FEDERAL COURT OF AUSTRALIA

Reckitt Benckiser (Australia) Pty Limited v Procter & Gamble Australia Pty Limited [2018] FCA 378

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| File number: | NSD 239 of 2018 |
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| Judge: | **LEE J** |
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| Date of judgment: | 12 March 2018 |
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| Catchwords: | **CONSUMER LAW** – application pursuant to s 234 of the Australian Consumer Law for an interim injunction enjoining the respondent from publishing or broadcasting a television commercial and conducting an in-store promotion both featuring comparative advertising – where the issue of whether a prima facie case exists is determinative and where application will likely resolve the substantive proceeding – no sufficient prima facie case established – application dismissed with costs |
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| Legislation: | *Competition and Consumer Act 2010* (Cth), Sch 2  *Australia Consumer Law*, ss 18, 33, 232, 234, 236  *Federal Court Rules 2011* (Cth), r 35.14 |
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| Cases cited: | *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Ltd (ACN 004 189 708)* [2014] FCA 634; (2014) 317 ALR 73  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640  *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25  *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223; (2002) 193 ALR 629  *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435  *Hoover (Australia) Pty Ltd v Email Ltd* (1991) 104 ALR 369  *Novartis Pharmaceuticals Australia Pty Ltd (ACN 004 244 160) v Bayer Australia Ltd (ACN 000 138 714)* [2015] FCA 35; (2015) 322 ALR 621  *Reckitt Benckiser (Australia) Pty Limited v Procter & Gamble Australia Pty Limited* [2015] FCA 753  *Reckitt Benckiser (Australia) Pty Limited v SC Johnson & Son Pty Limited* [2004] FCA 1237  *Samsung Electronics Australia Pty Ltd (ACN 002 915 648) v LG Electronics Australia Pty Ltd* (ACN 064 531 264) [2015] FCA 227; (2015) 113 IPR 11  *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No. 2)* [2010] FCA 566  *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161  *Telstra Corporation Ltd v Optus Communications Pty Ltd* (1996) 36 IPR 515  *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 |
|  |  |
| Date of hearing: | 12 March 2018 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 71 |
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| Counsel for the Applicant: | Mr D Studdy SC and Mr A Vincent |
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| Solicitor for the Applicant: | HWL Ebsworth Lawyers |
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| Counsel for the Respondent: | Mr M Hall SC and Ms S Stewart |
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| Solicitor for the Respondent: | King & Wood Mallesons |

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| **Table of Corrections** |  |
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| 3 April 2018 | At paragraph [69], the word “strong” has been inserted after the word “relatively”, and the word “strong” before the word “for” has been deleted. |

ORDERS

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|  | | NSD 239 of 2018 |
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| BETWEEN: | RECKITT BENCKISER (AUSTRALIA) PTY LIMITED ACN 003 274 655  Applicant | |
| AND: | PROCTER & GAMBLE AUSTRALIA PTY LIMITED ACN 008 396 245  Respondent | |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 12 MARCH 2018 |

THE COURT ORDERS THAT:

1. The interlocutory application filed on 23 February 2018 be dismissed.
2. The applicant pay the respondent’s costs of the interlocutory application.
3. The time for filing any application for leave to appeal from these orders be extended to a date 14 days after the date upon which the revised reasons for judgment are published to the parties and, to the extent necessary, the requirements of FCR 35.14 are dispensed with.
4. Pursuant to ss 37AF and 37AG of the *Federal Court of Australia Act 1976* (Cth), until further order of the Court, in order to prevent prejudice to the proper administration of justice, confidential exhibit DMW-1 to the first affidavit of Duncan McLeod Watson affirmed on 23 February 2018, confidential exhibit KI-4 to the affidavit of Kensuto Ito affirmed on 27 February 2018 and documents produced pursuant to notices to produce dated 27 February 2018 and 8 March 2018 be treated as confidential, and are not to be published or made available, and are not to be disclosed to any person or entity other than:
   1. the Court for the purposes of these proceedings;
   2. the applicant’s external legal advisors as follows:
      1. partners, employed solicitors, paralegals and secretaries of the applicant’s external solicitors retained in these proceedings;
      2. barristers briefed in these proceedings and their assistants; and
      3. any other persons designated by agreement between the applicant and the respondent, or by order of the Court;

provided that those persons have first signed a confidentiality undertaking in the form of annexure 1 to these orders.

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

**Annexure 1**

**Confidentiality undertaking**

NSD 239 of 2018

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| Federal Court of Australia | |
| District Registry: | New South Wales |
| Division: General | |
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| **Reckitt Benckiser (Australia) Pty Limited** (ACN 003 274 655) | |
| Applicant | |
|  | |
| **Procter & Gamble Australia Pty Ltd** (ACN 008 396 245) | |
| Respondent | |

I undertake to the Applicant / Respondent and Procter & Gamble International Operations SA Singapore in relation to the documents and information which comprise the evidence referred to in Confidential Exhibit DMW-1 to the first affidavit of Duncan McLeod Watson, Confidential Exhibit KI-4 to the affidavit of Kensuto Ito affirmed 27 February 2018 and documents produced pursuant to the Notices to Produce, respectively dated 27 February 2018 and 8 March 2018 that:

1. I will keep the documents and information confidential at all times.
2. I will not use the documents or the information for any purpose other than the sole purpose of the conduct of these proceedings.
3. Subject to paragraph 4 below, the documents and information will not be disclosed by me (either in whole or in part) either directly or indirectly to any person including the parties to these proceedings, their related, associated and/or affiliated entities, or the respective servants and agents of such parties or entities, without the prior written consent of the solicitors for the Applicant / Respondent, unless:
   1. such disclosure is expressly authorised by the Court; or
   2. such part of the documents or information has already been disclosed otherwise than in contravention of this or a similar confidentiality undertaking.
4. The documents and the information may be disclosed by me to:
   1. partners, employed solicitors, paralegals and secretaries of the solicitors for the Applicant / Respondent;
   2. barristers briefed in these proceedings and their assistants; and
   3. any other person designated by agreement between the Applicant and the Respondent or by Order of the Court;

who have signed a confidentiality undertaking in similar form to this confidentiality undertaking.

