Federal Court of Australia

Harvard Nominees Pty Ltd v Nicoletti [2022] FCAFC 179

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| Appeal from: | *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105 |
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| File number: | WAD 59 of 2022 |
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| Judgment of: | **BANKS-SMITH, COLVIN AND O'SULLIVAN JJ** |
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| Date of judgment: | 8 November 2022 |
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| Catchwords: | **CONSUMER LAW** - where on remitter primary judge found that first and second respondents were liable to pay damages arising from loss under the *Australian Consumer Law* - where primary judge held that the remitter did not disturb first instance findings as to the third respondent and therefore did not order damages against him - where appellant alleges that the primary judge erred in construing the nature and terms of the remittal - where the primary judge properly construed the reasons and orders of the Full Court - appeal dismissed |
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| Cases cited: | *Harvard Nominees Pty Ltd v Tiller (No 2)* [2020] FCA 604  *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105  *Harvard Nominees Pty Ltd v Tiller* [2020] FCAFC 229  *Re The Spanish Club Ltd* [2015] NSWSC 1858 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Date of last submissions: | 29 August 2022 (Appellant)  12 September 2022 (Third Respondent) |
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| Date of hearing: | 24 August 2022 |
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| Counsel for the Applicant: | Mr RC Newlinds SC with Mr TM Rogan |
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| Solicitor for the Applicant: | Hotchkin Hanly Lawyers |
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| Counsel for the Third Respondent: | Mr MD Cuerden SC with Mr AM Freund |
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| Solicitor for the Third Respondent: | Lawton Gillon |

ORDERS

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|  | | WAD 59 of 2022 |
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| BETWEEN: | HARVARD NOMINEES PTY LTD (ACN 008 761 037)  Applicant | |
| AND: | GIOVANNI BASILIO NICOLETTI  Third Respondent | |

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| order made by: | BANKS-SMITH, COLVIN AND O'SULLIVAN JJ |
| DATE OF ORDER: | 8 november 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant do pay the third respondent's costs to be assessed on a lump sum basis by a registrar if not agreed.
3. There be liberty to the appellant to apply within 14 days to vary the costs order should it maintain that there should be any different order as to costs.
4. The liberty to apply shall be exercised by filing and serving any submission of no more than three pages stating the costs order sought and the contentions advanced as to why the order should be made together with any affidavit in support.
5. If the liberty is exercised, then the third respondent shall file and serve any submission in response of no more than three pages together with any affidavit.
6. Unless otherwise ordered, any issue as to whether the costs order should be varied shall be determined on the papers.

THE COURT NOTES THAT:

1. These orders do not affect the costs and other consequences of the notices of discontinuance of the whole of the appeal as against each of the first and second respondents.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. Harvard Nominees Pty Ltd (**Harvard**) is controlled by Mr John Caratti. Harvard owns a farm near Esperance in Western Australia known as Warrinup Farm. Together with his brother, Mr Caratti also owns another farm in the area which is known as Howick Farm. At the beginning of 2019, both of the farms (**Farms**) were leased to Mammoth Investments Pty Ltd (**Mammoth**), another entity controlled by Mr Caratti. Mammoth had subleased the Farms to Mr Simon Tiller and his wife under long term arrangements (**Tiller Lease**). The Tillers were behind in the payment of rent and outgoings under the Tiller Lease. There had also been a breakdown in their marriage which had resulted in their separation in March 2018. Mammoth served a default notice.
2. For present purposes, it may be accepted that everyone concerned in the dealings that occurred thereafter thought that the rent payable under the Tiller Lease was very favourable to the Tillers as lessees. Nevertheless, Mr Tiller was under considerable pressure and engaged in conversations with Mr Caratti about a new lease with Dimension Agriculture Pty Ltd (**Dimension**), a company that he said was going to take over the farming business that, until then, had been carried on by him in partnership with his wife. He explained that he sought the new arrangements by reason of the breakdown in his marriage. Mr Tiller also sought deferral of the payments of rent and outgoings that were then due.
3. At the time of these communications, Mr Tiller had been talking to Mr Giovanni (John) Nicoletti about obtaining further financial backing so that he could continue to operate the Farms. There was considerable animosity between Mr Caratti and Mr Nicoletti such that Mr Caratti was unwilling to be involved in any business dealings with Mr Nicoletti. Indeed, it was said that they hated each other. Mr Tiller was aware of the animosity.
4. In early February 2019, there were discussions between Mr Caratti and Mr Tiller concerning the leases for the Farms. They resulted in new arrangements being concluded and documented by which (a) the lease to Mammoth over Warrinup Farm was surrendered; (b) the lease over Howick farm was assigned to Harvard; (c) the sublease by Mammoth to the Tillers was surrendered; and (d) Harvard leased Warrinup farm and subleased Howick farm to Mr Tiller and Dimension (**New Leases**). It appears that the arrangements in (a) and (b) by which Harvard came to be the party who could enter into the New Leases were matters in which Mr Tiller and Dimension were not involved. They were internal matters that concerned interests held by members of the Caratti family. They affected the dealings between Mr Caratti and Mr Tiller only in the sense that the New Leases were both to be made with Harvard.
5. The New Leases continued the favourable rental terms of the original Tiller Lease. They also provided for deferred payment of arrears in rent and reimbursement to Harvard of amounts in relation to rates.
6. Harvard claimed that it entered into the instruments recording the new arrangements on the basis of the truth of certain representations made by Mr Tiller and Dimension to the effect that Mr Nicoletti had no involvement, and would have no involvement, in Dimension.
7. In April 2019, Mr Caratti came to know that Mr Nicoletti was involved in Dimension and the activities on the Farms. Harvard's position was that it would not have entered into the New Leases had it known the true position. It claimed to have been misled and asserted in correspondence an entitlement to rescind the New Leases. It proceeded to enter into a new lease in respect of the Farms with a Mr Fowler (**Fowler Lease**). It was a condition precedent to the Fowler Lease that Harvard was able to secure vacant possession of the Farms by 1 May 2019. The Fowler Lease provided for a much higher rent than was payable under the New Leases (and had been payable under the original Tiller Lease).
8. Unbeknown to Harvard at the time of entry into the Fowler Lease, on 15 February 2019 Mr Tiller and Dimension had executed deeds by which Mr Tiller assigned his interest in the New Leases to Dimension (**15 February Deeds**). Although Mr Nicoletti was not a director or shareholder of Dimension, he had effective control of Dimension. Therefore, by that means, Mr Nicoletti secured full control of the Farms.

## The commencement of proceedings

1. In May 2019, Harvard commenced proceedings in this Court. At that time, Harvard did not know of the existence of the 15 February Deeds. They were revealed to Harvard as a result of their disclosure in the course of the proceedings. At the final hearing, two claims of misleading and deceptive conduct were advanced by Harvard.
2. *By the first claim*, Harvard alleged that it was misled by Mr Tiller and Dimension as to the involvement of Mr Nicoletti in the affairs of Dimension prior to entering into the New Leases in early February 2019. It also alleged that Mr Nicoletti and a director of Dimension, Mr Damian Bryce, were each knowingly concerned in or a party to the misleading conduct. It claimed relief bringing the New Leases to an end and damages, being the loss of the significantly higher rent that it could have secured under the Fowler Lease. We will refer to this claim as the **First Claim** and the conduct said to give rise to the First Claim as the **Main Conduct**.
3. *By the second claim*, Harvard alleged that it was misled by the concealment of the 15 February Deeds. The claim was brought against Mr Tiller, Dimension, Mr Nicoletti and Mr Bryce. Harvard alleged that entry into those deeds was a fundamental breach of the New Leases and, had it known of the existence of the 15 February Deeds, it would have exercised its right at law to terminate and re-enter and thereby be able to perform the condition precedent to the Fowler Lease. The claim made was for damages only, being the loss of the additional rent that it would have obtained under the terms of the Fowler Lease. We will refer to this claim as the **Second Claim** and the conduct said to give rise to the Second Claim as the **Concealment Conduct**.
4. Mr Tiller's wife was also a respondent on the basis that the relief sought may affect her interests. She was not alleged to have engaged in misleading conduct.

