

SUPREME COURT OF QUEENSLAND

CITATION: *Converging Momentum Pty Ltd v Birse* [2026] QSC 146

PARTIES: **CONVERGING MOMENTUM PTY LTD**
ACN 617 126 968
(first plaintiff)
STARDUST WITHIN PTY LTD
ACN 619 316 899
(second plaintiff)
RENE GEORGES PENTECOST
(third plaintiff)
v
RUSSELL KEITH BIRSE
(first defendant)
LAKE MULLALLOO PTY LTD
ACN 064 082 757
(second defendant)
KYLE ANDREW WILLIAMS
(third defendant)
RUNAWAY COVE (AUST) PTY LTD
ACN 079 797 087
(fourth defendant)
MICHAEL ANTHONY OAR
(fifth defendant)
123 BANG PTY LTD
ACN 100 176 458
(sixth defendant)

FILE NO: 5982 of 2020

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 26 June 2026

DELIVERED AT: Brisbane

HEARING DATE: 18 August 2025; 19 August 2025; 20 August 2025; 21 August 2025; 22 August 2025; 25 August 2025; 26 August 2025; 27 August 2025; 14 November 2025

JUDGE: Muir J

ORDER: **The proceedings are dismissed.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE

CONDUCT GENERALLY – where the third plaintiff was an accountant employed by a lending business operated by the first, third and fifth defendants, with shares held through related corporate defendants – where the third plaintiff alleges the first and third defendants made representations to him, personally and as director of the other plaintiffs, as to the present and future value and financial performance of the business – whether the third plaintiff relied on those representations in causing the first plaintiff to pay \$7 million to purchase shares in the business – where it later became apparent that the shares acquired were worthless – whether the conduct was misleading or deceptive in contravention of section 18 of the Australian Consumer Law (Queensland)

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – FALSE REPRESENTATIONS GENERALLY – where the Court is required to make findings of fact about a series of conversations between the third plaintiff and the second defendant – where, save for three representations recorded in a spreadsheet, the representations relied on were made orally – where the credibility and reliability of the third plaintiff's and the second defendant's recollections of those conversations are in issue – where the defendants allege that any reliance by the third plaintiff on the representations was unreasonable and factually misconceived – whether the representations alleged were made and, if so, whether the third plaintiff reasonably relied on them

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – STATEMENTS AS TO FUTURE MATTERS AND PROMISES – where two of the representations alleged concerned the future financial performance of the lending business – where a person who makes a representation about a future matter is taken to have engaged in misleading conduct if the person did not have reasonable grounds for making the representation – where the defendants deny that the representations as to future matters were made without reasonable grounds – whether the defendants had reasonable grounds for the representations as to future matters and, if not, whether the conduct contravened section 4 of the Australian Consumer Law (Queensland)

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – LIABILITY OF CORPORATION DUE TO CONDUCT OF

DIRECTOR, SERVANT OR AGENT – MISLEADING AND DECEPTIVE CONDUCT – where the plaintiffs seek an order under sections 236 and 237 of the Australian Consumer Law (Queensland) for damages or compensation of \$7 million – where, alternatively, the plaintiffs claim \$3.7 million calculated as the difference between the price paid for the shares and their fair market value at the time of sale, based on the defendants' expert valuation method

Australian Securities and Investments Commission Act 2001 (Cth)

Civil Liability Act (2003) (Qld), s 30

Competition and Consumer Act 2010 (Cth), Sch 2, s 18, s 236, s 237, s 243

Fair Trading Act 1989 (Qld), s 15, s 16

Australian Competition & Consumer Commission (ACCC) v Dateline Imports Pty Ltd [2015] FCAFC 114

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

ASIC v BPS Financial Pty Ltd [2024] FCA 457

Australian Securities and Investments Commission v GetSwift Ltd [2021] FCA 1384

Australian Securities and Investments Commission (ASIC) v La Trobe Financial Asset Management Ltd [2021] FCA 1417

Birbilis Bros Pty Ltd v Bunnings Group Ltd [2023] QSC 256

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25

City of Botany Bay Council v Jazabas Pty Ltd [2001] NSWCA 94

Fox v Percy (2003) 214 CLR 118

Guirguis Pty Ltd v Michel's Patisserie [2017] QCA 83

Henville v Walker (2001) 206 CLR 459

HTW Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640

Potts v Miller (1940) 64 CLR 282

Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd (2023) 277 CLR 186

Sutton v AJ Thompson Pty Ltd (in liq) (1987) 73 ALR 233

Sykes v Reserve Bank of Australia (1998) 88 FCR 511

Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

Unisys Australia Ltd v RACV Insurance Pty Ltd [2004] VSCA 81

Viterra Malt Pty Ltd v Cargill Australia (2023) 74 VR 1

Wedgewood Road Hallam No 1 Pty Ltd v Diamond [2013] VSC 447

Willet v Thomas [2012] NSWCA 97

COUNSEL: D M Logan KC with J Mitchenson for the plaintiffs
B W Wacker for the defendants

SOLICITORS: Irish Bentley Lawyers for the plaintiffs
Cowan Schwarz Marschke Lawyers for the defendants

Introduction

- [1] In February 2016, the third plaintiff, Mr Pentecost, was employed as the in-house company accountant for the RS Group of companies, the operators of a second-tier lending business. Mr Pentecost had moved to Australia from New Caledonia to study and work 12 years earlier and was keen to achieve success and prosperity in his adopted country. From the outset, Mr Pentecost was impressed by the apparent lucrative business model of the RS Group which had been established by the first defendant Mr Birse, the third defendant Mr Williams and the fifth defendant Mr Oar.
- [2] Between September 2016 and July 2016, Mr Pentecost actively explored the idea of investing in the RS Group. His investigations included a number of conversations and meetings with Mr Birse. In February 2017, Mr Pentecost registered the first plaintiff Converging Momentum and in May 2017 he registered the second plaintiff Stardust Within. In mid-July 2017, Mr Pentecost's family advanced \$13.2 million to him (through Stardust Within) for an investment in Rapid Securities (the holding company of the RS Group). Subsequently, Mr Pentecost transferred some of these funds to Converging Momentum.
- [3] On 17 July 2017, Converging Momentum entered into a written Share Sale Agreement with the following parties to purchase 10 per cent of the shares in Rapid Securities for \$7 million:
- (a) the second defendant, Lake Mullaloo (Mr Birse's corporate vehicle);
 - (b) the fourth defendant, Runaway Cove (Aust) (Mr William's corporate vehicle); and
 - (c) the sixth defendant, 123 Bang (Mr Oar's corporate vehicle).
- [4] By these proceedings, Mr Pentecost claims that he and the corporate plaintiffs (of which he is the sole director and shareholder) were induced into the Share Sale Agreement by various representations as to the present and future value of Rapid Securities made by Mr Birse and to a lesser extent, Mr Williams (on behalf of Mr Oar and the corporate defendants). The plaintiffs' case is that the representations were misleading or deceptive in contravention of s 18 of the *Australian Consumer Law (Queensland)* (ACL(Q)) because the shares were in fact worthless.
- [5] Mr Pentecost seeks to recover all or some of the \$7 million investment the plaintiffs lost through various orders for damages or compensation under ss 236 or 237 of the ACL(Q) against the defendants.
- [6] Before identifying the issues for resolution in the context of the alleged representations, it is instructive to explain the business of the RS Group

The business of the RS Group

- [7] Rapid Securities is the holding company of the RS Group which is comprised of the corporate entities Rapid Loans, Rapid Loans NZ and Rapid Business Finance.
- [8] Through these subsidiaries, Rapid Securities engaged in the business of providing small personal and business loans to customers in Australia and New Zealand who were unable to obtain loans through traditional lenders. Mr Brise, Mr Williams and Mr Oar were the founding directors of each of the companies within the RS Group. They were each shareholders of Rapid Securities through their respective related entities: Lake Mullaloo, Runaway Cove and 123 Bang.
- [9] Rapid Securities' primary asset was its Loan Book which consists of the total balance of monies owed by individual borrowers for loans made by the RS Group. The face value (or gross value) of the Loan Book is comprised of the finance amount, together with the interest payable and fees and charges adjusted to the extent of payments received.
- [10] The money used by the RS Group to loan to individual borrowers was itself borrowed by Rapid Securities in the form of interest-bearing unsecured loan contracts (known as Notes) and by Rapid Loans in the form of loan facilities secured against the Loan Book (known as Secured Loans). The RS Group derived profit by lending money at a higher effective interest rate to borrowers than the interest it owed under the Notes and Secured Loans.
- [11] As income is earned over time, and because not every loan will be recovered, the face value of a Loan Book is adjusted for income not yet earned (known as deferred revenue), and impaired to reflect the expected recoverability of the loans (known as impairment). Much of the plaintiffs' case is underpinned by the notion that where a company such as Rapid Securities fails to properly account for deferred revenue and impairment, it gives a false impression of its true value and financial performance.
- [12] The RS Group's key secured lender was a South African company known as Skybound Capital Limited (Skybound). Throughout the evidence, parties referred to Skybound interchangeably with Suzerain Investment Holdings (Suzerain), a British Virgin Islands company formerly known as SkyB Investment Holdings.

The alleged representations underpinning the plaintiffs' case

- [13] The following oral and written representations are maintained by the plaintiffs as having been made by Mr Birse or Mr Williams to Mr Pentecost in his personal capacity (or as director of Converging Momentum) between late-September 2016 and mid July 2017 (the representations struck through were ultimately not pressed by the plaintiffs):

The oral representations

Representation 1: that Rapid Securities (or the RS Group) was worth \$70 million, or Rapid Securities "was a 70 million dollar company";

Representation 2: that Rapid Securities (or the RS Group) loan book was worth \$70 million, ~~or approximately \$60 million as at 22 May 2017;~~

Representation 3: that Rapid Securities was going to be a \$100 million dollar company (or worth \$ 100 million plus) within a year or so (or within the next year) ~~or worth at least \$99 million by 30 June 2018~~;

Representation 4: that Rapid Securities' equity value would increase greatly over the coming years;

Representation 5: that a lucrative margin of two to three times the investment would be made when selling shares later;

Representation 6: that the shareholders in Rapid Securities would double their money within two to three years; and

Representation 8: that the price, and value, of Rapid Securities' shares would be significantly higher in six months after May 2017, due to Rapid Securities' predicted increased financial performance based on the growth of the loan books held by its subsidiaries.

The written spreadsheet representations (in respect of the RS Group)

Spreadsheet 1 Representation: by spreadsheet (19.09.16), that:

- (a) for the financial year 2016/2017 the net profit after tax would be \$6,234,787 and the loan book value would be \$76,053,313;
- (b) for the financial year 2017/2018 the net profit after tax would be \$11,120,563 and the loan book value would be \$103,276,683;

Spreadsheet 2 Representation: by spreadsheet (14.10.16) that:

- (a) for the financial year 2016/2017 the net profit after tax would be \$6,816,598 and the loan book value would be \$75,306,269;
- (b) for the financial year 2017/2018 the net profit after tax would be \$12,028,767 and the loan book value would be \$106,146,973;

Spreadsheet 3 Representation: by Spreadsheet (11.11.16) that:

- (a) for the financial year 2016/2017 the net profit after tax would be \$7,148,880 and the loan book value would be \$70,056,637; and
- (b) for the financial year 2017/2018 the net profit after tax would be \$12,423,989 and the loan book value would be \$101,319,090.

General representations

Representation 10: (by all the Spreadsheets) that the business value of Rapid Securities (or the RS Group) was \$70 million; and

Representation 9: that Representations 1 to 8, 10 and the Spreadsheet Representations were soundly based, and it was safe for Mr Pentecost and Converging Momentum to rely upon them.

- [14] The fact of these representation having been made is denied by the defendants.

Issues for Determination

- [15] The parties agreed there were four categories of real issues in dispute between them:

- Issue one: **The alleged representations:** did Mr Birse or Mr Williams make one or more of the nine alleged Representations or the Spreadsheet Representations to Mr Pentecost between late September 2016 and mid July 2017? This issue turns on the resolution of contested questions of fact between the evidence of the plaintiffs' main witness Mr Pentecost and the defendants' main witness Mr Birse.
- Issue two: **The alleged misleading or deceptive conduct:** were any representations of the defendants, when considered in context, conduct that was objectively misleading or deceptive or likely to mislead or deceive in contravention of s 18(1) of the ACL(Q)? The answer to this question requires a consideration and characterisation of all the circumstances and the context in which the statements were made including whether any of the representations were of future matters and if so, whether the representations were made on reasonable grounds.
- Issue three: **Causation/ Reliance:** was Converging Momentum/Mr Pentecost subjectively misled and induced by the defendants conduct in contravention of s 18(1) of the ACL(Q) to enter into the Share Sale Agreement? This issue turns on whether the defendants conduct was any real inducement for Converging Momentum to enter into that agreement. The probability of that inducement is to be considered in the context in which the representations were given, other statements or representations made about the likely value of the RS Group business and the profitability of an investment in that business by way of the purchase of shares, the independent assessments and assumptions Mr Pentecost made about the viability of the business and his experience and knowledge of the business as the company accountant, including the approach to deferred revenue and impairment taken in the Loan Book at the time the shares were purchased.
- Issue four: **Loss and Damage:** was the misleading conduct the legal cause of the loss and damage suffered by the plaintiffs? This question turns on an assessment of the "true value" of the shares in Rapid Securities at the time of the Share Sale Agreement. The appropriate method for such an assessment turns on a resolution of the competing views of the plaintiffs' expert witness, Mr Benjamin and the defendants' expert witness, Mr Lytras. This impasse is resolved by assessing whether their respective approaches are supported by the assumptions relied on.

[16] The issues are layered and cascading requiring the resolution of many contested facts.

Matters of Credit

- [17] The determination of the contested facts centres around my assessment of the credit of Mr Pentecost and Mr Birse. Neither of whom I found to be a particularly credible or reliable witness. Although, I am not satisfied that either man was deliberately dishonest. Rather, they each tried to tell the truth as they saw it. But aspects of their evidence were infected by hubris, distorted by the passage of time and by a common tendency that flows from the frailties of human nature – to selectively recall and recast the past in a way that most conveniently supports a particular narrative or agenda.
- [18] Mr Pentecost was an earnest but anxious witness, with a selective memory and a tendency to deny a proposition unless and until shown a document inconsistent with the position. Some of my concerns about the reliability of his evidence may be explained by nerves, the passage of time and I assume his lack of familiarity with a court setting. But many aspects of his evidence cannot be forgiven by these factors. For example, Mr Pentecost:
- (a) deliberately downplayed the extent of his role at and knowledge of the financial structure and operations of the RS Group. It was only after contemporaneous documents including various task lists were referred to by Mr Birse in his first affidavit that it was revealed by Mr Pentecost (through his second affidavit), that his role at Rapid Loans was far broader than he had first disclosed;
 - (b) was selective about disclosing all of the relevant facts leading up to his purchase of the shares including about the extent of his own due diligence and knowledge of the provisioning of the loans;
 - (c) deliberately failed to disclose eight emails containing financial information about Rapid Securities that he accessed and sent to his personal email during the time he was preparing a business proposal for his family to lend him money;
 - (d) was not transparent about the fact of or why he obtained the BDO report on 15 May 2017. He made no mention of such a report in either of his affidavits and under cross-examination refused to accept that his uncle required a due diligence report to fund the proposed transaction; and
 - (e) reconstructed critical parts of his evidence from complex and detailed spreadsheets that he had only seen once some five years previously.
- [19] Mr Birse was a confident witness who variously displayed a lack of candour. As much as it might be said that Mr Pentecost downplayed the tasks he undertook and the role he played at the RS Group, Mr Birse equally downplayed the obvious influence and authority he had over Mr Pentecost. He was an argumentative and non-responsive witness who also presented with a selective memory. For example, Mr Birse:
- (a) repeatedly depicted Mr Pentecost as an experienced company accountant when he first started with Rapid Loans when on any view he was not;
 - (b) clearly had authority over Mr Pentecost and gave him direction; the idea that he did not is impossible to accept given Mr Birse's position as one of the founding members of the RS Group, the stakes involved, and is otherwise inconsistent with the express words of Mr Pentecost's letter of employment that Mr Pentecost's role was subject to the direction by the directors;

- (c) was not transparent about the context in which he showed Mr Pentecost the various spreadsheets. His evidence was conveniently crafted, deliberately evasive and simply not believable;
- (d) was initially emphatic in his denial of any conversations of substance with Mr Pentecost about the purchase of shares in September, October and November 2016. But he eventually conceded that he had shown spreadsheets and had other conversations with Mr Pentecost about Mr Pentecost purchasing shares in Rapid Securities during this period;
- (e) attempted to downplay and deny any involvement or input in the Business Proposal in the face of overwhelming evidence to the contrary. For example, even in the face of documentary evidence that he was asked by Mr Pentecost for a “paragraph” about a particular issue he would not accept that it was for the purpose of the Business Proposal; and
- (f) gave evidence about the alleged “one off” accounting error with the trial loan product for car loans (which I do not accept) that was reconstructed and disingenuous and an obvious attempt to support the 2017 deferred revenue accounting error referred to in paragraph 5.5 of Mr Lytras’ report.

[20] I have therefore assessed the evidence of these witnesses objectively in light of all the evidence before the Court. Particularly, the relatively contemporaneous documentary evidence and upon a consideration of where the balance of probabilities lies based on that analysis; *Fox v Percy* (2003) 214 CLR 118, [31].

[21] Turning now to the factual landscape in which the representations are said to have been made and relied upon.

Mr Pentecost’s background prior to being employed with Rapid Loans

[22] Mr Pentecost was born and raised in New Caledonia. He moved to Australia in 2004 at about the age of 18 to study English. French being his native tongue. In 2006, he completed a Bachelor of Commerce (majoring in accounting) at Bond University and in February 2012, he obtained a Master of Business again from Bond University.

[23] Mr Pentecost’s first foray into the accounting world after completing his studies was a five-month stint as a bookkeeper at a small three-person accounting firm on the Gold Coast. There he undertook general bookkeeping duties, including tax lodgements for local businesses.

[24] In July 2012, Mr Pentecost obtained a position as a bookkeeper for the Residual Property Group, an investment and wealth management business focused on the property sector. This position required him to track the details of investors, prepare monthly financial statements for investors, manage bank accounts and assist with payroll. The Residual Property Group underwent a restructure in mid-2015 and Mr Pentecost was then employed in a similar role by a related company called Ruark Properties.

[25] On 5 August 2015, Mr Pentecost was appointed as a director of Residual Finance (another company part of the Residual Property Group). Mr Pentecost described this appointment as being “in title only” and one that “did not result in any further expansion of my role”.

- [26] But when cross-examined, it emerged that Mr Pentecost had downplayed the extent of his experience at Ruark Properties.
- [27] An email from Mr Pentecost to his uncle on 11 December 2015 (a few months after Mr Pentecost resigned as a director of Residential Finance in October 2015), reveals that:
- (a) Mr Pentecost's role was more extensive than he initially let on; it included preparing financial statements, taxation statements, reconciling bank accounts, payroll, accounts receivable and accounts payable;
 - (b) his job was to "measure and report metrics";
 - (c) after he became a director, he was sufficiently experienced to realise that the numbers "coming through the accounts department" were such that he became concerned about the health of the overall business; and
 - (d) Mr Pentecost was savvy enough to discover through his analysis of the financial statements that another director had concealed the reality that the company was in a negative cash flow position and was conducting a "Ponzi scheme".

Mr Pentecost's becomes the Company Accountant for the RS Group

- [28] In February 2016, Rapid Loans advertised the position of a company accountant. The company was looking "for an experienced Company Accountant to lead the finance department of the RS Group and to support its commitment regulatory and fiscal compliance".
- [29] Mr Pentecost was interviewed by Mr Birse and Mr Williams for this role on 18 February 2016. The resume Mr Pentecost submitted outlined his tertiary qualifications and listed his previous roles as an "accounts manager" and an "account's assistant", and described Mr Pentecost as having an "an eye for detail" and being literate in the Microsoft suite of software.
- [30] The defendants portrayed Mr Pentecost as an experienced company accountant when he came to be employed by Rapid Loans. I do not accept this depiction as accurate. Mr Pentecost's education and experience were plainly insufficient to support such a label and he did not hold himself out as such. On the face of his resume, he was clearly smart, enthusiastic, and fiercely determined to be thought of as an experienced and competent company accountant "in the making". Such a finding is consistent with the heading of the resume which describes Mr Pentecost as a "Motivated Company Accountant" with the objective of obtaining "a challenging opportunity in a well-established firm, where strong academic knowledge and performance can be escalated into commercial skills while developing a challenging career path in an accounting or finance related environment/discipline".
- [31] During the interview, Mr Pentecost allegedly said to Mr Birse and Mr Williams that his prior experience was limited to data entry, bookkeeping and managing payables and "some payroll", and was told by Mr Birse that his role at Rapid Loans would be similar. Mr Birse and Mr Williams denied that Mr Pentecost's role was this confined. I do not accept Mr Pentecost's evidence about this conversation.
- [32] First, as discussed earlier, Mr Pentecost's role at Ruark Properties was not limited in the manner he professed.

- [33] Second, it is inconsistent with the express terms of his letter of employment with Rapid Loans which states that Mr Pentecost was engaged as the “Company Accountant” (not a bookkeeper or some similar role), and that the responsibilities of the role may vary over time.
- [34] Third, the tasks that Mr Pentecost performed from the outset of his position as the company accountant for the RS Group were far more extensive than data entry, bookkeeping, managing payables and some payroll.
- [35] Mr Pentecost was successful in his application and commenced as the company accountant for Rapid Loans in late February 2016 on a salary of \$75,000 per annum. The letter of appointment states the “principal responsibilities” for the role to be “the management of accounts of all companies in the Rapid Group and as directed by the directors”. With the proviso that the “continuing growth” of the Rapid Group may see the responsibilities varying from time to time.

The various roles Mr Pentecost undertook within the RS Group

- [36] In his first affidavit Mr Pentecost described his primary role to be limited to bookkeeping and entering data from RS Group’s bank accounts and loan management software into MYOB. Although, he also accepted that he undertook other tasks such as reconciling employee payroll, loading payments into online banking for approval, lodging BAS, providing statements to the external accountants, Whytes Accountants (Whytes), undertaking bookkeeping and assisting Mr Birse to prepare management reports for Skybound.
- [37] Subsequently, in his second affidavit, Mr Pentecost accepted that his role was far broader and included other tasks such as:
- (a) ensuring cashflow management was adequate to accommodate Rapid Securities’ cash needs (such as payroll and disbursements);
 - (b) maintaining the company’s accounting system (limited to MYOB);
 - (c) supervising the accounts assistant;
 - (d) preparing and posting month-end journals to the general ledger;
 - (e) maintaining the chart of accounts;
 - (f) maintaining the unsecured note investors database;
 - (g) preparing financial reports, periodic tax filings (i.e. BASs) and other submissions to government entities;
 - (h) liaising with the ATO and Office of State Revenue;
 - (i) reconciling the loan management bank account with high volume of transactions; and
 - (j) supervising the execution of banking, payroll, accounts receivable and accounts payable.
- [38] As part of his induction as the company accountant, Mr Birse provided Mr Pentecost with a monthly checklist of tasks to be completed by the accounting/finance department of the RS Group. This document included items for “Payroll Tax”, “NZ pay withholding tax to IRD”, “BAS”, “Skybound reports” and “Check if EOM Reports Balance in Lotus Notes”. Mr Pentecost shared these tasks mainly with Ms

Billington, a bookkeeper who also started working at Rapid Loans in 2016. For example, Ms Billington completed the reconciliation of the Lotus Notes and Mr Pentecost would check the reconciliation.

