entered into the Asset Sale Agreement would have understood the Seller Warranty in clause 3.1 of Schedule 1 that "the Accounts give a true and fair view of the financial position and state of affairs of the Business and the Assets as at their respective Accounts Date", insofar as it applied to the TB Linked Worksheet, as meaning that it presented a profit and loss account for the Transferred Business for the three-month period from September to November 2022 derived from revenue and expenses which the Sellers had attributed to the Transferred Business by extracting from the Management Accounts for the Original Business [34] an amount in respect of each category of revenue and expenses that, in the Sellers' reasonable opinion, quantified the extent to which the activities of what was to become the Transferred Business had generated that revenue or had incurred or contributed to the incurring of that expense. I have rejected the defendants' contention that the Buyer agreed that the Sellers should apply the revenue-based expense attribution method in quantifying the extent to which the Transferred Business had contributed to the incurring of the expenses of the Original Business. [35] As the plaintiffs submitted, the reasonable businessperson in the position of the parties at the time they

entered into the Asset Sale Agreement with knowledge of the circumstances referred to above would not have understood the parties to have intended by the language used in clause 3.1 of Schedule 1 that the Buyer, rather than the Sellers, would bear the risk that the revenue-based expense attribution method chosen by the Sellers might prove inappropriate to accurately apportion the relevant categories of expenses of the Original Business between what would become the Transferred Business and the Retained Business.

Both Ms Wright and Mr Ross relied on relevant accounting standards as informing the concept of materiality. Those standards provide that information is material “if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements”. Ms Wright adopted a materiality test of 10% of EBITDA. [36] Mr Ross did not express an opinion in numerical terms about what constitutes a “material” omission or misstatement in financial accounts. For reasons that will become apparent, the precise numerical approach to materiality is not determinative of the question whether there has been a breach of the Seller Warranties in this case.

As the plaintiffs submitted, the Accounts, including the TB Linked Worksheet, were provided for the purpose of its assessment of the financial position and performance of the heatset and hybrid components of the Original Business that the plaintiffs were considering acquiring.

In the ordinary course of things, the Buyer’s assessment would include a forward-looking valuation of those components of the business, informed by the TB Linked Worksheet which presented a view of the historical performance of those components of the Original Business for the three months of September, October and November 2022, extracted from the accounts that recorded the historical performance of the Original Business as a whole for that same three-month period. That is what in fact occurred. The TMA Board Report contained the analysis and forward-looking valuation prepared by Ms Karam and her due diligence team. The TB Linked Worksheet was one input into that valuation. [37]

I reject the plaintiffs’ submission that the TB Linked Worksheet was a “forward-looking” set of accounts. The Seller Warranty in clause 3.1 of Schedule 1 of the Asset Sale Agreement was expressly directed to the position as at the Accounts Date (i.e. as at 30 September 2022, 31 October 2022 and 31 November 2022) and was not directed to the financial position or state of affairs of what would become the Transferred Business at any time thereafter. The TB Linked Worksheet represented the Sellers’ opinion as to the historical performance of what would become the Transferred Business during the three months of September, October and November 2022. By raising the three normalising items “for consideration” in the TB Linked Worksheet, the Sellers were impliedly expressing an opinion that the Buyer could reasonably make those adjustments to the Sellers’ historical representation of the profits and loss of what would become the Transferred Business when considering how that business might perform in the forthcoming year.

It will be recalled that clause 3.3 of Schedule 1 of the Asset Sale Agreement is a warranty given by the Sellers to the Buyer that “[t]he Management Accounts have been prepared with due care and attention and shows with no material omissions the state of affairs, profit or loss of the Business as at the date and for the period in respect of which they have been prepared”.

There is an internal inconsistency within the terms of this warranty, in that the “Management Accounts” to which it applies are defined in clause 1.1 of the Asset Sale Agreement as the monthly management accounts “of the Sellers” for each month during the five years up to and including December 2022, yet the “Business” referred to as the subject of those accounts in clause 3.3 of Schedule 1 is defined as the Transferred Business, not the whole of the business of the Sellers. Monthly management accounts prepared for the Original Business are not capable of showing the state of affairs of the Transferred Business. That is the very reason why monthly management accounts were constructed for the Transferred Business for the purpose of due diligence. Those monthly management accounts for the Transferred Business were constructed only for the three-month period from September to November 2022, and not for a five-year period. Reading clause 3 of Schedule 1 as a whole, it is plain that the warranty in clause 3.3 was intended to apply to a different set of accounts than those to which the warranty in clause 3.1 applied.