## Decision of primary judge

1. After a final hearing, the application by Harvard was dismissed: *Harvard Nominees Pty Ltd v Tiller (No 2)* [2020] FCA 604. This was despite Harvard having enjoyed a considerable measure of success as to the matters in issue in the proceedings. For present purposes, it is sufficient to quote the summary of the outcome given by the primary judge at [9]:

The outcome is that the application will be dismissed. Harvard's claim in respect of the first instance of misleading or deceptive conduct fails because, while it has established that it relied on misleading representations made by Mr Tiller and Dimension, it has not proved that it suffered any loss or damage because of that reliance. Also, it has not established that Mr Nicoletti or Mr Bryce had sufficient knowledge of the misleading or deceptive conduct to attract liability for the conduct under the ACL. Harvard's claim in relation to the second instance of misleading or deceptive conduct fails because, while the conduct was misleading or deceptive or likely to mislead or deceive, and while the entry into the 15 February Deeds was a breach of the New Leases, it was not a fundamental breach which would have permitted Harvard to re‑enter the Farms, had it been aware of it. Also, Harvard has not established that Mr Bryce engaged in the relevant conduct.

1. It can be seen that, as to the First Claim, the primary judge found that Harvard relied on misleading conduct of Mr Tiller and Dimension. His Honour also found that there was a causal nexus between that conduct and a refusal to deliver possession based on the New Leases which prevented Harvard from receiving the additional rent under the Fowler Lease: at [506]‑[507].
2. However, his Honour did not accept that the additional rent claimed was a loss that was suffered because of the Main Conduct. The reasoning to support that conclusion involved two steps. First, a finding that the state of affairs in existence before the Main Conduct was that Mr Tiller and his wife had an enforceable lease and they enjoyed the financial support of Mr Nicoletti. Therefore, there was no ability to give vacant possession to another party, whether under the Fowler Lease or otherwise: at [510]‑[513], [531]. Second, there was no other detriment from entering into the new Leases. In particular, his Honour held that entry by Harvard into a contract that it would not have otherwise entered into (the New Leases) was not, of itself, loss or damage. This was not a case where Harvard could have been free of obligations of the kind expressed in the New Leases. This was because at the time of the Main Conduct, 'legal relations were already in place which were no different in their effect from the legal relations from which Harvard would have abstained': at [565]. In short, even if the Main Conduct had not occurred (being the arrangements made in early February 2019), the Tiller Lease would still be binding. It was for that reason that Harvard failed in its claim that it suffered loss by the misleading conduct the subject of the First Claim.
3. His Honour also decided that there was no evidence upon which a finding could be made that Mr Nicoletti or Mr Bryce knew about the representations made by Mr Tiller that comprised the Main Conduct: at [488]‑[492].
4. As to the Second Claim, his Honour found that entry into the 15 February Deeds was not a fundamental breach of the New Leases: at [634].
5. Therefore, even if it had known about the 15 February Deeds, that knowledge would not have revealed facts upon which Harvard could terminate the New Leases for fundamental breach. The case advanced by Harvard on the Second Claim was that the Concealment Conduct meant that Harvard did not terminate the New Leases for fundamental breach (and thereby secure the vacant possession required to be able to perform the Fowler Lease). It was only on the basis that entry into the 15 February Deeds was not a fundamental breach that his Honour found that the Second Claim must fail.
6. Mr Tiller, Dimension and Mr Nicoletti were found to have engaged in the Concealment Conduct and thereby to have misled Harvard: at [654]‑[665]. Mr Bryce was found not to have engaged in the relevant conduct: at [666]‑[669].

## Appeal by Harvard

1. Harvard brought an appeal against the decision of the primary judge (**First Appeal**). Three grounds were raised in the First Appeal. They were to the following effect:
2. *Ground 1a*: The primary judge erred in finding that Harvard did not suffer loss or damage because of the conduct of Mr Tiller and Dimension in engaging in the Main Conduct.
3. *Ground 1b*: The primary judge erred in finding that Harvard did not suffer loss or damage because of the conduct of Mr Tiller, Dimension and Mr Nicoletti in failing to disclose the 15 February Deeds.
4. *Ground 2*: The primary judge erred in finding that the failure to disclose the 15 February Deeds did not repudiate the New Leases entitling Harvard to terminate the New Leases and procure immediate vacant possession of the Farms from on or about 15 February 2019.
5. It may be noted that ground 1b referred to the conduct of 'the Respondents', but it was evident from the way that the appeal was conducted that it was only a complaint about the conduct of Mr Tiller, Dimension and Mr Nicoletti (being the respondents who had been found to have misled Harvard in the manner alleged in the Second Claim). Further, it was evident that ground 1 as a whole challenged the finding that Harvard did not suffer loss and damage with ground 1a dealing with the First Claim and ground 1b dealing with the Second Claim.
6. It may also be observed that there was no challenge to the finding that Mr Nicoletti had not been knowingly involved in the Main Conduct and consequently was not liable in respect of the First Claim.

## Outcome of the First Appeal

1. The First Appeal was upheld on the basis that entry into the New Leases did result in loss. The loss was found to take the form of Harvard being bound to extended contractual performance with someone it strenuously did not wish to contract with and on terms it would not have agreed if the New Leases were to be for the benefit of someone other than Mr Tiller: at [78]‑[82]. It was held that rescission was the only relief that could cure that loss or damage: at [86]. Therefore, Harvard was entitled to have the New Leases surrendered with effect from 2 April 2019: at [88]‑[89], [95]. Whether, as a matter of discretion, the statutory remedy of rescission was to be granted was properly a matter for determination by the primary judge on remitter: at [96]. The broad common-sense notion of causation was sufficient to support the conclusion that the loss represented by the lost opportunity of the Fowler Lease was loss or damage that had been suffered by Harvard: at [92]. It would also be necessary for the primary judge to consider the statutory damages to be ordered subsequent to determining whether statutory rescission should be ordered: at [97].
2. As to ground 2, the reasoning in the First Appeal was as follows (at [94]‑[95]):

Harvard's other ground of appeal was that the primary judge erred in finding that the 15 February Deeds conduct did not repudiate the New Leases entitling Harvard to terminate the New Leases and procure immediate vacant possession of the farms from on or about 15 February 2019.

Since we have found that Harvard had an entitlement to rescind the leases as at 2 April 2019, and that statutory rescission relief should follow from that, any finding in Harvard's favour on the alternative ground would be inconsistent. It is in that sense a pure alternative. Because of that, and because the matter has to be remitted to the primary judge for the question of relief, we do not consider that it is necessary or efficient to deal with the second ground. The notice of contention is advanced as an answer to the second ground and can accordingly be put to one side.

1. There was no separate reasoning as to ground 1b.
2. The significance, if any, to be given to ground 1b and the absence of any express reference to the ground in the reasons in the First Appeal was in issue in the present appeal and is a matter to which we return below.
3. The First Appeal was allowed and the matter was remitted to the primary judge: *Harvard Nominees Pty Ltd v Tiller* [2020] FCAFC 229.

## Decision of primary judge on remitter

1. On remitter, the primary judge found that the New Leases should be declared to have been void ab initio and that Mr Tiller and Dimension must pay damages determined by reference to the additional rental that would have been earned if vacant possession could have been given under the Fowler Lease. Relevantly for present purposes, his Honour found that:
2. the decision in the First Appeal did not involve a finding that Mr Nicoletti was liable to pay damages;
3. the Second Claim still depended upon whether entry into the 15 February Deeds amounted to a repudiation or fundamental breach of the New Leases;
4. the finding that entry into the 15 February Deeds was not a fundamental breach of the New Leases had not been disturbed by the First Appeal; and
5. therefore, because (a) Mr Nicoletti had been found not to be liable under the First Claim; and (b) the finding that the Second Claim was not to be upheld rested on the conclusion that entry into the 15 February Deeds did not amount to a fundamental breach of the New Leases, there was no basis for an order for damages against Mr Nicoletti.

