

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)
NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION** **No: NSD1198/2010**

NOTICE OF FILING

This document was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/03/2011.

DETAILS OF FILING

Document Lodged: Amended Document
File Number: NSD1198/2010
File Title: Asquith Rugby League Club Ltd ACN 000 610 542 & Anor v Capital Finance Australia Limited ACN 069 663 136 & Anor
District Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



★ Dated: 18/03/2011

Registrar

Warwick Soden

Note

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the document. The Notice must be included in the document served on each party to the proceeding.



**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY
GENERAL DIVISION**

File No NSD 1198 of 2010

**ASQUITH RUGBY LEAGUE CLUB
LIMITED**

(ACN 000 610 542)

First Applicant

**SHELLHARBOUR WORKERS CLUB
LIMITED**

(ACN 001 068 864)

Second Applicant

**CAPITAL FINANCE AUSTRALIA
LIMITED**

(ACN 069 663 136)

First Respondent

**TOTAL CONCEPT PROJECTS
(AUSTRALIA) PTY LIMITED**

(ACN 073 474 772)

(IN LIQUIDATION)

Second Respondent

AMENDED STATEMENT OF CLAIM

(Order 4 rule 6 and Order 11)

1. This proceeding is commenced as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) by the Applicants.

The Applicants

2. The Applicants and the persons they represent in these proceedings pursuant to Part IVA of the **FCA (Group Members)** are each persons who have:
 - (a) entered into one or more Rental Agreements with the First Respondent; and/or
 - (b) entered into a Revenue Agreement with the Second Respondent;

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- (c) entered into an Advertising Agreement with the Second Respondent or a related entity of the Second Respondent;
- (d) been Group Members when the proceedings commenced on 13 September 2010 and suffered loss and damage as a result of the wrongful conduct of the Respondents pleaded below; and/or
- (e) become Group Members following the orders of the Court on 16 February 2011, having first suffered loss and damage on or after 16 February 2005 as a result of the wrongful conduct of the Respondents pleaded below.
- ~~(e) as at the commencement of proceedings, entered into a Retainer Agreement with Slater & Gordon Lawyers, the solicitors on the record in these proceedings.~~
3. As at the date of the commencement of this proceeding, seven or more Group Members had claims against each of the Respondents.

Particulars

The final composition of the group will not be ascertained until opt-out requirements have been complied with and/or an order is made by the Court for closure of the class of group members who wish to pursue rights to compensation. Nevertheless, the group members with claims against the Respondents whose identity has currently been ascertained are as follows:

1. Asquith Rugby League Club;
2. Shellharbour Workers Club;
3. Penrith Returned Services Leagues Club;
4. Western Suburbs Leagues Club (Campelltown) Limited;
5. Wyong RSL Club;
6. North Sydney Leagues Club Limited;
7. Seagulls Club;
8. Hellenic Club of Canberra Limited;
9. Katoomba RSL All Services Club Limited;
10. Maroochydoore RSL Club;
11. Kedron Wavell Services Club Incorporated;
12. Club Marconi.

The Respondents

4. At all material times, the First Respondent (**Capital**):

- (a) was a company duly incorporated and is liable to be sued as such;
- (b) was in the business of supplying, or offering to supply, services of renting communications equipment, including digital signage equipment, to businesses;
- (c) was engaged in trade or commerce within the meaning of that term as used in the *Trade Practices Act (1974)* (Cth).

5. At all material times, the Second Respondent (TCP):

- (a) was a company duly incorporated and is liable to be sued as such;
- (b) was in the business of supplying, or offering to supply, the services of marketing and installing digital signage equipment;
- (c) was in the business, and had related entities that were in the business, of supplying, or offering to supply, the services of procuring advertising on digital signage equipment that it had installed;
- (d) was engaged in trade or commerce within the meaning of that term as used in the *Trade Practices Act (1974)* (Cth).

Pre-contractual representations by TCP

6. Between about 2004 and about 2008, TCP made the following representations in trade or commerce to each Group Member (subject to paragraph 6A below):

- (a) that TCP had, ~~as at the date of the representations, already installed a digital signage network in many other clubs in New South Wales, which clubs were operating that network profitably;~~
- (b) that TCP or its related entity had, as at the date of the representations, already entered into arrangements with several third party advertisers who were willing and able to purchase advertising time on any digital signage network that would be installed by TCP in the premises of that Group Member;
- (c) that TCP had, ~~as at the date of the representations, already identified the specific items of equipment that would be installed in the Group Member's premises should the Group Member elect to enter into a suite of agreements with TCP, its related entities and Capital;~~
- (d) that TCP was offering to procure that certain items of equipment comprising a digital signage network, including plasma video display screens and associated equipment, would be provided to each Group Member at no net cost to the Group Member;
- (e) that if the Group Member entered into an arrangement proposed by it:
 - i) TCP would design, supply and install a digital signage network system in the premises of that Group Member (the **Network**);

