Court of Appeal
Supreme Court
New South Wales

Case Name:	**Secure Parking Pty Ltd v Woollahra Municipal Council**
Medium Neutral Citation:	[2016] NSWCA 154
Hearing Date(s):	20 and 22 October 2015
Date of Decision:	4 July 2016
Jurisdiction:	Court of Appeal
Before:	Beazley P at [1]; Meagher JA at [2]; Ward JA at [123]
Decision:	1. Appeal allowed. 2. Set aside orders 1 and 3 made by the primary judge on 20 March 2015. 3. Amended summons dismissed. 4. Respondent pay the appellant's costs of the proceedings before the primary judge. 5. Respondent pay the appellant's costs of the appeal.
Catchwords:	CONTRACTS – formation of contract – tender offer in respect of the operation and management of car parks – whether appellant varied tender offer to give bank guarantee for requested amount of guaranteed income – whether acceptance matched tender offer, or tender offer as varied – whether lack of consensus as to date for commencement of management – whether intention to be bound immediately and to make further contract containing additional terms – whether primary judge erred in finding binding contract between parties CONTRACTS – termination of contract – whether respondent entitled to terminate – whether respondent ready and willing to perform agreement in its terms at time of termination – whether respondent insisted appellant execute and perform a form of agreement different from contract between parties TRADE AND COMMERCE – misleading and

deceptive conduct – whether appellant represented by submission of tender that it intended to enter into agreement and do what it had promised to do on proper, objective construction of tender conditions – whether respondent engaged in misleading and deceptive conduct by not disclosing information as to number of parking bays in redeveloped car park – whether reasonable expectation that information would be disclosed

Legislation Cited:

Competition and Consumer Act 2010 (Cth), Sch 2, Australian Consumer Law
Local Government Act 1993 (NSW), s 55
Local Government (General) Regulation 2005 (NSW)
Trade Practices Act 1974 (Cth)

Cases Cited:

Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540
Bill Acceptance Corporation Pty Ltd v GWA Ltd (1983) 78 FLR 171
Concrete Constructions Group v Litevale Pty Ltd [2002] NSWSC 670; 170 FLR 290
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; 209 CLR 95
Foran v Wight [1989] HCA 51; 168 CLR 385
Futuretronics International Pty Ltd v Gadzhis [1992] 2 VR 217
G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 39 FCR 546
HWT Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd [2004] HCA 54; 217 CLR 640
Masters v Cameron [1954] HCA 72; 91 CLR 353
McGrath v Australian Naturalcare Products Pty Ltd [2008] FCAFC 2; 165 FCR 230
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; 241 CLR 357
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; 218 CLR 451
Ross T Smyth v T D Bailey (1940) 67 Ll L Rep 147; 3 All ER 60
Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd) [2008] NSWCA 149
Shevill v Builders Licensing Board [1982] HCA 47; 149 CLR 620
Sinclair, Scott & Co Ltd v Naughton [1929] HCA 34; 43 CLR 310

Category:	Principal judgment
Parties:	Secure Parking Pty Ltd (Appellant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: B Walker SC with S Bogan (Appellant) I M Jackman SC with V Bosnjak (Respondent) Solicitors: Woods & Day Solicitors (Appellant) Gilbert & Tobin (Respondent)
File Number(s):	2015/102281

Decision under appeal

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law
Medium Neutral Citation:	[2015] NSWSC 257
Date of Decision:	20 March 2015
Before:	Ball J
File Number(s):	2014/354994

HEADNOTE

[This headnote is not to be read as part of the judgment]

In December 2010, Secure Parking Pty Ltd (**Secure**) submitted a tender offer to Woollahra Municipal Council (the **Council**) for the management of four car parks. Those car parks were located in Double Bay (in Cross Street, in the Cosmopolitan Centre and in Kiaora Lane) and Bondi (in Grafton Street). The Council resolved on 14 March 2011 to accept Secure's tender offer and notified Secure of that acceptance on 15 March 2011. A dispute arose between the parties as to whether a binding contract for the management of the car parks was made.

The primary judge (Ball J) upheld the Council's claim that a contract was made upon its acceptance of Secure's tender offer on 15 March 2011. His Honour found that the terms of the offer and acceptance included an agreed variation by which Secure would provide a bank guarantee for an increased amount of guaranteed income. He held that the Council was entitled to terminate the contract for repudiation when Secure refused to acknowledge the existence of, or perform its obligations under, that agreement. He considered that neither party had engaged in misleading and deceptive conduct in their dealings with one another.

The issues before the Court were:

i. whether the primary judge erred in finding that Secure had varied its tender offer so as to offer a bank guarantee in relation to an increased amount of guaranteed income;

ii. whether the primary judge erred in finding that the Council's acceptance of Secure's tender corresponded with the offer;

iii. whether the primary judge erred in not finding that there was no contract because there was no agreement as to the commencement date of the management periods for each car park;

iv. whether the primary judge erred in not finding that the Council was not entitled to terminate the contract because it was not ready and willing to perform that contract in its terms;

v. whether the primary judge erred in holding that the Council had not engaged in misleading and deceptive conduct by failing to disclose that the redevelopment of the Kiaora Lane car park would involve an increase in the number of parking bays; and

vi. whether the primary judge erred in not holding that Secure had engaged in misleading and deceptive conduct by representing, contrary to its actual intention, that it intended to enter into and perform an agreement in accordance with the terms of the tender conditions.

The Court (Meagher JA, Beazley P and Ward JA agreeing at [1] and [123] respectively) held, **allowing the appeal**:

In relation to (i)

The Council asked for a variation of the proposed agreement so as to increase the amount of guaranteed income given by bank guarantee, and Secure's representatives agreed to increase the amount of guaranteed income on the basis of a performance bond: [51], [53]. A reasonable bystander in the position of the parties would have understood that there was a difference in substance between what was sought by the Council and offered by Secure: [52], [54]. Secure did not agree to vary its offer: [56].

In relation to (ii)

The Council's acceptance was not qualified by the amended management agreement, which was sent to Secure in the email communicating the Council's acceptance and incorporated changes to the draft management agreement which had not been agreed by Secure: [65]. The Council's acceptance was subject to a condition that an increased bank guarantee be offered, something that Secure had not agreed to offer: [67].

In relation to (iii)

There was no express term of a management contract between the parties which provided for agreement as to a commencement date for the management periods within 14 days of acceptance: [74]. In the absence of that express term, a term should not be implied to deal with the circumstance in which the parties fail to agree: [74]. There was no consensus between the parties as to the date for commencement: [77]. The parties accepted that it was necessary for the formation of the contract that they reach consensus as to that date.

In relation to (iv)

Following 15 March 2011, the Council insisted that Secure execute and perform its obligations under the amended management agreement which had accompanied the communication of acceptance and incorporated changes that had not been agreed: [85]-[88]. Had a contract been formed, the Council would not have been entitled to terminate it because it was not ready and willing to perform the agreement for its part: [89].

In relation to (v)

In the face of the information that was publicly available regarding the redevelopment of Kiaora Lane, there was no basis for a reasonable expectation on the part of Secure that any information relevant to the viability and profitability of the car parks for which tenders were invited (that information being the number of parking bays that would exist in a nearby, redeveloped car park), would be disclosed directly to tenderers by the Council's representatives: [114]-[115]. There was also no reasonable expectation that the information would be disclosed upon the Council's receipt of Secure's tender offer: [116]-[118]. Accordingly, the Council did not engage in misleading and deceptive conduct: [119].

In relation to (vi)

Secure's acknowledgement in its tender offer that it understood and accepted the terms and conditions of the tender said nothing about its understanding of the scope and content of the obligations which in law it was undertaking: [98]. No representation was made by Secure in the terms contended for, and as such there was no misleading and deceptive conduct: [99].

JUDGMENT

1 **BEAZLEY P**: I have had the advantage of reading Meagher JA's reasons in draft. I agree with his Honour's reasons and proposed orders.

2 **MEAGHER JA**:

Introduction

In November 2010 the respondent, Woollahra Municipal Council (the **Council**), issued an Invitation for Tender in respect of the operation and management of four car parks owned by it. Three of those car parks were in Double Bay - in Cross Street, in the Cosmopolitan Centre in Knox Street and in Kiaora Lane. The fourth was in Grafton Street, Bondi Junction. The Council's Invitation for Tender was for the management of all or any of the four car parks. In the case of the Cross Street, Cosmopolitan Centre and Grafton Street car parks, the offer invited was to enter into an agreement for seven years, with an option to renew for a further seven years. As the Kiaora Lane car park was the subject of a redevelopment proposal involving Woolworths Limited, the agreement proposed was on a month to month basis.

3 The appellant, Secure Parking Pty Ltd (**Secure**), lodged its tender on 16 December 2010. The Council resolved on 14 March 2011 to accept that tender and notified Secure of that acceptance on 15 March 2011. Although the parties did not thereafter sign or otherwise enter into any formal agreement, the Council's position was that on 15 March 2011 it had made a binding contract with Secure for management of all of the car parks. Secure disputed the making of that contract. Correspondence and meetings between the parties continued through the balance of 2011 and into 2012 in an attempt to resolve that dispute. In the course of those discussions, on 8 June 2011, Secure became aware, for the first time, that the Woolworths redevelopment involved increasing the capacity of the Kiaora Lane car park from 110 to 500 parking bays.

4 Secure had managed the Cosmopolitan Centre, Cross Street and Kiaora Lane car parks since 2009, and on a monthly basis since the expiry of earlier management agreements in 2010. It continued to do so throughout this period. The Council terminated those month to month arrangements by letters dated 7 March 2012. Having done so, it then gave notice on 9 March 2012 that it proposed to terminate the contract made on 15 March 2011 for repudiation unless, by 29 March 2012, Secure acknowledged the existence of that contract and commenced to perform its obligations under it. Secure did not do so and by letter dated 8 June 2012, the Council purported to terminate the contract with immediate effect. It then brought proceedings seeking a declaration as to the existence of that contract and its being validly terminated, and claiming damages. The Council also alleged, in the alternative, that Secure had engaged in misleading or deceptive conduct before and during the tender process by representing, contrary to its actual intention, that it intended to enter into the management contract if its tender was accepted.

