



Equity Division Supreme Court New South Wales

Case Name: **Greenshades Pastoral Co Pty Ltd v Hardi Australia Pty Ltd**

Medium Neutral Citation: [2022] NSWSC 755

Hearing Dates: 2-5, 9, 11 and 12 May 2022

Date of Decision: 10 June 2022

Jurisdiction: Equity – Commercial List

Before: Stevenson J

Decision: Misleading or deceptive conduct found; loss not established

Catchwords: CONSUMER LAW – representative proceedings – misleading or deceptive conduct – self-propelled crop sprayer – whether representations as to robustness, 4WD capability, crop spraying and braking ability misleading or deceptive – whether representative plaintiffs have established loss

Legislation Cited: Civil Procedure Act 2005 (NSW)
Competition and Consumer Act 2010 (Cth)
Competition and Consumer Act 2010 (Cth) – Schedule 2, Australian Consumer Law

Cases Cited: Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45; [2000] HCA 12
Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191; [1982] HCA 44

Category: Principal judgment

Parties: Greenshades Pastoral Co Pty Ltd (First Plaintiff)
Ritter Investments Pty Ltd (Second Plaintiff)
Hardi Australia Pty Ltd (Defendant)

Representation: Counsel:
W G Muddle SC with A E Hopkins (Plaintiffs)

R C A Higgins SC with Z Hillman and K Sharma
(Defendant)

Solicitors:
Rural Law with Peter Long (Plaintiffs)
MinterEllison (Defendant)

File Number: 2019/101980

JUDGMENT

- 1 The first plaintiff, Greenshades Pastoral Co Pty Ltd, owns a property at Wallendbeen, New South Wales (the “Greenshades Property”), on which it conducts mixed farming activities.
- 2 The second plaintiff, Ritter Investments Pty Ltd, owns a property at Mount Tyson in Queensland, on which it conducts strip farming; growing wheat, barley and other crops.
- 3 The defendant, Hardi Australia Pty Ltd, imports, designs and manufactures agricultural equipment in Australia. One of those products is a self-propelled sprayer known as the “Hardi Presidio 2700”. I will refer to it simply as the “Presidio”. Hardi marketed and sold the Presidio through a dealer network across Australia using print and video advertising.
- 4 Below is a picture of the Presidio:



- 5 Greenshades brings these proceedings as representative proceedings under Pt 10 of the *Civil Procedure Act 2005* (NSW) in its own right and as a representative of a closed class of eight parties who purchased a Presidio between 1 April 2013 and 1 December 2018 for use in farming activities (the “Group Members”).

- 6 Greenshades, and the Group Members, claim that they purchased the Presidio based on representations made by Hardi in print and video form concerning:
 - (a) the strength of the Presidio chassis (the “Chassis Issue”);
 - (b) whether the Presidio was four wheel drive (the “4WD Issue”); and
 - (c) the braking capabilities of the Presidio (the “Braking Issue”).

- 7 Ritter Investments is a Group Member, but in addition to the claims made by Greenshades on behalf of the Group Members, makes a separate claim concerning the manner in which the spray rate controller on the Presidio

operated (the “Spray Rate Controller Issue”). No other Group Member makes that claim.

- 8 Greenshades, on behalf of the Group Members, alleges that the representations made by Hardi concerning the Chassis Issue, the 4WD Issue and the Braking Issue were misleading or deceptive for the purpose of ss 18 and 29 of the Australian Consumer Law.¹ Ritter Investments alleges that the representations made in respect of the Spray Rate Controller Issue were also misleading or deceptive.
- 9 A claim hitherto brought by Greenshades and Ritter Investments in negligence was abandoned at the outset of the hearing.
- 10 In the Third Further Amended Statement of Claim, filed with leave during the course of the hearing, the claims of misleading or deceptive conduct were put this way:

“In the circumstances where the [Presidio] was not reasonably fit for Purpose² the [various representations to which I will return] and [Hardi’s] failure to warn the Group Members (including the Ritter Subgroup) of [various alleged deficiencies] were separately and/or together conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of sections 18 and 29 of the [Australian Consumer Law].”

The common questions

- 11 The Third Further Amended Statement of Claim poses a number of common questions.
- 12 Greenshades and Ritter Investments, and Hardi, have made submissions concerning the four issues I have identified at [6] and [7] above and as to how, in the light of those submissions, the common questions should be answered.