- ii) the Network would comprise, inter alia, a number of plasma video display screens and related networking equipment as selected by and installed by TCP (the **Equipment**);
- iii) the Equipment:
 - ~~(a) would be state of the art;~~
 - ~~(a) would be that equipment described by product name, model and serial number in a document provided by Capital and described as a Rental Schedule;~~
 - ~~(a) would be delivered within about 12 weeks of execution by the Group Member of documents recording those arrangements;~~
 - ~~(a) would not be defective or unfit for the purpose of operating the Network;~~
- iv) TCP or its related entity would procure on behalf of that Group Member substantial advertising content to be transmitted over the Network and displayed on each screen installed by TCP in that Group Member's premises;
- v) the advertising content to be procured by TCP or its related entity would generate revenue for that Group Member that would exceed or, at the very least, equal the cost to the Group Member of installing the Network and paying the rental on the Equipment;
- vi) in the event that the advertising content procured by TCP or its related entity did not generate revenue for the Group Member that exceeded or, at the very least, equalled the cost to the Group Member of installing the Network and paying the rental on the Equipment, TCP would make good the shortfall within 7 days of being requested to do so;
- ~~vii) the Group Member would be able to exchange any item of Equipment with which it was unsatisfied for a new item at no extra cost to the Group Member;~~
- ~~viii) the arrangement would be good value for the Group Member;~~
- ~~ix) it would be in the interests of the Group Member to enter into the arrangement;~~
- (f) ~~TCP was sufficiently financially sound such that any promise made by it to the effect that it would make payments in the future would not be worthless.~~

(the **TCP Representations**)

Particulars of TCP Representations

The TCP Representations were both express and implied. The express TCP Representations were communicated orally and in writing by TCP to each Group Member at different times and in different locations by officers and/or employees of TCP.

To the extent they were implied, they were implied by the other TCP Representations and the circumstances in which the TCP Representations were made.

Particulars of the TCP Representations to the ascertained Group Members in subparagraphs 6(b), (d) and e(v) to (vi) were supplied by the solicitors for the Applicants, Slater & Gordon, to the solicitors for the Second Respondent, Kemp Strang, in a letter dated 15 November 2010.

Further Particulars will be provided in due course of the TCP Representations in respect of each Group Member (other than the Applicants) will be provided after determination of the issues common to the claims of all Group Members, as identified in the Amended Application (hereafter the "common issues").

Particulars of TCP Representations to First Applicant

To the extent that the TCP Representations to the Applicant were oral they were comprised in conversations, including:

- (a) between Ray Agostino, the CEO of the First Applicant and Thurid Bouzaid a TCP representative in about November 2005 ~~at the Annual Leagues Club Conference.~~
- (b) between Ray Agostino and Cindy Bunyan, the Assistant General Manager of the First Applicant on the one hand and Thurid Bouzaid from TCP on the other hand in about November or December 2005;
- (c) ~~between Ray Agostino and Cindy Bunyan on the one hand and Thurid Bouzaid on the other between about 28 November 2005 and 9 December 2005;~~

To the extent that the TCP Representations were written they were comprised in various documents provided by TCP to the Applicant, including the following documents:

- (i) Club Digital NetworX proposal dated 17 November 2005;
- (ii) ~~Revised General Viewing System document proposal~~ proposal dated 28 November 2005;
- (iii) Revenue Agreement proffered to the First Applicant on or before 9 December 2005;
- (iv) TCP Full Service Agreement for Club Digital NetworX proffered to the First Applicant on or before 9 December 2005;
- (v) ~~TCP TCM Media Advertising Agreement~~ proffered to the First Applicant on or before 9 December 2005;
- (vi) Club Digital NetworX brochure provided by Thurid Bouzaid to Ray Agostino in November 2005.

To the extent they were implied, they were each implied by the other TCP Representations and the circumstances in which the TCP Representations were made.

Particulars of TCP Representations to Second Applicant

To the extent that the representations were oral they were comprised in conversations, including:

- (a) between David Whyte, the CEO of the Second Applicant and Mark Cannon from TCP on 16 July 2005 and 21 October 2005 at the premises of the Second Applicant;
- (b) between David Whyte of the Second Applicant and Thurid Bouzaid from TCP on 9 August 2005 at the premises of the Second Applicant.

To the extent that the representations were written they comprised various documents provided by TCP to the Second Applicant, including the following documents:

- (c) Club Digital NetworX proposal dated 9 August 2005;
- (d) Total Concept Media Kit provided to the Second Applicant in or around August 2005;
- (e) Revenue Agreement proffered to the Second Applicant in about October 2005;
- (f) TCP Full Service Agreement for Club Digital NetworX proffered to the Second Applicant in or about October 2005;
- (g) ~~TCP Media~~ TCM Advertising Agreement proffered to the Second Applicant in or about October 2005.

To the extent they were implied, they were each implied by the other TCP Representations and the circumstances in which the TCP Representations were made.

6A. In the case of a sub-group of Group Members, the TCP Representation in paragraph 6(e)(vi) was that in the event that the advertising content procured by TCP or its related entity did not generate revenue for the Group Member that exceeded or, at the very least, equalled the cost to the Group Member of installing the Network and paying the rental on the Equipment, TCP would make good 50% of the shortfall.

Particulars

These Group Members are Maroochydoore RSL and Hellenic Club of Canberra

7. Further the TCP Representations at sub-paragraphs 6(e)(v) and (vi) ~~-(iii), (vii), (viii) and (ix)~~ and 6A above were communicated by officers or employees of TCP acting within the actual and/or ostensible authority of Capital.

Particulars of actual authority

The Applicants refer to the particulars of actual authority referred to in paragraph 5 of the letter from Slater & Gordon to Kemp Strang dated 15 November 2010.

Capital and TCP were parties to an arrangement, agreement or understanding whereby officers or employees of TCP procured rental business for Capital by marketing digital signage equipment to businesses which equipment it then procured and sold to Capital for Capital then to rent to those businesses.