- [39] Mr Pentecost was obviously a dedicated employee who displayed initiative and enthusiasm in his new role. On 8 March 2016, he recommended to Mr Birse and Mr Williams that a new procedure for accounts payables that he and Ms Billington had discussed be tested and implemented. In May and June 2016, Mr Pentecost documented his “observations & suggestions” as to how to change the invoicing of service fees between companies in the group. He also identified discrepancies between intercompany invoicing and direct debits by reconciling the MYOB accounts and, amongst other things, the ATO business portal.
- [40] Despite his initiative, Mr Pentecost found his job difficult for the first few months. This is not surprising. For a start, he had taken on the role of company accountant when (as both Mr Birse and Mr Williams well knew) he was not a chartered accountant or certified practising accountant. He was also undertaking a broader role than he had previously, and in an industry (finance) that he had no discernible previous experience in. In these circumstances, and as a matter of common sense, I therefore accept that Mr Pentecost and Mr Birse worked closely together, and that Mr Birse provided considerable guidance to Mr Pentecost as he carried out his new role.
- [41] Mr Pentecost enjoyed a considerable degree of autonomy, but he remained under the watchful eye of the person with the most authority within the RS Group: Mr Birse.
- [42] Mr Birse said that Mr Pentecost would “from time to time” send him drafts of documents to review, and that any amendments were only matters of style. But the oversight was far more regular and consistent, and Mr Birse had considerably more input than he let on. Mr Birse kept a close watch on Mr Pentecost. That is apparent from the various email exchanges between the two men and Mr Birse’s plainly authoritative manner which manifested itself from the witness box.
- [43] For example, Mr Pentecost liaised with Mr Birse in the preparation of the monthly management reports for Skybound. Mr Birse was clearly across the details and provided considerable input into these reports. He also gave final approval. This is consistent with his obligations as a director of the RS Group and the managing director of Rapid Securities.
- [44] Mr Pentecost and Mr Birse obviously developed a close working relationship over the first few months of Mr Pentecost’s employment in 2016. Mr Pentecost’s desk was located near Mr Birse’s office so as a matter of common sense and practicality I accept Mr Pentecost’s evidence that he would often walk into Mr Birse’s office and would be invited to pull up a chair beside Mr Birse. Other times, they would discuss work issues in the boardroom. Mr Birse provided Mr Pentecost with answers to forward on to third parties such as auditors and lenders. He regularly dictated the tone and content of emails with third parties (such as Skybound) and required Mr Pentecost to send him draft emails so that he could check them before they were sent.
- [45] Mr Pentecost was clearly impressed by Mr Birse’s success and prowess in financial and business matters concerning the RS Group. As often occurs in such a work setting, Mr Pentecost and Mr Birse also discussed their personal lives and shared stories about their families. It is understandable, and I accept, that over time Mr

Pentecost came to think of Mr Birse as a friend and a mentor and that he told Mr Birse so.

- [46] These findings do not mean that Mr Pentecost was unable to perform his role at Rapid Loans independently of Mr Birse. He clearly was.
- [47] Mr Pentecost's diligence and enthusiasm led to his continued employment and promotion within the RS Group. True to his word, Mr Pentecost was obviously a quick learner and worked hard. He was also organised. He used an online service called "ToDoist.com" which sent daily emails that outlined the tasks to be undertaken each day. One of those tasks was "Deferred revenue within write offs – adjust EOM [end of month] journals. Mr Pentecost accepted this was a task he undertook but "under the guidance" of Mr Birse.
- [48] As foreshadowed by the initial letter of employment, Mr Pentecost's tasks and role changed over time. From about February 2017, he was a member of both the executive team and the operational management team.
- [49] In July 2017, a new chief executive officer, Richard Kennerley, was appointed to Rapid Securities. Mr Pentecost was required to report to Mr Kennerley on his role. A further change in the personnel organisational structure of the RS Group was instigated by the newly appointed Chief Financial Officer, Ms Lisa Lee, in October 2017. As part of the restructure, in late October 2017, Mr Pentecost provided Ms Lee with a "high level" table of some of the tasks he undertook as the Company Accountant. The "Accounts Task Lists" included: directors' salaries, superannuation payment, MYOB reconciliation loan management bank accounts for Rapid Loans (Aus) and (NZ), checking banking against ARMnet, BAS lodgement, investors' interests, NZ tax compliance, Skybound monthly reporting including cash flow statements produced manually, intercompany interests from one company to another and interest generation and cash flow to Skybound and different funds.
- [50] A diagrammed chart from October 2017 refers to Mr Pentecost as the Finance Manager (and Ms Billington as his accounts assistant). Although Mr Pentecost's evidence was that he did not formally take on this role until February 2018, it was apparent he was carrying out much of this work well before that time.
- [51] In early 2018, Mr Pentecost drafted a job description for the position of Finance Manager, drawing on internet resources provided to him by Ms Lee. Mr Pentecost protested that several of the tasks he identified were aspirational and things he and Ms Lee had agreed he would work towards in his new role, and that regardless many of the tasks were ultimately undertaken by Ms Lee. It is unnecessary to unravel this web of which of these tasks were so, for two reasons. First, in sending Mr Pentecost the various links, Ms Lee observed that she believed that Mr Pentecost was "doing a good amount of this role already". Second, it is reasonable to infer that in settling such a document Mr Pentecost considered he had the necessary skills or potential to carry out the tasks identified.
- [52] Mr Pentecost's position changed from Finance Manager to Finance Operations Manager on 3 August 2018. Although there does not appear to have been a letter of variation changing his employment from Company Accountant (pursuant to the initial letter of employment on 22 February 2016) to Finance Manager. The practical

difference (apart from the title) between these two positions is not apparent nor does it matter.

Mr Pentecost's understanding and use of the financial records of the RS Group

- [53] There was disagreement between the parties about the full extent of Mr Pentecost's access to and knowledge of the financial records of the RS Group.
- [54] There were two accounting systems maintained by the RS Group that contained the accounting data. Those systems were MYOB, which Mr Pentecost accepted he had unrestricted access to, and the "proprietary" version of the loan management system called ARMnet, which he alleged he had restricted access to. Although it was not clear what these restrictions were. But regardless, I do not accept Mr Pentecost's contention that his access to ARMnet was restricted as he contended.
- [55] First, it is highly unlikely that a person in Mr Pentecost's position as the company accountant would have restricted access to financial data maintained by the company. If this was in fact the case it is reasonable to assume there would be some internal emails reflecting that fact and requesting access, or at the very least complaining about such restricted access.
- [56] Second, Mr Pentecost's evidence that he had restricted access is inconsistent with his various tasks including the reconciliation of the daily deposits into the bank accounts against the ARMnet data report and identifying any discrepancies.
- [57] Mr Pentecost also manually prepared the monthly cash flow spreadsheet for Skybound. Initially, Mr Pentecost said that this entailed simple data transposition; copying data from MYOB into a report sent to Skybound. But he conceded in cross-examination that there was more to this task, including that he was required to manipulate each report to create a new column for each new month and modify the formulae to correctly calculate that month's data. This required a level of knowledge of Microsoft Excel to copy and modify formulae.
- [58] The Skybound reports are instructive because they show the detailed accounting information available to Mr Pentecost. A cursory review of the March 2016 report shows the Loan Book has a recorded opening balance of \$40,076,279 and that \$310,959 in loans were written off that month. Mr Pentecost accepted he understood how the loan balance was calculated and that these spreadsheets recorded the monthly provisions or write-offs against that Loan Book. It follows that Mr Pentecost was privy to detailed information about the recorded value of the Loan Book and the extent of provisions (or write-offs) made each month.
- [59] The correspondence with Skybound is otherwise another demonstration of Mr Pentecost's reasonably detailed understanding of Rapid Securities' business and financial affairs. For example, the email of 7 February 2017 drafted by Mr Pentecost reports issues with discrepancies in ARMnet and the progression of the audit and end-of-year changes to the accounts to reflect Commerce Commission rebate journals.
- [60] The various emails to Skybound from Mr Pentecost also demonstrate that Mr Pentecost was not simply providing Skybound with "standard bookkeeping" services as he contended but that he answered questions relating to loan book movements. For example, Mr Pentecost reported on:

- (a) adjustments needed to deferred income;
 - (b) the calculation of the Skybound 1 per cent management fee;
 - (c) write-offs being brought to account for the New Zealand business; and
 - (d) discrepancies in ARMnet provisions and write-offs.
- [61] Mr Pentecost also liaised between the external accountants, Whytes and Integrated Audit Service Pty Ltd (IAS), about the discrepancies between the MYOB files and the financial statements that Whytes had prepared and the work IAS was undertaking. As part of this role Mr Pentecost was requested to “have a look” and advise if there were “any glaring issues” in the draft audited financial statement for the FY16 year that were sent to him by Mr Swanpoel of IAS on 29 March 2017. Mr Pentecost could not recall whether he undertook this review. But I am satisfied that he did.
- [62] First, Mr Pentecost had been dealing with the auditors since January 2017, when he instructed the audit to commence and he subsequently responded to many of their queries, identifying discrepancies. Including about how deferred income was dealt with in the MYOB accounts.
- [63] Second, Mr Pentecost followed up the auditors on at least five occasions seeking delivery of the draft audit report. Given his obvious diligence and that he saw it as his role to report to the directors on the progression of the audit, it is most likely he reviewed the draft audited financial statements to ensure that there were not any “glaring issues”.
- [64] Third, Mr Pentecost did not send the draft audited financial statements to Mr Birse until 3 April 2017, several days after he received them; allowing time for a review.
- [65] Having reviewed these draft audited statements, it is reasonable to assume, as I do, that Mr Pentecost was aware that the only provision to the “active loans” was \$62,222 (as was contained in the final audited statements).
- [66] Another one of Mr Pentecost’s roles in 2017 was the preparation of quarterly reports and the presentation of those reports to the directors.
- [67] These reports were presented in a Microsoft Word document prepared by Mr Pentecost and the topics to be addressed included “collection percentage of disbursements”, “write-offs” and “percentage of overall write-offs, across SACCs, MACCs and LACCs and New Zealand vs Australia.” Two such reports were prepared in early 2017.
- [68] The quarterly reports provide a detailed breakdown of Rapid Securities:
- (a) income, including as to what factors contributed to income growth;
 - (b) expenses, again with commentary on the reasons for any change;
 - (c) cashflows; and
 - (d) loan book movements (from ARMnet).
- [69] The commentary in the reports reveals a good level of knowledge of the business. For example, Rapid Group Quarterly Results Q FY17 Report, states on page 7:

“As mentioned earlier in the report, in October 16 the sales team had set a goal to improve our car loans disbursements. This is reflected in the graph by a significant increase in car loans in October 2016. We can see however, MACC loans taking a slight dip at the cost of the extra focus on car loans until December 16 after which MACC Loans started to recover in quarter 3. We registered the highest disbursement level for MACC loans in February 17 at \$924k so far this year - and also the highest disbursement for car loans in Australia \$1.6million.”

- [70] The quarterly reports also demonstrate the reasonably high level of understanding of the business and financial affairs of the RS Group that Mr Pentecost needed to be able to perform his role.
- [71] The notes Mr Pentecost prepared in advance of the directors’ meeting at which he was to present the Q2 FY17 quarterly report (which he accepted were prepared late and without the assistance of Mr Birse or Mr Delaney) reveal Mr Pentecost’s appreciation and understanding of the two accounting systems maintained by the RS Group (MYOB) and the loan management software (ARMnet) in the following ways:
- (a) Mr Pentecost recorded that the write-offs (“WOs”) had not been fully reflected in the books yet and so expenses were likely to be understated and therefore net profit inflated;
 - (b) Mr Pentecost recorded (under “Cash Flow Statement”) that “Good to see NZ has been able to fund itself for a while”, demonstrating a knowledge that the New Zealand business could fund itself;
 - (c) Mr Pentecost recorded (under “Advances”, “Nz”) that he had broken the reporting of the NZ business into ranges. He accepted that he could only have obtained that data from ARMnet; and
 - (d) the notes included (under “Collections”) detailed quarterly data “drilling down” into the “\$12m reported by ARMnet”. Mr Pentecost denied obtaining that data from ARMnet but accepted it was not included in MYOB. I accept (as the defendants’ submitted) that if it was not included in MYOB, it could only have come from ARMnet.
- [72] Other evidence shows Mr Pentecost developing an understanding of the deferred revenue and approach to provision of bad debt within the financial records of the RS Group.
- [73] The minutes of the board meeting at which Mr Pentecost presented the Q2 FY17 quarterly report to the board on 17 March 2017 specifically address the issue of deferred revenue as follows:
- “The Board discussed addressing the deferred revenue aspect by converting a part of the current provider fee on Medium Amount Credit Contracts and Larger Amount/Longer Term Credit Contracts to in an ‘interest rate’. Calculations of these fees and/or interest rate will remain under the NCCP cap.”
- [74] Mr Pentecost could not recall the discussion. But it is reasonable to assume the minutes accurately record what was discussed and Mr Pentecost later recalled the matters so recorded. I am therefore satisfied that Mr Pentecost was present for this discussion about deferred revenue.

[75] Mr Pentecost also came up with a “new approach” to write-offs. On 18 May 2017, he sent Mr Brise an email stating:

“I spoke to the auditor regarding **our new approach regarding the write-offs - posting a monthly provisions**. He is in agreeance with **our conservative approach** as long as the monthly provision figure is backed up by historical data (12-month) and properly documented. The provision that we would post in Month 1 is essentially what we think we will actually write-off in month B. When the actual write-off amount comes through the loan management system EOM report, we put this against the provision account to reduce it. As 30/06/201X - in the case where we overestimated our write-offs over the period of the last 12 months, an adjustment would be made so that the closing balance of the provision for write-offs would only display what we think actual write-offs would be for July 201X.

For Rapid Loans NZ as at 30/06/17, the provision for write-offs account will not only represent the anticipated write-offs for July 2017, but will also potentially include any leftovers from the “blister” - unless we manage to clean up all of it by 30/06/2017.”

[Emphasis added]

[76] Mr Pentecost accepted during cross-examination that the “new approach” as discussed with the auditors was that:

- (a) in each month (month 1), a provision would be raised as to what would be the anticipated provision for that month (to be actually recorded in the next month, month 2);
- (b) when the actual amount for month 1 was known, the provision raised for month 1 would be adjusted to the actual amount; and
- (c) at the end of year, there would be an adjustment so that the closing balance for the provision would reflect the estimated actual amount for the financial year.

[77] On 27 June 17, Mr Pentecost sent an email to Mr Birse attaching the Rapid Group Quarterly Results Q3 FY17 Report to directors that he had prepared. This quarterly report is another example of Mr Pentecost’s knowledge of the financial statements of the RS Group:

“**We have discussed with the external audit firm, IAS Audit, regarding providing in the books on a monthly basis for write-offs, starting 1/07/2016. They are in agreeance with our conservative approach as long as the monthly provision is backed up by historical data and documented.** Going forward, a monthly provision will be posted in both Rapid Australia and Rapid New Zealand which will reflect in the Profit and Loss via an expense account, and will also reflect in the balance sheet via a liability account. Once the actual write-offs come through the loan management system, they will be offset against the liability raised. This will be done monthly during the financial year. At the end of the financial year, an end-of-year adjustment journal will be entered to reset the liability account back to nil against the expense account debited in the first place.”

[Emphasis added]

[78] Mr Pentecost accepted that this part of the report reflected his email to Mr Birse of 18 May 2017 regarding the new process for provisions which he had discussed with the auditors.

[79] On page 7 of the Rapid Group Quarterly Results Q3 FY17 Report, Mr Pentecost records the valuation of the Loan Book as follows:

“As per Annex 4, the consolidated loan book, which includes Australia and New Zealand converted to Australian dollars, is approximately valued at \$56.2million as at 31/3/2017. This is an overall loan book gain of \$6.5 million during quarter 3, up from \$3.6million during quarter 2. This was our best quarterly loan book growth yet this financial year 2017:

- Australia reported an asset gain of \$5 million
- New Zealand reported an asset gain of \$1.5 million.”

[80] On page 9, Mr Pentecost recorded that no half-year audit was to be undertaken and he stated his understanding of the state of the loan book being written off as follows:

“Our Bad Debts were an average of 22.19% of our revenues. The company has done well taking it from 30.89% down to 18.51%. It still looks high but it is where we are expecting it to be while we are growing the business and still in the process of purging the loan book of old corrupt loans.”

[81] On 27 June 2017, Mr Pentecost sent a further version of the Rapid Group Quarterly Results Q3 FY17 Report to Mr Birse “with amendments as requested”. The section on bad debts now read:

“During the forthcoming year we intend to regulate this item by expensing a set amount to build a balance sheet provision. We have discussed with the external audit firm, IAS Audit who are in agreeance with our conservative approach provided the monthly provision is backed up by historical data and documented.

The monthly provision will be posted in both Rapid Australia and Rapid New Zealand which will reflect in the Profit and Loss via an expense account, and will also reflect in the balance sheet via a liability account. Once the actual write-offs come through the loan management system, they will be offset against the liability raised. This will be done monthly during the financial year. At the end of the financial year, and end-of-year adjustment journal will be entered to reset the liability account back to nil against the expense account debited in the first place.”

[Emphasis added]

[82] Mr Pentecost accepted in cross-examination that this proposal was to commence in FY18. This is consistent with Mr Pentecost being aware that commencing from FY18 (i.e. 1 July 2017), the RS Group “intended to regulate” bad and doubtful debts by “expensing a set amount to build a balance sheet provision” which would be:

“...posted in both Rapid Australia and Rapid New Zealand which will reflect in the Profit and Loss via an expense account, and will also reflect in the balance sheet via a liability account” and for that “set amount” to be adjusted as “actual write offs come through the loan management system” which would “offset against the liability raised”.

[83] On 20 July 2017 (three days after the completion of the Share Sale Agreement), Mr Pentecost wrote to Mr Birse as follows:

“Hi Russell

Can you please advise what the split will be for the monthly provision for WO for NZ and AU? I'll make sure this is entered in MYOB.

I thought we spoke of a provision of \$1,000,000 monthly across both countries.”

[84] It is reasonable to infer that Mr Birse and Mr Pentecost had a discussion (most likely around the time of the 18 May 2017 email or the preparation of the Q3 FY2017 report to directors) that the provision to be raised each month (and adjusted the following month to reflect actual loan book movements) commencing in FY18 was \$1,000,000 per month across both the Australian and New Zealand loan books. Mr Pentecost accepted that that was a matter he discussed with Mr Birse but could not recall the exact amounts.

[85] As discussed earlier, in June 2017, the directors of Rapid Securities recorded their desire to replace the auditors with “a more recognised firm”. Mr Kennerley set about interviewing a potential new audit firm. Mr Pentecost was involved in communications with Grant Thornton as to that firm’s potential appointment as auditor.

[86] On 2 August 2017, Mr Pentecost and Mr Kennerley attended a telephone call with auditors from Grant Thornton. Following the call, Matthew Tierney of Grant Thornton sent an email to Mr Pentecost and Mr Kennerley stating:

“Thanks very much for your time this morning, it was very beneficial to get a brief history on the Group, the strategic direction and current operations. To further our understanding, it would be great if you could provide:

- 2016 audited financial statements
- 2017 draft financial statements (if possible/available)
- June 2017 Management accounts / report
- Loan Book - any documentation on how this is operated and accounted for, specifically addressing interest and impairment, would be very helpful

As discussed, the loan book is composed of financial assets and the accounting treatment for these is in the process of changing as AASB 9 comes into effect in the near future. A number of listed and other companies in your market have early adopted the new standard as the accounting treatment applied better reflects the underlying operations and can be easier to manager [sic]...”

- [87] The reference to AASB 9 above is a reference to the fact that, from 1 January 2018, the Australian Accounting Standards Board standards 9 and 5 were to take effect. The evidence was that the RS Group was aiming to become an early adopter of those standards.
- [88] Mr Pentecost drafted a response to Mr Tierney and sent it to Mr Kennerley on 2 August 2017 as follows:

“Please find attached as requested:

- Audited financials for financial year 2016
- A drafted diagram showing flow of operation/information from customer to audited financials
- Multi-period monthly report including June 2017 management report (please note the 2017 accounts do not include the year-end adjustments entries)

Regarding the loan book, we do not have any formal documentation on how the loan book is operated apart from ARMnet internal procedures applicable to respective internal staff (credit officer, sales agent, financial controller).

ARM (sometimes ARMnet) is the Loan Management system responsible for controlling all banking and payment functions, disbursements, direct debits, customer transactions and all functions related to the running of active loans including daily interest calculations which are managed in ARM.

Our defaults are also managed by ARM and go through particular steps based on a set of rules coded and implemented in the ARM system -

Active Loan > In Action (1 to 5 score) > Awaiting Debt Collection > Default list > Write- Offs.

As far as how we account for the loan book, a monthly summary report is generated by ARM. This report is reformatted into a text file that is uploaded into MYOB which generates an end-of-month general journal entry.

Please see attachments for illustration for RAP AU.

To answer your question regarding the incurred vs expected loss model, I confirm Integrated Auditing Service has not shared with us any information related to AASB 9 or IFRS 9. As a result, the Rapid Group does not currently have a model measuring expected losses. However, during financial year 2017, we have introduced a monthly provision in both countries in an attempt to better anticipate our write-off costs and bring a little more consistency to our bottom-line. The monthly provision remains the same and is the previous 12-month average - adjusted by management.”

- [89] This email is instructive in two important ways.

- [90] First, it shows (again) Mr Pentecost's apparent knowledge of the ARMnet system, contrary to his evidence that his understanding of ARMnet (or his access to ARMnet) was limited to producing end-of-month reports. It certainly does not suggest that Mr Pentecost had any restricted access to this system.
- [91] Second, it shows Mr Pentecost's detailed knowledge of audits that had been undertaken by IAS in prior years. For example, Mr Pentecost notes that "Rapid Loans does not currently have a model measuring expected losses" and that "we have introduced a monthly provision in both countries in an attempt to better anticipate our write-off costs and bring a little more consistency to our bottom-line". Plainly a reference to the new provisioning methodology that Mr Pentecost outlined in the Rapid Group Quarterly Results Q3 FY17 Report following his email to Mr Birse of 18 May 2017.
- [92] Whilst this email was sent around two weeks after the Share Sale Agreement was signed, it is reasonable to infer that Mr Pentecost was aware of these matters prior to 17 July 2017.
- [93] The draft 2 August 2017 email was sent to Grant Thornton on 8 August 2017 in the form of the draft provided to Mr Kennerley (with slightly less detail about the ARMnet system). In response, Mr Tierney wrote:
- "The loan book provisioning that you have outlined sounds like it is the beginning of an expected loss model which is good. Once we've had a chance to go through the information in more detail it would be good to meet face-to-face and we can discuss this further..."
- [94] Mr Pentecost took comfort in that response from Grant Thornton. He forwarded it to Mr Birse on 10 August 2017 stating:
- "As per below, it turns out the provision we brought into account for a Bad Debts [sic] is very close to what seems to be compulsory going forward.
- Can you please provide me with the monthly provision for each country for period July 17 to Dec 17 and we'll review/adjust the provision in January 2018."
- [95] Mr Pentecost was therefore aware that prior to FYI7, Rapid Securities had not been raising provisions but what was proposed to be introduced in FYI7 was, on Mr Pentecost's assessment, "very close" to that required by AASB 9.
- [96] I am satisfied that over his 18 months as the Company Accountant, Mr Pentecost:
- (a) capably used Microsoft Excel and understood spreadsheets;
 - (b) had an understanding of the deferred income that was recorded in the MYOB accounts;
 - (c) had unrestricted access to and used ARMnet;
 - (d) developed considerable knowledge and understanding of both the Rapid Securities accounting system and the recording of deferred income;

- (e) was able to liaise with Whytes Accountants, the external accountants for the RS Group and provide input into the auditor's (IAS) review of the financial statements for the 2016 financial year;
- (f) learnt to make adjustments to the level of deferred revenue and write-offs in Rapid Loans company accounts;
- (g) knew of the limited amount of provision that had been made for active loans; and
- (h) was learning about and engaged in the reporting requirements of large corporations.

