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Hubexo Australia Pty Ltd v CoreLogic Australia Pty Ltd & Ors

Federal Court of Australia Proceedings No. NSD285/2021

RESPONDENTS' OUTLINE OF OPENING SUBMISSIONS

A OVERVIEW

1. A reader of the applicant's submissions (**AS**) could be excused for coming away with the impression that it is not for the applicant to prove its own case. Through assertions (the respondents "*must have infringed*": AS [12]), emotion (conduct is "*staggering*": AS [5]; evidence is "*remarkable*": AS [11]) and rhetorical devices alien to the law (see AS [19]), the applicant attempts to shirk its burden of proof and elide any direct attempt to confront the serious flaws underlying each of the four causes of action it maintains against the respondents.

2. These flaws will be fatal for the applicant's case both as to liability and causation and loss.

3. On liability, the chief problems the applicant faces are:

   (a) on the tortious inducement case, that:

      (i) damage is an element of the tort; and

      (ii) the applicant (for reasons addressed below) will not be able to prove damage;

   (b) on the misleading or deceptive conduct case, that:

      (i) the question of whether there has been misleading or deceptive conduct, in contravention of s 18 of the *Australian Consumer Law,* involves, as its first step, "…*identifying with precision, the conduct said to contravene s 18*…": ***Self Care*** *IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 at [80];

      (ii) the applicant has neither adequately pleaded nor proven, the conduct underpinning any of its alternative misleading or deceptive conduct cases, including:

         (A) the Forum Group, SkillTech and Gingold Subscription Representations**:** **F**urther **A**mended **S**tatement **o**f **C**laim [100], [107], [114] and [121];

         (B) the alleged "Third Party Representations" (FASOC, [124]) which the second respondent, **RP Data**, is said to have made to customers and potential customers of the applicant;

      (iii) further, the applicant has not demonstrated that the Third Party Representations were misleading, deceptive or false; and

      (iv) again, loss and damage is an element of the cause of action and (for the reasons developed below), the applicant has not proven any loss or

damage;

(c) on the breach of confidence case, that:

(i) none of the BCI Confidential Information (defined at FASOC [93]) had the necessary quality of confidence, it having being drawn from public sources and having, in any event, been disseminated to every person who acquired a subscription to the applicant's product **LeadManager**; and

(ii) in any event, the respondents did not come under any of duty of confidence *vis a vis* the applicant, and that the attempt to foist liability on them via an analogy to *Barnes v Addy* principles in the area of breach of confidence is novel and unorthodox;

(d) on the copyright infringement case, that:

(i) copyright does not subsist in any of the alleged BCI Works (defined at FASOC [56]). The Project Reports are neither *original* nor have a human *author* within the meaning of the *Copyright Act 1968* (Cth) (the **Act**), in circumstances where: (i) the compiled data is strictly of a factual nature mechanically obtained; and (ii) the compilers did not in any event arrange that information, the compilers' work being arranged into a pre-existing template form (over which template copyright is *not* claimed) by a computer process. The Project Information and Project Spreadsheets are even further removed from any independent intellectual effort by a human author;

(ii) even if copyright is shown to subsist:

(A) the respondents did not infringe that copyright by creating **Comparative Documents** (as defined in the FASOC) – those documents involved no reproduction of any of the BCI Works – they merely involved counting the number of projects in LeadManager;

(B) the failure to demonstrate that there was any infringement by creating Comparative Documents is significant given that is the lynchpin of the applicant's entire case as to loss and damage;

(C) the suggestion, otherwise made but irrelevant to the damages case, that the respondents used information copied from LeadManager to fill gaps in their product, **Cordell Connect**, is both unproven by the applicant and illogical given that the respondents considered that the data in LeadManager lacked sufficient reliability to be ingested into Cordell Connect: see, for example, Affidavit of Ms Alexandra **Bolles** dated 12.09.25, [46]ff;

(iii) further, even if there were acts of infringement:

(A) there is no liability in respect of any acts of infringement carried out by **Telus** International (as alleged in FASOC [75A])

because, whilst the work carried out by Telus was authorised by RP Data that work was carried out in the Philippines and not in Australia such that RP Data cannot be liable under s 36(1) of the ***Copyright Act*** *1968* in respect of its authorisation; and

(B) contrary to the extravagant claims made in the AS, and on the applicant's own evidence, the period during which Project Spreadsheets were regularly exported from LeadManager was, in fact, just a 10-month period between May 2019 and March 2020; and

(iv) even if those problems were not sufficient to dispose of this case:

(A) the copyright in the BCI Works and any action based on the infringement of those works was not even owned by the applicant at the relevant time but was, instead, owned by a separate company, **BCI** Media **Asia** Philippines, Inc;

(B) the assignment of that copyright and the claim for infringement of did not occur until 8 May 2020 (FASOC [71] which was *after* the loss claimed by the applicant was suffered;

(C) the applicant cannot now advance a claim in respect of losses which it suffered prior to the assignment but is, instead, limited to losses suffered by BCI Asia: *Dawson v Great Northern & City Railway Co* [1905] 1 KB 260; and

(D) the applicant has neither pleaded nor proven that BCI Asia suffered any losses which is, ultimately, unsurprising given that there is no suggestion that it was selling subscriptions to LeadManager in Australia.

4. A further issue that affects all the causes of action is the applicant's inability to prove that the respondents' conduct was causative of any relevant loss suffered by the applicant (relevant to all causes of action), or any relevant profit made by the respondents (relevant only to breach of copyright and confidence).

5. The applicant fails to meaningfully engage with the very specific case it advances by its pleading as to causation and loss. The pleaded case is extremely precise. It is that the customers listed in Revised **Confidential Annexures** A, B and C to the FASOC were: (a) approached by the respondents and shown Comparative Documents, or information contained in Comparative Documents; (b) induced to believe that the respondents' data was superior to the applicant's data; and (c) as a consequence of that inducement, behaved in a certain way.

6. Having initially disavowed it, the applicant later confirmed that it intends to prove each of those matters by inference. The problem is that the facts relied upon by the applicant to support those inferences are incapable of establishing them. Many of those primary facts are, themselves, unproven. So, under the guise of advancing an inferential case, the applicant, in truth, advances a case which involves little more than speculation and guesswork. That is impermissible because, as Buchanan J (Tracey J agreeing) said in

Tisdall v Webber (2011) 193 FCR 260 (at [128]):

> It is important to bear in mind also that **the inferential process is not one where speculation, guesswork or mere assumption is accommodated**. So far as the work of courts is concerned, where the application of a judicial method is expected, **the process of drawing an inference from available facts is not to be equated with conjecture, surmise or guesswork**. The arbitrary selection of one possibility over others from an available number of possibilities by such a method is not merely lacking in logic; **it fails to conform to the necessity that inferences be drawn as matters of legitimate deduction, based on probative values**. (emphasis added)

7. The applicant seeks to overcome those difficulties by seeking to suggest that there is a reversal of onus (AS [100]) or by reliance on what has been labelled the "facilitation principle" (AS [108]ff). It eschews any attempt to lead evidence in support of its pleaded case and, instead, pivots toward some sort of (unpleaded and unproven) case advanced at an impermissibly high level of generality. The approach is epitomised by AS [21], where it is said that: "[w]*here representations are intended to induce customers to* [cease subscribing to LeadManager and to subscribe to Cordell Connect]*, the court will infer that customer* [sic] *were induced to so act*".

8. Those submissions are based on principles drawn from authorities which involved different causes of action and very different facts. They are of no application here. The true position is an unsurprisingly orthodox one – it is the applicant which has a "*legal onus*" which is "*constant*" to establish that the loss and damage it claims (being lost revenue from the customers in the Confidential Annexures) was caused in the manner which it pleads (being the inducement of the customers in the Confidential Annexures): ***Berry*** *v CCL Secure Pty Ltd* (2020) 271 CLR 151 at [65] (Gageler and Edelman JJ). Here, the location of the evidentiary onus is no different given the allegations as to causation and loss in the FASOC are advanced with surgical precision: *Berry* at [66]. The applicant cannot now run a case which is divorced from the precision in its pleading.

9. The position does not improve for the applicant by electing (where it can do so) for an account of profits. An account of profits is, ultimately, directed to requiring a wrongdoer to disgorge the profits or benefits obtained by its wrongdoing: ***Hospital Products*** *Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110 (Mason J). The manner in which that inquiry is to be undertaken depends on the facts. Again, having pleaded a very specific case as to the respondents having earned revenue from certain (specifically identified) customers in the Confidential Annexures, the applicant cannot now seek to suggest that there is some sort of reversal of the onus.

