IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
EXPEDITED CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-16-04450

KALIBRATE ASSET MANAGEMENT SOLUTIONS PTY LTD Plaintiff

v

IBM AUSTRALIA LIMITED Defendant

---

| | |
|---|---|
| JUDGE: | HIS HONOUR JUDGE COSGRAVE |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 12, 13, 14, 15, 16, 19 and 20 February 2018 |
| DATE OF JUDGMENT: | 23 March 2018 |
| CASE MAY BE CITED AS: | Kalibrate Asset Management Solutions Pty Ltd v IBM Australia Limited |
| MEDIUM NEUTRAL CITATION: | [2018] VCC 332 |

**REASONS FOR JUDGMENT**

---

| | |
|---|---|
| Subject: | CONTRACT – TRADE PRACTICES – ESTOPPEL – PRACTICE AND PROCEDURE |
| Catchwords: | CONTRACT – terms – construction – implied terms – implied duty to co-operate<br>TRADE PRACTICES – misleading and deceptive conduct – measure of damages – loss of opportunity to renegotiate terms of agreement<br>ESTOPPEL – promissory estoppel – estoppel by waiver<br>PRACTICE AND PROCEDURE – departure from pleadings |
| Legislation Cited: | *Civil Procedure Act 2010* (Vic); *Competition and Consumer Act 2010* (Cth); *Trade Practices Act 1974* (Cth) |
| Cases Cited: | *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570*; Austotel Pty Ltd v Franklins Self-Serve Pty Ltd* (1989) 16 NSWLR 582; *Blakely v CGU Insurance Ltd* [2017] VSCA 378*; Butt v M'Donald* (1896) 7 QLJ 68; *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* (2016) 333 ALR 384; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Havyn Pty Ltd v Webster* [2005] NSWCA 182; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298; *Jones v Dunkel* (1959) 101 CLR 298; *King v Yurisich* (2006) 153 FCR 78; *Legione v Hateley* (1983) 152 CLR 406; *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243; *Marks v GIO Australia Holdings Ltd* (1998) 196 |

CLR 494; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Protec Pacific Pty Ltd v Steuler Services GmBH & Co KG* [2014] VSCA 338; *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Shahid v Australiasian College of Dermatologists* [2008] FCAFC 72; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466

---

| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Plaintiff | Mr T Barry | Isakow Lawyers |
| For the Defendant | Ms M Norton | Corrs Chambers Westgarth |

HIS HONOUR:

## Issue

1 The plaintiff, Kalibrate Asset Management Solutions Pty Ltd ("Kalibrate"), is a company which conducts a business of supplying implementation services in respect of a particular software product, Maximo, which is owned and developed by the IBM group of companies. The defendant, IBM Australia Ltd ("IBM"), is one of the companies in that group. The major issue in the case is whether Kalibrate was entitled to a special payment due to its involvement in a transaction involving Maximo with TasWater in 2015. Kalibrate claims that it should have received a further payment of approximately $514,000 from IBM. IBM contends that it has discharged all its payment obligations to Kalibrate.

## Background

2 Michael Milstein ("Milstein") established Kalibrate to pursue opportunities to sell and implement Maximo software to customers in need of asset maintenance management solutions. In September 2008, Kalibrate became a registered Business Partner of IBM pursuant to an IBM Partner World Agreement. As a registered Business Partner of IBM, Kalibrate supplies the following products and services to its customers:

(a) development and customisation of Maximo solutions;

(b) support services to customers including training staff to use the Maximo solution, answering queries and resolving problems;

(c) resale of licences of Maximo products. Kalibrate is a reseller because it obtains the licences by purchasing them from IBM through an approved distributor.

3 Maximo is a software solution which assists businesses in their management of the maintenance and disposal of assets. It also runs applications regarding the

maintenance and disposal of assets. Maximo cannot simply be purchased by an end-user and installed into their computer system on a "plug and play" basis. The program must be tailored or customised so that it will integrate with a customer's existing computer system and provide the asset maintenance management solution which the end-user requires. During the case, the parties referred to this process of both tailoring or customising the Maximo software to integrate with the end user's system and providing the solution which the end user required as the implementation of a Maximo software solution.

4 Kalibrate employs staff to perform two different sorts of work. There are business consultants who have a functional role and technical consultants who perform technical work. The current head of operations for Kalibrate is Jacob Kruger ("Kruger"). His role is to speak with customers to understand the nature of their business and assets, the problems they face and the requirements they have for a solution. Kruger then talks with the technical consultants within Kalibrate, who program the Maximo products and develop solutions which meet the end-user's requirements and solve their problems. In short, Kruger develops a functional design specification which is then provided to the technical consultants who program the Maximo suite of products to meet that specification.

5 As an IBM Business Partner, Kalibrate is authorised by IBM to resell Maximo licences. Kalibrate can acquire those licences from IBM through a distributor. In 2014 and 2015, Kalibrate used Meier Business Systems ("MBS") as its distributor of Maximo licences. When it sells licences, Kalibrate charges its customers a margin. IBM specifies the maximum margin which Kalibrate is allowed to charge an end user. Kalibrate is also able to apply to IBM through its distributor to buy and resell Maximo licences to customers at discounted prices. An application to sell at a discounted price is called a special bid.

6 In addition to the margin which Kalibrate can make through reselling software licences, IBM also offers Kalibrate as an IBM Business Partner, various

incentive programs to earn additional income on the sale of IBM software. One such program is the VAP-G program for sales of software to government clients. Kalibrate's claim is based on an alleged entitlement pursuant to this program.

7 On 8 January 2012, Kalibrate became eligible for the VAP-G Business Partner program and became a Value Advantage Plus Business Partner.

8 The VAP-G program entitled a VAP Business Partner to a percentage of the sale value of software sold to a government department in accordance with the terms of an Operations Guide ("the Guide") published by IBM.

9 From 1 July 2009, there were three regional Tasmanian water and sewerage corporations: Ben Lomond Water in north-eastern Tasmania; Cradle Mountain Water in the north-western region; and Southern Water in the southern region. Onstream provided information technology, human resources and finance services to those three corporations. Onstream was jointly owned between the local governments in the north-eastern, north-western and southern regions of Tasmania.

10 In about June 2012, Onstream issued a request for proposal for an asset management information system in the northern region of Tasmania. IBM's in-house management consultancy business, Global Business Services ("GBS"), prepared IBM's response to the request for proposal. GBS competes directly with Business Partners, such as Kalibrate, when opportunities arise for IBM to work directly with an end user to implement, inter alia, solutions for business issues.

11 In August 2012, Onstream wrote to IBM to confirm that its response had been short-listed for further consideration.

12 In January 2013, the request for proposal process was stayed. Onstream advised the short-listed candidates that the tender would not progress to the

procurement process at that time due to the proposed amalgamation of the three water and sewerage corporations.

13 On 1 July 2013, TasWater was created when the three former regional Tasmanian water and sewerage corporations, together with Onstream, merged.

14 Prior to the merger, in about late 2012 or early 2013, Ben Lomond Water and Onstream decided to run a pilot program with the Maximo software to see if employees could use it to perform work processes out in the field. Ben Lomond Water and Onstream chose Maximo because staff in both organisations had previous experience with the product when it was used by Launceston Council between about 2000 and 2009. Kalibrate was the company chosen for the pilot program using Maximo.

15 It appears that part of the reason for the pilot program was the different views of the regional CEOs regarding the kind of asset management system to use in their respective businesses. Southern Water was using a software program called Navision for finance and purchasing. Because there was no asset management system to capture field service work, Southern Water was creating a bespoke program within Navision. Ben Lomond Water's approach was to use an off-the-shelf product like Maximo. It seemed that the CEO of Ben Lomond Water hoped that if the pilot program was successful, then the CEO and Board of TasWater could make a more informed decision about the best approach to adopt for the future.

16 Between about March and June 2013, Kalibrate customised the Maximo program to suit the needs of Ben Lomond Water. The pilot checked whether employees could put data on a tablet out in the field and update it. Kalibrate implemented the pilot on five or six tablets. The pilot program was successful.

17 After the creation of TasWater on 1 July 2013, that component of the business which was previously Southern Water sought to pursue its project to develop a bespoke software solution customised for the merged business. The project

commenced by Southern Water continued after TasWater began operation. However, by about 2014, that project was running months behind schedule. Further, the budget for the project had been exceeded and the information technology service provider had not delivered the solution which had been promised.

18 It was in those circumstances that TasWater decided to conduct another pilot of a Maximo solution to be implemented in the southern region of TasWater's business.

19 By email dated 25 July 2014 from Tim Singline of TasWater to Rick van Driel of Kalibrate, TasWater invited Kalibrate to present Maximo to its management team.

20 TasWater invited Kalibrate to put a "proof of concept" proposal forward. This involved Kalibrate providing a proposal for implementing the licences in a limited fashion to a small group of about 50 staff within TasWater.

21 On 1 September 2014 there was a meeting between representatives of Kalibrate and TasWater regarding the proposal that Kalibrate should provide a proof of concept of Maximo software to TasWater. Kalibrate produced a proposal for the proof of concept and TasWater accepted the proposal in late September 2014.

22 At around the same time, Kalibrate applied for, and received, payment from IBM under the VAP-G program for the sale of licences to TasWater in relation to the proof of concept which Kalibrate was about to roll out. This was known as a VAP-G rebate.

23 After the Maximo licence was sold to TasWater and the VAP-G payment was made to Kalibrate, Kalibrate delivered its proof of concept to TasWater between about October and early December 2014. Part of the proof of concept involved integrating Maximo's software with TasWater's existing Navision software and

its geographic imaging system. It was essential that Maximo be able to work smoothly within TasWater's existing software environment.

24 On about 5 December 2014, the proof of concept and Maximo software tailored and implemented by Kalibrate became integrated with the existing TasWater systems and went "live". This proof of concept was significantly larger than the Ben Lomond pilot. As a result of the proof of concept being successfully implemented, on time and within budget, TasWater had about 50 crews of staff operating in the field accessing information in the way which Kalibrate's design had proposed. Under the proof of concept, TasWater staff was aware that there were some limitations on the use which staff could make of the Maximo software in the field in the absence of an internet connection.

25 Subsequently, TasWater acquired a product called Maximo Anywhere, which enabled the use of the Maximo software notwithstanding the absence of an internet connection.

26 Due to the success of the proof of concept, TasWater decided to call for a tender to obtain an off-the-shelf product to be used across TasWater's entire enterprise for field work and asset maintenance management. TasWater decided to no longer pursue the development of a bespoke product.

27 By email on 5 December 2014, Ian Catterall of TasWater emailed Kruger of Kalibrate to thank him for his team's professionalism and competency in meeting the proposed deadline and in improving the proof of concept to deliver a better solution for TasWater.

28 Kruger forwarded a copy of this email to his CEO, Milstein, who in turn sent a copy of the email to Philip Williams ("Williams"), a sales executive at IBM. Milstein said that he concluded his email to Williams with the statement "let's see what we can do this year …" because, at the time, Kruger was continuing to pursue a sale of a full implementation and software licence to TasWater, and

Kalibrate required Williams' involvement to ensure that any licences resold through Kalibrate were sold at a price which would enable the deal to be done.

29 In late 2014 and early 2015, Kalibrate spoke with TasWater about further software licence sales including the extension of some proof of concept licences and possible new licences for the Maximo Anywhere product. These potential sales were put on hold when TasWater commenced its tender process.

30 On 13 March 2015, Williams sent an email to Kalibrate in which he said that he wanted Kalibrate's assistance regarding a letter of offer for a special bid for an extension of licence with TasWater. He said that he wanted this done before April so that it could be deployed before the main tender expected from TasWater was released. The expectation at the time was that TasWater was to issue a tender to seek a full implementation and software purchase for an asset maintenance management system.

31 On 14 March 2015, Milstein responded to say that Kruger and Kalibrate's accounts manager, Fran Dalglish, would handle the special bid request.

32 On about 15 April 2015, TasWater issued a request for tender ("RFT") for the supply, implementation and support of an asset management information system.

33 The TasWater RFT was sent to each of the parties successfully shortlisted for the Onstream request for tender issued in 2012 regarding an asset management information system. This did not include Kalibrate.

34 On about 14 April 2015, Williams registered the TasWater RFT as an opportunity in the IBM global partner portal. The opportunity was allocated opportunity number ZYXOJ2NQF ("the TasWater opportunity").

35 In about April 2015, Milstein had a telephone call from either Williams or his boss, David Small, from the IBM Sales team. The gist of the call was that IBM wanted Kalibrate to partner with them in connection with the forthcoming

TasWater tender because of the relationship which Kalibrate had already established with TasWater. Milstein was hesitant about partnering with IBM's global business solutions team. Kalibrate had never previously worked with GBS because it was IBM's internal implementation team and Kalibrate's prime competitor.

36 On about 22 April 2015, shortly after the phone call, Milstein received an email from Alex Towns of GBS in the following terms:

> *"Hi Michael*
>
> *Following on with your conversations that you've had with Phil around partnering with GBS on the TasWater Asset Management opportunity I'd like to offer our thoughts on how this might be structured:*
>
> - *Kalibrate would sell the software licences*
> - *Kalibrate would have agreed project roles, but the resources provided would need to have been involved to date on the Taswater POC and we would work under a 'one team' approach*
> - *Kalibrate would actively contribute and work on the tender response including written response & tender presentation/demos (at Kalibrate's expense) (sic) Again the resources provided would need to have been involved to date on the Taswater POC.*
> - *We would work as a one joint team*
> - *IBM procurement will work with Kalibrate to agree rates & terms*
> - *IBM GBS would prime the response that would go in on IBM paper but reference the Kalibrate partnership within the Exec Summary*
> - *IBM GBS will project manage and maintain ownership of the project*
>
> *As you are aware the tender & one-on-one briefings are scheduled over this coming Thursday & Friday. We would appreciate continuing this conversation to reach an agreement, so that any key questions already identified by the Kalibrate team can be represented at these briefings.*
>
> *Please let me know when I can schedule a phone call (this afternoon/evening) at your earliest convenience & I can also introduce you to John (our Business Development Exec for this opportunity)? (sic)*
>
> *Best Regards*
>
> *Alex Towns"*

37 At about 10pm on 22 April 2015, Kruger sent Towns an email (copied also to

Williams, Milstein and other Kalibrate personnel) setting out, inter alia, details of what solution Kalibrate delivered for TasWater in December 2014, comments on pricing, the need to integrate the work with TasWater's geographic information system, the need to rebuild the existing integration between Maximo and Navision, and the maturity of TasWater in its dealings with an asset management system. Kruger provided documents prepared by Kalibrate in connection with the proof of concept and also did a first cut of the response to the TasWater RFT where it set out its requirements. Kruger and his team assisted GBS and IBM Sales in preparing the tender response. The extent of the contribution is a matter of dispute.