Mr Pentecost is interested in purchasing shares in Rapid Securities from April 2016

- [97] Not long into his employment, Mr Pentecost began “gazing” at the idea of how he would get involved with the RS Group “if he had resources available”. By the end of April 2016, it became clear to him that Rapid Loans was not “just an ordinary company making a just-above-average profit” but far more lucrative than he first thought.
- [98] The plaintiffs’ case is that Mr Pentecost had been working at Rapid Loans for around seven months when, in September 2016, he first raised the prospect of buying shares in Rapid Securities with Mr Birse. With further critical conversations occurring in October and November 2016.
- [99] The defendants deny any discussions took place at these times and contend that they occurred later (and not in the way the plaintiffs allege in any event). I reject the defendants’ submissions both about the timing and more generally the nature of the discussions for two reasons.
- [100] First, although Mr Birse denies having ever seen the Business Proposal prepared by Mr Pentecost for his family prior to these proceedings (or having any input into it), he knew about it because Mr Pentecost told him that he needed to prepare such a document if he was to obtain funds for the purchase of shares. As a matter of logic, conversations about the sale of shares must have taken place before the Business Proposal was, in fact, prepared.
- [101] Second, the Business Proposal was finalised and sent to Mr Pentecost’s uncle and grandmother on 21 November 2016. It is therefore reasonable to assume, as I do, that there had been several discussions between Mr Birse and Mr Pentecost about Mr Pentecost investing in Rapid Securities prior to that date. The finding that the two men spoke on this issue is consistent with the contemporaneous and express reference:
- (a) in the covering letter, Mr Pentecost sent to his uncle attaching the Business Proposal. Here Mr Pentecost explains the delay in providing the proposal as due to wanting “to chat to Russell [Mr Birse] about a few points I needed to bring into my due diligence”; and
 - (b) in the Business Proposal, to Mr Pentecost having long meetings with Mr Birse about the road ahead for Rapid Loans including among other things the optimal funding.

- [102] Unravelling the minutia of exactly what was said and by whom between the time Mr Pentecost first spoke to Mr Birse about investing in Rapid Securities in September 2016 and when the Share Sale Agreement was signed in July 2017 is a difficult undertaking. Made harder by the passage of time, obvious conflation of conversations and events and the artificial reconstruction of evidence by Mr Pentecost and Mr Birse which in turn infect the reliability of their evidence. The most reliable sources of evidence are the relatively contemporaneous documentary evidence; to the extent that such documentation exists. But even then, some of the conversations as they are said to have occurred do not entirely make sense.

Conversations about the sale of shares in September, October and November 2016

- [103] The plaintiffs pleaded case and the List of Issues in Dispute allege without any real specificity that the representations were made over a broad period of time between late September 2016 and mid July 2017. Conveniently, the relevant evidence said to underpin the alleged representations as they were ultimately maintained by the plaintiffs, was identified during the course of the plaintiffs' closing submissions.
- [104] Overall, I am satisfied that there were various fluid conversations between Mr Birse and Mr Pentecost between September 2016 and November 2016 about Mr Pentecost investing in Rapid Securities. I am satisfied that the conversations first started in about September 2016, when Mr Birse told Mr Pentecost that he was in talks with Skybound about buying equity in Rapid Securities. Initially, Mr Birse did not go into much detail about these discussions apart from saying that Skybound were going to buy into the business for \$14 million, would obtain a 20 per cent equity share and increase their debt facility. It is objectively likely that this discussion took place in 2016 given that Skybound had been expressing an interest in acquiring shares in Rapid Securities since mid to late 2015. At a meeting held on or about 27 May 2016, Skybound and the directors of Rapid Securities discussed a transaction where Skybound would acquire \$6 million in shares from the existing shareholders in Rapid Securities in addition to \$8 million in newly issued shares in the company. Following the 27 May 2016 meeting, a terms sheet seeking additional debt funding was prepared. That terms sheet recorded among other things that "An equity investor has been sourced who has agreed to invest \$14 million for a 20 per cent stake in the company...".

General Conversations in September 2016

- [105] This proposed investment by Skybound obviously piqued Mr Pentecost's interest and during a conversation with Mr Birse in September 2016 he asked Mr Birse how he could become a 10 per cent (or something like that) shareholder. Mr Pentecost also mentioned to Mr Birse, (either at this point or in a conversation shortly afterwards) that his grandfather was a businessman who had done well for himself in mining and that his family might be willing to assist him to purchase shares if he could convince them it was a good investment. Unsurprisingly, Mr Birse told Mr Pentecost that he would need to speak to Mr Williams and Mr Oar and about any potential investment. Mr Birse also told Mr Pentecost around this time that the shareholders were looking at selling a portion of their shares as they grew the business. Shortly after the first conversation in September 2016, Mr Birse told Mr Pentecost that the directors were happy for Mr Pentecost to purchase shares, but they needed to speak to Mr Warren, the chairman of Skybound, about this.

- [106] At this time, Mr Oar was a non-executive director of various entities within the RS Group. Mr Oar's expertise is in computer science and information technology but in 2012 he stopped working full time at the RS Group. Although he attended the Rapid Loans offices located on the Gold Coast Highway at Miami on a semi regular basis - usually on a Monday. These visits were to assist in the development of software or for a coffee with Mr Birse and Mr Williams. I accept (as Mr Pentecost described), that Mr Oar was retired and "only passively involved" with the business.
- [107] Mr Oar had very little interaction with Mr Pentecost. He could only recall being present for one conversation with Mr Pentecost, Mr Birse and Mr Williams about Mr Pentecost purchasing shares in the RS Group. But he did not say when this was. Although he did not dispute being present when Mr Birse told Mr Pentecost that the other directors were happy for him to come on board but subject to checking with Mr Warren first. It is reasonable to infer from the way events transpired, that Mr Oar instructed Mr Birse, or at the very least was more than content, for Mr Birse to act on his behalf and on behalf of 123 Bang in the negotiations for the sale of shares.
- [108] Mr Williams was the Sales Director who had been an executive director of Rapid Loans since its inception in March 2003. His key responsibilities were sales and marketing, the management of the active loan book and human resources. Mr Williams accepted under cross-examination that he had numerous one-on-one conversations with Mr Pentecost. But he could not remember much detail. Again, it is reasonable to infer from the circumstances that Mr Williams instructed Mr Birse, or was at the very least content, for Mr Birse to act on his behalf and on behalf of Runaway Cove in the sale of the shares.
- [109] Subsequently, Mr Birse spoke to Mr Warren (most likely later in September 2016) and Mr Warren confirmed that Skybound had no issues about any sale of shares to Mr Pentecost and Mr Warren perhaps understandably thought it positive that the company accountant was wanting to invest.
- [110] During one of the September conversations:
- (a) Mr Pentecost told Mr Birse that the reason he was considering investing was because Mr Birse was "the brains of the business," crunched the numbers and "know it better than anyone". Mr Pentecost also told Mr Birse that he was a mentor and a role model who had "done well" and he [Mr Pentecost] would like to "achieve the same thing to show my family". Mr Birse accepted that Mr Pentecost said something along those lines but could not recall when. I am satisfied that it is objectively likely as a matter of logic that such a conversation took place when the issue of investing in Rapid Securities was first raised in September 2016 most likely at the time when Mr Birse showed Mr Pentecost Spreadsheet 1;
 - (b) Mr Pentecost also explained to Mr Birse that he would need to prepare a report for his family's Swiss bankers about how the business worked and to show "if it is a good investment". Mr Birse rejected the notion that Mr Pentecost told him that his family would not transfer the money unless they were satisfied that it was a good investment. But it follows as a matter of logic and common sense that the whole idea of such a report was to persuade Mr Pentecost's family that buying shares in Rapid Securities was a good investment. It is therefore objectively most likely that Mr Pentecost framed it as such when talking to Mr Birse; and

(c) Mr Pentecost asked Mr Birse if he could help him with the report and according to Mr Pentecost, Mr Birse said yes. Mr Birse denied ever seeing the Business Proposal or having any real input. But he accepted that Mr Pentecost asked him about his thoughts on the format of the report, and that he agreed to point him in the direction of information that he needed. I am satisfied that the true position is somewhere in the middle, and that Mr Birse told Mr Pentecost that he [Mr Pentecost] would need to do up the report himself but if there were specific queries then he [Mr Birse] would assist him where he could. For example, Mr Birse sent Mr Pentecost the Money3 Report on 14 October 2016 as an example of an industry report to help him with the Business Proposal.

[111] As well as these more general discussions, Mr Pentecost had another conversation with Mr Birse in mid to late September 2016 (which the plaintiffs define as the Third Conversation). It is during the Third Conversation Mr Birse is said to have made the first series of crucial representations about the then present and future value and financial performance of Rapid Securities to Mr Pentecost.

Third Conversation in September 2016 when Spreadsheet 1 shown to Mr Pentecost

[112] In mid-late September 2016, during one of the ongoing conversations between Mr Birse and Mr Pentecost about Mr Pentecost’s purchase of shares in Rapid Securities, Mr Pentecost alleges that Mr Birse showed him a software spreadsheet dated 19 September 2016 (Spreadsheet 1) from his computer in his office.

[113] It is uncontroversial that spreadsheets such as this were created by Mr Birse as a business planning tool of the RS Group to “provide a range of possibilities for the monitoring of performance targets” and as a “Model” for the RS Group to:

“...forecast cash flow requirements, simulate increased funding amounts (whether that be sourced from debt or equity) to stimulate and project Rapid Loans’ and Rapid Loans NZ’s loan capacity, test new loan products and the interaction with resourcing, including staffing and advertising matters.”

[114] Spreadsheet 1 has nine Tabs. Each Tab contains a complex array of numbers and equations which permit the values in Tabs 2 to 9 to feed into Tab 1. Whilst going over these Tabs, Mr Pentecost said that Mr Birse told him that he did not need to worry about Tabs 2 to 9 because they all fed into Tab 1. Mr Pentecost then contends that Mr Birse then took him to Tab 1 and directed his attention to cells B52 and C52 and to B56 and C56 which Mr Pentecost extracted and recalled in his affidavit sworn five and a half years later (on 23 March 2023) as follows:

Offering	20.00%
Equity + Buy Out	\$14,000,000
Retained Equity portion	\$8,000,000
Buyout portion	\$6,000,000
Business Value	\$70,000,000

[115] While directing Mr Pentecost to these cells, Mr Pentecost recalled that Mr Birse made several representations to him about Rapid Securities’ value and future plans of the directors and shareholders including that:

(a) “Rapid was worth about \$70 million today”;

- (b) Skybound (Suzerain) was looking to purchase 20 per cent of Rapid Securities, being \$14 million, and that, as part of the deal, Mr Birse, Mr Williams and Mr Oar would be selling some of their existing shares to Skybound;
- (c) Mr Birse, Mr Williams and Mr Oar were planning to sell more of their shares in the future "after the business is worth \$100 million plus"; and
- (d) Mr Williams and Mr Oar may sell all their shares eventually and move on.

[116] Mr Birse is then said to have directed Mr Pentecost to cell E22 in yellow which showed the figure of \$8,000,000 as an equity injection (capital restructure) under the year "16-17", stating at that time:

"Skybound has also agreed to inject a further \$8 million into the business to help us grow. That's this number here. Again, the plan is to onboard a CEO, CFO and COO and grow the business even more. Having C-suite officers will raise the overall profile of the company. **I would like to take this company public at some point in the future too. When this thing goes public your shares will be worth a lot more.**"

[Emphasis added]

[117] It is instructive that the cells in the E column appear under the "Face Value" section of the spreadsheet.

[118] Mr Birse then allegedly took Mr Pentecost to the line of cells from B26 to H26 (Book Value) and from B31 to H31 net profit after tax (NPAT) of the following table in the spreadsheet:

Book Value		\$48,519,147	\$75,053,313	\$103,276,582	\$136,882,372	\$152,957,896
Average Capital Employed		\$31,656,191	\$51,725,455	\$74,795,140	\$98,355,092	\$100,663,394
Debt Funding		\$35,848,539	\$49,190,958	\$66,250,133	\$85,364,191	\$91,535,976
EBITDA	3.7	\$8,970,102	\$14,993,355	\$23,260,588	\$33,678,901	\$37,170,145
EBT (Y/N Add BizFinance)	N	\$4,356,012	\$9,035,410	\$15,886,518	\$23,932,355	\$26,112,485
NPAT	8.0	**\$3,049,208	\$6,324,787	\$11,120,563	\$16,752,649	\$18,278,740

[119] In referring to this table Mr Birse apparently:

- (a) Pointed to cells E26 (\$76,053,313) and E31 (\$6,324,787) under the year "16-17", saying words to the effect that the key asset (the Loan Book) is sitting at around \$70 million and with Skybound increasing its debt facility it will be worth about \$76 million by the end of the financial year, with a profit of about \$6.3 million.
- (b) Directed Mr Pentecost to cells F26 (\$103,276,582) and F31 (\$11,120,563) under the year "17-18", G26 (\$136,882,372) and G31 (\$16,752,649) under the year "18-19", H26 (\$152,957,896) and H31 (\$18,278,740) under the year "19-20", saying words to the effect of:

"You can see here that Rapid is going to be worth over \$100 million next year and then you can see it's going to just keep going up and up. You can see the same with the profit right.

Skybound aren't buying in just for fun. They are coming on board with a purpose and really accelerating their debt funding so that we can

increase the value of the loan book and all make a good profit. **We're going to double our money in a few years Georges.**"

[Emphasis added]

- [120] Mr Pentecost's evidence of the specific contents of the figures in Spreadsheet 1 was obviously reconstructed some years later after, I assume, he refreshed his memory from looking at the spreadsheet during preparation of his affidavit to be filed in this proceeding. I do not accept it was a memory imprinted in his mind from September 2016 for several reasons.
- [121] First, there is no evidence that Mr Pentecost made a note of these figures.
- [122] Second, Mr Pentecost's evidence, which I accept, is that, at the time of the Third Conversation, he did not say much as he had not seen Spreadsheet 1 before and "he did not completely understand it". It is objectively unlikely that Mr Pentecost would have recalled specific figures in the nature of those shown on the spreadsheet even assuming that he understood it. Let alone when he did not. The lack of reliability in Mr Pentecost's recollection of this conversation is reflected in the fact that he did not understand the Skybound deal and that he thought he was competing against, not potentially coming on board with Skybound.
- [123] Third, Mr Pentecost's evidence was that he never read Spreadsheet 1 again, despite sending himself a copy on 23 September 2016. It is therefore highly unlikely, and I do not accept, that Mr Pentecost has a specific memory of the specific figures on Spreadsheet 1.
- [124] But this does not mean that I am not satisfied that Mr Pentecost was shown Spreadsheet 1 in September 2016. He clearly was.
- [125] By their defence, the defendants admit that Mr Birse showed Mr Pentecost Spreadsheet 1, but only in the context of Mr Pentecost being the company accountant and finance manager and so he could "take a further look at the Model to gain a further understanding of the RS Group's needs from a cash flow forward looking perspective" not for the purpose of his purchase of shares in Rapid Securities. Eventually, and somewhat reluctantly, Mr Birse conceded (and I accept) that during the course of a private conversation with Mr Pentecost at the Rapid Loans office in September 2016, he did, in fact, show the spreadsheet to Mr Pentecost in the context of discussing his potential purchase of 10 per cent of the shares in Rapid Securities.
- [126] The use of spreadsheets to inform investors is consistent with the unchallenged evidence of Mr Allen (Mr Pentecost's financial adviser) that Mr Birse showed similar spreadsheets to him in a meeting on 22 May 2017, and the evidence of Ms Zunker (Mr Allen's colleague), who made a contemporaneous file note of that meeting.
- [127] I am therefore satisfied that Mr Birse showed Spreadsheet 1 to Mr Pentecost in mid-September 2016 as part of his discussions with Mr Pentecost about investing in Rapid Securities.
- [128] Mr Birse conceded that as he was showing Mr Pentecost Spreadsheet 1, he focused on the Assumptions Tab. I am also satisfied as a matter of common sense and logic, (and again as Mr Birse conceded), that in focusing on these Assumptions Tabs, Mr Birse:

- (a) took Mr Pentecost to cell E22 in yellow and told Mr Pentecost that Skybound had agreed to inject a further 8 million to help the business grow;
 - (b) told Mr Pentecost that there was a plan to onboard C-suite officers like a CEO to raise the profile of the company;
 - (c) said that he would like to take the company public at some point in the future and if that happened Mr Pentecost's shares would be worth a lot more; and
 - (d) told Mr Pentecost that with Skybound increasing its debt facility the loan book would grow.
- [129] In taking Mr Pentecost to the figures in the Book Value row of cells, it is objectively likely that Mr Birse said to Mr Pentecost that the loan book is actually sitting at around \$70 million "give or take" and with Skybound increasing its debt facility it [the Loan Book] will be worth \$76 million by the end of the year. I also accept that it is most likely that he also showed Mr Pentecost the increasing profit amounts corresponding to each of these years. Such a finding is consistent with what the figures in the cells show. Although as stated earlier, I do not accept that Mr Pentecost could have possibly remembered those specific figures.
- [130] I am not satisfied however that Mr Birse also told Mr Pentecost in the same conversation that Rapid Securities is "worth" about \$70 million today and is going to be worth over \$100 million next year. The onus is on Mr Pentecost to satisfy me that the representation, as he contends, was made. And in the instance, he has not done so.
- [131] First, it is objectively unlikely that Mr Birse would conflate the worth of the business with the Loan Book value of the business as they are two separate things. Mr Birse was an experienced businessman and it is inherently unlikely that he would make definitive statements about the future value of the business when there are so many variables that can impact that assessment.
- [132] Second, Mr Pentecost refers to Rapid Loans having been recently valued at \$70 million in the Business Proposal, but this reference needs to be seen in the context that he also refers to the Loan Book sitting at approximately \$45 million. Mr Pentecost obviously sought to distinguish between the Loan Book value and the business value. Although the fact that the business is valued more than the Loan Book does not really make much sense.
- [133] Third, it is unlikely that Mr Birse told Mr Pentecost in the same conversation that the Loan Book value was \$70 million and the business was worth \$70 million and the more likely position is that Mr Pentecost has not accurately recalled what was said, was confused about what was said or conflated the two values. It is more likely given the reference on the spreadsheet that he was taken to was to the "book value" and that it was that value that Mr Pentecost was told about.
- [134] Fourth, Mr Pentecost was clearly confused at the time. This is apparent from his evidence that he knew that the spreadsheets he was shown by Mr Birse were based on a series of assumptions (including for example that that Skybound were paying \$14 million for 20 per cent of the shares in Rapid Securities). Yet, he curiously maintained that during the conversations leading up to preparation of the Business Proposal (and as emerges from the Business Proposal) that he thought that it was either team Pentecost or team Skybound.

- [135] Fifth, I accept that it is objectively likely that Mr Birse told Mr Pentecost that he, Mr Williams and Mr Oar were planning to sell more of their shares in the future “after the business is worth \$100 million plus”. But I do not accept that Mr Birse said (as Mr Pentecost alleges) it was going to be next year. This finding is consistent with:
- (a) The fact that the Business Proposal refers to it being “a shame 2-3 years down the track watching Rapid Loans become a \$100,000,000 + corporation”;
 - (b) the 2016 Terms Sheet (which was created around 21 September 2016 by Mr Brett Delaney – a former Price Waterhouse Coopers partner assisting Rapid Securities to find an equity partner who was able to lend funds to the RS Group) which stated at page 6 that “...Rapid Group will grow its consumer lending book to its target of \$100 million...in the next three years.” Mr Birse accepted he shared the same view as Mr Delaney; and
 - (c) Mr Pentecost’s concession that the reference to Rapid Loans being “well and truly on its way to becoming a \$100M + corporation” (and not next year as alleged by Mr Pentecost) was an assessment he made himself.
- [136] I am also not satisfied that Mr Birse said to Mr Pentecost that, “we’re going to double our money in a few years Georges”.
- [137] First, such a statement is inconsistent with other aspects of the conversation which I accept occurred including that Mr Birse told Mr Pentecost that he would like to take the company public and that when that happened, “your shares will be worth a lot more”. It is also inconsistent with what Mr Pentecost says variously in Business Report:
- (a) that “if Rapid Loans gets the funding its needs to respond to business growth, the share prices will increase over the next 2 to 10 years - as an exit strategy you could sell your shares at a much higher price 2 to 3 years from today or even later”; and
 - (b) that the shareholders are confident of letting go of 20 per cent of the company because they know that their 26.67 per cent share will be worth a lot more than their current 33.33 per cent shares in two to three years.
- [138] Second, there is also no objective contemporaneous evidence to support such a statement having been made. For example, Mr Pentecost makes no such statement in his Business Proposal or his email to his uncle Richard Pentecost. If such a statement was made, it is reasonable to assume that Mr Pentecost would have repeated it in his Business Proposal.
- [139] Third, and as a matter of common sense, the statement is at odds with the context. Whether someone will “double” their money depends on the price at which their money was invested. As the defendants submitted (and I accept), Mr Birse, Mr Williams and Mr Oar had acquired their shares (through their corporate entities) for very little, as they were the founding shareholders in Rapid Securities. It follows that they would “double” their money on a slight increase in the valuation of the shares. Mr Pentecost was, according to his Business Proposal, seeking to buy shares at a \$40 million valuation. If, as Mr Pentecost recorded in this Business Proposal, those shares were “valued” at \$70 million then he would, near immediately, “double” his money.

- [140] Fourth, Mr Birse is a canny businessman. It is inherently unlikely that he would make such a specific statement about future profits as there are too many variables that could impact that outcome.
- [141] In these circumstances, the notion of doubling his money was clearly something that Mr Pentecost assumed rather than what he was told.