10. The overall problem is that the applicant cannot prove, and scarcely even attempts to prove, that it suffered any loss or that the respondents made any gains in respect of the customers in the Confidential Annexures. Without being exhaustive, the main problems the applicant faces on this aspect of its case are:

    (a) the absence of any direct evidence of loss. Most glaringly, the applicant has not called any evidence from any customer of either it or the respondents;

    (b) an inability to demonstrate the customers which left the applicant can be matched with customers who came to the respondents. It is striking that the Confidential Annexures – the key, and indeed *only* plank of the applicant's case as to damages and profits – are not referred to until page 27 of AS;

(c) the composition of the Confidential Annexures remains *wholly unexplained.* No attempt has been made to explain, or prove, the criteria used to include a customer in those lists;

(d) the Confidential Annexures suffer from obvious problems even on their face. This defect is epitomised by Confidential Annexure C, a list of prospective customers of the applicant who (it is said) would have become customers but for the wrongdoing of the respondents. This list includes customers who have in fact never held a subscription with *either* the applicant or the respondents, despite the agreed position that these are in effect the only two participants in the relevant market;

(e) a failure to grapple with how features of the market for construction information services in Australia affect the claims for loss. As noted above, it is *not* in issue that the applicant and respondents are in effect a duopoly in that market. It is therefore not enough for the applicant to show (which in any event, in most instances it cannot) that because customers switched between the two products at roughly the same time, the causative factor was conduct of the respondents. Rather, as a matter of ordinary fact-finding on the civil standard, the applicant must address the obvious inference that customers switching from one would necessarily go to the other, there being nowhere else to go so long as the customer continued to desire construction information services;

(f) the documentary evidence will show, particularly the extracts from the applicant's **C**ustomer **R**elationship **M**anagement system, that customers included in the Confidential Annexures made decisions to cease subscribing to LeadManager, or not subscribe to LeadManager, for a range of reasons other than concerns about the inferiority of the data in LeadManager, including price; and

(g) as to profits, evidence from the respondents which show that its profits were retreating in any event: see, for example, the Affidavit of Simba **Nikurawu** dated 17 October 2025 at [6]-[7].

11. The significance of those matters cannot be overstated. Once the applicant's hyperbole, bluster and outrage is put to one side (as they must be), what remains is the stark reality that the applicant's case both as to loss and damage and for an account of profits is dependent upon the allegations it makes about the customers in the Confidential Annexures. The fundamental problem for the applicant is that cannot prove any of those matters.

B STRUCTURE OF THESE SUBMISSIONS

12. The following structure is adopted in these submissions.

13. ***First****,* in part C below the allegations which are admitted by the respondents are summarised and discussed.

14. ***Secondly***, part D below summarises the evidence to be called by the respondents (both lay and expert) and responds to the applicant's submissions about the respondents'

failure to call certain witnesses.

15. ***Thirdly,*** in part E below, each of the causes of action advanced by the applicant are dealt with in the same order as those matters are dealt with in the AS. In doing so, the relevant evidence and legal principles are summarized to demonstrate why those claims must fail.

16. ***Fourthly,*** in part F below, the fundamental problems with the applicant's case as to causation and loss and the account of the respondents' profits it seeks are identified. Those submissions are, necessarily, limited given that Mr Ashby's further reports are yet to be produced.

C THE ADMITTED CONDUCT

17. Though it may not be readily apparent from review of the applicant's submissions, it is the case that the respondents have made substantial admissions in respect of the conduct alleged against them. It is important and, with respect, appropriate that these be addressed upfront, as they have the effect of narrowing the issues the Court needs to decide.

18. As to the conduct involving *access* to LeadManager, the respondents:

    (a) admit that RP Data obtained User Details provided by the applicant to each of Forum Group (on about 20 July 2016), SkillTech (on about 3 October 2017) and Gingold (on about 26 September 2018), in each case without the knowledge or consent of the applicant (FASOC/Defence at [27], [33] and [38]);

    (b) admit that from time to time, RP Data used those User Details to access LeadManager (FASOC/Defence at [41A]);

    (c) admit that the access admitted at Defence [41A] was done on certain occasions by use of software including a Robotics Program: Defence [41AA];

    (d) admit that RP Data contracted with Telus (from 4 October 2017) to access LeadManager using User Details it was provided by RP Data (FASOC/Defence at [41B]). At Defence [41B], they explicitly plead what it is they say Telus did, which was:

        (i) access LeadManager;

        (ii) count the number of construction projects in LeadManager;

        (iii) either provide those numbers to RP Data directly, or record them in spreadsheets which were provided to RP Data; and

    (e) accept that RP Data received the spreadsheets and information provided to it by Telus and circulated those spreadsheets between certain of its employees by email (Defence [42(c)]); and

    (f) accept that RP Data also contracted with Artis Group to perform certain tasks, being (Defence [41D]):

        (i) setting up of a Robotics Program;

(ii) calculating the time a Robotics Program took to count the number of projects in LeadManager; and

(iii) on one occasion, extracting a Project Spreadsheet from LeadManager.

19. As to conduct involving *use* of accessed material from LeadManager, the respondents:

(a) accept that between October 2017 and February 2020, Comparative Documents (being spreadsheets and presentations which compared the number of projects recorded in LeadManager with the number of projects recorded in Cordell Connect) were created by Telus and RP Data using certain data each obtained from their access to LeadManager (but not containing any words or content taken from LeadManager) (Defence [42C]);

(b) admit that RP Data created a process whereby its employees could request Comparative Documents to be generated for presentation to customers or prospective customers of the applicant (FASOC/Defence [43A]);

(c) admit that employees of RP Data requested and were provided with Comparative Documents pursuant to that process (FASOC/Defence [43B]);

(d) admit that Comparative Documents were provided to or circulated between employees of RP Data (Defence [43C]); and

(e) they admit that RP Data had knowledge of such allegations as are admitted above (Defence [43H]).

20. Further to those admissions on the pleadings, the respondents admit that:

(a) prior to May 2019, Telus downloaded or exported Project Spreadsheets from LeadManager in November/December 2017, January 2018 and March 2018; and

(b) between May 2019 and March 2020, one of the Robotics Programs was used, on a regular basis, to download or export Project Spreadsheets.

21. Plainly, some of this conduct would have been better avoided. But this not a public inquiry and the applicant is not a regulator. This a commercial case, run on specific pleaded causes of action that have been crafted by experienced lawyers over a period of years, in the crucible of highly contested interlocutory disputes. To win, the applicant needs to establish the elements of the causes of action it has pleaded and any remedies it is entitled to. For reasons introduced in these submissions, and that will be developed throughout the course of the trial, the respondents contend the applicant will not be able to do either.

D RESPONDENTS' EVIDENCE

D1 Respondents' lay and expert evidence

22. The respondents lead evidence from seven lay witnesses and two expert witnesses.

23. The lay witnesses include:

(a) Ms Alexandra **Bolles**[1], who is a product manager employed by RP Data and who was employed, in various roles, throughout the period the subject of the applicant's claims. Ms Bolles was a party to many of the emails which the applicant has indicated it will rely upon as parts of its case concerning the creation and use of Comparative Documents. The effect of Ms Bolles's evidence includes that:

(i) the source of the information used in both LeadManager and Cordell Connect was publicly available: Bolles1 [19] to [36];

(ii) contrary to what the applicant has alleged, data from LeadManager was *not* used to "fill gaps" in Cordell Connect: Bolles1 [39] to [54];

(iii) RP Data took the view that the data in Cordell Connect was unverified and unreliable such that they would never have contemplated ingesting it into Cordell Connect: Bolles1 [41] to [43] and [52];

(iv) that there was a strict process governing the provision of "Data Superiority Sheets" to salespersons which, amongst other things, involved recording the occasions on which those sheets were provided in a register: Bolles2, [3] to [6];

(v) the process was not widely taken up: AB-12 and Bolles2, [8]; and

(vi) there were only rare occasions where the process, including the register, were not followed: Bolles2, [10];

(b) Mr Simba **Nikurawu**[2], who was employed by RP Data in various roles between November 2016 and February 2022, including in respect of data acquisition and research and who, like Ms Bolles, features prominently in the allegations made by the applicant. Mr Nikurawu explains the process for creating Comparative Documents, the rationale for doing so and the use which was then made of those documents: Nikurawu [3] to [10] He also, consistently with Ms Bolles, denies that there was any copying of data from LeadManager into Cordell Connect: Nikurawu [15] and [16];

(c) Mr Anthony **Murton**[3], who was employed by RP Data in various sales roles between October 2015 and January 2022. Mr Murton's conduct in allegedly sending Comparative Documents is a critical part of the applicant's case. Mr Murton explains the processes he used to sell Cordell Connect to customers including, critically, that he did not use Comparative Documents with customers: Murton [4]. He explains that, in fact, comparative information was able to be supplied to customers as a consequence of doing live demonstrations – i.e. attending a prospective customer's premises who currently subscribed to LeadManager and having that customer run searches on LeadManager which

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1 Affidavit of Ms A Bolles dated 12.09.25 (CB#32) (**Bolles1**); Affidavit of Ms A Bolles dated 17.10.25 (CB#37) (**Bolles2**).