38 On 25 May 2015 Serge Navarro, Senior Procurement Specialist in IBM Transformation and Operations, emailed Milstein seeking follow up on a quote relating to the tender. Fran Dalglish responded on behalf of Kalibrate.

39 On about 27 May 2015, IBM submitted a response to the TasWater RFT.

40 Between 1 and 5 June 2015, Kruger informed Milstein that the date for presentation to TasWater was arranged without checking Kalibrate's availability and, as a result, it was a day when no one from Kruger's team could attend. Kruger also advised that Towns had refused to provide him with a full copy of the tender response to TasWater.

41 On 5 June 2015 Milstein sent an email to Williams, Small and Navarro in which he said that Kalibrate was unable to commit any longer to the project. He said that the partnering structure had been ignored and GBS had failed to co-operate appropriately with Kalibrate.

42 By email dated 6 June 2015, Towns sought to explain this refusal for sharing the tender response by asserting that GBS did not feel it was appropriate to share its intellectual property until it was clear whether the tender response to TasWater was successful.

43 By email dated 9 June 2015, Towns said that there was a lack of alignment in the expectations of GBS and Kalibrate as to their working relationship. Towns said that because GBS had primary responsibility for the response and carried the delivery risk associated with the project, in effect, Kalibrate was acting as a sub-contractor.

44 On about 17 June 2015, GBS and IBM Sales personnel attended a demonstration day with TasWater. No representative of Kalibrate was able to attend.

45 On about 7 August 2015, Williams sent a letter to TasWater setting out the proposed terms of the software sale. Williams prepared the letter with help from Milstein and sent it on Kalibrate letterhead.

46 TasWater awarded the tender to IBM. GBS performed the implementation work and IBM software arranged the sale of Maximo software licences. Kalibrate earned the usual commission rate on the sale transaction – a sales margin of $272,000 on the software sale of $2.57 million.

**Unusual features**

47 Before examining the issues in the case, I note three aspects of this proceeding which were unusual.

48 First, Kalibrate raised in final submissions a number of matters which were not pleaded. Such conduct is unusual, especially having regard to the number of new allegations or arguments sought to be raised. Generally speaking, a court expects parties to confine themselves to their pleaded case. However, I accept that, on occasion, a trial can evolve in such a way that the parties effect a de facto change in the pleadings and agree expressly or tacitly by their conduct, to contest an issue which is not explicitly pleaded. However, in the present case, the defendant was astute to object to the plaintiff's attempts to change its case. I will say more about this later.

49 Secondly, the plaintiff's approach to aspects of the litigation was confusing where, at different times in the case, the plaintiff would adopt a particular position on an issue and, at another time, adopt an opposing or inconsistent attitude on the same issue. For example, Kalibrate stated that the Operations Guide both was and was not part of the contract between the parties. Also, Kalibrate said that IBM both breached and complied with clause 3(a) of the Attachment.

50 Thirdly, Milstein presented as an experienced and shrewd businessman who not only had useful legal experience but commercial experience. When in April 2015, the TasWater request for tender was distributed to those entities shortlisted for the Onstream tender issued in 2012, IBM was extremely keen to exploit both its relationship with Kalibrate and Kalibrate's success in providing the proof of concept for TasWater. IBM hoped that joining with Kalibrate would increase its chances of winning the tender because Kalibrate had an established and successful relationship with TasWater. If the request for tender could be seen as building upon the good work already performed by Kalibrate, then it made economic and practical sense for TasWater to choose IBM and its smaller partner.

51 The evidence did not disclose why Kalibrate failed to maximise its advantageous position at that time either by varying the normal contractual arrangements which IBM entered into with Business Partners in the position of Kalibrate, or by obtaining an overriding commitment or guarantee that the VAP-G payment would apply in the event that IBM won the tender and TasWater bought software licences to implement the solution provided by IBM.

52 Finally, although this case involved one defendant, there were two distinct parts of IBM involved in the project with TasWater. GBS is an in-house entity which provides business solutions for clients. Also, there is an IBM Sales team which sells software products and licences. As Towns explained it, GBS was primarily involved in implementation work. As part of the solutions which GBS created

to solve particular problems, the clients required software to execute those solutions fully. However, GBS was not in the business of selling software licences. That was the role of the IBM Sales team. In the context of asset management solutions, IBM Sales was dependent upon GBS to the extent that, unless a client adopted a solution produced by GBS, there was no need for the client to purchase any software licence from IBM.

**Issues**

53 The major issues for determination in this case are as follows:

(a) was Kalibrate contractually entitled to the VAP-G payment with respect to the sale of licences of Maximo software to TasWater in September 2015?

(b) by registering the sale of licences to TasWater, did IBM breach its contractual obligations to Kalibrate by preventing Kalibrate from making the valid VAP-G claim?

(c) if Kalibrate is entitled to receive a VAP-G payment in respect of the sale to TasWater in 2015, what is the amount of the rebate?

(d) did IBM engage in misleading and deceptive conduct towards Kalibrate in breach of section 18 of the Australian Consumer Law,[1] and thereby cause Kalibrate any and what loss?

(e) is IBM estopped from resiling from the representation that Kalibrate would be entitled to a VAP-G rebate on the sale of licences of Maximo software to TasWater in September 2015?

(f) is IBM estopped from claiming that Kalibrate was not entitled to a VAP-G payment on the basis that IBM, not Kalibrate, had registered the TasWater opportunity?

---

1 The Australian Consumer Law is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**(a) Was Kalibrate contractually entitled to the VAP-G payment with respect to the sale of licences of Maximo software to TasWater in September 2015?**

54 Kalibrate's primary claim in this case is that it has a contractual entitlement to the VAP-G incentive payment pursuant to the terms of the agreement between itself and IBM.

55 The amended statement of claim says that the agreement was made on about 18 January 2012. The agreement was written and implied. The written element comprised the IBM Partner World Agreement – International Basic General Terms, the Value Advantage Plus Attachment ("the Attachment") and the Guide. The implied component was pleaded to arise from the registration of Kalibrate as an IBM Business Partner on 16 September 2008 and as a VAP-G Business Partner on 18 January 2012. Other than a term regarding the percentage of incentive fee paid to particular classifications of Business Partner, Kalibrate did not plead any specific terms of the agreement or any breach of a specific term.

56 There was no dispute that:

- there was an IBM Partner World Agreement;
- Kalibrate entered into such an agreement;
- Kalibrate became registered as an IBM Business Partner in September 2008;
- there was a VAP-G Attachment document;
- Kalibrate became eligible under the VAP-G Business Partner program in January 2012.

57 The terms of the VAP-G Attachment document were in addition to, or modified, the IBM Partner World Agreement. To the extent of any conflict, the former prevailed over the latter.

58 In general terms, the Attachment provides for IBM to allow a Business Partner such as Kalibrate the benefit of Value Advantage pricing when Kalibrate engages in transactions attracting such pricing. The Attachment refers in various places to the Guide. The latter is a document which sets out "details, processes, procedures and other pertinent information and requirements (…) for the Value Advantage Plus offering options" for which a Business Partner is approved.

59 The Guide is a detailed document and its status in this case is somewhat disputed. IBM insists that the Guide is part of the agreement between itself and Kalibrate. Notwithstanding that Kalibrate pleaded the Guide was part of the written agreement between the parties, counsel for Kalibrate said in his opening that his primary argument was that the Guide was not part of the agreement. Subsequently in the case, and also in final address, counsel accepted that the Guide was part of the agreement between the parties. However, Kalibrate said that the Guide was to be read through the Attachment and the obligations imposed on the parties under the Attachment – the contents of the Attachment gave contractual force to the Guide. Kalibrate argued that the Guide was subsidiary to IBM's obligations in the Attachment. It argued that the Guide explained or provided guidance about how Business Partners submit and pursue rebate claims and how IBM is to treat and review such claims. Ultimately, Kalibrate's main case was that the Attachment was the principal contract document containing the rights and obligations of the parties. Kalibrate's secondary position was that the Guide, if it contained rights and obligations affecting the parties, merely provided guidance and explanation about how IBM would fulfil its obligations under the contract and the offer in the Attachment.

60 There was no dispute between the parties about the general principles of construction to apply. It was accepted that cases such as *Mount Bruce Mining*

*Pty Ltd v Wright Prospecting Pty Ltd*[2] and *Blakely v CGU Insurance Ltd*[3] relevantly summarised the law.

61 Thus, the parties agreed that the documents to be construed in determining Kalibrate's entitlements were the Business Partner Agreement, the Attachment and the Guide.

62 Kalibrate submitted that all the contractual rights enjoyed by, or obligations imposed upon, Kalibrate were found within the Attachment. It argued that the significance of the Guide was twofold. First, it was a means by which IBM could fulfil its obligations under the Attachment to specify which IBM software could be included with Kalibrate's value add as authorised software and which qualified for the Value Advantage Plus pricing from a distributor. Second, it informed Kalibrate about the records it was required to retain in connection with the solution transaction.

63 Kalibrate contended that the documents should be construed as an incentive program whereby IBM encouraged Business Partners like Kalibrate to offer its approved value add with IBM software in order to market and sell both.

64 Kalibrate submitted that the only obligations imposed upon Kalibrate under the Attachment were obligations to provide IBM with access to facilities and records and to retain records in order that IBM could fulfil its obligations and review Kalibrate's satisfaction of the terms of the Attachment.

65 Kalibrate argued that clause 2 of the Attachment required it to comply in particular with the requirements of clause 2(d), (f) and (h). In summary, these clauses required that Kalibrate:

- provide IBM with access to Kalibrate's facilities and records to assist IBM in determining Kalibrate's compliance with the Attachment (clause 2(d));

---

2 (2015) 256 CLR 104 at [46]-[51].

3 [2017] VSCA 378 at [166].

- retain records of each solution transaction as specified by IBM in the Guide (clause 2(f));

- provide its distributor with its solution identification and Value Advantage Plus identification for each order for authorised software included in the applicable solution transaction (clause 2(h)).

66 Kalibrate said that it complied with these obligations.

67 Further, Kalibrate contended that clause 3 of the Attachment imposed obligations on IBM. Firstly, IBM was to specify which software could be included within Kalibrate's value add as authorised software and which software qualified for the Value Advantage Plus pricing. Secondly, Kalibrate was to provide the Value Advantage Plus pricing to Kalibrate's distributor. Kalibrate argued that whether or not Kalibrate satisfied all the various processes and requirements in the Guide, it remained the case that Kalibrate was entitled to receive a VAP-G rebate pursuant to the Attachment when both IBM specified the authorised software to be included as Kalibrate's value add and Kalibrate sold the authorised software incorporating that value add.

68 Kalibrate argued that there was a problem with IBM's construction of the agreement – namely, that the Attachment and Guide should be construed so that Kalibrate had to satisfy the requirements of the Guide before it had a contractual right to a VAP-G rebate payment. The essence of the problem, it was said, lay in the timing. It was Kalibrate's contention that a reasonable businessperson would understand the Attachment as imposing obligations upon IBM to inform Kalibrate about the authorised software which qualified for the VAP-G incentive rebate *before* the transaction took place. Kalibrate complained that the IBM view of the matter was that the Guide imposed requirements that Kalibrate had to satisfy *after* making the relevant sale. This was said to be inconsistent with IBM's obligation in clause 3(a). Also, IBM's construction changed the nature of the VAP-G scheme from an agreement

designed to incentivise a Business Partner in the future to one in which the parties looked backwards in examining a rewards program for sales of software already made.

69 When dealing with the interpretation of the contract between the parties, there are some basic principles to be borne firmly in mind:[4]

(a) Contracts are to be interpreted objectively.[5]

(b) The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. This will require consideration of the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or objects to be secured by the contract.[6]

(c) Appreciation of the commercial purpose or objects is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating.[7]

(d) The words of a contract should be interpreted in their grammatical and ordinary sense in context except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy.[8]

(e) In construing a contract, all parts of it must be given effect where possible and no part of it should be treated as inoperative or surplus.[9]

70 The major documents for present purposes are the Attachment and Guide. In my view, because of the plaintiff's pleaded case and because the Attachment expressly refers to the Guide, the two documents need to be read together and

---

4 See for example, Blakely v CGU Insurance Ltd [2017] VSCA 378 at [166]; Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 at [46]-[51].

5 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46].

6 Ibid at [47].

7 Ibid at [49].

8 K Lewison and D Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co, 1st ed, 2012) at [5.01].

9 Ibid at [7.03].

given effect to as harmoniously as possible.

71 Because the Attachment expressly refers to the Guide and, in my view, the Guide contains provisions of direct relevance to the rebate sought by Kalibrate, the terms of the Guide must be taken into account when examining the contractual arrangements between the parties.

72 Under the terms of the Attachment, the Guide is defined to be the "details, processes, procedures, and other pertinent information and requirements, which IBM provides … for the Value Advantage Plus offering options" for which Kalibrate is approved.

73 The Guide states that its purpose is to provide detailed guidance on the requirements and process steps necessary for Value Advantage Plus Business Partners to qualify to earn an additional discount from their preferred distributor for reselling and fulfilling eligible IBM distributed software to a government end-user. The objective of the Value Advantage Plus for Government Sales rebate is to recognise the Value Advantage Plus Business Partners who provide value beyond reselling and fulfilling sales orders for eligible IBM distributed software to government end-users. The recognition takes the form of an additional discount. The Business Partner must provide sales documentation which demonstrates active engagement by the Business Partner in the sales cycle which resulted in the end-user's decision to acquire the IBM distributed software. The Business Partner must register the sale opportunity and IBM must approve the opportunity as eligible.

74 In implementing the scheme for the payment of additional funds, the Guide contains stipulations regarding the eligible products, eligible opportunities, eligible transactions, and sales documentation.

75 The only eligible products are IBM distributed software products available through IBM. This was not an issue because there was no argument that Maximo software was eligible.

76 With respect to eligible opportunities, the Guide requires that there be a single unique opportunity in the Global Partner Portal approved for each sales order. This aspect of the case created two issues:

(a) was there a single unique opportunity?

(b) who registered the opportunity?

*Was there a single unique opportunity?*

77 Kalibrate argued at least some of the time that by working with TasWater in relation to the Maximo software and performing the proof of concept in 2014, it created and identified the opportunity which it then registered within the applicable IBM portal. Kalibrate contended that it fulfilled the necessary IBM criteria because IBM paid the VAP-G incentive on the proof of concept software sales. To the extent that IBM had accepted and approved that opportunity, Kalibrate submitted that the expansion of the dealings with TasWater to include an industry-wide asset management solution represented no more than an extension of the existing opportunity – it was part of the same continuum. Hence, Kalibrate maintained that it created the opportunity and registered it before Williams did in April 2015.