See: *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105.

## Harvard's Second Appeal

1. Harvard now brings an appeal against the decision of the primary judge on the remitter (**Second Appeal**). It seeks an order to the effect that Mr Nicoletti is also liable to pay the amount of damages that Mr Tiller and Dimension have been found liable to pay to Harvard. It advances three grounds, namely:
2. The primary judge erred in construing the orders and reasons in the First Appeal to mean that his Honour was precluded from finding that Mr Nicoletti was liable to Harvard for damages when the primary judge ought to have found on a proper construction of the reasons and orders that his Honour was required to determine the quantum of damages for which Mr Nicoletti was liable.
3. On a proper construction of the orders and reasons in the First Appeal, the primary judge ought to have determined that Mr Nicoletti was liable to pay Harvard damages in the same amount as Mr Tiller and Dimension.
4. On a proper construction of reasons and orders in the First Appeal, and in light of the findings by the primary judge as to the Concealment Conduct, the primary judge ought to have ordered that Mr Nicoletti personally pay such damages as should properly have been awarded by the primary judge.
5. It can be seen that each of the grounds depends upon a claim that the primary judge failed to correctly construe the reasons and orders in the First Appeal. All of the grounds are founded on the contention that, in the First Appeal, the Full Court either determined that Mr Nicoletti was liable for damages or allowed for such a determination to be made on the remitter.
6. The terms in which the three grounds are expressed tend to obscure the fundamental proposition upon which the present appeal rests. It is the proposition that the decision of the Full Court in the First Appeal somehow overturned the basis upon which Mr Nicoletti was originally found not to be liable for damages. It is a proposition that faces considerable obstacles.
7. As to the First Claim, there was no challenge in the First Appeal to the finding that Mr Nicoletti was not liable in respect of the First Claim. Plainly, that finding was undisturbed by the First Appeal.
8. As to the Second Claim, the primary judge had found that even though Mr Nicoletti was found to have engaged in the Concealment Conduct, he was not liable because the entry into the 15 February Deeds was not a fundamental breach of the New Leases. His Honour had emphasised the significance of this aspect of the case in his first reasons. In particular:
9. the Second Claim was first described by his Honour in those reasons (at [6]), in the following terms:

In relation to the alleged concealment of the 15 February Deeds, Harvard says that the entry into the deeds was a fundamental breach constituting a repudiation of the New Leases. It claims that if it had known of the 15 February Deeds by April 2019, it would have accepted the repudiation and gained vacant possession of the Farms in time for the Fowler Lease to come into effect.

1. then, when describing the Second Claim as pleaded, his Honour said (at [30]):

Harvard pleads that in reliance on [the non-disclosure of the 15 February Deeds] it did not terminate the New Leases as it was then entitled to do and was precluded from relying on its right to termination. This is said to have caused loss or damage because if the existence of the 15 February Deeds had been disclosed, Harvard would have exercised its right to terminate the New Lease before 30 April 2019, and delivered vacant possession of the Farms under the Fowler Lease by 1 May 2019.

1. in stating the issues for determination, his Honour posed one of the issues as being whether the making of the 15 February Deeds was a fundamental breach or repudiation of the New Leases which would have entitled Harvard to terminate those leases (at [47](6)).
2. his Honour's consideration of the issue as to whether the 15 February Deeds amounted to a repudiation of the New Leases commenced in the following way (at [582]):

It is critical to this part of its case that Harvard establish that the 15 February Deeds resulted in a breach of the New Leases that entitled it to terminate them. Only then will it be able to establish that any misleading conduct on the part of the respondents which led it to be unaware of the existence of the 15 February Deeds deprived it of the ability to give vacant possession to the Fowlers.

1. as to that issue, his Honour concluded squarely that the breaches of the New Leases that occurred when Mr Tiller and Dimension entered into the 15 February Deeds were not fundamental breaches or a basis for Harvard to terminate the New Leases and that '[a]s a result, Harvard's claim in respect of the [Second Claim] must fail' (at [634]).
2. his Honour's consideration of the question whether entry in the 15 February Deeds was a repudiation or basis for termination (and the reasons why the respondents claimed that was not so) occupied a considerable part of his Honour's reasons.
3. Therefore, the Second Claim as described by the primary judge and as dealt with by his Honour was framed in terms that if Harvard had known about the 15 February Deeds it would have exercised *its right to terminate the New Leases for repudiation* and thereby satisfied the condition precedent to the Fowler Lease. Put in that way, the Second Claim was wholly dependent upon the proposition that entry into the 15 February Deeds was a repudiation (that is, a sufficiently serious breach) of the New Leases which Harvard could have relied upon to lawfully terminate the New Leases. Harvard failed in its Second Claim because that proposition was not established.
4. Although the finding about the 15 February Deeds was challenged by ground 2 in the First Appeal, the reasons in the First Appeal state explicitly that 'we do not consider it necessary or efficient to deal with the second ground': at [95] (full passage quoted above). So, ground 2 was not addressed in the First Appeal. The basis for not addressing ground 2 was the Full Court's finding that there was a clear right to statutory rescission of the New Leases and the characterisation of the challenge to the finding about fundamental breach arising out of the Concealment Conduct as being 'a pure alternative'.
5. As has been mentioned, there was no reference in the reasons in the First Appeal to ground 1b.
6. Therefore, at its core, the present appeal depends upon the proposition that even though Mr Nicoletti was found not to be liable for damages by the primary judge, the decision in the First Appeal somehow overturned the findings of the primary judge as to Mr Nicoletti's liability *without considering in any respect the findings on which that part of the primary judge's decision was based*.
7. As will emerge, the flaw in the case advanced for Harvard in this Second Appeal is that it seeks to read passages in the reasons in the First Appeal in a manner that is divorced from the most basic understanding of the findings by the primary judge which led to his Honour's conclusion that Mr Nicoletti was not liable to Harvard for damages. Unless those findings can be shown to have been upset in some way by the decision on the First Appeal then they stand. The remitter is a continuation of the hearing, not an occasion to seek to go back and undo those aspects of the reasons of the primary judge that were not questioned by the First Appeal.

## Summary of outcome on present appeal

1. For the following reasons, the various ways in which Harvard sought to demonstrate error in the primary judge's decision on remitter that damages should not be awarded against Mr Nicoletti should not be accepted and the appeal must be dismissed.

## Contentions advanced by Harvard in the Second Appeal

1. Harvard's primary case in its Second Appeal was that, on remitter, the primary judge misconstrued the orders of the Full Court. It claimed that those orders required the primary judge to award damages against Mr Nicoletti (or possibly that the primary judge had no alternative but to do so). In the course of oral argument, Harvard developed a further point to the effect that, on remitter, it was open to the primary judge to award damages against Mr Nicoletti on the basis that Harvard would have acted as if it had a legal right to terminate the New Leases (even if that were not the case) had it known of the existence of the 15 February Deeds. That is to say, irrespective of whether it had a legal right to do so, Harvard would have re-entered. If it had done so, it would have earned the additional rent from the Fowler Lease and the fact that it could be shown thereafter that there was no lawful right to re-enter would be irrelevant because, on the First Claim, the New Leases would be brought to an end by the grant of statutory relief. Therefore, Mr Nicoletti could be liable for damages even if the finding of the primary judge that entry into the 15 February Deeds was not a repudiation was left undisturbed.
2. We will first consider the primary case and then consider Harvard's further point.
3. It was not in issue that the primary judge could resolve any dispute as to what was determined by the First Appeal and precisely what was the subject of the remitter: *Re The Spanish Club Ltd* [2015] NSWSC 1858 at [6]. It was accepted that the primary judge described the proper approach at [50] of his Honour's reasons on the remitter, in stating that the controversy between the parties as to what was and what was not decided by the Full Court was 'to be determined as a matter of objective construction of the orders made and the reasons expressed in the Appeal Judgment, in all the relevant context' and that the 'relevant context includes at least the grounds of appeal, the submissions on appeal, and the primary judgment'.