2 Affidavit of Mr S Nikurawu dated 17.10.25 (CB#38).

3 Affidavit of Mr A Murton dated 24.11.25 (CB#33).

could then be compared with Cordell Connect: Murton [2] to [3] and [5]. He considers and addresses each of the emails sent by him which the applicant relies upon: Murton [6]ff.

(d) Ms Pauline **Jones**[4], who was employed by the third respondent, **Cordell Information** Pty Ltd , prior to October 2015 and then by RP Data between May 1999 and March 2025, as a data researcher: Jones [1] to [3]. Ms Jones explains the process for collecting data for inclusion in Cordell Connect and how that has changed over time: Jones [6]ff. That evidence demonstrates that, contrary to what the applicant suggests, there was no particular skill or sophistication required to collect the data: Jones [27] to [28];

(e) Mr Michael **Hughes**[5], who was employed by Cordell between February 1993 and October 2006 and January 2014 and January 2016. Similarly, to Ms Jones, Mr Hughes provides important historical context to how the parties' businesses operate;

(f) Mr Jim Louis **Balas**[6], who is the Chief Financial Officer based in the United States of America for the group companies. Mr Balas expressly addresses the applicant's allegation that he had knowledge of all aspects of what RP Data were doing in respect of LeadManager and rejects that: Balas [8], [15] to [19]. His evidence is fatal to the claim advanced against the fourth respondent, **CoreLogic Inc**, being the ultimate parent company of the other respondents;

(g) Mr Ashely **Davies**[7] who is the Chief Financial Officer of RP Data. Mr Davies explains the respondents' corporate structure. He confirms that Cordell Information has not traded or employed anyone since October 2015 when the shares in that company were acquired by RP Data: Davies [6] to [11]. He also confirms that the first respondent, **Corelogic Australia** Pty Ltd, does not trade or employ anyone: Davies [3] and [14]. Mr Davies's evidence, to which the applicant has offered no answer, is the death knell for the applicant's misconceived claims against Cordell Information and CoreLogic Australia; and

(h) Mr Damian **Young**[8], a director of commercial finance in the employ of RP Data who, relevantly, exhibits documents identifying RP Data's customers and the revenue earned by those customers. He also exhibits tables which analysed the earlier versions of the Confidential Annexures against RP Data's records. That latter part of his evidence is now of limited utility given the changes made to the current versions of the Confidential Annexures.

24. The expert evidence relied upon by the respondents comes from Mr Trent Whitbourn[9], a forensic IT expert and Mr Matthew Ashby[10], a forensic accountant.

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4 Affidavit of Ms P Jones dated 12.09.25 (CB#34).
5 Affidavit of Mr M Hughes dated 11.09.25 (CB#35).
6 Affidavit of Mr J L Balas dated 15.10.25 (CB#39).
7 Affidavit of Mr A Davies dated 12.09.25 (CB#36).
8 Affidavit of Mr D Young dated 17.10.25 (CB#40); Affidavit of Mr D Young dated 12.12.25 (CB#41).
9 Expert Report of Mr Whitbourn dated 16.12.25 (CB#91).
10 Expert Reports of Mr Ashby dated 24.10.25 and 23.10.25 (CB#92 and CB#94) (Ashby1 and Ashby 2).

25. Mr Whitbourn's evidence is directed to the functionality and purpose of the Robotics Programs. He confirms, consistently with the evidence of the applicant's expert, Mr McKemmish, that there were two separate programs – one which merely counted projects numbers on both LeadManager and Cordell Connect and then produced comparative spreadsheets (**Comparison Program**) and one which exported spreadsheets from LeadManager (**Extract Program**): Whitbourn [3.2.3] and [3.3] and [3.4].

26. Mr Ashby is an important witness but his evidence is, at the time of preparing these submissions, incomplete. The respondents' expect that his evidence will demonstrate fundamental problems with the evidence of the accounting expert called by the applicant, Mr Andrew Ross. Mr Ashby's evidence will reveal the insuperable difficulties of the applicant's case as to both the loss and damage it suffered and the profits it says that the respondents made.

27. To the extent that the Court will be assisted by it, or if the applicant requires it, further submissions will be prepared following finalisation of Mr Ashby's evidence.

D2 The alleged failure to call certain witnesses

28. Contrary to the applicant's suggestion, the respondents have not failed to call any key witnesses. As has been explained above, the witnesses which the respondents have called were involved in the events alleged by the applicant. Other persons whom the applicant criticizes the respondents for not calling are no longer employed by the respondents and, otherwise, could only give evidence about matters which are admitted or about which the respondents' other witnesses have already addressed.

29. Those submissions do, in any event, involve significant overreach. It is, for example, submitted (at AS [2]) that Ms Lisa Claes was the respondents' CEO in late 2015. That is wrong. Evidence will be led at trial to show that Ms Claes did not become the respondents' CEO until October 2017. A similar point is made about Mrs Agrita Cliff where (at AS [7]) it is suggested that she was the General Counsel who "endorsed" the conduct which the applicant complaints about. Again, that is a serious allegation (made about a legal practitioner) which is both without evidentiary basis and wrong (among other reasons, Mrs Cliff not being appointed as General Counsel until January 2020).

30. Those submissions, which appear to be ultimately deployed to invite the Court to make adverse inferences against the respondents, ought to be rejected. The submissions, which lack any proper evidentiary basis, ought not to have been made.

E LIABILITY

E1 Inducing breach of contract

31. The elements of the cause of action for inducement of breach of contract are well settled and were set out by the Full Court in ***Daebo*** *Shipping Co Ltd v Ship Go Star* (2012) 207 FCR 220 at [88]. As was explained there "…*the breach must cause loss or damage to the plaintiff*".

32. For the reasons which are developed below (which are common to each of the causes of action advanced by the applicant), the applicant cannot demonstrate that it suffered loss and damage. The claim for inducing breach of contract must, therefore, fail.

33. There is no dispute that the other elements of the tort are made out on the evidence.

E2 Separate tort of interference with contractual relations?

34. The applicant also seeks to rely on a tort of "*interference with contractual relations*", in addition to the orthodox tort of inducing or procuring breach of contract.

35. In support of the proposition of this *sui generis* tort, the applicant relies on two decisions of Beach J where, in *obiter dicta*, his Honour suggests that such a tort may exist: see Reply at [6]; *State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 2)* (2021) 164 IPR 420; [2021] FCA 137 at [430]-[431]; *Donaldson v Natural Springs Australia Limited* [2015] FCA 498 at [202]-[224].

36. These observations by Beach J appear not to have been taken up by other cases in superior courts, except in another decision by his Honour: see eg *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 8)* [2022] FCA 1404 at [226]. The respondents will be submitting, with respect, that there is no such separate tort recognised by Australian law. The ingredients of the tort of inducing a breach of contract have been settled since at least *Short v City Bank of Sydney* (1912) 15 CLR 148: see *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 32-33. More recent authority considers breach of contract to be an element of the tort, in the manner it has always been: see eg *Watson Webb Pty Ltd v Comino* [2025] FCA 871 at [465].

37. That claim should be rejected.

E3 Misleading or deceptive conduct

38. There are three separate misleading or deceptive conduct claims advanced, being:

    (a) the "Subscription Representations", said to be made by each of SkillTech, Forum Group and Gingold to the applicant: FASOC [100], [107] and [114]; and

    (b) the "Legitimate Subscriber Representations", said to be made by RP Data to the applicant: FASOC [121]; and

    (c) the "Third Party Representations", said to be made by RP Data to customers or prospective customers of the applicant: FASOC [124].

E3(a) <u>The Subscription Representations</u>

39. The applicant alleges that each of Forum Group, SkillTech and Gingold represented to the applicant that they sought to access and use LeadManager for their own business purposes: AS [107] and FASOC [100], [107], [114], [121] and [124]. That is said to involve a contravention of s 18 of the *Australian Consumer Law* (**ACL**). RP Data is said to have been involved in that conduct.

40. There are, at least, three fundamental difficulties with that claim.

41. ***First,*** the alleged conduct of Forum Group, SkillTech and Gingold has not been proven whether at all or with sufficient specificity.

42. Section 18 of the ACL is analogous to s 52 of the *Trade Practices* Act 1974 (Cth) (which it replaced). That provision was considered by Hayne J in *Google Inc v ACCC* (2013) 249 CLR 435 where (at [89]) it was observed that:

> The generality with which s 52 was expressed should not obscure one fundamental point. The section prohibited engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. It is, therefore, always necessary to begin consideration of the application of the section by identifying the conduct that is said to meet the statutory description 'misleading or deceptive or… likely to mislead or deceive'. **The first question for consideration is always: 'What did the alleged contravener do (or not do)?' It is only after identifying the conduct that is impugned that one can go on to consider separately whether that conduct is misleading or deceptive or likely to be so.** (emphasis added)

43. Those observations were cited, with approval, by the majority in *Self Care* where (at [80]) the Court said that determining whether a person has breached s 18 involves four steps:

> **first, identifying with precision the 'conduct' said to contravene s 18**; second, considering whether the identified conduct was conduct 'in trade or commerce'; third, considering what meaning that conduct conveyed; and fourth, determining whether that conduct in light of that meaning was 'misleading or deceptive or… likely to mislead or deceive." (emphasis added).