5 The primary judge upheld the Council's claim that a contract was made on 15 March 2011. His Honour held that the contract was on the terms of the draft management agreement, which formed part of the Invitation for Tender, as varied in relation to the Initial Bank Guarantee Amount for each car park: *Woollahra Municipal Council v Secure Parking Pty Ltd* [2015] NSWSC 257. He held that the Council was entitled to terminate that contract for repudiation and assessed damages for loss of the benefit of that contract at $5,339,592, and for the cost of undertaking a second tender process at $122,829. Finally, the primary judge rejected Secure's claim that the Council had engaged in misleading or deceptive conduct in not disclosing that the Woolworths redevelopment included a car park of 500 parking bays. In view of these conclusions the primary judge addressed only briefly the Council's alternative case as to Secure's misleading or deceptive conduct. His Honour would have rejected that claim on the basis that no representation was made in the terms alleged.

The issues in the appeal and cross-appeal

6 By its amended notice of appeal, Secure challenges the primary judge's conclusions that a contract was made; that the Council was entitled to terminate that contract; and that the Council had not engaged in misleading or deceptive conduct. That appeal raises the following issues:

(1) whether the primary judge erred in holding that Secure had varied its tender offer so as to increase the Initial Bank Guarantee Amounts to two months' guaranteed income (grounds 3 and 4);

(2) whether the primary judge erred in holding that the Council's communicated acceptance of Secure's tender corresponded with that offer (grounds 1 and 2);

(3) whether the primary judge erred in not holding that no contract was made because of the absence of agreement as to the Commencing Date of the management period for each car park (grounds 5 and 6);

(4) whether the primary judge erred in not holding that the Council was not entitled to terminate the management contract because it was not ready and willing to perform it and was insisting that Secure execute a written form of agreement that did not accurately record the terms of the contract (grounds 7 and 8); and

(5) whether the primary judge erred in not holding that the Council had engaged in misleading or deceptive conduct by not disclosing to Secure that the Woolworths redevelopment proposal included a car park of 500 parking bays (grounds 9 and 10).

7 By its notice of cross-appeal, the Council challenges the primary judge's rejection of its claim that Secure engaged in misleading or deceptive conduct. That cross-appeal raises the following further issue:

(6) whether the primary judge erred in not holding that Secure had engaged in misleading or deceptive conduct and that as a result of that

conduct, the Council had lost the valuable opportunity to negotiate a management contract with Secure (cross-appeal grounds 1, 2, 3, 4 and 5).

8 I propose to start with the issues raised by Secure's appeal concerning the formation and termination of the alleged contract. I will then address the misleading and deceptive conduct cases, dealing first with that made by the Council.

Challenges to the conclusion as to the making of a binding contract on 15 March 2011

Overview

9 The Council's case as pleaded was that upon notification of its acceptance of Secure's tender, there was a binding contract for the management of the four car parks, either on the terms of the draft management agreement which formed part of the Invitation for Tender, or on those terms as varied in respect of the Initial Bank Guarantee Amounts (as to which see the explanation in [20] below). That acceptance was said to have been communicated to Secure by the provision of the relevant Council resolution together with a revised version of the draft management agreement for execution. Those revisions were alleged to include "changes necessary so as to reflect the terms" of Secure's tender offer as originally made, or as varied. I will refer to that revised form of the draft management agreement as the amended management agreement.

10 The amended management agreement included the variation to the Initial Bank Guarantee Amounts (Item 12 of the 'Information Table'). It also sought to incorporate changes to the draft management agreement which are not alleged to have been the subject of any agreement between the parties. Those changes were the nomination of 1 June 2011 as the Commencing Date for the management of each car park (Item 4); the provision for annual adjustment of the Bank Guarantee Amount in accordance with the Consumer Price Index (cl 7.2); and the requirement that Secure inform the Council of the number of parking bays at each of the car parks as at the Commencing Date (cl 8.2(b)).

11 The Council contended that its contract with Secure was such that the parties had been content to be bound immediately and exclusively by the terms on which they had agreed, whilst at the same time expecting to make a further contract in substitution for that made on 15 March 2011, containing additional terms by consent. That agreement was said to be within the fourth category of case, additional to the three described in *Masters v Cameron* [1954] HCA 72; 91 CLR 353: see *Sinclair, Scott & Co Ltd v Naughton* [1929] HCA 34; 43 CLR 310 at 317; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548-549; *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634-635.

12 The Council did not allege or contend that upon the submission of Secure's tender offer in December 2010, a different contract was made which governed the tender process, including its obligations and those of the successful tenderer following acceptance of its tender. No case was put that the effect of the terms of that contract (and in particular those in Section 3.1 set out in [25] below) was to require, following acceptance of the tender offer, that the Council complete the draft management agreement, including by inserting the details referred to it cl 3.1.1, and provide it to the successful tenderer, and that the tenderer sign and return that agreement to the Council, having nominated a Commencing Date.

13 In the way the proceedings were conducted at first instance and on appeal, there was no residual issue as to the existence of a binding contract once the parties had arrived at a consensus capable of forming such a contract. With respect to that question of consensus, the issues were as to whether there was correspondence of offer and acceptance, and agreement as to the date on which Secure's management of each car park should commence. It was accepted that agreement as to this last matter was essential to the formation of a binding contract. If there was consensus in these respects, it was common ground that the parties were to be taken to have intended that it constitute a binding contract. Neither party relied on the existence of any earlier agreement as to the tender process as objectively conveying that they did not intend to be bound to any management contract until the draft

management agreement was completed, a Commencing Date nominated and that agreement signed: see the principles discussed in *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 at [24]-[25].

14 At this point reference should be made to s 55 of the *Local Government Act 1993* (NSW) which required that the Council undertake the tender process before entering into any car park management contract and that the tendering be conducted in accordance with the Local Government (General) Regulation 2005, relevantly Pt 7. The primary judge correctly proceeded on the basis that these statutory provisions formed part of the context in which the Invitation for Tender was issued and the tender process conducted.

15 The relevant regulations, regs 176 and 178, provided:

> **176 Tenders may be varied in certain circumstances**
>
> (1) At any time before a council accepts any of the tenders that it has received for a proposed contract, a person who has submitted a tender may, subject to subclause (2), vary the tender:
>
> (a) by providing the council with further information by way of explanation or clarification, or
> (b) by correcting a mistake or anomaly.
>
> (2) Such a variation may be made either:
>
> (a) at the request of the council, or
> (b) with the consent of the council at the request of the tenderer, but only if, in the circumstances, it appears to the council reasonable to allow the tenderer to provide the information or correct the mistake or anomaly.
>
> (3) If a tender is varied in accordance with this clause, the council must provide all other tenderers whose tenders have the same or similar characteristics as that tender with the opportunity of varying their tenders in a similar way.
>
> (4) A council must not consider a variation of a tender made under this clause if the variation would substantially alter the original tender.
>
> ...
>
> **178 Acceptance of tenders**
>
> (1) After considering the tenders submitted for a proposed contract, the council must either:

(a) accept the tender that, having regard to all the circumstances, appears to it to be the most advantageous, or
(b) decline to accept any of the tenders.

...

(2) A council must ensure that every contract it enters into as a result of a tender accepted by the council is with the successful tenderer and in accordance with the tender (modified by any variation under clause 176). However, if the successful tender was made by the council (as provided for in section 55 (2A) of the Act), the council is not required to enter into any contract in order to carry out the requirements of the proposed contract.

(3) A council that decides not to accept any of the tenders for a proposed contract or receives no tenders for the proposed contract must, by resolution, do one of the following:

(a) postpone or cancel the proposal for the contract,
(b) invite, in accordance with clause 167, 168 or 169, fresh tenders based on the same or different details,
(c) invite, in accordance with clause 168, fresh applications from persons interested in tendering for the proposed contract,
(d) invite, in accordance with clause 169, fresh applications from persons interested in tendering for contracts of the same kind as the proposed contract,
(e) enter into negotiations with any person (whether or not the person was a tenderer) with a view to entering into a contract in relation to the subject matter of the tender,
(f) carry out the requirements of the proposed contract itself.

(4) If a council resolves to enter into negotiations as referred to in subclause (3)(e), the resolution must state the following:

(a) the council's reasons for declining to invite fresh tenders or applications as referred to in subclause (3)(b)-(d),
(b) the council's reasons for determining to enter into negotiations with the person or persons referred to in subclause (3)(e).

16 Those regulations are relevant in two respects. First, the Council contends that the variation to the Initial Bank Guarantee Amounts was made by Secure at its request, so as to correct a mistake or anomaly, as contemplated by reg 176(2)(a). Secondly, the Council contends that its acceptance of Secure's tender should be construed consistently with its having sought to comply with reg 178(2) and, accordingly, as having been made on terms which matched Secure's offer, or its offer as varied. Secure does not challenge the primary judge's rejection (at [100]-[102]) of its argument that the contract for which the

Council contended was unenforceable for illegality because it involved a variation of Secure's offer which was not made in accordance with reg 176.

Background facts

17 The factual background leading to the Council's notification of acceptance of Secure's tender is the subject of findings made by the primary judge at [10]-[68]. None of those findings is challenged on appeal. In what follows I have summarised those findings, where relevant indicating their significance for the issues in the appeal, and made some additional references to primary facts which are not controversial.

18 The Council's Invitation for Tender called for the lodgement of tenders before 2.30pm on 16 December 2010. It was divided into three sections. Section 1 set out the 'Conditions of Tender'. Section 2 consisted of 'Tender Schedules' identified by the letters A through to G. Only Tender Schedules A ('Tenderer's Offer') and E ('New Car Parking Equipment') are presently relevant. Section 3 consisted of three attachments. The first contained provisions dealing with the completion of the draft management agreement. The second was the draft management agreement, having a "DRAFT" water-mark on each page. The third contained historical statistics concerning the use of the car parks.

19 The senior executives of Secure gave evidence that they believed, because this version of the agreement was marked "DRAFT", that it was not in final form and that Secure would be able to negotiate its terms if it was the successful tenderer. Those executives included Mr Mathews, Secure's joint chief executive officer, and Mr Wade, its General Manager. The Council relies on this evidence as to Secure's intention as rendering false or misleading a representation said to have been conveyed by the submission of Secure's tender, namely that if its tender was accepted, Secure intended to enter into a contract on the terms of that draft management agreement (and without seeking to negotiate its terms).