## Harvard's primary case

1. As to its primary case, Harvard claimed that the course of argument in the First Appeal proceeded on the assumption that if Harvard was right to maintain that being bound to Mr Nicoletti 'opened the gateway to relief' then all relief sought would follow, including damages against Mr Nicoletti. It contended that the Full Court's reasons in the First Appeal exposed that correcting the error of the primary judge as to whether the misleading conduct (as found) had caused loss or damage ought to give rise to relief being granted against each of Mr Tiller, Dimension and Mr Nicoletti. It relied upon:
2. aspects of the way the First Appeal was argued;
3. the alleged significance of ground 1(b);
4. the reasons of the Full Court; and
5. the terms in which the orders were expressed.

Each of these aspects is addressed separately below.

### (1) The way the First Appeal was argued

1. In oral submissions in the First Appeal, the case for Harvard was presented as raising a single issue, namely whether the state of affairs brought about by the misleading conduct as found can be characterised as loss and damage caused by that conduct. It was contended for Harvard that it was possible to have a species of loss and damage that was sufficient to activate the statutory power to set aside an agreement even though it may not be loss and damage that could be the subject of a damages award in favour of the claimant. In short, the loss that might support statutory rescission could be different to the loss that might support an award of damages in circumstances where there was no rescission.
2. It was then submitted that the misleading conduct as found by the primary judge was directed to the identity of a person who would be involved in the transaction in circumstances where Harvard would not have entered into the new arrangements if it had known of the involvement of that person, being Mr Nicoletti. In those circumstances, it was put that entry into the New Leases by Harvard where Mr Nicoletti's involvement was concealed was, in itself, relevant loss and damage for the purposes of the claim to statutory rescission.
3. In that context, the Full Court was taken to the written opening submissions before the primary judge. Reliance was placed upon a statement in paragraph 4 of those submissions to the effect that the complaint made was that control of the Farms passed from someone that Harvard was prepared to support in times of difficulty (Mr Tiller) to someone who deserved no such support (Mr Nicoletti). In effect, by the misleading conduct Mr Nicoletti secured the benefit of the favourable rent that Mr Caratti as the operative mind and will of Harvard was prepared to extend to Mr Tiller.
4. The presiding judge in the First Appeal then directed the attention of senior counsel to paragraph 7 of those submissions which stated that Harvard's case essentially rested on four propositions being:

(a) Proposition 1 - [Harvard] had an absolute right to decide who could farm its land and had intended on 8 February 2019 only to have Mr Tiller do so with his company, Dimension Agriculture Pty Ltd;

(b) Proposition 2 - from mid-January 2019, Mr Nicoletti wanted to operate the Farms in place of Mr Tiller, and set about doing so in combination with Mr Tiller and Mr Bryce in a way which concealed Mr Nicoletti's intended involvement from the Applicant on 8 February 2019;

(c) Proposition 3 - After securing his entry on the Farms, Mr Nicoletti, with the help of Messrs Tiller and Bryce, used Dimension Agriculture in March and April 2019 to pretend that Mr Tiller remained involved in the management of the Farms, withholding facts which, if disclosed, would have enabled [Harvard] to have a lawful basis for exercising its right to terminate the new leases and re-take possession of the Farms in early to mid-April 2019;

(d) Proposition 4 - the measure of loss caused by the misleading and deceptive conduct of the Respondents is the difference between the rent which [Harvard] would have enjoyed from the first Fowler Lease if vacant possession had been delivered to [Harvard] when [Harvard] sought to rescind the new leases, and rent payable purportedly under the new leases from the date which the first Fowler Lease would have commenced if vacant possession had been given, on 1 May 2019.

1. Significantly, it was not Harvard who raised those propositions in support of its argument on the First Appeal.
2. It is propositions 3 and 4 that assume significance for present purposes. As to those propositions, it was put by senior counsel then appearing for Harvard that 'proposition 3 may come into it a bit later'. However, the then presiding judge did not draw attention to proposition 3 but rather pressed counsel as to the significance of proposition 4. It was put to counsel that the way the case was put in proposition 4 was that the only loss that the primary judge was required to look at was the difference between the rent paid by Mr Tiller and the rent that would have been enjoyed by Harvard if vacant possession had been delivered under the Fowler Lease.
3. In response, it was submitted that the claim by Harvard for rescission of the New Leases depended upon a different set of propositions to those that supported the claim for loss and damage. The response led into an exposition of the relevant authorities.
4. After dealing with the authorities as to what was required by way of loss and damage to support an order for statutory rescission, senior counsel for Harvard then turned to what was described as the 'second part of the case'. The submissions began with the following introduction:

The second part of the case, in one sense, is not necessary if the first part succeeds, this is the part of the case that looks at the non-disclosure of the 15 February deeds. Now, we rely on the 15 February deeds in relation to the first part because they demonstrate … that there was a recognition of the significance of concealing the ever present intention that Mr Tiller was not going to be substantively involved in the operation of the farms under the leases.

In other words, the 15 February deeds entered into less than two weeks after the new leases were entered into clearly demonstrate that what was in substance always [sought] to be achieved was the removal of Mr Tiller from the farms and the substitution of Mr Nicoletti …

The challenge that we make to his Honour's reasoning in respect of this part of the case is really quite [confined]. There's two aspects to it, the first is that we say his Honour erred in failing to find that there was a repudiation by reason of a breach that went to the root of the contract.

1. The presiding judge then posed the question 'Isn't this fundamentally inconsistent with your primary case?'. Senior counsel responded 'It's alternative'. Which led to the primary judge observing 'It's a pure alternative though'. To which senior counsel responded:

It's a pure alternative. As I say, it does not arise if the first part of the case is correct … I'm sorry if I haven't made that clear, your Honour.

1. Plainly, the challenge to the finding by the primary judge to the effect that the conduct in entering into the 15 February Deeds was not a repudiation of the New Leases was only pressed if the first part of the case was not successful. The first part of the case concerned a claim that there was loss or damage of a kind that justified statutory rescission (being a different question to whether there was loss and damage which might support an award of damages).
2. Submissions that were then advanced were to support a claim that the entry into the 15 February Deeds was a repudiation of the New Leases. Which led the presiding judge to observe:

This is why I have trouble with this part of the case … the matters you're calling in aide in order to demonstrate how fundamental this term was such as to - for it to be characterised in such a way that it amounted to a repudiation, hence allowing you to terminate, are precisely the matters you rely upon in order to say that there was a misrepresentation. But you only get to this in circumstances where there's not a misrepresentation. That's why they just - it seems to have such - I know you say it's a pure alternative. But it's a real inconsistency too…because essentially you're saying the reason why it's fundamental are the very same things as you say that gave rise to the right that you had in any event.

1. Which led, in turn, to senior counsel for Harvard indicating:

Can I be candid with your Honour. I think it is very unlikely that there will be any circumstance in which I lose on what I will call the first part of the case and I succeed on this part of the case…However, they are true alternatives. I do not submit, and I don't accept for the purposes of this submission, that there is any fatal conflict between them. If the first case fails, there is a second independent case which is premised upon a separate and discrete non-disclosure which arose in April rather than back in January.