Further conversations in October and November 2016

- [142] In October and November 2016, Mr Birse and Mr Pentecost continued to discuss Mr Pentecost's interest in purchasing shares on a regular but casual basis. Mr Birse's denial that any such discussions took place at this time (apart from his provision of the Money3 Report) was entirely unbelievable. The money ball of investment had already started rolling. It makes perfect sense and is logical that Mr Birse would keep the lines of communication open with one of his employees who was interested in investing a substantial sum of money in Rapid Securities.
- [143] The next important conversation in which further representations were said to have been made is when Mr Birse apparently showed Mr Pentecost Spreadsheet 2, dated 14 October 2016. Mr Pentecost was not certain of the date but believed this was on 14 October 2016, because that was the day Mr Birse emailed Mr Pentecost a Money3 article by Mr Bell Potter dated 11 October 2016.
- [144] The Money3 Report was (according to Mr Birse), sent to Mr Pentecost in response to a general inquiry from him about the second-tier lending industry and solely for the purpose of Mr Pentecost's employment. I accept that Mr Birse sent Mr Pentecost the Money3 Report on 14 October 2016, but I reject Mr Birse's explanation as to why he did this as being entirely implausible and another attempt by Mr Birse to distance himself from any involvement in the Business Proposal. Mr Birse knew at the time, that Mr Pentecost was preparing a report about the industry and the business of the RS Group, to send to his family in the hope of convincing them to help him invest. A transaction that Mr Birse and the other directors were clearly going to benefit from. I am satisfied that the Money3 Report was (as Mr Pentecost states), sent by Mr Birse, as an example of an industry report to help Mr Pentecost with the Business Proposal. Consistent with this, extracts and adaptations from the Money3 Report are littered throughout the Business Proposal. Although it is instructive to note that Mr Pentecost had already sent himself the Money3 Annual Report for 2015 on 28 September 2016 and, at least on one of his versions, almost finished the Business Proposal in early October 2016.
- [145] Mr Pentecost's evidence is that, just like in the Third Conversation, Mr Birse showed him Spreadsheet 2 in the context of discussing his purchase of shares in Rapid Securities. On this occasion, Mr Birse went straight to Tab 1 - the Assumptions Tab and as he did with Spreadsheet 1, Mr Birse directed Mr Pentecost's attention to the cells from E26 to H26 (Book Value) and from B31 to H31 (NPAT):

Book Value		\$48,519,147	\$75,306,269	\$106,146,973	\$137,641,198	\$153,884,975
Average Capital Employed		\$31,656,191	\$50,892,121	\$75,587,205	\$101,652,326	\$104,088,616
Debt Funding		\$35,848,539	\$49,190,958	\$68,250,133	\$89,364,191	\$95,535,976
EBITDA	3.5	\$8,970,102	\$15,560,773	\$24,641,356	\$32,720,753	\$36,978,948
EBT (Y/N Add BizFinance)	N	\$4,356,012	\$9,737,997	\$17,183,953	\$22,620,041	\$25,421,289
NPAT	7.4	**\$3,049,208	\$6,816,598	\$12,028,767	\$15,834,028	\$17,794,902

- [146] Just as he did with Spreadsheet 1, Mr Birse also directed Mr Pentecost to cells E26 (\$75,306,269) and E31 (\$6,816,598) under the year “16-17”, F26 (\$106,146,973) and F31 (\$12,028,767) under the year “17-18”, G26 (\$137,641,198) and G31 (\$15,834,028) under the year “18-19”, H26 (\$153,884,975) and H31 (\$17,794,902) under the year “19-20” and said (or words to like effect) “[t]hese are the updated figures for October. You can see the numbers have changed a little bit but it’s basically the same.”
- [147] Spreadsheet 2 included the same information cells as Spreadsheet 1 concerning Skybound’s proposed investment in Rapid Securities and the Loan Book value of Rapid Securities.
- [148] In early to mid-November 2016, Mr Birse and Mr Pentecost had a further conversation in which Mr Birse showed Mr Pentecost Spreadsheet 3 dated 11 November 2016. Mr Pentecost’s evidence is that, again, Mr Birse went to Tab 1 - the Assumptions Tab and as he did with Spreadsheets 1 and 2, Mr Birse directed Mr Pentecost’s attention to cells from E26 to H26 (Book Value) and from B31 to H31 (NPAT):

Book Value		\$48,519,147	\$70,056,637	\$101,319,090	\$132,642,191	\$148,486,331
Average Capital Employed		\$31,656,191	\$50,892,121	\$75,646,157	\$101,845,381	\$104,270,097
Debt Funding		\$35,848,539	\$49,190,958	\$68,250,133	\$89,364,191	\$95,535,976
EBITDA	3.4	\$8,970,102	\$16,012,305	\$25,205,959	\$32,341,146	\$35,450,383
EBT (Y/N Add BizFinance)	N	\$4,356,012	\$10,212,686	\$17,748,555	\$22,240,434	\$23,892,724
NPAT	7.2	**\$3,049,208	\$7,148,880	\$12,423,989	\$15,568,304	\$16,724,907

- [149] As he did with Spreadsheets 1 and 2, Mr Birse again directed Mr Pentecost to cells E26 (\$70,056,637) and E31 (\$7,148,880) under the year “16-17”, F26 (\$101,319,090) and F31 (\$12,423,989) under the year “17-18”, G26 (\$132,642,191) and G31 (\$15,568,304) under the year “18-19”, H26 (\$148,486,331) and H31 (\$16,724,907) under the year “19-20”. Mr Pentecost’s recollection of this conversation was limited. He could only recall the substance of the conversation being that these were the updated figures representing the value of the Loan Book and profit as at November 2016. Spreadsheet 3 also included the information cells about the Skybound deal.
- [150] Mr Pentecost’s evidence of the specific contents of the figures in Spreadsheet 2 and Spreadsheet 3 was obviously reconstructed (as it was for Spreadsheet 1). But, again, this does not mean he was not shown these spreadsheets.
- [151] Despite initially denying showing Mr Pentecost any spreadsheets (which seemed to be based on his disagreement about the physical location of where this might have happened), Mr Birse eventually recalled that he had conversations with Mr Pentecost in October and November 2016 about:
- Spreadsheet 2;
 - the potential growth of the Loan Book;
 - how things were progressing and was Mr Pentecost still interested;
 - whether Mr Pentecost was still working on the Business Proposal;
 - Spreadsheet 3;
 - the figures in Spreadsheet 3 so Mr Pentecost could update his knowledge about the business as he was considering purchasing shares;

- (g) Spreadsheet 3 where it was “quite likely” that he drew attention to and discussed the Book Values because that was important to Mr Pentecost’s decision whether to purchase the shares; and
- (h) whilst he did not specifically recall directing Mr Pentecost’s attention to the NPAT Value numbers that:
 - i. it was important for Mr Pentecost to know the NPAT Value numbers for the purpose of Mr Pentecost’s decision whether to purchase the shares;
 - ii. the NPAT Values numbers were “obvious in its yellow row”; and
 - iii. Mr Pentecost “was looking at” the NPAT Value numbers.

[152] In light of this evidence, and despite my concerns about the reliability of Mr Pentecost’s evidence generally and the obvious reconstruction of the details of the spreadsheets by Mr Pentecost after having not seen these documents since 2016, I accept Mr Pentecost’s evidence that Mr Birse showed him two further versions of Spreadsheet 1 - namely Spreadsheets 2 and 3 in October 2016 and November 2016. I am also satisfied that in doing so, Mr Birse took Mr Pentecost to the various assumptions tabs, most relevantly the Loan Book value and the corresponding profit figures as he had done when he took him through Spreadsheet 1.

[153] Mr Pentecost could not recall the substance of his discussions with Mr Birse (about his interest in investing in Rapid Loans) during October 2016 and November 2016 but he was apparently able to “specifically recall” Mr Birse saying the following words (or words to like effect):

- (a) “Rapid is worth \$70 million and is on its way to becoming a \$100 million company”;
- (b) “The talks with Skybound are going well, they are coming on board”;
- (c) “You want to be a part of this, trust me. You’ll double your money in a few years”;
- (d) “Now’s the time to get on board before Rapid’s imminent growth”;
- (e) “If you don’t get in now, it’s going to cost you more later if you change your mind”;
- (f) “I am excited for you. This is a great opportunity”.

[154] Despite the very general and unspecific nature and context of this evidence, I accept as a matter of common sense and reality that the objective likelihood is that Mr Birse said to Mr Pentecost over the course of the two months during October and November 2016 that the talks with Skybound were going well and that they were coming on board. Mr Birse accepted that he may have said something along these to Mr Birse prior to May 2017.

[155] I also accept that it is inherently likely that, having showed Mr Pentecost the Loan Book figures, and taking into account Skyboard’s investment, that Mr Birse suggested to Mr Pentecost that it was a good time to come on board; that it may cost more later if he changed his mind and that this was a great opportunity. Although this finding must be considered in the context that at that time Mr Pentecost was confused about the basis upon which he was to be investing; thinking it was him instead of Skybound.

- [156] For the reasons discussed at [130] to [135] above, I consider it inherently unlikely that Mr Birse said that Rapid Securities is worth \$70 million and is on its way to becoming a \$100 million company. It is more likely given the reference on the spreadsheet was to the “book value” that it was that value that Mr Birse spoke about.
- [157] For the reasons set out [136] to [141] above, I also consider it inherently unlikely that Mr Birse said to Mr Pentecost that he would double his money. I found this aspect of Mr Pentecost’s evidence conveniently contrived.

Troubling aspects of Mr Pentecost’s evidence – his lack of transparency

- [158] Mr Pentecost maintained that shortly after the Third Conversation in mid to late September 2016, Mr Birse saved a copy of Spreadsheet 1 on the Rapid Loans’ share drive for Mr Pentecost to look at and that he [Mr Pentecost] then sent a copy of Spreadsheet 1 from his Rapid Loan’s email address to his personal email address on 23 September 2016. Mr Pentecost said that same sequence of events occurred after he was shown Spreadsheet 2 dated 14 October 2016, and Spreadsheet 3 dated 11 November 2016 by Mr Birse. This evidence was obviously devised to bolster his narrative about his recollection of the spreadsheet representations and his reliance on them. But unhelpfully, Mr Pentecost was not transparent about the full story of what occurred in September, October, and November 2016 in several ways.
- [159] The first is that these spreadsheets and various versions of the Model were already saved on the Share Drive. So, Mr Birse did not need to save the spreadsheets on the Share Drive for the specific purpose of Mr Pentecost’s access as he suggested.
- [160] Secondly, Mr Pentecost conveniently failed to mention in his initial evidence that between 23 September 2016 and 11 November 2016, he sent eight emails attaching 24 of Rapid Securities’ largely confidential financial records to his personal email address. This lack of candour infects Mr Pentecost’s evidence with unreliability.
- [161] The first email was sent on 23 September 2016 at 5.35 pm and attached the following seven documents:
- (a) “Expansion Cash Flow 15-16.xlsx”;
 - (b) “RAPID IM Template.docx”;
 - (c) “Rapid_Chinese Cash Flow 16-17.xls”;
 - (d) “Rapid_SkyB Cash Flow 16-17.xls” (Spreadsheet 1);
 - (e) “RSL Interest earned table.xls”;
 - (f) “OVERVIEW OF RAPID LOANS June-15.docx” ; and
 - (g) “MetricTools.docx”.
- [162] The second email was sent on 23 September 2016 at 5.36 pm and attached two documents:
- (a) “Finascor - confirmation of agreement with RSL and RAP 119014.pdf”; and
 - (b) “SkyB Facility Agreement 01082014.pdf”.

- [163] The third email was sent on 28 September 2016 at 5.04 pm and attached “2015-09-30 AnnualReportJune2015.compressed.pdf”, being the annual report of the ASX listed competitor of the RS Group, Money3.
- [164] The fourth email was sent on 17 October 2016 at 5.22 pm and attached:
- (a) “Overview of Rapid Loans June-15.docx” (the Overview); and
 - (b) “Rapid Group Stats v2 6-16.pptx” (the PowerPoint Presentation).
- [165] The fifth email was sent on 17 October 2016 at 6.13 pm and attached:
- (a) “Rapid_SkyB Cash Flow 16-17.xls” (Spreadsheet 2); and
 - (b) “Investor Report_July-2016.xls” (the Investor Report).
- [166] The sixth email was sent on 9 November 2016 at 5.14 pm and it attached nine documents:
- (a) financial statements and income tax returns for Rapid Loans Pty Ltd for FY2012, 2013, 2014 and 2015;
 - (b) MYOB end of year adjustment journal;
 - (c) a document detailing bonuses paid to Mr Birse and Mr Williams in FY15; and
 - (d) general ledger for Rapid Securities Ltd.
- [167] The seventh email was sent on 10 November 2016 at 5.28 pm and attached “GrowthAnalysis 2012-2016.xlsx” spreadsheet. This spreadsheet was prepared by Mr Pentecost for each of the years 2012 to 2016 and contained the relevant data such as “income, expenses the foreign exchange gain, net profit before tax, the income tax, the net profit after tax, the profits available, the dividends and the retained profits” that Mr Pentecost had extracted from the financial accounts of Rapid Loans (both the Australian and New Zealand companies). In other words, as part of his research for the Business Proposal he was preparing, Mr Pentecost was undertaking his own analysis of the consolidated growth of Rapid Loans (Aus) and Rapid Loans Limited (NZ) over time.
- [168] The eighth email was sent on 11 November 2016 at 5.57 pm and attached “Rapid_SkyB Cash Flow 16-17.xlsx” (Spreadsheet 3).
- [169] Mr Pentecost admitted that he sent the Spreadsheets to his home email address but that “truthfully” he never opened them because:
- “...obviously you get to home and then you’re keen when you work – okay. I need to have a look at this at home, and then you get to the weekend, and you just simply don’t get to it, especially when you play a team sport on a weekend.”
- [170] As surprising as that evidence was (it seems strange that Mr Pentecost would have gone to the trouble of sending himself emails attaching documents that he did not later review), I accept it. It shows not only that Mr Pentecost has reconstructed his knowledge of those spreadsheets for the purpose of these proceedings but also that that the figures in the spreadsheets were not important to him. This is consistent with the fact that Mr Pentecost did not use any of the figures from the three spreadsheets in the Business Proposal.

- [171] Mr Pentecost did not disclose any of the eight emails he sent to his personal email address or their attachments in these proceedings. Leaving aside the three spreadsheets, it is reasonable to assume, as I do, that Mr Pentecost sent those documents to his personal email address for the purposes of undertaking his own analysis and due diligence of the RS Group. That Mr Pentecost was making his own investigations is also consistent with the email he sent to Johann Swanepoel of IAS on 10 November 2016 inquiring as to any documentation evaluating the overall value of the RS Group in both Australia and New Zealand.
- [172] Contrary to his assertions, Mr Pentecost had access to a wide range of Rapid Securities' financial documents and data for the purposes of convincing his family to provide him money to invest in Rapid Securities. Mr Pentecost conceded under cross-examination that Mr Birse had given him access to "anything I needed" for the purpose of preparing the Business Proposal; he accepted that part of his due diligence was reviewing the 24 documents he sent himself. Mr Pentecost also made it clear in the Business Proposal, that he had worked as an accountant for nearly 10 months and had "used the platform systems and observed the logistics behind the scene". It is also instructive, from the following covering email of the Business Proposal, that Mr Pentecost told his family that he had ensured that the auditors had tested the "reliability of the numbers that stem from the accounting system I manage".

Mr Pentecost's letter to his uncle on 21 November 2016

- [173] On 21 November 2021, Mr Pentecost sent an email to his uncle attaching the Business Proposal, and a document entitled "Investment Earnings - CashFlow.pdf" (the **Business Proposal Cashflow**). The covering email sheds some light on Mr Pentecost's thinking at the time:

"...

With the soccer season finished, and having no one waiting for me at home, I have been spending a lot more time at work. The Financial Year 2016 ended on 30th of June, and so I have been very busy ever since - liaising with the tax department to coordinate for the overall Group tax compliance. **I've also been very much in contact with the Auditors to prepare the financials, and to test the reliability of the numbers that stem from the accounting system I manage.** These audits take place quarterly, they greatly promote the credibility of Rapid Loans as a compliant organisation - these audit reports are lodged with the Australian Securities & Investments Commission (ASIC) - the government body that regulates all corporations in Australia.

Following up on **the discussion we had on the phone the other week regarding potentially investing interests in Rapid Loans Pty Ltd (RL), I put hours and hours into the business proposal that has finally been completed.** In reality, long before we first spoke about it, I had **already been gazing at the idea of how I would get involved with RL if I had resources available.** I had taken the time to go through the exercise simply because the profit and loss statement showed good and solid numbers back in February when I first started. **I still needed time though to wrap my head around RL's exact line of business, and to look at the cash flow statement.**

By the end of April, it became clear to me that what I originally surmised was just an ordinary company making a just-above-average profit, turned out to be a firm much more lucrative than I thought.

Rapid Loans Pty Ltd is well and truly on its way to becoming a \$100M+ corporation, and has real potential to be a major competitor in the Consumer Credit Sector in Australia and New Zealand. I think it is a great opportunity if not a blessing that I should cross path with Rapid Loans now and potentially be involved with the firm for the next 10 years.

Please take the time to visit Skybound Capital’s website which is provided in the report - so you can get an idea of the calibre of parties that have invested in Rapid Loans and got well rewarded for it.

It's going to be 13 years in February 2017 since I first moved to Australia. I have come a long way, and done everything I had come here to do as best as I could. It came with a lot of hard-work and sacrifices, and lot of proving-myself, and I never forget every day I certainly couldn't have done without family. **Rapid loans could be my next chapter in Australia.** I apologise for the delay in delivering the proposal, it just needed to be done properly, and **I wanted to chat with Russell about a few points I needed to bring into my due diligence.** Please make sure you take time to read the report with no interruption - there are 15 pages to read.

Please let me know your comments – I’m opened to any suggestions you may have.”

[Emphasis added]

How was the Business Proposal Compiled?

- [174] The Business Proposal is on “Rapid Loans” letterhead and aptly titled “Business proposal for Equity take-up and/or Senior Debt supply to Australian based company Rapid Loans Pty Ltd.”. The document is 15 pages long, said to be prepared by Mr Pentecost, and “presented” to Colette Pentecost [Mr Pentecost’s grandmother] and Richard Pentecost [Mr Pentecost’s uncle]. Despite the date it was sent [21 November 2016], the document itself is dated 2 October 2016 – some 7 weeks earlier. Mr Pentecost’s explanation about the date is confusing and self-serving. On the one hand, it was said to have been dated that way because it was his birthday and “it was around the time I was finalising the Business Proposal for my family”. But on the other hand, he claimed not to have finished it in mid-November 2016. It was not clear what bits were finished when – and why the date was not changed. Nothing turns on this.

The Business Proposal Cashflow

- [175] The Business Proposal Cashflow was prepared by Mr Pentecost. There was no evidence it was shown to Mr Birse either in draft or final form at the time. Some of the relevant features of this document include:
- (a) a proposed dividend distribution of 25 per cent extracted from the NPAT 75/25 ratio on page 15 of the Business Proposal which proposed a monthly dividend

of \$104,167, or \$1.25 million annualised. That was the dividend paid in FYI6 as recorded in the Growth Analysis spreadsheet (cell P13). Mr Pentecost could not recall where he obtained that figure from; however, taking it from actual FYI6 dividends is consistent with his earlier evidence that he “based it on what was currently being paid out at the time”; and

- (b) the predicted NPAT of \$5,000,000 (FYI7) and \$7,000,000 (FYI8) was Mr Pentecost’s own “conservative” estimate. Mr Pentecost accepted that those profit estimates did not match any of the estimates contained in Spreadsheet 1, Spreadsheet 2 or Spreadsheet 3. I am satisfied that these estimates were arrived at without reference to the spreadsheets he had been shown nor from any other of the alleged representations.

Mr Pentecost did not show the Business Proposal in any form to Mr Birse

- [176] Mr Pentecost claimed that he showed several hard copies of (I assume) the draft business proposal to Mr Birse as well as the final report. But I do not accept this happened. The report was obviously prepared in a soft format and it is reasonable to expect that if Mr Birse was reviewing the report, soft copy drafts would have been sent to him. But there was no documentary evidence showing this.
- [177] I am satisfied that Mr Pentecost took the lead in preparing the Business Report although he may have showed “bits” and “parts” to Mr Birse along the way. This finding is consistent with what is stated on the face of the business proposal – that it was prepared by “Georges Pentecost”. It is also consistent with what Mr Pentecost told his uncle in writing when he sent the document to him on 21 November 2021. That is, it had taken him “hours and hours” to complete the document and that he needed to “chat” with “Russell about a few points” to bring in his due diligence. If Mr Birse had assisted to the extent Mr Pentecost alleges, it is reasonable to assume that Mr Pentecost would have mentioned that in the document at the time. Instead, (for example at page 6) Mr Pentecost uses “I” (i.e. in the first person) “do not have much information about the Dartagan fund.” If Mr Birse had assisted in the preparation of the document, he could have provided the information. When that was suggested to Mr Pentecost under cross-examination, he had no explanation.
- [178] Further, if Mr Birse was shown the Business Proposal (as Mr Pentecost said he was), it is reasonable to infer that Mr Birse would have disagreed with the statement that Rapid Loans was prepared to let go of 20 per cent of shares for \$8 million because that was not, in fact, the true position.
- [179] I am therefore satisfied that Mr Birse was not shown the Business Proposal until it was disclosed in these proceedings and that Mr Birse was not intimately involved in its creation. It is perhaps unsurprising that Mr Pentecost did not show Mr Birse the completed Business Proposal because at this point, he was proposing to strategically move against Skybound in a way that had not been discussed with Mr Birse. Mr Pentecost had information about the Skybound facility because, he sent the SkyB Facility Agreement to his personal email address on 23 September 2016.
- [180] Mr Pentecost’s evidence under cross-examination was that in the discussion leading up to the preparation of the Business Proposal it was his understanding that it was either him or Skybound. This evidence was most surprising given that Mr Pentecost also said that at the time that the spreadsheets were shown to him they were based on

a series of assumptions (including, for example, that that Skybound were paying \$14 million for 20 per cent of the shares in Rapid Securities).

[181] Many parts of the Business Proposal are extracted and adapted from the Money3 Report. Other parts came from Mr Pentecost's discussions with Mr Birse and as a result of Mr Pentecost's own financial analysis based on the documents he sent himself and from other unknown sources. For example:

- (a) page 8 of the Business Proposal, entitled "Lending to those excluded from banks", was taken word-for-word from the Money3 Report, with Mr Pentecost populating the table on that page with the equivalent figures from the RS Group. Although he could not recall how he got those figures.
- (b) page 9 was copied from the Money3 Report, subject to the insertion of the sentence: "RL plans on focusing and allocating more resources into secured automotive loans to expand, which will reduce RL's overall risk profile";
- (c) page 10 was, again, taken from the Money3 Report. But Mr Pentecost inserted footnote 8;
- (d) pages 11 and 12 were taken word-for-word from the Money3 Report;
- (e) page 13 was largely taken from the Money3 Report. Mr Pentecost varied or added the bullet points for "Funding risk", "Market risk", "Operational risk" and "Key person risk";
- (f) page 7 is based on an email that Mr Birse sent Mr Pentecost following a request by Mr Pentecost made at 12.56am on 7 November 2016. Mr Birse said that he did not know this response was to be included in the Business Proposal; but I reject this contention. A request for a paragraph in the wee hours of the morning clearly suggests that it was not a work-related question and was for insertion in a document. Mr Birse knew that Mr Pentecost was interested in investing in Rapid Loans and was working on a proposal for his family at that time. Mr Pentecost did not copy Mr Birse's response word-for-word into the Business Proposal. Rather, he added:
 - i. (first paragraph) "In other words, the overall business can still manage to break even by a significant margin and shoulder a 10% of Face Value loans receivable written off to BDD [bad and doubtful debts]";
 - ii. (third paragraph) "(internal procedures and systems used by the credit team)";
 - iii. the entirety of the fourth paragraph. Relevantly, Mr Pentecost inserted a provision that bad debts "always average about 8-10% of "Face Value" of a loan - 10% is the industry benchmark. He "pulled that from somewhere" but could not recall where. This again, shows an understanding by Mr Pentecost of the quantum of bad debts being written off by Rapid Securities and the industry average.
- (g) other parts of the Business Proposal were taken by Mr Pentecost from the documents he emailed to his personal email address. For example, the graph on page 5 was taken from the Investor Report.