20 Clause 7 of the draft management agreement provided that in relation to each car park the successful tenderer should deliver to the Council an Initial Bank Guarantee. As defined that guarantee was an undertaking given by a licensed bank to pay the Initial Bank Guarantee Amount, being the amount specified for each car park in Item 12 of the Information Table. Those amounts were $25,000 in relation to Grafton Street; $110,000 in relation to Cross Street; $10,000 in relation to the Cosmopolitan Centre; and $10,000 in relation to Kiaora Lane, totalling an amount of $155,000. As appears below, after Secure's tender was submitted the Council sought to vary each of these amounts, resulting in a total amount of $577,500, being 3 months of the total guaranteed income as tendered by Secure.

21 Clause 1.1 of the Conditions of Tender included:

> As regards each of the Grafton Street Car Park, the Cross Street Car park and the Cosmopolitan Centre Car Park, the successful Tenderer/s will be required to enter into a management agreement with the Council for seven (7) years (commencing on a date as agreed between the Council and the successful Tenderer/s and including an option to renew term of the management agreement for another seven (7) years) upon the terms and conditions of the attached Management Agreement (**Management Agreement**) with the Management Agreement/s being completed as provided in the document attached to Section 3 of this Invitation for Tender entitled "Completion of Management Agreement".
>
> The Kiaora Lane Car Park is to be developed and the Council anticipates that construction will commence in mid 2011. Therefore, as regards the Kiaora Lane Car Park, the successful Tenderer will be required to enter into a management agreement with the Council on a monthly basis (commencing on a date as agreed between the Council and the successful Tenderer) upon the terms and conditions of the Management Agreement completed as provided in the document attached to Section 3 of this Invitation to Tender entitled "Completion of Management Agreement".

22 Clause 1.15 addressed the variation of tender responses:

> The Council reserves the right to contact Tenderers to clarify their Tender responses. If interviews, formal presentations or demonstrations are required, these may be organised at premises specified by the Council, including the Tenderers premises or another place nominated by the Council. At no stage, will Tenderers be permitted to vary or revise their Tender responses.

23 Tender Schedule A in Section 2 provided by cll 2, 3 and 4 (which in Secure's tender response were numbered cll 1, 2, and 3):

2. In consideration of the Council undertaking to take into consideration this Tender, the Tenderer agrees that this Tender shall remain open for acceptance by the Council for ninety (90) days from the closing date for lodgement of the Tenders.

3. The Tenderer acknowledges that it has fully investigated and informed itself as to the nature, location and suitability of the Premises and has in no way relied on any information provided by the Council in the preparation of this Tender.

4. The Tenderer acknowledges that by responding to the Invitation for Tender, the Tenderer understand and accept all relevant terms and conditions pertaining to this Tender.

24 At the foot of these clauses, there was provision for the signature of the tenderer and date. Clause 4 (cl 3 of Secure's tender response) read with cl 3.1.2 below, was relied on by the Council as constituting or conveying the representation that Secure intended "to enter into an agreement to manage the Car Parks from 1 June 2011, or such a reasonable period thereafter, on the terms of the Draft Management Agreement" as varied.

25 The terms and conditions of the tender included by attachment 3.1 in Section 3:

3.1 Completion of Management Agreement

3.1.1 Following the Council's acceptance of any Tender, the Management Agreement will be completed with insertion of the following:

- the name of the successful Tenderer as the Manager of each Car Park;
- the relevant information in the Information Table; and
- the name of the Senior Executive in relation to the Manager within the meaning of clause 1.1 of the Management Agreement.

The Council will then provide to the successful Tenderer/s the Management Agreement/s completed with the relevant detail referred to in this Item 3.1.1.

3.1.2 The successful Tenderer/s must within fourteen (14) days after the date of the Council's written notification of acceptance of a Tender, agree on a commencement date for the Management Agreement, sign the Management Agreement and deliver to the Council the signed Management Agreement together with evidence of the insurances and the initial Bank Guarantee required under the Management Agreement.

26 Mr Thornley, Secure's Business Development Manager, and Mr Wade attended a pre-tender meeting held on 8 December 2010. Mr Marolia, the Council's Manager of Property and Projects, made reference to the proposed Woolworths redevelopment. He advised that it was likely construction would commence in July 2011, although a development application had not yet been submitted. He was aware at this time of the proposal for "approximately 500 spaces" in the redeveloped car park and gave evidence that he would have disclosed that information if he had been asked. That information was otherwise discoverable by potential tenderers.

27 At [106] the primary judge recorded:

> It is not disputed that, between 22 November 2010 (and earlier) and 15 March 2011, the Council published various documents on its website, including a number of press releases, that gave information concerning the redevelopment of the land on which the Kiaora Lane car park was situated, including the proposal to construct a public car park with 500 spaces.

28 That website included a webpage containing hyperlinks to two documents referring to a proposed 500 space public car park, and a webpage that published a news item referring to that proposal. In addition, from January 2011, press releases dating back to 2010 were published on the Council's website under a heading "Media releases" in the "News" section. Three of those media releases, dated between April and November 2010, referred to the proposal for a 500 space car park. Between September 2009 and November 2010, articles referring to the proposal had also been published in the Sunday Telegraph and two local newspapers, the Wentworth Courier and the Eastern Suburbs Spectator.

29 Clause 4.1(u) of the draft management agreement imposed on the manager an obligation to install Car Parking Equipment in the three car parks other than Kiaora Lane on or before the Commencing Date. Tender Schedule E required that equipment be specified together with the estimated time and cost of supplying and installing it. Secure's tender response stated that it proposed to install Zeag Car Park Access Control equipment in those car parks. The delivery and installation timeline given suggested that equipment

could be ordered in February 2011, with 8-12 weeks for delivery and then 4 weeks for installation and commission, resulting in a "1 June 2011 start".

30 The Council's tender evaluation panel (which included Mr Marolia, an external consultant, Mr Bird, and the Council's purchasing coordinator, Mr Byatt, with Mr Windle, Manager of Governance at the Council acting as probity officer) met with Mr Wade and other representatives of Secure on 2 February 2011. During that meeting, Mr Wade said that Secure did not want to start paying "rent" until the new car parking equipment was installed.

31 There was a further meeting between members of that panel and Mr Wade and Mr Thornley on 16 February 2011. The primary judge made the following findings in relation to that meeting.

> 50 One of the issues discussed concerned the bank guarantee. On that issue, Mr Wade says in his affidavit evidence that there was a discussion between him and Mr Marolia to the following effect:
>
> > I said words to the effect of,
> > "Secure does not provide a bank guarantee. It is a direction from our board of directors. All we can offer is a performance bond."
> > Mr Marolia responded with words to the effect of "No. We can only accept a bank guarantee and as per the tender."
> > I said "We cannot offer a bank guarantee."
> > There was further discussion and Mr Marolia said "We'll have to look at that later."
>
> ...
>
> 56 I accept Mr Wade's evidence when he says he raised the question of a security bond. Mr Wade gave evidence that Secure's initial position in any new tender negotiations was that it did not provide a bank guarantee. He said that it would not do so without board approval. According to him, Secure had a facility with the ANZ Bank through which it could provide bank guarantees. ...
>
> 57 Mr Wade's evidence is supported by evidence given by Mr Garth Mathews, the joint CEO of Secure. According to Mr Mathews, he instructed Mr Wade only to offer a performance bond.
>
> 58 The evidence given by Mr Wade and Mr Mathews that Secure was keen to avoid having to give bank guarantees and that it would only do so with board approval strikes me as plausible and I accept it. It was natural in those circumstances for Mr Wade to raise the issue with the Council. Mr Marolia's evidence is equivocal on the subject. It is not plausible that Secure would have raised the question of the amount of the guarantee. Secure was seeking something in relation to the

guarantee that both Mr Wade and Mr Marolia's notes suggest was refused by the Council. ...

...

62 Another issue raised at the meeting on 16 February 2011 was the commencement date of the contract. On that issue, Mr Marolia's file note records the following:

> Secure intended to pay rent from date of installation of equipment. Current payments to remain until equipment is installed and agreement commences.

32 By an email dated 28 February 2011, the Council indicated to Secure that it 'required' the Initial Bank Guarantee Amount for each car park to be increased. Mr Marolia's email stated:

> In order to minimise the risk to Council, we will require the bank guarantees to be equivalent to 3 months Guaranteed Income submitted in you [sic] tender. Accordingly, should Council decide to appoint S&K as the preferred tenderer, we require your agreement to the following amendment to Item 12, initial bank guarantees from S&K as follows:
> Grafton Street: $143,750
> Cross Street: $312,500
> Cosmopolitan Centre: $58,750
> Kiaora Lane: $62,500
> Total $577,500
> Please let me know asap if you are in agreement as the Management Agreement cannot be altered after the report to Council has been submitted.

33 Mr Wade responded, later on the same day:

> I would like to advise that industry standard for surety is 1 month.
> We are happy however to agree a Performance Guarantee Bond for the amount of 2 months.

34 Shortly afterwards, Mr Marolia replied, again by email:

> Thanks Chris, I will put a requirement of 2 months Bank Guarantee ($385,000) in my report to Council.

35 Mr Marolia and Mr O'Hanlon, the Council's Director of Technical Services, submitted a report to the Council's Corporate & Works Committee on 4 March 2011. That report recommended the acceptance of Secure's tender. It included the following reference to the earlier communications between the Council and Secure regarding the Initial Bank Guarantees:

> Tenderers were initially required to only submit three months equivalent of the permanent parker income as security deposit, thus minimising Council's exposure to any future financial loss. However due to the high tender submitted by [Secure], it is recommended that the initial bank guarantees should be increased to cover two (2) months Guaranteed Income i.e. $385,000. This matter has been discussed with [Secure's] representatives and they have accepted this change, if they are appointed as the preferred Tenderer.

36 On 14 March 2011, the Council resolved to accept Secure's tender for each of the car parks. It also resolved that the "initial bank guarantees in the Management Agreement be amended" as recommended. The form of the resolution as passed is set out in [38] below.

37 Mr Marolia and Mr Windle met with Mr Wade and Mr Thornley on 15 March 2011 and advised them that Secure's tender had been successful. After that meeting, Secure's representatives were given two copies of the amended management agreement and a letter from Gilbert & Tobin, the Council's solicitors, dated 14 March 2011. That letter is summarised in [39] and [40] below.