1. Then, senior counsel went on to make clear that the second part of Harvard's case in the First Appeal was a claim that Harvard had a contractual right which 'was invoked as a step in the identification of loss which gives rise in this part of the case, only to a claim under section 236 [being the statutory provision that allows a person to recover loss and damage if the person suffers loss and damage because of the conduct of another person]'. Further, it was said that there was no claim for rescission or voiding and termination on the second part of the case. Rather, it was put that 'there was a contractual right to terminate for repudiation which was lost because we didn't know about it'.
2. For the purposes of this Second Appeal, two important matters emerge from the way the case was put for Harvard in the First Appeal, namely:
3. no significance was given to the fact that Mr Nicoletti was only personally liable under the second part of the case; and
4. the second part of the case was put on the basis that the loss suffered was a consequence of a failure to exercise a contractual *right* to terminate for repudiation.
5. With respect, it is difficult to see why, in those circumstances, it might be said (as was submitted by senior counsel for Harvard) that the second part of the case put on the First Appeal was a 'pure alternative' that did not arise if the first part of the case is correct. If the first part of the case was upheld then there remained an issue as to whether there was a contractual right to terminate which was not exercised because Harvard did not know about the 15 February Deeds. Its significance lay, at least, in the fact that it was the only pathway to liability on the part of Mr Nicoletti.
6. It appears that at the time of the First Appeal, Harvard was unconcerned about whether it succeeded on the first part or the second part of the appeal because its focus was upon securing the termination of the New Leases and a consequential award of damages (assessed on the basis that the New Leases were not binding). If Harvard succeeded on the first part of its appeal it would be entitled to that relief. It did not seek, at that time, to preserve the distinct second claim (in order to pursue that route to personal liability on the part of Mr Nicoletti). The claims were true alternatives if the only object in view was termination and damages rather than securing personal liability on the part of Mr Nicoletti. Indeed, quite properly, this explanation was exposed in the course of oral submissions for Harvard in the Second Appeal when it was said that the issue of Mr Nicoletti's personal liability came into sharp relief when issues arose as to the solvency of Dimension. The focus upon termination of the New Leases in the First Appeal is understandable because the New Leases operated for a considerable term and bound Harvard to ongoing dealings with Dimension.
7. Despite the indication in the First Appeal that proposition 3 may 'come into it a bit later', there was no further reference to proposition 3 or its significance in the course of the oral argument advanced for Harvard. Nor was there any separate reference to ground 1b.
8. The submissions advanced for the respondents in the First Appeal emphasised the significance of the way in which the case had been put to the primary judge. In that context, reference was made to the fact that the submissions for Harvard did not distinguish between Mr Tiller, Dimension and Mr Nicoletti. The point was made in the First Appeal that Mr Nicoletti was found not to be liable in respect of the Main Conduct. Reference was made to loss or damage being 'the gateway' to the statutory remedies (including rescission) but not the end of the inquiry. It was also emphasised that the claim to rescission of the New Leases was based solely upon the First Claim.
9. As to the four propositions in paragraph 7 of the written opening submissions before the primary judge (to which reference has already been made), the submissions for the respondents on the First Appeal focussed upon the fourth proposition. They made only passing reference to the third proposition. There was no suggestion that the third of those propositions was uncontroversial for the purposes of the First Appeal or anything that might be said to be a concession to that effect. Rather, the focus was upon a submission to the effect that the case run before the primary judge as to rescission was that, but for the Main Conduct, the Tiller Leases would have remained in place. It was submitted that 'the proposition that loss and damage, which open the gate to the statutory remedies under the Australian Consumer Law, was Mr Nicoletti being in de facto possession of the farming properties' was a proposition that was not put to the primary judge.
10. In the course of further submissions for the respondents in the First Appeal, some matters were raised by the Full Court with senior counsel for Harvard. In the course of dealing with those questions the description of the second part of the appeal as a 'true alternative' was again adopted by senior counsel. The following submission was then put for Harvard:

… the second case proceeds on the basis that there was an ongoing contract to be terminated … We say that it was, although there was no relief specifically sought directly vindicating the common law or equitable right to rescind, we do say that the substantive existence of that right was in play on the pleadings and in the way the case was run.

1. However, the submissions advanced by senior counsel for Harvard at that point then proceeded to return to the first part of the case in order to explain the basis upon which statutory rescission was sought (being a claim that was only made in the first part of the case). The submission put was that Harvard was seeking a confirmation of its election to rescind as expressed in correspondence at the time. Therefore, although there was no declaration sought to vindicate by way of declaration the exercise of that right to rescind, what was sought was statutory relief to confirm what had been sought in correspondence at the time. Which led to an exchange about the statutory gateway to relief. The presiding judge put to senior counsel that the approach that had been adopted 'erected a gateway which was not necessary' if it had simply been claimed that there had been lawful rescission.
2. In that context, the following exchange occurred:

COUNSEL: Ultimately, his Honour found that we didn't get through the gateway of loss and damage, so all questions after that fell away. But it remains the case, we would submit, that ultimately, the critical question in relation to both section 237 and rescission was, 'Had there been misleading conduct?' The trial judge found that there had been. And then, the second question would have been in the discretionary exercise of the statutory power, 'Whether relief should have been granted, given what else had happened?'

In other words, that was the same sort of question as whether restitution was possible, in Equity. So the substantive issues, all ultimately, became subsumed under the same decision that had to be made in relation to the statutory claim.

COURT: But so you don't allege, it's certainly not within your grounds of appeal. You don't, you do not conten[d] that his Honour fell into error in failing to determine whether or not you were entitled to rescind in common law, as of 2 April 2020?

COUNSEL: No. Because, we say, that - we say that the error occurred at a prior point in the analysis.

COURT: Yes.

MR OWENS: Ie the loss and damage gateway argument. And after that, all the trial judge's findings after that lead to the conclusion that we're entitled to relief that we've sought below and claimed in the notice of appeal.

1. In submissions for Harvard in the Second Appeal it was suggested that the final sentence quoted above was a submission to the effect that if Harvard was successful in the First Appeal then it was entitled to all the relief that it had claimed before the primary judge, including an award of damages against Mr Nicoletti. There was no foundation for such a suggestion. What was being put at this point was that if Harvard could show loss and damage (that is, satisfy the gateway to an order for statutory rescission) then it was entitled to the relief it had sought on the appeal. It was not directed to the issue whether it would be entitled to relief as against Mr Nicoletti. It was a single sentence in submissions made after the case for Harvard had been fully presented and at a point when senior counsel was dealing with a question raised as to whether Harvard sought an order for rescission based upon a claim at law (rather than under statute). Harvard disavowed any claim at law as a basis for rescission and did so immediately after confirming that the second case being advanced in the First Appeal (being the only case that could found a claim against Mr Nicoletti) was proceeding on the basis that the New Leases had not been terminated and as a 'true alternative' to the first case. It reflected an overall approach to the First Appeal that if Harvard was to succeed on its first case then its second case was simply an alternative way to the same outcome. It was an approach that gave no significance to the fact that, on the findings of the primary judge, Mr Nicoletti was only personally liable if the second case was successful. If indeed Harvard wished to seek damages against Mr Nicoletti then it was a flawed basis upon which to put the appeal. In order to overturn the decision of the primary judge that Mr Nicoletti was not liable then Harvard had to succeed on ground 2. Nevertheless, Harvard advanced its appeal on the basis that ground 2 was a pure alternative to ground 1.
2. Senior counsel for the respondents then resumed making submissions in answer to Harvard's appeal insofar as it concerned the first part of the appeal. He concluded those submissions by stating 'so now I've dealt with, I think ground 1, which has various subgrounds'. Then very short submissions were made concerning 'ground 2' by adopting the written submissions and noting that ground 3 of the notice of contention 'dovetails into ground 2'. Then, senior counsel made some brief submissions about ground 1b. The fact that these submissions were made separately indicates that the earlier reference to 'subgrounds' was to the particulars to ground 1a.
3. As to ground 1b, senior counsel noted that the position of the respondents was that the submissions did not conform to the way in which ground 1b was expressed. It was noted that the submissions advanced to support ground 1b challenged the correctness of a finding by the primary judge. It was a finding to the effect that if Harvard had sought to rely upon a right at law to terminate the New Leases then there would have been an application for relief against forfeiture and the likelihood was that such an application would have been granted. As to that challenge, senior counsel accepted that his Honour's reasoning in that regard 'was probably not correct' because any such application would 'have needed to be supported by an undertaking as to damages' and that 'my client would have been liable under that undertaking as to damages'.
4. However, none of those submissions conceded any error as to the finding by the primary judge that the entry into the 15 February Deeds was not a repudiation of the New Leases. As has been observed, that finding was the subject of ground 2 which was advanced as a true alternative. Nor did those submissions indicate any concession that there would be personal liability on the part of Mr Nicoletti if Harvard's claim about the gateway to statutory rescission was accepted.
5. After those submissions were made, the presiding judge put to senior counsel for the respondents certain propositions as to the issues for determination in the First Appeal. They were to the following effect:
6. The first issue for determination in the appeal was a pleading issue as to whether it was now open for Harvard to run a case that the loss and damage it had suffered for the purposes of the statutory gateway to relief was, in effect, the fact that it was now in a long term contractual relationship with Mr Nicoletti when it would not have entered into the New Leases had it known of his involvement.
7. If that case was open, then the second issue for determination was whether the loss and damage for the purposes of the gateway could be different to the loss in respect of which a compensatory award of damages might be made (being a proposition that was not challenged by the respondents).
8. Then, if it was found that there was error by the primary judge as to whether there was loss or damage for the purposes of the gateway to statutory relief by way of rescission the appropriate order was to remit the proceedings to the primary judge limited to the question whether Harvard was entitled to any of the relief sought in the originating application.
9. If Harvard was successful to that point then ground 2 goes away. As to that aspect, the presiding judge put the proposition that:

There will be no need to deal with Ground 2 … but then your trial wouldn't go back in respect of the alleged repudiation case arising in April.

1. Senior counsel for the respondents agreed, observing that 'from our point of view, that would seem right. Because the[n] ground 2 would be premised upon a scenario that will have been rejected … Because the loss of … the Fowler Lease is not the loss that will have been identified [for the purpose of statutory rescission]'. It was also accepted that if the matter was remitted on that basis then it would be for the primary judge to determine whether Harvard was entitled to damages to compensate for the loss of the additional rental that may have been earned from the Fowler Lease.
2. In reply, senior counsel for Harvard submitted that the Full Court could conclude that any correct exercise of discretion would involve the rescission of the New Leases. However, senior counsel did not cavil with the proposition that if Harvard was successful on ground 1 then ground 2 would go away.
3. As we have noted, that was indeed the outcome of the First Appeal, namely ground 2 was treated as a true alternative because the finding that there was a statutory entitlement to rescind the New Leases was inconsistent with ground 2.
4. What was put by Harvard in the Second Appeal was that the respondents (particularly Mr Nicoletti) somehow accepted in the course of the First Appeal that if the argument on the loss and damage gateway to statutory rescission was upheld then Harvard was entitled to relief against Mr Nicoletti. We are unable to reach such a conclusion. At no point was any attention given to the significance that success on what was described by senior counsel for Harvard as the first part of the appeal might have for the claim against Mr Nicoletti in particular. The proposition that ground 2 was a true alternative did not have its source in anything that was advanced for the respondents. It was a characterisation of the case that came from the presiding judge and was embraced wholeheartedly by counsel for Harvard. The submissions for Harvard focussed upon the gateway to statutory relief. It reflected a central concern with securing rescission of the New Leases and an award of damages in consequence rather than a desire to demonstrate a pathway to recovery from Mr Nicoletti personally.
5. It is the case that Harvard sought orders in the First Appeal against all three respondents to the appeal, namely Mr Tiller, Dimension and Mr Nicoletti. Further, as we will see, the orders made by the Full Court did not exclude Mr Nicoletti on the basis that there could be no liability on his part on the remitter. But the difficulty for Harvard is that the particular position of Mr Nicoletti was simply not addressed. In those circumstances, the way in which submissions were advanced is an insufficient foundation for a conclusion to the effect that it was accepted that if the appeal on the loss and damage gateway was successful then Mr Nicoletti would be personally liable for any damages that may be then awarded. Indeed, they demonstrate that there was no such basis for the way the case was run in the First Appeal.

### (2) The alleged significance of ground 1(b) in the First Appeal

1. It was submitted for Harvard in the Second Appeal that there was significance to be given to ground 1b in determining what had been decided by the First Appeal. Ground 1b was expressed in the following terms:

The Court erred in finding that the Appellant did not suffer loss and damage because of the conduct of … the Respondents, in failing to disclose the 15 February Deeds at any material time prior to the institution of proceedings in the Federal Court of Australia ('the 15 February Deeds Conduct') …

**Particulars**

The Court erred in failing to find that the Appellant suffered loss or damage because it lost the opportunity to rescind the New Leases on the ground that the 15 February Deeds falsified the assertion by the Respondents at all material times that the 31 January Conduct was true in fact, and thereby precluded the Appellant from obtaining immediate vacant possession of the Farms from on or about 15 February 2019.

1. The first matter to note is that ground 1b was directed at the conduct of all of the respondents to the appeal, namely Mr Tiller, Dimension and Mr Nicoletti. Ground 1a, in contrast, was directed to conduct of Mr Tiller and Dimension. This reflected the findings of the primary judge by which Mr Nicoletti was only found to be a party to the Concealment Conduct. The second matter to note is that the particulars to ground 1b allege that the primary judge should have found that Harvard 'lost the opportunity to rescind the new leases' and was 'thereby precluded from obtaining immediate vacant possession'. This too reflected the findings of the primary judge to the effect that the Second Claim failed because the entry into the 15 February Deeds was not a repudiation of the New Leases that entitled Harvard to terminate them.
2. In its written submissions in the First Appeal in support of ground 1b, Harvard submitted (paras 30‑34):

Harvard next contends that the trial judge fell into error in concluding that it did not suffer loss or damage by reason of the non-disclosure of the 15 February Deeds.

The fundamental question arising in this context is whether Harvard was in fact deprived of the opportunity to terminate the New Leases on the basis of a breach of a fundamental term or a repudiation constituted by the 15 February Deeds. Establishing that loss and damage requires overturning the trial judge's conclusion that the 15 February Deeds did not have that effect. **That topic is addressed in submissions in relation to the second ground of appeal below.**

There is an additional aspect of the trial judge's reasoning, however, that it is submitted is affected by error. That is, the trial judge erroneously had regard to the fact that the respondents would likely have obtained an interlocutory injunction preventing Harvard from giving vacant possession to the Fowlers. But the fact that the question whether the 15 February Deeds amounted to a repudiation of the New Leases might have been regarded as sufficiently arguable such that, when taking into account the balance of convenience, the respondents would have been permitted to remain on the Farms is beside the point.

It is submitted that the relevant counterfactual in such circumstances does not include the way in which the enforcement of legal rights would have played out in the legal system: rather, it looks only to the existence or non-existence of the rights asserted. In particular, it is not appropriate to test the existence of loss by reference to the conduct of the contravening party in seeking to avoid the imposition of a liability.

It follows that the relevant loss was that flowing from the inability of Harvard validly to assert its right to vacant possession of the Farms as at 5 April 2019 onwards. The appropriate relief to redress that loss was, accordingly:

(a) an order rescinding the New Leases; and

(b) monetary compensation for the pecuniary loss flowing from the fact that Harvard did not have vacant possession of the Farms from 5 April 2019 onwards (including the lost profits to be made under the Fowler Lease).

(emphasis added)

1. It can be seen that two points are made. As to the first point, it concerns the issue whether entry into the 15 February Deeds was a repudiation of the New Leases and is addressed in the context of ground 2. It is the same point as that raised by ground 2. As to the second point made by ground 1b it concerns the likelihood that an interlocutory injunction may have been obtained. As has been noted, in the First Appeal that aspect of the reasoning of the primary judge was conceded to be in error.
2. Therefore, the dispute between the parties as to ground 1b was the merits or otherwise of the point concerning fundamental breach and repudiation being made as to ground 2.
3. Consistently with that approach, the respondents' written submissions in the First Appeal dealt with grounds 1b and 2 as well as its notice of contention point in ground 3 together under a single subheading. The notice of contention ground was a causation point. As to ground 1b, it was submitted:

The written submissions on this issue do not conform to the ground or its particulars, and there are no submissions directed to the terms of ground 1(b) or its particulars.

