FEDERAL COURT OF AUSTRALIA

Crowley v Worley Limited [2022] FCAFC 33

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| Appeal from: | *Crowley v Worley Limited* [2020] FCA 1522 |
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| File number(s): | NSD 1248 of 2020 |
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| Judgment of: | **PERRAM, JAGOT AND MURPHY JJ** |
|  |  |
| Date of judgment: | 11 March 2022  |
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| Catchwords: | **CORPORATIONS** – representative proceedings – whether primary judge erred in not finding that respondent engaged in misleading and deceptive conduct –whether primary judge erred in not finding that respondent contravened its continuous disclosure obligations – relevant representor was the corporation and not the board of the corporation – knowledge of the board not determinative – inferences from facts as found – failure to call officers and employees – attribution of knowledge to a corporation – officer – meaning of “aware” – meaning of “information” – opinions are information – opinions that ought reasonable to have been formed are information – appeal allowed – remittal required |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB, 12DA*Competition and Consumer Act 2010* (Cth) Sch 2,ss 4, 18*Corporations Act 2001* (Cth) ss 9, 674, 677, 1041H  |
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| Cases cited: | *Australian Competition and Consumer Commission v Woolworths Limited* [2019] FCA 1039*Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521; (2019) 138 ACSR 459*Blatch v Archer* (1774) 98 ER 969 *Browne v Dunn* (1893) 6 R 67*City of Botany Bay Council v Jazabas Pty Limited* [2001] NSWCA 94; (2001) ATPR 46-210*Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; (2016) 341 ALR 572*Fox v Percy*[2003] HCA 22; (2003) 214 CLR 118*Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149; (2015) 322 ALR 723*Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2016] FCAFC 60; (2016) 330 ALR 642*James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; (2010) 274 ALR 85*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298*Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 40 WAR 299*Maloney v Commissioner for Railways (NSW)* (1978) 18 ALR 147*Pancontinental Mining Limited v Posgold Investments Pty Ltd* [1994] FCA 131; (1994) 121 ALR 405*Sykes v Reserve Bank of Australia* [1998] FCA 1405; (1988) 88 FCR 511*The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; (2008) 39 WAR 1 *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747; (2019) 140 ACSR 38*Warren v Coombs* [1979] HCA 9; (1979) 142 CLR 531 |
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| Division:  | General Division |
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| Registry:  | New South Wales |
|  |  |
| National Practice Area:  | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 186 |
|  |  |
| Date of hearing:  | 16-17 August 2021 |
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| Date of last submissions: | 22 October 2021 |
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| Counsel for the Appellant:  | Mr J Sheahan QC with Mr D Sulan SC and Mr A Edwards |
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| Solicitor for the Appellant: | ACA Lawyers |
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| Counsel for the Respondent:  | Ms W Harris QC with Mr R G Craig QC and Ms J A Findlay |
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| Solicitor for the Respondent: | Herbert Smith Freehills |

ORDERS

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|  | NSD 1248 of 2020 |
|   |
| BETWEEN: | **LARRY CROWLEY** Appellant  |
| AND: | **WORLEY LIMITED ACN 096 090 158** Respondent  |

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| order made by: | perram, jagot and murphy JJ |
| DATE OF ORDER: | [11 March 2022  |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. Orders 2 and 3 made on 22 October 2020 be set aside.

3. The matter be remitted to a single judge for such further hearing as that judge decides and for determination.

4. The respondent pay the appellant’s costs of the appeal as agreed or taxed.

5. The costs of the hearing below be remitted to the single judge for such further hearing as that judge decides and for determination.

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

REASONS FOR JUDGMENT

PERRAM J:

1 I agree with the orders proposed by Jagot and Murphy JJ and with their Honours’ reasons for those orders. I would like however to say something about my own interpretation of ASX Listing Rule 19.12 (‘Listing Rule 19.12’) in *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149; 322 ALR 723 (‘*Babcock & Brown*’). Listing Rule 19.12 now defines the word ‘aware’ in these terms:

an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

2 The plaintiffs’ contention in *Babcock & Brown* was that the directors of Babcock & Brown Limited (‘BBL’) ought to have held the opinion, on 29 November 2008, that the company was insolvent. My primary conclusion was that the facts known to the board on 29 November 2008 did not provide any basis for thinking that BBL was insolvent on that day. Consequently, there was no reason to think that the board ought to have formed an opinion that BBL was insolvent and hence no reason to think that it was ‘aware’ that it was insolvent. However, in the course of coming to that conclusion, I offered some observations on the interaction between the definition of ‘aware’ in Listing Rule 19.12 and the situation where facts might reasonably indicate that an opinion ought to be reached on those facts but where no such opinion is formed. I said this at [156]-[158]:

156. The word ‘information’ appears in both Listing Rule 3.1 and also in the definition of ‘aware’ in Listing Rule 19.12. I should be surprised if ‘information’ in Listing Rule 3.1 did not include opinions. For example, if the directors did in fact form the opinion that the company was insolvent it is difficult to see that Listing Rule 3.1 could be ignored on the basis that it did not apply to opinions. It is more likely that Listing Rule 3.1 should be construed as requiring the disclosure, all other requirements being satisfied, of opinions actually held or possessed. And, if ‘information’ includes opinions in Listing Rule 3.1, it is difficult to see that it does not bear the same meaning in the definition of ‘aware’ in clause 19.12. If directors hold opinions about market sensitive matters which are not generally available then, subject to the other requirements and exceptions in the ASX Listing Rules, these are to be disclosed to the market. However that observation needs to be understood in the context of *Jubilee*. The opinion of a single director would rarely be the correct information to assess from a disclosure perspective. Ordinarily, the relevant views are those of a board majority. This case does not raise any issue about the position of minority opinions and it is not necessary to express any concluded view on that matter, however.

157. What then of opinions not actually held? The plaintiffs submitted that BBL should have become aware of the fact of its insolvency on 29 November 2008 for a number of reasons to which I shall return. However, leaving that to one side, I do not think that the plaintiffs’ argument can be reconciled with the actual language of the definition of ‘aware’. What is required is that the information – on the present hypothesis, an opinion – ought reasonably to have come into the directors’ possession in the course of their duties. These words are not apt to describe the formation of an opinion. One does not come into possession of an opinion when one forms one because the phrase ‘come into possession’ conveys the concept of receipt and the concept of ‘receipt’ suggests an antecedent act of possession by another. Where the constructive knowledge limb of the definition of ‘aware’ is applied to information which is an ‘opinion’ what enlivens it is an opinion – not of the directors but of some other person – which reasonable diligence on the directors’ part would have brought to their attention. What it does not require is for the directors to form an opinion.

158. To give an example, if an opinion of senior counsel that a company was insolvent were included in its board papers then the company would be aware of that opinion within the meaning of the definition. Reasonable diligence on the part of the directors – i.e. reading the board papers – would have brought it to their attention. Leaving aside issues such as privilege, confidentiality and the need for its full context to be considered (i.e. *Jubilee*) it would be subject to Listing Rule 3.1. On the other hand, Listing Rule 3.1 is not engaged where the directors of a company should have, but did not, realise the implications of information of which they were aware.

3 Having considered the matter further, it seems to me that this statement is not correct. One problem it has is internal inconsistency. For example, in the third sentence of [156], I accepted that an opinion which was actually held would be within the definition of ‘aware’ (in the context of discussing ASX Listing Rule 3.1). Yet, at [157], I concluded that the formation of an opinion could not be brought within the language of ‘come into possession of the information’ because it connoted an antecedent act of possession by another. But if that was true, it is just as true in the case of an opinion actually held. The logic of the statement leads to the conclusion that the formation of opinions is not caught by Listing Rule 19.12.

4 Since no-one thinks that is correct, it implies that my approach to the construction of Listing Rule 19.12 has gone awry in some way. I think the error is in reading too much into the words ‘come into possession’. Once one accepts that ‘information’ can include an opinion, it is appropriate to construe the expression so that the definition is capable of applying to opinions just like any other class of information. Consequently, the information in Listing Rule 19.12 should not be approached on the basis that it is to be treated like a chattel in the sense that possession of it can only ever be obtained from another. Rather, the possession into which the rule contemplates that a person might come, must be a possession whose nature is sufficiently broad to encompass the various ways an opinion might be acquired. Opinions can no doubt be acquired from others but can also be formed for oneself. The concept of possession in the rule must account for both.

5 I would therefore accept that an entity to whom Listing Rule 19.12 applies is ‘aware’ of an opinion which it ought reasonably to have formed on the facts known to it regardless of whether it did or did not in fact form that opinion. To the extent that [157] of *Babcock & Brown* suggests otherwise it should be regarded as an incorrect statement.

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| I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram. |

Associate:

Dated: 9 March 2022

REASONS FOR JUDGMENT

JAGOT AND MURPHY JJ:

# 1 INTRODUCTION

6 This appeal is brought on multiple grounds alleging that the primary judge erred in dismissing the originating application and fourth further amended statement of claim (**4FASOC**) as a result of the primary judge rejecting the appellant’s claims that:

(1) the respondent, Worley Limited (**WOR**), engaged in misleading and deceptive conduct by representing that it expected to achieve **NPAT** (net profit after tax) in excess of $322 million in the financial year ended 30 June 2014 (**FY14**) and that it had reasonable grounds to so expect (the **FY14 guidance representation**), in contravention of s 1041H of the *Corporations Act 2001* (Cth) (the **Corporations Act**), s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and/or s 18 of the Australian Consumer Law (Sch 2 of the *Competition and Consumer Act 2010* (Cth)) (the **ACL**); and

(2) WOR contravened its continuous disclosure obligations under s 674 of the Corporations Act and listing rule 3.1 of the (then) Australian Stock Exchange (**ASX**) Listing Rules by not notifying the ASX of the **Material Information** (that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement) and/or the **Earnings Expectation Material Information** (that WOR’s FY14 earnings were likely to fall materially short of the consensus expectation of professional analysts covering the ASX and WOR securities that WOR would deliver between approximately $354 and $368 million in NPAT for FY14) on 14 August 2013, 21 September 2013, 9 October 2013 or 15 October 2013.

7 The primary judge’s reasons for rejecting the appellant’s claims are set out in *Crowley v Worley Limited* [2020] FCA 1522 (the **judgment below** or **J**).

8 For the reasons given below the appeal must be allowed and the matter must be remitted to a single judge for further hearing as that judge decides and determination. It is a matter for decision by that judge, but there is no apparent reason why it would be necessary for the further hearing to involve anything other than submissions as required, having regard to the reasons of the Full Court in this matter.

# 2 BACKGROUND

## 2.1 Defined terms

9 Terms defined in the judgment below have the same meaning in these reasons for judgment. In particular:

2.1.1 Budgets and budgeting terms

(3) the **27 May 2013 draft budget** means the proposed budgets prepared by each of the locations in which WOR operated, which when compiled together disclosed an NPAT of $252 million for FY14 (which NPAT increased to $284 million by the time of adoption of the FY14 budget due to changes in foreign exchange (**FX**) rates: J [45], [47], [165];

(4) the **FY14 budget** means WOR’s budget for the financial year 2013/2014 approved by WOR’s board in August 2013 and which forecast NPAT of $352 million: J [8];

(5) **HOH** means “Half on half” and refers to the “phasing” or timing of financial results; in particular comparisons of results between the first half of a financial year, 1 July to 31 December (**H1**) and the second half, 1 January to 30 June (**H2**): J [172];

(6) **P50** **budget** means a budget using the P50 parameter. P50 is a probabilistic Monte Carlo analysis of the statistical confidence level for an estimate. It means that 50% of estimates exceed the P50 estimate and, by definition, 50% of estimates are less than the P50 estimate. In other words, there is an equal chance of exceeding or going below the estimate: J [114];

(7) **sandbagging** means the suspected practice of executives in WOR’s locations attempting to lower the expectations of senior management by submitting a draft budget that they could then exceed quite readily: J [151];

2.1.2 WOR’s statements and alleged representations

(8) the **August 2013 earnings guidance statement** means the statement WOR published on 14 August 2013 saying (J [2]):

While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014;

(9) the **9 October 2013 announcement** means the statement WOR published on 9 October 2013 to the effect that its first-half result would be lower than in the prior year, but that it affirmed the August 2013 earnings guidance statement: J [3];

(10) the **November 2013 revised earnings guidance** means the statement WOR published on 20 November 2013 that (J [5]):

On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $100 million;

(11) the **FY14 guidance representation** means the representation alleged to have been conveyed by WOR publishing and maintaining its August 2013 earnings guidance statement that: (a) it expected to achieve NPAT in excess of $322 million in FY14, and (b) it had reasonable grounds to expect that it would achieve NPAT in excess of $322 million in FY14: J [23] and [624];

2.1.3 The allegedly non-disclosed material information

(12) **Material Information** means the claim that WOR did not have a reasonable basis for making the August 2013 earnings guidance statement: J [20];

(13) **Earnings Expectation Material Information** means the claim that WOR’s FY14 earnings were likely to fall materially short of the consensus expectation of professional analysts covering the ASX and WOR securities that WOR would deliver between approximately $354 and $368 million in NPAT for FY14: J [20];

2.1.4 WOR’s organisational structure

(14) **region** means one of the following eight regions around the world into which WOR’s business was organised, known as ANZ (Australia New Zealand), CAN (Canada), ASCH (Asia and China), USAC (USA and Caribbean), LAM (Latin America), MENAI (Middle East, North Africa, India), EUR (Europe), and SSA (Sub-Saharan Africa): J [91];

(15) **location** means the business locations into which each region was divided, of which there were 43 in total. For example, the ASCH region comprised eight locations, while MENAI comprised seven locations: J [92].

(16) **CSGs** means the three Customer Service Groups into which WOR allocated customers for FY14, being;

(a) **Hydrocarbons**:being customers involved in extracting and processing oiland gas;

(b) **Minerals, Metals & Chemicals** (MM&C): customers involved in extracting and processing mineral resources and manufacturing chemicals; and

(c) **Infrastructure**:a consolidation of two sectors Infrastructure & Environment (customers involved in projects relating to water, the environment, transport, ports and site remediation and decommissioning) and Power (customers involved in power generation, transmission and distribution).

There was a Managing Director for each CSG: J [93]-[94].

(17) **ExCo** meansthe Executive Committee, which reported directly to **Andrew Wood,** WOR’s Chief Executive Officer (**CEO**), means the committee comprising Mr Wood and six Group Managing Directors (**GMDs**) who reported directly to Mr Wood,being **Stuart Bradie** (GMD Operations), Iain Ross (GMD Development), David Steele (GMD New Ventures), Randy Karren (GMD Improve), Barry Bloch (GMD People), and, from September 2013, **Simon Holt**, WOR’s Chief Financial Officer (**CFO**). The ExCo met at least monthly: J [97]-[100];

(18) **CEOC** means the CEO’s Committee, comprising the members of ExCo, the CFO in the period when he was not formally on ExCo, eight Regional Managing Directors (**RMDs**) who reported to Mr Bradie, and three Managing Directors of the Customer Service Groups (**CSGs**). The CEOC’s role was only to advise Mr Wood, and it did not make decisions: J [33], [91]-[93], [100];

(19) **board** means WOR’s board of directors. From 23 October 2012 and throughout the relevant period, Mr Wood was WOR’s only executive director.

(20) **A&RC** means the Audit and Risk Committee of the board, comprised of board members;

2.1.5 The different types of work for budgeting purposes

(21) **secured work** related to revenue from WOR’s portfolio of work in hand; where a signed contract for the work existed: J [112];

(22) **unsecured work** related to revenue from work described either as a “proposal”, “prospect” or “blue sky”; which had the following meanings:

(a) **proposals** related to work for which WOR had submitted a tender or had received a request for a tender, where there was usually a proposed start date for the project within the forthcoming year. An assessment of “Go” and “Get” likelihood was made for proposals in order to risk weight forecasted revenue and costs for work that may not materialise. “Go” was a percentage figure representing the likelihood that the project would be undertaken at all. “Get” was a percentage figure representing the likelihood that WOR would be engaged for the work in the event that the project went ahead: J [116];

(b) **prospects** related to tender processes for which WOR had not yet submitted a tender, or known projects where the tender process had not started. Budgeted revenue from “Prospects” was also discounted for “Go” and “Get” risks: J [117];

(c) **blue sky** means estimated revenue from expected projects not identified at the time of forecasting. Mr Wood described “blue sky” as estimated revenue from expected projects based on discussions with customers and projects that are likely to materialise based on history and past experience, such as under a framework agreement. **Denis Lucey,** RMD of the ASCH region from 2011 to 2014, described it as an estimate of the value of projects which WOR expected to be engaged to undertake during the course of the financial year (other than secured work, proposals and prospects), based on a subjective assessment of the particular location’s historical performance and current market conditions and also taking into account WOR’s strategy for the coming year. **Robert Ashton**, RMD of the MENAI region from March 2013 to November 2016, described it as projects that were not known but were anticipated based on a combination of the operational history of the location, information obtained from customers or industry analysts and or anticipated market conditions. Blue sky was estimated at a numerical value and accounted for that value in the budget without any discount: J [41], [118]-[119];

2.1.6 Other

(23) **BEBIT** means business earnings before interest and taxes.

(24) **EBIT** means earnings before interest and tax.

(25) the **Holt memorandum** means a memorandum from Mr Holt, CFO, to the A&RC dated 5 December 2013: J [74];

(26) **Michael Daly** was WOR’s Global Director – Operations and Communications Support. He reported directly to Mr Holt: J [101];

(27) **John Allen** was WOR’s Global Director – Corporate Finance. He reported directly to Mr Holt: J [101];

## 2.2 Key facts

10 Many of the key facts were not in dispute.

11 On 14 August 2013 WOR published to the ASX the August 2013 earnings guidance statement, as follows (J [2]):

While recognizing the uncertainties in world markets, we expect our geographic and sector diversification to provide a solid foundation to deliver increased earnings in FY2014.