At a meeting on about 24 August 2006 between Debbie Organ of Integrity Finance, Ray Agostino, the CEO of the First Applicant, Cindy Bunyan, the Assistant General Manager of the First Applicant, Ted Mocha, National Manager Equipment and Vendor Collections Business Finance for Capital, and David Goldsmith, Manager Collections for Capital, the Applicants contend that David Goldsmith informed the First Applicant that Capital had an arrangement with TCP to the effect set out above.

Capital consented to and authorised all steps taken by TCP by its officers and employees in procuring such business for it, including making approaches and representations to the Group Members in pursuit of such business.

Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.

Particulars of ostensible authority

~~To be provided.~~

The Applicants refer to the particulars of ostensible authority referred to in paragraph 6 of the letter from Slater & Gordon to Kemp Strang dated 15 November 2010

Capital clothed TCP with authority to deal, and make the representations at sub-paragraphs 6(e)(v) and (vi) and paragraph 6A, on its behalf including by reason of:

- (a) the inclusion of TCP's name and logo on the Rental Agreement between the First Applicant and Capital for the Digital NetworX system dated 30 December 2005;
- (b) the inclusion of TCP's name and logo on the Rental Agreement between the First Applicant and Capital for the General Viewing system dated 30 December 2005;
- (c) the provision by TCP to the First Applicant of the Rental Agreements between the First Applicant and Capital in December 2005;
- (d) the provision by TCP to the Second Applicant of the Rental Agreement between the Second Applicant and Capital in October 2005; and
- (e) Capital being listed as one of the advertisers that TCP or its related entity had an arrangement, agreement or understanding with in the TCP Media Kit provided by TCP to the Second Applicant in August 2005.

Capital further appeared to authorise a director of TCP, Richard Skarzynski, to negotiate and agree to amendments to the terms of the Rental Agreements between:

- (a) the First Applicant and Capital in about October 2006;
- (b) the Second Applicant and Capital in about June 2006;
- (c) Western Suburbs Leagues Club (Campbelltown) Limited and Capital in about April 2005 (in particular, an email from Richard Skarzynski to Paul Ivery of Capital dated 12 April 2005 requesting that rental payments be adjusted from quarterly in advance to quarterly in arrears, and email reply from Paul Ivery to Richard Skarzynski dated 27 April 2005 confirming the instructions had been carried out.

Capital further appeared to authorise a representative of TCP, Thurid Bouzaid, to negotiate and agree to amendments to the terms of the Rental Agreement between Capital and Penrith Returned Services Leagues Club between about August 2004 and January 2005.

Further particulars of ostensible authority in respect of each Group Member (other than the Applicants) will be provided in due course, after determination of the common issues.

8. In the premises, the TCP Representations at sub-paragraphs 6(e)(v) and (vi) and paragraph 6A (iii), (vii), (viii) and (ix) were made by officers or employees of TCP as agents for Capital and Capital is liable as principal for them.

~~Pre-contractual representations by Capital and other Capital conduct~~

9. ~~Between about 2004 and about 2008, Capital made the following representations in trade or commerce to each Group Member:~~

~~(a) that if the Group Member entered into an arrangement with Capital and TCP by which TCP designed and installed and Capital rented the Equipment to the Group Member, that Equipment:~~

~~i) would be state of the art;~~

~~i) would be that equipment described by product name, model and serial number in a schedule to the rental agreement proffered to the Group Member (**Schedule**);~~

~~i) would be delivered within about 12 weeks of execution by the Group Member of documents recording those arrangements;~~

~~i) would not be defective or unfit for the purpose of operating the Network;~~

~~(a) the Group Member would be able to exchange any item of Equipment with which it was unsatisfied for a new item at no extra cost to the Group Member;~~

~~(a) the arrangement would be good value for the Group Member;~~

~~(a) it would be in the interests of the Group Member to enter into the arrangement;~~

~~(the Capital Representations)~~

Particulars of Capital Representations

~~The Capital Representations were both express and implied. The express Capital Representations were communicated orally and in writing by Capital to each Group Member at different times and in different locations by officers and/or employees of Capital.~~

~~To the extent they were implied, they were implied by the other Capital Representations and the circumstances in which the other Capital Representations were made.~~

~~Particulars will be provided in due course in respect of each Group Member.~~

Particulars of Capital Representations to First Applicant

~~To the extent that the Capital Finance Representations were written they were comprised in various documents provided by Capital Finance to the Applicant, including the following documents:~~

~~(a) Letter from Capital Finance to the Applicant dated 8 December 2005 enclosing Rental Agreement and its annexures;~~

~~(b) Rental Agreement with Capital Finance proffered to the Applicant by Capital Finance and TCP in December 2005;~~

~~To the extent they were implied, they were each implied by the other Capital Representations and the circumstances in which the Capital Representations were made.~~

Particulars of Capital Representations to Second Applicant

~~To the extent that the Capital Finance Representations were written they were comprised in various documents provided by Capital Finance to the Applicant, including the following documents:~~

~~(a) Letter from Capital Finance to the Applicant dated 20 October 2005 enclosing Rental Agreement and its annexures;~~

~~(b) Rental Agreement with Capital Finance proffered to the Applicant by Capital Finance and TCP in October 2005;~~

~~To the extent they were implied, they were each implied by the other Capital Finance Representations and the circumstances in which the Capital Finance Representations were made.~~