[182] Under cross-examination, Mr Pentecost explained where some (but not all) the figures came from:

- (a) (page 1) that the statement that “[Rapid Loans] is a healthy and profitable organisation, well and truly on its way to becoming a \$100M+ corporation” was an assessment he made himself;
- (b) (page 1) Mr Pentecost’s evidence was that he obtained the numbers “60% profit growth in FYI 6 reporting a Net Profit After Tax of \$3,691,562.55” from MYOB. Whether the underlying numbers came from MYOB, or the financial statements Mr Pentecost sent to his personal email address, it is plain that the calculation of those amounts is from the Growth Analysis spreadsheet, once completed;
- (c) (page 1) the forecast of a \$6,000,000 net profit after tax as at 30 June 2017 was not the forecast that Mr Pentecost adopted. Rather he adopted a profit projection of \$5,000,000 for FY2017 and \$8,000,000 for FY2018 (as recorded on page 15). Mr Pentecost accepted that he adopted those forecasts to be “conservative”. His evidence was that he did not rely on any predictions in any spreadsheet to arrive at those predictions. His evidence was “Honestly, yeah, sir, I can’t recall how I came up with those numbers, to be honest.”;
- (d) (page 3) that “[Rapid Loans] manages a growing profitable lending book of ~\$45m...” Mr Pentecost’s evidence was that “he pulled a figure from somewhere. I can’t recall.”; and
- (e) (page 15) that “Every year, Rapid Loans Pty Ltd makes a Net Profit after Tax— 75% of it is reinvested into the business and 25% is distributed to the shareholders via dividends paid monthly” and “The profits will be growing more and more for the next 10 years, as it has been for the previous 10 years — dividends obviously will grow in correlation if NPAT 75/25 ratio remains”. When taken to Spreadsheet 1 and shown that the dividend ratios outlined in the Business Proposal did not match those in the spreadsheet, Mr Pentecost’s evidence was that “I don’t even recall ever looking at this or talking to Russell about this.” Again, it appears that he arrived at his assumed dividend payout ratio himself, based on what “was currently being paid out at the time...because I had access to that information through dividend payments monthly...to the directors.”

Race against the clock to make a strategic move ahead of Skybound

[183] As discussed earlier, the transaction proposed by Mr Pentecost in the Business Proposal (at page 6) was not one to invest alongside Skybound, but rather to counteroffer against Skybound:

“Whilst RL’s existing senior secured lender (Skybound) is offering to increase its debt facility by an additional \$10 million, RL’s management still accepts investment from individuals considered to be “sophisticated investors” under the Corporations Act. Additionally, the directors are considering to raise equity capital during the forthcoming year to support its growth and subsequently lower its overall cost of debt capital.

They have started negotiations with Skybound Capital to become a part-owner of Rapid Loans. This is one of the objectives of this proposal, I would like to counteroffer Skybound Capital — it's a bit of a race against the clock.”

[Bold in original; underlining added]

[184] The opportunity “up for grab” [sic] was later described as follows (page 14):

“The Investment: Equity-Debt Deal Offer up for grab

Second question we need to address, and this is probably the most important one is what type of investment Debt or Equity? And how much of it?

I had long meetings with Russell Birse where we discussed a lot about the road ahead for Rapid Loans Pty Ltd for the next 5-10 years, and what would be the optimal funding structure and immediate needs for RL to ensure strong future profits.

The board of directors have started negotiations with Skybound Capital, and a debt-equity deal offer has been drafted and laid out on the table. The deal requires a combination of both debt and equity capital totaling [sic] \$14,000,000 to be injected into Rapid Loans:

1. Equity — Rapid Loans is prepared to let go of **20% of the company for \$8,000,000**. Considering Rapid Loans has been valued at \$70,000,000 recently, I believe \$8,000,000 for 20% of the overall business is a very good deal — the reason why the directors are giving up business equity is to recover part of the funds they originally injected into the business in the early days — the balance will go towards repaying small investors invested at 15% to reduce cost of debt. Another reason they are confident letting go of 20% of the company is because they know their 26.67% share of Rapid Loans will be worth a lot more than their current 33.33% share in 2 to 3 years.
2. Debt — to ensure the growth of the loan book, a \$6,000,000 debt funding facility should be provided at 15% annual interest rate paid monthly — I would probably suggest for the funding facility to be disbursed progressively over time by scheduling progressive drawdowns —just to give enough time to the brokers to disburse capital into the market. The \$6,000,0000 loan would be fully secured against the loan book.”

[185] Mr Pentecost had not discussed the idea of counteroffering Skybound with Mr Birse. But he was clearly keen not to miss out. He expressly told his family that “it would be fantastic if we could make this strategic move” before Skybound does.

[186] As matters transpired, this race to move against Skybound became a race to come on board with Skybound.

Did Mr Pentecost value Rapid Loans at \$40 million?

[187] The defendants submit that the contents of the Business Proposal show that Mr Pentecost valued the Rapid Securities business at \$40 million. That evidence being that Rapid Loans is prepared to let go of 20 per cent of the company for \$8 million. A deal Mr Pentecost accepts he never discussed with Mr Birse. A deal that the plaintiffs accept (as do I) was objectively not being negotiated between Rapid Securities at the time.

- [188] The plaintiffs submit that it is understandable that Mr Pentecost mistakenly thought this was the deal on the table because Mr Birse told him when he took him to each of the three spreadsheets that Rapid Securities was worth \$70 million at the time. I reject the defendants' submission because such a foundation has not been established.
- [189] I am satisfied that for the purpose of the Business Proposal that Mr Pentecost valued the business at \$40 million himself. For a start, Mr Pentecost conceded under cross-examination that he had done so. Further a higher valuation of the business would be at odds with the Loan Book sitting at around \$45 million as Mr Pentecost set out in the Business Proposal. It is reasonable to expect that the value of the Loan Book as the main asset would be higher than the value of the business.

Counteroffer in Business Proposal goes nowhere

- [190] There is no evidence of a response to the Business Proposal from Mr Pentecost's family. The proposed counteroffer was never made. But at some point around this time, Mr Pentecost must have tweaked that he was not in competition with Skybound and the proposal to his family was a misconceived one.
- [191] Mr Pentecost apparently discussed the document with his uncle a month later during a trip to Hawai'i (in mid-December 2016 to mid-January 2017). He could not recall exactly what was said during these discussions, other than that his family would back him if he wanted to invest, but the decision was ultimately his. His uncle suggested also that he should hire a lawyer. When Mr Pentecost returned to Australia, Mr Pentecost continued to pursue his desire to invest in Rapid Securities.

Events of January 2017

- [192] On his return in mid-January 2017, Mr Pentecost told Mr Brise that his family would provide him the money he needed to purchase the shares. But he was going to obtain legal representation to help draw up the documents and carry out due diligence. Mr Birse accepted that such a conversation took place around this time but said that he also suggested to Mr Pentecost that he should obtain accounting advice as well as legal advice. Which is what Mr Pentecost did. Although according to the Business Proposal (page 14) Mr Pentecost had already obtained professional legal advice from a lawyer he used to work with about the appropriate legal vehicle to use.
- [193] Around this time, Mr Pentecost also met with Mr Warren. In an email of 27 January 2017 to Mr Botha of Skybound (apologising for the delay in meeting the monthly management reports amongst other things), Mr Pentecost states how great it was to meet Mr Warren who had spoken to "us" about the concept of cryptocurrency and commented further as follows:
- "It's exciting knowing Rapid Loans might no longer depend on a central bank for its everyday banking. Cliff is a very impressive and interesting being to listen to."
- [194] The defendants submit that Mr Pentecost was so enamoured with Mr Warren after meeting him that he decided to invest alongside Skybound rather than counteroffer. Mr Pentecost denied such a suggestion.
- [195] I accept that Mr Pentecost was clearly impressed by Mr Warren and was now buoyed by the fact Skybound were investing in Rapid Securities, as he was considering doing

at that time. But I do not accept that Mr Pentecost had finally decided to invest at that point in time and, even if he had, that it was solely because of his meeting with Mr Warren. Such a finding is inconsistent with:

- (a) the evidence of Mr Birse that he was told by Mr Pentecost in mid-January 2017 (that is, prior to Mr Pentecost meeting with Mr Warren) that his family were going to financially support his investment in Rapid Securities; and
- (b) the evidence of Mr Pentecost that between February 2017 and April 2017 Mr Birse was following him up about whether he had in fact decided to purchase shares in Rapid Securities. In other words, at that point in time he was still considering his options and had not made a definite decision to purchase shares.

[196] However, it cannot be overlooked that Skybound subsequently proceeding with its investment in Rapid Securities was variously and expressly stated by Mr Pentecost's solicitors to be "material" and "fundamental" to Mr Pentecost proceeding with his investment in Rapid Securities [265], [383].

[197] In late January 2017, Mr Pentecost engaged Irish Bentley Lawyers to "advise" in relation to his "purchase of shares in Rapid Securities". These solicitors subsequently incorporated Converging Momentum and Stardust Within. In April 2017, Mr Pentecost instructed Irish Bentley Lawyers to retain Marsh & Partners to advise him in relation to his purchase of shares in Rapid Securities. That engagement is discussed under the heading below.

The 15 March 2017 directors' meeting

[198] Mr Pentecost attended (at least for a time) the meeting of directors of Rapid Securities held on 15 March 2017. The minutes of that meeting record:

"4.2 Funding

The Directors are also considering an offer put forward by an Georges Pentecost [sic] whereby he is looking to purchase an equity stake in the company. This is likely to be a purchase of shares from the current shareholders if accepted."

and:

"Resolutions

It was resolved to:

Discuss potential investment from Georges."

[199] Mr Pentecost could not recall whether he was present at the meeting when that matter was discussed. But he did not challenge what was recorded in the minutes when they were put to him in cross-examination. He understood that the directors were okay for him "to come on board" but the issue was that he was still trying to "figure out" things and "get to that final decision."

Mr Pentecost obtains further research reports

[200] On 10 May 2017, Mr Pentecost approached a research house called "IBISWorld" to obtain industry research. The reports were entitled "Non-Depository Financing in Australia Risk Ratings Report.pdf" and "Non-Depository Financing in Australia

Industry Report.pdf". He could not recall why he obtained these reports which he sent to his personal email address.

- [201] It is reasonable to infer as I do that Mr Pentecost, although eager to invest, was still trying to come to a decision and obtained these reports so that he could better understand the industry risks.

Mr Pentecost engages Marsh & Partner to provide advice

- [202] The engagement letter between Mr Pentecost and Marsh & Associates dated 4 May 2017 outlines the tasks Marsh & Partners was to perform (for a fee of \$3,000 to \$5,000 plus GST) as follows:

“Initial meeting with Zeke Bentley from Irish Bentley Lawyers

Meeting with Rapid Securities Ltd staff

Review of audited financials for Rapid Securities Ltd

Review of other information regarding Rapid Securities Ltd

Develop Due Diligence plan based on the information supplied”

- [203] Mr Allen, a Chartered Accountant and Chartered Tax Advisor with Marsh & Partners, was tasked with providing the advice to Mr Pentecost. I accept Mr Allen as an honest and objective witness. His evidence about his discussions with Mr Pentecost and Mr Birse was largely unchallenged.

- [204] Mr Allen and Mr Bentley of Irish Bentley Lawyers met for an initial meeting on 10 May 2017. At this meeting, Mr Bentley told Mr Allen that Mr Pentecost was considering purchasing 10 per cent of the shares in Rapid Securities for \$7 million.

- [205] On 18 May 2017, Irish Bentley Lawyers briefed Mr Allen with the financial statements and income tax returns for Rapid Securities, Rapid Loans and Rapid Loans Ltd (NZ). These documents were provided by Mr Pentecost after obtaining permission from Mr Birse to release them.

- [206] Mr Allen and his colleague Ms Zunker reviewed the financials provided and identified three key areas of concerns regarding the reliability of those documents and the reported value of Rapid Securities as follows:

(a) “There were inconsistencies between the audit reports prepared by IAS and the financial accounts prepared by Whytes, specifically with the opening balances not matching the signed financials from prior years without explanation. My concern was that I could not rely on these documents for an accurate picture of the RS Group's financial position;

(b) Based on the RS Group Material and the proposed purchase price for a 10 per cent share in Rapid Securities, Rapid Securities had a higher price to earnings ratio (PE ratio) than some of the largest multi-level lenders at the time. For example, Rapid Securities had a PE ratio of about 23.79 times. Around the time I reviewed the RS Group Material, Westpac Banking Corporation's PE ratio and Money3's PE ratio was about 15 times. My concern was that Rapid Securities was overvalued relative to more conservative lenders with a lower risk profile or when compared with its peers; and

- (c) The impairment for bad debts recorded in the audit reports prepared by IAS was significantly lower than I expected it to be based on my experience with second-tier lenders. The 2016 draft audit report for Rapid Securities showed an impairment provision for bad debts of only \$62,222 on an active loan book of \$43,645,663. This represented an impairment of only 0.14 per cent. In my experience this is very low and my view was that it was unlikely to be correct...”

[207] On 19 May 2017, Mr Allen met with Mr Pentecost and told him of his three concerns. Mr Allen could not recall all that was said at the meeting other than the substance of the conversation being that he told Mr Pentecost that:

- (a) based on the information he had seen, Rapid Securities looked overvalued and Mr Pentecost would be paying a premium at \$7 million; and
- (b) he needed access to the financial information which sat behind the RS Group’s financials “to test the financials and be able to understand the provision for bad debts”.

Mr Birse meets with Mr Allen and Mr Pentecost on 22 May 2017

[208] On 22 May 2017, Mr Allen met with Mr Birse and Mr Pentecost at Rapid Loans’ office. Ms Zunker was also present to take notes and made a contemporaneous file note. Mr Allen confirmed that the file note taken by Ms Zunker generally accorded with his recollection of what Mr Birse said to him and showed him during that meeting.

[209] Most of the meeting involved Mr Birse speaking to Mr Allen about the RS Group’s history, business model and financial position. Very early in the meeting, Mr Birse directed Mr Allen’s attention to a spreadsheet which he projected on the wall of the conference room. Mr Allen was not given a copy of the spreadsheet at the time of the meeting, but he subsequently confirmed that the form of the spreadsheet was the same as Spreadsheets 1, 2 and 3. This finding is consistent with the evidence of:

- (a) Ms Zunker, who also recalled that shortly after the meeting started Mr Birse directed her and Mr Allen to a spreadsheet which was in a similar format to Spreadsheets 1, 2 and 3;
- (b) Mr Pentecost who gave evidence that the spreadsheet was an updated version of Spreadsheets 1, 2 and 3 that had been shown to him in late 2016; and
- (c) Mr Birse who gave evidence that the spreadsheet he showed Mr Allen was an “updated or varied version of Spreadsheet 1, 2 or 3”.

[210] Mr Allen’s evidence is that, whilst the numbers on the spreadsheet Mr Birse showed him may have been different, he was shown the following cells (taken from Spreadsheet 1 as an example):

Investment Scenarios	Base_1	15-16	16-17	17-18	18-19	19-20
Additional from RSL Investors	11.25%	\$4,892,783	\$2,842,419	\$1,059,176	\$1,114,058	\$1,118,758
Additional Investment in Fund A	12.50%	\$2,000,000	\$0	\$0	\$0	\$0
Additional Investment in Fund B	12.50%	\$4,750,000	\$10,000,000	\$16,000,000	\$18,000,000	\$5,000,000
Monthly Draw Downs			\$1,500,000	\$2,000,000	\$2,500,000	\$2,500,000
Equity Injection (Capital restructure)	Jan-17	12	\$8,000,000	\$0	\$0	\$0
Minimum Cash Position	\$0		\$1,061,172	\$521,842	-\$31,795	\$234,547

Investment Scenarios	Base_1	15-16	16-17	17-18	18-19	19-20
Cash low point			Aug-16	Sep-17	Jun-19	Apr-20
Maximum Position	Cash \$7,000,000		\$9,102,713	\$3,283,496	\$4,824,914	\$3,293,668
Book Value		\$48,519,147	\$76,053,313	\$103,276,582	\$136,882,372	\$152,957,896
Average Capital Employed		\$31,656,191	\$51,725,455	\$74,795,140	\$98,355,092	\$100,663,394
Debt Funding		\$35,848,539	\$49,190,958	\$66,250,133	\$85,364,191	\$91,535,976
EBITDA	3.7	\$8,970,102	\$14,993,355	\$23,260,588	\$33,678,901	\$37,170,145
EBT (Y/N) Add BizFinance)	N	\$4,356,012	\$9,035,410	\$15,886,518	\$23,932,355	\$26,112,485
NPAT	8.0	**\$3,049,208	\$6,324,787	\$11,120,563	\$16,752,649	\$18,278,740

Offering	20.00%		
Equity + Buy Out	\$14,000,000		
Retained Equity portion	\$8,000,000	11.4286%	
Buyout portion	\$6,000,000		
Business value	\$70,000,000		
		Existing Shares	Post Restructure
Newly Issued Shares		0	1,290,459
Purchased Shares		0	967,844
Existing Shareholder 1		3,333,685	3,011,070
Existing Shareholder 2		3,333,685	3,011,070
Existing Shareholder 3		3,333,685	3,011,070
Total Issued Shares		10,001,055	11,291,514
			100%

- [211] These are the same cells that Mr Birse showed Mr Pentecost in Spreadsheets 1, 2 and 3.
- [212] Ms Zunker's contemporaneous file note records "\$60M book - growth to \$100M; \$96,000 - 17/18, \$109,000 - 18/19". Mr Allen and Ms Zunker confirm, and I accept, that the latter references to Loan Book values in the thousands were obvious mistakes as the figures shown were in the millions.
- [213] Mr Allen's evidence was that, whilst showing these Book Values in the spreadsheet, Mr Birse said (or words to like effect):

"Skybound are going to increase their debt facility as part of the deal we have with them to come on board. They don't want to become a majority shareholder but they will get a seat at the table.

This additional debt will allow us to lend out more funds to customers **and grow the value of the loan book. We are at about the \$60 million mark now.** By getting these additional funds we can retire some high interest debt we have from friends and family and from mum and dad investors. By lowering our debt costs we can increase our profit margin.

You can see the **loan book** is set to grow to about \$100 million over the next few years with Skybound coming on board. With the growth of the loan book, the profits and potential dividends for investors will also grow. The return won't just be in the form of dividends. It will also be in the value of the business."

[Emphasis added]

- [214] Mr Allen recalled, and I accept, that Mr Birse also said words to the effect of "as the value of the loan book goes up so will the share price. Georges could wait 12 months but the price will be higher then."

[215] This finding is consistent with Ms Zunker’s contemporaneous file note which records that the “Price per share” would continually go up over time as follows:

19 June 2017 - \$6.70

17 July 2017 - \$8.76

18 Jan 2019 - \$9.68

17 July 2019 - \$9.81

[216] Mr Birse refused to concede under cross-examination that he was showing the spreadsheet to Mr Allen and Mr Pentecost to justify the price of the shares. This was surprising as in his affidavit evidence he accepted that:

- (a) he projected the spreadsheet on the wall in the context of Mr Allen and Mr Pentecost seeking to negotiate the price of the shares; and
- (b) the Loan Book Value and the NPAT Value in the spreadsheet were relevant to supporting the price he was asking Mr Pentecost to pay.

Mr Allen raises concerns about lack of impairment with Mr Birse and Mr Pentecost

[217] Towards the end of the meeting, Mr Allen raised his concerns about the lack of impairment for bad debts in the Loan Book by telling Mr Birse that he considered the impairment to be “very low”. In response Mr Birse said:

“[w]ell that is for the accountants but we charge additional penalties for people who are behind on their payments. Those penalty fees go towards covering the bad debt component of the loan book.”

[218] Mr Birse also explained that whilst 15 per cent to 20 per cent of direct debits were dishonoured on a monthly basis, only 8 per cent to 10 per cent would be written off, and that as of 22 May 2017, the RS Group collected 97 per cent of its then current loan book. Mr Allen could not recall this being said.

[219] Mr Allen requested access to the underlying financials in the loan management system to understand the policy around bad debts and how they are determined. But Mr Birse would not give Mr Allen access to that data as it contained confidential information. Mr Birse said that he expected Mr Allen already had access to all the Loan Book information he needed from Mr Pentecost.

[220] Mr Allen maintained that the shares were overpriced and raised the issue of negotiating a price. But Mr Birse would not budge on price, stating that “Georges either buys in at the same price as Skybound or he doesn’t.”

[221] The 22 May 2017 meeting ended with Mr Allen expressing the pointlessness at going through the spreadsheet anymore and his frustration at Mr Birse’s refusal to allow access to the underlying financials he wanted and to negotiate on price. It is instructive to note that Mr Allen put no weight on the spreadsheet and did not therefore request a copy. He was not “overly concerned with it”.

[222] Mr Pentecost did not give any evidence about what was shown on the spreadsheet at the 22 May 2017 meeting with Mr Allen. If the contents of the spreadsheets were in

any way relevant to his decision to buy shares it is reasonable assume that not having looked at any of the spreadsheets for over six months, he would have at the very least remembered being shown an updated more recent versions.

Mr Allen advised Mr Pentecost not to invest in Rapid Securities

[223] Mr Allen and Ms Zunker spoke to Mr Pentecost after this meeting and told Mr Pentecost in no uncertain terms that:

- (a) without access to the underlying financials, he could not test the numbers and he could not give any assurance around the viability of the business; and
- (b) he should not buy shares in Rapid Securities.

[224] Mr Allen subsequently sent a letter of advice to Mr Pentecost (through Irish Bentley Lawyers) to the same effect; [235].

[225] Shortly after speaking to Mr Allen, Mr Pentecost spoke to Mr Birse again about providing Mr Allen with access to the underlying financial systems held by the RS Group that Mr Allen had requested.

[226] Mr Pentecost's evidence was that the conversation was as follows:

“No Georges, he's not getting access. That's it. Look, we have already put the proposal together, you've got all the information. We have spent enough time on this. I know my business better than anyone and I have shown you where we are going. You've been here for a while now, you know what we do. Go away and think about it then give us your answer. Mate you have everything. There is nothing left for me to give you. You're wasting my time and yours.

...

No, it's not going to happen. These lawyers and accountants are just trying to get fees out of you Georges. That's what they do. They harvest fees.”