78 IBM had a different view of the matter and contended that the two dealings between Kalibrate and TasWater were distinct.

79 Given the terms of the Guide, I consider that IBM was entitled to treat the proof of concept and the later industry-wide asset management solution as two different opportunities. I so conclude for several reasons.

80 First, the 2014 proof of concept was for a specific purpose of implementing Maximo licences in a limited fashion to about fifty members of TasWater staff. The 2015 request for tender sought the supply of an asset management solution for the whole organisation and broader functionality through the Maximo Anywhere product.

81 Secondly, the implementation aspects of the proof of concept and the 2015 asset management system were different. It was apparent from the fees TasWater paid for this work that the 2015 solution was much more substantial. Moreover, Alexander Towns of GBS gave evidence, which I accept, that the solution which TasWater ultimately accepted in 2015 contained none of the key components used in the proof of concept. The proof of concept had served its purpose and the design had later developed and evolved due to the use of newer software and discussions between GBS and TasWater regarding the latter's needs and how soon they would be met. Also, the approach to the 2015 solution changed from being the "crawl, walk run" approach initially suggested by Kruger to the "big bang" approach which TasWater adopted during or around the time of the July 2015 workshop.

82 Thirdly, it was accepted that while TasWater had chosen Kalibrate to do the proof of concept, TasWater had not included Kalibrate as one of the parties invited to respond to the request for tender. There was no direct evidence explaining this point. However, it was possibly due to a risk management issue facing TasWater. According to Towns, when he told Ian Catterall at the five day workshop in July 2015 that GBS would proceed to complete the project without Kalibrate, Catterall (who is now dead) allegedly said that while Kalibrate had good people, this was a large implementation project for TasWater and, from a risk perspective, he needed to deal with a party like IBM.

83 Fourthly, the 2014 proof of concept was a limited project and it was completed. IBM had paid Kalibrate all that was due in connection with the work.[10] To that extent, the opportunity was spent.

84 Fifthly, the Guide clearly requires that there be a relationship between a given sales order and an opportunity. Here, the two different sales orders are the work done and service and equipment provided in connection with the 2014

[10] TasWater paid Kalibrate $260,150.00 for implementation services and $159.657.52 (inclusive of GST). Accordingly, IBM approved Kalibrate's VAP-G claim for the proof of concept licence sales and Kalibrate received a combined sales margin and VAP-G rebate of $52,686.67 for the opportunity.

proof of concept, and the asset management solution in 2015. They reflected two separate opportunities. In final address counsel for Kalibrate conceded that IBM registered a new opportunity – that of supplying an asset management system for the whole TasWater business – after Kalibrate registered the proof of concept opportunity the year before. [11]

85 Finally, even Milstein agreed that, by comparison with 2014, the tender for TasWater in 2015 was a "whole new ball game".

*Who registered the opportunity?*

86 On the evidence, Williams clearly registered the opportunity associated with the industry-wide asset management solution in April 2015. At least initially, IBM used this as a basis to refuse payment of the rebate to Kalibrate.

87 I note that the Kalibrate evidence never explained why, notwithstanding Kalibrate's obvious knowledge about the requirements of the VAP-G rebate system and its workings, it did not register the opportunity. For example, no one from Kalibrate gave evidence to the effect that Kalibrate forgot to register the opportunity or that Kalibrate thought it was unnecessary to register the opportunity because the software sales associated with the proof of concept in 2014 were already registered. The issue was shrouded in silence.

88 An eligible transaction is a sales order of IBM distributed software to a government end-user for eligible products that are acquired through IBM Passport Advantage. There was no dispute that the 2015 transaction with TasWater was covered by the Guide. Hence, Kalibrate was required to demonstrate "active selling engagement" with TasWater for the IBM products by providing supporting documentation which showed that its activities contributed to TasWater's decision to buy the IBM solution which included particular software.

---

11 I note too that Kalibrate submitted that what really matters is who identified the opportunity- I assume rather than who registered it. This is not correct and ignores totally the clauses in the Guide.

89 The eligible sales documentation had to clearly show the Business Partner's involvement in the sales cycle and that the partner's actions convinced the end-user customer to acquire the eligible products. To qualify as appropriate sales documentation, the documents had to:

- show that the Business Partner authored the documentation, recommended the eligible products and influenced the end-user to purchase the eligible products;
- include a reference to the eligible product and the quantity or configuration of the product recommended to the end-user;
- provide evidence of at least two 2-way communications between the end-user customer and the Business Partner; and
- support sales activity beyond purely fulfilling orders.

90 Examples of documentation which could not be used to satisfy this criterion included sales orders, contracts and the like which evidenced previous sales and documentation of a relationship with the end-user customer. This description covered the documents relied upon by Kalibrate. They related to the 2014 proof of concept.

91 Kalibrate submitted that it satisfied the terms of the Guide by being actively engaged in the sales cycle that resulted in TasWater's decision to acquire software, whether the opportunity was the broader sale of an asset management system to TasWater (as it submitted), or the narrower sale of licences pursuant to the tender (as IBM submitted). In making this submission, Kalibrate relied on the following:

(a) Kalibrate introduced Maximo into TasWater's system during the proof of concept and demonstrated its capabilities as an asset maintenance management system, its capabilities to be used anywhere, and that it could be implemented within the agreed timeframe and budget.

(b) Kalibrate provided all of its knowledge from the 2014 proof of concept in assisting GBS with the 2015 tender response. It also demonstrated to TasWater how the software in the 2014 proof of concept could be integrated with the software solution ultimately provided in September 2015.

(c) The non-attendance by Kalibrate at demonstrations during the tender process did not reflect a failure to provide input into the process, and in any event was due to a scheduling clash.

(d) IBM relayed Kalibrate's questions and comments to TasWater at the 23 and 24 April 2015 meetings.

(e) IBM sought confirmation that Kalibrate was still involved in the tender response, with Phil Williams of IBM ("Williams") visiting the home of Michael Milstein on 23 July 2015 to discuss the commercial terms for the sale of licences to TasWater.

(f) Williams informed Kalibrate after the meeting in August 2015 that he had represented to TasWater that Kalibrate would be making the sale of licences.

92 IBM submitted, relying principally on the evidence of Alexander Towns, that:

(a) GBS and IBM Sales chose to collaborate with Kalibrate because Kalibrate had been involved in the 2014 proof of concept, and felt that telling a combined IBM-Kalibrate "story" would give a "point of leverage" in their proposal to TasWater.

(b) Neither Towns nor any member of his team read the various documents prepared by Kalibrate during the proof of concept.

(c) Towns described many of the insights or observations arising from the proof of concept as standard, self-evident from the 2015 RFT, or things

that GBS would have done in any event.

(d) Kalibrate's contribution to the tender response and design was minimal, consisting of background insights, some contribution to the tender specification document, some phone calls, three biographies and a reference that was not ultimately used.

(e) Towns estimated that Kalibrate spent at most two days on the above tasks, whereas GBS personnel performed work over many weeks.

(f) The work done by Kalibrate on the proof of concept was not ultimately relevant to the solution GBS proposed to TasWater. This became evident at the workshop in July 2015 which Kalibrate was unable to attend.

(g) The modifications made during the July 2015 workshop caused the value of the software sale to increase from around $980,000 in May 2015 to around $2.57 million in July 2015.

93 IBM submitted therefore that Kalibrate did not influence the tender process to a degree sufficient to claim a VAP-G incentive rebate. While it was hoped the proof of concept would provide an important "head start", as the tender process progressed, in IBM's submission it became clear the proof of concept had served its purpose and would not be included in the GBS solution.

94 IBM further submitted that while Kalibrate had clear evidence of its active engagement in the 2014 proof of concept, no such documentary evidence of its active engagement in the 2015 tender process was produced at trial. The documentation adduced was limited to documents concerning the 2014 proof of concept.

95 In resolving this part of the case, one needs to have regard both to the level of Kalibrate's active engagement in the dealings with TasWater and the documentation evidencing that engagement.

96 In my view, there is no issue that:

(a) Kalibrate's work in preparing and implementing the proof of concept for TasWater in 2014 included:

- presenting the proof of concept to TasWater representatives in September 2014, answering questions about the proof of concept including how Maximo might integrate with other programs used in TasWater's business such as Navision and Esri;
- preparing detailed documents about the proof of concept and its various component parts;
- attending meetings with TasWater between September and December 2014 about the implementation of the proof of concept and its expansion to include preventative maintenance; and
- implementing the proof of concept so that it went live in December 2014.

(b) Kalibrate's proof of concept involved Maximo working with Navision and Esri. Kalibrate said that this work would need to be redone in the tender for the asset management system for the whole business.[12]

(c) After the TasWater request for tender was issued in April 2015, GBS and Kalibrate agreed to work together on the response which IBM proposed to submit.

(d) Kalibrate, through Kruger sent emails to Towns in which he provided his insights into TasWater's business and Kalibrate's key contacts at TasWater. Kruger provided documents which Kalibrate had prepared as part of the proof of concept and also did a "first response" to TasWater's

12 See Kruger's email to Towns dated 22 April 2015 where he advised that the existing integration with Navision would have to be redone.

requirements as set out in its request for tender.

(e) Kalibrate did not physically attend meetings with TasWater between April and August 2015. However, especially at the early meetings, its views were represented.

(f) On about 7 August 2015 Williams of IBM Sales sent a letter to Ian Catterall of TasWater containing the proposed terms of software sale. Williams sent the letter on Kalibrate letterhead after visiting Milstein at his home to discuss the commercial terms.

(g) The solution produced by GBS included aspects of the proof of concept such as the ability to work with the TasWater programs Navision and Esri. Aspects of the design or architecture for the solution looked similar to that developed by Kalibrate on the proof of concept.

97 As noted elsewhere, there were two divisions of IBM involved in the TasWater tender – GBS and the IBM Sales software team. In this transaction, relations between Kalibrate and GBS were strained. This was originally for historical reasons because the two were business competitors. Later, after Kalibrate had provided information, data and documentation to GBS, GBS refused to act in a similarly collaborative manner and would not provide to Kalibrate a copy of the tender response submitted to TasWater. This conduct and the response of GBS to Kalibrate's complaint about it had the practical effect of terminating the relationship between Kalibrate and GBS. Due to the lack of co-operation and consequent ill feeling, Kalibrate had very little contact with GBS after about early June 2015. This behaviour by GBS upset both Kalibrate and the IBM Sales people. The latter were apprehensive that Kalibrate might try to persuade TasWater to allow them to submit an individual response to the TasWater request for tender.

98 I am satisfied by Towns' evidence that the solution which GBS promoted and TasWater ultimately accepted was an IBM solution arrived at by the GBS team

which was experienced in performing such work. The solution was different in scope and magnitude from the 2014 proof of concept undertaken by Kalibrate. While certain elements were common, for example the need to communicate with TasWater's Navision and Esri systems, the architecture involved was different and TasWater listed other significant requirements in its specification for the work which were not included in the proof of concept.

99 By comparison, relations between the IBM Sales personnel and Kalibrate were friendly. This branch of IBM appeared to appreciate the extent to which it was prudent for IBM to exploit the good relationship between Kalibrate and TasWater based upon the success of the proof of concept work.

100 The interaction between IBM Sales and Kalibrate was limited and the evidence disclosed no direct dealings between Kalibrate personnel and TasWater personnel after April 2015 regarding the purchase of software – at least until the software proposal went to TasWater on Kalibrate letterhead (at the insistence and with the consent of IBM Sales). Although there were ongoing communications between Williams and Milstein, especially about commercial issues affecting the offer, Kalibrate had no direct input into the bill of materials drawn up to meet TasWater's requirements. Milstein agreed that he did not comment on the bill of materials because he never saw it.

101 The tender response operated in such a way that GBS had to produce a solution which satisfied the various requirements specified by TasWater. Once the solution was finalised and accepted, then the solution would determine the software licence requirements needed by TasWater to appropriately operate the solution. To that extent, the dealings between GBS and TasWater in creating a satisfactory solution constituted the more critical aspect of the project. If GBS had failed to win the tender and provide a solution, there would have been no software sales.

102 In this context, I accept that:

- Kalibrate made an early contribution to the process by providing background insights, data, documentation, biographical information and a “first cut” response to TasWater’s requirements.

- Kalibrate’s historical connection and relationship with TasWater probably assisted IBM in becoming the successful tenderer.

- The Kalibrate contribution was limited to a few days whereas the GBS personnel worked for many weeks on the project.

- The proof of concept work was not used in the 2015 project. It was overtaken by events and newer software. The magnitude of the changes to the solution ultimately accepted by TasWater are reflected in the value of the software sales which, between about May and July 2015, increased from approximately $980,0000 to $2.57 million.

103 However, especially in circumstances where Kalibrate advised itself and hence, agreed that work had to be redone for the 2015 asset management solution, Kalibrate did not:

(a) Satisfy me that IBM appropriated its work in a way which meant that GBS in effect simply adopted or took the work performed by Kalibrate in connection with its proof of concept.

(b) Satisfy me that the GBS claims to have spent many weeks working on the tender response and considerable time preparing scenarios for the meetings with TasWater and the five day workshop in July were untrue or exaggerated. Kalibrate challenged these factual matters either barely or not at all.

(c) Explain how, if it made a sufficient contribution to the solution, the value of the Maximo software sales increased from about $980,000 in May

2015 to $2.57 million in July 2015. Without proper evidence on the matter, I fail to see the basis for any claim by Kalibrate that it was actively involved in that increase.

(d) Dispute or challenge the notion that the solution finally adopted by the client, TasWater, determined the number and kind of software licences needed to implement the solution.

(e) Explain how it contributed to, or was actively involved in, the final solution accepted by TasWater when, on its own case, it had little contact with GBS after early June 2015.

104 In the circumstances, I am not satisfied that Kalibrate was actively involved in the project in a way which reflected one or more recommendations by Kalibrate to TasWater which convinced TasWater to buy the IBM software required under the solution which it agreed to purchase. Rather, I am satisfied from the evidence that TasWater was agreeable to adopting the solution which GBS put forward. This was directed to the end of securing a suitable asset management solution for TasWater. A means to that end was appropriate Maximo software licences to perform the tasks provided for in that solution.

105 With regard to Kalibrate's argument that its compliance with clause 2 of the Attachment was sufficient basis to warrant the payment of the VAP-G rebate, I disagree. In my opinion, there were requirements in the Guide which Kalibrate had also to satisfy. It did not satisfy them.