38 Following this meeting Mr Marolia also sent Mr Wade and Mr Thornley an email in the following terms:

> Further to our meeting earlier this morning, as requested I attach the following:
>
> a. Letter explaining changes to draft contract provided to tenderers; and
>
> b. the revised agreement incorporating the changes referred to in the letter.
>
> The Agreement has been amended only to reflect the Council resolution passed last night.
>
> 1. That Council accept the tender received from [Secure] for a seven year term with an option to renew for a further seven years for:
>
> a) the management of Cross Street, Double Bay car park for a minimum guaranteed income of $1,250,000 per annum excluding GST plus 50% of surplus fees;

b) the management of Cosmopolitan Centre, Double Bay car park for a minimum guaranteed income of $235,000 per annum excluding GST plus 50% of surplus fees; and

c) the management of Grafton Street, Bondi Junction car park for a minimum guaranteed income of $575,000 per annum excluding GST plus 50% of surplus fees;

2. That Council accept the tender received from [Secure] for a month to month basis for the Kiaora Lane, Double Bay car park for a minimum guaranteed income of $250,000 per annum excluding GST plus 50% of surplus fees.

3. That the initial bank guarantees in the Management Agreement be amended for all the car parks, to two (2) months Guaranteed Income submitted by [Secure].

4. That the Management Agreement list the mandatory capital equipment specified by [Secure], to ensure that all the proposed works are carried out and there is no disadvantage to Council.

39 The enclosed letter from Gilbert & Tobin commenced:

> We enclose a revised copy of the Agreement to reflect the terms of the tender submitted by [Secure] (**Manager**) and Council's resolution of 7 March 2011.
>
> Besides inserting the Manager's name, ABN and address, deleting all drafting notes, correcting typographical errors and cross-references and making minor formatting changes, we have made the following changes to the draft agreement provided to tenderers:
>
> ...

40 The letter then explained the changes which had been made to the draft management agreement. They included the amendment made to the Initial Bank Guarantee Amounts as well as the changes described in [10] above. The letter concluded:

> Council and the Manager should each sign 2 copies of the Agreement so that each can retain a fully executed copy.

The primary judge's reasoning

41 At [90]-[91], the primary judge considered the position of the parties following the lodgement of Secure's tender to have been as follows:

> [90] The parties contemplated that if the offer was accepted by the Council then the parties were obliged to enter into a Management Agreement on the terms identified in cl 3.1.1 of Section 3 of the tender. Leaving aside the question of the commencement date, it is apparent that a Management Agreement completed in accordance with cl 3.1.1 would deal with all the essential terms of the agreement between the parties relating to the management of the car parks. ...
>
> [91] In order to have the Council consider its tender, Secure had to accept the terms of the invitation to tender. When it did so by signing the terms of the Tenderer's offer it accepted an obligation to complete the Management Agreement in accordance with cl 3.1.1 if its offer was accepted.

42 I agree with the first of these observations and, subject to one qualification, with the second. As to the latter, I note that cl 3.1.1 contemplated that the Council would insert the relevant details and then forward the document to the tenderer. However neither observation addresses the case made by the Council which does not rely on Secure having had any binding obligations under the terms of the tender process with respect to the completion and execution of the draft management agreement.

43 The primary judge also noted that it was open to the parties to negotiate variations to any tender offer, provided they were in accordance with reg 176. His Honour continued at [92]:

> ... If the parties could not reach agreement on particular matters, then the consequence of their failure to agree was that there would be no variation to the tender to be considered by Council in accordance with the conditions of tender and the Regulations. In the absence of that agreement, Secure may have been entitled to withdraw its tender in accordance with the conditions of tender. But absent withdrawal, the offer contained in its tender remained open for acceptance by the Council. The fact that particular issues raised by Secure were unresolved in the sense that the parties did not reach agreement in relation to them was irrelevant to the question whether an offer remained on foot that was capable of acceptance by the Council.

44 I respectfully agree with these further observations.

45 The question which then arose was whether the Council's communicated acceptance corresponded with Secure's offer. The answer to that question did not necessarily turn on whether that offer had been varied because the

Council argued that its acceptance matched Secure's offer, whether varied or not.

Did the parties agree to vary Secure's offer so as to increase the amounts of the Initial Bank Guarantees (grounds 3 and 4)

46 The primary judge dealt with this issue at [97]:

> ... The first question is whether the parties agreed to a variation of the terms of Secure's tender. In my opinion they did; and the variation that they must be taken to have agreed to was one that involved a bank guarantee for two months of guaranteed revenue. It is true that Mr Wade said in his email that Secure would be prepared to agree to "a Performance Guarantee Bond" for that amount. However, it is clear from Mr Marolia's response that he interpreted that statement as agreeing to an increase in the bank guarantee. He told Mr Wade that he was proceeding on that assumption and Mr Wade did nothing to correct Mr Marolia's misunderstanding. Looking at the correspondence objectively, Mr Wade attempted to reintroduce the notion of a performance bond, Mr Marolia did not accept that condition and Mr Wade permitted Mr Marolia to proceed on the basis that the requirement was not essential. In doing so, he conveyed the impression that a bank guarantee was acceptable to Secure. Mr Marolia acted reasonably in proceeding on that basis. The question of the bank guarantee had been raised previously by Mr Wade. Mr Marolia, no doubt conscious of reg 176 of the Regulations, resisted any changes to the terms of the tender. Mr Marolia's minutes of the meeting on 16 February 2011 made Council's position on the guarantee clear. If that position was a serious problem for Secure, it is to be expected that it would have raised the issue again, particularly in light of the fact that Mr Marolia said that he would look at the issue later. The fact that Secure did not suggests that it was not a critical issue. When Mr Marolia raised the question of an increase in the guarantee, Mr Wade's response focussed on the amount of the guarantee. He said that it was normal to offer a guarantee of one month's guaranteed income, but that Secure was prepared to offer two. It was reasonable of Mr Marolia to read the reference to "a Performance Guarantee Bond" as a reference to a bank guarantee in circumstances where Mr Marolia had previously said that the security had to be in the form set out in the draft Management Agreement, Secure had not followed up the issue, Mr Wade's email did not clearly state that Secure would agree to two months but only if the Council agreed to a performance bond in place of a guarantee, and Mr Wade did not seek to correct Mr Marolia's misunderstanding when he replied to Mr Wade's offer of two months.

47 Secure submits that the primary judge erred in holding that there was agreement to vary the terms of its tender offer. That error is said to arise for two reasons. First, Secure's offer (or more accurately, its counter-offer) was to "agree a Performance Guarantee Bond for the amount of 2 months" and Mr Marolia's response was that he would "put a requirement of 2 months' Bank Guarantee ($385,000)" in his report to Council. The latter did not

purport to accept or agree with the former. There was a difference of substance between a performance bond and a bank guarantee. The earlier discussions between the parties made clear that from Secure's perspective, the significant difference was that a performance bond did not have to be given by a bank (and presumably could be obtained at a lower cost).

48 Secondly, treating Mr Marolia's response as a further counter-offer, the primary judge erroneously proceeded on the basis that Secure's silence in the face of that reply conveyed its agreement to accept a requirement for a bank guarantee in an amount equal to two months' guaranteed income. For silence to constitute the acceptance of a contractual offer there must be other circumstances which, taken with the silence, objectively convey that the offer has been accepted. As McHugh JA said in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 at 535, the "ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted". Secure maintained that there was no conduct on its part that, viewed objectively, manifested its assent to provide a bank guarantee for the increased amount.

49 The Council supports the reasoning and conclusion of the primary judge. In the earlier discussions concerning the requirement for a bank guarantee, the Council had made clear that it would only accept a bank guarantee. Mr Marolia's response of 28 February was to the same effect and Secure's silence was to be taken as signalling its acceptance of that position.

50 I agree that there was no agreement made by the mere exchange of those email communications. However the primary judge's conclusion was based on Secure's subsequent silence in the face of those communications. Accordingly, the factual issue identified by McHugh JA in *Empirnall Holdings* arose. It was not suggested by the Council that the circumstances which conveyed that consent included that Secure had in some way joined in the terms of Mr Marolia's report to the Council Committee (see [35] above) and allowed its tender to be considered on that basis.

51 The Council's first email of 28 February 2011 "required" an increase in the Bank Guarantees to an amount equivalent to 3 months' guaranteed income. In its terms that letter first sought Secure's agreement "should Council decide to appoint [it] as the preferred tenderer". That statement was unclear as to whether the agreement sought was to the variation of its offer. However the last sentence indicated that Secure's agreement was sought in relation to an alteration to the draft management agreement and that it should be given before the tenders were considered and any decision made as to the preferred tenderer.

52 Mr Wade's brief response was a counter-offer. The earlier discussions showed that the parties regarded there to be a distinction of commercial significance between an obligation to provide a bank guarantee and an obligation to provide a performance bond. If the position had been otherwise there would have been no point in Secure having earlier sought to vary its obligation for the provision of a bank guarantee or in the Council having refused to accede to that request because it could "only" accept a bank guarantee. In the light of those exchanges, I do not agree with the primary judge's conclusion that it was reasonable for Mr Marolia to read Mr Wade's reference to a performance bond as a reference to a bank guarantee.

53 The circumstances in which Mr Wade referred to a performance bond in his reply email were also different from those in which the earlier discussions occurred. Whereas previously Secure had sought a variation from what it was obliged by its tender to give, on this occasion the Council was requesting an alteration to Secure's tender which was beneficial to it. Mr Wade's email stated that Secure was prepared to come part of the way in relation to that request by increasing the amount guaranteed, but on the basis that the Council agree to a performance bond. It follows that I also do not agree with the primary judge's conclusion that Mr Wade's email did not convey sufficiently clearly that Secure's agreement to increasing the amount was only proffered on the basis that it gave a performance bond rather than a bank guarantee. That is what the email said and it did so in circumstances where the distinction was significant , and Secure was in a position to insist on it.

54 Whether a reasonable bystander in the position of the parties would have regarded Secure's conduct in not responding to Mr Marolia's second email as signalling that it agreed to provide the bank guarantee recommended focusses on Secure's conduct and what it conveyed. Mr Marolia's email did not say that he was proceeding on the basis that he had Secure's agreement to provide a bank guarantee for the revised amount. Nor did it say that the Council would assume that agreement in the absence of a response. The terms of his email, including its expression of gratitude, were equally consistent with his proceeding on the basis of a belief that he would obtain that agreement if Secure was the successful tenderer.