44. The Subscription Representations, as pleaded and particularised, have not been proven, let alone with any precision.

45. The SkillTech and Forum Group Subscription Representations are particularised as being wholly oral: FASOC [100] and [107]. No evidence has been led by the person to whom those representations were made. The documentary evidence, which consists only of extracts from the applicant's CRM, is scanty at best. It falls well short of demonstrating that the representations were made.

46. The Gingold Subscription Representation is said to have been made partly in writing and partly orally: FASOC [114]. Again, no evidence has been led as to the oral component of that representation. It is also not obvious that the documents said to contain the written component of the representation did, in fact, convey that representation at all.

47. ***Secondly,*** RP Data was not relevantly "*involved*" in the representations. Whilst it is admitted that RP Data procured each of those parties to obtain subscriptions to LeadManager, there is no evidence that it had knowledge of what, specifically, was said by those persons to the applicant.

48. ***Thirdly,*** as with many of the other causes of action advanced by the applicant, it cannot show that it suffered loss or damage by reason of the making of the Subscription Representations. That is an element of the cause of action under s 236 of the ACL.

E3(b) Legitimate Subscription Representations

49. By FASOC [121], the applicant alleges that RP Data represented to the applicant that *it* was Forum Group, SkillTech or Gingold when it accessed LeadManager.

50. That claim is hopeless.

51. RP Data never, in fact, engaged in any such conduct. It made no representations to the applicant at all.

E3(c) Third Party Representations

52. It is alleged (at FASOC [124]) that RP Data made representations to "*customers and prospective customers*" of the applicant and RP Data, variously, about Cordell Connect having superior data to LeadManager. The particulars to the FASOC identify that the customers to whom the representations were made were the customers in the Confidential Annexures.

53. There are a number of problems with this claim.

54. ***First,*** the making of the representation has been neither pleaded nor proven with any specificity or particularity. Neither the pleading nor the evidence identify:

    (a) when those representations were made;

    (b) how those representations were made;

    (c) the number of occasions on which the representations were made;

    (d) the words which were spoken or written which are said to have conveyed those representations; and

    (e) which of the customers in the Confidential Annexures the representations were made to.

55. For those reasons alone, the claim fails for the same reasons as the Subscriber Representations: see [43] to [45] above.

56. Relatedly, the allegation is not one which is advanced on the basis of inference (unlike other parts of the FASOC). The applicant is well aware of the difference between a case based on direct proof and one based on inference: *BCI Media Group v CoreLogic Australia Pty Ltd (Review of Registrar's Decision)* [2025] FCA 616 at [48]. It is, therefore, not open for the applicant to now seek to pivot and seek to prove the making of those representations by way of inference.

57. ***Secondly,*** even if it could be proven that the representations were made as alleged, they are vague statements which are in the nature of puffery common in commercial dealings with the supplier of a product and customers and potential customers. Such statements are incapable of being misleading or deceptive for the purposes of s 18 of the *Australian Consumer Law.*

58. The point was explained by Davies and Einfeld JJ in *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 145. Their Honours said (at 178) that it is necessary to assess whether a statement is misleading or deceptive "*…in light of the ordinary incidents and character of commercial behaviour*". Their Honours went onto say (at 178) that:

> Thus, in the ordinary course of commercial dealings, a certain degree of "puffing" or exaggeration is to be expected. Indeed, puffery is part of the ordinary stuff of commerce.

59. A similar point was made by Gleeson JA (Ward and Emmett JJA agreeing) in *Doppstadt*

Australlia Pty Ltd v Lovic & Son Developments Pty Ltd [2014] NSWCA 158 at [168].

60. ***Thirdly,*** and in any event, the applicant has not proven that those representations were untrue or misleading. The falsity of those representations could only be demonstrated by evidence which demonstrated that, at the time each representation was made, the particular claim was untrue. So, for example, the applicant would need to demonstrate that on a particular date it was not correct to say that Cordell Connect had 70% more projects in the planning stage than LeadManager by leading evidence which, in fact, compared the number of projects in the planning stage on that date between the two products.

61. There is, of course, no evidence to that effect.

62. It appears that the applicant, instead, seeks to prove those matters through the evidence in Confidential Annexure A to Mr M Krups' first affidavit. That is the only evidence cited in support of it in AS [70]. Leaving aside the inadmissibility of that evidence, it falls well short of demonstrating that those claims were false. Instead, it consists of little more than speculation from Mr Krups about how the manner in which the respondents were conducting searches of LeadManager. Even if that speculation was admissible and probative (and it is not), it is incapable of demonstrating the falsity of particular claims made on particular dates about relative data superiority.

63. ***Fourthly,*** and assuming the applicant could overcome all of the earlier mentioned difficulties, it cannot prove that any customer *relied* upon those representations.

64. It has not called evidence from any customers demonstrating reliance. It has not produced any coherent documentary evidence recording statements from the customers saying that such representations were made to them which they then relied upon. The claim is, therefore, doomed to fail.

65. The applicant appears to suggest (at AS [114]) that it is not necessary for it to lead evidence of that kind. The suggestion appears to be that it is open to it establish all of those matters based purely on inference. This is not a case where the representations are alleged to have been made to the public at large or to a group of unidentified persons. Instead, the applicant pleads that those representations were made to each of the customers in the Confidential Annexures: FASOC [128] and [128A]. There is a distinction between the two types of case which the applicant has not attempted to grapple with: *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [100] and [101].

E4. Breach of Confidence

66. The applicant advances two claims involving claims based on breaches of equitable duties of confidence:

    (a) ***first,*** it says that the usernames and passwords supplied to Forum Group, SkillTech and Gingold constituted confidential information which was misused by the respondents: FASOC [83] to [85] (**Confidential User Details**); and

    (b) ***secondly,*** it says that the project information contained in LeadManager, which the respondents accessed, constituted confidential information which was

misused by the respondents: FASOC [86] to [89] (**Confidential Project Information**).

67. The elements of the cause of action are well settled: *Del Casale & Ors v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148; [2007] NSWCA 172 at [36]. They are that:

    (a) the information must be identified with specificity;

    (b) the information must have the necessary quality of confidence and not merely in global terms;

    (c) the information must have been received by the respondent in circumstances importing an obligation of confidence; and

    (d) there must be an actual or threatened misuse of the information without the applicant's consent.

68. The applicant fails to make out any of the elements of the cause of action in respect of the User Details.

69. The second and third elements of the cause of action are not made out in respect of the Confidential Project Information.

E4(a) Confidential Project Information case fails

70. There are four reasons why the case as to the Confidential Project Information fails.

71. ***First,*** the applicant has failed to identify that information with sufficient specificity.

72. It is not permissible to identify information in "*global terms*": *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 87 (Gummow J). A specific identification of the information is necessary so that the court can make an assessment of the quality of that information, to determine whether it is in truth of a confidential nature: *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196 at [159].

73. The applicant has pleaded the "Confidential Project Information" (at FASOC [86]) as a broad and non-definable combination of information in relation to building and construction projects. It is non-definable because, as the documents which will be produced and tendered at the hearing show, there is no consistency between the quality and nature of the Confidential Project Information which, necessarily, differs from project to project.

74. ***Secondly,*** the Confidential Project Information does not have the necessary quality of confidence. The question of whether information possesses sufficient qualities of confidence is, ultimately, one of fact having regard to considerations which include the extent to which the information is the public domain, the amount of effort or money expended in developing it and the ease or difficulty involved in acquiring or duplicating it: *Del Casare* at [40].

75. That information was information which was publicly available. It consisted of the addresses of construction projects and the names and contact persons of persons associated with those projects – e.g. the builder or the project architect. The evidence,

particularly that of Ms Bolles and Ms Jones, will demonstrate that the information was readily available and could be acquired with relative ease and without any particular skill. That evidence should be preferred to the conclusory evidence which is given by Mr Krups[11] and Ms Aizenberg[12] for the applicant which, in any case, accepts that much of the information was publicly available (e.g. newspaper articles, public notices, development approvals, etc).[13]

76. Moreover, the information was made available to every subscriber to LeadManager. Whilst there were some limitations on the use which those subscribers could make of the information, they were not onerous. There was, for example, no prohibition on subscribers creating their own comparative documents. There was, equally, no prohibition on subscribers compiling their own lists of information taken from LeadManager. Thus, the information was in the public domain.

77. ***Thirdly,*** it is necessary that the information be received by the respondent in circumstances importing an obligation of confidence. But none of the respondents received the information in those circumstances: RP Data received the User Details from third parties; and RP Data never *received* – or indeed even had *access to* – the Confidential Project Information but rather was able to the public-facing Project Reports and Spreadsheets.