106 In the context, there was no significance in the distinction contended for by Kalibrate between a forward-looking incentive and a backward-looking reward. In general terms, I consider that to be a distinction without difference. However, whether or not that is correct, it is irrelevant to the extent that it does not improve Kalibrate's position contractually. It does not enable Kalibrate to meet terms of the contract which it could not otherwise satisfy.

107 In summary, I consider that Kalibrate was not contractually entitled to the VAP-G rebate with respect to the sale of Maximo software to TasWater in September 2015 because:

(a) This represented a second opportunity, different from the 2014 proof of concept and IBM registered it first.

(b) In any event, Kalibrate did not establish that it was actively engaged or involved in TasWater's purchase of the software for the asset management solution produced by GBS. Nor did Kalibrate provide to IBM sufficient relevant documentation in accordance with the Attachment and Guide to make good its claim.

**(b) By registering the sale of licences to TasWater, did IBM breach its contractual obligations to Kalibrate by preventing Kalibrate from making the valid VAP-G claim?**

108 As noted at paragraph 86 above, IBM registered in April 2015 the opportunity associated with the industry-wide asset management solution for TasWater. Kalibrate failed to demonstrate that this action constituted a breach of any pleaded contractual obligation.

109 Kalibrate submitted that IBM breached a number of duties that should be implied into the contract between the parties (as they are implied into all contracts). These claims were not initially pleaded in the statement of claim, but were subsequently incorporated into the amended statement of claim dated 15 February 2018 after they were moved from the reply.

110 The implied duties that IBM were said to have breached were the duty of good faith, the duty to co-operate, and further or alternatively, the duty not to prevent fulfilment of the other party's purpose. I will address each of these claims in turn.

111 Kalibrate's claim regarding the duty of good faith was abandoned in closing submissions when Mr Barry conceded that Victorian law does not imply the term into all contracts. Accordingly, the duty of good faith was not pressed by Kalibrate as anything more than academic argument, and Mr Barry told the court that Kalibrate's written submissions on this point should be ignored.

112 With respect to the duty to co-operate, Kalibrate submitted that the duty required a party to "do all such things as are necessary on his part to enable the other party to have the benefit of the contract".[13] Part of this duty, Kalibrate submitted, was not to prevent the other party from having the benefit of the contract, which appears to be the negative form of the same duty. It was this negative formulation of the duty that Kalibrate submitted should apply especially in this case. Accordingly, the implied duty to co-operate and the duty not to prevent the fulfilment of the other party's purpose, although expressed as alternative claims, appear to be two sides of the same coin.

113 Kalibrate pleaded that IBM breached the implied duty of co-operation (and non-prevention) because:

(a) IBM knew that Kalibrate:

(i) introduced the Maximo Asset Management Software to the predecessor companies of TasWater;

(ii) engaged with TasWater about purchasing the Maximo Asset Management Software; and

(ii) had a good working relationship with TasWater that was critical to TasWater purchasing the Maximo Asset Management Software; and

(b) with that knowledge, IBM registered the TasWater opportunity on or

13 See *Butt v M'Donald* (1896) 7 QLJ 68, endorsed by the High Court in *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at [26].

about 14 April 2015, thereby preventing Kalibrate from making a valid VAP-G claim.

114 Kalibrate claimed in its written submissions that the duty was further breached by IBM by its failure to transfer full recognition to Kalibrate of ownership of the opportunity to sell licences to TasWater pursuant to the terms of the agreement contained in the 22 April 2015 email. I note that this aspect of Kalibrate's argument was not pleaded, as pointed out by IBM at trial. Accordingly, I do not propose to address this aspect of Kalibrate's submissions.

115 Again, while not pleaded, Kalibrate further claimed in closing submissions that the implied duty to co-operate acted to "complete" IBM's obligation under clause 3(a) of the Attachment. The implied duty, in Kalibrate's submission, supplemented "what's missing" from clause 3(a) by requiring IBM not only to tell Kalibrate what software could be included in Kalibrate's value add and would qualify for Value Advantage Plus pricing, but what would not qualify. Counsel for Kalibrate argued that this interpretation of the duty to co-operate only applied in this way if, contrary to Kalibrate's submission, the definition section of the Guide operated in such a way that the prior registration of an opportunity would extinguish any future claim for VAP-G.

116 I consider it unnecessary to address this submission for several reasons. First, this formulation of the alleged breach of implied duty was not pleaded and accordingly, I do not need to examine it. Secondly, even if this claim had been pleaded, I am not convinced that, if there were a breach, the duty was breached in such a way as to have any causal connection to the loss claimed by Kalibrate. Kalibrate did not explain how any of the evidence produced at trial established this new unpleaded breach. Further, it was never disputed at any point by the parties that Maximo qualified for Value Advantage Pricing, as it had done pursuant to the 2014 sales. Accordingly, in my opinion, it was not open to Kalibrate to claim that IBM, in breach of its implied duty, failed to notify Kalibrate of information that had any material impact on its position.

117 IBM submitted that there was no evidence to support the finding that Williams had an ulterior motive for registering the opportunity in April 2015 and thus preventing Kalibrate from so doing. Rather, his action simply coincided with IBM being invited to participate in the 2015 TasWater tender. IBM further submitted that, even if Kalibrate's claims for breach of implied terms could be properly substantiated, Kalibrate could not establish any loss in circumstances where it was ineligible for a VAP-G incentive rebate in any event.

118 Because counsel for Kalibrate ultimately told the court that any line of argument regarding loss that departed from the pleaded case would no longer be pursued, I am left only with Kalibrate's submission regarding the implied duty to co-operate, which is said to have been breached by IBM registering the opportunity when it did, resulting in Kalibrate being prevented from making a valid VAP-G claim.

119 In the circumstances, I reject Kalibrate's claim on this point.

120 First, by registering the opportunity when it did, IBM was simply responding to the tender request sent to it. In reaching this view it is not relevant to consider Williams' motive (whether ulterior or otherwise). Rather, for the reasons outlined at paragraphs 80 to 85 above, IBM was entitled to treat the tender request as an opportunity separate from the earlier proof of concept. I note, in passing, that:

(a) Kalibrate raised no complaint or objection about IBM registering the opportunity per se – rather the complaint related to the circumstances in which it was done; and

(b) Kalibrate raised no complaint or allegation about IBM breaching any fiduciary duty owed to Kalibrate or any obligation as a partner.

121 Secondly, even if there were a breach as Kalibrate alleges, Kalibrate is unable to claim the VAP-G rebate as a loss arising from the alleged breach of implied

duty where, for reasons unrelated to the breach, it was not legally entitled to the only amount claimed as damages.

122 Further, there is an underlying difficulty in this claim by Kalibrate. TasWater issued the RFT and IBM registered the opportunity by 15 April 2015. On 22 April 2015, IBM through Towns sent the proposal to Kalibrate to act as partners on the one team regarding the TasWater RFT. Kalibrate argued that it agreed to this proposal on or after 22 April 2015. Thus, at the time IBM registered the opportunity, the agreement whereby IBM and Kalibrate agreed to work on this project together had not been made. Accordingly, IBM could not breach the implied terms alleged before the agreement was made.

123 In short, IBM did not breach its contractual obligations to Kalibrate by registering in April 2015 the opportunity to sell an asset management solution including licences to TasWater.

**(c) If Kalibrate is entitled to receive a VAP-G payment in respect of the sale to TasWater in 2015, what is the amount of the rebate?**

124 Kalibrate claims a contractual entitlement from IBM to the sum of $514,000 in respect of a VAP-G incentive rebate for the sale of Maximo software licences to TasWater in 2015. The rebate claimed represents 20% of the total sale to TasWater, which amounted to $2,570,000.

125 The percentage to be applied to the total sale figure in order to calculate the VAP-G incentive rebate depends upon the classification of the Business Partner, as pleaded at paragraph 20 of the statement of claim:

> It was a term of the agreement that, effective 1 July 2014, an incentive fee would be paid as follows depending on the classification of the Business Partner:
>
> (a) Industry classification – 10%;
>
> (b) Enterprise select classification – 15%;
>
> (c) Enterprise non-select – 15%; and

(d) Mid market – 20%;

**Particulars**

These figures are set out on the page of IBM's website headed "Incentive Payment updates for VAP and VAP for Government".

126 I note at the outset that the pleadings refer to the classification of the Business Partner, which in this case was Kalibrate. However, both Kalibrate (in its written and oral submissions) and IBM (in its oral submissions) argue to the effect that the classification applies instead to the customer, which in this case was TasWater. At one level whether the classification applies to the Business Partner (as per the pleadings) or the customer (as per the submissions) does not make a significant difference. This is because Kalibrate's claim relies primarily on the fact that it received a VAP-G rebate previously in respect of the 2014 sale to TasWater, in which the Business Partner and the customer were the same as those in the 2015 sale.

127 Nevertheless, there is at least one document that might clarify this point, namely the email from IBM dated 17 September 2014 which was referred to by Fran Dalglish in her affidavit. The email attached a quote for the proposed sale of Maximo licences to TasWater which stated, *inter alia*, "Customer is (GB Mid Market), rebate is 18% of customer price". Accordingly, I am more inclined to find that Kalibrate has simply made an error in its pleadings, and as such, the classification that determines the quantification of the rebate is that of the customer or "end user", rather than the Business Partner.

128 In opening submissions, Kalibrate argued that it should receive a VAP-G rebate in respect of the 2015 sale to TasWater according to the classification that had been applied to its previous VAP-G rebate, namely mid-market. Kalibrate received a rebate in respect of the sale of software to TasWater in September and October 2014, according to which it was classified as mid-market. Accordingly, Kalibrate received a rebate of 18% of the sale price. Because the parties had agreed that the rate applying to mid-market from September 2015

(at the latest) was 20%, Kalibrate claimed that it should therefore be entitled to 20% of the $2.57 million in total sales to TasWater, which equates to $514,000.

129 Kalibrate relied on the 2014 VAP-G rebate payment again in closing submissions. Kalibrate referred to the quote described at paragraph 127 above, which was received by Dalglish and stated that TasWater was a "GB Mid Market" customer, and accordingly, the rebate would be 18% of the sale price. Kalibrate then referred to further documents which established that it received the VAP-G rebate at the quoted rate of 18%. These documents were said to be the "best evidence" of how to calculate VAP-G on the basis of the classification of TasWater and the rates that applied at the time.

130 In its written submissions, Kalibrate further argued that IBM had adduced no evidence to displace the classification of TasWater as mid-market. Accordingly, since IBM admitted in its defence that the rates at paragraph 20 of the statement of claim applied, Kalibrate submitted that it should be entitled to 20% of the total sales of $2.57 million.

131 IBM admitted in its defence (both original and amended) that the figures at paragraph 20 of the statement of claim were correct. I note that therefore, prima facie, if Kalibrate can successfully establish that TasWater was a mid-market customer, IBM would be liable to pay the corresponding rebate percentage, namely 20%. In opening submissions, however, IBM raised two issues it claimed would disentitle Kalibrate to the VAP-G rebate amount it claimed.

132 The first issue was the percentage to be applied to the sale to TasWater. IBM noted that Kalibrate's claim for $514,000 was based on TasWater being classified as mid-market. However, IBM said that the forthcoming evidence of Ms Lisa Anne Hills, VAP-G administrator at IBM, would establish that TasWater was in fact reclassified in the first half of 2015. As a result, the applicable percentage would become 15% rather than 20%.

133 Ms Hills was not called to give evidence and her affidavit was not relied upon

at trial. This was the result of a change of approach by IBM following Kalibrate's decision to amend its statement of claim part way through the trial. Accordingly, no evidence was ultimately adduced regarding any reclassification of TasWater.

134 I am therefore left without any substantive challenge to Kalibrate's claim that, in the event it had a contractual entitlement to a VAP-G rebate with respect to the 2015 sale to TasWater, such rebate should be calculated according to the mid-market rate as was done in 2014.

135 The second issue was the sum on which the VAP-G percentage rebate should be calculated. IBM said that Ms Hills' evidence would establish that the rebate could only be claimed on the 2015 sale of software licences to TasWater for the first year, and not the second and third years (which were described as "licence extensions"). Accordingly, the sales figure upon which a VAP-G rebate could be claimed was not $2.57 million as Kalibrate claimed, but some lesser portion of that total. In the event IBM is correct on this submission, it is necessary firstly to determine the value of Maximo sales for each year.

136 The approximate breakdown of the $2.57 million in total sales was given in evidence by Kruger of Kalibrate as approximately $1.8 million in the first year and $370,000 in subsequent years.

137 It appears from my review of the evidence that an accurate breakdown of the $2.57 million in total sales was provided in attachments to an email from Michael Milstein (of Kalibrate) to Omeed Kroll (of IBM) on 2 June 2016. Those attachments include a series of tax invoices each dated 1 September 2015 for:

- $1,800,000 which includes "YEAR 1" in the Description column;
- $385,000 which includes "YEAR 2" in the Description column; and
- $385,000 which includes "YEAR 3" in the Description column.

The above three invoices add up to $2,570,000. Accordingly, the correct

breakdown of total software sales appears to be $1.8 million in the first year and $385,000 in each of the second and third years.

138 As noted at paragraph 133, Ms Hills did not ultimately give any evidence on this or any other matter. However in closing submissions, IBM relied instead on an email from Sandeep Bakhshi of IBM to Michael Milstein on 23 June 2016. The email relevantly provided:

> *"Further, please understand, as provided in the Program, VAPG payment/s if they are eligible to be made, are only made on the "One time charge" or "perpetual licence" component of an order", not on the total transaction value including Subscription and support. Therefore for this specific transaction the one time charge was $1,440,048 of which Maximo was $1,433,446, Vap G would have of been $238,955.46."*

Accordingly, IBM submitted that, if Kalibrate were entitled to VAP-G in respect of the 2015 sale to TasWater, it would be in the sum of around $239,000.

139 The above email from Mr Bakhshi appears to state IBM's policy regarding which components of a sales order are eligible for the VAP-G rebate. However, it does not do so by reference to any term of the agreement between Kalibrate and IBM, such as the Attachment or the Guide. I note also that this email was sent after the sales order.

140 A review of the definitions section of the Guide reveals the following under "Eligible Products":

> *"The ONLY eligible products are IBM distributed software products that are available through IBM Passport Advantage and are designated as "New License" part numbers, except as noted below. New License part numbers are part numbers in the IBM Distributed Software Price Book with the following Part Type:*
>
> *New License + SW Subscription & Support*
>
> *New Trade Up License + Software Subscription & Support"*

141 As noted at paragraph 75, there was no argument whether Maximo software was eligible. However, if the sales of Maximo were to fall into one of the category "New License (sic) + SW Subscription & Support", then they would appear to be eligible for a VAP-G rebate.