10. ~~Further at the time that Capital made each of the Capital Representations set out at paragraph 9 above to each Group Member, Capital in trade or commerce failed to disclose that it would seek delivery up of the equipment described in the Schedules at the expiry of the term of the Rental Agreements irrespective of whether that equipment had ever been provided to the Group Member or whether different equipment which did not correspond to the description in the Schedule had been provided to the Group Member and in respect of which the Group Member had paid rental to Capital (the Capital silence).~~

Particulars

~~The Capital silence constituted a representation by silence of matters in circumstances where Capital could reasonably have been expected to make such disclosure.~~

Misleading or deceptive conduct

11. The TCP Representations were misleading or deceptive in contravention of section 52 of the Trade Practices Act in that:

- (a) ~~the digital signage networks TCP had installed in other clubs in New South Wales were not being operated profitably by those clubs;~~
- (b) at no time did TCP or its related entities have arrangements with sufficient third party advertisers who were willing and able to purchase sufficient advertising time on the Network for revenue derived therefrom to be sufficient to meet the rental payments on the Equipment;
- (c) ~~TCP had not identified the specific items to equipment to be installed at the Group Member's premises as at the time the TCP Representations were made;~~
- (d) TCP was not offering plasma video display screens and associated equipment to Group Members for no net cost but instead proposed in concert with Capital to arrange for the Equipment to be rented to Group Members for an annual rental which substantially exceeded the cost to purchase and maintain the Equipment and exceeded any revenue that could reasonably be expected to be generated from it;
- (e) ~~it was not the fact, and~~ TCP had no reasonable basis to represent, that if the Group Member entered into an arrangement in which TCP designed and installed the Network and the Group Member rented the Equipment from Capital:
 - i) ~~the Equipment comprised therein:~~
 - ~~(a) would be state of the art;~~
 - ~~(a) would be that equipment which had been represented by product name, model and serial number in the Schedule;~~
 - ~~(a) would be delivered within 12 weeks;~~
 - ~~(a) would not be defective or unfit for the purpose of operating the Network and the equipment which was delivered in fact had none of these characteristics;~~
 - ii) TCP or its related entity would or could procure on behalf of the Group Member sufficient advertising content to be transmitted over the Network and displayed on each screen installed in the Group Member's premises as to generate sufficient revenue to meet the costs to the Group Member in installing and renting the Equipment and it failed to do so;
 - iii) the advertising revenue to be procured by TCP or its related entity would exceed or even equal the cost to the Group Member of installing the Network and paying the rental on the Equipment which TCP in fact failed to do;
 - iv) In the event that the advertising revenue to be procured by TCP or its related entity did not exceed or, at the very least, equal the cost to the Group Member of installing the Network and paying the rental on the Equipment, TCP would make good the shortfall ~~within 7 days of being requested to do so, which it in fact failed to do;~~

- v) ~~the Group Member would be able to exchange any item of equipment with which it was unsatisfied equipment at no extra cost to the Group Member as there was no provision in any agreement with Capital that would have entitled it to do so;~~
- vi) ~~TCP was sufficiently financially sound that any promise made by it to the effect that it would make payments in the future would not be worthless as such promises were never fulfilled or capable of being fulfilled by it.~~
- (f) ~~the arrangements were not good value for the Group Member;~~
- (g) ~~it was not in the commercial interests of the Group Member to enter into the arrangement.~~

12. ~~The Capital Representations were misleading or deceptive in that:~~

- (a) ~~It was not the fact, and Capital had no reasonable basis to represent, that if the Group Member entered into an arrangement in which TCP designed and installed the Network and the Group Member rented the Equipment from Capital the Equipment comprised therein:~~
 - i) ~~would be state of the art;~~
 - i) ~~would be that equipment which had been represented by product name, model and serial number in the Schedule;~~
 - i) ~~would be delivered within 12 weeks;~~
 - i) ~~would not be defective or unfit for the purpose of operating the Network and the equipment which was delivered in fact had none of those characteristics;~~
- (a) ~~there was no provision in the Rental Agreement by which the Group Member would be able to exchange any item of Equipment with which it was unsatisfied for a new item at no extra cost to the Group Member;~~
- (a) ~~the arrangement was not good value for the Group Member;~~
- (a) ~~it was not in the interests of the Group Member to enter into the arrangement.~~

13. ~~The Capital silence was misleading or deceptive in that:~~

- (a) ~~Capital contends that on its true construction the Rental Agreement requires each group Member to deliver up to Capital the equipment as described in the Schedules in good working order and condition irrespective of whether Capital ever delivered and/or rented that equipment to the Group Member;~~
- (b) ~~at all material times Capital intended to rely on that clause so construed.~~

14. ~~To the extent that the conduct of TCP and Capital pleaded above comprised representations as to future matters, the Applicants Group Members rely on s.51A of the Trade Practices Act 1974.~~

15. Relying on the TCP Representations, ~~the Capital Representations and the Capital silence~~, each Group Member:

- (a) entered into the Agreements set out at paragraphs ~~19-18A~~ to 25 below;
- (b) ~~took delivery of equipment which did not correspond with the equipment described in the Schedule proffered to it by Capital;~~
- (c) commenced paying rental to Capital in respect of that equipment.

16. By reason of the above, each Group Member has suffered loss and damage.

Particulars

Each Group Member has suffered loss and damage by incurring obligations to Capital which it would not have incurred but for its reliance on the Representations.

The First Applicant has incurred total obligations to Capital in the sum of \$518,013.20 which it would not have incurred but for its reliance on the Representations. The revenue derived by the Applicant from the Network has been approximately \$20,000 in cash and \$47,682.65 in contra equipment. The best particulars presently available to the First Applicant are that its loss has been approximately \$470,365.84.