1. I will, upon the conclusion of these proceedings (including any appeals) whether by judgment, settlement or otherwise, ensure that:
   1. all documents; and
   2. any notes made by me or given to me recording or referring to the information, are destroyed.
2. Despite paragraph 5, the solicitors for the Applicant / Respondent may hold one copy of the documents in electronic form, for the sole purpose of complying with any further Court proceeding related to the subject matter of the confidentiality undertaking (with access to these documents to be restricted to those persons who have signed a confidentiality undertaking in similar form to this confidentiality undertaking).

Dated:

Signed …….....................................................

Name:

Firm/Chambers:

REASONS FOR JUDGMENT

(Revised from the transcript)

LEE J:

# A INTRODUCTION, THE PROCEEDINGS AND THE INTERLOCUTORY APPLICATION

1. To those interested in reading judgments of this Court concerning comparative advertising, what follows may engender feelings of déjà vu.
2. In *Reckitt Benckiser (Australia) Pty Limited v Procter & Gamble Australia Pty Limited* [2015] FCA 753 (***Reckitt Benckiser***), Gleeson J dealt with a dispute between the applicant (**RBA**) and the respondent (**PGA**) concerning a television advertising campaign promoting PGA’s “Fairy Platinum” dishwashing product (**Fairy Platinum**). In that case, her Honour was persuaded that RBA was entitled, upon providing the usual undertaking as to damages, to an order pursuant to s 234 of the *Australia Consumer Law* (being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**)) restraining publication or broadcasting of the advertisement the subject of those proceedings on an interlocutory basis.
3. RBA then and now imports, markets and sells “Finish” dishwashing products including, relevantly, Finish tablet products including what is described as its premium product, “Finish Quantum Ultimate” (**FQU**) and another product called “Finish Quantum”. PGA markets and sells “Fairy” automatic dishwashing detergent products, Fairly Platinum and “Fairy All in 1”. Fairy Platinum directly competes with the two RBA products I have identified: FQU and “Finish Quantum”.
4. In a further attempt to engage in a successful comparative advertising campaign, on or about 4 February 2018, PGA commenced broadcasting a television commercial which sought to spruik the claims of Fairy Platinum. Additionally, from about 16 February 2018, PGA has conducted in-store promotions including, relevantly, a Fairy Platinum in-store promotional booth (**Store Promotion**) at a Coles Supermarket in Waterloo, New South Wales. It will be necessary to come to the details, but it is common ground that during the course of the Store Promotion, similar claims have been made by PGA as are made during the course of the commercial.
5. The gentle rinse of dishwashing detergent is not reflective of the vigorous thrust of commercial rivalry between the protagonists. It is plain that the automatic dishwashing detergent market in which both RBA and PGA operate is highly competitive. No doubt as a reflection of this, the response of RBA to the Fairly Platinum commercial and Store Promotion has been swift. RBA contends that a series of representations were, and are, being conveyed which are false. Its originating application seeks to restrain PGA, on a permanent basis, from making the representations it alleges are conveyed. In aid of this final relief, RBA seeks an interim injunction to restrain PGA from making the representations until further order, or until determination of the proceedings. In effect, RBA now seeks the relief it was successful in obtaining in *Reckitt Benckiser* before Gleeson J.
6. The balance of these reasons will be divided into the following headings:

B The Advertisement

B.1 The Approach to Viewing the Advertisement

B.2 Findings

C Additional Evidence and Findings

D The Applicable Law

D.1 The Australian Consumer Law

D.2 Misleading or Deceptive Conduct in Comparative Advertising

D.3 The Principled Approach to the Interlocutory Relief Sought

E A Prime Facie Assessment of the Applicant’s Case

E.1 Are the Representations Conveyed?

E.2 The Representations that are Conveyed

E.3 Do any Representations Conveyed Arguably constitute Contravening Conduct?

F The Balance of Convenience

G Conclusion and Orders

# B The Advertisement

## B.1 The Approach to Viewing the Advertisement

1. Given that the commercial was inevitably to be adduced in evidence, I took the opportunity, out of Court and prior to the commencement of the hearing of the application, to view it. It was also played twice in Court; once during the course of opening and again during final submissions.
2. The commercial lasts for 15 seconds; it is neither subtle nor multi-layered and deconstructing it like it was an early work of Ingmar Bergman would be as unproductive as it would be misconceived. Put simply, for reasons I will explain, it seems to me to have what might be described as a linear meaning.
3. In viewing the commercial, I directed myself to have regard to the observations in *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223; (2002) 193 ALR 629, where Lindgren J noted at 641-642 [47]-[49]:

[47]…apart from the difference between a one-off viewing and repeated viewings, the circumstances in which a judge attends to a television commercial for the purposes of a case are not those in which members of the public do so. First, members of the public watch a commercial after and before viewing other things, rather than in isolation. Secondly, unlike the judge, they do not carefully view the commercial with a special interest in noting and memorising its features. Thirdly, they view the commercial, not in the calm of chambers, but against a background of distractions, such as domestic activity, or simply a preoccupation with other more interesting or pressing concerns. Fourthly, usually they do not know in advance that the commercial is about to commence.

[48] I have tried to make allowances for these considerations.