Taking all of those matters into account, a reasonable person in the position of the parties would have understood the parties to have intended to refer to the Original Business rather than the Transferred Business in clause 3.3 of Schedule 1, and that their use of the defined term “the Business” when referring to the subject matter of “the Management Accounts” was an obvious mistake. Clause 3.3 of Schedule 1 should therefore be construed by reading the words “the Business” as if they referred to the Original Business, consistently with the parties’ intentions objectively ascertained. [38]

Thus, the Seller Warranty in clause 3.3 of Schedule 1 applied to the TB Original Worksheet contained within the Financials Spreadsheet which contained a profit and loss statement for the Original Business for the months of September 2022 to November 2022, and to other management accounts for the Original Business that were provided to the Buyer during the due diligence process, whether as part of the Financials Spreadsheet or in some other form. As I have said above, the reasonable businessperson would have understood the Seller Warranty in clause 3.1 that “the Accounts give a true and fair view of the financial position and state of affairs of the Business and the Assets as at their respective Accounts Date” as meaning that the “Accounts” prepared for what was to become the Transferred Business presented a profit and loss account for the Transferred Business for the three-month period from September to November 2022, derived from revenue and expenses which the Sellers had attributed to the Transferred Business by extracting from the “Management Accounts” of the Original Business – prepared with due care and attention and with no material omissions, as warranted in clause 3.3 – an amount in respect of each category of revenue and expenses that, in the Sellers’ reasonable opinion, quantified the extent to which the activities of what was to become the Transferred Business had generated that revenue or had incurred or contributed to the incurring of that expense.

The Sellers breached the Sellers' Warranty in clause 3.1

I find that the TB Linked Worksheet included in the Financials Spreadsheet failed to give a true and fair view of the financial position and state of affairs of what was to become the Transferred Business as at the end of the months of September, October and November 2022, and failed to give a true and fair view of the financial performance of that Transferred Business during each of those months, because the TB Linked Worksheet:

understated those categories of costs and operating expenses of what was to become the Transferred Business identified in Ms Wright's second report;

understated the electricity costs of what was to become the Transferred Business; and

contained a normalising entry conveying an opinion that the Buyer could reasonably expect that the revenue of what was to become the Transferred Business would increase by 7.3% per annum from January 2023, in circumstances where the Sellers had no reasonable basis for that opinion at the time, and thereby overstated the estimated future revenue of the Transferred Business.

For the reasons explained at [298]-[302] above, I reject the plaintiffs' submission and Ms Wright's evidence that, in order to give a true and fair view of the financial performance of what was to become the Transferred Business during each of the months of September, October and November 2022, it was necessary for the TB Linked Worksheet to adopt a "forward-looking" approach to accounting for the cost of paper used in those months by calculating those costs on the basis of then-current paper prices, rather than on the basis of the Spotpress Seller's cost of the paper stock used during those months as allocated by its accounting system. I accept Mr Ross's evidence that only the normalising adjustments in the TB Linked Worksheet were required to be "forward-looking". [39]

However, as Ms Wright identified, the cost of paper used recorded in the TB Linked Worksheet was not calculated by reference to the Spotpress Seller's cost of the paper inventory used for heatset printing during September, October and November 2022. [40] Rather, the calculation had been undertaken by applying the revenue-based expense attribution method to the Original Business cost of paper used, which appears to reflect the Spotpress Seller's cost of the paper inventory used for heatset and coldset printing during those three months. This approach understated the cost of paper used by what would become the Transferred Business because heatset paper was more expensive than coldset paper, as I have found at [45] above. This understatement meant that the calculation of the normalising entry in the TB Linked Worksheet for an anticipated 12.3% reduction to current paper prices during 2023 proceeded from an erroneous starting point, as I have mentioned at [46] and [245] above.

Ms Wright's evidence does not quantify the extent of the understatement of the costs of paper used by reference to the cost of the paper inventory used rather than the forward-looking methodology which I have rejected at [308] above. Nor does Ms Wright's evidence quantify the flow-on effect to the 12.3% normalising entry for a reduction in current paper prices.

With the exception of the cost of paper used, Ms Wright's adjustments in her second report to the costs and operating expenses recorded in the TB Linked Worksheet were not the subject of any contrary evidence by Mr Ross and were not relevantly challenged in cross-examination, as I have stated at [247] above. I accept her evidence concerning those adjustments. I reject the defendants' submission that the adjustments are inconsistent with the allegedly agreed revenue-based expense attribution method. I have found at [30] above that this method was not agreed between the parties.

My finding that the electricity costs were understated in the TB Linked Worksheet is based on the evidence and my findings in relation to electricity consumption at the Marrickville premises at [191]-[217] above, and on Ms Wright's unchallenged evidence in her third report in relation to Scenario 2 referred to at [262]-[270] above which I accept. I reject the defendants' submission at [280] above, which is contrary to those earlier findings.

My finding that the Sellers had no reasonable basis for the opinion expressed in the normalising entries of the TB Linked Worksheet, that the Buyer could reasonably expect that the revenue of what was to become the Transferred Business would increase by 7.3% per annum from January 2023, is based on the evidence referred to at [167]-[171] above, including Ms Karam's unchallenged price increase analysis evidence which I accept.