¹ *Competition and Consumer Act 2010* (Cth), Sch 2 – Australian Consumer Law.

² Defined as “applying agricultural chemicals to farmlands whilst traversing the same to control unwanted herbage and pests”.

- 13 The course I propose to follow is to make findings about the four issues, and then invite submissions as to how, in the light of those findings, the common questions should be answered.
- 14 The common questions are set out in the attachment to these reasons.

Reliance, loss and damage

- 15 There was debate as to whether it was necessary that Greenshades and Ritter Investments make out their entire case, including as to reliance and loss, at this hearing.
- 16 In Greenshades' and Ritter Investments' opening written submissions it was stated:

“The Court is not, of course, considering questions of reliance, loss or remedies at this stage but, rather, is tasked with determining the common questions set out in the Further Amended Statement of Claim in the Representative Proceedings.”

- 17 During his oral opening, Mr Muddle SC, who appeared with Mr Hopkins for Greenshades and Ritter Investments³ said:

“... the Court's orders don't make it really very clear precisely what the limits of this two weeks are but, as we apprehend it, if your Honour is limited to the common questions and is not dealing with questions of reliance by individual members or even plaintiffs and their individual loss, then there is no – there won't be [a] dispute because the other class members don't need to give lay evidence.”

- 18 But there has been no order for a separate determination of the question of Greenshades' and Ritter Investments' reliance or loss. Indeed, both Greenshades and Ritter Investments adduced evidence of reliance and loss in the affidavits of Mr Stephen Hicks, a director of Greenshades, and Mr Gavin Ritter, a director of Ritter Investments. Further, until Mr Muddle's opening submissions, the plaintiffs brought a case in negligence, which necessarily involved the establishment of loss. Nor has there been an order for the

³ For convenience, and without intending any disrespect to Mr Hopkins, I will henceforth refer only to Mr Muddle.

separate determination of the common questions. The matter was allocated a hearing date on 9 April 2021 when Hammerschlag J simply made the Usual Order for Hearing. They were the orders then sought by the parties. Greenshades did not then seek any order concerning common questions. On 25 March 2022 Ball J granted Greenshades leave to file a Further Amended Statement of Claim and ordered that the questions identified in an annexure to Greenshades' solicitor's affidavit of 16 March 2022 be "the common questions for the purpose of the hearing of these proceedings". No order was made, nor sought, that those questions be separately determined.

19 In closing written submissions, Dr Higgins SC, who appeared with Ms Hillman and Mr Sharma for Hardi,⁴ made detailed submissions as to why it was necessary that the plaintiffs' reliance on loss and damage "must be proved at this trial".

20 Those submissions included:

"The fact that common questions are to be determined for the benefit of group members does not negate the usual position, which is that as between the parties the pleaded case is to be determined at trial. That is why the representative plaintiffs' case is ordinarily determined – in full – at trial as the vehicle through which certain issues, common to group members and identified by way of common questions, are determined."

21 Although Mr Muddle's closing written submissions maintained the position set out at [16] and [17], in oral reply submissions he did not dispute that it was necessary for the plaintiffs to establish their entire case in these proceedings. Indeed, Mr Muddle directed submissions to those questions, and did not refer to, or contest Hardi's "must be proved at this trial" submission.

22 Greenshades and Ritter Investments must make out their entire case at this hearing, including as to reliance, causation and loss.

⁴ Again, for convenience and without intending any disrespect to Ms Hillman and Mr Sharma, I will henceforth refer only to Dr Higgins; although Dr Higgins was gracious enough to say that Ms Hillman was responsible for the submissions to which I am about to refer.

23 Once the common questions are answered, the remaining Group Members will have to establish reliance, loss and damage in the usual way.

The Representations

24 The Representations on which Greenshades and Ritter Investments rely were made in one or more of six brochures published by Hardi (the “Brochures”), advertisements published by Hardi in agricultural farming magazines (the “Advertisements”) and YouTube videos (the “Videos”).

The Brochures

25 Greenshades and Ritter Investments allege that the Brochures contained representations⁵ that the Presidio:

- (a) was rugged and built for demanding conditions with optimised design strength and weight distribution;
- (b) had class leading field performance;
- (c) had a HARDI OnRate fluid system that:
 - (i) delivered precision application every time;
 - (ii) allowed the operator to retain the target rate through changing spraying speeds, with variable rate application and auto boom section control active at the same time;
 - (iii) held the target rate whether sections are switched on or off, varying speed, changing rate or turning in or out of headlands;
 - (iv) was easy to use; and

⁵ Omitting those not relevant to the pleaded case.