The Second Applicant has incurred total obligations to Capital in the sum of \$536,259.44 which it would not have incurred but for its reliance on the Representations. The revenue derived by the Second Applicant from the Network has been Nil. The best particulars presently available to the Second Applicant are that its loss has been approximately \$536,259.44.

~~To the extent that the Group Members are obliged under the Rental Agreements to deliver up to Capital the equipment as described in the Rental Schedules, they will be unable to do so as they have never had possession of that equipment. Each Group Member will further suffer loss commensurate with any otherwise successful claim by Capital for damages arising out of any failure to deliver up to it the equipment as described in the Rental Schedule at the conclusion of the term of the Rental Agreement.~~

~~Further loss was suffered by each Group Member by reason of the delay in delivery of the equipment.~~

Further particulars of the loss or damage of individual Group Members (other than the Applicants) will be provided in due course.

Liability of Capital for TCP Representations

17. At all material times Capital, acting in trade or commerce:

~~(a) was aware that TCP proposed to communicate to persons including the Group Members the TCP Representations set out at paragraphs 6 (b), (d), (e)(iv), (e)(v), (e)(vi) and (f) above;~~

Particulars

~~The knowledge was that of Mr Paul Ivery, Senior Manager – Direct Equipment Finance. Mr Ivery had such knowledge from no later than March 2005.~~

~~Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.~~

~~(a) was aware of the following matters:~~

~~i) that TCP and its related entities had been unable to procure on behalf of each Group Member sufficient advertising content to be transmitted over the Network and displayed on each screen installed in the Group Member's premises as to generate sufficient revenue to meet the costs to the Group Member in installing and renting the Equipment;~~

~~i) that TCP had been unable to make good the shortfall between the rental payments due on the equipment under the Rental Agreements and the revenue derived from advertising procured on behalf of each Group Member for display on the Network;~~

Particulars

~~The knowledge was that of Mr Ivery. Mr Ivery had such knowledge from no later than March 2005.~~

~~Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.~~

~~i) that TCP had no real prospect of ever being able to make good the shortfall between the rental payments due on the equipment under the Rental Agreements and the revenue derived from advertising procured on behalf of each Group Member for display on the Network;~~

Particulars

~~The knowledge was that of Mr Ivery and is in any event to be inferred from (ii) above. Mr Ivery had such knowledge from no later than March 2005.~~

~~Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.~~

~~(a) participated in the making of the TCP Representations at paragraphs 6(b), (d), (e)(iv), (e)(v), (e)(vi) and (f) by:~~

- ~~i) attending meetings between TCP and Group Members and agreeing with the TCP representations;~~
- ~~ii) allowing TCP to act on its behalf in agreeing revisions to the terms of Rental Agreements;~~
- ~~iii) allowing its documents to be badged with the TCP name and logo.~~

Particulars

~~TCP's name and logo were on several Capital Finance documents distributed by TCP, including the Rental Agreement.~~

~~Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.~~

~~18. In the premises, Capital is a person knowingly concerned or a party to the contraventions of the Trade Practices Act 1974 pleaded against TCP at paragraphs 11(b), (d), (e)(iv), (e)(v), (e)(vi) and (f) above and is liable in respect of such contraventions.~~

Agreements with TCP

18A. Each Group Member has entered into an agreement with TCP to design, supply and install the Network (the Club Digital Networkx Agreements).

Particulars

The Club Digital Networkx Agreements are wholly written and are comprised of a written proposal from TCP and a letter of acceptance executed by the Group Member and TCP.

The Club Digital Network Agreement entered into by the First Applicant is comprised of:

- (a) a written proposal dated 17 November 2005; and
- (b) a letter of acceptance executed 12 December 2005.

The First Applicant also entered into a further agreement with TCP to supply and install Equipment (the **General Viewing System Agreement**). The General Viewing System Agreement is comprised of:

- (a) a written proposal dated 28 November 2005;
- (b) a letter of acceptance executed on or about 12 December 2005.

The Club Digital Network Agreement entered into by the Second Applicant is comprised of:

- (b) a written proposal dated 9 August 2005; and
- (c) a letter of acceptance executed on or about 14 October 2005.

19. Each Group Member has entered into an agreement with TCP described as a TCP Revenue Agreement (the **Revenue Agreements**).

Particulars

Each Revenue Agreement was wholly written and each was comprised in a document executed by the parties thereto.

Particulars of the Revenue Agreements entered into by the ascertained Group Members are contained in paragraph 3 of the letter from Slater & Gordon to Kemp Strang dated 15 November 2010.

The First Applicant entered into its Revenue Agreement with TCP on 9 December 2005.

The Second Applicant entered into its Revenue Agreement with TCP on 14 October 2005

20. It was an express terms of each Revenue Agreement that if the gross advertising revenue received by the Group Member from any source from use of the Equipment did not exceed the rental paid by the Group Member for the Equipment in any period of 12 months during the term of the Rental Agreement, TCP would pay to the Group Member 100% of the deficiency of advertising revenue as against rental for the Equipment [clause 5].

21. Each Group Member has entered into an agreement with TCP or a related entity of TCP described as a Full Service Agreement for Club Digital Networkx (the **Full Service Agreements**).

Particulars

The Full Service Agreements were wholly written and each was comprised in a document executed by the parties thereto.

The First Applicant entered into its Full Service Agreement with TCP on or about 9 December 2005.