Taken together, the impact of the matters referred to at [307]-[313] on the EBITDA of what was to become the Transferred Business was material. Excluding any adjustment for the understatement of the cost of paper used and even before making any allowance for any adjustment to the 12.3% normalising entry relating to an anticipated reduction in paper costs, and correcting only the understatement of the other costs and expenses referred to at [311] and [312] above (and applying Scenario 2 when correcting the electricity costs), would result in a reduction of 45.54% to the EBITDA for what was to become the Transferred Business recorded in the TB Linked Worksheet. [41] On any view, the understatement of costs and expenses to that extent is material in the sense that it could reasonably be expected to influence decisions that the Buyer would make on the basis of the TB Linked Worksheet within the Financials Spreadsheet that was prepared specifically for the purpose of the transaction giving rise to these proceedings. [42] That is so, irrespective of precisely where the materiality threshold is drawn in numerical terms. I reject the defendants' submission to the contrary, which was based on a construction of the Seller Warranties which I have rejected. [43]

I reject the defendants' submissions that the understatement of costs and operating expenses to which I have referred above were offset by an understatement of revenue because the TB Linked Worksheet did not record revenue for work done by the Spotpress Seller in November 2022, but not invoiced to its customers until December 2022. That submission was not supported by any evidence of Mr Ross. When pressed in closing submissions to identify a cogent reason why that revenue should have been included in the November 2022 revenue recorded in the TB Linked Worksheet, senior counsel for the defendants was unable to do so. [44]

For all of those reasons, I find that the Sellers breached the Sellers' Warranty in clause 3.1 of Schedule 1 to the Asset Sale Agreement, construed as explained at [298]-[306] above.

Quantum of damages

Applying the principles referred to at [283]-[285] above, the damages for the Sellers' breaches of the Seller Warranty in clause 3.1 are to be assessed as the difference between: (1) the non-stock purchase price of \$6,000,000 paid by the Buyer for the Transferred Business in accordance with the Asset Sale Agreement, including by incurring liability to repay that part of the non-stock purchase price which was borrowed under the Loan Deed; and (2) the true value of the Transferred Business at the time of Completion.

As noted at [289] above, the defendants contend that, in assessing the true value of the Transferred Business as at Completion, Ms Wright disregarded "synergistical benefits" which are said to have enhanced the value of the Transferred Business to the Buyer. That contention is the only basis on which the defendants dispute the appropriateness of any of Ms Wright's approaches to determining true value. The contention is devoid of substance. The defendants failed to identify the nature of the alleged "synergistical benefits" and how or to what extent they are said to have affected the true value to the Buyer. To the extent that the contention relies on an alleged enhancement in true value from the subjective perspective of the Buyer, it is contrary to Mr Ross's evidence. [45]

I consider that Mr Ross's criticisms of Ms Wright's assessment of true value in her first report have substance. [46] The First Wright Report Approach to assessing true value set out in Ms Wright's second report is an iteration of the assessment in her first report. [47] I therefore prefer Ms Wright's Additional Documents Approach and Alternative Approach set out in her second report, subject to the subsequent adjustments made to the Additional Documents Approach in her third report and in her letter dated 12 May 2025.

The Additional Documents Approach and the Alternative Approach each has shortcomings.

The Additional Documents Approach incorporates Ms Wright's adjustment to the cost of paper used which I have rejected at [308] above, and does not quantify the extent of the understatement of the costs of paper used by reference to the cost of the paper inventory used or the flow-on effect to the 12.3% normalising entry for a reduction in current paper prices as I have noted at [310] above.

As explained at [257]-[259] above, the Alternative Approach is based wholly on the post-completion earnings of the Transferred Business and a range of EBITDA multiples derived from market research into other transactions involving other printing businesses. Even in the absence of evidence of any change in the operation of the Transferred Business post-completion that materially affected its financial performance, [48] an approach to determining true value that is based wholly on post-completion performance is unorthodox in my opinion.

The task of assessing the true value of the Transferred Business necessarily involves a degree of estimation and I consider that the plaintiffs have adduced such evidence as was reasonably available to them in the circumstances by presenting and comparing Ms Wright's three approaches to that assessment in her second and third reports. I accept the plaintiffs' submission that each of the Additional Documents Approach (as varied in Ms Wright's third report and in her letter of 12 May 2025) and the Alternative Approach provides a reasonable measure of corroboration of the other because each of those approaches arrives at substantially the same outcome as the other after addressing the same question from a different perspective, and that the two approaches taken together provide a rational basis for assessing true value and estimating loss. In relation to the Additional Documents approach, I prefer Scenario 2 in Ms Wright's third report for the reasons explained at [212]-[217] above. [49]

On that basis, doing the best I can on the basis of the available evidence, I assess the true value of the Transferred Business as at Completion as \$1,125,000 and the Buyer's loss as \$4,875,000 (being the difference between the non-stock purchase price of \$6,000,000 and the assessed true value).