- (v) had an infinitely variable proportional hydraulic valve which is up to 20 times faster than conventional flow meter controlled regulation systems;
- (d) had a Bosh Rexroth 4WD transmission with axial piston pump and bent axis piston motors which deliver high power, economy and reliability;
- (e) had 4WD drive, 3-speed hydrostatic transmission;
- (f) had 4WD hydrostatic transmission;
- (g) had a heavy duty chassis;
- (h) had electronic control of the hydrostatic transmission and diff lock which optimised performance;
- (i) had intelligent electronics, which prevents wheel slippage for superior tractive power; and
- (j) had a rear axle which oscillates to maintain traction on all four driving wheels.

The Videos

26 The Videos:

- (a) stated that the Presidio was standard equipped with 4WD and 3-speed hydrostatic drive;
- (b) stated that the Presidio had a traction control valve on the front and rear axles which supplies reliable power to the wheels regardless of the field conditions and slopes;

- (c) stated that the Presidio had electronic control of hydrostatic transmission which optimised performance of the Presidio; and
- (d) contained the depiction showing that an axial piston motor with planetary gearbox was fitted to each of the four wheels⁶.

The Advertisement

27 The print Advertisement repeated the statement that the Presidio had 4WD hydrostatic transmission.

Greenshades' experience with the Presidio

28 Greenshades' operations are conducted by Mr Hicks, to whom I have referred, and his wife Ms Rosalyn Crawford. Both are experienced farmers and graziers. Mr Hicks has been farming, with occasional breaks, since 1981; over 40 years.

29 Mr Hicks has previously used four tractors, each of which was a "front wheel assist" or "FWA" tractor.

30 In relation to those FWA tractors, Mr Hicks said:

"Each of those tractors had a switch I could flick that turned them from a two wheel drive ('2WD') machine into a FWA tractor. The purpose of that functionality was that it was cheaper and less wear and tear to run the tractor in 2WD mode than in FWA mode but it allowed us to have the functionality of mechanical power provided to all four wheels when we needed it. In straight 2WD tractors, only the rear two wheels are powered.

All our tractors are FWA with small diameter front wheels and larger diameter rear wheels and can be operated in 2WD when dry or switched to FWA when wet or needed for heavy tillage. When switched to FWA functionality, all four wheels drive with power allocated either 40:60 or 30:70 depending on model and setup.

Those tractors were a CASE IH MX100, a John Deere 6920, a CASE IH MX270 and a CASE IH Puma 165. We also now have an MX315 bought privately to replace the MX270.

⁶ Hardi accepts that axial piston motors were in fact fitted only to the rear wheels, with radial piston motors fitted to the front wheels. There was no evidence before me revealing what difference this makes. Accordingly, I will consider it no further.

The MX270 tractor got badly bogged suddenly one day when seeding in a wet spot when I was operating it and it went through a rapid deceleration and stalling, which broke the fuel pump shaft.”

31 Mr Hicks said that he started looking around to purchase a sprayer in about October 2016.

32 He then approached Carruthers Machinery Co (from whom Greenshades had earlier purchased tractors) to enquire about the Presidio, as well as a competitor product.

33 Mr Hicks spoke to “Bruce”, the sales manager at Carruthers in Cowra, who said:

“Knowing how wet you guys are, the Presidio is significantly lighter, around 40% lighter than the [competitor product], than any of the other self-propelled units on the market ... it'll do everything you want as it has 4WD.”

34 Mr Hicks said that “this piqued my interest and I chose to investigate the Presidio as an option as opposed to the other units.”

35 Mr Hicks then watched two videos in relation to the Presidio and read one of the brochures provided by the dealer.

36 A short time later Bruce said to Mr Hicks, of the Presidio:

“It'll be no problem. It's ... fantastic. It's got the highest flow of any of the pumps on the market and with the rate controller is a leap forward in all of the technology. It's absolutely brilliant.”