1. In those circumstances (and having regard to the course of the oral argument), when the Full Court reasoned by upholding ground 1 and by finding that ground 2 was a pure alternative it could not be said to have been implicitly upholding ground 1b. Rather, ground 1b fell to be determined by the same reasoning as ground 2, namely it was not 'necessary or efficient' to deal with the ground. The decision by the Full Court not to deal with the respondents' notice of contention point which was advanced as an answer to the repudiation point is also consistent with the Full Court not dealing with that aspect on the basis that it was a pure alternative to the loss and damage gateway point. Success on the gateway point alone could not establish personal liability on the part of Mr Nicoletti.

### (3) The reasons of the Full Court in the First Appeal

1. The reasons of the Full Court in the First Appeal began with a summary of the proceedings. The summary correctly identified that the primary judge had found that, as to the First Claim, it was Mr Tiller and Dimension that had engaged in misleading conduct. There was no reference to Mr Nicoletti. The issue in the First Appeal was then expressed in the following terms (at [2]):

Despite the findings of the primary judge that Mr Tiller and Dimension had engaged in contravening conduct, Harvard was unsuccessful in obtaining relief. This result followed his Honour concluding that Harvard had failed to establish that it suffered or was likely to suffer any loss or damage. In broad terms, this appeal turns upon whether this conclusion as to a failure of Harvard to establish any loss or likely loss was correct.

1. Notably, again there is no identification of any issue as to the liability of Mr Nicoletti and no suggestion of an assumption that Mr Nicoletti would be liable for loss and damage despite the contrary finding by the primary judge.
2. The reasons then dealt with the issues that had been exposed by the oral submissions as summarised in the exchange with the presiding judge at the end of submissions by senior counsel for the respondents. The first matter addressed was the pleading point as to whether the way in which the case as to the loss that provided the gateway to statutory rescission was put in the First Appeal had been advanced before the primary judge: see [21]‑[22]. For that purpose, an extract from the opening submissions before the primary judge was reproduced which included the four propositions (as already quoted above). After setting out the extract, the Court then said (at [26]):

It is worthwhile interpolating that on appeal, out of these four propositions identified in opening, only Proposition 4 remains controversial. Further, these opening submissions do not clearly advance a case that the loss or likely loss relied upon to operate as a 'gateway' for the statutory rescission and further orders was somehow different from the loss and damage said to give rise to statutory compensation.

1. For Harvard, it was submitted in the Second Appeal that the above statement was intended to record that the correctness of proposition 3 was not controversial in the Second Appeal. By way of reminder and for ease of reference, proposition 3 (which has been quoted above) was in the following terms:

After securing his entry on the Farms, Mr Nicoletti, with the help of Messrs Tiller and Bryce, used Dimension Agriculture in March and April 2019 to pretend that Mr Tiller remained involved in the management of the Farms, withholding facts which, if disclosed, would have enabled [Harvard] to have a lawful basis for exercising its right to terminate the new leases and re-take possession of the Farms in early to mid-April 2019;

1. The part of proposition 3 that was said to be significant was the statement that if facts had not been withheld Harvard would have had a lawful basis for exercising its right to terminate. Of course, the finding by the primary judge was to the contrary. It was a finding that was challenged in the First Appeal by ground 2 (and by ground 1b to the extent that it depended upon the same proposition).
2. In their written submissions in the First Appeal, the respondents dealt with ground 2. The submissions made included the following (paras 76‑78):

Any question of Harvard's right to terminate the New Leases for fundamental breach not only proceeded on the basis of the validity of the New Leases, but turned on the existence of contractual rights thereunder, which were to be determined objectively by reference to the terms of the New Leases.

It cannot be said that the assignment of leasehold rights by Tiller to Dimension was a breach so serious as to go to the root of the New Leases *by reason of Dimension's identity* (being the only matter upon which Harvard now relies) when Dimension was already a lessee under the New Leases.

To the contrary, if an assignment of the leasehold rights under the New Leases in breach thereof was not generally speaking (as Harvard now appears to accept) one which was so serious as to amount to fundamental breach, that same conclusion must necessarily be reached a fortiori when the assignment is from one co-tenant to another existing cotenant.

(original emphasis)

1. Therefore, it was not the case that the statement in proposition 3 that Harvard 'would have a lawful basis to terminate the new leases and re-take possession of the Farms' was uncontroversial. It was the subject of ground 2 (and, in part, ground 1b) and was in issue between the parties on their written submissions. Further, nothing was said in the course of the oral submissions to indicate that proposition 3 was accepted by the respondents. For reasons that have been given, the approach whereby ground 2 was treated as a true alternative did not arise from anything done by the respondents. If indeed proposition 3 was not controversial then it would have followed that ground 2 was conceded (and also ground 1b by reason of the concession in relation to what would have occurred if an injunction had been sought to restrain the retaking of possession by Harvard). However, that was not the approach of the Full Court. Rather it treated ground 2 as a ground that it was not 'necessary or efficient to deal with'. Plainly, the question whether the entry into 15 February Deeds was a repudiation of the New Leases was not determined by the Full Court in the First Appeal. It approached that issue on the basis that it was a true alternative to the point advanced by Harvard concerning the gateway to statutory rescission.
2. In those circumstances, there is no merit in the contention that the Full Court in the First Appeal proceeded on the basis that proposition 3 was conceded. Rather, the statement made at [26] of the reasons in the First Appeal (that only proposition 4 remains controversial) reflects the fact that it is only the correctness of proposition 4 that needed to be determined by the Full Court. It is consistent with the earlier statement to the effect that in broad terms the appeal turns on whether Harvard failed to establish that it suffered loss or damage.
3. The Full Court went on to conclude that Harvard's argument that the loss or likely loss that allowed for statutory rescission was not the same as the actual alleged loss and damage which it sought to recover was an argument that was sufficiently raised before the primary judge: at [33]. It was then determined that the loss as alleged was established and that was sufficient to have concluded that the loss represented by the lost opportunity of the Fowler Lease was loss or damage because of the conduct of another person: at [92] (thereby satisfying the gateway for statutory relief by way of rescission). However, questions remained as to whether rescission should be granted and there was a need to assess any statutory damages. Those were matters that the Full Court determined should be decided by the primary judge on a limited remitter: at [93]‑[98].
4. Therefore, the reasons given in the First Appeal do not support the case advanced for Harvard in the Second Appeal.

### (4) The terms in which the orders were expressed by the Full Court in the First Appeal

1. In the First Appeal, the Full Court allowed the appeal. It set aside orders of the primary judge dismissing the originating application. It remitted to the primary judge 'the question of what, if any, relief should be granted under s 236 and s 237 of the *Australian Consumer Law* and any issues as to the costs of the proceeding below'. It ordered the respondents to pay the costs of and incidental to the appeal.
2. Therefore, the orders made did not differentiate between the position of Mr Tiller and Dimension (on the one hand) and Mr Nicoletti (on the other).
3. For Harvard it was submitted that the form of the orders reflected an implicit acceptance that Mr Nicoletti was liable. Given the findings made by the primary judge concerning the extent of the liability of Mr Nicoletti, it is difficult to see how an order that set aside an order dismissing the proceedings could somehow, of itself, provide the basis upon which the primary judge was required to find that Mr Nicoletti was liable. All the more so when the basis upon which Mr Nicoletti had been found not to be liable by the primary judge was not disturbed by any part of the reasoning in the First Appeal.
4. In the course of detailed reasons given by the primary judge on the remitter, his Honour dealt with the character of the remitter. The propositions as to the scope of the remitter expressed in those reasons were not sought to be impugned. Significantly, his Honour found (with respect, correctly) that:
5. the court on remitter must act consistently with the appeal judgment (at [45]);
6. where the appellate court has disturbed findings of the primary court, it will be open to the primary court to determine those issues afresh provided it does so in accordance with the judgment of the appellate court and no application to reopen for that purpose is necessary (at [46]); and
7. the primary court on remitter cannot go outside the scope of what is remitted or reconsider any of its previous findings that have not been disturbed by the appellate court unless leave is given to reopen (at [47]).
8. Therefore, on the remitter, Harvard was burdened with those findings that had not been disturbed by the Full Court in the First Appeal. For reasons that have been given, the findings as to the extent of the personal liability of Mr Nicoletti were not disturbed and the primary judge was correct to approach the remitter on that basis.