I have arrived at that assessment by placing equal weight on the Additional Documents Approach and the Alternative Approach, relying on the shortcomings in each approach to be effectively ameliorated by corroboration of its outcome against the outcome arrived at by the other approach. My assessment of the loss as \$4,875,000 must therefore be regarded as inclusive of the loss that flowed from the Sellers' overstatement of estimated future revenue by the normalising entry relating to the 7.3% price increase to be passed on to customers (which was incorporated in Ms Wright's Additional Documents Approach). [50]

For all of those reasons, there will be an order requiring the Sellers to pay damages to the Buyer in the sum of \$4,875,000 in respect of the Sellers' breach of the Seller Warranty in clause 3.1 of Schedule 1 of the Asset Sale Agreement.

Buyer's claim for damages for Sellers' failure to transfer the hybrid business in breach of the Asset Sale Agreement

The Buyer claims damages for the Sellers' admitted failure to transfer the hybrid business to the Buyer on Completion, in breach of clause 2 of the Asset Sale Agreement. [51]

The Sellers do not dispute the \$600,000 quantum of the loss claimed by the Buyer based on Ms Wright's evidence estimating the future maintainable earnings of the hybrid business. [52] The Buyer is therefore entitled to damages in that amount.

Buyer's claim for damages in respect of Mr John Georgantzakos's alleged breaches of the Consulting Services Agreement

The Buyer claims that the Sellers' failure to transfer the hybrid business on Completion also constituted a breach by Mr John Georgantzakos of clause 15.4 of the Consulting Services Agreement that he entered into with the Buyer (as Principal).

Clause 15.4(a) of the Consulting Services Agreement relevantly provided:

“During the Engagement and for the Restraint Period ... the Consultant must not (without the Principal’s prior written consent, which may be withheld in its sole and absolute discretion) in any capacity, on its own account, or as a consultant or contractor to, or as a partner, agent or shareholder of any other person, business or entity, either directly or indirectly:

- (i) participate, establish, or otherwise be directly or indirectly involved in any way whatsoever, in any Commercial Printing Business;
- (ii) solicit, canvass, approach or accept an approach from a Customer with a view to obtaining their custom in a business that is the same or similar to the Business, or is in competition with the business of the Principal or an Associated Entity of the Principal;

...

- (iv) interfere or cause to interfere directly or indirectly with the relationship between the business of the Principal ... and its customers ... which includes employing, soliciting or enticing away from the business of the Principal ... any of its ... customers ...;

...”

The term “Business” is defined in the Consulting Services Agreement in the same way as in the Asset Sale Agreement. The “Restraint Period” is defined in clause 1 of the Consulting Services Agreement as a period of at least one year after the Completion Date.

Mr John Georgantzakos gave evidence in paragraph 153 of his affidavit sworn on 11 April 2024, which the plaintiffs tendered as an admission, that the Spotpress Seller continued to invoice the hybrid printing customers in the period between 7 March 2023 and September 2023, and that the Spotpress Seller paid the Spotpress Buyer for the heatset printing components of that hybrid work at cost price. I accept the plaintiffs’ submission that this admission demonstrates that Mr John Georgantzakos personally caused the Spotpress Seller to continue undertaking work for hybrid printing customers that had formed part of the Transferred Business, and caused the Spotpress Seller to retain the profits earned from that work. That is to say, he approached or accepted approaches from hybrid customers and obtained their custom for the Spotpress Seller in breach of clause 15.4 of the Consulting Services Agreement.

The Buyer claims damages in the amount of \$347,109, being the profit margin that it would have earned from the hybrid business but for Mr John Georgantzakos’s breach of the Consulting Services Agreement. That margin is the starting point for Ms Wright’s calculation of the annualised lost margin of \$400,000 and the lost future maintainable earnings of the hybrid business of \$600,000. The plaintiffs accept that the Buyer is not entitled to recover those lost future maintainable earnings of \$600,000 from the Sellers and also recover the lost profit of \$347,109 from Mr John Georgantzakos.

There will therefore be an award of damages of \$347,109 in favour of the Buyer against Mr John Georgantzakos on account of his breach of clause 15.4 of the Consulting Services Agreement, subject to a further order preventing double-recovery.

Buyer's claim for allegedly misleading or deceptive price increase representations

The plaintiffs submit that, in the due diligence materials and January 2023 email correspondence between Ms Karam and Mr John Georgantzakos referred to at [47]-[49] above, Mr John Georgantzakos represented on behalf of the Sellers that: (1) all customers of the Spotpress Seller had been notified of a 7.3% price increase effective from 1 January 2023; (2) the price increase had been passed on to all customers; and (3) the Buyer would receive the benefit of the price increase.