55 There is no evidence, beyond the fact of Mr Marolia's response, that supports the primary judge's finding at [97] that Mr Marolia told Mr Wade he was proceeding on the assumption that there was agreement "to an increase in the bank guarantee". In my view, that finding was not justified. At its highest the final email may have suggested that Mr Marolia was proceeding on a wrong understanding of Secure's position. If he was, that was not as a result of any conduct of Secure. The statement that he would put a "requirement" for an increased bank guarantee in his report was more likely to have indicated to Secure that there remained a difference between the parties, albeit one that was likely to be resolved, and that the difference was a matter to be considered by the Council.

56 In my view, Secure's conduct in the circumstances did not convey that it agreed to the requirement for a bank guarantee of two months' guaranteed income. It follows that its offer was not varied in that respect. The primary judge erred in concluding otherwise. Grounds of appeal 3 and 4 should be upheld.

Whether the Council's acceptance of Secure's tender offer was qualified or subject to any condition (grounds 1 and 2)

57 The question whether offer and acceptance "matched" was addressed by the primary judge in two parts, reflecting the way in which it was argued. First, Secure submitted that there was no correspondence because the Council's

acceptance was subject to the terms of the amended management agreement, including the changes from the draft that had not been agreed. The Council conceded the amended management agreement contained such changes, but maintained it did not form part of the basis on which it accepted Secure's offer. The primary judge dealt with that argument at [94]:

> In my opinion, the amended Management Agreement did not form part of the Council's acceptance or purported acceptance of Secure's offer. The act of acceptance was the resolution by Council. That resolution made no reference to the form of the Management Agreement that was subsequently given to Secure. The fact that Mr Marolia chose to include a copy of the Management Agreement (in response to a request from Secure) in the email in which he communicated the terms of Council's acceptance does not mean that the Management Agreement became part of the acceptance. If the Management Agreement did not accurately reflect the terms of any agreement that arose from acceptance of Secure's offer, it was open to Secure to seek amendments to it. It was also open to Secure to renegotiate some of the terms of any agreement that arose on acceptance of its offer, as it sought to do. However, neither of those matters meant that the Council's acceptance did not correspond to Secure's offer. Similarly, the fact that the parties were unable to reach agreement on changes to the Management Agreement does not affect the answer to the question whether the Council's purported acceptance gave rise to a binding contract at the time it was communicated.

58 Secure also submitted that there was no correspondence of offer and acceptance because its offer was not amended to include the bank guarantee of two months' guaranteed income and the Council's acceptance was on terms that assumed such an amendment. The primary judge held, having found that Secure's offer was varied, that the Council's acceptance "clearly matched" the varied offer. His Honour then considered the position if, as I consider the position to have been, Secure's offer had not been varied in that respect. He concluded at [98] that "the acceptance still matched the offer":

> ... For the reasons I have given, if the parties did not reach an agreement on an increase in the security, the effect of that is that they did not agree to a variation of the tender. That still meant that, in accordance with the tender conditions and the Regulations, there was an offer available to be accepted by the Council. The question, then, is whether the Council accepted that offer. In my opinion, it did. Under the Regulations, the Council had a choice. It could accept a tender or it could reject all tenders. It could not make a counter-offer. Absent clear language, it must be taken to have elected to adopt one of the two options open to it. Looking at the matter objectively, it seems to me that it elected to accept the offer that was open to it. The first two resolutions of the Council are clearly expressed as acceptance of Secure's tender. Resolution 3 does not purport to qualify that acceptance. Rather, it states a proposal or

intention of the Council. That proposal or intention was to seek to amend the Management Agreement in the way identified. For the reasons I have given, a proposal or intention to seek to vary an agreement does not mean that an agreement has not already come into force. That happened as a result of resolutions 1 and 2 and the communication of those resolutions to Secure.

Was the Council's acceptance subject to the terms of the amended management agreement?

59 Secure makes the following submissions in support of its position that the primary judge erred in finding that the amendment management agreement did not form part of the Council's acceptance. First, it is said his Honour did not consider the terms in which acceptance was notified. That notification included provision of the amended management agreement for execution, on the basis that it recorded the terms on which the Council had accepted the offer. Secondly, it is argued that the primary judge did not consider the subsequent correspondence between the parties which indicated that the Council's acceptance was subject to the terms of the amended management agreement. Thirdly, the conduct of the parties is said not to indicate, as the Council urged, that they intended to be bound to a contract on the terms of the draft management agreement whilst at the same time expecting to negotiate and enter into a revised form of agreement.

60 In response the Council seeks to support the primary judge's reasoning in the following way. Although the email of 15 March 2011 informed Secure of the acceptance, that email set out the Council resolution in full and that resolution constituted the terms of the Council's acceptance. Resolutions 1 and 2 recorded the Council's unequivocal acceptance of Secure's tender offer and resolution 3 recorded that the Initial Bank Guarantees would be amended, thus conveying a proposal or intention to amend the draft management agreement. The amended management agreement was attached because the parties, whilst content to be bound immediately, expected to make that further contract. Finally, the subsequent conduct of the parties was consistent with them expecting to make a further contract in substitution for that made on 15 March 2011.

61 By its tender response, Secure offered to enter into a management agreement in respect of each car park for which its offer was accepted. The form of that agreement was the draft management agreement. The Invitation for Tender provided that following acceptance, that form of agreement would be completed with relevant details and, upon the tenderer agreeing on a Commencing Date and signing it, returned to the Council.

62 The Council's email of 15 March 2011 advised of the terms of its resolution, enclosed a copy of the amended management agreement and attached a copy of a letter from Gilbert & Tobin, which explained the "changes" made to the draft management agreement so as to produce that amended form of agreement. The letter described the amended management agreement as reflecting "the terms of the tender submitted by [Secure] and Council's resolution". Its reference to a resolution of 7 March 2011 appears to be an error, the relevant resolution having been passed on 14 March 2011. The statement that the enclosed agreement reflected the terms of the offer and acceptance was not correct because it included substantive changes which had not been agreed, either in accordance with reg 176 or otherwise. The letter concluded with a statement that the Council and Secure "should each sign 2 copies of the Agreement". That request was consistent with what was contemplated by cll 3.1.1 and 3.1.2 in Section 3 of the Invitation for Tender (see [25] above). The Council's email, having referred to the letter and the enclosed "revised" version of the draft management agreement, sought to make clear that the latter had "been amended only to reflect the Council resolution". That statement was also incorrect in view of the changes made to the draft management agreement beyond those addressing the variation of the Initial Bank Guarantee Amounts.

63 In my view, three things follow from a consideration of this correspondence from the Council to Secure. The first is that the letter and email clearly proceed on the basis that the terms of the Council's acceptance of the tender offer were contained in its resolution of four paragraphs passed on 14 March 2011. The second is that the amended management agreement was prepared or completed to record or "reflect" what was believed to be the

consensus reached by that offer and acceptance. It was not proffered as forming part of that acceptance or as qualifying it. The third is that the provision of the amended management agreement at the time of communication of the Council's acceptance was explained by the Council's obligation under cl 3.1.1.

64 The subsequent negotiations between the parties do not assist in the resolution of this question. That conduct may show, as Secure contends, that the Council asserted throughout 2011 and in early 2012 that Secure was required to sign the amended management agreement. However its having done so is not relied upon as assisting an understanding of the context in which Secure's tender was accepted or as throwing light on the interpretation of the correspondence by which that occurred. That subsequent conduct may have been relevant to whether the parties were to be taken to have intended to make a concluded bargain: cf *Australian Broadcasting Corporation v XIVth Commonwealth Games* at 547-548; *Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd)* [2008] NSWCA 149 at [99]-[103]; a question not in issue between the parties.

65 In the result, I agree with the primary judge's conclusion that the terms of the amended management agreement did not form part of the Council's acceptance of Secure's tender offer, and for that reason did not qualify it.

Was the Council's acceptance subject to a condition that the Initial Bank Guarantee Amounts be varied?

66 Resolution 3 is in the form of a statement that the Initial Bank Guarantees in the "Management Agreement" be amended for each of the car parks. The agreement referred to is the draft management agreement. That statement qualifies the Council's acceptance of Secure's offer by providing that the draft agreement "be amended" in that respect. That it was to be understood as doing so was wholly consistent with the terms of the Council's email and Gilbert & Tobin's letter. As I have concluded above, each proceeded on the basis that the draft agreement had been amended to "reflect" the terms of the

Council's acceptance of Secure's offer as contained in its resolution of four paragraphs.

67 The primary judge considered that resolution 3 recorded a proposal or intention of the Council to "seek to amend" the draft management agreement in the way identified. I disagree. I consider grounds of appeal 1 and 2 are made out. The terms of the tender purportedly accepted by the Council did not correspond with the terms offered by Secure. The former included the provision of Initial Bank Guarantees for 2 months' guaranteed income. It follows that the parties did not reach any consensus that was capable of supporting the contract alleged by the Council to have been made on 15 March 2011.

Was there agreement as to the Commencing Date for the management agreement (grounds 5 and 6)?

68 As I have observed above, the parties accepted that it was also necessary that they reach consensus as to the date on which Secure's management of each car park should commence. Although the Council had inserted 1 June 2011 in the amended management agreement as the Commencing Date, it was conceded that there was no agreement as to that being the relevant date. The indication given in Secure's tender as to the possibility of a "1 June 2011 start" was just that and, among other things, had been overtaken by the passing of the February 2011 order date on which that estimate had been based.

69 The Council's pleaded case was that it was a term of the management agreement that the parties would agree on a Commencing Date within 14 days of the Council's notification of its acceptance of the tender offer or that failing such agreement, the Commencing Date would be a date within a reasonable time after that notification. The first term was said to be express and contained in cl 3.1.2 in Section 3 of the Invitation for Tender. The second was said to be implied by law or as a question of fact so as to give business efficacy to the management agreement.

70 The primary judge dealt with this question at [99]:

> As I have said, it is not entirely clear how Secure now puts its case in relation to the commencement date of the Management Agreement. However, it is apparent from Mr Marolia's and Mr Wade's file notes that the parties agreed that the agreement should commence once the new equipment had been installed, although they did not fix on an actual date that reflected that agreement. Consistently with the conditions of tender, they left that date to be determined if and when the tender was awarded to Secure. In that context, when the Council inserted a commencement date in the contract of 1 June [2011] it was to be understood as proposing that date. It was open to Secure to propose some other date which better reflected the agreement the parties had reached. If the parties could not reach agreement on that issue, a reasonable commencement date consistent with the agreement of the parties could be determined by the court. The agreement was not uncertain in that respect. And the fact that the Council proposed a commencement date was not inconsistent with the offer made by Secure. Rather, it was consistent with the Council's obligations following acceptance of that offer.