WOR’s NPAT for FY13 was $322 million: J [1].

12 WOR’s earnings guidance was based upon its internal FY14 budget, which forecast FY14 NPAT of $352.1 million: J [8].

13 On 9 October 2013, WOR made the 9 October 2013 announcement, to the effect that its first-half result would be lower than in the prior year, but that it affirmed the August 2013 earnings guidance statement: J [3].

14 On 10 October 2013, Mr Wood gave a strategy presentation on behalf of WOR to members of the investment community. WOR lodged a slide pack of Mr Wood’s presentation with the ASX and thereby publicly released it. By that presentation WOR repeated the August 2013 earnings guidance statement: J [4] and [505].

15 On 15 October 2013, Mr Wood presented at the Macquarie WA Investor Forum. The slide pack for the forum ended with several bullet points including:

* We remain committed to our Vision 2017

…

* Expect improved earnings FY14 across all sectors

By that presentation WOR repeated the August 2013 earnings guidance statement: J [4] and [510].

16 On 20 November 2013 WOR published the November 2013 revised earnings guidance, in the following terms (J [5]):

On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $100 million.

17 On publication of the November 2013 revised earnings guidance, the price of ordinary shares in WOR fell approximately 26%: J [1].

18 The appellant purchased 423 WOR shares on 4 October 2013 for a total consideration (including brokerage) of $10,046.59. On 30 May 2015, the appellant sold all of his WOR shares for $2,755.70: J [16].

19 The November 2013 revised earnings guidance led to reflection among WOR senior management about what might have gone wrong in WOR’s budgeting process. Mr Wood requested that Mr Holt “download…the issues as people saw them” about WOR’s budget process: J [577]. Mr Holt interviewed WOR managers and others, made the Holt interview notes, and prepared a memorandum dated 5 December 2013 accompanied by his notes of the interviews, which is the Holt memorandum: J [74] and [577].

20 The subject of the Holt memorandum was “Financial forecasting process” and its stated purpose was (J [571] and [576]):

… to provide a review of the current process that WorleyParsons follows with respect to its budgeting and forecasting and to discuss certain changes to this process being actioned or considered by management.

21 The “Background” section of the Holt memorandum records:

In the past six years, WorleyParsons has underperformed its original budget by 10% or more five times.

Moreover, re-forecasts done during the year have also proved to be less reliable than we would have expected.

Given that WorleyParsons uses its budgets/forecasts to provide guidance to the market, we have been in a position where we have been required to make a number of formal and informal profit downgrades.

These downgrades, and in particular the most recent one, have had an adverse impact not only on the WorleyParsons share price but also on our credibility in the market.

A summary of our budgeting process is attached as Appendix One to this document. It is important to note that the stated intention of the budgeting process is that the budget should be a “P50” budget. That is, that there should be a 50% chance that the group, or any particular location within the group, will achieve its budget.

22 Section 3 of the Holt memorandum is headed “Recent results”. It includes a table, reproduced below, comparing WOR’s original budget, reforecast and final NPAT numbers over the past 5 years, including the analysts’ views of WOR for the period based on the analyst reports written following the release of WOR’s full year results:



23 The Holt memorandum says:

The table shows that, with the exception of FY12, WorleyParsons has underperformed on its original budget by at least 10% for every year back to FY09 (and will again for FY14). Further, the numbers suggest that our re-forecasts have probably not been much better than our budget from an accuracy perspective. However, the figures do indicate that we have done a good job at year end of guiding the analysts to a consensus that is approaching our budgeted figure.

24 In section 4, headed “Reasons for poor budgeting/forecasting performance”, the Holt memorandum records:

The CFO has undertaken a review to seek to understand why budgets and forecasts have consistently not been met over the last six years. This review has included discussions with EXCO, The Managing Directors of Operations and the Finance Leadership Team including the Finance Directors. The main conclusions are discussed below.

25 The key points about the budget are said to be that:

* There are some practical and cultural issues around the budgeting process including whether it is the right process for all locations.
* Expectations of growth at the senior management level have been too optimistic and have not matched what the locations are seeing on the ground.
* There is insufficient allowance made in the budget process for potential downsides.
* There is continued tension between locations and senior management as to whether locations are “stretching” themselves sufficiently in preparing their budgets.

26 The Holt memorandum continues:

The budget process

…there are still questions around whether the current process is appropriate for all locations and whether there is sufficient analysis being done of the reasonableness of the budget numbers at a group level. The budget process needs to be challenged/refined around the level of comfort placed in the go/get of prospects/proposals versus a scenario based methodology and the impacts of binary outcomes of the same prospects/proposals.

…

A culture of optimism

A consistent message is that there has been an expectation at group level that the company will grow, or grow at a certain rate versus previous years. This expectation seems to be driven both internally (“WorleyParsons has always grown at these type of rates”) and externally (“the market expects us to grow at x% so therefore that is what we need to do”). It does not necessarily seem to be driven by our own assessment of the markets in which we operate.

This expectation is then communicated back to the locations. The consequence of this is that, in many cases, the bottom up build that the locations submit does not match the expectations of growth from senior management. In order to meet these expectations, the most common response is for locations to simply include a greater level of “blue sky” revenue in the second half of their budget period. In essence, locations are ending up budgeting on the hope that work will materialise, rather than any real expectation that it will. Therefore, the probability that the budget will be met decreases. A conclusion from this is that our budgets have not genuinely been P50 budgets. This is supported by the fact that we have missed budget five out of the last six years.

Insufficient allowance for potential downsides

The review identified that our budget process does not make sufficient allowance for potential downsides – whether known or unknown. As the WorleyParsons business model has moved into larger and more complicated projects, the potential for material downside on one or more of these projects in a particular accounting period is high, but this potential downside is not built into the budgeting process. Put another way, our budget assumes that everything will go right in a world where we know things will go wrong.

The size of these issues can impact not only on the ability of a location to meet its budget, but on the group as a whole. In addition, the way in which the group budgets and operates means that it is unlikely that there will be unknown upside (i.e. work that is not already in secured, prospect or blue sky that is won and executed during the financial period) sufficient to offset the potential downsides.

In cases where potential problems have been identified on projects the feedback is that locations are actively discouraged from including potential downside in their budgets (at best, these are treated as a sensitivity at group level).

“Are we stretching?”

Another common message is that there is an assumption that locations are not “stretching” when they put in their initial budgets. The reasons for this appear to be both historical (based on the fact that for many years WorleyParsons consistently outperformed its budgets) and remuneration related (because location managers are rewarded based on their performance versus budget there is an assumption that they will always look to put in a low budget).

This perceived lack of trust in the initial location budget places pressure on the process, and leads to a considerable amount of back and forth between locations and management. It also obviously has the potential of penalising locations who make a genuine effort to get their forecasts correct, but who are still assumed to be “sandbagging”.

27 The Holt memorandum then turned to the issue of “Re-forecasts”. It says:

As noted above, the intention behind our re-forecast process is to give management an assessment, on a quarterly basis, as to how the group is tracking versus its original budget. This assessment is then used to determine whether WorleyParsons current market guidance is appropriate.

In practice, it appears that similar issues to those identified in the budget are cropping up in the re-forecast process. In particular, locations are under significant pressure to “hold the line” with respect to their original blue sky forecasts, even in situations where the local market conditions are such that it has become less likely that this work will materialise.

The reason given for this approach is to continue to put pressure on locations to perform. However, the risk is that our re-forecast is still about work we hope will come, rather than about work that we feel the market for our services will deliver.

28 In section 5, headed “Consequences”, the Holt memorandum says:

From an equity market perspective the consequences of our poor budgeting and forecasting have been pretty clear – a loss of confidence leading to a significant decline in our share price. In the longer term, if this lack of confidence continues, our ability to raise equity as required (e.g. for a material acquisitions) is also likely to be severely reduced.

A key point to note is that we have been good at guiding the market to our budgeted number; but that what the market did not necessarily realise is that this was a “P50” number (and, in reality, was probably lower than this). Consequently, the market is probably more surprised than it should be when we don’t reach this number.

From a staff perspective, the inaccurate budgeting has had a direct impact via our incentive schemes. The existence of the “gate opener” that was tied to performance versus budget has led to the very low payouts in recent years on our incentive schemes, with the resulting impact on engagement/retention etc.

In addition to the direct financial impact on staff, the setting of budgets that are considered unrealistic has, at least in some parts of the business, had a de-motivating effect. It is hard to engage staff when their views on budgets are not being taken into account and when they are being set targets they believe have a low probability of being met.

Another potentially less understood consequence has been that it has potentially allowed additional overhead to creep into the organisation. That is, we build an overhead structure for the revenue that we budget for, which includes blue sky. As blue sky revenue tends to be back ended, the overhead costs most likely get added earlier than when the blue sky revenue is earned. Consequently, if the revenue does not arise as forecast, it is not possible to remove the associated overhead in time to compensate.

29 The Holt memorandum concluded by noting that changes arising from a review process would be implemented in the FY15 budget process.

30 Appendix one to the Holt memorandum is headed “The current budget process”. It notes that the “current process is, at least in theory, a ‘bottom up’ process” explained as involving the following:

1. Most locations forecast their revenue and gross margin based on work that is “secured”, “prospects” or “blue sky”. Certain locations (usually the smaller ones and/or locations with high levels of consulting revenue) may budget more based on the current and forecast number of people.

2. This revenue and gross margin is split across the three CSGs and four service lines.

3 The location then determines what a reasonable level of overhead for the location is and derives the “location BEBIT” – which is essentially the EBIT of the location before global charges.

4. The location BEBIT number is subject to review by the Managing Director responsible for the location, and then by the Global Director of Operations, with any changes being put through the location pack.

5. Once all of the locations have determined their BEBIT, this result is consolidated at the group level to reach a group “Operational BEBIT” number.

6. The Global Services Group costs are then determined and subtracted from the Operational EBIT number to arrive at a Group EBITDA number.

7. Estimates are made of group interest, tax, depreciation, amortisation, minority interests etc. to arrive at a Group NPAT number.

8. The full result is then reviewed by the CEO and the CFO and changes may be made to either location or group numbers.

9. After all changes are made, the final pack is presented to the Board for its review and approval.

31 Appendix one to the Holt memorandum also records this:

Note that the stated intention of the budgeting process is that the budget should be a “P50” budget. That is, there should be a 50% chance that the group, or any particular location within the group, will achieve its budget.

32 As to re-forecasts, appendix one to the Holt memorandum says WOR does regular forecasts, previously 4+8 (that is, four months in for the next eight months) and 8+4 (that is, eight months in for the next four months).

33 WOR did not call Mr Holt, the author of the Holt memorandum, to give evidence. In addition, WOR also did not call Mr Bradie, Mr Allen or Mr Daly who were directly involved in the amendments to the 27 May 2013 draft budget, in which the 27 May 2013 draft budget with an NPAT of $252 million ($284 million with FX increases up to August 2013), was increased in the FY14 budget to an NPAT of $352.1 million. Her Honour described this process at J [47], as follows:

(1) the 27 May 2013 draft budget produced a forecast NPAT of $252 million;

(2) Messrs Bradie and Daly then added $34.9 million in operational EBIT and Mr Allen added $12 million for acquisition stretch with the result that the budgeted FY14 NPAT was $288.6 million;

(3) Messrs Bradie and Daly then added $20.7 million in operational EBIT with the result that budgeted FY14 NPAT increased to $295 million;

(4) CEOC then resolved to include an additional $43.8 million in overhead savings in the FY14 budget, of which $33 million would be recorded in operational EBIT; and

(5) $32 million was added to the budget NPAT figure using the current foreign exchange spot rate (Mr Crowley makes no complaint about this adjustment).

34 On 31 May 2013 Mr Daly noted in an email to Mr Holt and Mr Allen about the 27 May 2013 draft budget that “you see that the level of blue sky in ANZ (North and West) in particular is very high (ANZ South is high but is not such a worry given the nature of their business)”: J [198(2)].

35 On 11 June 2013, Mr Allen made the following comments to Ms Wallace (WOR’s Group Financial Controller), following a conversation with Mr Daly (J [224]):

Our guess is that Stu Stu [i.e. Mr Bradie] got a rocket from Andrew last week re the budget and has been told to change everything - making somewhat of a mockery of the process. If there was going to be a top down target why didn’t we start with that in the first place??

I am also concerned that we are putting the company’s reputation at risk. If we go out with another unrealistic budget, and need to do another profit downgrade next year, it is not going to look good at all in the market. Something to discuss with Simon.

36 On 3 August 2013 Mr Bradie emailed all RMDs about the draft budget, noting that the first and second half weighting of 43/57 was too second-half weighted and the RMDs needed to look across locations to see if more revenue could be moved into the first half: J [288].

37 On 7 August 2013 Mr Daly emailed Mr Holt saying (J [293]):

As an fyi only, there remains a strong sense within the business that the FY14 targets – both full year and H1 – are a stretch and I agree with that given current performance and the reliance on timely realisation of the cost saving targets. Something to bear in mind during your briefings over the coming weeks!

38 WOR released its final FY14 results on 27 August 2014. WOR reported statutory NPAT of $249 million, down 23% and underlying NPAT of $263 million, down 18%: J [611]. That is, having represented to the market that it expected to achieve NPAT in excess of $322 million in FY14 and that it had reasonable grounds to so expect, WOR in fact achieved NPAT of only $263 million.

# 3 PRIMARY JUDGE’S KEY FINDINGS

39 The primary judge made some key findings which are not the subject of challenge. These include that by publishing and maintaining the August 2013 earnings guidance statement WOR made the FY14 guidance representation on 14 August and thereafter, including on 9, 10 and 15 October 2013 that it expected to achieve NPAT in excess of $322 million in FY14, and it had reasonable grounds to so expect: J [29].

40 The August 2013 earnings guidance statement was based on its expected NPAT, calculated by reference to WOR’s FY14 budget: J [111].

41 WOR professed to adopt the P50 parameter to produce its budgets: J [114]. However, the FY14 budget was not a P50 budget: J [197].

42 As the FY14 budget setting process began, WOR’s major markets were “either not growing or were deteriorating”: J [418]. WOR admitted that there would be “continued uncertainty in the markets for its services in FY 14”: J [419]. The 27 May 2013 draft budget, compiled from the budgets provided by each of the locations, resulted in an NPAT of approximately $252 million: J [165]. On Mr Wood’s evidence, this draft budget generally reflected the locations’ efforts to identify “aggressive yet achievable budget targets”: J [196].

43 CEOC directed a reconsideration of the draft budget as a result of which, by late June 2013, the revised draft budget instead reflected an NPAT of $352.1 million: J [254]-[263]. As a result of this revision ExCo was concerned that “[e]veryone will be challenged to meet their budgets” and also that the split between the first and second halves of the year needed “more work … to reduce the weighting to the second half”: J [286]. The weighting to the second half of the year in fact increased as a result of further work: J [294]-[295].

44 On 13 August 2013 the board approved the FY14 budget with an NPAT of $352.1 million, a 9% increase on the FY 2013 result of NPAT of $322.1 million: J [309]. The August 2013 earnings guidance statement was developed in meetings of the A&RC on 12 and 13 August 2013: J [303]. The board approved the August 2013 earnings guidance statement to the market: J [298]-[303].

45 By its statements to the market, WOR aimed to get the analysts to align with WOR’s expectations and to encourage analysts to forecast WOR’s FY14 NPAT at around $352 million: J [307]-[308].

46 The primary judge also concluded that:

(1) the fact that, by the 23 February 2013 and 17 May 2013 ASX announcements, WOR had downgraded its earning guidance on two recent occasions before the FY14 budget was approved and stated that the downgrades were required because of WOR’s underperformance against its internal budget are additional matters that provided WOR’s officers with a basis for approaching the FY14 budget with caution: J [416] and [417];

(2) the fact that, as the FY14 budget setting process began, WOR’s major markets were “either not growing or were deteriorating” and that WOR was aware that in FY13 it had experienced challenging conditions in a number of its key markets and there would be continued uncertainty in the markets for its services in FY14, is a persuasive reason for approaching the FY14 budget with caution: J [418]-[421];

(3) there is evidence that aspects of the 27 May 2013 draft budget were optimistic and that, overall, the draft budget was “ambitious”: J [423];

(4) the Holt memorandum tends to support the appellant’s case that WOR’s historical performance against budget reflects defects in WOR’s budgeting process: J [600]; and

(5) the Holt memorandum demonstrates a significant record of underperformance by WOR against its internal budget every year since FY09, with the exception of FY12. It states that in five of the past six years WOR had underperformed its original budget by 10% or more: J [410]. The Holt memorandum interview notes provide “a basis for suspecting some locations may have submitted to pressure to accept adjustments to their respective budgets that they considered to be unrealistic, or may even have proposed budgets that they considered to be unrealistic”: J [329].