142 The invoices referred to at paragraph 137 appear to describe the sale of software of exactly this kind. The descriptions on each of the three invoices dated 1 September 2015 include the following:

- "IBM MAXIMO ADD-ON AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS";
- "IBM MAXIMO ASSET MANAGEMENT SCHEDULER AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS";
- "IBM MAXIMO HEALTH, SAFETY AND ENVIRONMENT MANAGER AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS";
- "IBM MAXIMO ASSET MANAGEMENT EXPRESS USE AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS";
- "IBM MAXIMO FOR UTILITIES AUTHORISED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS"; and
- "IBM MAXIMO FOR UTILITIES LIMITED USE AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPPORT (sic) 12 MONTHS".

143 Further, a quote prepared in relation to the 2014 sales by Nancy Venticinque from MBS described the software products in similar terms, namely:

- "IBM MAXIMO ASSET MANAGEMENT EXPRESS USE AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPORT 12 MONTHS";
- "IBM MAXIMO ASSET MANAGEMENT SCHEDULER AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPORT 12 MONTHS"; and

- “IBM MAXIMO FOR UTILITIES AUTHORIZED USER LICENSE + SW SUBSCRIPTION & SUPPORT 12 MONTHS”.

144 Kalibrate ultimately received a VAP-G rebate of 18% of the sum of the above software sales in 2014, notwithstanding that they were described as including “subscription and support” components.

145 Therefore, while Bakhshi informed Milstein that the sales in respect of the “subscription and support” elements were not eligible for VAP-G rebate, this appears prima facie to contradict the Guide, as well as the evidence in connection with prior payments of the VAP-G rebate.

146 In the circumstances, if Kalibrate were entitled to the VAP-G rebate in respect of the sale of the asset management solution (including Maximo Software Sales) to TasWater in 2015 (which I do not accept), I consider that the better view is that it should receive 20% of the total price, including subscription and support, namely $514,000.

**(d) Did IBM engage in misleading and deceptive conduct towards Kalibrate in breach of section 18 of the Australian Consumer Law and thereby cause Kalibrate any and what loss?**

147 Kalibrate also claims that IBM engaged in misleading and deceptive conduct which caused it to suffer loss and damage.

148 The claim is pleaded in the following way in the amended statement of claim. Kalibrate contended that the defendant made the VAP-G representation, namely, it represented to Kalibrate that “it would be entitled to an incentive fee in accordance with the terms of the Guide as in force from time to time as that Guide has been applied in practice from time to time”. The representation was particularised as being constituted by the Guide, the registration of Kalibrate as a VAP Business Partner and other IBM documentation concerning the VAP-G initiative.

149 It was said that IBM made the representation in trade or commerce. Kalibrate contended that the representation was misleading and deceptive because IBM refused to pay the incentive fee in accordance with the terms of the Guide. The representation related to the future and so, unless IBM established reasonable grounds for the making of the representation under subsection 4(1) of the Australian Consumer Law, it was deemed to be misleading and deceptive.

150 In its written and oral closing submissions, Kalibrate made a number of observations about this head of claim.

151 Kalibrate contended that in the email from Towns of IBM dated 22 April 2015, IBM represented that Kalibrate would sell the licences to TasWater like it did before. It said that this representation was misleading or deceptive because of IBM's silence in failing to tell Kalibrate that in April 2015 it had registered the opportunity to sell software to TasWater. This was said to be a material fact affecting the terms upon which IBM and Kalibrate were to enter into partnership. Specifically, it directly affected the benefits Kalibrate might expect to receive by agreeing to the terms proposed. Kalibrate said that for this reason, there was a reasonable expectation that IBM would disclose its prior registration of the opportunity. Kalibrate argued that Phil Williams of IBM was the person who registered the opportunity and it was he who should have revealed this fact to Kalibrate. Williams remained silent notwithstanding that he had direct dealings with Kalibrate in 2014 in connection with the proof of concept, he had discussed with both Milstein and Kruger the request for tender which TasWater was expected to issue and had said that he wished to support Kalibrate in connection with that tender. The fact that Williams remained silent about the act of registration after receiving a copy of Towns' email showed that IBM did not have reasonable grounds for making the representation that Kalibrate would sell the licences as they did before.

152 Kalibrate submitted that the failure by IBM to call Williams to give evidence enlivened the rule in *Jones v Dunkel*[14] so that the court should infer that any evidence by Williams on this issue would not have assisted IBM.

153 Kalibrate argued that it relied upon the representations in the 22 April 2015 email and, as a result, it:

- agreed to partner with IBM to respond to the TasWater RFT;
- contributed to the partnership its knowledge, designs and intellectual property created in connection with the proof of concept;
- contributed to the development of the design of the solution which TasWater ultimately accepted; and
- agreed to provide 25 days' free support and the use of its probo software to TasWater.

154 Kalibrate characterised its loss in two ways in its closing written submissions. It said first that it suffered the loss of the promise to pay the VAP-G incentive payment. This was equivalent to the type of loss or damage arising under the contract. Second, it suffered a loss of opportunity to renegotiate the terms of its deal with IBM including the chance to agree that Kalibrate would be entitled to the VAP-G payment and pursuing an alternative opportunity such as the chance to make an unsolicited bid in circumstances where Kalibrate was not one of the parties to whom TasWater sent the request for tender. In its oral closing submissions, Kalibrate seemed to place greater emphasis on its loss of opportunity claim and referred to the decision of the High Court in *Sellars v Adelaide Petroleum NL*.[15]

155 Kalibrate claimed damages under section 236 of the Australian Consumer Law to compensate for the loss of the VAP-G incentive rebate. The quantum was

14 (1959) 101 CLR 298.
15 (1994) 179 CLR 332.

said to be $514,000, being 20% of the value of the contract between TasWater and IBM for the sale of the software licences, namely $2.57 million.

156 In my view, the misleading and deceptive conduct claim should fail for several reasons.

157 First, the representation relied upon in the submissions is different from the representation pleaded in the amended statement of claim. As noted, the defendant objected to various aspects of Kalibrate's final submissions where the arguments departed from the case which Kalibrate pleaded and which IBM came to meet.

158 The pleaded representation clearly arises from one of the major contractual documents relied upon by Kalibrate. By comparison, the representation relied upon in this part of its case is focused on a specific email from IBM dated 22 April 2015 and silence from IBM in failing to notify or advise Kalibrate that IBM had registered the opportunity to supply an enterprise wide asset maintenance system to TasWater. There was no reference in this part of the pleading to either the specific email or the notion of misleading and deceptive conduct arising from silence. Silence is assessed as a circumstance like any other. The question is whether, having regard to all the relevant circumstances, there has been conduct which is misleading or deceptive or likely to mislead or deceive. The context may or may not include facts giving rise to a reasonable expectation that in the particular context, if certain matters exist, they will be revealed or disclosed.[16] No such circumstances or context were pleaded in this case.

159 Secondly, even if Kalibrate had pleaded the 22 April 2015 email, I do not accept its characterisation of the representation. The terms of the email are set out in paragraph 36 above.

160 The thrust of Kalibrate's argument was that this email should be read as meaning Kalibrate would sell the licences to TasWater as it did before and

16 See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.

thereby qualify for VAP-G. Hence, because Kalibrate was engaged in the sale of the software licences under the solution which TasWater purchased as part of its asset management system, it claimed that the representation was misleading because, despite the sale of the licences, Kalibrate did not get the VAP-G incentive payment.

161 In my view, there is no proper or sufficient basis to read the email in this way or to accept that it amounts to a representation in the terms alleged.

162 Kalibrate read the 22 April 2015 email as if it said that Kalibrate could sell software to TasWater again as it had done in 2014 and would be entitled to a VAP-G rebate on that sale. It was as if Kalibrate had an entitlement to the rebate whether or not it met the requirements in the VAP-G Attachment document and Guide. To the extent that Kalibrate needed the implicit additional reference to the VAP-G entitlement, it read too much into the terms of the email.

163 The email suggests major features of a possible structure by which the GBS section of IBM might partner with Kalibrate in relation to the asset management opportunity provided by TasWater. The email makes clear that, under the proposal, Kalibrate would both sell the software licences and have project roles – that is, be engaged in implementation work, provided that those involved were people who worked on the TasWater proof of concept. While Kalibrate personnel and GBS would work as one team, GBS would be the project manager, own the project and have the main role in drafting a response to the TasWater tender. The context of the email was such that a reasonable person would not construe the words as yielding a meaning whereby Kalibrate could properly contend it would sell the licences to TasWater as before and necessarily be eligible for the VAP-G rebate payment.

164 Both Milstein and Kruger agreed that there was no discussion of the VAP-G payment issue until September 2015. Milstein said he assumed at all times that Kalibrate's entitlement to the rebate would be determined by IBM's processes.

165 Because Towns was a person with an implementation focus rather than a software sales focus, I accept that in April 2015 he was not familiar with the details of the licence sale which Kalibrate made to TasWater in 2014.

166 Thirdly, even if Kalibrate established the misrepresentation alleged in its written submissions, and that it was misleading or deceptive, I am not satisfied that it is entitled to the only monetary relief which it claimed.

167 Michael Milstein is and has been since 2008 the founder and CEO of Kalibrate. He has degrees in commerce and law. He began work in 1976 with Pavey's Lawyers before establishing his own firm in 1981. He worked in this firm until 1986, at which time he moved to Italy and worked in businesses that manufactured, imported and exported clothing and equipment.

168 Milstein founded Kalibrate to pursue opportunities to sell and implement Maximo solutions to customers requiring an appropriate tool for asset maintenance management. As CEO, he was responsible for the following: employing and supervising staff; interacting with customers and suppliers in the course of Kalibrate's business; setting the commercial and strategic direction of the company; managing the financial performance of the company; identifying and responding to changes and trends in the demands of customers, the products and solutions available on the market and the actions of competitors. He employed in the business two kinds of consultants. The first group had a functional role. They worked with customers to determine their needs for a Maximo solution and then designed a solution to meet customers' requirements. The technical consultants were to work with the functional consultants to build and implement the Maximo solution for the customer. Milstein had no training or experience in computer software and did not deal with the functional or technical implementation of Maximo software.

169 During Milstein's evidence-in-chief, Kalibrate's counsel, Mr Barry, sought to supplement the witness statement produced for Milstein which was meant to

stand as his evidence. As a result of comments made earlier in the trial by the defendant's counsel, Mr Barry seemed to appreciate that evidence of Kalibrate's detrimental reliance upon IBM's conduct was needed and, arguably, there was a gap in Kalibrate's evidence. In granting leave to lead additional evidence from Milstein, I did so on the basis that IBM was at liberty to make submissions about the circumstances in which the evidence was given and the weight I should attach to it.

170 When Milstein was asked what he would have done if IBM had told him that Kalibrate would not be entitled to a VAP-G payment on the sale of the software licences to TasWater, he said that he would not have proceeded with any arrangement with IBM. In cross-examination, Milstein confirmed that he would not have proceeded with any arrangement with IBM. But he also said that, had he known about the non-payment of the incentive, he would have had the chance to look at his options and decide what he intended to do with the entire transaction. Thus, the gist of Milstein's evidence was that while he would not have proceeded with any arrangement with IBM, he did not know precisely what he would have done – he would have considered his options. However, there was no evidence about precisely what these options were, how likely each option was or what the financial consequences of each option might have been.

171 This evidence was important due to its consequences for the plaintiff's damages claim. If it is accepted, it provides some evidence about the loss which Kalibrate claims. If it is not accepted, then there is little or no evidence relevant to this aspect of the case. Cases such as *Gates v City Mutual Life Assurance Society Ltd*[17] and *Marks v GIO Australia Holdings Ltd*[18] show that the measure of damages in misleading and deceptive conduct cases is usually akin to the tortious measure of damages rather than contractual. Where the damages awarded are more contractual in nature, it is normally dependent upon the

17 (1986) 160 CLR 1.
18 (1998) 196 CLR 494.

evidence in the particular case.

172 In *Gates* the plaintiff applied to CML for the addition of a total disability clause to his existing superannuation policy and for the inclusion of such a clause in a life insurance policy. CML's agent assured the plaintiff that the clause had the effect that, if he suffered illness or injury resulting in his continuous inability to attend to his occupation for 90 days, the policy benefits would become payable. In fact, the policy entitled the plaintiff to benefits only if he became incapable of attending to any gainful occupation. Gates subsequently sustained injury which resulted in his incapacity to carry on his business as a builder.

173 When CML refused to pay him the disability benefit he was expecting, he sued for damages for breach of contract and for contravention of section 52 and 53(g) of the *Trade Practices Act 1974* (Cth) ("the TPA"). The trial judge awarded him damages for breach of contract but held he was not entitled to any damages in respect of the breach to the TPA.

174 On appeal to the Full Court, it said that the representations made were not contractual in nature, and the damages awarded for breach of contract could not be sustained. The court said that the trial judge was correct to refuse damages under the TPA. The appeal to the High Court was dismissed.

175 The High Court observed that it was open to Gates to establish that, but for his reliance on the representation by the CML agent, he could and would have entered into policies of insurance containing a disability clause of the kind represented to him. In that case, he might have succeeded in obtaining an award of damages equal to the benefits which would have been payable under such policies (less the premiums paid or payable in respect of them). However, there was no evidence that:

- Gates would have been minded to obtain insurance of this type had it not been for the agent provoking his interest in it;

- had Gates known that CML did not offer disability insurance on the terms represented by the agent, he would have sought cover from a different insurer;

- such cover was available from another insurer on the terms represented or similar terms;

Thus, the court found there was no causal connection between CML's contravening conduct and the loss claimed.

176 The court also commented in relation to the damages recoverable under the TPA that:[19]

> *"..there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all Part V, cases especially those involving misleading or deceptive conduct and the making of false statements. Such conduct is similar both in character and effect to tortious conduct, particularly fraudulent misrepresentation and negligent misstatement."*

This proposition has been accepted in subsequent cases.[20]

177 In *Marks,* the appellant borrowers entered into loan facilities with a public company financier, GIO, in reliance upon written representations that interest would be at a specified base rate plus a margin fixed at 1.25% per annum. The borrowers drew down funds on the facilities. Contrary to the representations, the loan contracts enabled GIO to vary the margin upon giving 90 days' notice. The lender subsequently notified the borrowers that, from a date more than 90 days later, the margin would change to 2.25% per annum. The lender also gave the borrowers the opportunity to refinance without penalty before that date. No borrower chose to do so.

---

19 (1986) 160 CLR 1,14.