71 Secure makes the following submissions in support of its challenge to this conclusion. First, the terms of the draft management agreement show that the Commencing Date is to be a calendar date not an event which will occur on an unknown or uncertain date. The parties did not agree on the calendar date from which Secure's management of each car park should commence. That much is common ground. Secondly, any consensus that Secure's management should not commence until installation of the Zeag car parking equipment (see [29] above) was not agreement as to the Commencing Date or as to the manner in which it should be determined. To the extent the parties had an agreement as to how that date was to be determined, it was, in accordance with cl 3.1.2, that it be determined within 14 days after the acceptance of Secure's tender. Secure had not made that determination and the fact that the Council had nominated 1 June 2011 was of no contractual consequence.

72 Finally, the primary judge's reasoning proceeds on the basis that the commercial consensus reached at the meeting on 2 February 2011 (see [30] above) was an agreement as to the manner in which the Commencing Date would be determined. If Secure's tender was successful and the parties could not agree on that date, a court could give effect to this earlier agreement and determine "a reasonable commencement date". Secure submits that this

reasoning is flawed because it seeks to imply a term into the contract sought to be enforced which is inconsistent with the 'express' provision as to when and how the Commencing Date was to be determined. That provision is itself an agreement to agree, and for that reason, is unenforceable in any event.

73 In response, the Council maintains its pleaded case and supports the primary judge's conclusion. The circumstances on which it relies as justifying the implication of a term that the Commencing Date be a date within a reasonable time after notification of acceptance of the tender include the consensus between the parties, found by the primary judge, "that the agreement should commence once the new equipment had been installed": [99]. In its oral submissions, the Council put a slightly different argument in support of the conclusion that there was consensus as to that date. In February 2011, the agreement of the parties was as to the event which would be the Commencing Date, namely the installation of the Zeag equipment. That consensus determined the Commencing Date, which did not need to be a calendar date.

74 It is convenient to start with the Council's pleaded case. The first part of the obligation pleaded (that is, to agree within 14 days) was not an express term of the draft management agreement and could not have been an express term of any management contract which it was proposed might be entered into on or following the acceptance of Secure's tender. It was an obligation imposed by cl 3.1.2, a term of the agreement governing the tender process. In the absence of that obligation being an express term of any management contract said to have been made, there is no basis in law, or reason of necessity, for implying the second part of the pleaded obligation which is only said to apply "failing agreement" in accordance with the first part of that obligation.

75 By cl 3.1.2, the parties agreed that the Commencing Date was to be determined after the successful tender was accepted. In the face of that obligation and in the absence of clear language, the parties should not be taken to have intended to reach any binding consensus in February 2011,

either as to the Commencing Date on the basis that it might include an event, or as to the manner in which the date might subsequently be determined. To the extent that the primary judge is to be taken to have concluded otherwise at [99], I respectfully disagree with that conclusion. Whilst there may have been a commercial consensus as to when Secure's car park management might commence, the evidence did not suggest that it was objectively intended to have legal consequences, either by amending their existing contract governing the tender process, or by varying the terms of Secure's tender offer.

76 As at 15 March 2011, the only express agreement the parties had as to the determination of the Commencing Date was in cl 3.1.2. To the extent that an agreement governing the tender process may by this clause have imposed a separate obligation on Secure to nominate such a date, it was not relied upon by the Council. Its case was that any such provision was a term of the management contract for which it contends. Finally, I accept Secure's submission that the Commencing Date must be a calendar date and not an event, the date of which is unknown or uncertain at the time the management agreement is made. In the agreement, the Commencing Date is defined as "the date in Item 4". There is nothing in the other provisions of the draft management agreement which suggests that "date" should be given other than its ordinary meaning as a calendar date. The draft agreement proceeds on the basis that at the time it becomes effective that date is known and certain. Times for the performance of obligations are fixed by reference to that calendar date.

77 By way of summary, as at 15 March 2011 there was no consensus between the parties as to the Commencing Date. Nor did any term, express or implied, of any proposed management agreement provide for how that date should be determined in the absence of any such consensus. The primary judge erred in concluding otherwise. Grounds 5 and 6 should be upheld. The absence of agreement as to this date provides an additional reason for concluding that no contract for the management of the car parks was made on the Council's notification of its acceptance of Secure's tender.

Was the Council entitled to terminate any such contract (grounds 7 and 8)?

78 Having regard to the conclusions above, this question does not arise. Nonetheless I will deal with it on the basis that the primary judge was correct to conclude that there was a binding contract.

79 Secure submitted that the Council was not entitled to terminate the contract made on 15 March 2011 because it was not ready and willing to perform the contract at the time it did so. A party seeking to terminate an agreement prior to the time for performance on the basis of renunciation by the counter-party must establish that, up to that time, it was ready and willing to proceed with the contract and to perform the agreement for its part: see *Foran v Wight* [1989] HCA 51; 168 CLR 385 at [41]-[47]. On the holding of the primary judge the contract to be performed was either on the terms of the draft management agreement or that agreement as varied to provide for a bank guarantee of 2 months' guaranteed income. Secure's contention before the primary judge was that in June 2012 when the Council sought to terminate that contract, it was insisting on performance of the amended management agreement which included further changes that had not been agreed.

80 The primary judge's findings as to the communications between the parties after 15 March 2011 are at [70]-[76]. With one exception, during that period the Council asserted that there was a contract and that Secure must acknowledge that fact by signing the amended management agreement. Mr Marolia agreed in cross-examination that was the Council's position. The exception was a letter of Gilbert & Tobin of 8 April 2011 which required that Secure sign the draft management agreement.

81 On 9 March 2012, the Council wrote to Secure in the following terms:

> As stated in previous correspondence to you it is Council's position that a legally binding Management Agreement relating to the above Car Parks has been on foot since Council notified Secure (formerly, S&K Car Park Management Pty Limited) of its acceptance of Secure's tender dated 16 December 2010. Council first notified Secure of its successful tender on 15 March 2011.

> Council considers that Secure's continual refusal to acknowledge the existence of a legally binding agreement between Council and itself as a repudiation of the Management Agreement.
>
> Notwithstanding that Council is not required by the Management Agreement to do so in the circumstances of a repudiation, Council gives notice that unless Secure returns an executed version of the Management Agreement provided to Secure on 15 March 2011 on or before 29 March 2012 and performs its obligations under that Agreement, Council intends to accept Secure's repudiation, terminate the Management Agreement and sue Secure for any loss suffered by Council as a result of Secure's repudiation. Council will also re-tender for the management of the Car Parks.

82 By its letter dated 26 March 2012, the Council repeated its request that Secure return an executed version of the amended management agreement and perform its obligations under that agreement. On 8 June 2012, the Council purported to terminate for repudiation. Having referred to its letter of 9 March, and Secure's failure to execute and return, and perform its obligations under, that agreement, the Council continued:

> At least since 17 June 2011, Secure has continually denied the existence of the Management Agreement. For example, in a letter dated 17 June 2011, Secure states: *"The draft management document annexed to the Tender document No 10/08 does not have the effect of S&K entering a legally binding agreement at the time S&K's Tender was lodged by S&K..."*. Again, on 1 August 2011, Secure stated in its letter to Council: *"Secure Parking do not believe that a legally binding agreement is in place and stand by our letter dated 17th June 2011."* This amounts to a repudiation of the Management Agreement.
>
> Accordingly, Council gives notice under clause 18.2(a) of the Management Agreement that it is terminating the Management Agreement.
>
> Council holds Secure liable for any loss suffered by Council as a result of Secure's repudiation of the Management Agreement. [emphasis in original]

83 The primary judge rejected at [116] Secure's argument that the Council was not itself ready and willing to perform the contract because of its continued insistence that Secure execute the amended management agreement:

> ... The short answer to this point is that the Council did not insist on execution of the agreement in that form. What the Council did in its letter dated 9 March 2012 is insist that there was a legally binding agreement resulting from the Council's acceptance of Secure's tender. It insisted on performance of that agreement. It maintained that performance could occur by execution of the Management Agreement in the form that it had provided previously. However,

there can be no suggestion that the Council would not have been prepared to amend the terms of that agreement if it had been pointed out to the Council that the document did not accurately reflect the terms that had been agreed. It was clear that the Council was prepared to entertain changes to that document provided the changes were consistent with the agreement it maintained had been reached.

84 Secure takes issue with the primary judge's interpretation of the 9 March 2012 letter. It says the Council was not to be understood as requiring performance of an agreement made on 15 March 2011, whilst not also insisting that the agreement to be performed was in the terms of the amended management agreement proffered for execution on that day. In response, the Council points to the second paragraph of its letter as making clear that it was Secure's refusal to acknowledge the existence of a legally binding agreement after 15 March 2011 that constituted its repudiatory conduct. The termination letter of 8 June 2012 also made that clear.

85 The circumstances preceding the Council's termination were as follows. The position maintained by the Council is described in [80] above. Secure's position, from the outset, was that there was no binding contract made as a result of the acceptance of its tender. In those circumstances, the parties undertook commercial negotiations concerning the terms of a management agreement which each might be prepared to sign. It was not common ground that they did so each accepting that it was bound to any existing contract. As at early June 2011, the Council had indicated a preparedness to agree to some variations to the amended management agreement. It was at this point that Secure became aware of the proposal for a 500 bay car park in Kiaora Lane. From that time, the issue between the parties remained whether there was a binding contract made by the Council's acceptance of the tender. The terms of that contract, assuming it had been made, were not explored beyond the Council stating and maintaining its position that they were the terms of the amended management agreement.

86 The determination of what was reasonably to be understood as conveyed by the Council's letter of 9 March 2012 is not made easier by the repeated use of the expression "Management Agreement" to describe the agreement said to

have been made on the acceptance of Secure's tender. In the first two paragraphs of that letter, this expression is used to refer to the fact of an agreement rather than to any particular form of it. By contrast, in the third paragraph when referring to the agreement which is to be acknowledged by execution, and to be performed, the capitalised expression describes a contract on the terms contained in the amended management agreement.