I accept the plaintiffs' submission that the due diligence materials referred to at [47] above, read together with the emails referred at [48]-[49] above, conveyed the first representation. Mr John Georgantzakos has admitted as much in part of his affidavit sworn on 11 April 2024 which I have extracted at [50] above. The case has been conducted on the basis of that admission, and I reject the defendants' submission that the plaintiffs are confined to a narrower pleaded case that the Sellers represented that the 7.3% price increase had been passed on to all regular customers. For at least a year prior to the final hearing, it has been clear to the defendants – from Mr John Georgantzakos's admission, from the manner in which the defendants themselves had calculated the normalising entry for the 7.3% price increase, and from the lay and expert evidence served by the plaintiffs calculating the difference between a 7.3% price increase passed on to all customers (being the alleged represented scenario) and a 7.3% price increase passed on to some customers only (being the actual scenario) – that the case was being conducted on the basis of an alleged representation that a 7.3% price increase had been passed on to all customers. Procedural fairness does not require that the plaintiffs' pleading be read strictly so as to confine the case in a manner that is contrary to the way in which all parties have approached it prior to and during the hearing.

I accept the plaintiffs' submission that the emails referred at [48]-[49] above conveyed the second representation.

I accept the plaintiffs' submission that the third representation is implied from the first and the second representations. I reject the defendants' submission that the third representation was not implied, or could not have been relied on, due to the nature of the Transferred Business in which prices for printing jobs were estimated and quoted with an eye to the pricing being offered by competitors. In my opinion, that submission misunderstands the nature of the representation alleged. As I understand the plaintiffs' case and Ms Karam's evidence, the alleged third representation is that the Buyer would get the benefit of taking over the Transferred Business with the Spotpress Seller having already informed customers about increased prices, and the Buyer would be able to get straight on with operating the Transferred Business quoting for jobs on the basis of those increased prices.

I accept the plaintiffs' submissions that the price increase representations were misleading, because they had not in fact been notified and passed on to all customers at the time the representations were made, and there is no evidence that Mr John Georgantzakos had any reason to believe that they would be notified and passed on to all customers prior to completion of the sale of the Transferred Business to the Buyer.

As I have mentioned earlier in these reasons, Ms Karam was not cross-examined on her evidence that she relied on the price increase representations, and her evidence about the purchase price reduction of approximately \$260,000 that she would have negotiated if she had known the true extent to which the price increase had been passed on to customers prior to Completion, as revealed by her subsequent analysis. [53]

I accept that the sum of \$260,000 represents the loss of a purchase price reduction that the plaintiffs did not negotiate by reason of the misleading price increase representations. However, the plaintiffs have already been awarded damages for that loss in the form of the 4.34% adjustment incorporated in Ms Wright's Additional Documents Approach to estimating the loss flowing to the Buyer from the breach of the Seller Warranty in clause 3.1 of Schedule 1 of the Asset Sale Agreement. [54] Accordingly, there will be no separate award of damages against the Sellers in favour of the Buyer for misleading or deceptive conduct in respect of the price increase representations.

Buyer's claim and Sellers' cross-claim in relation to Accrued Employee Entitlements

As referred to at [111] above, it is now common ground that that the Buyer is entitled pursuant to clause 7.1 of the Asset Sale Agreement and clause 4.3 of the Loan Deed to reduce the purchase price by deducting from the amount owing under the Loan Deed the sum of \$1,221,972.05 in respect of the Accrued Employee Entitlements of those employees of the Spotpress Seller and Real Media who commenced employment with the Buyer on Completion. A declaration will be made to that effect. The Spotpress Sellers do not press their cross-claim for a declaration to the contrary in prayer 7A of their Amended Cross-Summons.

Buyer's claims for breach of Seller Warranty and misleading or deceptive conduct in relation to necessary assets and Sellers' cross-claim alleging wrongful deprivation of printing equipment

For the reasons explained at [149]-[164] above, I accept the plaintiffs' submission that the Sellers breached the Seller Warranty in clause 5.1 of Schedule 1 of the Asset Sale Agreement by failing to include in the Assets transferred to the Buyer the Wohlenberg Guillotine, the Shoei Machinery Folder, the Rima Crash Folder and the Rima Stacker purchased by the Sellers in December 2022 and known as the "New Stacker".

It was common ground between the parties that the appropriate remedy for any such breach of that warranty would be an order rectifying the Asset Sale Agreement to include those items of equipment in the definitions of “Assets”, which will have the effect of entitling the Buyer to retain those items which are already in its possession at the Marrickville premises. An order will be made to that effect.

For the same reasons as I have upheld the Buyer’s claim for breach of the Seller Warranty in clause 5.1 of Schedule 1 to the Asset Sale Agreement, I reject the Sellers’ cross-claim in prayer 7E of their Amended Cross-Summons for an order requiring the Buyer to deliver up those items of equipment to the Sellers.

It is not necessary to address the Buyer’s alternative claim for misleading or deceptive conduct.

Buyer’s claim for breach of Sellers’ obligation to procure release of Deferred Encumbrances

For the reasons explained at [181]-[185] above, there will be a declaration to the effect that the purchase price payable by the Buyer to the Sellers under the Asset Sale Agreement is to be reduced by the value of those Assets that were the subject of the Deferred Encumbrances that are returned by the Buyer to the Sellers within 14 days of the making of orders and declarations giving effect to these reasons for judgment.