78. The applicant appears to accept the difficulty of this aspect of their case at AS [74]. Its attempt to circumvent this issue is to allege that RP Data was knowingly involved in, or provided knowing assistance in relation to Forum Group, SkillTech and Gingold's alleged breaches of confidence: FASOC [98]. Besides the fact that the applicant will not establish all the elements for a breach of confidence by those third parties, the bigger issue for the applicant is that there is no such accessorial liability recognised by equity. In its Reply at [8], the applicant refers to two authorities said to support such a proposition: *The City of Sydney v Streetscape Projects (Australia) Pty Ltd* (2011) 94 IPR 35; [2011] NSWSC 1214 at [475]-[491] and ***Lifeplan*** *Australia Friendly Society Ltd v Wolf* (2016) 250 FCR 1; [2016] FCA 248 at [334]. The respondents will address these authorities in more detail in closing address, but for present purposes, note that:

    (a) both cases are first instance decisions which were subsequently overturned;

    (b) the relevant reasoning in both cases is obiter; and

    (c) the reference to "*confidence*" in the *Lifeplan* appears to be no more than a single word.

79. Other authorities indicate that the question of whether accessorial liability is available for a breach of confidence indicates is not settled.[14]

80. ***Fourthly,*** the applicant says that the Confidential Project Information was (mis)used in

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11 Affidavit of Mr M Krups dated 30.04.25 (CB#16), [35].

12 Affidavit of Ms M Aizenberg dated 30.04.25 (CB#21), [42].

13 Ibid at [43] to [47].

14 *Countrywide Austral Pty Ltd v Emergency Media Pty Ltd* [2018] VSC 540 at [75]; *20 Trevis Court Pty Ltd v Emmapeel Holdings Pty Ltd* [2023] QSC 254 at [31]-[40]. See also *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [238] (Edelman J); and *New Aim Pty Ltd v Leung (No 4)* [2025] FCA 747 at [206].

two ways:

(a) the creation of Comparative Documents; and

(b) to fill gaps in Cordell Connect.

81. Neither of those contentions can succeed.

E4(a)(i) Process for creating Comparative Documents involved no use of Confidential Project Information

82. It is to be recalled that the Confidential Project Information (whilst described at an impermissibly high level of generality) is identified by the applicant as involving:

(a) a combination of information relating to specific building projects comprising: (i) details of the project; (ii) the stage of the project; (iii) the names and contact details of persons involved with the project (e.g. developer, property manager and contractors): FASOC [86]; and

(b) further information, described as "Confidential Feature Information", not specific to any project described (loosely) as information about the most active companies, trending projects and latest projects: FASOC [89].

83. The creation of Comparative Documents did not involve any *use* of any of that information. The Comparative Documents were, instead, limited to counting the number of projects in LeadManager. There was no use of the information itself.

84. That emerges from a number of features of the evidence, including:

(a) the Comparative Documents[15] themselves which:

(i) were all based on a template document created by Ms Irene Gardner in February 2017;[16]

(ii) constituted spreadsheets which contained tallies of the number of projects in both LeadManager and Cordell Connect at the particular time, sorted by location, the stage of the project and other classifications;

(iii) did not contain or include *any* of the actual project data (whether it being the details of the project or contact details) included in either LeadManager or Cordell Connect;

(b) the instructions given to Telus, who were responsible for generating Comparative Documents between May 2017 and February 2019, demonstrate that no part of the process for creating Comparative Documents involved copying or taking any actual data in LeadManager but, instead, set out a process which was limited to counting the number of projects in LeadManager and then recording those numbers in a spreadsheet;[17]

(c) there were Comparative Documents produced each month between May 2017 and February 2019 despite, on the applicant's own case, no Project Spreadsheets

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15 See, for example, COR.001.003.0263 (May 2017) and COR.001.007.0376 (March 2019).

16 COR.001.002.0625.

17 COR.001.002.0240; COR.001.003.0266.

(or Project Reports) having been exported or copied from LeadManager for much of that period;[18] and

(d) the same is true once the process for producing Comparative Documents started being carried out by one of the Robotics Programs in March 2019[19] because, as Mr Whitbourn has explained (Whitbourn, [3.2] to [3.4]), the program responsible for producing the comparative spreadsheets merely counted project numbers and did not capture or copy project information.

85. The respondents accept that Project Spreadsheets were exported from LeadManager. That primarily occurred from May 2019 but did occur on certain occasions earlier (November/December 2017, January 2018, March 2018 and October 2018). Those documents were not used to create the Comparative Documents. The applicant has adduced no evidence to suggest otherwise and it is quite inconsistent with the clear evidence identified above about how the Comparative Documents were created and the information they contained.

86. It follows that there was no misuse of the Confidential Project Information for the purposes of creating Comparative Documents.

E4(a)(ii) There was no gap filling

87. There was no use of Confidential Project Information to fill gaps in Cordell Connect.

88. The applicant has led no evidence of any gap filling. It, instead, seeks to establish that through the emails it particularises in paragraph [43] of the FASOC. Those emails do not establish the inference which the applicant says should be drawn. That emerges, in most cases, merely by examining those emails in the broader context in which they were exchanged.

89. The instances of gap filling identified in the pleading have all been addressed by Ms Bolles. Her evidence has been discussed above – there was no use of information in LeadManager to fill gaps in Cordell Connect: Bolles1, [39]ff. Her evidence is both consistent with that Mr Nikurawu (Nikurawu, [15] and [16]) and supported by contemporaneous records from one of the computer programs used by RP Data to record updates to Cordell Connect: Confidential Exhibit AB-9; Bolles1, [48] to [51].

90. The evidence given by Ms Bolles and Mr Nikurawu is the *only* direct evidence dealing with the topic. The latter's evidence is of particular moment given he has, otherwise, candidly explained his involvement in producing Comparative Documents (which, as earlier discussed, involved no copying of information from LeadManager) and the fact that he is no longer employed by the respondents. His evidence could scarcely be described as self-interested.

91. Despite resisting the respondents' previous requests for particulars of paragraph [43] of the FASOC, the applicant has for the first time in the last ten days, identified further gaps which it says were filled in a document delivered recently which it describes as

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[18] Confidential Exhibit NR-2, pp. 282 to 290 (CB#110) shows that there were no exportation of Project Spreadsheets between April and September 2018 or between November 2018 and May 2019.

[19] COR.001.001.0396.

"Part C – Applicant's Background Facts (Identification and Filling of Gaps)". Similar evidence to that already given by Ms Bolles will be given in respect of those newly identified the projects. That evidence will show that there was no filling of gaps in respect of those projects now (belatedly) identified by the applicant.

E4(b) User Details case also fails

92. It may be accepted that, unlike the case as to the Confidential Project Information, the Confidential User Information *has* been identified with adequate specificity and not merely in general terms.

93. The User Details case suffers from the same difficulty mentioned above (see [78]) that that information was never imparted directly to the respondents. That difficulty aside, the information also lacks the necessary quality of confidence given that:

(a) the details are automatically generated by the applicant;

(b) the fact that there are as many iterations of the User Details as there are customers of the applicant; and

(c) the fact that each iteration of the User Details provides access to the precise same set of information – that is, the information on LeadManager.

E5 Copyright Infringement

94. There are four main issues arising on the applicant's copyright infringement suit, being whether:

(a) copyright subsists in any of the BCI Works, being the Project Reports, the Project Information and the Project Spreadsheets – it does not;

(b) even if copyright does subsist in those works, whether there was any infringement of that copyright – the production of Comparative Documents involved no infringement;

(c) RP Data is liable in respect of any infringement of the BCI Works by Telus – it was not because that conduct occurred outside of Australia; and

(d) the applicant can advance any claim for loss and damage it has suffered in respect of any copyright infringement – it cannot because any loss occurred prior to the assignment.

E5(a) Copyright does not subsist in the BCI Works

95. There are three BCI Works over which the applicant claims copyright protection. The respondents deny that copyright subsists in any of them.

E5(a)(i) Project Reports

96. Upon analysis, the applicant's contentions as to the work said to be done to produce the Project Reports are that:

(a) Mr Krups and Mr Roy designed the template forms: AS [83]; and

(b) a number of researchers, largely if not entirely employed by BCI Asia (**BCI Researchers**) obtained and inputted information about construction projects: AS [84].

97. At AS [85], the applicant submits that Project Reports are, accordingly, *each* a "*curated, edited and refined literary work*" that is authored by Mr Krups, Mr Roy *and* the BCI Researchers. That submission must be rejected for a number of reasons.

98. ***First,*** the effect of the applicant's evidence is that the Project Reports were generated in final and expressed form using a computer process or processes, and therefore do not have a human author: Defence [57(b)].