The Second Applicant entered into its Full Service Agreement with TCP on or about 14 October 2005 .

22. Each Group Member has entered into an agreement with either TCP or a related entity of TCP described as an advertising agreement (the **Advertising Agreement**).

Particulars

The Advertising Agreements were partly express and partly implied. To the extent they were express they were partly written and partly oral. To the extent they were written it was comprised in a document executed by the parties thereto.

The First Applicant entered into its Advertising Agreement with Total Concept Media Pty Limited on or about 9 December 2005.

The Second Applicant entered into its Advertising Agreement with Total Concept Media Pty Limited on or about 14 October 2005.

To the extent they were oral the Advertising Agreements were comprised in conversations between officers and employees of each Group Member and officers and employees of TCP and/or its related entity.

To the extent they were implied, the terms of the Advertising Agreement were implied in fact by reason of the following circumstances known by the Applicant and TCP and/or its related entity at the time of entry:

- (a) the terms of the TCP Representations;
- (b) the terms of the other Agreements entered at about that time.

Agreements with Capital

23. Each Group Member has entered into one or more agreements with Capital for the rental by the Group Member from Capital of the Equipment (the **Rental Agreements**).

Particulars

The Rental Agreements are wholly written and comprised in documents executed by the parties thereto.

Particulars of the written Rental Agreements are referred to in paragraph 9 of the letter from Slater & Gordon to Kemp Strang dated 15 November 2010.

The Rental Agreements entered by the Applicants are comprised in the following documents:

- (a) Rental Agreement executed by the First Applicant on 3 January 2006
- (b) Revised Rental Agreement executed by the First Applicant on 29 December 2006.
- (c) Rental Agreement executed by the Second Applicant on about 24 October 2005;
- (d) Revised Rental Agreement executed by the Second Applicant on about 21 June 2006;
- (e) Rental Agreement executed by the First Applicant on 3 January 2006.

24. The following were express terms of each Rental Agreement:

- (a) Capital agreed to rent to the Group Member all of the equipment identified by product description and serial number in the Schedule thereto (the **Contracted Goods**) [page 1]
- (b) The term of each Rental Agreement was specified in each Rental Agreement [page 1];
- (c) The rental payments for the Equipment were specified in each Rental Agreement [page 1];
- (d) Rental payments were due at the end of each quarter during the term [page 1];
- (e) On expiry of the term the Group Member was required to deliver up to Capital the Contracted Goods [clause 8.1(a)];
- (f) If the Contracted Goods or any item of the Contracted Goods were lost, stolen or damaged beyond economic repair, the Group Member was to replace those Goods at its own cost with Goods approved by Capital as being at least equivalent in type, functionality and value or pay

to Capital by way of indemnity such amount as notified by Capital as rental payments then due and owing, such early termination amount as notified by Capital and such amount as notified by Capital as the gross residual value of the Contracted Goods [clause 11.1];

- (g) On termination each Group Member was to ensure that the Contracted Goods were returned in accordance with the provisions of clause 11 [Return Conditions Appendix clause 1.4];
- (h) If the Contracted Goods are not returned at the time and in the condition required under the Rental Agreement, the Group Member is required to pay to Capital rent from the date that it has been returned until the date that it is returned and put into the condition required at the same monthly rental as was payable during the term [Return Conditions Appendix clause 2.4];
- (i) If the Group Member fails to pay any sum due under the Return Conditions Appendix within seven days of demand, then default interest was payable by the Group Member to Capital Return Conditions Appendix clause 2.5].

~~25. On their true construction, clauses 8 and 11 of the Rental Agreement and clauses 1.4, 2.4 and 2.5 of the Return Conditions Appendix thereto only require the delivery up at expiration of the term of such equipment as in fact was delivered to each Group Member and in respect of which that Group Member has paid rental.~~

~~Shortfall in advertising revenue~~

~~26. Each Group Member has paid substantial sums to Capital by way of rental on the equipment delivered to it.~~

~~Particulars~~

~~The amount paid by the First Applicant to date is \$339,664.76 plus other administrative expenses.~~

~~The amount paid by the Second Applicant to date is \$351,846.80 plus other administrative expenses.~~

~~Particulars of the amounts paid by each other Group Member will be provided in due course.~~

~~27. The total amount of revenue derived from all sources of advertising on the Network to date by each Group Member, including payments made by or on behalf of TCP and any related entity of~~

~~TCP, is substantially less than the sum paid by that Group Member to Capital by way of rental on the Equipment.~~

Particulars

~~The amount of advertising revenue derived by the First Applicant to date from all sources is \$67,682.65.~~

~~The amount of advertising revenue derived by the Second Applicant to date from all sources is Nil.~~

~~Particulars of the amount of revenue derived by each other Group Member will be provided in due course.~~

Claim in debt against TCP and damages for breach of contract

~~28. By operation of clause 5 of the Revenue Agreement, in the premises of paragraphs 26 and 27 above, TCP is indebted to each Group Member in the amount of the difference between the aggregate of the sums paid by or on behalf of that Group Member to Capital by way of rental on the Equipment and the total amount of revenue derived from all sources of advertising on the Network to date by that Group Member (the shortfall).~~

Particulars

~~The amount due to the First Applicant to date is \$292,017.40.~~

~~The amount due to the Second Applicant to date is \$351,846.80.~~

~~Particulars of the amount due to each other Group Member will be provided in due course.~~

~~29. Further, in breach of the Revenue Agreements, TCP has failed to pay to each Group Member the shortfall, in consequence whereof each Group Member has suffered loss and damage.~~