[227] Mr Birse accepts that he refused the request for Mr Allen to have access (but for privacy reasons) and contends that he also reminded Mr Pentecost (as he had at the 22 May 2017 meeting) that he had access to the underlying data from ARMnet and Lotus Notes. He otherwise denied the balance of the version alleged by Mr Pentecost.

[228] I am satisfied that the conversation was most likely a hybrid of the two alleged versions.

[229] In circumstances where the idea of Mr Pentecost investing in Rapid Securities had been floating around since September 2016 and Mr Birse had just made it clear that there was no negotiation on price, I am satisfied that it is highly likely that Mr Birse just wanted Mr Pentecost to decide and, in his frustration, said words to the effect as alleged Mr Pentecost.

[230] In circumstances where Mr Pentecost had unrestricted access to the underlying data from ARMnet/Lotus Notes (including the full history of the loan data, loan amount interest and write-offs) both as part of his role and in preparing the Business Proposal it is also highly likely that Mr Birse reminded him of this.

Information and documentation not given to Mr Allen

- [231] The defendants submitted that the Court should infer that Mr Pentecost was prepared to allow Mr Allen to labour under a misapprehension as to the level of write-offs against the Loan Book because he thought it would assist Mr Allen in seeking to negotiate with Mr Birse on the purchase price to be paid. In doing so, the defendants referred to the fact that Mr Pentecost did not tell Mr Allen that:
- (a) the impairment (write-off) of bad debts was recorded in the accounts of Rapid Securities as “discount given”;
 - (b) just the day prior, on 18 May 2017, he had emailed Mr Birse outlining a new approach to provisioning loans to be undertaken in FYI8; and
 - (c) historically, Rapid Securities had not raised a provision against its loan book, but that was to change in FYI8.
- [232] It is correct that Mr Pentecost did not mention the new approach to provisioning outlined above to Mr Allen. But Mr Birse knew these things too and made no mention of them to Mr Allen when the issue of impairment was raised with him. I am not persuaded that the inference sought by the defendants should be drawn. Although the issue of Mr Pentecost’s knowledge of whether Rapid Securities had adequately provisioned its Loan Book is relevant to the issue of causation.
- [233] I otherwise reject the defendants’ case theory that Mr Pentecost did not provide Mr Allen with access to MYOB or the loan management system because he thought it would assist Mr Allen in the negotiations with Mr Birse about the purchase price to be paid as highly speculative.
- [234] It is not clear why Mr Pentecost did not tell Mr Allen what he knew about the new approach to provisioning or why Mr Pentecost did not try to obtain the further documentation on ARMnet himself. It was also not clear what further information Mr Allen was seeking that Mr Pentecost did not have. But nothing turns on this, because it is reasonable to infer as I do, that the provision of such information and documentation would not have changed Mr Allen’s advice to Mr Pentecost that he should not purchase shares in Rapid Securities at \$7 million because he was paying an unknown premium. It would only have served to have re-enforced it.

Written advice from Mr Allen

- [235] On 24 May 2017, Mr Allen provided a letter of advice to Irish Bentley Lawyers about the proposed purchase of shares by Mr Pentecost. The advice made four recommendations.
- (a) First, not to proceed with the proposed purchase as the purchase price to be paid was “a huge premium on the real value of the shares” because “the business unit is grossly overvalued” at \$70 million;
 - (b) Second, if the purchase is to proceed, a “full” due diligence be undertaken. A quote was prepared for that task (which is not in evidence);
 - (c) Third, any draft agreements be reviewed by Irish Bentley Lawyers and Marsh & Associates; and
 - (d) Fourth, if the purchase is to proceed, an equal 10 per cent ownership be acquired in Precise Transactions Pty Ltd (Precise Transactions). Precise Transactions

was part of the RS Group and provided the employees and IT staff to Rapid Loans.

[236] As matters transpired, Mr Pentecost disregarded the first three recommendations. But he obviously took on board the fourth, albeit in a modified way. Therefore, contrary to Mr Pentecost's pleaded case, I accept the defendants' submission that Mr Pentecost relied on parts of Marsh & Associates' advice.

[237] Mr Pentecost also obtained legal advice from Irish Bentley Lawyers on the acquisition of shares in Rapid Securities by (at least) a letter dated 16 June 2017. That advice included a consideration of the "additional due diligence" provided by BDO on 6 June 2017. Mr Pentecost elected to maintain privilege in that advice, so it is unknown what that advice was and whether Mr Pentecost followed it.

25 May 2017 Conversation

[238] On or about 25 May 2017, Mr Pentecost spoke to Mr Birse in his office about the Marsh & Associates advice.

[239] Mr Williams was also present.

[240] Mr Pentecost's evidence is that the following conversation occurred:

Me: I got Cameron's advice. He says that I shouldn't go through with it at the current price because I would be paying a premium.

Mr Birse: Georges, the price is the price. I've already told you. There is nothing else to say. The price reflects Rapid's strong growth and value. Maybe the price includes a premium, maybe it doesn't. But you will be recovering all your money in a few years anyway so who cares.

You're wasting your time by involving these lawyers and accountants. They are overly conservative and are not going to tell you to invest otherwise they're on the hook. They are just money hungry and will drag this process out forever.

I know my business better than anyone. We can't just tweak the price for you or Skybound will find out. Skybound have no problem paying what they are paying. They are an experienced global investor who has performed their own due diligence. You are getting the same deal as them. Pay it or no deal.

Me: What if I come in, in say, 6 months' time? I think I just need a bit more time to look at things.

Mr Williams: Georges, there is nothing wrong with Rapid. It has a bright future. You shouldn't hold out on this for even 6 months. The price will be significantly higher after Skybound come in and the loan book grows. Skybound are an experienced and sophisticated investor and they are investing in Rapid. I don't know why you're so cautious. You're wasting all of our time."

[241] Mr Birse and Mr Williams recalled a conversation at this time. Mr Birse accepted that Mr Pentecost said what he [Mr Pentecost] says he said, although in an embellished way. How it was embellished was not clear.

[242] Mr Birse recalled (and I accept) that he said, “the price is the price”. Mr Birse also recalled (and I accept) that Mr Williams said words to the effect of that Mr Pentecost needed to make a decision either way. Mr Williams did not recall what was said during this conversation - although he was adamant, he did not say what Mr Pentecost said he did. Otherwise, Mr Birse and Mr Williams denied the conversation occurred as Mr Pentecost said it did.

[243] As discussed earlier, I found Mr Pentecost an unreliable witness with a propensity for convenient reconstruction. I found his ability to specifically recall the exchange of a conversation that took place over five years earlier to be self-serving and contrived. But by this time (and as the defendants conceded), it was plain that Mr Birse and Mr Williams were waiting on Mr Pentecost to make a decision. It is therefore reasonable to assume that they were becoming frustrated by the length of time it was taking. In this context, I am therefore satisfied that it is objectively likely that part (but not all) of what Mr Pentecost recalled was said by Mr Birse and Mr Williams.

[244] Relevantly, I am satisfied that Mr Pentecost told Mr Birse that Mr Allen had advised him not to purchase the shares at the current price because he would be paying a premium, Mr Birse said in reply:

“Georges, the price is the price. I’ve already told you. There is nothing else to say. Maybe the price includes a premium, maybe it doesn’t.”

[245] The fact that Mr Birse mentioned that the price may include a premium is consistent with what Mr Birse had said earlier to both Mr Allen and Mr Pentecost and with what is stated later by the plaintiffs’ solicitors in writing to the defendants’ solicitors.

[246] But I am not satisfied that Mr Birse went on to tell Mr Pentecost that he would be recovering all his money in a few years anyway “so who cares”. Such a statement is an inherently unlikely thing for Mr Birse to have said in circumstances where Mr Pentecost was looking at investing a considerable amount of money by way of the purchase of shares.

[247] Nor am I satisfied that it is objectively likely that Mr Birse told Mr Pentecost he was wasting his time involving lawyers and accountants (for the reasons alleged by Mr Pentecost as set out above) or that in this context, that Mr Birse suggested he knew his business better than anyone. This part of Mr Pentecost’s evidence was highly contrived and obviously reconstructed with the benefit of hindsight. Mr Birse knew that Mr Pentecost had solicitors acting for him at that time. He also knew that Mr Pentecost was an accountant himself – so it seems unlikely he would have used such words.

[248] I am however satisfied that Mr Birse said to Mr Pentecost words along the lines of:

“...We can’t just tweak the price for you or Skybound will find out. Skybound have no problem paying what they are paying. They are an experienced global investor who has performed their own due diligence. You are getting the same deal as them. Pay it or no deal.”

[249] The objectively likelihood of such a statement being made by Mr Birse is supported by the fact that:

- (a) it is understandable that with two parties buying shares at the same time, the seller would not want one party to know if the other is getting a better deal (even though the terms might be slightly different);
- (b) Mr Birse mentioned to Mr Pentecost that Skybound had carried out its own due diligence is consistent with:
 - i. Mr Pentecost subsequently asking Mr Birse if he could obtain a copy of Skybound's due diligence; and
 - ii. Mr Birse accepting that around this time he told Mr Pentecost not to disrupt the Skyboard transaction and he needed to rely on his own due diligence and advisors; and
 - iii. It is likely that Mr Birse said, "Pay it or no deal" as he had previously said something similar that is "the price is the price".

[250] I am also satisfied (and it was conceded by Mr Birse) that Mr Pentecost inquired whether he could purchase the shares in six months' time, noting that he needed "a bit more time to look at things". Given the length of time Mr Pentecost had been interested in investing in Rapid Securities, I am satisfied too that it is highly likely that Mr Williams responded with words to the effect that Rapid has a bright future; Mr Pentecost should not hold out as the price might be higher in six months, that Skybound are an experienced and sophisticated investor and they are investing in Rapid and, that Mr Pentecost needed to make a decision as he was wasting their time. It follows that I do not accept the nuanced way that Mr Pentecost recounted the conversation in full. Again, I found this aspect of Mr Pentecost's evidence conveniently contrived. Particularly by way of example, his specific recollection that Mr Williams referred to the price increase being a "significant one" with reference to the loan book increasing.

[251] A few days after this meeting in late May 2017, Mr Pentecost spoke to Mr Birse about approaching Skybound to see if he could look at their due diligence on Rapid Securities. But Mr Birse did not think this was a good idea as he was concerned Skybound might see it as a red flag and that it might tank the deal and their ongoing relationship.

[252] Mr Pentecost said that at this point he was already satisfied that he should proceed with the Share Sale Agreement "based on the conversations that I had had with Mr Birse and the information I had seen in the Spreadsheets". But he wanted Skybound to share their due diligence with him so that he could provide this to Mr Allen so that he would also be satisfied that Mr Pentecost should "proceed with the share sale and that it was a sound investment." This evidence does not strictly make sense but shows the flaws that emerge in a web of reconstruction.

Mr Pentecost obtains a due diligence report from BOD

[253] On 15 May 2017, Irish Bentley Lawyers (on behalf of Mr Pentecost) also engaged BDO to provide a counterparty due diligence report. The letter of engagement is not in evidence, but the report dated June 2017 was provided to Mr Pentecost on 6 June 2017. It is, as Mr Pentecost accepted, a very high-level due diligence report. Mr Pentecost said it was mainly "a background check on the directors".

Mr Pentecost's solicitors request documentation about the Skybound investment

- [254] On 30 May 2017, Irish Bentley Lawyers wrote to Rapid Securities' solicitors (Tucker & Cowen, later Cowen Schwarz Marschke) about their client's proposed investment, noting the "timeframes involved" and requested "documentation relating to the Skybound investment, particularly as this will be relevant to our Client's investment".
- [255] On 31 May 2017, at Mr Pentecost's request, Mr Birse emailed the terms sheet executed by Rapid Securities, Lake Mullaloo, Runaway Cove, 123 Bang and Skybound (Skybound Terms Sheet), which had been signed on 19 May 2017. Again, Mr Pentecost was not initially transparent about this, suggesting in his first affidavit that Mr Birse sent him that document unsolicited. The Skybound Terms Sheet provided that the parties were to enter into a Share Sale Agreement and Share Issue Agreement within 14 days.

Mr Pentecost makes a decision

- [256] After obtaining the Skybound Terms Sheet, Mr Pentecost appears to have considered time was running out for him to be able to invest and he instructed his solicitors accordingly. On 1 June 2017, Irish Bentley Lawyers followed up Tucker & Cowen for a copy of the draft shareholders agreement, deed of accession and Share Sale Agreement. Noting that that they understood that time was of the essence. The draft agreement was initially prepared by Tucker & Cowen (on that firm's heading) but its terms in so far as Mr Pentecost and Converging Momentum are concerned were negotiated by Irish Bentley Lawyers (on their behalf).
- [257] Mr Pentecost's evidence was that Mr Birse was repeatedly putting him under pressure to make a decision. I accept that by May 2017, Mr Birse was pressing Mr Pentecost about whether he had made a decision. And encouraging of Mr Pentecost investing in Rapid Securities. But I am not satisfied that Mr Birse was pressuring Mr Birse to invest in Rapid Securities. As Mr Pentecost recalled, it was made clear to Mr Pentecost that he could pay the \$7 million or there was no deal; that maybe the price included a premium but maybe it didn't and he could wait 12 months, but the price might go up.
- [258] I am satisfied that once Mr Pentecost obtained the Skybound Terms Sheet he was in a rush to complete the transaction to ensure that he did not miss out on buying shares in Rapid Securities. This finding is consistent with Mr Allen's evidence (which I accept) that Mr Pentecost rang him in early June 2017 and told him that he had spoken to Mr Birse and it was all fine, he had decided to buy into the business and he was concerned that if he kept digging around asking questions, Mr Birse would no longer want to proceed with the transaction and the price would be even higher.
- [259] Mr Allen again told Mr Pentecost that it was not a good idea but Mr Pentecost said to Mr Allen "I know but I am going to do it". Mr Pentecost had no recollection of this discussion.
- [260] Shortly after Mr Pentecost was told again by Mr Allen not to invest, he spoke to Mr Birse in early-June 2017 and Mr Birse asked Mr Pentecost what the "go" was and whether he had made a decision. Mr Birse and Mr Pentecost gave slightly different versions of where in the office this conversation took place and exactly what was said. But nothing turns on resolving this factual impasse because both agree, and I accept,

that Mr Pentecost responded to Mr Birse's question with: "yeah okay. Let's do this. I'm in."

Mr Pentecost obtains an advance of \$13.2 million from his grandmother

[261] Consistent with Mr Pentecost having just told Mr Birse he was "in" on 12 June 2017, Mr Pentecost's grandmother advanced \$13.2 million into an account with Westpac Banking Corporation in the name of Stardust Within. There was no evidence of why this sum, as opposed to an amount of \$7 million, was transferred. Or what happened to the balance of these funds. But nothing turns on this.

[262] When pressed under cross-examination about the timing of his decision, Mr Pentecost could not recall the exact point in time that he had finally decided to proceed with the acquisition but frankly admitted that as far as he knew "it was happening regardless of Marsh & Partners."

Mr Pentecost is keen for the sale to go through once the Skybound transaction was finalised

[263] Mr Pentecost was legally represented during the negotiations and final agreement for the purchase of the shares. On 23 June 2017, Irish Bentley Lawyers wrote to Tucker & Cowen stating:

"Our Client wishes to ensure that his investment is properly secured, particularly where:

1. **he is paying a significant premium;** and
2. in circumstances where his rights are exceptionally limited as a minority shareholder."

[Emphasis added]

[264] Mr Pentecost knew he was paying a premium but not how much of one.

[265] The 23 June 2017 email noted that the Skybound transaction had now settled and that was "a material condition of our Client's investment". A copy of the relevant executed shareholder agreements from that transaction were requested. The following seven "points" were also said to be "material" to Mr Pentecost and "critical to his investment" in Rapid Securities:

1. That the current standard of monthly dividend drawings be applied as far as possible going forward, to be enshrined in the shareholders agreement.
2. A right to appoint a director.
3. A right to receive a copy of the reporting package delivered to the directors in accordance with clause 18.1 of the shareholders agreement and comprising the elements set out at points 18.1.1 to 18.1.9 of the shareholders agreement.
4. An increase in his gross annual salary to \$128,000.00 plus superannuation.

5. That in the event of our Client's unfair dismissal as an employee, the Company will offer to buy back his shares for 90% of the Purchase Price.
6. That in the event of an Exit Event, the Company will offer to buy back his shares for 90% of the Purchase Price.
7. That the terms of the Skybound transaction are substantially reflected in the terms to our Client's investment."

[266] Points 1, 2 and 6 were ultimately not included in the final Share Sale Agreement. It is reasonable to assume as I do that Mr Pentecost gave up these points because he was eager to finalise the transaction. Once Skybound had come on board he admitted that did not want to miss out. Consistent with this, he instructed his solicitors to write to Tucker & Cowen on 14 July 2017 advising that he was keen to finalise the agreements as soon as possible.

Directors approve the sale of shares in Rapid Securities to Mr Pentecost

[267] On 30 June 2017, Mr Pentecost was present for the duration of a meeting of the board of directors of Rapid Securities. The minutes record (at [3.2](e)):

"Action items or updates from the previous board meeting are as follows. References are to points in the 15 March 2017 Meeting Minutes:

....

- (i) Georges Pentecost expressed an interest in purchasing shares in the company. The other shareholders are comfortable with this. The share sale agreement is expected to be received shortly and it was acknowledged that this will be accepted."

[268] The minutes further record that Mr Pentecost presented the finance report and (at [5.2]):

"The Company is not impressed with the auditor (IASS) who completed the audit of the last financial year and intend to move to a more recognised firm. However, the company has already instructed IASS to complete the audit for the 2016-2017 financial year. Recommendations for a new auditor will be presented for the board's consideration at the next board meeting."

[269] And at [7.1]):

"The issue of ownership of Intellectual Property (IP) in relation to the proprietary software being developed by Precise Transactions Pty Ltd was raised previously by Georges Pentecost.

A Loan Management System Software Development Agreement between Rapid Loans Pty Ltd and Precise Transactions Pty Ltd has been prepared confirming that Rapid Loans Pty Ltd is the owner of the

proprietary software being developed by Precise under contract to Rapid.”

- [270] That was the subject of the fourth recommendation by Marsh & Associates in their 24 May 2017 advice letter. It was also a matter that Mr Birse and Mr Pentecost had discussed. Mr Birse wrote to Mr Pentecost on 16 June 2017 with clarification of the current and likely future arrangements between Precise Transactions and Rapid Securities.
- [271] At the meeting, the directors resolved to sign the Share Sale Agreement and approve the sale of shares in Rapid Securities to Mr Pentecost.
- [272] On 4 July 2017, the parties signed the Terms Sheet for the sale of shares in Rapid Securities. These terms were reviewed and negotiated by both sets of solicitors (on instructions). This terms sheet summarised the terms of the proposed sale of the shares subject to the definitive terms being finalised and detailed in a legally binding document.
- [273] On 14 July 2017, Irish Bentley sent an email to Tucker & Cowen which stated that, “The SkyB Transaction at clause 6.1.3 is fundamental to our client’s desire to purchase the shares”.

Mr Pentecost signs the Share Sale Agreement

- [274] On 17 July 2017, Converging Momentum (by Mr Pentecost) entered into:
- (a) the Share Sale Agreement; and
 - (b) a deed poll styled Deed of Accession.
- [275] Under cross-examination, Mr Pentecost contended that he did not read the Share Sale Agreement before signing it. I reject this evidence as being objectively and highly improbable and inconsistent with other evidence that I accept.
- [276] As a start, it is reasonable to expect that Mr Pentecost would have mentioned this important fact as part of his evidence in chief when he stated that he “caused” Converging Momentum to execute the Share Sale Agreement. But he did not.
- [277] Second, Mr Pentecost had been told by his uncle to obtain legal advice about the transaction. Which he did. Irish Bentley Lawyers were acting for Mr Pentecost on the sale of shares. Mr Pentecost conceded that if he had any queries or concerns in relation to the proposed agreement, he could seek legal advice from this firm; that he did. For example, his solicitors wrote to Tucker & Cowen seeking amendments to the terms of the draft share sale agreement (assumedly on Mr Pentecost’s instructions) and some of Mr Pentecost’s requested conditions (such as a pay increase) were incorporated into the final Share Sale Agreement. It is reasonable to infer that Mr Pentecost read the draft agreement to provide these instructions.
- [278] Third, in his own words (as stated in his resume), Mr Pentecost had an “eye for detail”. That much was evident from the time and information he put into preparing the Business Proposal and Business Proposal Cashflow. This eye for detail is also apparent from his dealings with the auditors, exchanges with Skybound and the two quarterly reports he prepared for the directors of Rapid Securities.

[279] Fourth, Mr Pentecost had been quietly coveting the idea of investing in Rapid Securities since April 2016. Since around September 2016 he had spent hours and hours of his time undertaking due diligence and preparing the Business Proposal. He also obtained both accounting and legal advice about the investment. The idea that he did not review the very document giving effect to his dream is contrary to common sense and to the great lengths he had undertaken to make his dream come true.

[280] Even if I had accepted that Mr Pentecost did not read the Share Sale Agreement at the time he signed, it is reasonable to infer that his solicitors would have advised him of its terms including clauses 16 and 18. The plaintiffs submitted that there was no evidence to suggest that the defendants brought these clauses to Mr Pentecost's attention. But this submission overlooks that a draft of the Shareholders Agreement was provided by the defendants' solicitors to Mr Pentecost's solicitors well prior to July 2017. It is reasonable to assume that at the very least Mr Pentecost was taken through this agreement in detail as he instructed his solicitors to negotiate some clauses.

The terms of the Share Sale Agreement and Deed of Accession

[281] By the Share Sale Agreement, Converging Momentum agreed to purchase the following shares in Rapid Securities:

- (a) 376,383 shares for \$2,333,333 from Lake Mullaloo;
- (b) 376,384 shares for \$2,333,333 from the Runaway Cove;
- (c) 376,384 shares for \$2,333,334 from 123 Bang.

[282] The Share Sale Agreement provided (at clause 16):

“16. TAXATION AND OTHER ADVICE

16.1 The parties agree and acknowledge that:

- 16.1.1 they must obtain their own professional advice, including taxation advice, in relation to this Agreement;
- 16.1.2 in entering into this Agreement, they have relied entirely on their own searches, judgments, enquiries and any other professional advice obtained in relation to this Agreement;”

and (at clause 18):

“18. ENTIRE AGREEMENT

18.1 This Agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this Agreement. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions hereof or binding on the parties with respect to any of the matters to which this Agreement relates.

- 18.2 Each of the parties hereby covenants and irrevocably acknowledges that it has not been induced to enter into this Agreement by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Agreement.

The provisions of clauses 18.1 and 18.2 will operate and remain in full force and effect, except in the case of fraud by another party to this Agreement. No other fact, matter or circumstance including breach of provisions of Chapter 2 of the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth)) by any party to this Agreement will interfere with or in any way derogate from the operation and effect of clauses 18.1 and 18.2.”

[283] The Deed of Accession relevantly provided as follows:

“Introduction

This Deed is supplemental to the Rapid Securities Limited Shareholders Agreement dated 20 June 2017 between the parties listed in Schedule 1 below and Rapid Securities Limited (ACN 157 687 146) (**Rapid Securities Shareholders Agreement**).