20 See for example: *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [1] per Basten JA and Gleeson JA, at [9] per Adamson J; *Protec Pacific Pty Ltd v Steuler Services GmBH & Co KG* [2014] VSCA 338 at [540], [546], [547], [729] per Tate, Santamaria and Kyrou JJA; *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 at [152] per Giles JA; *Shahid v Australiasian College of Dermatologists* [2008] FCAFC 72 at [224] per Jessup J*; King v Yurisich* (2006) 153 FCR 78 at [56] per Sundberg, Winberg and Rares JJ; *Havyn Pty Ltd v Webster* [2005] NSWCA 182 at [117] per Santow JA,; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [11] per Gaudron J, at [39] per McHugh, Hayne and Callinan JJ, at [63], [90], [96], [135], [161] per Gummow J.

178 The borrowers brought proceedings alleging misrepresentation and misleading conduct under section 52 of the TPA. At trial, no borrower said that if the true terms had been known, he or she would have chosen not to borrow at all or would have entered into alternative arrangements. The borrowers conceded that, even with the increased margin, the facility was more beneficial to them than any other facility available. The trial judge found that GIO had engaged in misleading and deceptive conduct and awarded damages under section 82 of the TPA. GIO successfully appealed to the Full Federal Court. That court considered that the decision in Gates precluded the recovery of damages for expectation loss and dismissed the appeal. The borrowers' appeal to the High Court was likewise dismissed.

179 The joint judgment of McHugh, Hayne and Callinan JJ in the High Court said that the bare fact the contract had been made which conferred rights or imposed obligations which were different from that which one party represented to be the case did not demonstrate that the misled party suffered loss and damage.[21] A party that is misled suffers no prejudice or disadvantage unless it is shown that the party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted.[22] Thus, the misled party will have suffered loss if a chose in action which was acquired was worth less than the amount paid for it. There may be other ways in which it might suffer loss or damage, for example, consequential loss may be suffered. But no loss of that kind was alleged.

180 In this case, I am not persuaded that I should accept Milstein's evidence on this issue. It is well established on the authorities that a plaintiff seeking damages for misleading and deceptive conduct has to show the detriment suffered as a result of that conduct. Often it involves acting in reliance upon a misrepresentation. Notwithstanding this, the witness statement prepared for, and adopted by, Milstein as his evidence-in-chief did not include evidence on

21 (1998) 196 CLR 494 at [47].
22 (1998) 196 CLR 494 at [48].

this basic issue. So it was that Kalibrate's counsel made special application during the trial to adduce further evidence from Milstein. Kalibrate did not seek to explain why the matter was not dealt with in the witness statement and how it came to be addressed so late in the carriage of the proceeding. As I indicated when dealing with the application by Kalibrate to adduce the evidence, I disallowed the objection by IBM and allowed Mr Barry to lead the evidence with misgivings. Although I permitted Milstein to give the extra evidence, I give it little weight because:

- the evidence was not included in the witness statement when it was significant and ought to have been included;
- Kalibrate did not explain why the evidence had not been included in the witness statement and why it was sought to be introduced only when it was. In these circumstances, the court does not know whether the omission was due to oversight, or the result of a deliberate decision;
- the evidence was self-serving;
- the evidence was not particularly credible.

181 My comment as to credibility of the evidence arises from my view that, as things are, Kalibrate obtained a payment of $272,000 from the transaction with TasWater. While it is possible that Kalibrate might have sought to renegotiate the terms of the arrangement with GBS and/or TasWater, I consider it unlikely that Kalibrate would have decided to play no further role with IBM in the transaction and thereby receive nothing.

182 Even if I did accept Milstein's evidence, Kalibrate's position on the issue of damages would not materially improve. In short, this is because Kalibrate has not satisfied me that it suffered loss and damage as a result of the misleading conduct complained of.

183 In *Protec Pacific Pty Ltd v Steuler Services GmBH & Co KG*,[23] the Victorian Court of Appeal summarised the relevant principles governing issues of damage under section 82 of the TPA as follows:[24]

> *There are several relevant principles governing the issues of causation and loss under s 82 of the TPA that are important to keep in mind:*
>
> *(1) A plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage it has suffered in consequence of its altering its position under the inducement of the misrepresentations made by the defendant;*
>
> *(2) Under s 82(1) of the TPA, as under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage;*
>
> *(3) In determining whether a plaintiff has suffered loss or damage under s 82(1), it is usually necessary to compare the position that the plaintiff is in having been misled, with the position it would have been in but for the misrepresentation; by undertaking this comparison a court can determine whether the plaintiff is worse off as a result of relying upon the misrepresentation made by a defendant;*
>
> *(4) Section 82 requires identification of a causal link between loss or damage and conduct done in contravention of the Act; the question of causation is relative to the purpose of s 82, applied to the circumstances of a particular case;*
>
> *(5) Determining the question of causation will often involve considering how much worse off the plaintiff is as a result of entering into the transaction which the representation induced it to enter than it would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from its reliance on the representation, at least if the loss is foreseeable;*
>
> *(6) Analysing the question of causation only by reference to what is, in essence, a "but for" test has been found wanting in other contexts and it should not be treated as an exclusive test of causation under s 82 of the TPA either; especially where there is more than one cause of the loss;*
>
> *(7) It is relevant to ask what the plaintiff would have done had it not relied on the representation;*
>
> *(8) As the judge recognised here, there are cases where if the contravening conduct had not occurred which misled the plaintiff, the plaintiff would not have embarked upon the project or transaction at all615 (the "no transaction cases"), and there are cases where if the plaintiff had not been misled it would still have embarked upon the project or transaction, but would have done so by entering into an alternative arrangement with the same party or a different party ("alternative transaction cases"); (references omitted)*

---

23 [2014] VSCA 338.

24 [2014] VSCA 338 at [540].

(9) A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted;

(10) A court should not engage in speculation about multiple possibilities of past hypotheticals to which no specific evidence was directed;

(11) Once the causal connection is established, there is nothing in s 82 of the TPA which suggests that the amount that may be recovered under that section should be limited by drawing some analogy with the law of contract, tort or equitable remedies;

(12) If the defendant's breach has "materially contributed" to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage;

(13) In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional.

184 The situation in the present case is similar to that faced by BHP in the *Steuler case*. There, BHP sued Steuler alleging that, as a result of representations made by Steuler about the suitability and performance characteristics of its high density polyethylene product ("HDPE"), BHP bought and installed the Steuler HDPE as the liner in solvent extraction tanks at its Olympic Dam mine. The lining failed and BHP had to replace it.

185 At trial, BHP argued that, had it been aware of the problem with the Steuler HDPE before it bought the product, it was impossible to determine what it would have done regarding the purchase of the tank lining. Steuler relied upon this statement to argue that, because BHP could not prove what it would have done if not misled, it was unable to demonstrate that it was worse off as a result of its reliance upon the misrepresentation. The court accepted the submission by BHP that the trial judge should not have concluded that BHP could not prove that it had suffered any loss because it could not prove precisely which of two alternative transactions it might have entered into but for Steuler's contravening conduct. However, the court found that BHP was unable to prove any loss, not

because it failed to prove precisely what it would have done but for Steuler's misleading and deceptive conduct, but because it could not prove that it would have been worse off from having relied upon the misrepresentation alleged. Without proof of loss, the court could not find that BHP had suffered prejudice or disadvantage even though it had been misled. In those circumstances, the Court of Appeal upheld the decision of the trial judge that BHP was not entitled to any damages.

186 Here, Kalibrate has not adduced any sufficient evidence about what it would have done had it not been misled. While Milstein said he would not have entered into an agreement with IBM, he was not clear on what he would have done. In the circumstances Kalibrate did not prove that it had suffered loss as a result of the allegedly misleading and deceptive conduct by IBM.

187 In summary, I consider that IBM did not engage in misleading and deceptive conduct as alleged by Kalibrate. Further, if it did, Kalibrate did not establish any loss and damage.

**(e) Is IBM estopped from resiling from the representation that Kalibrate would be entitled to a VAP-G rebate on the sale of licences of Maximo software to TasWater in September 2015?**

188 Kalibrate made two claims in promissory estoppel.

189 The first claim related to a representation that Kalibrate was entitled to the VAP-G rebate if it sold the Maximo software licences to TasWater in late 2015.

190 The second claim concerned IBM's alleged waiver of its right to rely upon its earlier registration of the TasWater opportunity on the Global Business Partners Portal as a means for avoiding payment of the VAP-G rebate to Kalibrate ("estoppel by waiver").

191 The first estoppel is taken to be a promissory estoppel because:

- its form in the original and amended statement of claim suggested that it covered the main elements of the doctrine;

- the plaintiff's counsel took no issue with this description which the defendant used in its written and oral submissions;

- the plaintiff seemed to adopt this characterisation of the claim itself.

192 Counsel for Kalibrate described the second claim in his opening and closing submissions as a claim in promissory estoppel.

193 In general, the elements of estoppel exist when a promise, representation or conduct of A leads B to assume that either A will follow a certain course of action, or that certain facts are established, or that a certain legal relationship exists (or will exist), and B acts on that assumption in some material way. That is, B relies on the promise, representation or conduct to its detriment so that it would be unconscionable for A to go back on the promise or representation or to undermine the assumption generated by its conduct. [25]

194 There are three major elements required to establish a promissory estoppel:

(a) The representation relied upon must be clear and capable of misleading a reasonable person in the way that the person relying on the estoppel claims they have been misled. [26] If there is a doubt or ambiguity about the representation, it is less likely the estoppel doctrine can apply.

(b) There must be detrimental reliance upon the promise or representation – that is, as a result of relying on the representation as the basis of action or inaction, the other party will have placed himself or herself in a position of material disadvantage if the party who made the representation were

---

25 N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot Law of Contract* (Lexis Nexis Butterworths, 10th ed, 2012) at [2.2].

26 *Legione v Hateley* (1983) 152 CLR 406, 435; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* (2016) 333 ALR 384 at [35] per French CJ, Kiefel and Bell JJ.

allowed to depart from the position originally taken.[27]

(c) It would be unconscionable in the circumstances to permit the promisor to resile from the representation initially made (and relied upon by the promisee).[28]

*VAP-G Representation estoppel*

195 The plaintiff's claim changed as the trial progressed. Initially, the plaintiff claimed that the doctrine of promissory estoppel should prevent IBM from departing from the VAP-G Representation. This was said in paragraph 25 of the amended statement of claim to be constituted by the Guide, the registration of Kalibrate as a VAP Business Partner, and other IBM documentation concerning the VAP-G initiative.

196 However, by the time of final submissions, the representation which Kalibrate relied upon was Towns' statement in the 22 April 2015 email to Milstein, where he said that "Kalibrate will sell the licences". Kalibrate contended that this was a representation that Kalibrate would sell the licences to TasWater and receive a VAP-G rebate as it had done before in respect of the 2014 proof of concept.

*The representation*

197 Kalibrate submitted that a reasonable person in its position would have understood the representation that "Kalibrate will sell the software licences" to be a representation that it would sell the licences like it had previously, that is, where it had received VAP-G rebates on its last sale to TasWater following the proof of concept. The supporting evidence which Kalibrate relied upon included: that:

(a) Kalibrate received the VAP-G rebate for the successful proof of concept

---

27 *Legione v Hateley* (1983) 152 CLR 406, 437 per Mason and Deane JJ.

28 *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 per Priestley JA with whom Hope and McHugh JJA agreed, quoted in *Austotel Pty Ltd v Franklins Self-Serve Pty Ltd* (1989) 16 NSWLR 582, 603 per Priestley JA with whom Kirby P agreed.

with TasWater in 2014;

(b) after the 2014 sale to TasWater and prior to IBM making the representation, Kalibrate had been in discussions with IBM's software sales group about collaborating to respond to the TasWater RFT and to sell software licences to TasWater;

(c) the IBM software sales team made further representations from 22 April 2015 onwards, again repeating that Kalibrate would sell the licences, in order to encourage Kalibrate's continued involvement in the project.

198 IBM answered the originally pleaded claim and proceeded on the assumption that Kalibrate was relying on a combination of the following as creating the VAP-G representation:

(a) contractual documents;

(b) IBM's payment of VAP-G with respect to the 2014 proof of concept software sale;

(c) discussions between the parties in early 2015 regarding further sales of Maximo software to TasWater;

(d) Towns' 22 April 2015 email, in which he stated "Kalibrate will sell the software licences".

199 On this basis, IBM submitted that there was no evidence to support the claimed VAP-G representation.

200 The defendant submitted that the representation was not sufficiently certain or clear to found an estoppel, and that it did not meet the requirements that the majority in *Crown* focused on – that the words were capable of misleading a reasonable person.[29]

---

29 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* (2016) 333 ALR 384 at [35] per French CJ, Kiefel and Bell JJ.

201 First, the 22 April 2015 email was silent on the issue of the VAP-G rebate. There was nothing in the surrounding circumstances which would lead a reasonable person to infer that the statement "Kalibrate would sell the software licences" meant that Kalibrate would sell the licences to TasWater and thereby necessarily become entitled to a VAP-G rebate on the sale.

202 Secondly, during cross-examination Towns said that, at the time he sent the 22 April 2015 email, he had no knowledge of the sale of licences to TasWater which formed part of 2014 proof of concept.

203 Thirdly, both Milstein and Kruger agreed they had not discussed the VAP-G rebate entitlement with IBM at any stage prior to the September 2015 software sale to TasWater.

204 Fourthly, Milstein's evidence was that, at all times, he assumed Kalibrate's entitlement to the VAP-G rebate would be determined by "IBM's processes".

205 In my view the representation was not sufficiently clear or unambiguous to constitute the basis of a promissory estoppel. The email has to be construed in its context.

206 Towns of GBS wrote the email to Milstein in circumstances where TasWater had just sent its RFT to the six parties shortlisted for the Onstream proposal in 2012 before that project was stayed. Through the discussions between Williams and Milstein in late 2014 and early 2015, both parties had recognised that TasWater might pursue an asset management solution for its whole business given the successful proof of concept with Maximo in December 2014. IBM, through Small or Williams,[30] indicated an interest in joining forces with Kalibrate to respond to the TasWater RFT. Within IBM, GBS and Towns in particular were responsible for the tender response. So, although GBS and Kalibrate normally competed for work against each other, on this occasion, in order to improve the chances of winning the tender, GBS proposed a basis

30 In evidence, Milstein explained that he was unsure if the communication was with Small or Williams.

upon which GBS and Kalibrate might work together as a single team. The 22 April email proposed a structure in general terms – GBS had the lead responsibility for the project but would refer to Kalibrate in the documentation; Kalibrate would sell the software licences and would also have some specific roles in the implementation work; Kalibrate would work on the tender response using staff who were involved in the proof of concept.