[49] In assessing the likely effect the commercial would have on the viewing public, I have borne in mind the fact that the impressions conveyed and taken away are at once more and less than those conveyed by, and taken away from, a studied reading of the transcript [of the commercial]. A television commercial simultaneously stimulates the visual and auditory senses. There are subtleties of suggestion not available from a reading of the transcript.

1. Doing the best that I could, I attempted to view the commercial through the prism of how it would be viewed by what I perceive to be the “ordinary” or “reasonable” member of the class of persons (or target audience) who would likely view the commercial as “*an unbidden intrusion on [their] consciousness*”: see *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435 at 443 per French CJ, Crennan and Kiefel JJ and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at 654 [47] per French CJ, Crennan, Bell and Keane JJ. Even though I viewed the commercial three times, I do not consider that this meant that I perceived its messages (to use a neutral word) other than as those messages would be received into the consciousness of the target audience. I am fortified in that view because the impressions I gained, on each occasion, were consistent.

## B.2 Findings

1. The commercial commences with a woman holding some form of transparent baking dish, looking at it quizzically and, after commenting “*I don’t get it*”, proceeding to scratch the baking dish. Very much in the background is a blue packet standing on top of what appears to be a dishwasher, marked with the words “*Leading Tablet*”. I pause to remark that there seemed to be no question between the parties that a reference to the “*Leading Tablet*” was a reference to Finish products. It will be necessary to return below to the question of precisely what Finish product or products was, or were, represented.
2. Additionally, at the commencement of the commercial, a white superscript appears in the bottom left of the frame, bearing the words “*Baked on starch*”. Certainly on my viewings of the commercial, the reference to “*Baked on starch*” was quite obscure. The commercial then continues with the woman adopting a somewhat vexed expression, asking the rhetorical questions: “*What is this thing?*” and “*Should I pre-rinse?*” Then comes what counsel for PGA described, appropriately, as a *deus ex machina* event: a vastly outsized version of the packet bearing the words “*Leading Tablet*” appears, causing the woman to gasp. A disembodied voice then intones, with authority: “*It’s not your fault, try a new tablet*”.
3. I interpose to note that in broad terms, I accept PGA’s submissions that the narrative of the commercial (up until the moment just described) depicts a consumer encountering what is suggested to be a common problem, and speculating to herself as to the steps she might take to resolve the problem. An outside event then occurs, intruding itself upon the consumer’s cogitations and directing her to the fact that the real resolution to her quandaries or concerns is trying a new dishwashing tablet.
4. Following the *deus ex machina* event, the product of PGA, Fairy Platinum, is introduced into the commercial with the admonition to “*Switch to* ***Fairy Platinum***” (bolding in original). The attributes of Fairy Platinum are represented to the ordinary viewer by three colours (blue, yellow and green), evidently representing the cleaning agents, swirling around in what is described as a “*triple action*”. Importantly, the disembodied voice referred to at [12] above intones, again authoritatively: “*With triple action, it beats Finish Quantum at cleaning stuck-on food on the first wash*”.
5. Additionally, at the time the swishing “*triple action*” is represented, a further white superscript is added, which reads: “*Third party laboratory tested with Finish Quantum in market as of Nov 2017 using baked on starch and baked on pasta*”. For my part, I found this superscript very difficult to read on my viewings of the commercial and, although I concede it may be able to be discerned by those with an acute and abiding interest in detergent commercials (if such persons exist), I think it is unlikely to be conveyed readily to the target audience of consumers. Despite this, it seems to me that even without the references to Finish Quantum in the superscript being conveyed prominently, it is quite plain from the words spoken by the authoritative, disembodied voice that it is Fairy Platinum and Finish Quantum that are the two products the subject of comparison.
6. Continuing the sequence of the commercial, it then continues with the depiction of a sparkling baking dish displayed prominently next to the Fairy Platinum product. During the last part of the commercial, the superscript referred to at [15] above continues to be displayed.
7. As one would expect, given a case of this type, RBA has sought to identify and plead various representations which it says are conveyed by the commercial. I will return below (in considering whether a *prima facie* case has been established) to the issue of whether or not I consider that the pleaded representations are conveyed in the light of the observations as to the commercial I have noted.
8. Also in evidence were four photographs relating to the Store Promotion. The Store Promotion was typical of what a shopper commonly sees at the end of an aisle of a large supermarket. It comprised a stand upon which various Fairy products were displayed, including Fairy Platinum, and a sign attached to two poles. On the sign there was a reference to Fairy Platinum next to the wording, “***Cleans Better*** *than* ***Finish Quantum****\* Even on stuck on food*” (bolding in original). The asterisk refers the reader to the following words appearing in smaller lettering at the base of the sign: “*Tested by third party with Finish Quantum in market as of Nov 2017 using baked on pasta*”.
9. As would already be evident, what might be described as the ‘key’ message of the Store Promotion and the commercial are essentially the same.