Particulars

~~The Applicants repeat the particulars to the previous paragraph.~~

Breach of contract by Capital

~~30. In breach of the clause at paragraph 22(a) above, Capital did not rent to the Group Members all of the equipment identified by product description and serial number in the Schedule to the Rental Agreement.~~

Particulars

~~The equipment was not that represented by Capital to the Group Members in that the items of equipment as delivered were not the brand or model number as set out in the Schedule and no item of equipment bore the serial number as set out in the Schedule.~~

~~31. By reason of the breaches by Capital of the Rental Agreements, each Group Member has suffered loss and damage.~~

Particulars

~~The equipment rented to each Group Member was of lower quality than that which Capital was obliged to supply and accordingly had inferior performance and required greater maintenance.~~

~~Further, in the event that the Rental Agreements are properly construed to oblige each Group Member deliver up to Capital the equipment as described in the Schedule, it will be unable to do so because, as a result of Capital's breach, the Group Member had never been in possession of that equipment in the first place. Any liability that the Group Member incurs as a result is caused by Capital's own breach.~~

Unconscionable conduct by Capital

~~32. The circumstances of entry by each Group Member into the Rental Agreements included:~~

~~(a) the description in the Schedule of the Contracted Goods was presented to the Group Members by Capital;~~

~~(a) the description in the Schedule of the Contracted Goods was false in that the equipment delivered to the Group Members did not bear the represented serial number and many items of equipment were not even as described by brand or model number therein;~~

~~(a) as at the time of entry into the Rental Agreements, to the knowledge of Capital and TCP, no equipment had been delivered to the Group Member such that Group Member could not verify~~

~~the representations made by TCP and Capital in the Rental Agreements concerning the Equipment;~~

~~(a) Capital did not afford the Group Member a reasonable opportunity to review, negotiate or consider the terms of the Rental Agreements.~~

~~33. In the premises of the previous paragraph, unfair tactics were used against each Group Member at the time, and for the purpose of procuring, its entry into the Rental Agreements.~~

~~34. Further, the terms of the Rental Agreements were not reasonably necessary for the protection of any legitimate interest of Capital in that:~~

~~(a) In the event that clauses 8 and 11 of the Rental Agreement and clauses 1.4, 24 and 2.5 of the Return Conditions Appendix thereto, properly construed, requires the Group Member to deliver up to Capital on expiry of the Rental Agreement equipment which Capital had not rented to the Group Member and of which the Group Member had never had possession:~~

~~i) no legitimate proprietary or possessory interest in that equipment would be protected by the term;~~

~~ii) the failure by the Group member to deliver up such equipment would constitute a breach of the Rental Agreements sounding in damages which would not reflect any loss actually suffered by Capital;~~

~~(b) The rental on the Contracted Goods was unconscionably and manifestly excessive.~~

~~35. In the premises, the conduct of Capital in procuring entry by each Group Member in the Rental Agreements on the terms thereon was unconscionable conduct within the meaning of section 51AC of the Trade Practices Act 1974 (Cth).~~

~~36. By reason of the unconscionable conduct pleaded above, each Group Member has suffered loss and damage.~~

Particulars

~~To the extent that each Group Member is obliged under the Rental Agreements to deliver up to Capital the equipment as described in the Schedule, it will be unable to do so because, as a result of Capital's breach, the Group Member had never been in possession of that equipment in the first place. Any liability that the Group Member incurs as a result is caused by Capital's unconscionable conduct.~~

Exclusive Dealing by TCP

37. Further, or in the alternative, the Applicants repeat the allegations in paragraphs 4 and 5 above.

38. TCP supplied, or offered to supply, its services of:

- i) marketing the Equipment;
- ii) designing and installing the Equipment; and
- iii) undertaking to meet any shortfall between the advertising revenue received by the Group Members and the rental paid by the Group Members for the Equipment.

in circumstances whereby:

- (a) TCP supplied the Equipment to Capital, a rental company, pursuant to invoices payable to TCP wherein the cost of the Equipment incorporated an installation and service fee to TCP;
- (b) TCP negotiated the entry by Group Members into the Club Digital Networkx Agreements, Revenue Agreements, Full Service Agreements and Advertising Agreements prior to the entry by Group Members into the Rental Agreements, with the result that Group Members were not actually aware, at least prior to the execution of the agreements with TCP, that Capital was the owner of the Equipment;
- (c) The written proposals presented to Group Members by TCP, for the design, supply and installation of the Network, contained standard phrases which:
 - i) expressly contemplated the prospective entry of the Group Members into the Rental Agreements and the amount of rental; and
 - ii) stated that the amount of rental included the cost of the equipment, installation and cabling and the monthly service fee payable under the Full Service Agreements.
- (d) The Revenue Agreements that Group Members entered into with TCP contained standard terms which anticipated the entry of the Group Members into and the terms (including the amount of rental) of the Rental Agreements offered to them by Capital, the owner of the Equipment, namely:
 - i) The Club entering into an Agreement with a rental company to rent the goods from that rental company as owner of the goods. The Club and TCP being aware of the rental payable and the term before entering this Agreement (clause 3);