207 I consider that the gist of the 22 April email was to delineate at a general level the roles and responsibilities for the TasWater project and invite a response from Kalibrate. This was a significantly different situation from the proof of concept in 2014 where Kalibrate was working on an opportunity by itself and not jointly with a major competitor. Thus, as noted elsewhere in this judgment, read in this context, I find that the words relied upon by Kalibrate from the email are not sufficiently clear to constitute a representation for the purposes of promissory estoppel. A reasonable person would not fairly construe the words in the manner contended for by Kalibrate. Kalibrate selling Maximo licences to TasWater could not necessarily of itself entitle it to the VAP-G incentive.

*Detrimental reliance*

208 In its pleadings, Kalibrate particularised its detrimental reliance as constituting various examples of conduct which occurred before the representation. The only conduct pleaded which occurred after the representation was made was the September 2015 licence sale to TasWater.

209 At trial, Kalibrate largely ignored its pleaded claim on this point and submitted that the evidence showed that it had relied on the representation to its detriment in that it:

(a) agreed to partner with IBM to respond to the TasWater RFT;

(b) contributed its knowledge, designs and intellectual property created during the proof of concept to the partnership;

(c) contributed to the design of what became the solution that TasWater accepted in the tender process;

(d) agreed to provide 25 free days of support and the use of Kalibrate's probo software to TasWater in the 7 August 2015 letter

(e) through Milstein, had given evidence that, had it known or been told it would not be entitled to the VAP-G rebate in relation to the tender, Kalibrate would not have accepted the 22 April 2015 offer and it would have considered its options.

210 Kalibrate further submitted it suffered detrimental reliance as follows:

(a) it continued with (a) – (d) in paragraph 209 above, and did not pursue other potential options Kalibrate had at its disposal, including an unsolicited bid; and

(b) it did not seek to substantively renegotiate the terms put forward by Towns in the email of 22 April 2015 to improve its position. Such improvement might have included agreeing up front that Kalibrate would be entitled to a VAP-G incentive payment or obtaining a larger share of the total amounts received of more than $5 million for the tender.

211 The defendant submitted that Kalibrate had failed to establish detrimental reliance on the alleged VAP-G representation.

212 First, the September 2015 licence sale resulted in a $272,000 profit for Kalibrate.

213 Secondly, if the alternative basis for detriment were accepted, there was no convincing evidence concerning the alternative options that would have been available to Kalibrate, had it known the position concerning the VAP-G rebate. IBM also submitted that Milstein's evidence about other opportunities and considering his options should not be accepted – both because of the

circumstances in which the evidence was given, but also because it was implausible.

214 I note that Milstein's evidence concerning the alternatives that would have been available to him changed between evidence-in-chief and cross-examination. As I have outlined previously at paragraph 170, in evidence-in-chief Milstein said that he would not have proceeded with any arrangement with IBM. However, in cross-examination he said that he would have had the chance to look at his options, and decide what he intended to do with the entire transaction.

215 Further, Milstein's actual reliance on the alleged representation was undermined by his evidence that he assumed that Kalibrate's entitlement to a rebate on the sale would be determined by IBM's processes.

216 Even if I found there was a representation for the purposes of a promissory estoppel, I am not satisfied there was detrimental reliance. There was no specific evidence about what Kalibrate would have done but for its alleged reliance upon the representation. As referred to in the misrepresentation section of this judgment, I do not accept Milstein's evidence on the issue of what Kalibrate would have done had it known that Kalibrate would not receive the VAP-G payment on the sale of software licences to TasWater.

217 But even if I did accept Milstein's evidence about not proceeding with any arrangement with IBM or considering Kalibrate's options, the situation does not materially improve for the plaintiff. There is no evidence about potential options. There is no evidence about Kalibrate seeking to submit an individual tender response to TasWater or how TasWater might have responded to such an initiative. If Kalibrate had not proceeded with any arrangement with IBM on this project, it would have forgone the payment of $272,000. Viewed in this way, acting in reliance upon the alleged representation appears to have been of greater financial benefit to Kalibrate than not being involved in the transaction at all.

*Unconscionability*

218 Finally, Kalibrate submitted that it would be unconscionable to allow IBM to resile from the representation in circumstances where IBM wrote to Kalibrate on 22 April 2015 requesting Kalibrate contribute information and data in return for the sale of licence (and involvement in implementation work), IBM obtained the benefit of Kalibrate's work, but did not inform Kalibrate that IBM had registered the opportunity.

219 In circumstances where IBM submitted that Kalibrate established neither the representation nor detrimental reliance, IBM did not deal specifically with the unconscionability point.

220 I find that IBM's conduct in relation to an alleged promissory estoppel was not unconscionable. Apart from the representation in the 22 April email not bearing the meaning which Kalibrate contended for and the absence of detrimental reliance, if the words in the email did constitute a representation, it was true in any event. It was Kalibrate's role in the transaction with TasWater to sell the software licences and it did so. It is unrealistic for Kalibrate to argue that simply by selling the software licences to TasWater in 2015, it thereby became entitled to the VAP-G rebate. Such reasoning ignores the Attachment and the Guide.

**(f) Is IBM estopped from claiming that Kalibrate was not entitled to a VAP-G payment on the basis that IBM, not Kalibrate, had registered the TasWater opportunity**

221 At the outset of this trial, I asked Kalibrate's counsel to indicate what it meant in its claim pleaded as an estoppel by waiver. The plaintiff explained that it was relying on a claim of promissory estoppel, which involved an act of waiver on the part of IBM.

222 Kalibrate submitted that the High Court in *Agricultural and Rural Finance Pty*

*Ltd v Gardiner*[31] held that Australian law does not recognise a distinct legal doctrine of waiver. Rather, waiver is a shorthand description the result of the doctrines of election, estoppel, variation by contract and release.

*Departure from the pleadings*

223 As was the case with Kalibrate's other claim in promissory estoppel, it departed from its pleadings in respect of its claim of estoppel by waiver. In particular, Kalibrate changed its position with respect to:

(a) what constituted the representation that was said to give rise to the estoppel;

(b) what actions constituted reliance by Kalibrate on the representation; and

(c) how the reliance was detrimental.

224 The pleaded claim was that IBM represented to Kalibrate that it would not prevent Kalibrate from claiming entitlement to a VAP-G incentive fee, on the basis that IBM, not Kalibrate, had first registered the TasWater opportunity. The particulars stated that the representation was constituted by: [32]

(a) an email of 21 August 2015 from Odb_systemid to Fran Dalglish of Kalibrate assigning the opportunity to Kalibrate;

(b) an email of 13 May 2016 from Brigitte Acke of IBM to Patrick O'Kane of Kalibrate entitled "Re: Tas Water Kalibrate";

(c) the letter of 23 June 2016 from Sandeep Bakhshi of IBM to Michael Milstein of Kalibrate;

(d) failure to inform Kalibrate at any time prior to the filing of the Defence that Kalibrate was not entitled to VAP G incentive fee because IBM, not

31 (2008) 238 CLR 570.

32 Originally, the representation was also said to be constituted by an oral conversation on 31 May 2016 between IMB and Kalibrate, as well as an email from IBM to Kalibrate's solicitors dated 24 August 2016 – however they were ultimately not led by the plaintiff or introduced into evidence.

Kalibrate, had registered the TasWater opportunity.

225 The first document was the email assigning the opportunity to Kalibrate sent to Dalglish. The email said no more than that. The email from Acke referred to the requirements about the need for appropriate written documentation to justify the payment of benefits to parties such as Kalibrate. The email said nothing about the registration of the opportunity or, more importantly, IBM abandoning that argument. The third document from Bakhshi repeated that Kalibrate failed to meet the IBM program requirements to justify additional payments. The letter also pointed to an alleged error in the calculation methodology used by Kalibrate in its claim. Nonetheless, IBM made an open offer to Kalibrate to make a "one-off payment" subject to a non-disclosure agreement. Again, there was no reference to IBM abandoning the registration argument.

226 However at trial Kalibrate submitted that the 21 August 2015 assignment of the registered opportunity from IBM to Kalibrate itself constituted a representation to Kalibrate that:

(a) Kalibrate was the owner of the opportunity to sell licences to TasWater;

(b) Kalibrate was eligible for all margin and other benefits, including the VAP-G rebate in respect of the sales; and

(c) IBM had waived any right to argue otherwise.

227 It also submitted that there was a second representation on 10 December 2015 and 17 February 2016. Although in the earlier email Ms Lisa Anne Hills of IBM indicated that the claim for the VAP-G rebate was rejected, because IBM had registered first, Kalibrate contends this rejection was undermined by the fact she later encouraged Kalibrate to update the opportunity and the sales order number and submit if for payment. This was said to constitute a further representation that Kalibrate would be entitled to the VAP-G rebate because Ms Hills instructed Kalibrate to prepare further evidence about its influence over

TasWater in making the software licence sale. This further representation or estoppel was not pleaded.

228 Originally, Kalibrate pleaded that its detrimental reliance on the representation was constituted by the steps it took to prove that it influenced TasWater in purchasing the software, in order to show that it was entitled to the VAP-G rebate.

229 However, at trial, counsel submitted that reliance was made out by Dalglish's acceptance of the assignment of the opportunity on 21 August 2015 and processing the order for the sale of software to TasWater in September 2015.

230 IBM objected promptly when it became apparent that Kalibrate had departed from its pleadings. Kalibrate did not make an application to amend its statement of claim upon being notified of IBM's objections. IBM submitted that the plaintiff should be kept to its pleadings because of the prejudice that would be suffered by the defendant if the plaintiff were not required to continue with the case it had required the defendant to answer.

231 In closing submissions, counsel for Kalibrate contended that I should allow it to depart from pleadings for the following reasons:

(a) in respect of the change in representation, the change should be accepted because the 21 August 2015 assignment of the opportunity was pleaded as a particular of the original estoppel by waiver claim. Thus, its later formulation of the waiver claim fell within what was pleaded originally in the plaintiff's statement of claim. Kalibrate did not make submissions with respect to the 10 December 2015 representation;

(b) the change to the detriment suffered by the plaintiff should be allowed because this conduct had been pleaded in respect of Kalibrate's promissory estoppel claim concerning the VAP-G representation. There was no prejudice because they were relying on the acts of reliance

already pleaded. The pleading had, in effect, alleged that Kalibrate had proceeded with the September 2015 licence sale to TasWater.

(c) in respect of the prejudice that would be suffered by the defendant in allowing the change of conduct forming reliance on the representation, the plaintiff raised a bare assertion that there was no prejudice.

232 Overall, I am not persuaded that I should accept the plaintiff's alternative formulation of its estoppel claim in respect of waiver.

233 First, although the 21 August 2015 email was pleaded as part of the original estoppel by waiver claim, the 'second representation' of December 2015 was not.

234 Secondly, I have real issues with the submission concerning the change to the plaintiff's case in respect of detriment. This is largely because the plaintiff appears to be relying on pleadings made in respect of detriment concerning its VAP-G estoppel claim – which as I have explained at paragraph 231, it has applied to depart from in respect of that claim. The plaintiff cannot have it both ways. It cannot seek to depart from pleadings, and then later rely on them as a source for justifying why there is no prejudice in departing from pleadings in respect of another claim.

235 Third, the plaintiff's bare argument in respect of the change in acts of reliance is unconvincing.

236 Finally, having regard to the *Civil Procedure Act 2010* (Vic), especially sections 7, 8 and 9, I do not consider it would be an appropriate exercise of my discretion. Having regard to the inefficient and confusing manner in which the plaintiff has conducted its case, it would not give effect to the overarching purpose of the Act.

237 Accordingly, I agree with the defendant that Kalibrate should be kept to its pleaded case on this point. In circumstances where the plaintiff has departed

or sought to depart from its pleadings on numerous occasions throughout the course of this trial, it would be inappropriate to grant a further departure. Particularly is this so where the plaintiff has been afforded the opportunity to amend its pleadings during trial in respect of other matters, the plaintiff did not submit a new pleading for consideration, and the defendant objected upon hearing the plaintiff's new formulation of its case.

*The representation*

238 Kalibrate's argument on this second estoppel was conveniently summarised in the defendant's final submissions as follows. By reason of:

- the assignment of the TasWater opportunity in August 2015;
- correspondence between IBM and Kalibrate in May and June 2016 about whether Kalibrate had sufficiently demonstrated its influence on TasWater for the purposes of the VAP-G program; and
- IBM's alleged failure to inform Kalibrate prior to filing its defence that Kalibrate was not entitled to a VAP-G rebate because IBM had already registered the opportunity,

IBM represented to Kalibrate that it would not deny Kalibrate a VAP-G rebate on the basis that IBM and not Kalibrate had registered the opportunity first.

239 The initial requirement is that the representation relied upon be clear. As Hargrave J said in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd:*[33]

> *"In determining whether a representation is sufficiently precise to support an estoppel, the Court examines the sense in which the representee understood the representation and relied upon it, and then determines whether, in the context of the facts of the particular case, it was reasonable for the representee to understand and rely upon the representation in that sense."*

33 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [89]. This passage was referred to with apparent approval by Keane J when the matter went to the High Court: see *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* (2016) 333 ALR 384 at [109].

240 The only person who gave direct evidence about the assignment was Fran Dalglish, the accounts manager at Kalibrate. She said in her witness statement that, when she accepted the assignment from IBM in the Global Partner Portal she assumed the assignment was made because Kalibrate was the owner of the opportunity. This assumption was said to be based on TasWater being Kalibrate's customer and Kalibrate having previously sold licences to TasWater for the proof of concept in 2014.

241 I regard Ms Daglish as an unimpressive witness whose testimony on some matters was confusing, inconsistent and inspired no confidence.

242 In her witness statement, she said that she was not an expert about the terms or requirements of the VAP-G program on IBM's Global Partner Portal. She said, and I accept, that she relied upon IBM staff managing those programs to answer questions and provide her with assistance when submitting claims for VAP-G payments. She also sought help from staff at Kalibrate's distributors, MBS.

243 Dalglish also said that she was responsible for preparing special bid applications when instructed by Kalibrate staff or IBM sales teams. She sent the applications to Kalibrate's distributor who, in turn, sought approval from the applicable division of IBM. Such special bid applications are needed when a Business Partner like Kalibrate wants to sell a licence for IBM software at a discount to the list price. Dalglish said that most sales orders for Kalibrate involved making a special bid application.

244 In cross-examination, Dalglish said that she was not familiar with the special bid process. When challenged about the inconsistency between this evidence and her witness statement, she said that she believed her statement had been amended in a second statement. In re-examination Dalglish she did not know whether Kalibrate had applied for special bids or for discounts. Shortly after, she said that a special bid could come from Kalibrate. The inconsistencies in

her evidence were puzzling and concerning.

245 However, Dalglish did seem to be aware that if a Business Partner were to make a special bid, it was necessary to provide an opportunity number to the distributor for this purpose.