# C additional evidence and findings

1. Despite the speed at which this matter has come before the Court, at least from the perspective of PGA, this present dispute has evidently had a long gestation and has been carefully choreographed.
2. Reference has already been made above to third party testing which occurred in November 2017. Reflecting the fact that this matter has been the subject of attention by PGA for some time, the evidence is that Procter & Gamble’s Singapore research and development centre requested a third party laboratory, the SGS Institut Fresenius GmbH (**SGS**), to conduct a comparative study of the cleaning performance of Fairy Platinum and various Finish variants. Confidentiality orders have been made in relation to the various exhibits, which placed into evidence the report commissioned by Procter & Gamble Singapore which was prepared by SGS, apparently in Germany (**SGS report**). Doing the best I can to record my reasoning while being circumspect in revealing confidential material, the following was established:
   1. testing occurred between 27 November 2017 and 5 December 2017;
   2. the SGS report, which was completed following the testing, was commissioned by an Assistant Brand Manager at Procter & Gamble Singapore;
   3. the testing was conducted in accordance with what is described as the **IKW Standard**, which is an internationally accepted industry standard for the assessment of the cleaning ability of dishwashing tablets (more particularly, the standard used, updated in 2015 and published in 2016, was referred to in the SGS report as the “*Method IKW 2016*”).
3. The IKW Standard is of some significance: in very broad terms, it is a standard which determines and can benchmark the cleaning profile of various cleaning products and which involves the identification of suitable ‘soil’ classes and testing by reference to those classes. The IKW Standard was first published in 1995, was updated in 2005 and, as indicated above, was further revised in 2015, following work that had commenced two years earlier. Again as noted above, the IKW Standard involves soils being divided into a number of soil classes and, after refinement, seven soil classes are presently delineated by the IKW Standard, being: pasta, minced meat, egg yolk, starch, milk skin, tea and crème brûlée.
4. As an aside, I note that the working group set up in 2015, which was apparently involved in revising the updated draft of the IKW Standard, included representatives of both protagonists to the current dispute.
5. Returning to the narrative, on 10 January 2018, a Certificate of Analysis was provided by SGS which identified the results of its analysis of the samples it had received from Procter & Gamble Singapore. It is apparent from the SGS report that it carried out a comprehensive comparative cleaning performance test of four automated dishwashing detergents in accordance with the IKW Standard. An overall summary of the results of the SGS report was that, under the chosen conditions, Fairy Platinum was shown to have an overall better cleaning performance than Finish All in 1, Finish Quantum and FQU. It is necessary to explain, in a little detail, what I mean by an ‘overall better performance’.
6. In particular, as to the seven soil classes, the evidence discloses that Fairy Platinum performed significantly better than Finish Quantum and FQU in four soil classes and marginally better in relation to the three remaining soil classes, namely milk skin, tea and crème brûlée. I hasten to add that when I say ‘marginally better’ this is a reference to precise individualised test results for the three relevant soil classes and another way of putting it is that the comparative test results for the three relevant soil classes, although not identical, were sufficiently close to be regarded as being comparable. This is because, when it comes to the evaluation of the results, the SGS report notes that “*Results with a difference of [a stated figure] and more are evaluated as significantly different*” and that this stated figure is not exceeded in relation to the milk skin, tea and crème brûlée soil classes. The submission of RBA is that the SGS report proves that Fairy Platinum does not provide a better clean (or is not superior) to Finish Quantum for milk skin, tea and crème brûlée, in that the relative results are comparable (as the differences are so marginal).
7. Despite this, however, it is correct to say the SGS report conveys the impression that the testing performed supports the conclusion that Fairy Platinum had an *overall* generally better cleaning performance across soil classes than, relevantly, Finish Quantum.
8. The scientific evidence relied upon by PGA is uncontradicted on this application. That is, the only comparative testing in evidence is that conducted and reported upon by SGS, and tendered by PGA. Not only was this testing uncontradicted through the process of cross-examination, but no comparative testing was adduced in evidence by RBA and no adjournment was sought to obtain such independent testing. The only somewhat similar evidence adduced by RBA is contained in an affidavit of Mr Duncan Watson, the “*Head of Research and Development, Hygiene and Health – Australia and New Zealand*” at RBA. Mr Watson gives evidence of internal tests that were done in relation to a product which is no longer on the market (having been removed in April 2017).
9. It follows that the testing deposed to by Mr Watson was not carried out using the current Finish Quantum or FQU formulations. Critically, it seems to me, while Mr Watson may seek to extrapolate from this earlier work some conclusions relevant to the comparative performance of current Finish products and, at least inferentially, the performance of Fairy Platinum, it seems to me that even allowing for the interlocutory context of this application, I should approach the evidence based on non-current products with some care. It is no substitute for the rigour reflected in the independent scientific evidence. It follows, for the purposes of this application, that I accept the evidence contained in the SGS report as representing the true relative performance of Fairy Platinum and Finish Quantum, which is the express basis of the comparative advertising in the commercial and the Store Promotion.
10. In doing so, it is convenient to deal now with an argument advanced on behalf of RBA in relation to the relative performance data. It is suggested that in relation to starch and pasta, the preparation and procedure for testing those soil classes refers to the soil being applied on clean plates and aged under “*defined conditions*”. Mr Watson gives evidence that he understands the reference to defined conditions to be a reference to the protocols contained in the IKW Standard, which, as to starch, involve what might be described as a ‘drying protocol’. Similarly, with regard to pasta, Mr Watson gives evidence that the preparation and procedure for this soil class refers to applying a pasta mixture to plates which are then dried for a period of two hours at 120 degrees Celsius. Although Mr Watson accepts that the procedures adopted accord with the IKW Standard for testing in relation to starch and pasta, it is said that this *drying* protocol is to be distinguished from *baked-on* soils. Mr Watson notes that from his review of the IKW Standard and the SGS report, the only soil to be baked or ‘baked-on’ is crème brûlée which, as will be recalled, is a soil class in which the results achieved by Fairy Platinum and Finish Quantum are not identical, but are comparable.
11. Mr Watson gives evidence of his experience that there are many different ways in which soil can be applied or ‘stuck’ to a dish for testing. For example, a soil may be dried-on, baked-on, melted-on or burnt-on. After reviewing this evidence in the context of the whole of the IKW Standard and the SGS report, it seems to me that the distinction between baked or dried soils may, at best, be somewhat overstated. I do not consider that there is any relevant difference between the bases upon which the testing of the products in relation to stuck-on food has taken place. Those deciding upon the precise terms of the IKW Standard have, quite deliberately, after consultation and what appears to be application of their scientific expertise, chosen the precise relevant conditions and methodology upon which the comparative testing is to take place and there does not seem to me to be any real substance in the criticism made by Mr Watson. There is some substance in PGA’s submission that RBA seeks to attack the testing by parsing the words of the IKW Standard for the testing of dishwashing tablets and then speculating on possible results if the independent testing had been conducted differently.
12. The less than compelling nature of the criticism of failing to maintain a rigorous distinction between dried-on and baked-on soils is illustrated, albeit to a limited extent, by reference to two extracts from the Finish website, www.finishinfo.com.au, which refer to food residues such as “*dried on food like lasagne and oatmeal*” and the ability of Finish Quantum to “*breakdown even the toughest dried & baked-on food*”.
13. Of course, I am conscious that in the opening frames of the commercial, reference is made to “***Baked on*** *starch*” (see [12] above), while in that part of the commercial where the swishing “*triple action*” is represented, white superscript is added which reads: “*Third party laboratory tested with Finish Quantum in market as of Nov 2017 using baked on starch and baked on pasta*” (see [15] above). Overall, however, when the simulated application of the Fairy Platinum product occurs and the critical reference to “*beating*” Finish Quantum is made, the wholly predominant message is to the more general proposition, being: “*cleaning stuck-on food on the first wash*”.
14. As I have already explained, this criticism does not seem to me to have any real substance when it takes place without any independent testing being produced by RBA of the Finish Quantum product or any comparative testing with Fairy Platinum which might establish the significance of the difference in a way which undermines the conclusions drawn in the SGS report. Additionally, it is not as if the IKW Standard is controversial: the evidence discloses that it is widely accepted in use, including by RBA. As I will explain below, the central, overall and predominant claim conveyed is not made in respect of ‘baked-on’ food specifically, but rather in respect of ‘stuck-on’ food remaining after washing in a dishwasher.
15. As I will explain when I return to considering precisely what was conveyed and whether it is arguably misleading, the relevant question is whether or not the testing supports the claim in the commercial and the Store Promotion, not as to how scientific testing may have been conducted differently.