87 In that paragraph the Council was to be understood as (again) stating its position as to the terms of the contract. However, having done so it then goes further and insists that Secure acknowledge the existence of and perform a contract in those terms. It also states that it will treat Secure's failure to do so as a repudiation of that contract. In so stating, the Council was not to be understood as offering or inviting performance of that form of the contract, whilst at the same time accepting that it might not in some substantial respect accurately record the contract made on 15 March 2011: cf the position in *Ross T Smyth v T D Bailey* (1940) 67 Ll L Rep 147; 3 All ER 60 at 72; *Shevill v Builders Licensing Board* [1982] HCA 47; 149 CLR 620 at 625-626. On the contrary, in my view, the letter by its language conveyed that the Council was insisting that the contract as formulated by it was that to be performed by the parties.

88 It follows that I do not agree with the primary judge's conclusion that it "was clear that the Council was prepared to entertain changes to that document provided the changes were consistent with the agreement it maintained had been reached". That is not the effect of the third paragraph of the 9 March 2012 letter which made plain that it was the Council's position that the "document" provided on 15 March 2011 recorded the terms of the agreement made on that day. The contract which the Council was insisting be performed was not the contract which the primary judge held then existed between the parties.

89 Had I concluded that there was a contract on the terms of the draft management agreement, or that agreement as varied in relation to the Initial Bank Guarantee Amounts, I also would have concluded that the Council was

not entitled to terminate it. Had they been engaged, I would have upheld grounds 7 and 8.

Did Secure engage in misleading or deceptive conduct (cross-appeal grounds 1 to 5)

90 The issue raised by this cross-appeal is a 'live' one in view of my conclusions concerning the contract claim. The Council's alternative claim as pleaded was that during the period from 16 December 2010 to 15 March 2011, Secure represented that, in the event that its tender was successful, its intention was to enter into an agreement to manage the car parks from 1 June 2011, or such a reasonable period thereafter, on the terms of the draft management agreement as varied in accordance with the Council's contract claim. It was alleged that by making this representation, Secure engaged in misleading or deceptive conduct because its senior executives did not have that intention. They believed (see [19] above) that the terms of that agreement could be negotiated if Secure's tender was accepted. Accordingly, if they intended to enter into an agreement, it was to be an agreement as amended following further negotiations.

91 The Council alleged that because of this conduct it lost the opportunity to negotiate a management contract with Secure or another car park operator. That was said to follow because "but for" the misleading conduct, Secure would not have submitted a tender offer which included the acknowledgement in cl 3 of its tender response (cl 4 in [23] above). The argument then proceeded as follows. Without such an acknowledgement, Secure's offer would have been a non-conforming offer. In that event none of the tenders would have been conforming. As a result Mr Marolia would have recommended that the Council reject each of the tenders and enter into negotiations with Secure. Those negotiations would not have been subject to any regulation requiring that the contract be substantially in the form of the draft management agreement. Following such negotiations, the Council would have accepted an offer from Secure equivalent to at least $1.8m guaranteed income.

The reasoning of the primary judge

92 The primary judge did not accept that by giving the acknowledgment in cl 3, Secure made a representation in the terms alleged. His reasons for that conclusion are at [144]-[145]:

> In my opinion, if the Council's contract case had failed, then its case based on s 18 of the ACL would also fail. The reason for that is that, in the context, I do not think that the statement made in cl 3 of the conditions of tender was anything more than a representation that Secure agreed to be bound by its contractual obligations arising from the tender documents. As Mason P said in *Concrete Constructions Group v Litevale Pty Ltd* [2002] NSWSC 670; (2002) 170 FLR 290 at [169] in relation to s 52 of the *Trade Practices Act 1974* (Cth) (the predecessor to s 18 of the ACL):
>
> > Why should the parties be found or presumed to have intended more by what they expressly represented and understood? Of course, s 52 goes beyond intentionally misleading or deceptive conduct, but it does not follow that the innocent party understood or relied upon anything more than the express representations and the usually adequate consequences stemming from breach of them stemming from the law touching the mutually chosen regime, ie contract.
>
> It was Secure's position that the terms of the tender did not require it to enter into the Management Agreement on the terms identified by Council immediately. If it was wrong about that, as I have found it was, then the Council was entitled to enforce the terms of the agreement or terminate it for breach. If it was correct in that view, because for one reason or another acceptance of its tender did not give rise to a binding agreement, I do not think that by agreeing to cl 3 it was representing that it would do something that it was not contractually obliged to do.

93 His Honour made no express finding that the Council suffered loss or damage by reason of that conduct. With respect to damages, he found that had the Council been in a position to negotiate a management contract with Secure, there was a 50% chance that it would have concluded those negotiations and made a binding agreement before Secure discovered that the Kiaora Lane redevelopment involved a car park of approximately 500 parking bays. In that event Secure would have agreed to pay guaranteed income of $2.31m. Had Secure discovered that fact before those negotiations were concluded and an agreement made, it would likely have agreed to pay guaranteed income of $1.8m. There was also a possibility, which the primary judge assessed at 10%, that Secure and the Council would not have reached any agreement at all.

94 Adopting the calculations of the experts in their joint report, the value of the lost opportunity found by the primary judge (that is, a 50% chance of having secured $2.31m, and a 50% chance of having secured $1.8m), discounted by 10%, was $3,613,414. Given that this meant there was a 10% risk that a second tender process would have been necessary, and the Council's costs of conducting that process had been $122,829, the Council was also entitled to 90% of those costs ($110,546) on the basis that it had lost a 90% chance of avoiding those costs. The total of the damages awarded was $3,723,961.

Determination of issue

95 As a general proposition, it may be accepted that the absence of a capacity or intention to perform a contractual promise at the time the promise is made may constitute misleading or deceptive conduct: *Bill Acceptance Corporation Pty Ltd v GWA Ltd* (1983) 78 FLR 171 at 176-179; *HWT Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; 217 CLR 640 at [13]. That is because the making of a contractual promise may involve an implied representation that at the time of its making the promisor has the intention to carry the promise out and a present ability to fulfil it: *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217 at 239 (Ormiston J). In *Concrete Constructions Group v Litevale Pty Ltd* [2002] NSWSC 670; 170 FLR 290, Mason P (sitting at first instance) considered that in such a case "it will be comparatively easy to establish that a contracting party is implicitly representing a present intention to perform it according to its tenor": at [167]. As his Honour then noted, because that implied promise is to perform the contract in accordance with its terms as properly understood, any claim of misleading intent was unlikely to advance the innocent party's position because the law of contract would adequately compensate it for any consequences of non-performance.

96 The Council's case was not that there was any express contractual promise made which did not admit of any uncertainty as to its meaning. Nor did it argue that at the time it submitted its tender, Secure had no intention to perform its contractual obligations under the conditions of the tender process,

whatever they might be. The Council does not allege misleading conduct by the making of an implied representation as to its intention in such general terms.

97 It contends for a much more specific representation as to Secure's subjective state of mind, namely that Secure understood the content of its obligations as properly construed and intended to perform them as so understood. The Council then points to the disconformity between what Secure's senior executives understood was its obligation with respect to the draft management agreement and that obligation as truly arising on the proper construction of the contract. The existence of that disconformity is said to have resulted in misleading or deceptive conduct.

98 As Allsop J observed in *McGrath v Australian Naturalcare Products Pty Limited* [2008] FCAFC 2; 165 FCR 230 at [138]: "the divining of representations from the making of contractual promises and the entry into contracts is a task to be approached with caution and with an eye to all the facts and not by reference to implying representations mechanistically from equivalent promises". When a party enters into a contract, it does not necessarily make any representation as to its subjective understanding of the content of any of the obligations that it has undertaken. Secure's acknowledgement that it understood and accepted the terms and conditions of the tender said nothing about its understanding of the scope and content of the obligations which in law it was undertaking. It may or may not have had a correct or complete appreciation of the content of those obligations and how they were to be performed. It was not necessary, from the Council's perspective, that it have such an appreciation in order that it be bound to any contract: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [22].

99 For these reasons, I agree with the primary judge's conclusion that there was no representation made in the terms contended for and no misleading or deceptive conduct on the part of Secure.

100 On the assumption that this conclusion is wrong, I will deal briefly with Secure's arguments which address questions of causation and damages.

101 The question of causation has to be approached in a practical and common-sense way. Assuming there was a disconformity between Secure's understanding of the content of its obligations and those obligations in fact, it was not likely to have been of any significance to the Council. Secure had submitted a conforming tender. The views of Secure's senior executives as to the content of its obligations were of no legal significance or consequence. Secure remained bound by the terms of the contract governing the tender process, irrespective of those views, and its tender continued to be a conforming one. If there was misleading conduct it would not have resulted in any change in the Council's position.

102 Secure challenges the primary judge's assessment that it was likely it would have agreed to offer a guaranteed income for the four car parks of $1.8m had it been aware of the proposed redevelopment of the Kiaora Lane car park. It points out that the evidence of Mr Mathews, on which the primary judge relied, showed that the feasibility studies justifying such an offer made two significant assumptions. They were first, that the Council would permit permanent parkers in the Cosmopolitan Centre car park and second, that it would permit the conversion of permanent unreserved parkers to permanent reserved parkers at the Cross Street car park.

103 The primary judge addressed those assumptions. As to the first, he considered it was "unclear whether the Council would have agreed" to it. As to the second, he held that there was "little doubt" that the Council would have agreed to that change. He considered that the risk the first would not be agreed was sufficiently taken into account by discounting the overall damages by 10 per cent: [148].

104 Secure submits that there was no evidence to sustain either of those assessments and points to evidence which it asserts shows that at the time the Council's position was to the contrary and unlikely to result in agreement.

105 The question to which those assessments are relevant is as to the amount of the offer Secure was likely to have made with full knowledge of the Kiaora Lane redevelopment. Mr Mathews oversaw the preparation of Secure's December 2010 tender response. His evidence was that although the Council's stated position in early 2011 was that there could be no permanent parking at the Cosmopolitan Centre, the Council had allowed permanent parking previously and at that time. On that basis, Mr Mathews was confident that the Council would eventually formally agree to that occurring on a continuing basis. That evidence justified the primary judge's assessment in relation to this car park.

106 With respect to the Cross Street car park and the conversion of unreserved parking to reserved parking, the Council's position was that it would not agree to permanent unreserved parkers being "forced" to convert to permanent reserved parking. Secure's feasibility studies were prepared on the basis that those parkers would be invited to change their status. At no stage did Secure have any intention to force them to do so. In the face of this evidence, the primary judge's conclusion that the Council would have agreed to the position which formed the basis of Secure's feasibility studies, was justified.