- ii) In consideration of the business relationship and these agreements referred to herein between the Club and TCP, in the event that gross advertising revenue obtained by the Club from any source from use of the goods did not exceed the rental paid by the Club for the goods in periods of 12 months of the rental contract prior to any re-roll, TCP undertook to pay the Club 100% (or 50% in the case of the sub-group members in paragraph 6A) of the deficiency (clause 5).
- (e) In the negotiations and dealings between TCP and Group Members, the option of Group Members acquiring the Equipment in their own right was not offered by TCP;
- (f) TCP representatives presented or delivered to Group Members, and/or procured them to enter, the Rental Agreements and/or Rental Schedules with Capital, the owner of the Equipment;
- (g) The Rental Schedules presented or delivered to Group Members by TCP representatives referred, amongst other things, to serial numbers for plasma screens and audio visual equipment before the equipment had been delivered or installed, which information could only have been provided to Capital, the owner of the Equipment, by TCP;
- (h) The monthly service fees for the Full Service Agreements with TCP were incorporated into the rent paid by the Group Members to Capital, the owner of the Equipment, and the term of the Full Service Agreements and the Rental Agreements were the same.
39. In the premises, in contravention of s 47(1) of the Trade Practices Act, TCP engaged in the practice of exclusive dealing within the meaning of s 47(6) of the Trade Practices Act by supplying, or offering to supply, to Group Members the services of marketing and installing digital signage equipment on the condition that the Group Members acquire from another person, the rental company that owned the Equipment, the services of leasing the Equipment.

Particulars

The condition arises by implication or is to be inferred from each or all of the circumstances referred to in sub-paragraphs 38(a) to (h) inclusive.

The Applicant reserves the right to supplement these particulars following discovery and other pre-trial processes, including, where appropriate, the administration of interrogatories.

Exclusive Dealing by Capital

40. Further, the exclusive dealing was engaged in by TCP on behalf of Capital, as an agent of Capital, and within the actual and/or apparent authority of Capital.

Particulars of actual authority

The Applicants rely upon and repeat each of the circumstances in sub-paragraphs 38(a) to (h) inclusive and contend that those circumstances manifested and were attributable to an arrangement, agreement or understanding whereby officers or employees of TCP procured rental business for Capital by marketing digital signage equipment to businesses which equipment it then procured and sold to Capital for Capital then to rent to those businesses.

Capital consented to and authorised all steps taken by TCP by its officers and employees in procuring such business for it, including making approaches and representations to the Group Members in pursuit of such business.

Further particulars will be provided in due course, including after discovery and, if necessary, the administration of interrogatories.

Particulars of ostensible authority

Capital clothed TCP with authority to negotiate and procure the entry of the Applicants into a Rental Agreement, including by reason of the matters set out in paragraph 38 and:

- (a) the inclusion of TCP's name and logo on the Rental Agreement between the First Applicant and Capital for the Digital NetworX system dated 30 December 2005;
- (b) the inclusion of TCP's name and logo on the Rental Agreement between the First Applicant and Capital for the General Viewing system dated 30 December 2005;
- (c) the provision by TCP to the First Applicant of the Rental Agreements between the First Applicant and Capital in December 2005;
- (d) the provision by TCP to the Second Applicant of the Rental Agreement between the Second Applicant and Capital in October 2005; and
- (e) Capital being listed as one of the advertisers that TCP or its related entity had an arrangement, agreement or understanding with in the TCP Media Kit provided by TCP to the Second Applicant in August 2005.

Further particulars of ostensible authority in respect of each Group Member (other than the Applicant) will be provided in due course, after determination of the common issues.

41. In the premises, Capital is deemed to have also engaged in the practice of exclusive dealing pursuant to section 84 of the Trade Practices Act.

42. By reason of the above, each Group Member has suffered loss and damage.

Particulars

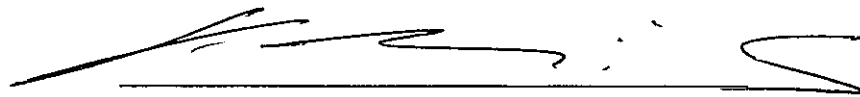
Each Group Member has suffered loss and damage equivalent to the difference between the value of the Equipment that the Group Member could have acquired otherwise than from Capital as at the date of entry into the Club Digital Network Agreement and the total amount payable by the Group Member under the Rental Agreement.

AND the Applicants claim the relief specified in the Amended Application.

This amended pleading was prepared by ~~Kevin Andronos~~ Alister Abadee and Ralphed Notley, counsel and Van Moulis and Samuel Fanous, solicitors

Date: 17 March 2014

Signature:



Van Angelo Moulis

Solicitor for the Applicants

**IN THE FEDERAL COURT OF AUSTRALIA
NSW REGISTRY
GENERAL DIVISION**

File No NSD 1198 of 2010

**ASQUITH RUGBY LEAGUE CLUB
LIMITED**

(ABN 31 000 610 542)

First Applicant

**SHELLHARBOUR WORKERS CLUB
LIMITED**

(001 068 864)

Second Applicant

**CAPITAL FINANCE AUSTRALIA
LIMITED**

(ACN 069 663 136)

First Respondent

**TOTAL CONCEPT PROJECTS
(AUSTRALIA) PTY LIMITED**

(ACN 073 474 772)

(in liquidation)

Second Respondent

Certificate of Legal Practitioner

I, Van Angelo Moulis, certify to the Court that, in relation to the pleading dated ~~13-17 September~~
~~March 2010-2011~~ filed on behalf of the Applicants, the factual and legal material available to me at
present provides a proper basis for each allegation in the pleading.

Dated: ~~13-17 September~~ ~~March 2010~~ 2011



Van Angelo Moulis
Practice Group Leader
Slater & Gordon Lawyers
For the Applicants