99. More specifically, the applicant's evidence establishes that the Project Reports are produced by the "BCI Researcher" from a template form that was developed by Nikhil Roy and/or Matthias Krups in the early 2000s: Affidavit of Nikhil Roy dated 30.04.25, [24]-[27]; Affidavit of Mathias Krups dated 30.04.25, [45]-[48].

100. It is essential, for the purposes of s 32 of the *Copyright Act,* to focus on the time that the works were made. The applicant does not sue on infringement of copyright of the mere templates created by Mr Krups and Mr Roy, but rather on the "*individual reports*" which have "*specific identification numbers relating to specific building and construction projects in Australia*": FASOC [56(a)]. These reports did not come into existence until after a BCI Researcher inputted information. However, the BCI Researchers did not input their data into the template form, but rather into an internal "resource management system" (RMS), which stored the information in a database: Roy 1 at [22] (CB 18). Mr Roy has put the relevant part of the RMS into evidence at page 2 of Confidential Exhibit NR-2 (CB 110). Plainly, it is a different document from a Project Report as otherwise identified by the applicant.

101. Accordingly, there must be some further process that occurs between the inputting of the RMS and the creation of the Project Report. It is that process which the respondents allege is done by a computer not by a human. Although it is not explicitly said by him, this appears to be the upshot of Mr Roy's evidence at Roy 1 [31]-[33] (CB 18). It follows that the claim that copyright subsists in the Project Reports must fail at the outset: ***Telstra Corporation*** *Ltd v Phone Directories Company Pty Ltd* (2010) 194 FCR at [72] (Keane CJ); [113] to [114] (Perram J).

102. ***Secondly,*** and relatedly, the applicant has failed to prove the identity of each BCI Researcher said to have authored each Project Report, especially in circumstances where the applicant has not sought to prove that most of the alleged authors of the Project Reports were, in fact, employed by either the applicant or BCI Asia. It has only discovered employment agreements for relatively small number of the alleged authors.[20]

103. ***Thirdly,*** the Project Reports do not show sufficient originality of expression within the meaning of s 32(1). There is some overlap with the first point, in the sense that the originality in the expression of the Project Reports (as they are pleaded) does not derive from the BCI Researchers. But the respondents' further point is that the compilations that are Project Reports in any event do not disclose the requisite degree of "*independent*

[20] This will be dealt with in an aide memoire.

intellectual effort" or "*sufficient effort of a literary nature*" to constitute works protected by copyright: ***IceTV*** *Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at [33] and [99]. The author must have done something that can be considered "*original*": *Telstra Corporation* at [32].

104. The mere collection or collation of data or information is not sufficient: *Telstra Corporation* at [71] (Keane CJ). The focus is on the "*precise work in which copyright is said to be subsist*": *Telstra Corporation* at [72]. Work, even if it be substantial and intensive, to collate and collect information is not sufficient unless it is directed to the particular form of expression: *Telstra Corporation* [82] and [89] to [90] (Keane CJ). That point was put similarly by Perram J in *Telstra Corporation* who observed (at [104]) that:

> …Whatever else might be said of the kind of efforts required of an author, they must be efforts which result in the material form of the work. The important creative steps which involve the fashioning of the ideas on which a literary work's ultimate form rests are not actions which the Act counts as authorial and this is because what is protected by the copyright monopoly is the form of a work and not the ideas which presage or prefigure it. And this is so even if those ideas can plainly be discerned in the fabric of the material form…Much skill and hard work – "sweat of the brow" – may be involved in the steps preparatory to the making of the material form of a work but those labours are not what is protected by copyright and are relevant only to show that the work is not copied.

105. It is wrong to speak of the "appropriation" of "skill and labour" in considering the subsistence of copyright: *IceTV* at [131] to [132].

106. The BCI Researchers' process is, at best, in the nature of industrious collection, not independent intellectual effort. To the extent there was any such effort, it was directed towards assessing the *quality* of the information obtained, not on the *expression* of that information. That does not satisfy the originality requirement in s 32 of the *Copyright Act.*

107. ***Fourthly,*** the applicant has failed to grapple with how the effect of their own evidence of "updating" the Project Report impacts their claim to copyright in those works, some of which are said to have 19 separate versions: see eg Roy 1 at [40] (CB 18). This raises the issues addressed in *JR Consulting & Drafting Pty Ltd v Cummings* (2016) 116 IPR 440; [2016] FCAFC 20 at [275].

108. ***Lastly***, the respondents reject the allegation (at FASOC [64]) that the Project Reports are works of joint authorship. Section 10 of the Act defines that term to mean a collaboration of two or more authors in which the contribution of each is not separate from the contribution of the others. If a work can be divided into parts, with separate parts that can be attributed to each individual authors, then it is not a work of joint authorship: *Acohs Pty Ltd v Ucorp Pty Ltd* (2010) 86 IPR 492; [2010] FCA 577 at [55] (affirmed on appeal on this point: *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173 at [86]).

E5(a)(i) Project Information and Project Spreadsheets

109. The applicant has even greater problems establishing copyright in either the Project Information or the Project Spreadsheets. That is significant given that its case as to infringement is based, almost exclusively, on the exportation of Project Spreadsheets.

110. The Project Information, as best as it has been explained by the applicant, is merely unprotectable raw data. It is the underlying information or facts which is included in the Project Reports. Information and facts are not protected by copyright: *IceTV* at [28]. Even if organised into a database form that does exist electronically in an expressed form somewhere (a matter which is not accepted), this would not be sufficient. Databases – even those that require significant investment to produce – do not attract copyright protection: *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 264 ALR 617; [2010] FCA 44 at [29]-[30]. In any event, it suffers from all the same defects as is addressed above with respect to Project Reports. The evidence references cited by the applicant at AS [86] does not explain how it is said that BCI Researchers have any role whatsoever in the *expression* of this information in the specific compilation that is pleaded.

111. As to the Project Spreadsheets, the evidence cited by the applicant is that these are produced from the export of Project Reports, in whole or in part: Roy 1 at [28] (CB #18). Whatever original work may have been done by BCI Researchers in the process of creation of Project Reports, Project Spreadsheets are in an entirely different category: they are secondary products, produced by a computer program based on (some) of the data in the Project Reports. There are many subsistence difficulties for the applicant, the most glaring being a lack of any human author and a lack of relevant originality. Evidence from Mr Roy about his choice in what fields to export (see Roy 1 at [28]-[30] (CB #18) does not assist the applicant, in circumstances where its claim is not for breach of the mere template form or the fields, but the actual compiled spreadsheets, which necessarily depend on subsequent work from the BCI Researchers, among others.

112. The applicant attempts, in its submissions, to elide the distinctions between Project Reports and Project Spreadsheets. An example is AS [10], where the applicant refers to spreadsheets "*containing tens of thousands of Project Reports exported from LeadManager*". But the spreadsheets cited by the applicant in support of that proposition[21] does not show the "exporting" of a Project Report. Rather, that spreadsheet shows a list of projects containing some, but by no means all, of the data that was ultimately contained in Project Reports.

E5(b) No infringement

113. Copyright infringement is alleged by the applicant against RP Data (FASOC [73], [74] and [75]), Telus (FASOC [73A], [74A] and [75A]) and Artis Group (FASOC [73B], [74B] and [75B]). In each case, the acts comprised in the copyright alleged to have been done are:

    (a) reproduction of the work in a material form;

    (b) publishing the work;

    (c) making an adaptation of the work; and

    (d) communicating the work to the public (said to be done by making available

[21] For example, COR.001.001.0047.

online or electronically transmitting the work).

114. The suggestion that there has been infringement, other than by reproduction, can be readily discounted. No real attempt is made by the applicant to say otherwise other than to repeat what is said in the FASOC: AS [89]. That is because the applicant must surely appreciate those aspects of its case are untenable given that:

(a) as to publishing, that exclusive right is defined by s 29(1) of the Act. Even on the applicant's view of the facts, however, it is not the case that RP Data supplied to the public any of the BCI Works, as opposed to Comparative Documents. This part of the case must fail;

(b) for similar reasons, the allegation of communicating the work to the public must fail; and

(c) as to making an adaptation, that term is exhaustively defined in s 10(1), and none of the six options even comes close to arising. In any event, it would be necessary (to succeed on this front) for the applicant to establish that RP Data itself produced a work, which would not succeed in respect of the Comparative Documents for substantially the same reasons as no copyright subsists in the BCI Works: *Computer Edge v Apple Computer* (1986) 161 CLR 171 at 186 (Gibbs CJ) and 205 (Brennan J).

115. Other than the exportation of Project Spreadsheets (and a few occasions where screenshots were taken of Project Reports), the applicant must also fail in respect of reproduction. That is so for a few reasons.

116. ***First,*** as has been explained above ([83] to [86]), the Comparative Documents did not involve *any* copying or reproduction of the Project Reports, Project Information or Project Spreadsheets. Those documents involved a mere counting of projects in LeadManager.