# D The Applicable Law

## D.1 The Australian Consumer Law

1. As noted above, the relief sought by RBA is for declaratory relief and an order enjoining PGA pursuant to s 232 of the ACL, and statutory compensation pursuant to s 236 of the ACL. The declaration sought is in the following terms:

A declaration that [PGA], by causing the [commercial] to be broadcast and the [Store Promotion] to be published, has contravened sections 18, and 33 of the [ACL].

1. Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive, and s 33 relevantly provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for purpose, or quality of any goods.

## D.2 Misleading or Deceptive Conduct and Comparative Advertising

1. Although there are differences in emphasis, there is no real difference between the parties as to the principles to be applied in determining whether or not an example of comparative advertising amounts to conduct which contravenes the norms relied upon by RBA.
2. The applicable principles have been explained in a number of cases, including the decisions of Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73, Nicholas J in *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2015] FCA 227; (2015) 113 IPR 11 and, as an echo of battles past, *Reckitt Benckiser* per Gleeson J at [34]-[42].
3. What is evident is that a two-step analysis is required: the *first* inquiry being whether or not any of the pleaded representations are conveyed by the advertisement, and, *secondly*, whether any of the representations conveyed are false, misleading or deceptive or likely to mislead or deceive: see *Novartis Pharmaceuticals Australia Pty Ltd v Bayer Australia Ltd* [2015] FCA 35; (2015) 322 ALR 621 at 681 [200] per Robertson J.
4. An additional important point needs to be stressed. As the Full Court (Besanko, Markovic and Lee JJ) recently explained in *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25 at [15], it is trite that the consideration as to whether particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence as to the alleged conduct and all relevant surrounding facts and circumstances. It is a fundamental requirement that it be established, in the circumstances, that the impugned conduct induces or is capable of inducing error. As the Full Court made clear, “*[i]t necessarily follows that context is critical*”. It also follows that it is necessary to view the conduct as a whole and, of particular importance for present purposes, the dominant message will be of crucial importance: see *Coles Supermarkets* at [42] citing *TPG Internet* at [45].
5. In the particular context of an advertising case, in *Samsung* at [73], Nicholas J referred to the observations of Hill J in *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50 (as to a newspaper advertisement there in issue):

Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct of placing the advertisement in a newspaper is misleading or deceptive conduct must be tested against each meaning which is reasonably open. This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error.

(Citation omitted)

1. Balanced against this, however, is the importance, as I have stressed above, of viewing a 15 second commercial in the way in which a member of the class of persons who could be expected to view it would receive its message. Similarly, in the context of the Store Promotion, I need to have regard to the nature of the message likely to be received by a supermarket shopper who engages with the advertisement. In *Reckitt Benckiser* at [40], Gleeson J referred to some propositions in a further and earlier case involving the applicant, *Reckitt Benckiser (Australia) Pty Limited v SC Johnson & Son Pty Limited* [2004] FCA 1237 at [38], where Conti J set out the following propositions which I do understand to be controversial:

(i) in identifying what may constitute relevant conduct, the packaging and advertising of the product must be viewed as a whole, rather than by endeavouring to ascertain in isolation the meaning of the critical words;

(ii) it is the first impression conveyed by the packaging or other advertising which creates the impact on a reader or viewer, rather than an analysis of the constituent parts of the advertised message;

(iii) the whole of the message the subject of a controversial promotion etc should be considered in context; thus where a false dominant impression is conveyed, its message will not be ameliorated by the accuracy which may be derived from a careful analysis of all the constituent parts of the whole; most readers or viewers would not make a close study for instance of the subject packaging or television advertisement, but would absorb the general thrust thereof.