Buyer’s claim to recover amounts owing in respect of unpaid invoices

As explained at [165]-[166] above, this claim was not the subject of any dispute by the conclusion of the hearing, with the exception of the following three Category 4 invoices for shared services:

invoice 2301052 issued by the Buyer to the Spotpress Seller on 14 September 2023 in the amount of \$187.11 for “Recharge for Sameday Laser Printer Service”;

invoice 2301639 issued by the Buyer to the Spotpress Seller on 29 December 2023 in the amount of \$976.12 for “Recharge for Remondis Australia”; and

invoice 2301822 issued by the Buyer to the Spotpress Seller on 21 February 2024 in the amount of \$849.48 for “Recharge for Remondis Australia”.

Ms Karam has given evidence that all invoices for “Recharge for Same day Laser Printer Service” related to the costs of a shared office printer in the space of the Marrickville premises that was shared by the Buyer and the Spotpress Seller in the period after Completion. Ms Karam says that invoices for the use of that printer were issued to the Spotpress Seller in accordance with an agreement to equally share outgoings of the office space. These aspects of Ms Karam’s evidence were not the subject of cross-examination. The Spotpress Seller disputes invoice 2301052 on the basis that there is no evidence that it utilised the shared printer. I reject that submission, which misses the point of Ms Karam’s unchallenged evidence that the shared printer was part of the shared office space facilities which the Buyer and the Spotpress Seller had agreed to pay equally.

Ms Karam has given evidence that all invoices for “Recharge for Remondis Australia” related to the costs of removing rubbish from the Marrickville premises, and that the Buyer invoiced the Spotpress Seller for 30% of those costs on the basis of an informal agreement made at about the time of Completion that those costs would be shared between them in that manner. Ms Karam has also given evidence that the Spotpress Seller continued to generate rubbish at the Marrickville premises until at least December 2023. Those aspects of Ms Karam’s evidence were not the subject of cross-examination. The Spotpress Seller submits that it is not liable to pay invoices 2301639 and 2301822 because there is no evidence that it was responsible for generating 30% of the rubbish at the Marrickville premises at that time. I reject that submission having regard to Ms Karam’s unchallenged evidence and in the absence of any evidence adduced by the defendants to the contrary of Ms Karam’s evidence.

The plaintiffs correctly accept that, if the Buyer succeeds on its claim for loss of \$600,000 for the Sellers’ failure to transfer the hybrid business to the Buyer on Completion, [55] then the Buyer is not entitled to recover, in addition to that loss, their charges to the Spotpress Seller for a 25% margin on the heatset printing services performed for the Spotpress Seller under the Services Agreement in the period after Completion. In order to avoid double recovery in this scenario, the plaintiffs accept that the Buyer is not entitled to recover the whole of the Category 1 invoices (totalling \$92,760.87) and the 25% margin component of the Category 2 invoices (being \$52,939.16).

The defendants did not dispute the accuracy of any of the plaintiffs’ calculations of the unpaid invoice amounts, including the plaintiffs’ calculation of the total amount of \$145,700.03 to be excluded from the damages awarded to the Buyer in respect of the unpaid invoices claim if the Buyer is awarded damages for the Sellers’ failure to transfer the hybrid business.

There will therefore be an award of damages against the Spotpress Seller in favour of the Buyer in the sum of \$422,609.11, being the plaintiffs’ calculation of the total amount owing in respect of the undisputed and disputed unpaid invoices, excluding the Category 1 invoices and the 25% margin component of the Category 2.

Buyer’s claim for rental contribution in relation to Mascot Premises

For the reasons explained at [173]-[178] above, there will be an award of damages against the Spotpress Seller in favour of the Buyer for damages in the sum of \$77,000 in respect of the Spotpress Seller’s breach of the oral agreement to pay a one-third contribution to the rent for the Mascot premises leased by the Buyer and used by both the Buyer and the Spotpress Seller.

Claims by the Buyer and JG & DG Properties in relation to electricity costs under the Lease

I accept the plaintiffs' submission that, properly construed, Clause 2 of Schedule 2 to the Lease requires JG & DG Properties to procure the supply of electricity to the Marrickville premises at the cost price to the Lessor applicable as at the date of commencement of the Lease (being 7 March 2023) and to invoice the Buyer monthly for the electricity that it has consumed in the preceding month at that cost price to the Lessor. [56] The defendants did not propound an alternative construction.

For the reasons explained at [66]-[94] above, JG & DG Properties has failed to establish that the solicitor acting for the plaintiffs in the negotiation of the Lease inadvertently failed to draw the terms of that clause, which included amendments proposed by the Buyer, to the attention of the representatives of JG & DG Properties during the negotiation of the Lease and the other Transaction Documents on 7 March 2023. JG & DG Properties has also failed to establish that Mr John Georgantzakos did not agree to the terms of clause 2 of Schedule 2 of the Lease on behalf of JG & DG Properties before executing the Lease and the other Transaction Documents later that day. Their claim for rectification of that clause in the Lease as a remedy for alleged misleading or deceptive conduct therefore fails.