117. Reproduction requires that there be an "*objective similarity*" between the alleged reproduction and the copyright work, in the sense of adopting the "*essential features and substance*" of the copyright work: ***Eagle Homes*** *Pty Ltd v Austec Homes Pty Ltd* (1999) 87 FCR 415. It is plain that the data and Comparative Documents produced by RP Data – which fundamentally merely *count* number of projects – do not match this description. Rather, what was used was the information underlying the works: *Eagle Homes* at [95]-[97].

118. ***Secondly,*** it is no part of the applicant's pleaded case that the creation or production of Comparative Documents infringed the copyright in the BCI Works. That suggestion is, however, now advanced by the applicant in its submissions: AS [89].

119. The respondents strictly hold the applicant to its pleaded case. It cannot advance unpleaded allegations by way of submissions.

120. If copyright is found to subsist in the Project Spreadsheets, it may be the case that the applicant can establish that they were reproduced when they were exported and downloaded by RP Data. That, however, goes nowhere. As has been explained above ([83] to [86] and [87] to [91]) those exported spreadsheets were neither used for the

purpose of creating the Comparative Documents nor to fill gaps in Cordell Connect. It was incapable of causing the applicant any loss and did not generate any revenue for RP Data.

E5(c) No liability for infringement by Telus

121. Paragraph [75A] and [78] of the FASOC allege, respectively, that Telus infringed the applicant's copyright in the BCI Works and the applicant authorised that infringement.

122. A critical fact is missing from the allegation in paragraph [78] of the FASOC. No allegation is made that RP Data authorized Telus to do anything in *Australia.* That is fatal. A person is only liable for authorizing "*…the doing of Australia of, any act comprised in the copyright*": *Copyright Act*, s 36(1).[22]

123. There can no serious dispute that Telus did not do anything in Australia. It was based in the Philippines. So much is clear from both: (a) the contract with Telus which states, relevantly, that work it was engaged to carry out would be performed at an address in Makati City, Philippines;[23] and (b) the address on the email signature of the person at Telus who was carrying out the work (Mr Allan Raneses).[24]

124. RP Data is not liable for any infringement of the BCI Works by Telus.

E5(d) No claim in respect of loss and damage

125. It is evident that most of the BCI Researchers were employed by BCI Asia and not the applicant. It is not possible to be any more specific than that given the applicant's failure (addressed earlier) to adequately identify the authors of each of the BCI Works. All that exists is the submission (at AS [32]) that 110 of the 120 BCI Researchers were based in the Philippines.

126. That creates a fundamental problem for the applicant.

127. On its own pleaded case, BCI Asia was the owner of the BCI Works authored by the persons employed by it. It did not assign that copyright, or any action in respect of the infringement of that copyright, to the applicant until 8 May 2020: FASOC [71].[25] That was after the alleged infringement by the respondents and after the applicant suffered the loss it seeks to recover.

128. The (belated) assignment of those rights does not permit the applicant to recover losses which it suffered prior to the assignment. It is limited to recovering any losses suffered by BCI Asia: *Dawson v Greater Northern and City Railway Co* [1905] 1 KB 260, 272-3; *Renold Australia Pty Ltd v Fletcher Insulation (Vic) Pty Ltd* [2007] VSCA 294 at [25]; *Clyne v Deputy Commissioner of Taxation (Cth)* (1981) 150 CLR at 20-21 (Mason J).

129. There is no allegation that BCI Asia suffered any loss. It is too late for the applicant to

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22 *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23 at [658]; *Connect TV Pty Ltd v All Rounder Pty Ltd (No 5)* [2016] FCA 338 at [129]-[133].

23 COR.001.008.2597.

24 See, for example, COR.001.008.3775.

25 A copy of the "Confirmatory IP Deed" is BCI.001.002.0895.

now seek to allege any. In any case, it is difficult to see how BCI Asia could have suffered any loss in respect of a diminution in revenue from the sale of LeadManager subscriptions in Australia.

130. The applicant does, therefore, have no claim to general damages in respect for copyright infringement under s 115(1) of the *Copyright Act.*

E6 Claims against respondents other than RP Data

131. The applicant persists in alleging that the relevant conduct went beyond RP Data, extending to each of the other respondents. The centrepiece of this allegation appears to be the claim, at FASOC [7], that each of the Australian-based respondents "*operated their business jointly*".

132. The respondents reject this somewhat curious, rolled-up allegation. They contend that the evidence plainly shows that all relevant conduct was engaged in by RP Data, and RP Data alone. Cordell Information and CoreLogic Australia did not trade and had no employees during any relevant period: Davies, [3] to [12] and [4]. Similarly, the allegations that try to involve CoreLogic Inc in RP Data's alleged breaches are unsustainable in light of Mr Balas's evidence about his lack of knowledge or involvement in the conduct which the applicant complaints about: Balas [3]ff.

F CAUSATION, LOSS AND PROFITS

133. The last substantive topic is the question of causation, loss and profits. For the same reasons addressed by the applicant at AS [95] (namely, the fact that the expert accountants are continuing to progress their evidence), at this stage the respondents only make submissions by way of overview of the likely contests.

F1 A summary of the inferential case

134. It is to be recalled that the applicant's case as to causation, loss and profits is a wholly inferential one. It is alleged at paragraph [43D] of the FASOC that Comparative Documents (and information from Comparative Documents) were presented to customers of the applicant. The inferential case, however, goes further. It is also alleged that *further* inferences should be stacked on these inferences, to the effect that:

(a) customers and prospective customers of the applicant, being the customers and prospective customers in the Confidential Annexures, were induced to believe that the information in Cordell Connect was more comprehensive and accurate than the information in LeadManager: FASOC [43E];

(b) this inferred induced belief in turn leads to two *further* inferences it is said should be drawn about the customers and prospective customers in the Confidential Annexures:

(i) *first*, that they either ceased subscribing, "*required*" a discount or did not subscribe to LeadManager: FASOC [43F]); and

(ii) *secondly*, that they entered into subscription agreements with RP Data or

Cordell Information: FASOC [43G].

135. It may be immediately be seen that the applicant's case as to causation is one which is pleaded with surgical precision. The allegations are all made in respect of the specific customers mentioned in the Confidential Annexures. The pleaded case is not one which pleads, in a plenary way, diminution in the value of the applicant's business. That is, at least in part, of the manner in which the Court has required the applicant to plead its case: *BCI Media Group Pty Ltd v CoreLogic Australia Pty Ltd (No 2)* [2023] FCA 664 at [97] (Yates J); [2025] FCA 1030 at [79] (Needham J).

136. The applicant's case as to loss is solely based on those matters. The losses it claims (across all of its causes of action) are based on the lost revenue from the customers who behaved in the manner pleaded in paragraph [43F]: FASOC [55A], [82A], [99A], [128A] and [128B].

137. The account of profits sought on the copyright and breach of confidence claims is similar. It is alleged that the revenue RP Data and Cordell Information was increased by earning revenue from the customers mentioned in paragraph [43G]: FASOC, [82D(b)] and [99D(b)]. The account of profits case has another aspect to it. That is that the gap filling improved Cordell Connect and, thereby, saved RP Data costs in making improvements and increased the "*capital value of Cordell Connect product as an asset*": FASOC, [82D(a)] and [99D(a)].

F2 Some principles

138. The inferential case is built on little more than speculation, guesswork and assumption. That is impermissible: *Tisdall v Webber* (2011) 193 FCR 260 (at [128]).

139. The respondents do not disagree with the effect of the authorities set out in AS [22], but the use which the applicant seeks to make of them is misconceived. As to that:

(a) the respondents do not cavil with the proposition at AS [22] that facts on such a case are not to be considered in isolation. The difficulty for the applicant, however, is not just that their case is inferential. It is inference stacked on inference. There is a small needle through the eye of which the applicant must thread the forensic camel;

(b) on the other hand, the respondents disagree that the principles in *Blatch v Archer* (1774) 1 Cowp. 63 at 63 have any role to play in these proceedings, other than to the limited extent which the Court is persuaded to draw any *Jones v Dunkel* inferences (which are a particular application of *Blatch v Archer*: see *Ho v Powell* (2001) 21 NSWLR 572; [2001] NSWCA 168 at [16]): cf AS [24]-[25]. It is for the applicant to prove its case. If there is a lacuna in the evidence, that is not a matter lying at the feet of the respondents, in the absence of the applicant pointing to some misconduct in the manner the respondents conducted their discovery (which, of course, they cannot do). The proper inference from that absence of evidence is that the fact contended for is not made out; and

(c) as to *Jones v Dunkel* inferences (cf AS [26]-[27]), the respondents will be contending that these ought not to be drawn against them. As set out above, the

applicant's focus on "schemes" and "processes" and "clandestine" is simply not relevant to what the Court needs to decide: being largely factual questions of access and use. In other words, the evidence that those witnesses might otherwise have given has been overtaken by the admissions. The respondents will instead call those witnesses who might reasonably be expected to speak to those questions, and those witnesses address those topics. Rather, the glaring focus for *Jones v Dunkel* inferences in this case lies at the applicant's door, via its failure to lead evidence from *any* customer or prospective it alleges was lost by it or gained by the respondents.