(Citations omitted)

1. At [37] above I referred to some differences of emphasis between the parties. The differences of emphasis found reflection in the way in which the parties, at least in their written submissions, made specific reference to what might be described as cautionary comments in some of the comparative advertising cases. Not surprisingly, RBA placed some emphasis on the observations in cases such as *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161 at 163 (Lockhart J) about the need for an advertiser to take particular care when it engages in conduct which boosts its own product, but compares a competitor’s product unfavourably.
2. Similarly, reference was made to the observations of Gummow J about the dangers in “*half truth*” or the unqualified literal truth in comparative advertising: see *Hoover (Australia) Pty Ltd v Email Ltd* (1991) 104 ALR 369 at 375. RBA stressed that particular care needed to be taken to ensure the advertisement is accurate because comparative advertising may have a greater potential to mislead customers than statements made in what might be described as ‘unilateral’ advertisements: see *Novartis* at 674 [177].
3. Those cautionary observations seem to me to be an illustration of, or perhaps more accurately, an application in the particular circumstances of, the general necessity when dealing with any misleading or deceptive conduct case, to pay attention to all relevant circumstances, including the precise context in which the impugned conduct takes place. Cases subsequent to *Stuart Alexander* make it plain that these cautionary comments are relevant to discussing the context of comparative advertising and that there is no separate legal test or higher threshold that applies in cases of comparative advertising than in other contexts: see, for example, the following:

* There is no separate legal test that applies in cases of comparative advertising: *Reckitt Benckiser* at [41] per Gleeson J.
* There are no special principles that apply to comparative advertising and there is no higher threshold than for unilateral promotions, despite observations made in some of the case law about the need for caution in cases of comparative advertising: *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No. 2)* [2010] FCA 566 at [73] per Katzmann J.
* It is not to be postulated that there are different legal principles to be applied in respect of comparative advertising: *SC Johnson* at [38(vi)] per Conti J.

## D.3 The Principled Approach to the Interlocutory Relief Sought

1. No detailed attention was given by the parties to the approach that I should take in relation to determining whether interlocutory relief should be granted. This is hardly surprising, as the principles are well-known and there is no argument as to the principles to be applied.
2. Section 234(1) of the ACL provides that if an application is made under s 232, such as here, the court may, if it considers it desirable to do so, grant an interim injunction pending the determination of the substantive relief claimed. I do not believe that I can summarise the principles more efficiently than Gleeson J in *Reckitt Benckiser* at [44]-[49]:

[44] In *Warner-Lambert Co LLC v Apotex Pty Ltd* [2014] FCAFC 59; (2014) 106 IPR 218 at [68]-[70], the Full Court set out the principles which govern applications for interlocutory relief in the following terms:

…There are two inquiries that must be undertaken when determining whether an applicant should be granted an interlocutory injunction. The first relates to the strength of the applicant’s claim to final relief. The second relates to the balance of convenience or, as it is sometimes expressed, the balance of the risk of doing an injustice by either granting or withholding the interlocutory relief sought.

The principles to be applied in determining whether or not to grant interlocutory relief were considered by the High Court in *Australian Broadcasting Corporation v O’Neill* [2006] HCA 46; (2006) 227 CLR 57, including by Gummow and Hayne JJ at [65]-[72]. Gleeson CJ and Crennan J agreed at [19] with the explanation of the relevant principles in those paragraphs. In *O’Neill* Gummow and Hayne JJ stated at [65]:

The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; [(1968) 118 CLR 618]. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued [at 622-623]:

“The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.”

By using the phrase “prima facie case”, their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument [at 620]. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal [at 622]:

“How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.”

Whether an applicant for an interlocutory injunction has made out a prima facie case and whether the balance of convenience favours the grant of such relief are related questions. It will often be necessary to give close attention to the strength of a party’s case when assessing the risk of doing an injustice to either party by the granting or withholding of interlocutory relief especially if the outcome of the interlocutory application is likely to have the practical effect of determining the substance of the matter in issue or if other remedies, including an award of damages, or an award of compensation pursuant to the usual undertaking, are likely to be inadequate.

[45] The Court is required to make an assessment of the applicant’s case for the purpose of deciding whether it has made out a prima facie case of sufficient strength to justify the grant of an interlocutory injunction to restrain the advertisements: cf *Samsung v LG* at [87].

[46] In considering whether to grant an interim injunction, the Court should also weigh up the real consequences to each party, taking into account both the public interests and the private interests involved: cf *Trade Practices Commission v Santos Ltd* (1992) 38 FCR 382 at 397.

**[47] In this case, there is a dispute between the parties as to whether the grant or refusal of an injunction would effectively resolve the commercial dispute between the parties, or determine the matter in favour of one of the parties. To the extent that the grant or refusal of interlocutory relief is going to have the practical consequence of deciding the applicant’s claims for final relief, the applicant is required to demonstrate a relatively strong case: cf *Samsung Electronics Co Ltd v Apple Inc* [2011] FCAFC 156; (2011) 217 FCR 238 (“*Samsung FC*”) at [87]; *Generic Health Pty Ltd v Otsuka Pharmaceutical Co., Ltd* [2013] FCAFC 17; (2013) 296 ALR 50 per Emmett J at [26], Greenwood J at [253], and Bennett J at [121]-[128].**

[48] I accept that the relief may be final to the extent that the respondent’s ability to attract custom by the use of the advertisement would be lost for the duration of any interlocutory injunction: cf *Telstra Corp Ltd v Optus Communications Pty Ltd* (1996) 36 IPR 515 at 527.

[49] The consideration of the balance of convenience involves a consideration of whether the likely harm to the applicant if no injunction is granted outweighs or is outweighed by the assessment of prejudice or harm to the respondent an injunction is granted (*Samsung FC* at [55], [62] and [66]). The question of whether damages will be an adequate remedy will ordinarily be considered as part of the balance of convenience (*Samsung FC* at [61]).