## Conclusion as to Harvard's primary case

1. For the above reasons, Harvard's primary case on the Second Appeal must be rejected. If Harvard wished to press its challenge to the finding of the primary judge as to the liability of Mr Nicoletti then it needed to press that case in the First Appeal. Instead, it treated success on the 'first part' of its appeal as sufficient for its purposes. The first part of its appeal concerned whether Harvard had advanced a case of loss and damage of a kind that was sufficient to meet the gateway requirement for statutory rescission. The damages for loss that might be awarded if there was statutory rescission were treated as a separate matter.
2. Significantly, when it came to the relief that should flow if Harvard was successful on its loss and damage gateway point, the submission advanced by senior counsel for Harvard at the First Appeal was as follows:

… based on the material that is before this court and, critically, the findings that his Honour made in the judgment, it would be open to this court to conclude that it is appropriate and, indeed, that any correct exercise of the discretion would involve the rescission of the new leases. There may be an additional question whether other orders ought be made, as it were, to rebalance the - whatever other interests have arisen? But none of those are the issues, whether they be making of improvements to the land or anything else, would provide a reason why the primary order ought not be granted. So we would say that, although it is true that your Honours don't have the material before you to get into the nitty gritty of what improvements were made and whether or not that should be the subject of some sort of complementary order. Your Honours do have the point and material to know that the only way to remedy the loss and damage that we have alleged is to bring to an end the [leases] that have Mr Nicoletti as a substantive party to them …

1. In response, the presiding judge observed as follows:

… the difference between your position - and this is assuming we get to this point - and [the] position [of the respondents] is that, well, you ask us to go one step further. Rather than saying the gateway is open, you want us to say, it would be appropriate to exercise discretion and give statutory rescission but the issue of the terms upon which that is made, or the other orders and any subsequent claim for statutory compensation are all matters that should go back to the - back to trial.

1. Therefore, both parties were proceeding on the basis that there would be a remitter which would consider any award of damages to Harvard. What was not advanced for Harvard was any claim that in making that assessment, the primary judge should contemplate making an award of damages against Mr Nicoletti despite finding that he was not liable for reasons other than the issue concerned with whether there was loss and damage that opened the gateway to rescission.
2. In short, the conduct of the First Appeal was to focus open securing an order for rescission. Having succeeded on that limited basis, what Harvard then sought to do before the primary judge was to revisit the finding that Mr Nicoletti was not liable because the entry into the 15 February Deeds was not a repudiation which could have formed a lawful basis for Harvard to terminate the New Leases. That course was not open.

## Harvard's further point

1. In the course of oral submissions for Harvard in the Second Appeal, it was submitted that, on remitter, the primary judge was in error in failing to consider a claim by Harvard that even if entry into the 15 February Deeds did not give rise to a lawful right to terminate and re-enter, that is the view that would have been taken by Mr Caratti for Harvard at the time and Harvard would have acted accordingly. On that basis, Harvard would in fact have secured possession and been paid the additional rent and, by its First Claim, would subsequently have secured relief to the effect that the New Leases were void ab initio. In that indirect way, the action that it would have taken would be vindicated even though it did not have a right at law to itself effect a valid termination of the New Leases because there had been no repudiation by entry into the 15 February Deeds. Therefore, it should have been found by the primary judge to be entitled to damages on the Second Claim which award would be against Mr Tiller, Dimension and Mr Nicoletti.
2. The short answer to that point is that it was not raised by Harvard before the primary judge on remitter. It was said that the point was raised before the primary judge at the original hearing. It is by no means clear that this was so. The passage of transcript relied upon to support that submission concerns a response to a question raised by the primary judge as to the way in which the First Claim was put. As to that claim, counsel for Harvard was asked whether it was necessary for the court to find that there had been rescission at law. However, the case now sought to be advanced concerns the Second Claim.
3. In any event, as has been explained, it was not open to Harvard on the remitter to go behind the findings as to the basis upon which the Second Claim against the respondents (including Mr Nicoletti) was not upheld. Even if a case of the kind as now advanced had been put at the first hearing before the primary judge then it is plain from the reasons given by the primary judge that his Honour did not apprehend the case as having been put in that way. If complaint was to be made about that approach then it needed to have been raised in the First Appeal, but it was not.
4. Indeed, to the extent that the point was addressed in the First Appeal, it was in terms that disavowed any such case. As has been observed, the written submissions for Harvard in support of ground 1b included the following (repeated here for ease of reference):

Harvard next contends that the trial judge fell into error in concluding that it did not suffer loss or damage by reason of the non-disclosure of the 15 February Deeds.

The fundamental question arising in this context is whether Harvard was in fact deprived of the opportunity to terminate the New Leases on the basis of a breach of a fundamental term or a repudiation constituted by the 15 February Deeds. **Establishing that loss and damage requires overturning the trial judge's conclusion that the 15 February Deeds did not have that effect.** That topic is addressed in submissions in relation to the second ground of appeal below.

…

It is submitted that the relevant counterfactual in such circumstances does not include the way in which the enforcement of legal rights would have played out in the legal system: **rather, it looks only to the existence or non-existence of the rights asserted.**

(emphasis added)

1. Therefore, it appears that the submission now advanced for Harvard must be that it should be allowed to raise the further point, in effect, for the first time in the Second Appeal. The point is not simply a question of law. It could give rise to issues as to what would have happened if Harvard had chosen to follow such a course, even though it had no legal basis for doing so. This Court does not have the benefit of reasons from the primary judge or the perspective of the primary judge regarding the evidence that may be relevant to a case put in that way. We were not taken through the evidence and there were detailed findings by the primary judge as to the course of events and the credibility of the accounts given by the protagonists, including Mr Caratti. The respondents contend that various issues as to causation would arise if the further point had been advanced at the original hearing (noting the contention that it was raised). They include the proper approach to evidence from Mr Caratti as to what he might have done had he known of the 15 February Deeds. It appears that he acted on legal advice at the time. Issues would have arisen as to how events may have unfolded including whether an injunction might have been sought and obtained to restrain any re-entry and whether, absent any injunction, Mr Fowler would have been willing and able to enter into possession and pay rent in such circumstances. On the approach adopted by the primary judge in the first reasons, the finding that the entry into the 15 February Deeds was not a repudiation was an answer to the claim. Although some findings were made as to other possible consequences they were not made on the basis of the further point that Harvard now seeks to advance.
2. Further, parties are expected to raise all issues for determination at a final hearing and then to respect the finality of the judicial determination made in the interests of quelling disputes. It is very late in the day to be entertaining the possibility of a new way of putting the case that was not raised in the First Appeal.
3. In all the circumstances, we are not persuaded that Harvard should be permitted to raise the further point at this late stage.

## Conclusion and costs

1. For the reasons given, the appeal must be dismissed. Prior to the hearing of the appeal, notices of discontinuance were filed as against the first and second respondents, being Mr Tiller and Dimension. There being no reason submitted as to why costs should not follow the event there should be an order that Harvard as the appellant pay Mr Nicoletti's costs of the appeal to be assessed by a registrar on a lump sum basis if not agreed. We will reserve liberty to Harvard to apply within 14 days to vary the costs order should it maintain that there should be any different order as to costs.

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| I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Banks-Smith, Colvin and O'Sullivan. |

Associate:

Dated: 8 November 2022