F3 The inferential case must fail

140. The facts which are relied upon to support the inference have not been proven. Even if they were, they are incapable of supporting the pleaded inferences. That is so for a number of reasons.

141. ***First,*** there is no direct evidence at all from any of the customers in the Confidential Annexures that they were approached by the respondents, induced to believe that Cordell Connect was superior and, for example, ceased subscribing to the applicant because of it. Not a single customer is called.

142. ***Secondly,*** and relatedly, the applicant has failed to adduce any evidence explaining the composition of the Confidential Annexures. There is no evidence which establishes the basis upon which the particular customers included in the annexures were included. There is no principled basis identified for the applicant for separating a customer in the Confidential Annexures from other customers who ceased to subscribe during the relevant period. That problem is particularly acute in respect of the customers in Confidential Annexure B. No evidence is led at all as to why discounts were given to those customers.

143. ***Thirdly,*** a necessary ingredient in the applicant's inferential case as to the customers in Confidential Annexures A and C must be that any customer it lost (or failed to gain) became a customer of RP Data within a relatively short period of time. Yet, that ingredient is missing.

144. The inferential case is unworkable without that ingredient. It is uncontroversial that the applicant and RP Data are, in effect, the only competitors in a duopoly. It is implausible that a customer would be induced to believe that LeadManager was inferior and, as a consequence, do nothing more than cease to subscribe to either LeadManager or Cordell.

145. It is too late for the applicant to now pivot toward an inferential case which includes that additional ingredient. Moreover, it is doubtful that the inclusion of that ingredient would assist the applicant very much. The analysis undertaken by Mr Young in respect of the earlier version of the Confidential Annexures demonstrates that only relatively few of the customers in the Confidential Annexures would satisfy that additional criterion of having subscribed to Cordell after unsubscribing to LeadManager. The evidence will show that the same is true in respect of the current version of the Confidential Annexures.

146. ***Fourthly***, the inferential case assumes that every customer in the Confidential Annexures left because of what they were told by the respondents about the data quality in LeadManager. That assumption is wrong. The extracts from the applicant's CRM[26] shows that many of those customers told the applicant that they were leaving because of price.[27] Other customers left for other reasons wholly unconnected with anything about data quality.[28] That not only exposes the fundamental problems with the inferential case but calls into question the veracity of the Confidential Annexures.

147. ***Fifthly***, the inferential case also assumes that representations were only made to customers about data quality because the respondents had gained access to LeadManager and produced Comparative Documents. Again, that assumption is wrong. The evidence demonstrates that similar claims about data quality were made well *before* July 2016 when the respondents gained access to LeadManager.[29]

148. There is another reason why that assumption is wrong. The use of Comparative Documents was not the only way that the respondents were able to demonstrate the superiority of the data in Cordell. That also occurred, as Mr Murton explains, by undertaking live demonstrations with customers where side-by-side comparisons were made between the two products: Murton, [2] and [5]ff.

149. Once those matters are put together, it becomes evident that the applicant cannot, on the balance of probabilities, prove its case. As Gageler J (as he then was) said in *Henderson v Queensland* (2014) 255 CLR 1 (at [89]):

> … The threshold requirement for the party bearing the burden of proof to adduce evidence at least to establish some fact which provides the basis for such a further inference was explained by Kitto J in *Jones v Dunkel*:
>
> > "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."

150. The applicant's case as to causation does not pass beyond the realm of conjecture.

F4 Damages

151. It follows from what has just been said that the applicant's damages case cannot succeed. It is wholly dependent on the inferential case discussed above.

152. The applicant, perhaps aware of the problems it faces, seeks to sidestep those problems by suggesting that there is some sort of reversal of the onus of proof by reference to what was said in *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 about the "facilitation principle": AS [107]-[108]. Those submissions misconceive what was said in that case and fail to properly apply it. It affords the applicant no assistance at all.

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26 BCI.001.002.0817; BCI.003.001.001; BCI.003.002.0001; BCI.003.003.0001.

27 An aide memoire will be prepared which identifies those customers.

28 That will be the subject of a further aide memoire.

29 Murton, [25]; Exhibit AM-4 (CB#135). Further examples will be tendered at trial and summarised in an aide memoire.

153. The "facilitation principle" there discussed (as AS [108] confirms) speaks about the potential for the evidentiary onus to shift where a defendant's wrongdoing has resulted in uncertainty as to the quantum of loss. Here, the problems for the applicant do not just go to quantum. They infect its entire case as to causation. The "facilitation principle" cannot be deployed to overcome such a fundamental problem.

154. In any case, the potential for the evidentiary onus to shift is always dependent on the facts of the case at hand. That point was made by Gageler and Edelman JJ in *Berry* where (at [66]) their Honours said:

> The practical burden of introducing evidence the so-called "evidentiary onus" is a different matter. In the pre-trial and trial processes that lead up to a court ultimately having to determine whether a plaintiff has discharged the legal onus of proof by inferences drawn from the whole of the evidence, the practical burden of introducing evidence can and often does shift. **Whether, and if so how and to what extent, an evidentiary onus might shift from a plaintiff during the conduct of an action depends in large measure on how the plaintiff chooses to formulate the loss or damage claimed to have been suffered, and on how the parties thereafter choose to join issue on the questions of connection with the contravention and quantum that arise in respect of the chosen formulation. Much, in other words, depends on the pleadings.** (emphasis added)

155. As has been explained above, the applicant has (as the interlocutory history of the matter explains) formulated its claim for loss and damage with precision. It precisely fixes on the loss of revenue from the customers in the Confidential Annexures. Having advanced a case with that level of precision (however flawed it may be), it cannot be now heard to say that there is some shift in the onus. The orthodox position must prevail – it is for the applicant to demonstrate causation and loss.

F5 Account of profits

156. Similar considerations apply to the claim for an account of profits insofar as it seeks to require the respondents to disgorge the revenue generated from the customers in the Confidential Annexures.

157. The aim of an account of profits is not to punish the defendant, but to prevent its unjust enrichment: *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 at 111 and 114-115; *Hospital Products* at 110.

158. Again, the applicant seeks to side step the problems it has by making much of what said in ***Ancient Order*** *of Foresters in Victoria Friendly Society Ltd v Lifeplan Australian Friendly Society Ltd* (2018) 265 CLR 1. That case lends the applicant no assistance.

159. ***First****, Ancient Order* was a case about knowing assistance in a dishonest and fraudulent design of a fiduciaries to breach their fiduciary duties. Both the cause of action and the conduct of the assistant ("*deliberate and dishonest*": see [16]) are plainly essential to the High Court's enunciation of principle in that case. Fiduciaries have always been treated differently by the law. So much is clear from what is said at [13]. The logic in that case cannot be extended to a breach of copyright or a misuse of confidential information.

160. ***Secondly****,* the scenario considered in *Ancient Order* is very different to the present case. It involved the "*wholesale acquisition of the business connections*" of the plaintiff: [2].

It was not a case, like here, where the claim which is one which is narrowly focused on the acquisition of particular customers which the applicant has identified.

161. ***Thirdly,*** and in any case, the evidence demonstrates that the respondents did not gain most of the customers in the Confidential Annexures and did not earn revenue from them. That emerges from Mr Young's analysis which, whilst now superseded, will be updated to reflect the Confidential Annexures. So, to the extent there was any shift in onus back on to the respondents, it has been discharged.

The other basis for an account

162. The applicant also seeks an account based on its allegations as to gap filling. It says that, by filling gaps in Cordell Connect, RP Data saved the cost of improving Cordell Connect and increased the capital value of the Cordell Connect business.

163. For the reasons which have been deal with above, the gap filling allegations must fail. But, in any case, there is no evidence as to any costs savings or any increased capital value of the Cordell Connect business. No account can be ordered on that basis.

164. As to evidence which Mr Ross gives about capital profits in the hands of CoreLogic Inc, that evidence does not quantify any increased capital value of Cordell Connect in the hands of the Australian respondents by reason of gap filling.

F6 Additional and exemplary damages

165. The applicant's case in respect of additional damages under s 115(4) of the *Copyright Act* appears to depend on a number of allegations which have not been proven and cannot be established. Those matters include (baseless) complaints about the manner in which the respondents have conducted the proceedings (AS [12], [14] and [18]) and improper complaints about the conduct of Mr Whitbourn (AS [46]). The respondents will address the claim in respect of additional damages further once it is known whether the applicant presses those complaints.

166. The application, otherwise, says that it seeks exemplary damages for inducement of breach of contract. That claim is made but is wholly unpleaded. It is too late for the applicant to now advance such a claim which, necessarily, required it to plead the facts in support of it.

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