As the plaintiffs submitted, it follows that the Buyer is entitled to be charged for electricity that it consumes at the Marrickville premises only at the rates that were payable by JG & DG Properties as at 7 March 2023. JG & DG Properties breached the terms of the Lease when it failed to calculate the electricity supply charged to the Buyer at those rates, as referred to at [189] above.

I accept the plaintiffs' submission that the Buyer is therefore entitled to be indemnified by JG & DG Properties in an amount to be calculated as the difference between what JG & DG Properties has charged to the Buyer for electricity since 1 January 2024 which the Buyer has paid directly to the electricity supplier, and the amount that JG & DG Properties was entitled to charge under clause 2 of Schedule 2 of the Lease, up to the date of entry of orders. There is no dispute that the amount of that difference is \$292,811.48 in respect of the period from January 2024 to March 2025, as referred to at [190] above. It remains for the parties to calculate the amount of the difference in the period after March 2025.

Rectification

It is common ground between the parties that the Loan Deed should be rectified to address obvious errors by:

replacing the words "Seller Fundamental Obligations" in clause 4.1 of the Loan Deed with the words "Fundamental Seller Obligations"; and

replacing the reference to clause 15.5 of the Asset Sale Agreement in clause 4.6 of the Loan Deed with a reference to clause 18.5 of the Asset Sale Agreement.

Orders will be made to that effect.

The Sellers' cross-claim for outstanding amounts under the Loan Deed and the question of set-off

The provisions of the Loan Deed are summarised at [125]-[128] above.

It is common ground that the Buyer made payments under the Loan Deed totalling \$920,294.34 in the period up to 12 October 2023.

There is now no dispute that clause 4.3 of the Loan Deed entitles the Buyer to set-off the Accrued Employee Entitlements in the amount of \$1,221,972.05 against the amount owing under the Loan Deed. [57]

The plaintiffs have calculated that, after setting off the Accrued Employee Entitlements, the balance owing under the Loan Deed is reduced to \$2,670,182.25, subject to an adjustment that will be required if the value of the Assets to deducted from the stock purchase price after being returned to the Sellers as referred to at [347] above is something more or less than \$221,890.03. I did not understand the defendants to dispute that calculation.

As referred to at [179] above, the Buyer gave notice to the Sellers on 8 November 2023 that it was exercising its right under clause 4.6 of the Loan Deed to set-off against amounts owing under the Loan Deed the losses incurred by the Buyer as a result of the breaches of the Seller Warranties under the Asset Sale Agreement (the Notice).

Clause 4.6 of the Loan Deed, as rectified, provides:

"The Borrower shall make any payment required under this Agreement without any set-off, whether on account of taxes or otherwise, except as provided for pursuant to clause 18.5 of the Asset Sale Agreement."

Clause 18.5 of the Asset Sale Agreement provides:

"The Sellers acknowledge and agree that the Buyer may set off and deduct any amounts owing by the Sellers to the Buyer under this agreement from any amounts owing by the Buyer to the Sellers under the Related Agreements."

The Sellers do not dispute that the Buyer is entitled to set-off against the remaining amount of \$2,670,182.25 owing under the Loan Deed (subject to any adjustment referred to at [364] above):

the amount of any damages awarded to the Buyer in respect of its claims for breaches of the Seller Warranties, which I have now determined in the amount of \$4,875,000; and

the amount of any damages awarded to the Buyer in respect of its claims for the Sellers' breach of the Asset Sale Agreement in failing to transfer the hybrid business to the Buyer on Completion, which I have now determined in the amount of \$600,000.

The Sellers do not dispute that the Buyer has a procedural right of set-off under s 96 of the Civil Procedure Act 2005 (NSW) in respect of:

the amount of any damages awarded to the Buyer in respect of the unpaid invoices, which I have now determined in the amount of \$422,609.11; and

the \$77,000 rental contribution for the Mascot premises.

Declarations will be made to that effect.

Other pleaded claims not pressed

The parties pleaded numerous claims and cross-claims in addition to those addressed at [218]-[370] above. Those other claims and cross-claims were not pressed by the conclusion of the final hearing.

Conclusion and orders

At the conclusion of the final hearing the parties indicated that, and I accepted, that they would wish to be heard about the precise terms of the orders to be made to give effect to my reasons for judgment once published.

The Schedule to these reasons contains a draft form of orders which, subject to hearing from the parties, seem to me to give effect to these reasons. I gratefully acknowledge the work undertaken by the plaintiffs in preparing a first draft of those orders during closing submissions. Much of that first draft is now reflected in the Schedule. I am nevertheless content to afford the parties an opportunity to review the Schedule after considering these reasons and be heard in relation to the precise terms of the orders.