# 4 THE MISLEADING AND DECEPTIVE CONDUCT CASE

## 4.1 The appellant’s case

47 The appellant contends that the primary judge made all necessary findings to support the conclusion that WOR lacked reasonable grounds for the August 2013 earnings guidance statement which conveyed the FY14 guidance representation other than the ultimate finding to that effect. According to the appellant, this failure results from four fundamental errors in the primary judge’s approach:

(1) first, a focus on justifying a decision of the board of WOR to approve the FY14 budget for 2014 and the August 2013 earnings guidance statement, rather than the required focus on the reasonableness or otherwise of WOR using the FY14 budget to justify the August 2013 earnings guidance statement;

(2) second, an unwarranted search for a level of detail in the evidence which would permit the primary judge to identify a calculation of NPAT for FY14 which would have been reasonably based;

(3) third, failing to appreciate the full significance of the evidence that was tendered and the findings made by considering the issues through too narrow a lens and failing to assess the evidence in the context of the other evidence; and

(4) fourth, failing to weigh the evidence and the proper inferences to be drawn consistently with the principles in ***Blatch v Archer*** (1774) 98 ER 969 and ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298.

48 The appellant submitted that these errors in approach are apparent in the primary judge’s apparent reluctance to draw the ultimate adverse inference against WOR, as disclosed in numerous paragraphs of her Honour’s reasons including as follows:

(1) as to WOR’s historical underperformance against budget resulting in previous earnings guidance downgrades, “more detailed analysis would be required to make a finding about the reason or reasons for WOR’s historical underperformance against EBIT and NPAT budgets. WOR’s performance against budget certainly raised an issue about systemic problems in accurately forecasting EBIT and NPAT, but it does not provide a basis for making a finding of systemic problems in accurately forecasting EBIT and NPAT without more”: J [414];

(2) as to these facts providing WOR’s officers with a basis for scepticism as to the grounds for the FY14 budget, “without knowing more about the reasons for WOR’s underperformance in any year, WOR’s track record does not itself provide a sound basis for a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement”: J [415];

(3) as to WOR twice having to downgrade pervious earnings guidance in 2013, “[t]hese are additional matters that provided WOR’s officers with a basis for approaching the FY14 budget with caution but again, without knowing more about the reasons for WOR’s underperformance against its internal budget in FY13, they do not themselves provide a sound basis for concluding that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement”: J [417];

(4) as to the fact that WOR’s markets were not growing or deteriorating when the FY14 budget was set, while this was “a persuasive reason for approaching the FY14 budget with caution”, whether “it provided a basis for concluding that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement must depend upon the extent to which the budget reflected the perceived market conditions. That question was not analysed in sufficient detail to permit a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement”: J [421];

(5) as to the fact that aspects of the 27 May 2013 draft budget were optimistic and that, overall, the draft budget was “ambitious”, the subsequent amendments increasing NPAT “does not prove that subsequent changes to the budget were unreasonable or inappropriate. By way of analogy, solicitors and junior counsel may conscientiously develop a set of arguments; those arguments may still be refined and improved by senior counsel”: J [229];

(6) as to the Holt memorandum, it does not “analyse how any particular defect affected any element of any budget. Nor does it attempt to quantify the impact of any defect in the budget process. For example, the memorandum does not analyse how any of its ‘key points’ affected the budget EBIT or NPAT figures in any year or years. Nor does the memorandum seek to test whether there might be any other explanation for the identified discrepancies between budget and actual performance apart from defects in the budgeting process. Nor, perhaps unsurprisingly, does the memorandum contain a broad conclusion that WOR’s budget process was ‘not reliable’, as Mr Crowley contended that the Court should find”: J [600]; and

(7) as to the Holt interview notes, which record WOR senior management’s “strong criticism of aspects of WOR’s budgeting and reforecasting processes”, “the notes do not provide significant weight in support of a conclusion that the FY14 budget lacked a reasonable basis to any particular extent, or that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement”: J [602]-[603].

49 The appellant also noted that, on the evidence and the primary judge’s findings:

(1) despite Mr Wood’s evidence that blue sky revenue was a function of market buoyancy, blue sky revenue was included in the FY14 budget when markets were flat or deteriorating as 19% of the gross margin, the same percentage of the total as in 2013, when markets were buoyant;

(2) the proportion of blue sky revenue was maintained at all times despite overheads being reduced so that blue sky, with its inherent risk, became a greater proportion of the EBIT; and

(3) the November 2013 revised earnings guidance was largely a result of a reduction in blue sky revenue of $110 million.

50 The appellant submitted that there was more than sufficient evidence, identified and accepted by the primary judge, which established that WOR lacked reasonable grounds for the August 2013 earnings guidance statement but because of her errors in approach the primary judge refused to make that finding. In particular, the primary judge should have approached the issues recognising that:

(1) there is no principle which required a level of detail in the evidence sufficient to enable the primary judge to calculate the FY14 guidance representation which would have been based on reasonable grounds, and her Honour’s search for that kind of detail was erroneous;

(2) in any event, there was only one party that could provide detail of that kind, being WOR. Yet WOR only called evidence from Mr Wood, Mr Lucey and Mr Ashton, the latter two being RMDs for regions whose earnings were relatively minor, and it did not call evidence from Mr Holt or those directly reporting to him, particularly Mr Bradie, Mr Allen and Mr Daly, thereby engaging the principles in *Blatch v Archer* and *Jones v Dunkel*;

(3) all of the known and identified risks in the budgeting process, confirmed by the Holt memorandum, in fact came to pass; and

(4) the Holt memorandum is a near contemporaneous analysis of what was wrong with WOR’s budgeting process, promoted by the problems caused by the FY14 budget and August 2013 earnings guidance statement. It was not a product of hindsight by a person either uninvolved in or trying to deflect blame for the events. It was by the CFO, Mr Holt. It exposed precisely why the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement. It bears no resemblance to the years after the event documents characterised as nothing more than hindsight in *Australian Prudential Regulation Authority v* ***Kelaher*** [2019] FCA 1521; (2019) 138 ACSR 459.

51 The appellant submitted that the primary judge also should have appreciated the significance of her finding at J [197] that the FY14 budget on which the August 2013 earnings guidance statement was founded was not a P50 budget. It is one thing to intend a budget for internal purposes to be a P50 budget. It is another to use a budget that is not a P50 budget for the purposes of providing external guidance about earnings to the market. Given that the FY14 earnings guidance, as given in the August 2013 earnings guidance statement and thereafter, involved a positive statement to the market about expected earnings, the basis for that statement must be at least a P50 financial forecast (one where the results are as equally probable as improbable). Anything less is inherently unsuitable for use as the basis for external earnings guidance because, by definition, the expectation is not as equally likely to be met as not met. WOR’s officers knew or ought to have known this at the time.

52 According to the appellant, given that the August 2013 earnings guidance statement was a representation as to a future matter, and the only evidence WOR adduced to the contrary was as to the FY14 budget and the asserted P50 budget process, the primary judge should have concluded in these circumstances that WOR did not have reasonable grounds for making the FY14 guidance representation.

## 4.2 Discussion

53 The appellant’s contentions that the primary judge’s process of reasoning miscarried should be accepted.

54 Contrary to the case put for WOR below and in the appeal, the relevant issue was not what was actually known by WOR’s board, what views the board held, or the reasonableness of the conduct of the board (although that was also put in issue by the appellant below). WOR made the FY14 guidance representation, which conveyed to the market that it expected to achieve NPATin excess of $322 million in FY14 and that it had reasonable grounds to so expect. While the FY14 guidance representation was made as a result of a decision of the board to adopt the FY14 budget and give the August 2013 earnings guidance statement to the market, the representor was WOR, not the board of WOR. Accordingly, the issue is whether WOR had reasonable grounds for making the FY14 guidance representation. The issue is not whether the board acted reasonably or unreasonably given the information made available to it by WOR’s officers.

55 The appellant did not contend before the primary judge that the board made the FY14 guidance representation. In the 4FASOC the appellant pleaded at para 51 that WOR made the FY14 guidance representation. The submissions made by the appellant below, recorded at J [640]-[645], do not suggest to the contrary. Those submissions focus on a different issue, being the deeming provision in ss 4(1) and (2) of the ACL and s 12BB(2) of the ASIC Act. A representation as to a future matter is taken to be misleading if a person does not have reasonable grounds for making the representation. A person is also taken not to have reasonable grounds for making such a representation “unless evidence is adduced to the contrary”. In the context of evaluating whether WOR had adduced evidence to the contrary the appellant submitted to the primary judge that “it was necessary for WOR to identify the relevant decision makers who relied on the asserted evidence to the contrary; and to prove that the asserted evidence to the contrary was in fact relied on by those decision makers”. This does not mean that the appellant was submitting that WOR’s board made the FY14 guidance representation, with the consequence that the issue of reasonable grounds was to be answered by reference to the diligence or otherwise of WOR’s board.

56 The erroneous focus of the primary judge on the conduct and knowledge of the board, as opposed to the conduct and knowledge of WOR, is most evident in the way in which her Honour dealt with her finding that the FY14 budget was not a P50 budget. At J [428] the primary judge said:

Considered together, there were reasons for WOR’s Board to approach the task of approving the FY14 budget with caution (although there is no evidence that the Board ought to have known that the budget was not a true P50 budget). However, the matters identified by Mr Crowley fall well short of proving on the balance of probabilities that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement.

57 The relevant issues were that the FY14 budget was not a P50 budget and whether WOR knew that to be so or knew the facts from which it should be inferred to have known that was so. If WOR knew, or by its knowledge of underlying facts should be taken to have known, that the FY14 budget was not a P50 budget then that would have been evidence supporting the inference that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement. And as explained below, the fact that Mr Holt, Mr Bradie, Mr Daly and Mr Allen were not called to give evidence was itself relevant to the question whether the inference should be drawn that relevant persons within WOR (whether officers of WOR or not) knew or should be taken to have known that the FY14 budget was not a P50 budget.

58 Nor can it be accepted that the appellant did not put below that WOR’s FY14 budget did not provide reasonable grounds for the making of the FY14 guidance representation. The appellant pleaded in the 4FASOC that, by 14 August 2013:

(1) WOR’s officers with responsibility for overseeing the budget projections were aware, and it was a fact that, the FY14 budget would be challenging to achieve (para 22B) including because:

(a) the forecast NPAT was increased from $252 million in the 27 May 2013 draft budget, as provided by the locations, to $352.1 million (particular 10);

(b) the 27 May 2013 draft budget and the adjusted budget thereafter reflected unrealistic blue sky forecasts (particular 11); and

(c) WOR had underperformed on its NPAT budget by at least 10% in each financial year from FY09 other than FY12 (particular (c));

(2) WOR’s officers with responsibility for overseeing the budget projections were aware, and it was a fact that, the FY14 budget (para 22C):

(a) provided for 19% of WOR’s expected earnings to come from the realisation of blue sky revenue;

(b) provided for 16% of WOR’s expected earnings from the realisation of prospect revenue;

(c) projected 59% of EBIT would be accrued in the second half of 2014, significantly exceeding the 52% EBIT actually achieved in the second half of 2013; and

(d) projected a significantly greater proportion of EBIT from blue sky and prospect revenue against secured work in in the second half of 2014 as compared to the first half of 2014;

(3) WOR had downgraded its earnings guidance on two occasions in FY13 (involving a downgrade in earnings from an NPAT of $346 million in FY12 to an NPAT of $260 to 300 million for FY13): para 23;

(4) WOR was aware that in FY13 WOR had experienced challenging conditions in a number of its key markets and that there would be continued uncertainty in the markets for its services in FY14: para 24;

(5) WOR was “aware” within the meaning of ASX Listing Rule 19.12, and it was the fact that, it did not have a reasonable basis for making the August 2013 earnings guidance statement (para 46), because (amongst other things)

(a) the effect of the budget process within WOR required the locations to reflect WOR’s growth strategy without due regard to the market conditions, including through an additional EBIT of $88.6 million to the “bottom up” build from the location’s budgets and $12 million “acquisition stretch” to WOR’s EBIT figure without a proper basis, and by including no contingency against underperformance except that from movements in foreign exchange rates: particular (a);

(b) the budget process within WOR had not included any or any adequate critical review of the locations’ blue sky revenue forecasts to ensure the forecasts were not inflated: particular (b);

(c) WOR budgeted for an unreasonable amount of blue sky revenue in its ANZ region, and in the SWO location of its USAC region: particular (c);

(d) as a result, WOR did not have reasonable grounds for including in the FY14 budget an NPAT forecast materially higher than approximately $284 million and/or a profit guidance to the market of “growth” on its FY13 NPAT result of $322 million: particular (d);

(e) further as a result, WOR’s officers with responsibility for overseeing its budget and forecasting processes ought to have known that WOR did not have a reasonable basis to forecast increased earnings in FY2014: particular (e); and

(6) further or in the alternative to para 46, WOR was “aware” within the meaning of ASX Listing Rule 19.12, and it was the fact that, its FY14 earnings were likely to fall materially short of the FY14 WOR Earnings Expectation: para 47;

(7) by reason of these matters, by making and repeating the August 2013 earnings guidance statement on 14 August 2013, 9 October 2013, 10 October 2013 and 15 October 2013 WOR engaged in misleading and deceptive conduct in contravention of s 1041H(1) of the Corporations Act, s 12DA(1) of the ASIC Act, and/or s 18 of the ACL: paras 51-55.

59 The respondents’ contention - that it was no part of the appellant’s case that there was no reasonable basis for the FY14 budget because it was not a P50 budget - does not withstand scrutiny. It is true, as WOR contended, that the appellant did not plead that the FY14 budget was not a P50 budget. It is also true that the appellant submitted at one point below that the case was not a case about a generally defective budget process but concerned an “obvious and unreasonable upwards adjustment of projected earnings by WorleyParsons’ executives once its budget process had produced unsatisfactory numbers” in the sense of the projected NPAT being too low. In other words, the appellant accepted that the outcome produced by the 27 May 2013 draft budget was reasonable (that is, a forecast NPAT for FY14 of approximately $252 million).

60 However, as discussed, the 4FASOC did sufficiently plead the alleged deficiencies in the budgeting process which meant that the FY14 budget was not a P50 budget. Further, in opening written submissions the appellant identified that while WOR claimed to have produced a P50 budget the evidence would show that “this is far from what occurred in FY14”. In oral opening submissions the appellant contended that the interview notes underlying the Holt memorandum said that there was a “[g]eneral recognition of P50 trending down to P25”, and therefore that WOR “have only a 25% chance of meeting their internal forecasts”. In closing written submissions the appellant submitted that the essential conclusions from Mr Holt’s review were or included that:

…insufficient allowance was being made in the budget for potential downsides. WorleyParsons’ budget process “*assumes that everything will go right in a world where we know things will go wrong*.” Locations reported being “actively discouraged” from budgeting for downside risks. A process that was supposed to produce a P50 budget - namely a target with a 50% probability of being achieved - instead became a P25 budget meaning, critically, that it was three times more likely to be missed than achieved.

The appellant also submitted that the FY14 budget was not a true P50 budget, and included no adequate allowance for the risks associated with continued slow markets and operational underperformance.

61 In closing submissions the appellant further submitted:

The effect of the stretch targets for gross margin in the 27 May 2013 budget, plus the management adjustments that followed during June 2013, was to strip any P50 character from the budget. If every element of a budget is optimistic, there is no “portfolio offset” where a miss on one item can be offset by gains on others - a miss anywhere has an immediate effect on achievement of the budget. The process of “management adjustments” during June 2013 demonstrates how that P50 ambition became something much closer to a P 25 reality - as the Holt interview notes observed.

62 The appellant argued that: (a) WOR’s abandonment of a “bottom-up” budget process led to senior management imposing an unrealistic amount of EBIT for FY14 on the draft 27 May 2013 budget outcomes (referred to as **management adjustments**), and (b) the impact of flawed processes and assumptions resulted in a substantial and material overstatement of WOR’s FY14 budget and its guidance to the market.

63 In opening written submissions below the appellant said that this would be established by: (a) WOR’s historical underperformance against its budgets (b) the unrealistic and unreasonable “top down” pressure placed on the business in order to fulfil market expectations of continued growth, and (c) the fact that in November 2013 WOR removed about $97 million blue sky forecast from its FY14 budget, generally equivalent to the additional EBIT added to the 27 May 2013 budget by the management adjustments.

64 WOR’s response was that the robustness of its budget process and the availability of budget contingencies answered the appellant’s claims. In its further amended defence WOR pleaded that it had systems in place for the preparation of a robust and detailed annual budget for FY14: for example, paras 25(b) and 54(a). In its written opening submissions WOR made the positive assertion that the “evidence will show that WorleyParsons adopted a P50 parameter to produce the [FY14 budget]” and that the appellant appeared to accept that “a P50 standard is, without question, an appropriate measure for *budgetary* purposes”, which is correct because “the very task of forecasting is complex and there is an appreciation that forecasting for a 12 month period will mean that there will likely be change to the individual line items within the forecast” and operating a business is about taking calculated risks.

65 In its written opening submissions WOR also submitted that there were reasonable grounds for the August 2013 earnings guidance statement as it resulted from “a detailed, time consuming and thorough budget process”. WOR further submitted that the August 2013 earnings guidance statement was substantially more conservative than the forecast NPAT in its FY14 budget, noting that there was approximately $30 million in “headroom” between the FY14 budget of $352.1 million and the August 2013 earnings guidance statement which forecast growth from the FY13 NPAT of $322 million, and even more when the FX contingency is taken into account.