(Emphasis added)

1. Before passing from this topic, I should make specific reference to the section of her Honour’s reasons I have bolded above (*Reckitt Benckiser* at [47]), that is, the principle that where the grant or refusal of an injunction would effectively resolve the commercial dispute between the parties or have the practical consequence of deciding the claim for final relief, the party seeking the injunction is required to demonstrate a relatively strong case. Unlike in *Reckitt Benckiser*, where the characterisation of the application as “*effectively*”, or practically, determinative was apparently in dispute, here, Mr Studdy SC, who appeared with Mr Vincent for RBA, appeared to accept (or at least did not dispute) that this application is such a case (see, for example, T 67). It follows, given I accept PGA’s submission that this is a case of such a character, that it is necessary, in order for RBA to succeed, that RBA not only persuade me that the representations pleaded were conveyed, but also that there is a “relatively strong” *prima facie* case that the making of the representations found to be conveyed amounted to contravening conduct. I will come back to this later in these reasons.
2. It is convenient to now turn to the representations pleaded and whether they were conveyed.

# E A Prima Facie Assessment of the Applicant’s Case

## E.1 Are the Representations Conveyed?

1. RBA submits that the following representations are conveyed by the commercial:
   1. pre-rinsing is required when using Finish dishwashing tablets;
   2. Finish dishwashing tablets are faulty;
   3. Fairy Platinum is better than Finish Quantum at cleaning all stuck-on food;
   4. Fairy Platinum is superior to Finish Quantum for all stuck-on food; and
   5. there is a current adequate foundation in scientific knowledge for each of the representations in (a)-(d) above.
2. In respect of the Store Promotion, RBA submits that the following representations are conveyed:
   1. Fairy Platinum is better than Finish Quantum at cleaning all stuck-on food;
   2. Fairy Platinum is superior to Finish Quantum for all stuck-on food; and
   3. there is a current adequate foundation in scientific knowledge for each of the representations in (a)-(b) above.
3. I will deal with each of these representations in turn.

### E.1.1 Pre-rinsing is required when using Finish dishwashing tablets

1. As would have already been evident by my description of the advertisement, the predominant message conveyed by the introductory part of the commercial is the vexation caused to the woman who is faced with the difficulty of removing a soiled dish from the dishwasher and is faced with the quandary of the residuum of food on the dish and whether she should have pre-rinsed. This was the portrayal of a rhetorical exercise, which the next part of the commercial seeks to resolve by comforting the consumer with the reassurance she should trouble herself no more, noting that it is not her fault, and conveying the suggestion that she should try a new tablet (being Fairy Platinum).
2. In my view, there is a degree of artificiality in contending that what is being conveyed is that pre-rinsing is required when using Finish dishwashing tablets. This is for at least two reasons. *First*, it is quite evident, taken as a whole, that the comparison being drawn is between Fairy Platinum and one Finish product, namely Finish Quantum; the reference is not conveyed as to Finish dishwashing tablets generally. Accordingly, I fail to see how it could reasonably be suggested that a representation is conveyed that pre-rinsing is required when using Finish dishwashing tablets generally. *Secondly*, no representation is made that pre-rinsing is always required when using Finish dishwashing tablets; what is being discussed is the specific context when there is ‘stuck-on’ food on dishes before a proposed dishwashing – everyday experience suggests that this may, or may not, be the case.
3. It follows that, in my opinion, the first representation is not conveyed.

### E.1.2 Finish dishwashing tablets are faulty

1. Plainly, the genesis of this formulation of representation comes from what I described earlier as the *deus ex machina* event of the male narrator comforting the consumer by saying “*It’s not your fault, try a new tablet*”. Again, this seems to me to be a reference to suggesting that the solution to the problem confronting the consumer (‘stuck-on’ food) is to try a new dishwashing tablet and that she need look no further (as a resolution to the problem identified) than trying a new product. To suggest that this involves a representation that all varieties of Finish dishwashing tablets are faulty is, in my view, unsustainable.

### E.1.3 Fairy Platinum is better than Finish Quantum at cleaning all stuck-on food

1. For reasons that will become obvious, I do consider that this representation is of more substance than the previous alleged representations considered. Indeed, in effect, this was conceded by counsel for RBA. I will pass over this alleged representation for present purposes and return to it below when I formulate the representations that I consider were conveyed.

### E.1.4 Fairy Platinum is superior to Finish Quantum for all stuck-on food

1. This alleged representation falls into the same category as the preceding alleged representation and I will return to it below.

### E.1.5 There is a current adequate foundation in scientific knowledge for each of the alleged representations

1. Read literally, of course, this representation simply cannot have been conveyed. This follows as a matter of logic, given that I have rejected the notion that the first two alleged representations were conveyed. Having said that, I do not believe that I should, for the purposes of this interlocutory application, take such a technical approach to the pleading of the applicant’s claim. Again, I will return to this when I discuss the representations I consider are conveyed.

## E.2 The Representations that are Conveyed

1. As Merkel J said in the context of comparative advertising in *Telstra Corporation Ltd v Optus Communications Pty Ltd* (1996) 36 IPR 515 at 524, “*it will be the first impressions conveyed to that viewer, rather than an analysis of the cleverly crafted constituent parts of the commercial, which will be determinative*”. To similar effect, as French CJ, Crennan, Bell and Keane JJ noted in *TPG Internet* at 654 [47]:

Here, the advertisements were an unbidden intrusion on the consciousness of the target audience. The intrusion will not always be welcome. The very function of the advertisements was to arrest the attention of the target audience. But while the attention of the audience might have been arrested, it cannot have been expected to pay close attention to the advertisement; certainly not the attention focused on viewing and listening to the advertisements by the judges obliged to scrutinise them for the purposes of these proceedings. **In such circumstances, the Full Court rightly recognised that “many persons will only absorb the general thrust”**.