246 IBM argued that it assigned the opportunity to Kalibrate in August 2015 because in order to make a special bid regarding the software to be supplied to TasWater, Kalibrate had to provide an opportunity reference number.

247 I note that in March 2015, Dalglish assumed responsibility for a special bid for a proposed sale of additional software licences to TasWater. She advised Williams that MBS had asked her for an opportunity number. Williams supplied a number for that special bid. Although that bid was approved, it did not proceed to completion. This event, taken in conjunction with the other special bids which Dalglish conducted for Kalibrate meant that she either knew or should have known that an opportunity number was required on all such bids.

248 The IBM explanation about the assignment may be correct but no one from IBM gave direct evidence about why IBM assigned the opportunity when it did and the purpose of the assignment.

249 Even if the assignment made Kalibrate the legal owner of the opportunity, the opportunity was still first registered by IBM and the change of registration did not necessarily mean that the point regarding first registration of the opportunity was being waived or ignored.

250 In my opinion, a reasonable person could not fairly construe the combination of documents and omission to advise Kalibrate as a representation that IBM no longer relied upon the prior registration of the opportunity. This is due partly to the difficulty in drawing such a specific inference from a variety of documents including those which were sent nine months or more after the assignment.

251 Further, the documents existed in a context where, as Dalglish agreed, she was

aware in December 2015 through an email from Lisa Hills of IBM that IBM had rejected the application for the VAP-G rebate. Dalglish informed Milstein of this and she believed he was not happy about IBM's decision. Thus, both Dalglish and Milstein were aware before Christmas 2015 that IBM considered Kalibrate was not entitled to the VAP-G rebate.

252 Finally, there is a suggestion that the reason for the assignment was related to the need for Kalibrate to submit an opportunity number with its application to IBM for a special bid.

*Detrimental reliance*

253 In its claim, Kalibrate pleaded that in reliance on the waiver estoppel, Kalibrate engaged in correspondence and communications with representatives of TasWater and IBM about Kalibrate's influence on TasWater's purchasing decision and reviewed its archives to identify evidence of influence. As noted, during trial, Kalibrate altered its case and submitted that reliance was made out by:

(a) Dalglish's acceptance of the assignment of the opportunity on 21 August 2015; and

(b) processing the orders for the sale of software to TasWater in September 2015.

254 Plainly, this was a change from the pleaded case and IBM took exception to the change. There was no formal application to amend and Kalibrate produced no draft amended claim. In circumstances where the Kalibrate argument was different from that pleaded and IBM objected to the new allegations, I see no sufficient reason to allow Kalibrate to advance this argument. Accordingly, I find there was no relevant reliance.

255 Even if Kalibrate were allowed to run the new amended argument on this issue, I would not find that the matters alleged to constitute the detrimental reliance

satisfied the level of significant disadvantage which promissory estoppel requires.

256 Kalibrate has not provided any evidence to establish or elucidate what loss was incurred by preparing itself to satisfy IBM that it had influenced TasWater. This gap in the evidence was probably caused because Kalibrate changed its case.

257 In *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd*[34] the New South Wales Court of Appeal, Handley JA dealt with a similarly claimed detriment, namely the detriment of being put to the trouble and some expense of having staff attend at the respondent company's premises in fruitless attempts to collect a cheque which the appellant claimed was owed to it.[35] His Honour held that: [36]

> *"While a single peppercorn may constitute valuable consideration which can support a simple contract it seems to me that the loss of such an item would not constitute a 'material detriment', 'material disadvantage' or a 'significant disadvantage' for the purposes of the law of estoppel. ..in the first case the consideration has been accepted as a the price of a bargain which the law strives to uphold. Promissory estoppels and estoppels by representation lack this element of mutuality, and the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation or promise."*

258 Thus, I accept IBM's submission that the pleaded detriment does not constitute a detriment that is a sufficient 'significant disadvantage' to found a promissory estoppel.[37] In circumstances where there is no evidence of the difficulties involved in preparing such proofs, or of any financial burden they may impose, I cannot find that such detriment was sufficiently material.

*Unconscionability*

259 In a case where I have found both that the representation relied upon by Kalibrate for the promissory estoppel does not reasonably bear the contribution

---

34 *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.

35 The appellant in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 also claimed that it had suffered detriment as a result of acts of forbearance in delaying the time in which it initiated proceedings against the respondent. This was said to be remedied by provisions of the *Supreme Court Act 1970* (NSW) which would granted pre-judgment interest to the plaintiffs. See *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 308C.

36 *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 307G – 308A.

37 *Commonwealth v Verwayen* (1990) 170 CLR 394, 444 per Deane J.

which Kalibrate contended for, and where there was no detrimental reliance established in accordance with the pleaded claim, there is no need to address the question of unconscionability. However, in short, I do not regard it as unconscionable for IBM to rely upon its prior registration when it advised Kalibrate in December 2015 that it rejected its claim to the VAP-G rebate and where it later examined Kalibrate's claim and found it did not satisfy the IBM requirements.

260 In any event, even if the estoppel were made out, the estoppel would only prevent IBM from relying upon the first registration point as a basis to refuse Kalibrate the VAP-G rebate. It would not follow that Kalibrate was necessarily entitled to the VAP-G rebate. If Kalibrate did not satisfy the criteria regarding documentary proof of evidence, that was an independent basis to refuse Kalibrate's demand.

*Credit of Towns*

261 Kalibrate contended that Towns was not a truthful witness. It submitted that he argued for IBM's position, skewed his answers in its favour and gave evidence which was inconsistent with contemporaneous documents. A particular area of criticism was that relating to the contribution which Kalibrate made to the solution that TasWater ultimately bought from IBM. Kalibrate contended that its contribution to the solution was significant, or at least sufficiently significant to qualify in accordance with the criteria for the VAP-G rebate as set out in the Attachment and the Guide. Kalibrate pointed to evidence such as the information supplied by its personnel like Kruger and the design and technical documents used for the proof of concept which it made available to GBS. In addition, there were ongoing dealings between Kalibrate and IBM software sales in the latter part of 2014 and into 2015. Kalibrate submitted that it was incorrect to say, as IBM did, that the Kalibrate contribution was minimal, the documents produced by Kalibrate were not relied upon, and that Kalibrate's input in conversations, discussions or other work was very limited in comparison

to the many weeks spent by GBS personnel.

262 My view of Towns was that he presented generally as a credible witness whose testimony I could accept. I have no doubt that he was not enthusiastic about having to work with Kalibrate. He was very much focused on the interests of GBS and what best suited its situation. Hence, he was protective of its intellectual property and he was not willing to give Kalibrate a full copy of the response to the TasWater RFT. Nor was he upset or concerned when Kalibrate terminated its involvement on the design and implementation aspects of the TasWater tender. Because Towns was the team leader for the project at GBS and was responsible of the financial and other aspects of the project he was pleased that, with Kalibrate no longer involved, he could simply work with his own experienced and trusted team. This made him more confident that the tender work would be covered in a way more consistent with the standards and practices which GBS had developed over time on this kind of project.

263 The fact that Towns admitted using the word “partnering” in the 22 April 2015 email rather than the word “subcontracting” because he knew it would cause a major problem with Kalibrate suggests to me that Towns’ evidence was true rather than false. He did not seek to hide from a piece of evidence which, on one view, did not reflect well on him.

264 However, Towns said, and I accept, that the solution ultimately sold to TasWater reflected the requirements specified by TasWater. Thus, significant aspects of the solution like compatibility and communication between the IBM solution and Navision and Esri was required. Other requirements were laid down by TasWater.

265 Kalibrate has not shown that there was anything original or unique to Kalibrate about the work which it did or that it contributed in a meaningful way (as required by the Guide) to the solution which TasWater bought. Other aspects of the work, said Towns, reflected the GBS solution to an issue.

**Claims not pleaded by Kalibrate**

266 In final submissions, IBM made comment about the number of matters raised by Kalibrate in its final address which were not pleaded.

267 The first point related to paragraph 21 of the amended statement of claim. There, Kalibrate pleaded that it fulfilled the terms of the Guide in several respects: Kalibrate was approved to participate in the VAP-G initiative; the TasWater sales order was fulfilled through a preferred distributor; Kalibrate provided sales documentation demonstrating active engagement by it in the sales cycle which resulted in TasWater's decision to acquire the Maximo asset management system; the TasWater sales opportunity was registered on the Global Partner Portal and approved as eligible; and Kalibrate attempted to upload sales documentation to the global partner portal within 15 days of the sales order date of 15 September 2015.

268 In his closing submissions, counsel for Kalibrate referred to the plaintiff satisfying or complying with its obligations in clause 2 of the VAP Attachment. The matters referred to there were not matters pleaded in paragraph 21 of the amended statement of claim. Nor were they matters which fell directly within the terms of the Guide. I am satisfied that Kalibrate departed from the terms of its pleaded case in addressing this issue and that its reliance on clause 2 of the Attachment amounted to a new case on this issue.

269 Next, in paragraph 88 of its closing submissions, Kalibrate contended that IBM's initial denial of Kalibrate's claim for a VAP-G incentive rebate on 10 December 2015 occurred in breach of the terms of the contract between the two parties. This allegation too was not pleaded in Kalibrate's claim and cannot be raised in final address.

270 In paragraph 90 of its closing submissions, Kalibrate submitted that the assignment of a registered opportunity in respect of the TasWater tender constituted a representation to Kalibrate that it was the owner of the opportunity

to sell licences to TasWater. It was therefore eligible for all margin and other benefits in respect of the sale, including the VAP-G payment, and IBM had waived any right to argue otherwise.

271 Again, this was not an allegation made in Kalibrate's amended statement of claim regarding the significance or effect of the assignment. Kalibrate said that paragraph 14 of the reply was relevant. There, Kalibrate alleged that IBM represented to it that it would not claim that Kalibrate was not entitled to a VAP-G incentive fee on the basis that IBM, not Kalibrate, had registered the TasWater opportunity. Thus, the reply did not allege that the assignment itself constituted a representation. Again, although in final address Kalibrate argued the assignment was a representation and Dalglish relied upon it by accepting the assignment on behalf of Kalibrate, this in turn was different from the acts of reliance set out in paragraph 16 of the reply. Thus, Kalibrate diverged again from its pleaded case.

272 In his closing submissions, counsel for Kalibrate commented at some length about the obligations imposed upon IBM by clause 3 of the VAP Attachment document. Kalibrate alleged (ultimately) that while IBM complied with clause 3(a) of that document, it breached clause 3(b). The clause is in the following terms:

> *"IBM agrees to:*
>
> *(a)* *…*
>
> *(b)* *provide the Value Advantage Plus pricing to your Distributor for the Authorized Software marketed as part of a Solution Transaction."*

In the amended statement of claim, apart from an allegation that IBM breached its contractual obligations by failing to pay Kalibrate a sum, namely the VAP-G rebate (at paragraph 22), it also said that it was a breach of the agreement pleaded at paragraphs 19 and 20 of the amended statement of claim to pay an incentive fee to Kalibrate.

273 Nowhere in the pleading was there any allegation about a breach of clause 3(b) of the VAP-G Attachment. Again, I agree with IBM's submission that it is not appropriate for Kalibrate to make such a claim for the first time in closing submissions.

274 At paragraph 98 of its written closing submissions, Kalibrate contended there was a further breach of the implied contractual terms arising from IBM's failure to transfer full recognition to Kalibrate of ownership of the opportunity to sell software licences to TasWater. Yet again, Kalibrate made no such allegation in its amended statement of claim.

275 In the context of the estoppel alleged in connection with the VAP-G representation, IBM drew attention to the acts of reliance identified by Kalibrate. Paragraph 27 of the amended statement of claim said that Kalibrate relied on that representation by taking steps to persuade TasWater to use the Maximo software as pleaded in paragraphs 6 to 13 of the amended statement of claim. The events alleged in those paragraphs preceded the representation made in the 22 April 2015 email and hence, they cannot constitute acts of reliance.

276 The letter from Kalibrate's solicitors to the defendant's solicitors dated 8 February 2018 sought to introduce further particulars of reliance, namely, the sale of software licences to TasWater in September 2015. This was the only matter relied upon which post-dated the April 2015 email. On this basis, the only act of reliance on the VAP-G representation was the sale of the software licences to TasWater in September 2015 – a sale which earned Kalibrate $272,000.

277 At paragraph 104 of its final submissions, Kalibrate referred to various things which it allegedly did as acts of reliance upon the assumption that it would be entitled or eligible to receive the VAP-G incentive rebate on the sale of licences to TasWater: it agreed to partner with IBM to respond to the TasWater tender; it contributed Kalibrate's knowledge, designs and intellectual property created

during the proof of concept to the partnership; it contributed to the development of the design of what became the solution which TasWater accepted in the tender process; it agreed to provide 25 free days of support and the use of Kalibrate's probo software to TasWater. None of these matters was pleaded but Kalibrate again sought to rely upon them.

278 As regards Kalibrate's misleading and deceptive conduct claim, IBM noted that Kalibrate's closing submissions sought to allege a form of misleading conduct arising from silence – IBM's failure to advise Kalibrate that it had registered the TasWater opportunity in April 2015. Also, Kalibrate posited as a form of loss the lost opportunity to receive the rebate payment claimed. IBM contended correctly that neither of these matters featured in the amended statement of claim. In my view, Kalibrate's assertions to the contrary are fanciful.

279 Apart from the above matters, there were others which, when IBM took the point that they were not pleaded or were inconsistent with the existing pleading, Kalibrate said it would not press.

280 From the foregoing, it is apparent that in its final submissions, Kalibrate sought to depart from its pleaded case and make submissions on matters which were not pleaded and/or were not raised in the case without objection by the defendant. For this reason, I consider that such matters or issues were not within the contest at trial and, therefore, cannot be raised in final submission for the first time. Especially is this the case in circumstances where Kalibrate did not seek leave to amend its amended statement of claim to incorporate the matters to which IBM took objection (although I allowed Kalibrate to amend during trial to move material from the reply to the statement of claim). IBM came to court prepared to meet the claim pleaded and not the claim contended for in final submissions. It is unfortunate when a party wastes the time of the other party and the court and increases the costs of the litigation by arguing matters which were not found in its pleaded case. Such conduct is contrary to the *Civil Procedure Act* and should be discouraged.

## Conclusion

281 In conclusion, Kalibate's claim is not made out. I am not satisfied that Kalibrate has a contractual entitlement to the VAP-G rebate which it sought. Nor do I consider that it has established a claim for misleading and deceptive conduct or estoppel.

282 Subject to hearing from the parties, I propose to make orders that the plaintiff's claim be dismissed and the plaintiff pay the defendant's costs of the proceeding, such costs to be taxed on a standard basis in default of agreement.