Operative part

1. The Acceding Party confirms that it has been supplied with a copy of the Rapid Securities Shareholders Agreement and covenants with all present parties to the Rapid Securities Shareholders Agreement (whether original or by accession) (**Parties**) to observe, perform and be bound by the Rapid Securities Shareholders Agreement so that the Acceding Party is deemed, from the date on which the Acceding Party is registered as a holder of Shares in the Company, to be a party to the Rapid Securities Shareholders Agreement.
2. The Parties agree that, despite anything in the Rapid Securities Shareholders Agreement, Georges Pentecost will have:
 - (a) the right to attend meetings of the Board of the Company; and
 - (b) the right to receive a copy of the reporting package delivered to the Directors in accordance with clause 18.1 of the Rapid Securities Shareholders Agreement and comprising the elements set out in subclauses 18.1.1 to 18.1.9 of the Rapid Securities Shareholders Agreement.

Schedule 1 - Parties to Rapid Securities Shareholders Agreement

Lake Mullaloo Pty Ltd (ACN 064 082 757) as Trustee for Birse Investment Trust

123 Bang Pty Ltd (ACN 100 176 458) as Trustee for Oar Discretionary Trust

Runaway Cove (Aust) Pty Ltd (ACN 079 797 087) as Trustee for Kyle Williams Family Trust

SkyB Investment Holdings”

[284] On or about 18 July 2017, Converging Momentum (by Mr Pentecost) completed the Share Sale Agreement and paid the total purchase price, being the sum of \$7 million.

No warranties clauses do not let the defendants off the hook

[285] Clauses 16 and 18 of the Share Sale Agreement did not provide for any warranties in favour of Converging Momentum made by Lake Mullaloo, Runaway Cove or 123 Bang with respect to any of the oral Representations or the Spreadsheet Representations maintained in this proceeding. But misleading and deceptive conduct can still be caught despite the existence of such clauses.

[286] Parties cannot contract out of s 18 of the ACL(Q); *Viterra Malt Pty Ltd v Cargill Australia* (2023) 74 VR 1, [426]. The question is, can the subsequent disclaimer be said to negate the prior misrepresentation in the context of the facts of the case? *Australian Securities and Investments Commission (ASIC) v La Trobe Financial Asset Management Ltd* [2021] FCA 1417, [12].

[287] Exclusion clauses like those in clauses 16 and 18 are therefore effectively treated as subsequent declarations to be considered for the purpose of assessing causation. As McHugh J observed in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, [157]:

“...a disclaimer is only effective if it actually modifies the impugned conduct such that the conduct as a whole may be seen as not misleading, not because the disclaimer has any independent force of its own.”

[288] The significance of clauses 16 and 18 is therefore a question of fact to be decided in the circumstances of the case; *Guirguis Pty Ltd v Michel's Patisserie* [2017] QCA 83, [28].

[289] Before then turning to the plaintiffs' case and the relevant legal principles it is necessary to set out the final factual piece in the factual puzzle.

What happened to Rapid Securities after Converging Momentum became a shareholder?

[290] Mr Pentecost remained involved in the business of the RS Group following his purchase of the shares.

[291] Between March 2018 and May 2018, BDO undertook an audit of Rapid Securities. It is not clear why, but I assume due to issues with cash flow, on about 24 May 2018, Stardust Within as trustee for the GP Genome Trust entered into a written agreement headed “Unsecured loan note” by which Stardust Within agreed to loan to Rapid Securities the sum of \$500,000.

[292] In completing the 2018 Audit, BDO identified several issues with the operation and management of the financial system maintained by the RS Group and made several

recommendations including that the financial reporting of revenue of the RS Group ought to shift from estimating revenue of establishment fees of a loan on an interest curve basis to a flat line basis under AASB 15. The practical effect of BDOs recommendations (including as to AASB 15 which only took effect on 1 January 2018), was that a component of capitalised establishment fees within the Loan Book of the RS Group was to be reversed and allocated to years following the 2018 financial year. The BDO recommendations also reversed some of Rapid Securities' previously accounted revenue (upon which tax had been paid), and accounted this revenue forward, which fundamentally changed the profit for Rapid Securities for the 2018 financial year. BDO also recommended extra 'provisioning' for delinquent loans.

- [293] On 30 July 2018, Mr Pentecost wrote to Mr Birse expressing his growing discontentment and disappointment with the management of the RS Group and setting out in some detail that it had become clear to him that Converging Momentum and Skyboard had paid too much money for their shares. Mr Pentecost blamed this on management decisions around the use of equity raised in 2017 based on the issue of new shares to Skybound, long "overdue unbooked write offs", significant under provision for bad debt and "mis-booking of deferred revenue."
- [294] Due to some back and forth between the RS Group and BDO about the various issues with deferred revenue and provisioning, there was a delay in the finalisation of the audit for the year ending June 2018. This meant that Skybound were not provided audited financials within the required timeframe. This, in turn, breached a covenant of the Dartagan Agreement; a facility agreement with a limit of \$36 million entered into on about 17 August 2017 by Rapid Loans and Dartagan Finance Investments Ltd, a company incorporated in Mauritius. In August 2018, Skybound ceased lending to Rapid Loans and Rapid Securities was no longer able to draw down any further funds from the Dartagan Facility. This meant no new loans were able to be made and obviously affected Rapid Securities cashflow.
- [295] On 24 January 2020, Rapid Securities entered voluntary administration. The directors did not provide any reasons substantiating the company's financial difficulties to the Administrators, but stated the reason for the appointment of Voluntary Administrators was to facilitate a restructure for the RS Group rather than a result of any financial difficulties.
- [296] The preliminary view of the administrators as set out in their Report to Creditors dated 21 February 2020 was that:
- (a) there was a possible deficiency to unsecured creditors of Rapid Securities of \$7,847 to \$13,135 million (under a liquidation scenario);
 - (b) there was a possibility that the liabilities of Rapid Securities materially exceed its realisable assets;
 - (c) the expected Loan Book cash receipts of Rapid Loans and Rapid Loans NZ were insufficient to pay all the liabilities of Rapid Securities; and
 - (d) no return was expected to be provided to the shareholders of Rapid Securities.
- [297] On 23 March 2020, the voluntary administration ceases and Rapid Securities became subject to a Deed of Company Arrangement.

[298] On 16 December 2021, Rapid Securities ceased being under a Deed of Company Arrangement and control of the company returned to its directors.

[299] Turning now to the legal principles relevant to the facts of the plaintiffs' case.

Legal approach to the assessment of whether conduct is misleading and deceptive

[300] Section 18 of the ACL(Q) provides that a person must not engage in conduct that is misleading or deceptive. This includes making a misleading or deceptive representation of fact. A representation of fact will be misleading or deceptive if it tends to lead a person into error; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [25]. The representation is to be judged objectively and at the time it was made; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [49].

[301] Whether conduct amounts to a representation is a question of fact to be determined against the background of all the surrounding circumstances; *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202. The conduct must not be considered in isolation but rather as whole “and its notional effects, judged by reference to its context, on the state of mind of the relevant person”; *Self Care IP Holdings Pty Ltd v Allegan Australia Pty Ltd* (2023) 277 CLR 186, [82].

[302] Whether the identified conduct was misleading or deceptive or likely to mislead or deceive requires the Court to characterise the conduct objectively whilst taking “into account the respective positions of the parties, including such matters as their knowledge of each other through previous dealings and their respective familiarity with the subject-matter of the contract”; *Sutton v AJ Thompson Pty Ltd* (1987) 73 ALR 233, 240. Further, the conduct said to be misleading cannot be “divorced” from “disclaimers” about that conduct or from other circumstances which might qualify its character; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, [39].

[303] The alleged representations in this case are a mix of representations as to present and future matters:

- (a) Representations 1, 2, 9 and 10 are representations as to facts or present matters; and
- (b) Representations 3 to 8 and the Spreadsheet Representations are representations as to future matters.

[304] This distinction is important because of the interaction between ss 18 and 4 of the ACL(Q). That is because a person making a representation with respect to a future matter must have reasonable grounds for making the representation: s 4(1). A person who is party to a proceeding (i.e. a defendant) who made a representation with respect to a future matter will be deemed not to have had reasonable grounds unless evidence is adduced to the contrary; ACL(Q), s 4(2).

[305] The question is whether the representator, objectively viewed, had reasonable grounds known to him or her to make the representation. The focus is on the reasonableness of the grounds then known, not what may later become known; *Australian Competition & Consumer Commission (ACCC) v Dateline Imports Pty Ltd* [2015] FCAFC 114, [182]. Whether the belief was held and held on those grounds

must be determined subjectively; *Unisys Australia Ltd v RACV Insurance Pty Ltd* [2004] VSCA 81, [75]. In determining whether a person had reasonable grounds the matter is to be judged as at the date of the representation; *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, 513. But this does not preclude examining evidence of later events – although it remains vital to guard against hindsight illusion; *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94, [83].

Issue one: Were the alleged representations made?

- [306] As in this case, where the pleaded conduct is said to amount to a representation, the starting point is to determine whether the alleged representation is established by the evidence; *Self Care IP Holdings Pty Ltd v Allegan Australia Pty Ltd* (2023) 277 CLR 186, [81].

Representation 1

- [307] The first alleged representation is that Rapid Securities (or the RS Group) was worth \$70 million, or Rapid Securities “was a 70 million dollar company”. This representation is alleged to have been made by Mr Birse during the Third Conversation in mid to late September 2016. For the reasons at [130] to [134], I am not satisfied that this representation was made by Mr Birse.

- [308] Representation 1 has not been established by the plaintiffs.

- [309] If I am wrong and a representation that the business value of Rapid Securities was \$70 million as made by Mr Birse, then for the same reasons as for Representation 2, I am not satisfied that in the context of this case this is conduct that is correctly categorised as misleading and deceptive; [352] to [356]. Even if it is, I am not satisfied that Mr Pentecost relied upon such conduct in entering into the Share Sale Agreement.

Representation 2

- [310] The second alleged representation is that “Rapid Securities (or the RS Group) loan book was worth \$70 million”. This was allegedly made during the Third Conversation.

- [311] For the reasons at [129] I am satisfied that this representation was made by Mr Birse.

- [312] Representation 2 has therefore been established by the plaintiffs.

Representation 3

- [313] The third alleged representation is that “Rapid Securities was going to be a \$100 million dollar company (or worth \$100 million plus) within a year or so (or within the next year)”. This representation is alleged to have been made by Mr Birse during the Third Conversation. For the reasons at [135], I am not satisfied that this representation was made by Mr Birse.

- [314] Representation 3 has therefore not been established by the plaintiffs.

Representation 4

[315] The fourth alleged representation is “that Rapid Securities’ equity value would increase greatly over the coming years”. Mr Pentecost did not give any evidence of such a statement being made to him by Mr Birse. But the plaintiffs rely on various parts of Mr Pentecost’s first affidavit, where he was allegedly told (between September to November 2016) that shareholders were going to “double their money in a few years” to support this representation arising by implication. For the reasons at [136] to [141] I am not satisfied that Mr Birse made such a statement to Mr Pentecost.

[316] But even if I was satisfied that the representation was made (that shareholders were going to “double their money in a few years”), I do not accept that Representation 4 arises by implication of those words. In that case, I accept the defendants’ submission that Representation 4 is so vague as to be meaningless. It begs more questions than answers: the equity would increase by how much? Over how many “coming years”?

[317] Representation 4 has not been established by the plaintiffs.

Representation 5

[318] The fifth alleged representation is “that a lucrative margin of two to three times the investment would be made when selling shares later”. Mr Pentecost does not give any evidence of such a statement having been made to him by Mr Birse. But the plaintiffs rely on the same parts of Mr Pentecost’s evidence as Representation 4 to support this representation arising by implication. For the reasons at [136] to [141], I am not satisfied that the representation underpinning the implication (that shareholders were going to “double their money in a few years”) was made by Mr Birse in the first place.

[319] But even if I was satisfied that such a representation was made, I do not accept that Representation 5 arises by implication of those words. In that case, I also consider that Representation 5 is so vague as to be meaningless and again it raises more questions than answers: what valuation was to be the “investment” and from what “lucrative margin” was that valuation to be determined?

[320] Representation 5 has not been established by the plaintiffs.

Representation 6

[321] The sixth alleged representation is “that the shareholders in Rapid Securities would double their money within two to three years”. This was alleged to have been said to Mr Pentecost during the Third Conversation.

[322] For the reasons at [136] to [141], I am not satisfied that this representation was made by Mr Birse.

[323] Representation 6 has not been established by the plaintiffs.

[324] Representation 7 is not pressed by the plaintiffs.

Representation 8

[325] The eighth alleged representation (which is said to arise, expressly or impliedly) is “that the price, and value, of Rapid Securities’ shares would be significantly higher in six months after May 2017, due to Rapid Securities’ predicted increased financial performance based on the growth of the loan books held by its subsidiaries”.

[326] Mr Pentecost does not give any evidence of this exact representation being made to him. The plaintiffs’ case is that it arises by implication from the 25 May 2017 Conversation when Mr Pentecost spoke to Mr Birse and Mr Williams about the Marsh & Associates advice not to purchase shares. Most particularly from the statement of Mr Williams that “You shouldn’t hold out on this for even six months. The price will be significantly higher after Skybound coming in and the loan book grows”.

[327] As discussed at [250], I am satisfied that Mr Williams told Mr Pentecost that he shouldn’t hold out even for six months as the price of the shares will be higher by then. But I am not satisfied that Mr Williams made any reference to the price increase being a significant one or that he made any reference to the Loan Book increasing. Even if he did make a fleeting reference to the Loan Book, it is a stretch to say by implication that this unknown increase in the price of shares was due to some unknown “predicted increased financial performance”.

[328] I am therefore not satisfied that this representation has been established by the plaintiffs.

[329] It is necessary to consider the Spreadsheet Representations before turning to each of Representations 9 and 10.

The Spreadsheet Representations

[330] The alleged Spreadsheet Representations rest on a finding that Mr Birse made those representations in each of three meetings in September, October and November 2016 by showing Pentecost Spreadsheets 1, 2 and 3 respectively. As established at [127] and [152] I am satisfied that Mr Birse did, in fact, show Mr Pentecost each of Spreadsheets 1, 2 and 3 as alleged by Mr Pentecost.

[331] The Spreadsheet Representations have been established by the plaintiffs.

Representation 9

[332] The ninth alleged representation is that (impliedly) Representations 1 to 8, and 10 and the Spreadsheet Representations were soundly based, and it was safe for Mr Pentecost and Converging Momentum to rely upon them.

[333] Representation 9 is to be considered in the context that Representation 2 and the Spreadsheet Representations have been established by the plaintiffs. Despite these findings, I am not satisfied that Representation 9 has been established by the plaintiffs.

- [334] First, the Spreadsheets were a business planning tool and were heavily reliant on the assumptions on which they were based. The Spreadsheets need to be considered as a whole. The assumptions included matters such as:
- (a) the number of loans written in any given month;
 - (b) the mix of loans (between short, medium and long);
 - (c) the term of the loans;
 - (d) the loan amounts;
 - (e) the interest rates on the loans;
 - (f) funding scenarios—of which there were seven: RSL, Inv A, Inv B, 16-17 Debt, 17-18 Debt, 18-19 Debt, 19-20 Debt; and
 - (g) debt and equity investments made into Rapid Securities.
- [335] Second, the three Spreadsheets produced vastly different and inconsistent results depending on the imputed assumptions. For example, over the space of two months the Spreadsheets show a:
- (a) forecast FY17 net profit varied from \$6.23 million to \$7.14 million;
 - (b) forecast FY18 net profit varied from \$11.12 million to \$12.42 million;
 - (c) forecast FY17 loan book value varied from \$70.05 million to \$76.05 million; and
 - (d) forecast FY18 loan book value varied from \$101.32 million to \$106.15 million.
- [336] Third, Representation 9 is premised on a finding that Mr Pentecost relied on one or all the representations in entering into the Share Sale Agreement. That reliance has not been established [366] to [391].

Representation 10

- [337] The tenth alleged representation is that “(by all the Spreadsheets) Rapid Securities (or the RS Group) business value was \$70 million”.
- [338] I am not satisfied that this representation is established.
- [339] First, the figures Mr Birse took Mr Pentecost to were the “Book Values” and “NPAT” cells, not the “business value” of the company. It was not controversial that the book value and business value were two different things.
- [340] Second, the Spreadsheets were based on assumptions that were able to be manipulated and not a proper representation of a valuation.
- [341] Third, the only possible “business valuation” of \$70 million that could be said to arise from the Spreadsheets is the valuation that Skybound implicitly arrived at in offering \$14 million to buy 20 per cent of the shares in Rapid Securities (one of the assumptions recorded in the spreadsheets). But that was Skybound’s estimated valuation not the company’s or Mr Birse’s.
- [342] If I am wrong and a representation that the business value of Rapid Securities was \$70 million does arise “by all the Spreadsheets” then for the same reasons as Representation 2, I am not satisfied that in the context of this case this is conduct that

is correctly categorised as misleading and deceptive. Nor am I satisfied that even if it was, Mr Pentecost relied upon such conduct in entering into the Share Sale Agreement [366] to [371].

Were the representations made on behalf of all the defendants?

[343] The plaintiffs' case is that to the extent that any of the representations are found to have been made by Mr Birse (and, in the case of alleged representations by Mr Williams) they are to be imputed to the other defendants because there was ostensible authority for Mr Birse/Mr Williams to act for each of the other defendants.

[344] This question turns on whether, in the circumstances of the case, there has been "a holding out of the agent as possessing the necessary authority." A holding out being a representation by the principal, not the agent, that the agent has authority to act on its behalf. While not conferring actual authority, it entitles a third party to rely on the appearance of authority, such that the principal may be prevented later from denying that authority; *Birbilis Bros Pty Ltd v Bunnings Group Ltd* [2023] QSC 256, [7]-[16].

[345] In this case I am satisfied that such a "holding out" has been established.

[346] First, Mr Williams and Mr Oar were both present during the General Conversations in September 2016 and knew that Mr Pentecost was exploring whether to invest in Rapid Securities with his families backing. They were happy for Mr Pentecost to invest subject to checking with Mr Warren from Skybound; which Mr Birse did.

[347] Second, the Representations that I have found to have been made occurred after the General Conversations in September 2016. The sale did not occur until July 2017 some 10 months later. It was obvious that over that time the corporate defendants, through their controlling minds (the directors), were content for Mr Birse to negotiate with Mr Pentecost on their behalf about the sale of their shares; which Mr Birse did.

[348] Third, Mr Williams and Mr Oar both denied appointing Mr Birse as their agent (or their respective companies' agent) for the sale of their shares in Rapid Securities. But Mr Oar had no real conversations about the sale with Mr Pentecost. Mr Williams had some conversations, but he could not recall any details. The sale of each of the corporate defendant entities shares to Converging Momentum did not come about in a vacuum. The sale was done as one not three separate transactions.

[349] Fourth, Mr Birse kept Mr Oar updated and Mr Oar relied on Mr Birse to communicate with Mr Pentecost. Mr Williams obviously did the same.

Issue two: Did the defendants engage in misleading and deceptive conduct?

[350] The proper characterisation of the relevant conduct, the representation, the negotiation of the Share Sale Agreement and its terms must be considered together as part of a totality of circumstances relevant to whether any representation found to have been made is conduct that is misleading and deceptive or likely to mislead or deceive; *Wedgewood Road Hallam No 1 Pty Ltd Diamond* [2013] VSC 447, [38].

Is the making of Representation 2 conduct that is misleading and deceptive or likely to mislead and deceive?

[351] Representation 2 is that the Loan Book was worth \$70 million.

- [352] In the context of the overall totality of circumstances in this case, I am not satisfied that such a representation is correctly categorised as conduct that is misleading and deceptive or likely to mislead or deceive.
- [353] First, Mr Benjamin accepted that the gross value of the Loan Book was \$70 million and therefore in that context was true at the time.
- [354] Second, Mr Pentecost had been the Company Accountant of Rapid Securities for six months and had access to and knowledge of the financial records and accounting systems maintained by the company including MYOB, the loan management accounting system ARMnet and Lotus Notes. In that sense, the spreadsheets were not being shown to a layperson devoid of an understanding of financial accounting information and inside knowledge of the business of the company.
- [355] Third, Mr Pentecost was taken to the book value of \$70 million in the course of being shown Spreadsheet 1. He knew the values in the spreadsheet were based on various assumptions. The representation should be seen in the context that it was a prediction, not a guarantee of what might occur.

Is the making of the Spreadsheet Representations conduct that is misleading and deceptive or likely to mislead and deceive?

- [356] The Spreadsheet Representations are mainly predictions as to future matters.
- [357] Where a party has made a representation with respect to a future matter, two questions of fact arise. First, what grounds were subjectively relied upon by the representor in making the representation and secondly were those grounds objectively reasonable: ACL(Q), s 4(1).
- [358] The plaintiffs submit that any future representations found to have been made must be deemed as misleading by s 4 of the ACL(Q), because the defendants have not pleaded any grounds upon which Mr Birse in fact relied. The latter is true but not surprising given that Mr Birse was adamant he did not make the Spreadsheet Representations in the first place. It is therefore difficult to see how facts could be pleaded as underpinning a statement said not to have been made. This quandary is well recognised. It has been suggested that s. 4 ought to be reviewed due to the insurmountable obstacle it poses for a defendant who denies making the alleged future representation: *Willet v Thomas* [2012] NSWCA 97, [44].
- [359] Having not pleaded any subjective facts, the defendants provided a schedule of contemporaneous facts and circumstances from which it can be inferred that, if the Spreadsheet Representations were made, Mr Birse had a reasonable basis for making them. These matters include Mr Birse's evidence about the RS Group, its growth and future expansion plans, and its Loan Book and the various Financial Reports for the 2014 to 2016 financial years. The defendants submit that Mr Birse's basis for making the Spreadsheet Representation is also contained within the spreadsheet itself, because the data on which those predications are made is contained within the other tabs and the formulae that make up the Assumptions tab.
- [360] The plaintiffs oppose the defendants' reliance on these matters, emphasising that a representor must identify some facts and circumstances existing at the time upon which they in fact relied in making the impugned representation; *Australian Securities and Investments Commission v GetSwift Ltd* [2021] FCA 1384, [2158]. But

they cannot do what the defendants purport to do in this case and that is, point to other facts or circumstances in existence at the time, which they did not rely on, to prove that there were reasonable grounds for making the representations: *ASIC v BPS Financial Pty Ltd* [2024] FCA 457, [232]-[246].

[361] There is some force to the plaintiffs' submission. It has been described as a "formidable task" to prove what, in fact, was relied upon in making a future representation when for example the person responsible for making a representation is not called: *GetSwift* at [2163]. But as Lee J also observed in *GetSwift* at [2156]-[2157] the test in s 4 of the ACL(Q) is a low threshold one that does not reverse the onus of proof.

[362] In certain circumstances, I am therefore satisfied that the low threshold test set by the deeming provision of s 4 can be discharged by the evidence adduced, not only by the representee but by any other evidence adduced. In this case, Mr Birse gave evidence of having shown the Spreadsheets (although in a different context and later) and the basis upon which it may be said he used the Spreadsheets more generally forms part of his evidence and otherwise, can be readily inferred, from the Spreadsheets themselves. They were future predictions predicated on manipulated figures and various assumptions.