(Citation omitted, emphasis added)

1. In my view, the first impression and the general (and only) thrust of the advertisement was as is displayed prominently on the sign above the Store Promotion, namely: “*Fairy Platinum cleans better than Finish Quantum*”. This was the representation conveyed, when viewed contextually. To this I would add that that representation is made in the context of it being better at cleaning “*stuck-on food on the first wash*” (as intoned in the voiceover that extends during what might be regarded as the key part of the commercial which demonstrates, through what was described in argument as Jackson Pollock-like ‘swishes’, the application of Fairy Platinum (see [14] above)). Indeed, the contextual reference to *“[e]ven on stuck on food*” is also made on the Store Promotion sign.
2. As I have already tried to explain, the central, overall and predominant claim conveyed is not made in respect of ‘baked-on’ food specifically or specific soils or all soils, but rather generally in respect of ‘stuck-on’ food remaining, after washing in a dishwasher. Put another way, the representation is to overall better performance in the context of ‘stuck-on’ food.
3. Moreover, although I do not believe a consumer watching would have fully absorbed the somewhat obscured superscript as to what testing had occurred, it is tolerably plain that a representation was also being made (by both the commercial and the Store Promotion) that the claim as to overall better performance had a reasonable foundation based in scientific material in the possession of those producing Fairy Platinum.

## E.3 Do the Representations Conveyed Arguably constitute Contravening Conduct?

1. On the current state of the evidence, I consider that the claim made that Fairy Platinum cleans better than Finish Quantum, on stuck-on food on the first wash, is supported by the research set out in the SGS report. I have already set out, in general terms, the conclusions of the relevant comparison in relation to the seven soil classes. In respect of four, Fairy Platinum is found, on the basis of the scientific material, to be significantly better than Finish Quantum. In respect of the balance, the testing demonstrates that the degree of performance could not accurately be described as significantly better and is to be considered comparable. Nevertheless, based on the results generally, Fairy Platinum does achieve a better overall result.
2. I am conscious of the fact that the claims made on behalf of Fairy Platinum are made with a high degree of generality and that, in respect of some soil classes, it cannot be said that its performance is superior in the sense of being significantly better. To me, however, this does not seem to be the point. Taken as a whole, the scientific testing results (which, again, I stress are relevantly unchallenged on this application) demonstrate what they demonstrate and if I am correct in my characterisation of the representations that were conveyed and the evidence remains unchanged, then I do not consider that there is a *prima facie* case established of contravening conduct – let alone a relatively strong one. This is not to prejudge the ultimate issue, should it be litigated. It may be that further testing results adduced in evidence show a different conclusion, but it is necessary for me to determine this interlocutory application on the evidence that has been adduced.
3. Even if I was to consider that the primary representation conveyed was subtly different, that is, the commercial and Store Promotion were seeking to make a comparative statement about *all* stuck-on food, I would still not consider that a relatively strong *prima facie* case had been established, although it may be that it could be said that if such a specific representation had been conveyed, it would be sufficiently arguable to be accurately described as establishing, albeit not to a standard of conviction that could be described as relatively strong, a *prima facie* case.

# F The Balance of Convenience

1. Against the prospect that I have erred in determining what was conveyed or alternatively whether it amounted to contravening conduct and constitutes a relatively strong *prima facie* case, I should proceed to deal with the second stage of the analysis, namely a determination as to where the balance of convenience lies.
2. In my view, if I was otherwise convinced that there was a relatively strong *prima facie* case, the balance of convenience strongly favours the grant of an injunction. *First*, and most importantly, the point of departure for me reaching this stage of the analysis is a conclusion that there was a relatively strong *prima facie* case that consumers were being misled. I would be satisfied that the nature of this misleading conduct was such as to have the potential to impact upon the sales figures of Finish products and cause damage to the Finish brand, which may be extremely difficult to quantify by way of a subsequent award of damages. I accept RBA’s submission that this is especially so in the dishwashing market, where consumers are likely to be responsive to advertising which casts a particular product in a negative light. Presumably this was the whole basis upon which PGA considered that a comparative advertising campaign, not only on this occasion but on earlier occasions, was an effective advertising tool. *Secondly*, PGA’s evidence on the balance of convenience is not compelling. There is no evidence of a current intention to conduct further store demonstrations and although it may be able to be established in due course that PGA has lost sales, PGA would be adequately protected by the usual undertaking as to damages given by a company which plainly has the ability to pay damages. In making this last comment, I am sensible to the fact that those damages may not be easily quantifiable, but the Court would have to do the best that it could in such circumstances.

# G Conclusion & Orders

1. For these reasons, I do not consider that the alleged representations pleaded in the statement of claim were conveyed by the commercial or the Store Promotion. Independently of that, I do not believe that the representations that I do consider have been conveyed are such that there is a basis (let alone a relatively strong basis) for concluding, on the current evidence, that contravention of the norms called in aid by RBA will be proved (so that there is a probability that RBA will be entitled to relief at any trial).
2. Accordingly, I dismiss the interlocutory application with costs.
3. In circumstances where this application came on for hearing quickly and the parties urged the Court to determine the interlocutory application as soon as possible, these reasons were delivered *ex tempore*. In the circumstances, it seemed to me appropriate that I should make an order extending the time for the filing of any application for leave to appeal until seven days after these revised reasons had been published. To the extent necessary, I dispensed with the need for there to have been compliance with the requirements of FCR 35.14. I did so because if any application for leave to appeal is made, it is better that a draft notice of appeal be prepared with the benefit of my reasons, in writing, revised from the transcript.

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee. |

Associate:

Dated: 27 March 2018