66 In its written opening submissions WOR submitted that the appellant’s case was “schizophrenic and irretrievably illogical in its foundation”. According to WOR the predicate for the management adjustments case was that the 27 May 2013 draft budget from the locations was reasonable but the “errors” in the FY14 budget relied upon by the appellant were embedded in that 27 May 2013 draft budget. This submission was overstated. The appellant accepted that the forecast NPAT in the 27 May 2013 draft budget ($252 million) was reasonable and contended that the FY14 budget forecast NPAT of $352.1 million was not. Moreover, in answer to WOR’s case, the appellant submitted that WOR’s reliance on the budget process was misplaced given WOR’s historical underperformance against budget, the content of the Holt memorandum about that process, and the steps involved in the management adjustments. In other words, the reasonableness of the budget process and FY14 budget NPAT forecast were in issue. The appellant also challenged WOR’s reliance on the contingency in the FY14 budget. The $16.1 million contingency in the FY14 budget arose from a favourable shift in FX rates. However, WOR described it as a general contingency and a contingency against FX movements. In our view it was never a general contingency given that it arose from a short-term movement in FX rates and was fully deployed for that reason early in the FY14.

67 Given the above, in particular the way WOR conducted its defence, WOR cannot now complain in the appeal that it was not part of the appellant’s case below that the FY14 budget was unreasonable and not fit for use to prepare the August 2013 earnings guidance statement because of: (a) WOR’s history of material budget underperformance, (b) WOR having to twice downgrade its earnings forecasts in 2013, (c) the fact that the FY14 budget was not a P50 budget and should have been known by WOR (and, it must be inferred, was known by some WOR employees) not to be such when it was adopted, (d) the fact that the FY14 budget did not result from a risk-adjusted approach to forecasting, (e) the fact that WOR’s markets were not growing or were deteriorating when the FY14 budget was being prepared, and (f) the fact that WOR maintained the 19% blue sky revenue, the same as 2013 when markets were buoyant, given that blue sky performance was a function of market buoyancy.

68 It is not to the point that WOR repeatedly asserted that it held the appellant to his pleading. The appellant was entitled to respond to the positive case asserted by WOR that its FY14 budget was the result of a robust and reasonable (indeed, according to WOR, “best practice”) budgeting process, was in fact reasonable as a matter of substance, and was a P50 budget which, by definition, was suitable for budgetary purposes and, by implication from WOR’s case, the FY14 budget was suitable to found the making of the August 2013 earnings guidance statement.

69 The primary judge referred to the appellant’s contentions to these effects at J [52] as the core factual matters on which the appellant relied to establish that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement. Her Honour said:

The [applicant’s] eight core factual propositions are as follows:

(1) WOR had a consistent record of underperforming against its internal budget since FY09, with the sole exception of FY12, and had not materially changed its FY14 budget-setting process from previous years.

(2) WOR had been required to downgrade its earnings guidance on two occasions in FY13 because of underperformance against its internal budget.

(3) In early 2013, as the FY14 budget-setting process began, WOR’s major markets were either not growing, or were deteriorating, and the expectation was for continued uncertainty in its markets during FY14.

(4) Between March and May 2013 the locations, together with the regional managing directors (**RMDs**) and managing directors of the customer service groups (**CSGs**), engaged in a thorough bottom-up budget process, with conscientious regard to “growth” and overhead reduction directives issued by senior management. The result was that the “detailed budget” compiled in very late May 2013 already incorporated stretch targets in respect of both revenue, and costs savings. Those targets were already optimistic, given market conditions.

(5) In June and July 2013, when it became apparent that the actual bottom-up budget would not support WOR’s **Vision 2017** objective of year-on-year growth in every year from FY13 to FY17 (set out in full at [121] below), senior management, by the so-called management adjustments, demanded a series of top-down adjustments that aimed to increase operational EBIT by $88.6 million. The locations duly stretched again to reflect the majority of those adjustments in their local budgets (however improbable they were and proved to be).

(6) The FY14 budget included the $12 million acquisition stretch addition to EBIT that lacked a proper basis.

(7) The FY14 budget was not a true **P50** budget (explained at [114] below), but rather included no adequate allowance for the risks associated with continued slow markets and operational underperformance.

(8) WOR’s budget process lacked a risk-adjusted review of its internal budget, particularly in relation to unsecured work, for the purpose of ensuring that any consequential guidance to the market properly reflected the risk associated with its stretch budget targets.

WOR has not filed any notice of contention to the effect that the primary judge erred in identifying the appellant’s case in these terms.

70 Further, and in any event, as the appellant submitted, regard should be had to the (accurate) observation of Beaumont J in *Pancontinental Mining Limited v Posgold Investments Pty Ltd* [1994] FCA 131; (1994) 121 ALR 405 at 414 that:

…under the modern system of pleading, the question is not whether the facts pleaded are in themselves sufficient to give rise to a cause of action. Rather, the question is whether it would be open to the applicant upon the pleadings to prove facts at the trial which would constitute a cause of action (see *Mutual Life and Citizens Assurance Company Limited v Evatt* [[1968] HCA 74]; (1970) 122 CLR 628 at 631).

71 For these reasons many of WOR’s submissions in the appeal must be rejected. For example, for the reasons given it is not to the point that:

(1) the 4FASOC does not refer to the FY14 budget not being a P50 budget;

(2) the 4FASOC does not assert that the FY14 budget was unreasonable and not fit for use as the foundation for the August 2013 earnings guidance statement because the FY14 budget was not a P50 budget; and

(3) there was no evidence that the board itself knew that the FY14 budget was not a P50 budget.

72 The 4FASOC pleaded the facts from which it was open to the appellant to prove that the FY14 budget was not a P50 budget and that WOR (as opposed to WOR’s board) should be inferred or taken to have been aware of this before the FY14 budget was adopted. Further, as WOR positively asserted that the FY14 budget was a P50 budget and therefore was both reasonable and a reasonable foundation for the August 2013 earnings guidance statement. It was open to the appellant to rebut that assertion by seeking to prove that the FY14 budget was not a P50 budget and that relevant persons within WOR knew this to be so before the August 2013 earnings guidance statement was made.

73 The primary judge also expressed concern that she could conclude that the FY14 budget was not a P50 budget but could not conclude that that was a result of the management adjustments and did not know how the P50 standard was applied by WOR in preparing the FY14 budget: J [197]. These observations may be correct but they did not change the fact that, amongst other things, the primary judge was satisfied that the budget was not a P50 budget. Having so concluded, the issue was whether WOR knew or ought to have known that before it adopted the FY14 budget and used it as the foundation for the August 2013 earnings guidance statement.

74 For the same reasons, and in particular given each of the circumstances described in [67] above, the appellant was entitled to seek to prove that WOR’s reliance on its asserted robust budget process did not establish the reasonableness of the FY14 budget or provide reasonable grounds for the August 2013 earnings guidance statement.

75 In the context of the cases put by the parties below, the primary judge was required to decide whether the appellant had established the facts described in [67] above and whether, as a result, the appellant was correct that WOR’s defence, that the evidence established the reasonableness of the FY14 budget and that it provided reasonable grounds for the August 2013 earnings guidance statement, should be rejected. As the appellant submitted, the primary judge did find all of the underlying facts but failed to draw the relevant inferences from those facts because of her Honour’s: (a) focus on the conduct of the board (in accordance with WOR’s submissions) rather than of WOR as the appellant submitted was appropriate, (b) search for a level of detail in the evidence enabling her Honour to decide on what would have been a reasonable forecast of FY14 NPAT, which was misguided, (c) lack of focus on the overall effect of the evidence, including the Holt memorandum, and (d) not weighing the evidence consistently with the principles in *Blatch v Archer* and *Jones v Dunkel*.

76 In particular, the primary judge made the following findings (and WOR has not filed a notice of contention that her Honour erred in so doing):

(1) the FY14 budget was not a P50 budget: J [197], [426];

(2) WOR had historically materially underperformed against its budgets from FY09 to FY13 (except in FY12) and had to twice downgrade its earnings guidance in 2013, and these facts provided a basis for WOR’s officers to be sceptical about the FY14 budget, and raised an issue about systemic forecasting problems in WOR: J [410]-[415];

(3) the FY14 budget process was not materially different from the process that had been followed in the preceding years: J [411];

(4) WOR’s markets were not growing or were deteriorating when the FY14 budget was set which was a persuasive reason for approaching the FY14 budget with caution: J [421];

(5) aspects of the 27 May 2013 draft budget (forecasting an NPAT of $252 million) were optimistic and that draft budget, overall, was “ambitious”, but the FY14 budget forecast NPAT of $352.1 million: J [423];

(6) ExCo was concerned that the FY14 budget meant that “[e]veryone will be challenged to meet their budgets” and the split between the first and second halves of the year needed “more work … to reduce the weighting to the second half”: J [286]; and

(7) the Holt interview notes record strong criticism by senior management of aspects of WOR’s budgeting and reforecasting processes”: J [602]; and

(8) consistent with the Holt memorandum (J [601]):

(a) WOR’s budget-setting process was affected by a culture of optimism. The Holt memorandum and the related interview notes recorded a “consistent message” of expectations of growth from senior management. There were cases where locations inflated their projections of blue sky revenue in order to meet senior management expectations;

(b) insufficient allowance was made in the WOR budget setting process for potential downsides. There was feedback that locations had been actively discouraged from including potential downside in their budgets where potential problems had been identified on projects; and

(c) there was a belief held by some of WOR’s senior management that locations were not sufficiently stretching in their initial budgets which was not necessarily valid.

77 The primary judge’s reasons do not bring all of these facts together in assessing whether WOR’s defence, and the appellant’s rebuttal of that defence, should be accepted. Rather, the primary judge focused on each piece of evidence explaining why, in and of itself, that piece of evidence did not support the appellant’s rebuttal. Accordingly, and as noted, the primary judge repeatedly considered that to draw the required inferences, more evidence and analysis would be required: J [414], [415], [417], [421], [229], [600]-[603] (set out in [48] above).

78 Further, while the primary judge referred to *Blatch v Archer* and *Jones v Dunkel* at [67] it is not apparent that the primary judge had regard to the fact that: (a) the inferences the appellant submitted the primary judge should draw were available on the whole of the evidence including the facts as found by the primary judge, (b) whether or not to draw those inferences should be informed by the principles in *Blatch v Archer* at 970 and *Jones v Dunkel* at 321 respectively that “all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted” and when a party who is capable of testifying, fails to give evidence without explanation “it may lead rationally to an inference that his evidence would not help his case”.

79 These principles were important in the present case because the evidence established that: (a) Mr Bradie, Mr Daly and Mr Allen, as well as Mr Holt to whom they reported, were key participants in the budget process which caused the forecast NPAT to be increased from $252 million to $352.1 million, (b) Mr Bradie, Mr Daly and Mr Allen expressed significant concerns about the FY14 budget before it was adopted, and (c) Mr Holt conducted the Holt interviews and prepared the Holt memorandum in the aftermath of the November 2013 revised earnings guidance. However, none of Mr Bradie, Mr Daly, Mr Allen and Mr Holt were called by WOR to give evidence.

80 The primary judge at J [72] said that:

At a general level, I accept that WOR’s failure to call the witnesses identified by Mr Crowley may provide support for one or more adverse inferences. However, it is necessary to address the issue by reference to particular inferences and the available evidence for and against any proposed inference.

81 However, it is not apparent that the primary judge applied the relevant principles when assessing either the individual pieces of evidence or the drawing of inferences overall. In particular, as recorded at J [73], the appellant had submitted to the primary judge that:

…the descriptions of the budget-setting process recorded in the interview notes collated for the purposes of Mr Holt’s memorandum prepared for the Audit and Risk Committee of the Board (and comprising Board members) (A&RC) on 5 December 2013 (what became known at trial as the Holt Memorandum) were an accurate description of the process actually followed.

82 When assessing whether to draw that inference the primary judge did not refer to the fact that Mr Holt was not called by WOR to give evidence and weigh that fact in the process of evaluating the inferences to be drawn. Rather, the primary judge said that the meaning of the Holt interview notes was very often unclear as was the basis upon which the interviewees had expressed their opinions (J [74]), and that while the Holt memorandum “tends to support Mr Crowley’s case that WOR’s historical performance against budget reflects defects in WOR’s budgeting process” (J [600]):

…the memorandum does not analyse how any particular defect affected any element of any budget. Nor does it attempt to quantify the impact of any defect in the budget process. For example, the memorandum does not analyse how any of its “key points” affected the budget EBIT or NPAT figures in any year or years. Nor does the memorandum seek to test whether there might be any other explanation for the identified discrepancies between budget and actual performance apart from defects in the budgeting process. Nor, perhaps unsurprisingly, does the memorandum contain a broad conclusion that WOR’s budget process was “not reliable”, as Mr Crowley contended that the Court should find.

83 The primary judge drew these conclusions despite accepting:

(1) at J [601] that the Holt memorandum did support the conclusions that:

(a) WOR’s budget-setting process was affected by a culture of optimism. The Holt memorandum and the related interview notes recorded a “consistent message” of expectations of growth from senior management. There were cases where locations inflated their projections of blue sky revenue in order to meet senior management expectations;

(b) insufficient allowance was made in the WOR budget setting process for potential downsides. There was feedback that locations had been actively discouraged from including potential downside in their budgets where potential problems had been identified on projects; and

(c) there was a belief held by some of WOR’s senior management that locations were not sufficiently stretching in their initial budgets which was not necessarily valid; and

(2) at J [426], based on Mr Holt’s conclusions in the Holt memorandum (as set out at J [402]), that the FY14 budget was “not a true P50 budget” because:

(a) WOR’s budgeting process had been infected with optimism bias;

(b) “there was an expectation of growth, driven both internally and externally, but not by WOR’s own assessment of the markets in which it operated”; and

(c) “in many cases, the bottom up build that the locations submit does not match the expectations of growth from senior management. In order to meet these expectations, the most common response is for locations to simply include a greater level of “blue sky” revenue in the second half of their budget period. In essence, locations are ending up budgeting on the hope that work will materialise, rather than any real expectation that it will.”

84 It is not easy to reconcile the primary judge’s findings about the conclusions the Holt memorandum supported and her rejection of it as evidence that WOR’s budget process was not reliable, which supports the conclusions of error in the primary judge’s process of reasoning. As to the latter, the primary judge appears to have been looking in the Holt memorandum for an express statement that the budget process used by WOR in FY14 was unreliable. Given that: (a) WOR’s budget process was the same in FY14 as it had been in previous years, (b) WOR had materially underperformed against its budget in FY09 to FY13 other than in FY12, (c) WOR had to twice downgrade its earnings guidance in FY13, (d) markets in FY14 were not growing or were deteriorating when the FY14 budget was being set, the caution and scepticism with which the primary judge said WOR ought to have brought to bear on a FY14 budget which increased forecast NPAT from $322 million in FY13 to $352.1 million in FY14 would seem to involve material understatement. When the lack of evidence from Mr Bradie, Mr Daly, Mr Allen and Mr Holt are factored in, the primary judge’s approach to the drawing of inferences supports the appellant’s contentions of error in that process.

85 The Holt memorandum itself reinforces the conclusion that the primary judge’s approach to the evidence and the drawing of inferences having regard to the principles in *Blatch v Archer* and *Jones v Dunkel* miscarried. The observations at J [600] expose the problem. The observations reflect the primary judge’s search for a line-by-line analysis of the FY14 budget sufficient to enable the primary judge to identify the number or the range for NPAT which would have been reasonable. As the appellant submitted, it was not necessary for the appellant to identify a reasonable forecast range in order for the appellant to demonstrate that WOR’s NPAT forecast in the FY14 budget was unreasonable and did not provide reasonable grounds for the August 2013 earnings guidance statement. A budget and earnings forecast might be proved unreasonable by a line-by-line analysis or by demonstrating that the reasonable range was materially lower than the forecast NPAT, but these are not the only methods by which a forecast might be proved to have lacked reasonable grounds when made. To the contrary, and for example:

(1) if the appellant proved that the FY14 budget was less than a P50 budget (which it did), then that might be sufficient, in and of itself, to prove that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement, if it could also be proved that WOR knew or ought to have known that fact by reason of its knowledge of the underlying facts;

(2) if the appellant proved that the 27 May 2013 draft budget with an NPAT of $252 million would itself be “ambitious” (which it did), and that the FY14 budget forecast NPAT of $100 million more, at $352 million (which it did), then that also might be sufficient, in and of itself, to prove that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement, if it could also be proved that WOR knew or ought to have known that fact by reason of its knowledge of the underlying facts; and

(3) the above circumstances had to be considered along with the other relevant circumstances identified at [67] above in the context of WOR’s forensic decisions not to call Mr Bradie, Mr Daly, Mr Allen and Mr Holt.

86 The primary judge’s conclusion at J [414] that more detailed analysis than that contained in the Holt memorandum about the reasons for WOR’s historical material underperformance against budget would be required to support any conclusion of systemic defects in WOR’s NPAT forecasting does not expose a weighing of all of the evidence, including the fact that Mr Holt was not called by WOR to give evidence, along with the contents of the Holt memorandum. This is reinforced by the fact that the primary judge considered that the Holt memorandum “provided a foundation for discussion at the A&RC of the particular subject of the FY14 budget, and the circumstances that had led to such a substantial revision to the budget” (J [597]) but, at the same time, did not deal with the topic of how the FY14 budget process miscarried (J [596]). These conclusions are also not easily reconciled. In circumstances where Mr Wood requested Mr Holt to prepare a memorandum after the November 2013 revised earnings guidance (J [577]) and the Holt memorandum records its purpose as being to “provide a review of the **current process** that WorleyParsons follows with respect to its budgeting and forecasting” (emphasis added) (J [571]), it cannot be the case that the Holt memorandum did not deal with the FY14 budget and FY14 budget process.