There will be directions for the parties to bring in within 14 days short minutes of order giving effect to these reasons for judgment. Those orders should provide for the parties to exchange and send to my Associate short written submissions in relation to the question of costs within a further 28 days, unless the parties reach an agreed position. In the absence of agreement, the question of costs will be determined on the papers.

Schedule (1.03 MB, pdf)

Endnotes

1.

See [19] above.

2.

See [22] above.

3.

See [22] above.

4.

See [98] above.

5.

See [96]-[97] and [120] above.

6.

See [260] below.

7.

See [47]-[49] above.

8.

See [130] above.

9.

See [27]-[28] above.

10.

See [59]-[61] above.

11.

See [19] and [62]-[63] above.

12.

See [28] above.

13.

See [46] above.

14.

Rounded from \$3,000,125.52 (4.14 x \$724,688).

15.

See [54] and [56]-[62] above.

16.

See [165] above.

17.

See [246] above.

18.

See [250] above.

19.

See [169]-[171] above.

20.

See [256] above.

21.

See [102] above.

22.

See [268] above.

23.

See [200]-[211] above.

24.

See [28]-[30] above.

25.

Robinson v Harman (1848) 1 Exch 850; 154 ER 363 at 365 (Parke B); Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64 at 80 (Mason CJ and Dawson J); [1991] HCA 54 (Commonwealth v Amann); Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25 at [164] (Gummow, Hayne, Heydon and Kiefel JJ); Clark v Macourt (2013) 253 CLR 1; [2013] HCA 56 at [106]-[110] (Keane J, Hayne J agreeing at [7] and [23], Crennan and Bell JJ agreeing at [24]-[30]); see also EW Blanch Pty Ltd v Cooper [2005] NSWCA 217 at [118] (Giles JA, Bryson JA and Brownie AJA agreeing); Davis v Perry O'Brien Engineering Pty Ltd [2025] QCA 18 at [53] (Bradley J, Flanagan JA and Brown J agreeing).

26.

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2024] HCA 54 at [34]-[40] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ) and the authorities there referred to; Clark v Macourt (2013) 253 CLR 1 at [106]-[110] (Keane J, Crennan and Bell JJ agreeing at [24]-[30]).

27.

See HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2024] HCA 54 at [39]-[40] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ); Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd [2019] VSCA 136 at [97] (Maxwell ACJ, Niall JA and Macaulay AJA); H & Q Café Pty Ltd v Melbourne Café Pty Ltd (2023) 72 VR 53; [2023] VSCA 200, especially at [134]-[135] (Niall JA, Kennedy JA and J Forrest AJA).

28.

See [276] and [281] above.

29.

(2015) 322 ALR 723; [2015] FCA 149 at [118]-[146] (Perram J). Note that an appeal was determined in a manner that did not require the Full Court of the Federal Court to address Perram J's construction of the meaning of "true and fair view": *Grant-Taylor v Babcock Brown Limited (in liq)* {2016} 330 ALR 642 [2016] FCAFC 60.

30.

Ibid at [136].

31.

[2022] NSWCA 188 at [38]-[42], [120] (Gleeson JA, Meagher JA and Simpson AJA agreeing).

32.

Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7 at [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [78] (Gageler, Nettle and Gordon JJ).

33.

See [14], [27]-[38], [40] and [58] above.

34.

Prepared with due care and attention and with no material omissions, as warranted in clause 3.3 of Schedule 1 of the Asset Sale Agreement.

35.

See [30] above.

36.

See [226] above.

37.

See [54]-[63] above.

38.

Zhong v Guan (2024) 116 NSWLR 258; [2024] NSWCA 300 at [32]-[38] (Kirk JA, Payne JA and Price AJA agreeing).

39.

See [227], [232]-[235] and [240] above.

40.

See [45] above.

41.

See [269] above.

42.

See [226] and [299] above.

43.

See [281] and [298]-[306] above.

44.

See [278] above.

45.

See [236] above.

46.

See [236]-[237] above.

47.

See [239]-[249] above.

48.

See [137]-[148] above.

49.

Commonwealth v Amann at 83 (Mason CJ and Dawson J), 125 (Deane J) and 153 (Gaudron J); Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 196 ALR 257; [2003] HCA 10 at [38] (Hayne J); Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31 at [135]-[137] (Beazley JA, Basten JA agreeing); Ramsay v BigTinCan Pty Ltd (2014) 101 ACSR 415; [2014] NSWCA 324 at [82] (Macfarlan JA, McColl and Gleeson JJA agreeing).

50.

See [257]-[260] and [271]-[273] above.

51.

See [165] above.

52.

See [260] above.

53.

See [167]-[171] above.

54.

See [271] and [325] above.

55.

See [327]-[328] above.

56.

See [129]-[130] above.

57.

See [342] above.

Amendments

26 November 2025

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Amendment to coversheet

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