107 For these reasons, I am not satisfied that the primary judge's assessment of the Council's damages involved error.

Did the Council engage in misleading or deceptive conduct (grounds 9 and 10)

108 This claim was relied upon by Secure in support of an order preventing enforcement of, or setting aside, any management contract made between the parties. On the hearing of the appeal, it was submitted that if it became necessary to consider it (because there was a contract as contended by the Council), the appropriate relief would be by way of an order preventing the enforcement of that contract to its full extent. That amendment to the relief sought was made to take account of the primary judge's assessment that notwithstanding the conduct complained of, Secure would have entered into a

contract with a guaranteed income of $1.8m, rather than $2.31m as in fact occurred.

109 Secure alleged that the Council engaged in misleading or deceptive conduct by failing to disclose that the proposed redevelopment of Kiaora Lane included a car park of 500 parking bays in place of the existing 110. It is said that the circumstances as they existed when the Invitation for Tender was issued, and after Secure had submitted its tender, gave rise to a reasonable expectation that if there was such a proposal, and it was known to the Council, it would be disclosed. See *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 at [18], [21], [82], [95].

110 The primary judge rejected that case. As to disclosure in the Invitation for Tender, his Honour held at [113]:

> .... [T]he invitation made it clear that Tenderers were to make their own enquiries. The information was not directly relevant to the tender because, as the invitation made plain, the car park was being redeveloped and, once redeveloped, was being put out to separate tender. The information was relevant to an assessment of the competitive threats that an operator of the two other car parks would face. But a great deal of additional information was also relevant to that question and it is to be expected that different tenderers would assess that information differently. Particularly in light of what the invitation to tender said, Secure could not have had a reasonable expectation that the Council would disclose all information [relating] to the competitive threats or economic viability of the Cross Street and Cosmopolitan car parks. Moreover, the Council did disclose the proposal to redevelop the Kiaora Lane car park in the invitation to tender and it did make available on its website current information relating to that redevelopment. It was open to Secure to ask about the redevelopment at the pre-tender or post-tender meetings it had with the Council. Secure had no reason to assume that the redeveloped car park would have the same number of spaces as the existing one. Consequently, it is to be expected that if the number of spaces it had was significant to it and it had not been able to ascertain the information from its own enquiries, it would have asked about that matter before submitting its tender.

111 In relation to disclosure following receipt of Secure's tender, the primary judge concluded at [114]:

> [I]f it was apparent to the Council that Secure had submitted its tender on the basis of a false assumption, then Secure could have had a reasonable

> expectation that Council would correct that assumption. Secure points to the material in its market analysis as demonstrating that it was labouring under a misapprehension concerning the number of car spaces in the redeveloped car park and to Mr Marolia's concession that that appeared to be the case from the SWOT analysis. However, I am not satisfied that the Council appreciated that at the time it considered the tender. I accept Mr Marolia's evidence that he paid little attention to the SWOT analysis at the time. As he pointed out, that was largely of significance for Secure. Despite Mr Marolia's concession, the statement that "No new car parks being developed in the area" was not clear. It was obvious to Secure that the Kiaora Lane car park was being redeveloped, and in that context the reference to "new car parks" appears to be a reference to entirely new car parks rather than the redevelopment of existing ones. It is apparent from the evidence that different views could be taken on the likely effect on the Cosmopolitan Centre and Cross Street car parks of a larger Kiaora Lane car park. It appears that Mr Marolia thought that the redeveloped car park would have a minimal impact. That was not an unreasonable view. The redeveloped Kiaora Lane car park would have to cater for additional traffic that was likely to be generated by the redevelopment. It was on the opposite side of New South Head Road to the other car parks, and there was a question of how willing drivers would be to cross New South Head Road to park. The Council had published a considerable amount of information about the redevelopment on its website; and it might reasonably have expected that anyone interested in the information would be able to locate it. Consequently, I do not think that it was obvious from what Secure said that it was labouring under a misapprehension concerning the proposed number of bays in the redeveloped car park. It follows that I do not think it could be said that Secure was misled by the Council's failure to say something in response to Secure's tender.

112 Secure's challenge to the first of these conclusions proceeds as follows. The primary judge erred in taking into account, as a factor relevant to the question of a reasonable expectation of disclosure, that the Invitation for Tender made clear that tenderers were to make their own enquiries. It is said that finding was based on the erroneous premise that a party may contract out of the Australian Consumer Law (which forms Sch 2 of the *Competition and Consumer Act 2010* (Cth)). This submission should be rejected. It misconstrues the primary judge's reasoning. The requirement that tenderers make their own enquiries would not displace a need to disclose information where the circumstances otherwise gave rise to one: *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 558. However, in assessing as between the Council and the proposing tenderers, whether the latter could reasonably expect that information known to the former regarding the redevelopment would be disclosed to them, the instruction that they should make their own enquiries remained one of the circumstances to be considered in assessing whether such an expectation arose.

113 Secondly, Secure alleges that the primary judge reversed the "onus of disclosure" which should have been on the Council to disclose matters directly within its knowledge that materially affected the viability and profitability of the tender. That submission begs the question. The reason for the information's relevance was that it disclosed a competitive threat to the operator of the other two car parks in Double Bay. Information of that kind was not limited to the potential number of parking bays to be made available in Kiaora Lane. Reasonable businesspeople were likely to have different opinions as to the information falling within that category. There could be no reasonable expectation that all information that might do so would be disclosed.

114 The primary judge's findings as to the public availability of information regarding the redevelopment are extracted in [27] above. His findings that there was "significant coverage in the press" and that the information was "not difficult to find" are challenged. Secure's submissions in this respect ignore the cumulative effect of the information made available to it. Secure was the existing manager of the Kiaora Lane car park. The Invitation for Tender disclosed the proposal to redevelop that car park. During the pre-tender meeting held on 8 December 2010, it was explained that the car park was part of a proposed redevelopment involving Woolworths. The redevelopment was the subject of reasonably extensive publicity and there was similar information available on the Council's website. In the face of the information that was publicly available, there was no basis for a reasonable expectation that any information relevant to the viability and profitability of the nearby car parks for which tenders were invited, would be disclosed directly to tenderers by the Council's representatives.

115 The conclusion that the circumstances did not give rise to this expectation is confirmed by the conduct of Secure's representatives, who, prior to the submission of their tender offer, made their own enquiries as to the details of the redevelopment. Mr Thornley's evidence was that in December 2010, he undertook searches of the Council's website in respect of that information. On appeal, Secure seeks to support its argument as to a reasonable expectation of disclosure by reference to the Council not having informed

tenderers that there was information available or its location, and the Council having created an impression that there was no relevant information to be found as a development application had not been submitted. That Secure's representatives in fact made their own enquiries does not support that being the position, or a finding that Secure reasonably expected that such information would be disclosed directly to it by the Council.

116 As to there being a reasonable expectation that the Council would disclose any such information following receipt of the tender offer, Secure challenges the primary judge's conclusion on the following bases. First, it is said that Secure's offer reasonably conveyed to the Council that it was labouring under a misapprehension as to the number of parking bays in the redevelopment. Two findings underlie the primary judge's conclusion that this misapprehension was not apparent or obvious. The first was that Mr Marolia had not examined the SWOT analysis included in Secure's tender offer and as such, did not identify any false assumption as to the number of parking bays. It was open to the primary judge, having heard Mr Marolia's evidence, to accept it in that respect. The observation that the SWOT analysis largely consisted of commercial calculations of relevance to Secure, rather than to the Council, which would, if necessary and irrespective of the accuracy of those calculations, be able to rely on a binding contract with Secure, was also open to his Honour. No error has been shown in this first finding.

117 The second finding is that Secure's statement that "no new car parks" were to be developed in the area was not sufficiently clear as to reveal Secure's misunderstanding of the redevelopment's size. Such a statement might, particularly in hindsight, suggest the existence of some misapprehension. However, it has not been established that the Council did or should reasonably have understood the statement in that way, in circumstances where Secure was aware of the redevelopment of the existing car park in Kiaora Lane and information as to that redevelopment was publicly available.

118 Finally, Secure challenges the primary judge's conclusion that it was not unreasonable for Mr Marolia to have formed the view that the redevelopment

would have a minimal impact on the other car parks in Double Bay. It is said that such a view was contrary to the evidence given by the Council's experts. That evidence was that there would be a 25% reduction in the number of casual parkers at the Cross Street car park in the period of July 2014 to July 2015 on account of the opening of the redeveloped Kiaora Lane car park. However, from July 2015, after the completion of the Woolworths development, it was expected that there would be no further impact on the number of casual parkers in Cross Street because the majority of the users of the Kiaora Lane car park would be shoppers associated with Woolworths. In circumstances where the Council had not recognised Secure's false assumption concerning the number of parking bays at the redeveloped site, Mr Marolia's view as to the importance of that information was not unreasonable. Secure did not establish that the significance of that information was such as to support or require a finding that the Council must have or ought to have realised Secure's mistake having received its tender offer. The nature of the information was one of the many circumstances considered by the primary judge in [114] when reaching the conclusion, which I agree with, that in the circumstances there could be no reasonable expectation on the part of Secure that the Council would disclose such information following receipt of its tender offer.

119 In my view, neither the circumstances surrounding the Invitation for Tender nor those that followed Secure's tender offer reasonably justified an expectation by Secure that further and direct disclosure of the details of the Kiaora Lane redevelopment would be made by the Council.

Conclusions

120 No contract was made between Secure and the Council for the management of the car parks. That is because Secure did not agree to vary its offer in the terms requested, and then purportedly accepted, by the Council. If such a contract had been formed, the Council would not have been entitled to terminate it, as it sought to in June 2012, because it was not ready and willing to perform that agreement in accordance with its terms.

121 I agree with the primary judge's conclusions that there was no misleading or deceptive conduct on the part of either Secure or the Council in their dealings with one another.

122 Taking account of these conclusions, the following orders should be made:

(1) Appeal allowed.

(2) Set aside orders 1 and 3 made by the primary judge on 20 March 2015.

(3) Amended summons dismissed.

(4) Respondent pay the appellant's costs of the proceedings before the primary judge.

(5) Respondent pay the appellant's costs of the appeal.

123 **WARD JA**: I have had the opportunity of reading in draft the comprehensive reasons of Meagher JA with which I agree. I also agree with the orders his Honour proposes.

I certify that the preceding 123 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Anthony Meagher.

4 July 2016 .....
DATED

.....
Associate