87 As set out above, the Holt memorandum records: (a) WOR underperforming against budget by more than 10% in the last five out of six years, (b) WOR’s budget process reflected senior management’s too optimistic expectations of growth compared to the view of locations, (c) locations budgeting for blue sky revenue in the hope rather than the expectation that work will materialise, (d) insufficient allowance made in the budget process for potential downsides, and (e) tension between senior management and locations in the budget process as to whether locations were “stretching” sufficiently in their draft budgets. It is not reasonably open to construe these issues as relating generally to WOR’s budget process and budgets and not also specifically to the FY14 budget process and FY14 budget. There is an obvious inference open on the face of the Holt memorandum that Mr Holt was identifying why the FY14 budget process and FY14 budget miscarried. The fact that Mr Holt was not called by WOR to give evidence would allow this inference to be more readily drawn.

88 The impact of these issues on the budget process is analysed in considerable detail in the Holt memorandum. The memorandum records that senior management (at the group level) had an expectation of year-on-year growth driven by assumptions about the nature of WOR rather than an assessment of the markets in which WOR operates. To address the mismatch between the expectations at group level and the locations’ assessment of the markets in which they operated “the most common response is for locations to simply include a greater level of ‘blue sky’ revenue in the second half of their budget period” in the hope rather than the expectation that work will materialise. The memorandum records the lack of sufficient allowance for potential downsides known or unknown and that WOR’s budgeting process “assumes that everything will go right in a world where we know things will go wrong”. Locations are “actively discouraged from including potential downside in their budgets (at best, these are treated as a sensitivity at group level)”. Senior management assume locations are “sandbagging” and not “stretching”.

89 Consistent with the conclusions above, it must be inferred from the circumstances that the Holt memorandum is conveying Mr Holt’s assessment (in part based on senior management’s views) as to why the FY14 budget, amongst others, miscarried. As discussed, the Holt memorandum is a relatively contemporaneous document brought into existence within a month of the November 2013 revised earnings guidance. It is a memorandum prepared by the CFO of WOR who was intimately involved in the FY14 budget. It is identifying things said to be known about the budget process, not things said to have been uncovered or discovered about the budget process.

90 Considered in isolation the Holt memorandum suggests that:(a) senior management required the budgets of locations to reflect year-on-year growth, (b) locations used blue sky revenue to meet the expectations of senior management, (c) WOR’s budgeting process assumed no downsides even though managers knew downsides would emerge, and (d) that these dynamics were at play in the preparation of the FY14 budget process (which saw the locations’ budgets forecasting NPAT of $252 million to the final NPAT forecast in the FY14 budget of $352.1 million in the context of flat or deteriorating markets). It is also relevant that Mr Holt was not called to give evidence. Nor were Mr Daly or Mr Allen. While the whole of the evidence must be considered, which cannot be done in the context of this appeal, there is an obvious question as to whether Mr Holt should be inferred to have known that the FY14 budget (and earlier budgets) were not P50 budgets at all. None of these matters, however, are apparent from the primary judge’s reasoning given her focus on the notion of a required line-by-line budget analysis and the processes of the board in considering and adopting the FY14 budget.

91 The same kind of reasoning is equally applicable to the positions of Mr Daly and Mr Allen. Mr Allen reported directly to Mr Holt. Mr Allen expressed the view in his email of 11 June 2013 that the upwards adjustments to the EBIT and NPAT after late May 2013 made “somewhat of a mockery of the process” (which was meant to involve a bottom-up build of the budget) and WOR risked its reputation if it went with “another unrealistic budget, and need to do another profit downgrade next year”. The available inference is that Mr Allen considered that the adjusted budget by June 2013 to be unrealistic. WOR did not call Mr Allen to give evidence, although he remained employed by WOR: J [70]. Yet the primary judge was concerned that she was “not able to make a finding (and Mr Crowley did not propose a finding) about what constituted Mr Allen’s basis for his concerns”: J [225]. The potential inference as to the basis of Mr Allen’s concerns, in the context in which they were expressed, is also obvious (the forecast EBIT and NPAT were too high), and reinforced by the fact that WOR did not call him to give evidence. Again, whether any such inference should be drawn depends on a consideration of the whole of the evidence.

92 Mr Daly also reported directly to Mr Holt. Along with Mr Allen and Mr Bradie he was intimately involved in the adjustments to the draft budget after late May 2013. In an email of 7 August 2013 Mr Daly emailed Mr Holt about the “strong sense within the business that the FY14 targets – both full year and H1 – are a stretch”. Mr Daly also undertook the review of the FY14 budget in mid-November 2013 and identified that $97 million of operational EBIT relating to blue sky projections should be removed altogether. WOR also did not call Mr Daly to give evidence.

93 In these circumstances, the primary judge’s observation at J [69] that the appellant’s case was “mostly hindsight and is not supported by detail that might have contradicted the evidence of WOR’s witnesses in substantial respects” cannot be accepted to be correct. As the appellant submitted in the appeal:

The Holt Memorandum ought to have been given significant weight in considering the reliability of WOR’s budget process. If WOR wished to suggest it did not reflect the facts, it could have called Mr Holt or the executives he interviewed.

94 The appellant also submitted that, as is the fact, WOR did not call an RGM from “the ANZ or USAC regions to seek to justify the blue sky revenue attributed to those regions in the budget. With CAN, they were the main profit centres of WOR, generating 67% of aggregate revenue: J [95]”.

95 All of these considerations indicate that the primary judge’s process of reasoning miscarried. If considered in isolation, a number of these circumstances, in and of themselves, would be sufficient to support the conclusion that the FY14 budget did not provide WOR with reasonable grounds to make the August 2013 earnings guidance statement. On that basis, the FY14 guidance representation, which the primary judge (correctly) concluded the August 2013 earnings guidance statement conveyed, would be misleading and deceptive in contravention of the statutory provisions on which the appellant relied. This is because it was WOR’s case that the FY14 budget process and FY14 budget provided it with reasonable grounds to make the August 2013 earnings guidance statement. WOR did not rely on any other matter to constitute reasonable grounds. The same conclusions would apply to the subsequent maintenance and reconfirmation of the August 2013 earnings guidance statement, as well as the risk management representation case which the primary judge rejected at J [657].

96 However, the identified circumstances cannot be considered in isolation. Rather they have to be considered along with the whole of the evidence. We do not consider that the questions in annexure A to the appellant’s notice of appeal are able to be answered without a reconsideration of the whole of the evidence. This appeal is not an appropriate vehicle for that reconsideration to take place. It follows that while the appeal must be allowed and orders 2 and 3 set aside (as well as the answers to questions about misleading and deceptive conduct in the judgment below to the extent they are inconsistent with the conclusions in the appeal), the matter needs to be remitted to a single judge for determination.

97 As noted, many of WOR’s submissions to the contrary in the appeal cannot be accepted or are immaterial. To the extent those submissions have not been discussed above, we express the following conclusions.

98 Contrary to WOR’s submissions, this is not a case in which the Court on appeal is asked to interfere with the primary judge’s findings of fact, in circumstances where those findings have not been demonstrated to be wrong by “incontrovertible fact or uncontested testimony” nor “glaringly improbable” or “contrary to compelling inferences”: ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 at 121-124.

99 The appellant does not seek to overturn the primary judge’s findings of fact which attract a *Fox v Percy* standard of review. Indeed, with one exception, he accepts and relies upon the primary judge’s factual findings. Rather, the appellant’s case challenges the primary judge’s approach to the inferences which should have been drawn from the underlying facts. The principles in *Fox v* Percy are not engaged. In our view the principle in *Warren v Coombs* [1979] HCA 9; (1979) 142 CLR 531 at 551-552 applies, to the effect that the appeal court is in a good a position as the primary judge to decide on the proper inferences to be drawn from facts which are undisputed or which, having been disputed, are as found by the primary judge.

100 In relation to the one exception, the appellant correctly identified that the higher *Fox v Percy* standard applied to ground 2(d) of the appeal, in which the appellant challenged one finding of the primary judge at J [173(9)] and [179] based on Mr Wood’s evidence - that the 27 May 2013 draft budget had the revenue projections “pretty right” and “[t]he revenue picture” hardly changed from the start to the end of the budget process. That finding is demonstrated to be wrong because the undisputed evidence was that the aggregated revenue increased by $851 million between the 27 May 2013 draft budget and the FY14 budget ultimately adopted and, at most, only $644 million was due to changes in foreign exchange assumptions.

101 Contrary to WOR’s argument, the appellant is not attempting to conduct the appeal by “rehearsing and rehashing the evidence at trial to…re-litigate the case below”. As noted, the grounds of appeal focus on a miscarriage in the process of reasoning of the primary judge in respect of the drawing of inferences from the facts as found (other than in ground 2(d) referred to above). That is not an impermissible approach to an appeal. We do consider, however, that the appellant is asking the appellate court to do too much insofar as he sought amended answers to the joint list of issues because, as explained, it is necessary for the matter to be remitted to a single judge for that overall evaluative exercise to be undertaken. What is apparent, however, is that the appellant has established error by the primary judge which requires the setting aside of her Honour’s order dismissing the originating application.

102 We do not accept WOR’s contention that the appellant’s misleading or deceptive conduct case in the appeal is vastly different from that which it ran before the primary judge. In aid of their arguments as to the matters that were or were not in issue at the hearing the parties filed submissions with detailed references to the primary judgment, the pleadings, the evidence and the parties’ opening and closing submissions. We have considered those references but it is unnecessary to reiterate the minutiae of the parties’ submissions. It suffices to note that we do not accept the respondents’ contention that it was not in issue before the primary judge that:

(1) because the FY14 budget was not a P50 budget the FY14 guidance representation lacked reasonable grounds. The primary judge noted that one of the eight core factual matters which the appellant relied upon in support of his contention that the FY14 budget did not in fact provide reasonable grounds for the FY14 earnings guidance (and that the Board and other officers of WOR ought reasonably to have recognised as much) was that “[t]he FY14 budget was not a true P50 budget…but rather included no adequate allowance for the risks associated with continued slow markets and operational underperformance”: J [52(7)]);

(2) the lack of reasonable grounds analysis put forward by the appellant below included the fact that in four of the previous five years WOR had fallen materially short of its budget forecast. The primary judge identified that another of the eight core factual matters upon which the appellant relied was that “WOR had a consistent record of underperforming against its internal budget since FY09, with the sole exception of FY12, and had not materially changed its FY14 budget-setting process from previous years”: J [52(2)];

(3) WOR’s budget process lacked a risk-adjusted review for the purpose of making statements to the market. Again, the primary judge recognised that one of the appellant’s eight core factual propositions was that “WOR’s budget process lacked a risk-adjusted review of its internal budget, particularly in relation to unsecured work, for the purpose of ensuring that any consequential guidance to the market properly reflected the risk associated with its stretch budget targets”: J [52(8)]; and

(4) it was not reasonable for WOR’s management to insist on overhead reductions at the same time as retaining the blue sky forecasts that had been embedded in the 27 May 2013 draft budget. The primary judge identified that the appellant argued below that the locations’ May 2013 budgets contained optimistic targets for blue sky, and thereafter, senior management “could have the blue sky, or have the overhead reductions, but it was not possible to expect both.” The appellant submitted that “WOR needed to incur costs in order to earn blue sky revenue and accordingly the inclusion of blue sky revenue in the budget necessarily entailed an inclusion of overheads”: J [403]-[404].

103 WOR did not file a notice of the contention to the effect that the primary judge erred in identifying the appellant’s case in these terms.

104 The appellant’s case in rebuttal of WOR’s case was just as much a part of the appellant’s case as the case the appellant made in the 4FASOC. In any event, many of the issues on which the appellant relied to rebut WOR’s case formed part of the 4FASOC. The appellant never suggested that the ultimate issue was whether there were reasonable grounds for the FY14 budget. The issue was whether, as WOR contended, the FY14 budget provided reasonable grounds for the August 2013 earnings guidance statement, and thus for the FY14 guidance representation. To that end, the reasonableness of the budget process and outcome, on which WOR relied, were in issue. As the primary judge found, WOR based its earnings guidance on WOR’s internal FY14 budget: J [8], [111]. If the FY14 budget process and budget did not provide reasonable grounds for the making of the August 2013 earnings guidance statement then the FY14 guidance representation is taken to be misleading and deceptive.

105 As discussed, the fact that the FY14 guidance representation reflected an opinion formed by WOR’s board is immaterial. WOR made the FY14 guidance representation. WOR either had reasonable grounds to make that representation as to a future matter or it did not. WOR does not challenge the primary judge’s conclusions that WOR made the FY14 guidance representation by making the August 2013 earnings guidance statement and that the FY14 guidance representation is a representation as to a future matter, that WOR expected to achieve NPAT in excess of $322 million in FY14.

106 Accordingly, the reasonableness of the formation of the opinion of WOR’s board, based on the information before or known to the board, is not the beginning and the end of the matter. It is, in fact, of marginal relevance. It was not necessary for the appellant to challenge the primary judge’s conclusions about the state of mind of the board. The appellant was correct to recognise before the primary judge that the board’s state of mind was potentially relevant as recorded at J [640]-[642]. This relevance was not because the board made the FY14 guidance representation. It was because the reasonable grounds relied upon had to be known to the decision-makers and those involved in the decision-making process at the time of the decision which the appellant said included the board and also senior executives of WOR such as Mr Holt. If, for example, it should have been inferred that Mr Holt knew or ought to have known that the FY14 budget included an unreasonable forecast of NPAT then it is not apparent why that knowledge or putative knowledge would not be attributable to WOR given Mr Holt’s position, responsibilities and involvement in the process by which the FY14 budget was prepared and submitted to the board. That being so (if it is so), it should follow that WOR did not have reasonable grounds for making the 2014 guidance representation as the FY14 budget and budget process were the only matters on which WOR relied to establish such reasonable grounds.

107 If it were otherwise the position would be untenable. A person in Mr Holt’s position, as the CFO, or Mr Wood’s position as the CEO, could withhold from the board the fact that its budget NPAT forecast which was to be used to give earnings guidance to the market was unreasonably and unrealistically high. Based on WOR’s approach, WOR could then succeed in defending itself from a claim of misleading and deceptive conduct merely because the board itself had no reason to know that the budget NPAT forecast was unreasonably and unrealistically high. That is not the law.

108 As noted, WOR did not file a notice of contention. Accordingly, it is not open to WOR to now contend that the primary judge dealt with issues that were not properly raised as an issue in the case. In any event, there is no basis for such a conclusion to be drawn. The primary judge made the findings relevant to the appellant’s case, WOR’s defence of it, and the appellant’s rebuttal of WOR’s defence.

109 As discussed, the statement in the appellant’s written opening submissions that this is “not a case about generally defective budget processes” needs to be understood in context. The appellant’s pleaded case focused on the management adjustments in the context of the nature of WOR’s budget process as disclosed in the Holt memorandum and other documents, but was pleaded more expansively than this in respect of the reasonableness of the FY14 budget overall, as explained above. The appellant’s case in rebuttal of WOR’s defence also included that the budget process and FY14 budget were unreasonable and unreliable for all of the reasons given. In other words, it cannot be fairly or accurately said that the appellant’s case below “embraced the budget process as one that was reasonable and reliable, save for any and all adjustments that were made after the 27 May 2013 Draft Budget”. That contention is inconsistent with the pleadings and the case as run before the primary judge. What is correct is that the appellant accepted that WOR had reasonable grounds for the NPAT forecast of $252 million in the 27 May 2013 draft budget (and thus a forecast NPAT of $284 million by August 2013 given the movement in the FX rates). This was not inconsistent with the balance of the appellant’s case, although the primary judge incorrectly appears to have accepted WOR’s submission to that effect to some extent at J [377].

110 Contrary to WOR’s contentions, the appellant did not submit that WOR needed to adduce evidence to refute any and every assertion made by him to support his reasonable grounds thesis. WOR is mistaking the effect of the appellant’s submissions about *Blatch v Archer* and *Jones v Dunkel* discussed above. It is true that, to avoid the deeming provision of misleading conduct in the legislation, WOR needed to adduce some evidence of reasonable grounds for the making of the FY14 guidance representation, consistent with the observations of Mortimer J in *Australian Competition and Consumer Commission v Woolworths Limited* [2019] FCA 1039 at [113]. WOR relied on its budget process and FY14 budget to constitute such reasonable grounds, and the appellant was entitled to rebut that contention.

111 The appellant’ case is not one of “generalised criticism of the FY14 budget (let alone individual line items within the FY14 Budget) being ‘optimistic’ or ‘challenging to achieve’”. The FY14 budget and the process by which it was prepared was WOR’s answer to the appellant’s case that WOR lacked reasonable grounds for making the FY14 guidance representation. The appellant directly challenged the reasonableness of the FY14 budget and the process by which it was prepared. The appellant contended that the FY14 budget was unrealistic and unreasonable, not merely “optimistic” or “challenging to achieve”. He argued that the FY14 budget did not provide reasonable grounds for the making of the FY14 guidance representation and that it should be inferred that WOR knew or ought to have known this to be so. As a result, the appellant’s case was (and is) not “pitched at a level of abstraction which could not give rise a conclusion of contravention”. If the FY14 budget is itself unreasonable in terms of its forecast NPAT then WOR did not have reasonable grounds for making the FY14 guidance representation.

112 The appellant did not have to quantify the errors that were made in order to show that reasonable NPAT for FY14 did not exceed $322 million. First, the appellant did not have to identify any specific line item error in the budget. Second, it is not to the point that the board gave itself $30 million “headroom” between the forecast NPAT in the FY14 budget of $352 million and the FY14 guidance representation referring to NPAT in excess of $322 million. Either the FY14 budget provided reasonable grounds for the FY14 guidance representation or it did not. Third, the appellant did not need to impugn the reasonableness of one or more inputs to an extent which implied that any objectively reasonable NPAT forecast was less than $322 million. To the extent the primary judge said otherwise at J [648] (in referring to the appellant not showing that “that particular integers or portions of the FY14 budget were overstated or understated so as to be unreasonable or unjustifiable”), the primary judge erred in the second way the appellant identified at the outset of its submissions in the appeal.