[363] This issue is a finely balanced one. But it is important to guard against hindsight illusion; *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94 at [84]. Taking into account the facts and circumstances relied upon by the defendants as the basis for reasonable grounds and bearing in mind that the extent of the issues concerning provisioning and deferred income were not known in late 2016, I am satisfied:

- (a) First, that Mr Birse had fact had a reasonable basis for making the Spreadsheet Representations; and
- (b) Second, that those grounds were objectively reasonable.

[364] I am therefore not satisfied that the plaintiffs have established that the Spreadsheet Representations were representations as to future matters that is conduct properly categorised as misleading and deceptive conduct.

[365] In case I am wrong in having considered other evidence adduced as underpinning a reasonable basis finding, and I am wrong in my conclusion about that evidence, and the Spreadsheet Representations are found to be conduct that is correctly categorised as misleading and deceptive conduct, I have considered the issue of causation/reliance below. That analysis shows that I am not satisfied that the Spreadsheet Representations played any part in Mr Pentecost's decision to enter into the Share Sale Agreement.

Issue three: Did Mr Pentecost rely on Representation 2 and the Spreadsheet Representations in entering into the Share Sale Agreement

[366] If I am wrong and the defendants are found to have engaged in misleading and deceptive conduct in making the representations I have found to have been made, it is necessary to consider the issue of reliance.

[367] In determining whether Mr Pentecost relied on these representations the Court is to apply common sense and experience, bearing in mind that the representations need

not be the sole inducement. It will be sufficient if the representation plays some even minor part in materially contributing to the formation of the Share Sale Agreement; *Henville v Walker* (2001) 206 CLR 459, [13],[14],[60],[61],[106],[107].

- [368] A declaration in a contractual document that no pre-contractual representations were relied upon – may in the circumstances of the case be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25, [28] - [30].
- [369] As a matter of consistency in the melting pot of facts and circumstances in this case, I add the fact that the Share Sale Agreement makes no reference to any warranties about any of the alleged representations being made. Nor was there any evidence of attempts to include such warranties.
- [370] Mr Pentecost’s evidence was that he entered into the Share Sale Agreement based on the conversations he had with Mr Birse and the information he had seen in the Spreadsheets. The plaintiffs submit that Mr Pentecost’s reliance is supported by the fact that the representations were, objectively, likely to induce a representee in Mr Pentecost’s position to enter into the Share Sale Agreement because:
- (a) of the relationship between Mr Pentecost and Mr Birse. Mr Pentecost considered Mr Birse to be his friend, mentor and role model and Mr Birse knew this to be the case;
 - (b) the representations were given legitimacy by virtue of Mr Birse’s position within Rapid Securities, his relationship with Mr Pentecost and the fact that Mr Birse made some of the representations to Mr Pentecost by reference to what appears, on its face, to be legitimate financial analysis; and
 - (c) Mr Pentecost signed the Share Sale Agreement against the advice of his own independent professional financial advisers. With common sense and experience dictating that Mr Pentecost must have had very good reason not to follow that advice.

- [371] Despite what he says, (hindsight being a wonderful thing), for the reasons that follow, I am not satisfied that Mr Pentecost was induced by or in fact relied on Representation 2 or the Spreadsheet Representations in entering into the Share Sale Agreement.

Did Mr Pentecost rely on Representation 2

- [372] Turning to Representation 2 first.
- [373] At page 3 of the Business Proposal, Mr Pentecost states that Rapid Securities “managed a growing profitable lending book of ~\$45m...” That is, Mr Pentecost did not refer to a Loan Book of \$70 million, rather he relied on a value of approximately \$45 million. It follows that he did not rely on a Loan Book value of \$70 million in any way.
- [374] As set out earlier, it is also prudent (and now convenient) to deal with whether Mr Pentecost relied on or was induced to enter into the Share Sale Agreement based on Representations 1 and 10, that the Rapid Securities business was valued at \$70 million.

- [375] I am not satisfied that he was.
- [376] First, Mr Pentecost was sceptical of the \$70 million valuation of Rapid Securities ascribed by the proposed Skybound transaction. On 10 November 2016, he wrote to Mr Swanepoel of IAS, seeking information as to whether they had undertaken a valuation. He accepted that he did so because he was seeking to “verify” that valuation.
- [377] Second, Mr Pentecost arrived at a valuation far less than \$70 million (one of \$40 million) as part of his pitch to his family in the Business Proposal.
- [378] Third, in May 2017, Mr Allen told Mr Pentecost that the business was grossly overvalued at \$70 million.
- [379] Fourth, Mr Pentecost knew (and accepted that he knew through his solicitors) that he was paying an unknown premium for the shares.
- [380] Fifth, the evidence shows that at the time Mr Pentecost signed the Share Sale Agreement he had been wanting to invest in Rapid Securities for nearly 18 months. Over that period (on his own admission), he had conducted his own research into the venture.
- [381] Sixth, even after Representation 1 and the Spreadsheet Representations were made, Mr Pentecost continued to investigate the viability of the investment himself and he negotiated the terms of the investment with the assistance of financial advisors and lawyers.
- [382] Seventh, by June 2017 Mr Pentecost was clearly in a rush not to miss out investing alongside Skybound. Skybound coming on board was expressly stated to be “material” to his investment.
- [383] Eighth, in July 2017, while the terms of the Share Sale Agreement terms were being negotiated, the “The SkyB Transaction” at clause 6.1.3 of the draft was expressly stated to be “fundamental” to Mr Pentecost’s “desire” to purchase the shares. Not the predictions contained in the Spreadsheet Representations or anything else said by Mr Birse.
- [384] The finding of no reliance is consistent with the fact that no such representation formed part of the negotiated Share Sale Agreement.

Did Mr Pentecost rely on the Spreadsheet Representations?

- [385] I am not satisfied that Mr Pentecost relied on the Spreadsheet Representations in any way or alternatively in any material way in entering into the Share Sale Agreement.
- [386] First, the Spreadsheet Representations were made in September, October and November 2016 during the course of fairly brief discussions. Mr Pentecost could not and did not remember what appeared on the face of these documents. His evidence about their contents was obviously reconstructed from the source documents for the purpose of his evidence in these proceedings. Mr Pentecost sent the spreadsheets to his personal email address on each occasion after he saw them, but he never looked at them again. If the figures in the Spreadsheets played any part in his decision to

enter into the Share Sale Agreement, it is reasonable to assume that he would have examined the Spreadsheets again in some detail. But he did not.

[387] Second, at the very least, if the figures in any of the Spreadsheets were important to Mr Pentecost's decision to enter into the Share Sale Agreement, it is reasonable to assume that he would have, at the very least, bothered to look at the Spreadsheets again. But he did not.

[388] Third, it is also reasonable to assume that if the Spreadsheet Representations were material to Mr Pentecost's decision, or mattered to him in any way, he would have reproduced them in the Business Proposal. But he did not. Instead, he arrived at his own projections of profit and of the Loan Book sitting at around \$45 million.

[389] Fourth, Mr Pentecost said that he did not understand what Mr Birse was saying when he was speaking to him about the Spreadsheets. That much is clear from his misunderstanding about having to compete against Skybound if he was to invest. It is reasonable to infer that is another reason why Mr Pentecost did not rely on any of the Spreadsheets Representations in the Business Proposal or go back to them later.

[390] The finding that Mr Pentecost was not influenced by the Spreadsheet Representations is consistent with:

- (a) the fact that he made no mention of having seen them again (much closer in time to the Share Sale Agreement being signed) when he and Mr Allen were shown updated versions in May 2017. This may be explained by Mr Allen saying that he put no weight on the spreadsheets and it was pointless to go through them any further; and
- (b) (again), the fact that no such representation formed part of the negotiated Share Sale Agreement.

[391] In case I am wrong and the defendants have engaged in misleading and deceptive conduct by the making of Representation 1 and the Spreadsheet Representations, it remains necessary to deal with the issue of Loss and Damage.

Issue four: Loss and Damage

[392] Section 236 of the ACL(Q) provides that the Court may award damages against a person who has engaged in, or who was involved in, misleading or deceptive conduct in contravention of s 18. Section 237 similarly provides that, in such circumstances, the Court may make any order it thinks appropriate, including those listed in s 243. Relevantly, s 237 empowers the Court to award compensation or to set aside a transaction induced by misleading or deceptive conduct.

[393] The primary objective of the Court's remedial powers in ss 236 and 237 is to restore the plaintiffs to the position they would have been in had the misleading or deceptive conduct not occurred. Whilst the Court may be assisted by analogies drawn with contractual or tortious measures of damage, the task is one of statutory interpretation having due regard to the policy of the ACL(Q); *Henville v Walker* (2001) 206 CLR 459, [18]; *Potts v Miller* (1940) 64 CLR 282.

[394] Such an assessment of loss or damage in this case requires the Court to subtract the true value of the shares from the price paid by Converging Momentum at the time of

the Share Sale Agreement; *HTW Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, [35].

- [395] The reasonable and experienced minds of the opposing experts in this case – Mr Benjamin and Mr Lytras disagreed about the most appropriate method to assess the “true value” of the shares. I accept both experts as reliable and truthful witnesses with the relevant qualifications and expertise to provide the carefully considered opinions they gave.
- [396] The plaintiffs’ pleaded case is that the true value of each of the shares owned by the corporate defendants and Skybound at the time Converging Momentum purchased 1,129,151 shares in Rapid Securities was nil or, alternatively, \$2.8977 a share. The plaintiffs claim is that because of the defendants misleading and deceptive conduct, they have therefore suffered loss or damage in the amount of \$7 million, calculated as the difference between the price paid for the shares and their fair market value at the time of the sale. Alternatively, the plaintiffs claim that they have suffered loss or damage in the amount calculated as the difference between the price paid for the shares and their fair market value at the time of the sale, based on the defendants’ expert Mr Lytras’ “NPBT Multiple valuation method”.

Is Mr Benjamin’s Net Tangible Assets Method the appropriate way to assess the true value of the shares?

- [397] In support of their primary claim the plaintiffs rely on the evidence of their expert Mr Benjamin of the “Net Tangible Assets Method” - a form of costs approach where the valuer seeks to value the share capital in a company by reference to the total assets and liabilities. The plaintiff’s referred to Mr Benjamin’s evidence that between September 2016 and mid-July 2017, the Loan Book was in fact worth between \$26,926,558 and \$38,891,029. Applying this method, Mr Benjamin’s opinion is that once deferred revenue and impairment in the Loan Book are properly accounted for, shares in Rapid Securities were worth nothing because the company was loss-making, carried a deficiency of assets over liabilities and this was unlikely to change in the ordinary course of business. The plaintiffs objected to this part of Mr Benjamin’s opinion as being inadmissible and irrelevant because the underlying assumption that the failure to account for deferred revenue and impairment (or lack of provisioning) were all matters that arose after the Share Sale Agreement, was factually wrong.
- [398] The defendants’ case is that these matters should not be considered in determining the “true value” of the shares for either or both of two reasons:
- (a) First, both of those matters were known to Mr Pentecost when he caused Converging Momentum to enter into the Sale Agreement; and
 - (b) Second, they were the cause of a subsequent, independent, supervening event—namely the early adoption of AASB 9 which changed the way Rapid Securities was required to impair its Loan Book.
- [399] I reserved my ruling on the admissibility of the contested parts of Mr Benjamin’s opinion to judgment. Having considered the matter, I will allow the admission of this evidence as being of some relevance because whilst the issues of deferred revenue and impairment (or lack of provisioning as it was also referred to) in the Loan Book were known by Mr Pentecost at the time – the full extent and impact of those matters on the value of the shares was not.

- [400] However, given the extent of Mr Pentecost's knowledge of these matters prior to and at the time he signed the Share Sale Agreement, for the following reasons, I am not satisfied Mr Benjamin's preferred method is a fair and reasonable or accurate way to assess the true value of the shares in this case. This is particularly so in this case where Mr Pentecost knew and had been warned by his own advisors that he was paying an unknown premium for the shares.
- [401] First, I accept that Mr Pentecost knew that at the time he caused Converging Momentum to enter into the Share Sale Agreement that the Loan Book had not been properly impaired (provisioned) and that a methodology for raising impairment or provision would be introduced in FY18. For example:
- (a) from at least May 2017 Mr Pentecost and Mr Birse had been discussing a new approach to provisioning the Loan Book to commence in FY18. Mr Pentecost also discussed this with the company's auditors and reported back to Mr Birse on 18 May 2017. Mr Pentecost described the approach he and Mr Birse had discussed to be "our conservative approach";
 - (b) in his Q3 FY17 report, Mr Pentecost reported to the directors of Rapid Securities on the new approach to be taken to raising provisions;
 - (c) two days after completion of the Share Sale Agreement, Mr Pentecost wrote to Mr Birse wanting to confirm the quantum of the monthly provision to be raised was to be \$1,000,000; and
 - (d) when inquiries were being made to retain a new auditor, Mr Pentecost gave detailed instructions to Grant Thornton about Rapid Securities' previous approach to impairing the Loan Book and recent introduction of a monthly provision [85] to [91].
- [402] This finding is consistent with Mr Pentecost's concession that he knew that no provision had been raised by Rapid Securities against its Loan Book at the time he caused Converging Momentum to enter into the Share Sale Agreement. But despite this finding, I am not satisfied that Mr Pentecost knew the true extent that the Loan Book had not been properly provisioned and the consequences of that at the time.
- [403] Second, I also accept that Mr Pentecost knew about the treatment of deferred revenue being an issue at the time he caused Converging Momentum to enter into the Share Sale Agreement. For example:
- (a) in response to a query raised by the auditors, Mr Pentecost gave a detailed response as to the extent to which deferred revenue had been raised in Rapid Securities' accounts. Mr Pentecost directed the auditors to specific MYOB accounts in which deferred revenue was recorded as an asset;
 - (b) during the March 2017 directors meeting, the board and Mr Pentecost discussed the extent to which fees earned on medium and long-term loans were to be the subject of deferred revenue. The extent to which deferred fees were booked was also recorded in the quarterly reports Mr Pentecost prepared for the board;
 - (c) in a draft email to be sent to Skybound, Mr Pentecost reported that there had been changes to the November and December 2016 balance sheets and profit and loss statements to reflect "deferred income adjustments and the split of regular vs arrear interests";

- (d) in an email to Mr Birse of 2 March 2017, Mr Pentecost recorded that “[d]ue to reporting limitations in ARMnet as compared to Lotus, an adjustment to our deferred income needed to be made. For the months of November 2016, December 2016, and January 2017 - amounts were reversed out of asset account 1-1402 Deferred Income Offset and credited to income account 4-1000 Establishment Fee Income - these fees relate to Application Fees on car loans...”;
- (e) page 4 of the PowerPoint Presentation Mr Pentecost emailed to his personal email address, recorded the deferred revenue recorded by Rapid Securities in its accounts for FY14-FY16 and projected amounts going upward; and
- (f) the extent to which Rapid Securities accrued deferred income was recorded in various balance sheets which Mr Pentecost reviewed including the Skybound monthly reports and the financial statements Mr Pentecost sent to his personal email address (and which he reviewed in drafting his Growth Analysis spreadsheet).

[404] These examples certainly show, as the defendants submitted, that at the time Mr Pentecost signed the Share Sale Agreement, he had a reasonable understanding of the extent to which deferred income was raised on loans. But given his lack of experience in the industry, I do not accept that Mr Pentecost fully understood that the deferred revenue had not been properly accounted for and the impact of that on the value of the shares he was purchasing.

[405] Third, whilst I accept the force of the defendants’ submission that the issues of deferred income and lack of impairment in the Loan Book were matters known to Mr Pentecost before he purchased the shares, I am not satisfied that there was a supervening event in the form of the early adoption of AASB 9 that was the cause of loss and damage. Mr Birse’s evidence about this was vague and self-serving, and not supportive of such a finding. It was also contrary to the contemporaneous records in the form of the FY2018 quarterly report which state that the RS Group did not early adopt AASB 9 but rather was proposing to apply it from 1 July 2018 for FY2019.

[406] Having found that the Net Tangible Assets Method is not an appropriate approach to the assessment of the true value of the shares. What are the other options?

Is Mr Lytras’ Recent Subject Entity Share Sales Transactions Method the appropriate way to assess the true value of the shares?

[407] Mr Lytras used five different methods to assess the “true value” of the shares in Rapid Securities at the time of the Share Sale Agreement. On each of these valuation measures, Mr Lytras assessed the market value of a share in Rapid Securities around 17 or 18 July 2017 to be greater than \$nil. Four of those assessments were based on Mr Lytras’ True Accounts Assumption - that the RS Group’s financials and MYOB statements reflected the true financial status of the RS Group at the time. That is, Mr Lytras did not inquire whether the Loan Book was sufficiently impaired for doubtful debts.

[408] Mr Lytras’ preferred method of the Recent Subject Entity Share Sales Transactions Method was not based on the True Accounts Assumption. Rather, that method entailed taking the price paid by Skybound of \$6.1993 per share for its 20 per cent of the shares in Rapid Securities just before Converging Momentum purchased its shares

and then discounting that amount by 10 per cent for as a form of margin of safety taking into account a number of factors, including for example the higher funding costs (and diminished profitability) being experienced in the first part of the 2018 financial year. This resulted in a valuation of \$5.5794 per share. This is the valuation the defendants press.

[409] Mr Benjamin was critical of this method as an appropriate basis for assessing the fair market value because:

- (a) the purchase price reflects the price paid in one overall transaction by a single investor who is a related party of the RS Group and therefore had a pre-existing direct or indirect financial interest in RS Group at the time of the investment and who obtained specific rights including the appointment of a director; and
- (b) because the price of \$6.1994 per share reflects the value to Skybound based on its individual investment requirements and expectations which have not been shown to reflect those of the market.

[410] In support of the plaintiffs' position, it was put to Mr Lytras that he should have valued Converging Momentum's shares at some different value to the other shareholders' shares. But I accept the defendants' submissions that the notion that there was a different value to certain shares is contrary to the plaintiffs pleaded case that:

- (a) "[a]s at 17 July 2017 and 18 July 2017, the true value of each share in Rapid Securities was nil dollars"; or, alternatively
- (b) "the true value of each share in Rapid Securities was \$2.8977".

[411] It follows that I am not satisfied that Mr Benjamin ought to have disregarded the purchase price paid by Skybound in calculating the value of Rapid Securities' shares as he did. But I do not accept that that the cross-examination of this issue was misplaced. Whilst Mr Lytras did not depart from his preferred valuation method under cross-examination, he conceded that a further discount of five to ten per cent was necessary to account for the additional valuable rights obtained by Skybound as part of its transaction. Although it was not apparent how Mr Lytras reached these percentages, he earlier accepted that a minority shareholders clause should be heavily discounted unless they have the voting power to protect themselves. Which Converging Momentum did not.

[412] It is instructive too that by any other method of analysis, Mr Lytras determined that the shares were worth considerably less than \$6.20 per share. The reason for the extreme variance in assessed value is that, whilst each of the other methods is tethered to the underlying financial performance of the company, the comparable transactions method is not. Rather, it relies on rationalising what other people have been willing to pay. But the only prior transaction was the Skybound transaction and, as Mr Benjamin observed (and I accept) "one transaction alone is not a market".

[413] I am not satisfied that Mr Lytras' preferred option of the comparable transactions method is an appropriate method for the assessment of the true value of the shares because:

- (a) it does not present as a fair or reliable way to assess that value in the circumstances of this case;

- (b) it is only based on one transaction which involved a purchaser obviously paying too much for shares in a company that had failed to properly account for deferred revenue and provisioning for some time;
- (c) Mr Benjamin and Mr Lytras could not isolate the special value in the Skybound transaction so it is not an appropriate price to be used as a benchmark for fair market value; and
- (d) it is difficult to adjust or discount fairly the price Skybound paid to arrive at fair market value without knowing exactly what to account for.

What is the true value of the shares?

[414] Mr Lytras otherwise assessed the true value of the shares in the range of \$1.7501 per share (referred to as the Net Tangible Assets Multiple) to \$4.0985 per share (referred to as the Loan Book Value Multiple) under the Comparable Companies Value and Metrics Methods after he applied a 20 per cent discount for share illiquidity and small size characteristics of Rapid Securities. He described the valuation methods applied to arrive at these values as follows:

- (a) Value as a multiple of NPBT;
- (b) Value as a multiple of the net loan book value;
- (c) Value as a multiple of net tangible assets.

[415] These assessments were based on the True Accounts Assumption by which Mr Lytras assumed the Loan Book was worth \$60,749,058 (and not \$37,891,029). Given what I have found to be the problems with the assumptions underpinning Mr Benjamin's Net Tangible Assets Method, I am satisfied (not without some hesitation) that the True Accounts Assumption is the appropriate base option upon which the true value of the shares is to be considered.

[416] Mr Benjamin's reply report addressed the position of his assessment of the Loan Book value being rejected and Mr Lytras True Accounts Assumption being accepted. This being so, Mr Benjamin agreed with Mr Lytras' assessment of \$2.8977 per share using the NPBT Multiple method as being the appropriate method for assessing the true value of the shares.

[417] In these circumstances, I accept Mr Benjamin's evidence that the most appropriate method to value Rapid Securities is Mr Lytras method using the NPBT Multiple because:

- (a) The Net Tangible Assets Valuation Method does not take into account goodwill given Mr Lytras' assumed level of earnings;
- (b) The Loan Book Value Multiple and Net Tangible Assets Multiple do not take into account the relative debt of RS Group and the comparable firms;
- (c) The Comparable Transactions Method is inappropriate for the reasons at [413];
- (d) The NPBT Multiple, using the level of earnings and net asset position assumed by Mr Lytras, accounts for goodwill and the relative debt carried by Rapid Securities; and
- (e) the most common approach for valuing unlisted equity where the enterprise is profitable is the 'income approach' and the NPBT Multiple is a method within that approach.

[418] I therefore assess the true value of the shares at \$2.8977 per share. It follows that the appropriate award of damages to reflect the loss and damage suffered by the plaintiffs because of the defendants' contravention of s 18 is \$3,271,940.85. This sum is calculated as the difference between the purchase price of \$7 million less the true value of 1,129,151 shares in Rapid Securities at \$2.8977 per share, being \$3,728,059.15.

Is there a basis for the claim to be reduced under the Civil Liability Act (2003) (Qld)?

[419] The defendants submit that, if the Court were to award damages it should reduce the damages on account of the plaintiffs' failure to notify Marsh & Associates and Irish Bentley Lawyers as concurrent wrongdoers under s 30 of the *Civil Liability Act 2003* (Qld). Although the defendants did not (and could not) point to an appropriate figure for such a reduction. This is not surprising. There is no evidence to support a finding that either of these entities were responsible in any way for the loss or damage suffered by the plaintiffs. In these circumstances, I am not satisfied that it is just and equitable to make any order for apportionment.

Orders

[420] The proceedings are dismissed. Ordinarily costs follow the event. My preliminary view is that the appropriate order as to costs is that the plaintiffs pay the defendants costs of the proceeding including any reserved costs. But I will allow the parties the opportunity to be heard on this issue.

[421] I direct that if another order as to costs is sought, the parties are to email my Associate by 4.00pm Friday 10 July 2026 so that directions can be made for submissions and if necessary, a hearing on this issue. Otherwise, the order foreshadowed will be made. In the meantime, if the parties agree on the appropriate order as to costs before 10 July 2026, that order can be emailed to my Associate for signing in chambers.