113 In answer to WOR’s propositions, first, it would suffice if the appellant established that the overall forecast NPAT of $352 million was unreasonable. This is because WOR only adduced evidence of the FY14 budget and the process by which it was prepared, including the assertion that it was a P50 budget, as evidence of reasonable grounds for the making of the FY14 guidance representation. If the budget process was inherently unsuitable for use as the basis for earnings guidance to the market because it would not produce a P50 budget and thus, by definition, was not at least equally likely to be correct as to the forecast NPAT as not, or if the forecast NPAT in the FY14 budget was itself unreasonable, it must follow that WOR did not have reasonable grounds for making the FY14 guidance representation.

114 Second, the $30 million “headroom” argument is misconceived. The forecast NPAT of $352 million in the FY14 budget was either reasonable or it was unreasonable. If it was reasonable, there were reasonable grounds for the making of the FY14 guidance representation. If it was not reasonable, there were not reasonable grounds for the making of the FY14 guidance representation. The “headroom” argument appears to assume that even if the NPAT in the FY14 budget had been $322 million WOR would have made the same FY14 guidance representation. There is no suggestion in the evidence to support that inference. In any event, the “headroom” argument is overstated. The FY14 guidance representation was not that WOR expected to achieve an NPAT of $322 million in FY14. It was that WOR expected to achieve NPAT **in excess of** $322 million in FY14. As the appellant submitted, there are materiality considerations in play. The FY14 guidance representation did not convey simply that WOR expected to achieve NPAT of $1.00 more than $322 million. By the FY14 guidance representation it conveyed a representation (and reasonable grounds for it) of achieving an NPAT *materially* in excess of $322 million. As the appellant submitted, immaterial growth in NPAT would not be the subject of the announcement that FY14 NPAT was expected to exceed FY13 NPAT. If a 5% materiality threshold is assumed that would be about $338 million; if a 10% threshold is assumed that would be about $354 million. Consistently with the evidence as to WOR’s success in aligning the analysts’ NPAT projections with WOR’s own expectations, it was open to conclude that WOR represented that NPAT would be around $352 million. Even so, the fact remains that the only ground for making the FY14 guidance representation was the FY14 budget and the process by which it was prepared and the NPAT forecast in that budget as a result of that process of $352.1 million either was or was not reasonable.

115 Third, the appellant did not have to impugn any particular budget input but, rather, could focus on the reasonableness or otherwise of the forecast NPAT. Further, the appellant did not have to succeed in demonstrating any input involved error sufficient to reduce the forecast NPAT in the FY14 budget to below $322 million. This is for the reasons already given above and the fact that the FY14 guidance representation was for NPAT in excess of $322 million.

116 The appellant does not need to succeed in challenging the primary judge’s findings at J [646]-[647], [650] that the board had reasonable grounds for making (and maintaining) the FY14 guidance representation. To succeed in the appeal the appellant needs to establish material error by the primary judge. This the appellant has done in respect of the appellant’s misleading and deceptive conduct case. The errors are material because it cannot be safely concluded that the primary judge would have reached the same conclusions as to whether WOR, the representor, had reasonable grounds for making the FY14 guidance representation. The ultimate issue, whether WOR had reasonable grounds for making the FY14 guidance representation, must be remitted for consideration, in the context of the evidence as a whole, by a single judge.

117 The appellant’s approach does not involve a misreading of ***Sykes*** *v Reserve Bank of Australia* [1998] FCA 1405; (1988) 88 FCR 511 at 513 to the effect that if there was a representation as to a future matter, the representor must show some facts or circumstances, existing at the time of the representation, on which the representor in fact relied, which are objectively reasonable, and which support the representation made. Given that the representor is WOR, not the board, it is WOR that had to rely on some facts or circumstances existing at the time of the representation which was objectively reasonable and which support the representation made. Matters not known to or before the board cannot be determinative or even particularly relevant if they were known to a person such as Mr Holt, the CFO. This is because, given his role and responsibilities in the process of preparing and putting the budget to the board, knowledge of Mr Holt is attributable to WOR under the ordinary principles of agency. More complex questions relating to the attribution of knowledge to WOR other than through the positon of Mr Holt (such as through Mr Bradie, Mr Allen and Mr Daly) might also be relevant depending on the nature of the information and the employee’s role and responsibilities: *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 (2008) 39 WAR 1 at [6142]-[6163], *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; (2016) 341 ALR 572.

118 As a result, any disconnect between what was actually known by the board when the FY14 guidance representation was made and what the board later knew in November and December 2013 is immaterial if a person such as Mr Holt knew the relevant matters when the FY14 guidance representation was made. Accordingly, it may be accepted that a relevant issue is whether the representor was aware of matters that “falsified the representation of opinion”, as identified in *City of Botany Bay Council v* ***Jazabas*** *Pty Limited* [2001] NSWCA 94; (2001) ATPR 46-210 at [83]-[85]. However, this question is to be answered by reference to the knowledge properly attributable to WOR according to orthodox principles, not merely knowledge of the board of WOR.

119 Care also needs to be taken not to confuse the various steps in the required reasoning process. The first issue would be the knowledge of the employee, such as Mr Holt. The knowledge of Mr Holt must include (at the least) what he actually knew and is to be taken to have known in the circumstances. Determining the employee’s knowledge is a matter of inference in the ordinary course including, if applicable, the principles in *Blatch v Archer* and *Jones v Dunkel*. The second issue would be the attribution of the knowledge of an employee or employees to WOR. This is to be resolved on orthodox principles of attribution of knowledge to a corporation. The evaluation of whether or not WOR had reasonable grounds for the FY14 guidance representation is then a third step. The inquiry in the third step is directed to the existence or not of reasonable grounds for WOR making the FY14 guidance representation. In this third step the issues include identifying what WOR in fact relied on to make the FY14 representation and deciding if those facts in fact relied on are objectively reasonable. It is in that third step that the warning in *Jazabas* at [85] applies that the relevant issue is what the representor in fact took into account, not what the representor ought to have taken into account.

120 To explain further, in the circumstances of the present case WOR’s defence was that the board made the representation and the board took into account what it knew about the FY14 budget and budget process. On that basis, WOR said the board did not know the matters on which the appellant relied to claim that the FY14 budget was not objectively reasonable and the FY14 budget process confirmed that to be so. As the relevant issue is what WOR, as the representor, relied on, the resolution of that issue must be different involving each of the steps identified for each relevant employee including, at the least, Mr Holt. The question of the objective reasonableness of the FY14 budget and budget process as supporting the representation made must be evaluated by reference to all of the knowledge properly attributable to WOR by reason of the knowledge of its employees as WOR’s agents. That does not involve impermissibly attributing to WOR what it “ought to have known”; it involves attributing to WOR what, in law, it actually knew and, by operation of orthodox principles attributing knowledge of an employee to a corporation, is to be taken as having known. Doing so does not offend the principle expressed in *Jazabas* at [85] that the inquiry about reasonable grounds does not involve consideration of what the representor ought to have known but did not in fact know.

121 For these reasons, the fact that the appellant accepted that the unreasonable NPAT of $352.1 million was based on numbers “baked into the numbers that went to the board” was not the end of the inquiry. It was not even the beginning of the required inquiry. Similarly, the fact that the appellant did not plead that employees did not provide certain information to the board or the board did not make certain inquiries, as recorded at J [271], is not the end of the inquiry. The observation in J [271] that matters is as follows:

There was no direct evidence that, in late June 2013, any individual manager regarded any aspect of the draft budget as “too stretched” or unreasonable, or had any “foundational concerns” with the process by which the draft budget had been developed. Accordingly, it is a matter of speculation whether an opportunity of the kind posited by Mr Crowley would have uncovered any claim that the draft budget lacked a reasonable basis.

122 This observation wrongly conflates two separate issues – what the board ought to have known (which is not an issue at all on the appellant’s case) and what employees knew or must be inferred to have known (which is a relevant issue). That latter issue, what employees knew or must be inferred to have known, was relevant because it formed the basis for the evaluation of the proper attribution of knowledge to WOR as the representor. In that context, the primary judge’s observation about there being no “direct evidence” about the state of mind of individual managers does not involve the required focus. By “direct evidence” the primary judge presumably means oral witness testimony. In this limited sense, the primary judge was correct that there was no direct evidence of the kind identified.

123 But evidence is not confined to oral witness testimony. It includes documents. And inferences can be drawn from documents and processes as a whole. And when drawing inferences, regard is to be had to the fact that WOR did not call the authors of documents such as Mr Holt, Mr Daly and Mr Allen or Mr Bradie, to explain what it is that they meant. The inference that, at the least, Mr Allen considered in June 2013 that the draft budget was “too stretched” and unreasonable, and that he had “foundational concerns” with the process by which the draft budget had been developed was not only available on the material, it was an obvious inference to draw if the 11 June 2013 email is considered in isolation. The relevance of that inference being drawn (if it is proper to draw it once all of the evidence is considered) to the inferences that should or could have been drawn about Mr Holt’s state of mind would (also) depend on a detailed examination of all of the evidence which is beyond the scope of this appeal. It is sufficient to say that J [271] exposes the kind of errors in reasoning the appellant identified as vitiating her Honour’s conclusions.

124 The submissions the appellant makes about *Blatch v Archer* and *Jones v Dunkel* are not “hollow” once it is recognised that the relevant representor is WOR and not the board. The primary judge’s observation at J [277] that it was not remarkable that WOR did not call evidence from the board may be accepted insofar as it goes. It is the fact that WOR did not call evidence from Mr Holt, Mr Bradie, Mr Allen and Mr Daly, given their important roles in the preparation of the FY14 budget and the documentary evidence from which inferences about their states of mind can be drawn, which is relevant. The primary judge’s observation at J [72] that she accepted “at a general level” that WOR’s failure to call these witnesses may provide support for adverse inferences but that “it is necessary to address the issue by reference to particular inferences and the available evidence for and against any proposed inference” exposes the second and third classes of error identified by the appellant – the unwarranted search for a level of detail in the evidence which would permit the primary judge to identify a calculation of NPAT for FY14 which would have been reasonably based and the failure to appreciate the totality of the evidence in context.

125 Contrary to WOR’s submissions, the fact that Mr Wood (and, it must be inferred other key employees involved in the budget setting process) knew that WOR’s markets were not growing or were deteriorating when the FY14 budget was prepared was (and is) important. While the primary judge, in accordance with the second error the appellant identified, said at J [421] that this “question was not analysed in sufficient detail to permit a conclusion that the FY14 budget did not provide reasonable grounds for the August 2013 earnings guidance statement”, the further analysis required is not apparent. WOR’s markets were not growing or were deteriorating compared to FY13. Amongst a raft of other relevant facts (WOR having to twice downgrade its FY13 earnings guidance, WOR’s historical material budget underperformance, the 27 May 2013 draft budget of $252 million NPAT compiled from budgets provided by the locations, the maintenance of 19% blue sky gross margin in a flat or falling market, amongst others), the FY14 budget and August 2013 earnings guidance statement involved a material improvement in NPAT in FY14 compared to FY13. That improvement was not achieved solely through cutting costs. It included increased revenue.

126 If the primary judge was accepting Mr Wood’s evidence that revenue was “flat” in the budget in early June at J [195], then it is clear that this concerns the 27 May 2013 draft budget compiled from budgets provided by each location, not the FY14 budget as adopted. While the primary judge accepted at J [218] that, in response to the 7 May 2013 draft budget, it was sensible for senior management to look for costs savings, the evidence shows that ExCo then decided to challenge that draft budget on both revenue and costs: J [219]. This was despite it being common knowledge that WOR’s markets were flat or falling: for example, J [220]. Mr Bradie, as known by Mr Wood, then worked hard to push the locations for both increased BEBIT and to make additional cuts to overheads: J [221]. It was in this context of Mr Bradie pushing the locations hard for increased EBIT and decreased costs that Mr Allen sent his email of 11 June 2013 which bears repetition:

Our guess is that Stu Stu [i.e. Mr Bradie] got a rocket from Andrew last week re the budget and has been told to change everything - making somewhat of a mockery of the process. If there was going to be a top down target why didn’t we start with that in the first place??

I am also concerned that we are putting the company’s reputation at risk. If we go out with another unrealistic budget, and need to do another profit downgrade next year, it is not going to look good at all in the market. Something to discuss with Simon.

127 WOR did achieve its objective of both increased revenue and decreased costs in the FY14 budget. According to the FY14 budget NPAT increased by 9.3% from FY13 to FY14. Operational EBIT increased by 13.8% from FY13 to FY14. Contrary to WOR’s submissions, Mr Wood did not suggest that the 9% NPAT increase meant revenue was flat. He said only that revenue was flat in the locations’ budget in early June 2013. By the time the FY14 budget was adopted revenues were estimated to increase to give an operational EBIT of 13.8% greater in FY14 compared to FY13. In other words, the efforts of Mr Bradie, in particular, who reported directly to Mr Holt, ensured that in flat or falling markets for WOR’s services the FY14 budget reflected a 13.8% increase in earnings over the buoyant FY13 market. Mr Wood (and by inference Mr Holt) must have known exactly what the process involving Mr Bradie’s hard work with the locations involved.

128 The aspect of Mr Wood’s evidence about which the appellant raised no serious questions was simply that if revenue is flat a search for costs to cut is not unreasonable: J [218]. The relevant fact, however, is that the WOR budget process did not accept that revenues should remain flat. WOR’s senior management pushed for and obtained a budget for FY14 reflecting materially increased earnings. That fact was fundamental to the appellant’s challenge to the objective reasonableness of the FY14 budget. WOR’s submission that “[r]ather than tending to prove that the FY14 Budget was unreasonable, this approach demonstrates a recognition of the market conditions” overlooks the fact that WOR’s senior management did not merely press the locations to cut costs. Notwithstanding that , as the primary judge found, WOR’s major markets were “either not growing or were deteriorating” and that WOR was aware that in FY13 it had experienced challenging conditions in a number of its key markets and there would be continued uncertainty in the markets for its services in FY14 (J [418]-[421]), management pressed the locations to increase earnings *and* cut costs, which they did to produce the FY14 budget with an increased NPAT of $352.1 million compared to the actual FY13 NPAT of $322 million.

129 The appellant’s point about the blue sky revenues in the 27 May draft budget prepared by the locations being already “aggressive” seems obvious but the primary judge said at J [133] that this submission was “not made out by the available evidence”. The basis for that conclusion is not apparent to us. The available undisputed evidence included that: (a) FY13 was a buoyant market, (b) FY14 was a flat or falling market, (c) blue sky revenue is a function of market buoyancy, and (d) the blue sky gross margin percentage allowed in FY14 was the same as in FY13, 19%. Again, the primary judge appears to have found all of the relevant facts but not drawn the inevitable inference those facts would require to be drawn.

130 The fact that the appellant accepted the 27 May 2013 draft budget compiled from budgets provided by the locations was reasonable was not inconsistent with this submission. The appellant could both accept that the overall 27 May 2013 draft budget provided a reasonable estimate of NPAT of $252 million and contend that an aspect of that draft budget, the blue sky revenue, was aggressive. Moreover, the appellant could also contend that maintaining that overall percentage of blue sky revenue, which WOR did in the FY14 budget, when overall revenue was increased and costs were cut, was objectively unreasonable in the circumstances. The pleaded case in relation to forecast blue sky revenue, contrary to WOR’s submissions, was not confined to two regions. Paragraph 22B particular 11 of the 4FASOC alleged that the locations’ budget submissions and the management adjustments reflected unrealistic blue sky forecasts. Similar pleadings about blue sky revenue are made in para 22C(a) and (d), which alleged that 19% of WOR’s expected earnings came from the realisation of blue sky revenue and it projected a significantly greater proportion of EBIT from blue sky and “prospect” revenue in the second half of FY14 as compared to the first half. There was sufficient evidence for the primary judge to make findings about the objective reasonableness of the blue sky forecasts in the FY14 budget without descending into a region-by-region analysis. The fact that in November 2013 Mr Daly reviewed the FY14 budget and stripped $110 million (or $97 million – it is unclear which amount is correct) of blue sky revenue from it was also relevant evidence. It is possible to use such after the event evidence without engaging in impermissible hindsight.

131 WOR’s reliance on what it described as Mr Wood’s uncontroverted evidence that he was “comfortable that Blue Sky was budgeted at 19% as this was within the ordinary bounds of Blue Sky that had been achieved in the past” is misplaced. There is no indication that the primary judge accepted this evidence. If it was not challenged, the primary judge was not bound to accept it. It had to be weighed along with the other evidence about the relationship between blue sky and market buoyancy and the flat or falling FY14 markets. The appellant’s case did not misunderstand the fact that WOR booked blue sky revenue at 100% value with no discount as to risk. That fact was also relevant to the objective reasonableness of the FY14 budget as it must have been known to the employees involved in the budget setting process. It did not need to be put to Mr Ashton that this was inappropriate. Mr Ashton was RMD of the MENAI region and not responsible for such high level considerations as the approach to blue sky revenue in the overall budget.

132 As discussed, characterising the Holt memorandum as nothing more than a set of hindsight reflections, given the circumstances and time at which it was created, its contents and the fact that Mr Holt was not called to give evidence by WOR, is unsustainable. Further, the primary judge’s approach to the Holt memorandum is the subject of the appeal as disclosed in grounds 1(h) (as to the interview notes), 2(e)(ii)(A), and (implicitly) 3. Those grounds raise for consideration the entirety of the primary judge’s approach to the Holt memorandum.

133 WOR is also incorrect in submitting that “there was nothing in the Holt Memorandum that could impugn the process by which *guidance* was arrived at, and it did not allow any inference that *guidance* was unreasonable in a given year” (emphasis in original). As noted, the August 2013 earnings guidance statement was founded on the FY14 budget. If the FY14 budget did not provide WOR with reasonable grounds for the August 2013 earnings guidance statement then the FY14 guidance representation conveyed by the August 2013 earnings guidance statement is taken to be misleading. Accordingly, the Holt memorandum and the inferences properly to be drawn from it could establish that the FY14 guidance representation was misleading. The Holt memorandum does not purport to hold WOR to a standard of perfection which is inapplicable as stated in *Maloney v Commissioner for Railways (NSW)* (1978) 18 ALR 147 at 148. Nor are the observations in *Kelaher* at [695] that errors are always obvious with hindsight applicable to either the circumstances in which the Holt memorandum was created or its content.

134 The fact found by the primary judge at J [265], that Mr Holt presented the draft FY14 budget to the board, is important but not for the reason WOR proposes. WOR submitted this:

In effect, [Mr Holt] had – along with Mr Wood – ultimate managerial ownership of the FY14 Budget. Further, it was Mr Holt who sent Mr Wood and others a draft of the FY14 Guidance suggesting an increase on FY13 earnings (J, [298]) and it was Mr Holt who tabled further drafts at subsequent Audit and Risk Committee and Board meetings, as the FY14 Guidance was developed by the Board (J, [299]-[301]). He demonstrably supported the reasonableness of the material placed before the Board as a foundation for approving the Budget and formulating the FY14 Guidance.

135 Mr Holt’s involvement in the process means his state of knowledge at the time the August 2013 earnings guidance statement was made is critical. But the fact that he was instrumental in the process of adopting the FY14 budget does not mean that it should be inferred that he “demonstrably supported the reasonableness of the material placed before the Board as a foundation for approving the Budget and formulating the FY14 Guidance”. That is an inference that WOR asks the Court to draw. It is not an inference the primary judge drew. It is an inference favourable to WOR in circumstances where it did not call Mr Holt to give evidence. Whether or not such an inference should be drawn depends upon the whole of the relevant evidence including the circumstance that WOR did not call Mr Holt despite Mr Holt’s role being an important part of the appellant’s case.

136 WOR’s focus on the need for a counter-factual budget NPAT reflects the second error identified by the appellant. The appellant’s fundamental case was that the FY14 NPAT forecast of $352.1 million was unreasonable and thus did not provide reasonable grounds for the FY14 guidance representation. As discussed, the fact that the FY14 guidance representation was that it expected to achieve NPAT exceeding $322 million in FY14 is not really to the point. The point is that WOR relied on the FY14 budget with its forecast NPAT of $352.1 million as reasonable grounds for its FY14 guidance representation. WOR cannot defend the claim by arguing that while a forecast NPAT of $352.1 million might not have been reasonable, a forecast NPAT in excess of $322 million was reasonable. This is because the ground on which WOR in fact relied to make the FY14 guidance representation was the FY14 budget with its forecast NPAT of $352.1 million. For this reason, WOR’s various submissions that, after August 2013, it may have been below budget but above guidance are misconceived. The issue at August 2013 is the existence of reasonable grounds. The issue after August 2013 is the continued existence of reasonable grounds. The fact that WOR was tracking materially below the FY14 budget later in 2013 is highly relevant to the continued existence of reasonable grounds or otherwise.

137 The fact that the appellant identified various potential counter-factual reasonable forecasts of NPAT as at August 2013 (from $252 to $300 million), does not mean that the appellant was wrong to argue that it did not need to do so to establish its causes of action. For the reasons given WOR is simply incorrect in its submission that:

If the Court could not and cannot make a finding that the counterfactual budget number was less than the FY14 Guidance of $322m, then it could not and cannot make a finding that the FY14 Guidance Representation was misleading or deceptive – because at NPAT of $333m, there are still reasonable grounds.

138 First, as noted, the reasonable ground that WOR relied on was the FY14 budget forecast NPAT of $352.1 million. Second, a forecast NPAT of $333 million is materially below a forecast NPAT of $352.1 million. Third, if the FY14 budget forecast NPAT of $352.1 million was not objectively reasonable then WOR did not have reasonable grounds to make the FY14 guidance representation. If the FY14 budget forecast NPAT of $352.1 million was objectively reasonable when first made, but at some later point it did not continue to be objectively reasonable, then WOR did not have reasonable grounds to reiterate the FY14 guidance representation. This is so whether or not the appellant proved a counter-factual reasonable forecast NPAT below, relevantly, $352.1 million. To be otherwise, WOR would have had to adduce evidence that after August 2013 it had some other reasonable ground, apart from the FY14 budget, to support the continuation of the FY14 guidance representation. On the material before us in the appeal it is not apparent that WOR did so. What may be accepted, however, is that insofar as the resolution of any issue requires a counter-factual budget number or range (which may well be confined to the quantification of damages only, should liability be established) the number or range must be used consistently.

139 The risk management representation case is raised in the appellant’s notice of appeal in grounds 7(c)(iii), 12(c), and in various of the issues contained in the list of issues for determination. WOR’s contrary submission is incorrect.

140 The primary judge found that by its 2013 annual report WOR represented to the market that it “it had effective management and internal control systems to identify, assess and manage the group’s material financial and non-financial business risks and report those risks to the board”: J [657]. Because the primary judge concluded that the evidence did not demonstrate that WOR did not have effective management and internal control systems of the kind it claimed to have had, she rejected the appellant’s case that the risk management representation was misleading and deceptive. In our view her Honour’s conclusion in this regard suffers from the same erroneous reasoning. The reasons WOR gave for the November 2013 revised earnings guidance, and the appellant’s lack of challenge to those reasons, do not mean that the appellant was precluded from contending that the evidence shows that the risk management representation was misleading and deceptive when it was made. The Court is not bound to accept the statements in the November 2013 revised earnings guidance as complete and accurate. One obvious financial risk that WOR faced at the time it set the FY14 budget is that it would fall materially short of its FY14 budget forecast of $352.1 million NPAT. On the evidence WOR either did or did not have effective management and internal control systems to identify, assess and manage the group’s material financial risks. The same erroneous reasoning and conclusions about the objective reasonableness of the FY14 budget forecast of $352.1 million NPAT are relevant to an evaluation of whether the risk management representation was also misleading and deceptive.

141 It follows from the above that the errors in reasoning affecting the primary judge’s approach to the August 2013 earnings guidance statement also affected her Honour’s approach to the subsequent confirmations of that statement. The relevant facts also changed between August and November 2013. The question of the inferences to be drawn from those facts had to be resolved in a manner unaffected by the four identified errors discussed above.

142 One other observation is necessary. In the hearing of the appeal WOR contended that it was important that various matters were not put to Mr Wood, Mr Ashton and Mr Lucey. As submitted for the appellant, the rule in *Browne v Dunn* (1893) 6 R 67 is engaged where the witness has had no notice of the matter sought to be relied upon in contradiction of the evidence. In the present case, given the pleadings and particulars, the witnesses called by WOR must have been on notice of the essence of the appellant’s case before they prepared their written evidence. In those circumstances, the appellant is not precluded from making submissions to the contrary of the witnesses’ evidence merely because propositions were not put to the witness. The fact that propositions were not put, however, may be relevant to the proper process by which inferences from facts are drawn or not drawn.

143 For these reasons the appeal must be allowed insofar as it concerns the misleading and deceptive conduct case.

# 4 THE CONTINUOUS DISCLOSURE CASE

144 The appellant relied on the same facts to support the claim that WOR had contravened its continuous disclosure requirements. Given the errors identified above about the primary judge’s process of reasoning in respect of the inferences to be drawn from the facts as found, it could not be concluded that the primary judge would have reached the same conclusions as she did about the continuous disclosure case had those errors not been made. This is clear from the primary judge’s reasons at J [617]-[618]. For this reason alone, the primary judge’s dismissal of the continuous disclosure case must be set aside.

145 As we have explained, the primary judge did not accept the appellant’s case that WOR did not have reasonable grounds for the August 2013 earnings guidance statement, and therefore the alleged Material Information and Earnings Expectation Material Information did not exist. It followed that no breach of s 674 was found: J [617]-[620]. The primary judge did not deal with the parties’ submissions as to the operation of s 674(2) of the Corporations Act and the ASX Listing Rules (**Listing Rules**) having regard to the possibility that her Honour’s conclusion about the alleged Material Information and Earnings Expectation Material Information was wrong.

146 In the appeal the appellant contended that the primary judge erred by not deciding whether Mr Allen and Mr Daly were officers of WOR at the relevant time: J [108]. The appellant submitted that they plainly were officers and her Honour should have made a finding to that effect. He also submitted that her Honour should have found that the appellant had established that, by August 2013, Mr Allen and Mr Daly knew or ought to have known that the FY14 budget was not a reasonable basis for theFY14 guidance representation. He contended that the position was even plainer by early October 2013 by which time senior executives of WOR, including the CEO, knew that WOR was tracking at a level very materially below the FY14 budget. In response WOR submitted that: (a) pursuant to the ASX Listing Rules and s 674 of the Corporations Act, opinions which were not actually formed are not required to be disclosed; (b) Mr Allen and Mr Daly were not alleged in the 4FASOC to know, and did not know, the alleged Material Information; and (c) in any event, Mr Allen and Mr Daly were not officers of WOR whose opinion should have been disclosed.

147 Section 674 of the Corporations Act relevantly provided:

**Continuous disclosure - listed disclosing entity bound by a disclosure requirement in market listing rules**

**(1) Obligation to disclose in accordance with listing rules**

Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity requires the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

148 It is uncontentious that at all material times: (a) the ASX was a prescribed financial market for the purposes of s 11AE(1)(a) of the Corporations Act; (b) WOR was included in the official list of the ASX and the Listing Rules applied to it, (c) WOR shares were therefore ED securities for the purposes of s 111AD(1), and (d) WOR was therefore a disclosing entity the purposes of s 111AC(1) and subject to the continuous disclosure obligations in s 674 of the Corporations Act.

149 At all material times:

(a) ASX Listing Rule 3.1 provided as follows:

**General rule**

Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.

(b) the definition of “aware” in Chapter 19 of the Listing Rules 19.12 was as follows:

an entity becomes aware of information if, and as soon as, an officer of the entity … has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

150 Listing rule 19.12 defined “information” for the purpose of Listing Rule 3.1 from 1 May 2013 as including “matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market” and “matters relating to the intentions, or likely intentions, of a person”.

151 The definition of “officer” is found in s 9 of the Corporations Act, which applied to the Listing Rules pursuant to Listing Rule 19.3. It relevantly provided as follows:

“**officer**” of a corporation means:

(a) a director or secretary of corporation; or

(b) a person:

(i) make, or participates in making, decision that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instructions or wishes of the directors of the corporation are accustomed to act…

152 WOR admitted below that at all material times Mr Wood and Mr Bradie were officers of WOR, and that Mr Holt was an officer of WOR from September 2013 when he became a member of ExCo: J [105]. It denied that Mr Allen or Mr Daly were officers. The primary judge found that Mr Holt was an officer of WOR from at least 1 February 2013 (J [106]), but considered it unnecessary to decide whether Mr Allen or Mr Daly were officers of WOR at any material time: J [109].

153 Whether or not Mr Daly and Mr Allen were officers of WOR at all material times will need to be decided in the remitted hearing. That is an issue of fact to be decided on the whole of the evidence.

154 In the appeal WOR also submitted that the alleged Material Information that was allegedly not disclosed to the ASX in alleged breach of WOR’s continuous disclosure obligations – that WOR did not have reasonable grounds for the FY14 Guidance Representation – was an opinion. Further, according to WOR, “where the “information” requiring disclosure is an opinion, s 674 of the Corporations Act and Listing Rule 3.1 require only the disclosure of opinions *actually held or possessed* by the company. They do not, therefore, require the disclosure of opinions *not* actually held – even if it could be said that they ought to have been.” It said that the question for the Court on appeal is not what opinion Mr Holt, Mr Allen, Mr Daly or anyone else within WOR ought to have formed – but whether in fact they did form those opinions.

155 WOR submitted that an applicant alleging that a company was “aware” of information constituting an opinion, must prove that the company had actually formed the opinion, citing ***Jubilee*** *Mines NL v Riley* [2009] WASCA 62; (2009) 40 WAR 299 at [89]-[90], Martin CJ, Le Miere AJA agreeing); ***Grant-Taylor*** *v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149; (2015) 322 ALR 723 at [157] (Perram J), upheld on appeal in *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2016] FCAFC 60; (2016) 245 FCR 402(***Grant-Taylor FFC***) at [172]-[187](Allsop CJ, Gilmour and Beach JJ); and *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v* ***Myer*** *Holdings Limited* [2019] FCA 1747; (2019) 140 ACSR 38 at [1136]-[1137], [1167]. It submitted that Guidance Note 8, [4.4] to the Listing Rules supports the view that Listing Rule 3.1 only applies to information actually in the possession of the entity, by pointing out that the effect of the definition of “aware” in Listing Rule 19.12 is that it “effectively deems an entity to be aware of information *if it is known by anyone within the entity* and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the entity in the normal course of performing their duties as an officer”.

156 We do not accept the respondents’ submissions.

157 The purpose of s 674 and the continuous disclosure regime is clear. In Treasury Paper, *CLERP Paper No 9, Proposals for Reform - Corporate Disclosure* (Part 8 at 8.4 ) it was described in the following terms :

The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets… Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity’s performance and prospects and this information can be more rapidly factored into the price of the entity’s securities.

158 In *Grant-Taylor FFC* at [92] the Full Court said, and we agree, that the main purpose of the regime is:

…to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information

159 It is necessary to keep in mind that s 674 of the Corporations Act is a remedial or protective provision which should be construed beneficially to the investing public and in a manner which gives the fullest relief which the fair meaning of the language allows: *Grant-Taylor FFC* at [93]; *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; (2010) 274 ALR 85 at [356].

160 As the appellant submitted:

(1) s 674(2) operates by reference to the material information the Listing Rules requires the listed corporation to notify to the ASX. The obligation is to do whatever the Listing Rules requires. If a listing rule deems a corporation to have information which it ought to have, and establishes an obligation to disclose that information, then the obligation applies by operation of the Corporations Act;

(2) the material information the Listing Rules requires the corporation to notify includes information an officer an officer of the entity has, or ought reasonably to have – as that is the information of which the corporation is “aware” pursuant to Listing Rule 19.12;

(3) the information required to be disclosed extends to opinions of officers of the corporation. If, for example, officers hold opinions about market sensitive matters which are not generally available then, subject to the other requirements and exceptions in the Listing Rules, these are required to be disclosed to the market. WOR did not contend otherwise; and

(4) the information that a corporation has or ought reasonably to have is not confined to information (including opinions) that an employee of the company has and ought to have informed the corporation about. Contrary to obiter dicta in *Grant-Taylor* and *Myer*, in our view the information that a corporation ought reasonably to have includes opinions that an officer ought to have held by reason of facts known to the officer.

161 ***Jubilee***is not authority to the contrary. That case concerned a gold mining company, Jubilee, which in 1994 received drilling hole data from another mining company indicating a valuable nickel resource within a mining tenement held by Jubilee. Jubilee was not a nickel miner and had no intention of becoming one. The data was not disclosed to the market until 1996, and a shareholder alleged breach of the predecessor to s 674, in s 1001A of the Corporations Law. The shareholder’s claim succeeded at trial on the basis that Jubilee should have disclosed the nickel find immediately after becoming aware of it. Jubilee succeeded on appeal.

162 In the appeal in *Jubilee* Martin CJ (with whom La Miere AJA agreed) reasoned at [89]-[90]:

…[t]he obligations imposed by the Listing Rules and the relevant statutory provisions are limited to the disclosure of information. The obligations do not extend to include, for example, making business decisions which might or even should be made as a result of the receipt of the information. At points in the argument advanced on behalf of Mr Riley, and in the master's reasons, it seems to be supposed that if Jubilee should have attached greater significance to the drill hole data it received and should have immediately undertaken exploratory drilling (perhaps by raising funds to enable that to occur), it was somehow a breach of the continuous disclosure provisions for Jubilee not to announce and take that course. Plainly, the obligations of continuous disclosure do not go that far.

Jubilee can only have been obliged to disclose information which it had or ought to have had. The latter expression **cannot be construed as extending to information arising from business decisions which Jubilee had not made - such as the decision to undertake exploratory drilling**. Jubilee’s obligations of disclosure must be assessed having regard to the totality of relevant information. It follows that if, for whatever reason (including flawed reasons), Jubilee had no current intention of undertaking exploratory drilling on the tenement, and that intention was relevant to the assessment of the extent to which provision of the drill hole data provided by WMC would be likely to influence those who commonly invest in securities in deciding whether or not to buy or sell Jubilee’s shares, Jubilee’s obligations of disclosure must be assessed in that light.

(Emphasis added.)

163 Accordingly, it was Jubilee’s lack of any current intention to undertake exploration and mining of nickel which dictated that it did not have any duty to disclose information it had received indicating a valuable nickel resource within a mining tenement it held. While Martin CJ also concluded at [123] that, in any event, the disclosure of the information about the prospect of nickel would not have been material given that the “company had no current intention of undertaking exploratory work, and lacked the financial capacity or the inclination to do so”, the significance of the decision is not confined to materiality. The significance of *Jubilee* is that it exposes that the business of the corporation is relevant to both the information the corporation ought to have had and its materiality.

164 Contrary to WOR’s submissions, the reference in *Jubilee* to “business decisions … [that] had not been made” should not be equated with “opinions that have not been formed”. There is no analogy between a corporation which has not made a decision to engage in a particular kind of business and a corporation which is engaging in a particular kind of business, has information relevant to that business, and does not form an opinion about the information which it ought to have formed. Having regard to the text, context and purpose of s 674 and the Listing Rules an opinion which the corporation ought to have formed in those circumstances is itself information of which the corporation is deemed to have been “aware”. If that information also satisfies the criteria that a reasonable person would expect it to have a material effect on the price or value of the entity’s securities, the corporation must immediately tell the ASX that information. *Jubilee* does not support the proposition that a corporation which knows facts concerning the business in which it is engaged (through its officers if they are under a duty to inform the corporation about the facts and through its other employees if they are under a duty to inform officers about the facts), and yet fails to draw the inference or opinion from those known facts which ought reasonably to be drawn, is not “aware” of that inference or opinion or that such an inference or opinion is not itself “information” within the meaning of the provisions.

165 WOR’s reliance on ASX Guidance Note 8, [4.4] is misconceived. It states as follows, under the heading “When does an entity become aware of information”:

The extension of an entity’s awareness beyond the information its officers in fact know to information that its officers “ought reasonably have come into possession of” effectively deems an entity to be aware of information if it is known by anyone within the entity and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the entity in the normal course of performing their duties as an officer. **Without this extension, an entity would be able to avoid or delay its continuous disclosure obligations by the simple expedient of not bringing market sensitive information to the attention of its officers in a timely manner**.

(Emphasis added.)

166 This supports our conclusions. There is no rational basis to characterise opinions which ought reasonably to be held in the circumstances as something distinct from information. On WOR’s approach to the protective obligations under Listing Rule 3.1 it would be straightforward for a listed entity to avoid its continuous disclosure obligations by the simple expedient of the relevant officer not forming an opinion from known facts, when, applying a standard of reasonableness, the opinion ought to have been formed.

167 *Grant-Taylor* also did not depend on a general proposition that opinions and inferences not drawn from known facts do not have to be disclosed. In that case Babcock & Brown (**BBL**) admitted that it was, in fact, insolvent on the date alleged, but said that at that time “no one within BBL thought it was insolvent” and “[t]his mattered…because BBL could not be required to disclose information which it did not have or opinions which it did not hold”: *Grant-Taylor* at [12]. Perram J observed at [154]-[155]:

The plaintiffs submit that the fact of BBL’s insolvency was ‘information’ and that BBL’s directors ought to have come into possession of that information on 29 November 2008. BBL submitted, on the other hand, that insolvency was a matter of opinion and that Listing Rule 3.1 did not operate to require the directors to form opinions that they did not hold citing *Jubilee* (2009) 40 WAR 299 at 322 [89]-[90].

I do not think either of these propositions is correct, at least not in the unqualified way for which BBL contends. No doubt, the insolvency of a company is a matter about which some people, such as directors, are required to form an opinion in the course of their duties but it remains nevertheless a question of fact which can be determined. Sometimes, the factual inquiry will be simple such as when a financier suddenly refuses to renew a facility whose existence is necessary to a company’s on-going ability to trade day to day. At other times, it will be complex such as in the case of a bank or insurance company. But in both cases it remains a question of fact.

168 It was in that context that Perram J proceeded to make the observations at [156]-[158] upon which WOR relied. His Honour said:

[156] The word ‘information’ appears in both Listing Rule 3.1 and also in the definition of ‘aware’ in Listing Rule 19.12. I should be surprised if ‘information’ in Listing Rule 3.1 did not include opinions. For example, if the directors did in fact form the opinion that the company was insolvent it is difficult to see that Listing Rule 3.1 could be ignored on the basis that it did not apply to opinions. It is more likely that Listing Rule 3.1 should be construed as requiring the disclosure, all other requirements being satisfied, of opinions actually held or possessed. And, if ‘information’ includes opinions in Listing Rule 3.1, it is difficult to see that it does not bear the same meaning in the definition of ‘aware’ in clause 19.12. If directors hold opinions about market sensitive matters which are not generally available then, subject to the other requirements and exceptions in the ASX Listing Rules, these are to be disclosed to the market. However that observation needs to be understood in the context of *Jubilee*. The opinion of a single director would rarely be the correct information to assess from a disclosure perspective. Ordinarily, the relevant views are those of a board majority. This case does not raise any issue about the position of minority opinions and it is not necessary to express any concluded view on that matter, however.

[157] What then of opinions not actually held? The plaintiffs submitted that BBL should have become aware of the fact of its insolvency on 29 November 2008 for a number of reasons to which I shall return. However, leaving that to one side, I do not think that the plaintiffs’ argument can be reconciled with the actual language of the definition of ‘aware’. What is required is that the information – on the present hypothesis, an opinion – ought reasonably to have come into the directors’ possession in the course of their duties. These words are not apt to describe the formation of an opinion. One does not come into possession of an opinion when one forms one because the phrase ‘come into possession’ conveys the concept of receipt and the concept of ‘receipt’ suggests an antecedent act of possession by another. Where the constructive knowledge limb of the definition of ‘aware’ is applied to information which is an ‘opinion’ what enlivens it is an opinion – not of the directors but of some other person – which reasonable diligence on the directors’ part would have brought to their attention. What it does not require is for the directors to form an opinion.

[158] To give an example, if an opinion of senior counsel that a company was insolvent were included in its board papers then the company would be aware of that opinion within the meaning of the definition. Reasonable diligence on the part of the directors – i.e. reading the board papers – would have brought it to their attention. Leaving aside issues such as privilege, confidentiality and the need for its full context to be considered (i.e. *Jubilee*) it would be subject to Listing Rule 3.1. On the other hand, Listing Rule 3.1 is not engaged where the directors of a company should have, but did not, realise the implications of information of which they were aware.

169 *Grant-Taylor* is not a case in which a corporation did not form an opinion about a relevant matter based on the known facts. In that case the corporation, through its board, did form an opinion about the relevant matter – the solvency of BBL – based on the known facts. That issue was the subject of “close attention” by the board. No-one within the corporation considered it was insolvent at the material time: at [12]. In that context, Perram J (correctly) observed at [156] that he would be surprised if “information” did not include opinions but was not persuaded that a corporation came “into possession” of information on the formation of an opinion as referred to in the definition of “aware”. Perram J also said at [156] that ordinarily “relevant views are those of a board majority”. His Honour dealt with opinions not actually held at [157] saying that:

Where the constructive knowledge limb of the definition of ‘aware’ is applied to information which is an ‘opinion’ what enlivens it is an opinion – not of the directors but of some other person – which reasonable diligence on the directors’ part would have brought to their attention. What it does not require is for the directors to form an opinion.

170 In *Grant Taylor* the issue of the corporation’s solvency was front and centre in the mind of the board and employees. The board considered the corporation was solvent at the relevant time. There was no suggestion that any employee of the corporation had formed an opinion of insolvency. Perram J correctly contemplated that if an employee or some other person who held an opinion of insolvency and the board ought to have been aware of that opinion, then the disclosure obligation might be engaged, given the facts.

171 This reasoning works in a context where the directing mind of the corporation had in fact formed a view about the relevant issue based on the then known facts, whether the corporation was solvent or not (and there was no challenge to the reasonableness of that opinion as formed). However, it does not work in every factual context. If the board or other directing minds of a corporation have not focused on the relevant issue based on the then known facts but reasonably ought to have done so and formed a particular opinion or drawn a particular inference, then there is no reason that such an opinion or inference (not in fact held by the board or any other person, but which on the known facts ought to have been held) should not be treated as “information” required to be disclosed.

172 In our view the analysis in *Grant-Taylor* that such an opinion or inference does not “come into possession” of the corporation on it being formed or drawn involves too narrow an approach to the statutory provisions. A person “possesses” an opinion once it is formed. Any relevant state of mind can be “possessed” once it is held. The statutory language is not strained by concluding that a state of mind is taken to “come within the possession” of a person (and thus, depending on the facts, the corporation) once it can be concluded that the state of mind ought to have been held based on known facts. Perram J observed that a company officer’s opinion about market sensitive matters which are not generally available is required to be disclosed to the market but took a different view in relation to opinions not actually formed. However, as the appellant submitted, insofar as the concept of “comes into possession” is concerned, there is no logical difference between an opinion in fact held of which the corporation is taken to be aware (which must be disclosed if it is material) and one that reasonably ought to be held. Accordingly, the use of the language of “comes into possession” does not justify treating an opinion held in one way (as information which, if material, must be disclosed) and an opinion which ought to have been held in another way (as something other than information which must be disclosed).

173 For these reasons the obiter dicta in *Grant-Taylor* at [158] is expressed at too high a level of generality. Listing Rule 3.1 can be engaged where the directors of a company (or its officers) should have, but did not, realise the implications of information of which they were aware. In *Grant-Taylor* itself the issue was resolved on the facts, specifically that the information available at the relevant time did not support the formation of a state of mind to the effect that the corporation was insolvent despite it later becoming apparent that the corporation in fact was insolvent at that time: at [165], [186], [190], [191]. The result in *Grant-Taylor*, accordingly, is unassailable.

174 The related appeal was dismissed in *Grant-Taylor FFC*. The Full Court explained at [179] that in assessing whether the board ought to have known of the fact of the corporation’s insolvency (which involves a fine distinction from the board having formed an opinion about that fact) it was impermissible to use a later admission (based on later known facts) “to establish the prior actual or constructive knowledge”. The Full Court expressly distinguished a challenge based on lack of reasonable grounds for an opinion from the challenge actually made in that case:at [184]. The Full Court’s rejection of error by the primary judge at [183], as relevant, was on the basis expressed at [181] that even accepting that “the relevant test was not whether BBL had knowledge of the relevant information but whether it had, or ought reasonably to have, come into possession of the information … no error has been shown in his Honour’s analysis”. In other words, the Full Court did not suggest that the statutory provisions excluded information (that is, an opinion) which should have come into the possession of the corporation.

175 In *Myer* at [1135] Beach J observed that the applicant’s case was that Myer was *in fact* aware of the lack of reasonable grounds for its NPAT forecast. The case was thus “one of actual awareness and not of constructive awareness”. That also appears to have been the position with respect to the “NPAT information” case as well: at [1174]. In *Myer* the claim was that Myer actually knew of the lack of the reasonable grounds so that it had to be proved that “Myer actually held the opinion” at the relevant time: at [1137]. Beach J was not considering a claim that the corporation ought to have known of the lack of reasonable grounds. It was in that context that Beach J said at [1136] that Listing Rule 3.1 does not operate to require officers to form opinions that they did not hold. His Honour’s remarks about opinions not actually held were, therefore, obiter dicta. In our view the obiter dicta is expressed too broadly. In our view his Honour was wrong to have said at [1174] that “applying the reasoning in *Grant-Taylor*, listing rule 3.1 is not engaged where the officers of a company should have, but did not, realise the implications of information of which they were aware. The officers are not required to form an opinion based upon information they know or ought to know of and then disclose that information to the market”. That too is obiter dicta, which is expressed at too high a level of generality. In our view neither *Jubilee* nor *Grant-Taylor* stand for that proposition.

176 As the appellant submitted below, neither Listing Rule 19.12 nor the operative provision in Listing Rule 3.1, nor s 674, uses the term “opinion”. The language of the Listing Rules and the Corporations Act is “information”. There is no great difficulty in applying that language to cases like the present, and no need to substitute references to “opinion”. The provisions do not embody any conceptual distinction between classes of “information”. They do not profess any division between “facts”, “circumstances”, and “opinions”. All are capable of constituting “information”.

177 In a case like the present, where the allegations is that the company issued an overstated profit guidance, the proper question is not whether WOR ought to have held an opinion that its NPAT for FY14 was likely to fall materially short of the amount forecast or the market consensus as to the NPAT, but whether the company had or ought reasonably to have had *information* to that effect. The proper questions for the Court are:

(1) whether it was the fact that there were not reasonable grounds for the forecast (that fact being the relevant material information); and

(2) whether that information – the fact that there were not reasonable grounds – was information of which the officer(s) ought reasonably to have been aware.

178 If the evidence shows that: (a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information, then s 674 and the Listing Rules deem the company to have had the information. This conclusion gives effect to the language of the Listing Rules and s 674, and it achieves the legislative purpose of those provisions. In contrast, WOR’s approach imposes pre-conceived distinctions between classes of information on Listing Rule 19.12 which, if applied, would undermine the legislative purpose of the provisions. WOR’s approach would effectively reward a publicly listed company for having such poor information systems and management procedures that the company does not come into possession of important, market-sensitive information and does not form an opinion based on known facts, which it reasonably should have formed. It would also reward a company for its officers holding back from the board an opinion they had formed about such matters.

179 Having regard to these observations, the submissions for WOR below and in the appeal are misdirected or pitched too high.

180 For the reasons already given, the issue as to whether there were reasonable grounds for making the FY14 guidance representation required an evaluation of whether the FY14 budget was objectively reasonable. This is because WOR contended that it relied on the FY14 budget with its NPAT of $352.1 million to make the FY14 guidance representation which was conveyed by the August 2013 earnings guidance statement.

181 The appellant’s contention was that WOR was required to tell the ASX the Material Information and the Earnings Expectation Material Information. Both kinds of information involve a state of mind which the appellant contended WOR ought to have formed based on then known facts. The conduit for attribution of that state of mind to WOR, on the appellant’s case, was not the board, but its officers including Mr Wood, Mr Holt, Mr Bradie, Mr Allen and Mr Daly (the first three being either admitted or held to be officers and latter two being alleged officers). That is, the appellant contended that those officers knew or ought to have known the Material Information and the Earnings Expectation Material Information at the relevant time so that WOR is taken to have also been aware of that information and that, as the information was material in the requisite sense, WOR was required to disclose the information to the ASX.

182 Given the statutory provisions, to confine the inquiry to the question whether an officer or employee under a duty to inform an officer in fact formed an opinion or drew an inference consistent with the Material Information and the Earnings Expectation Material Information would be in error. The required inquiry extends to the question whether an officer or employee under a duty to inform an officer knew facts from which they reasonably ought to have formed an opinion or drawn an inference consistent with the Material Information and the Earnings Expectation Material Information. The required inquiry then extends to whether WOR should be attributed with this deemed state of knowledge. It should also be said that even if the relevant inquiry were to be properly limited to the first question, that would not be fatal to the appellant’s case. The evidence extends to documents from which inferences could properly be drawn about the states of mind of at least Mr Allen, Mr Daly, Mr Bradie and Mr Holt, particularly given that they were not called by WOR to give evidence. Whether those inferences should be drawn or not, however, cannot be answered without consideration of the entirety of the evidence (which was not before us in the appeal).

183 Further, the fact that the board may be inferred to have considered that they did have reasonable grounds for adopting the FY14 budget and the August 2013 earnings guidance statement is also not fatal to the appellant’s case given that WOR was the representor and the orthodox process by which states of mind may be attributed to a corporation through the corporation’s officers and employees. WOR is not correct in submitting that it is “nonsense to suggest that the state of mind of these relatively junior executives could have been ‘determinative to the appellant’s continuous disclosure case’”. This is because the officers/employees relied upon by the appellant were either of the requisite seniority (such as Mr Holt) and/or were so intimately involved in the FY14 budget process that, on the appellant’s case, they should be taken to have known more than the board including the Material Information and the Earnings Expectation Material Information. The appellant’s case theory is cogent but it remains to be seen whether it is established once the process of drawing inferences from facts or not is properly performed.

184 The relevance of Mr Allen’s email of 11 June 2013, whether or not Mr Allen conveyed these views to Mr Holt and Mr Wood, is that a person directly involved in the FY14 budget process at a relatively high level apparently considered that the management adjustments made to the 27 May 2013 draft budget to ensure the FY14 budget showed growth in NPAT can be inferred to have held the view that the result of that process would be an unrealistic budget and involve the real risk of the need for forecast earnings to be downgraded. If that is the proper inference to be drawn (which depends on the entirety of the evidence) then the questions which arise are the likely basis for Mr Allen holding that opinion and the likelihood of others sharing that opinion absent wilful blindness, reckless indifference, or objective unreasonableness. The same kind of reasoning applies to the evidence relating to the views, or inferred views, of Mr Daly and Mr Bradie.

185 WOR’s proposition that the “evidence reflected that the CEO, Mr Wood, and the CFO, Mr Holt, regarded the FY14 Budget (and, correlatively, the FY14 guidance representation) as reasonable not only at the time they presented it to the Board for adoption, but in the ensuing period” involves contested inferences in respect of which the primary judge’s process of reasoning was undermined by the identified errors. The fact that Mr Allen recorded on 11 October 2013 that while he encouraged a more pessimistic outlook Mr Wood and Mr Holt remained optimistic does not prove that the states of mind of Mr Wood and Mr Holt were objectively reasonable on the facts as then known or that they were objectively reasonable on the facts as known on 13 August 2013. These issues of inference are not answered by the proposition that the “correct opinion for disclosure purposes was the opinion of the Board”. This might be true if a board is in the same position as the relevant officers. It is not necessarily the case if the officers are in a different positon with respect to what they know or ought to know compared to the board.

# 5 CONCLUSION

186 For the reasons given the appeal must be allowed, the primary judge’s dismissal of the originating application must be set aside, and the matter must be remitted to a single judge for determination.

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| 187 I certify that the preceding one hundred and eighty-one (181) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot and Murphy. |

Associate:

Dated: 10 March 2022