37 Mr Hicks said that “Bruce alleviated my concerns and I began to crunch some numbers.”

38 The dealer then provided Mr Hicks with a quote dated 15 December 2016 which described a number of aspects of the Presidio including:

“One (1) New HARDI PRESIDIO Self Propelled Sprayer fitted with:

Duetz Tier 3, 6 cylinder 174hp engine-common rail, turbocharged FWA with Rexroth 3 speed hydrostatic transmission & cruise control”. (Emphasis in original.)

39 The purchase price of the Presidio, including GST and taking into account a trade in, was stated to be \$235,950.

40 In his first affidavit Mr Hicks said:

“In 2018, I had to dig out the quotation from Carruthers dated 15 December 2016 in preparation for this Court case and I saw that it described the drive system as being FWA with Rexroth 3 speed hydrostatic transmission and cruise control. I don't recall seeing those words on the quotation when I received it as I was focussed on the price.”

41 However, in cross-examination, Mr Hicks gave this evidence:

“Q. Now, you say in your evidence that, when you read this, you were focused on the price at the bottom; is that correct?”

A. As a farmer, yes.

Q. And, you see under the heading proposal to supply on the left-hand side, it says, ‘One new HARDI Presidio self-propelled sprayer’ fitted with various things and it says, ‘Turbocharged FWA with Rexroth three speed hydrostatic transmission.’ Do you see that?

A. Yes, ma'am.

Q. You understand that the acronym FWA stands for four-wheel assist?

A. Front-wheel assist, actually, correction.

Q. That's what you understand FWA to mean?

A. I know it to mean.

Q. You say that you didn't see that at the time that you received the quote; is that correct?

A. I would have read the quote and it's the obvious, I know it's a front-wheel assist. I didn't need to read that it's a front-wheel assist, I've read the brochure.

Q. Did you read any other aspect of the quote?

A. Of course I have, ma'am.

Q. You read [it] when you received it; correct?

A. Correct.”

42 Thus, Mr Hicks' understanding was that the Presidio Greenshades was to purchase was a “FWA” or “front wheel assist”.

- 43 As I have set out, Greenshades already owned a number of front wheel assist vehicles.
- 44 Dr Higgins submitted that this evidence showed that Mr Hicks “was proceeding on the basis that the Presidio was a FWA and was not relying on any earlier statements in Hardi’s promotional material to the effect that the Presidio had a 4WD hydrostatic transmission.”
- 45 I do not think this is a fair reading of Mr Hicks’ evidence.
- 46 Mr Hicks said that having read the quote it was “obvious” that the Presidio was “front wheel assist” and that “I’ve read the brochure”.
- 47 That suggests that Mr Hicks’ state of mind was that “FWA” was equivalent to “4WD”; as it is, in the sense that both kinds of vehicles can be operated with power driven to all four wheels.
- 48 Dr Higgins did not pursue the matter with Mr Hicks and did not suggest to him that “FWA” was inconsistent with “4WD”.
- 49 After Mr Hicks received the quote, he arranged for Greenshades to place an order for the Presidio from the dealer.
- 50 In February 2019, the dealer, and a representative from Hardi, attended the Greenshades property to deliver the Presidio.
- 51 Mr Hicks signed and initialled warranty documentation, albeit without reading it.
- 52 In April 2017, Greenshades’ Presidio became bogged.
- 53 Mr Hicks described the circumstances as follows:

“In or around April 2017, the [Presidio] got bogged with the bottom of its rear wheels about 400mm below ground level while I was contract spraying on a property called ‘Bindinyah’ at Cootamundra. I observed that *the front wheels*

on the [Presidio] never turned while the [Presidio] was in the bog. I rang Roger⁷ and said:

'I'm bogged and *the front wheels aren't turning.*'

He said:

'You dickhead. You are supposed to be in first gear and engage the diff lock for the front wheels to turn.'

I engaged the diff lock and put it in first gear as he suggested but *the front wheels still never turned* even though they were on hard ground. I subsequently paid \$400.00 cash to a local excavator driver to pull me out. I tried to ring Roger to tell him the diff lock made no difference." (Emphasis added.)

- 54 Although Mr Hicks did not depose to any other occasions on which the Presidio was bogged, he gave this evidence:

"In or about July 2019, I was using the [Presidio] to spray a paddock of grazed barley on 'Coorabin', Wallendbeen for Ken Jacobs in the morning after a dew and I lost complete traction several times in the rear wheels and they spun *without any drive being available in the front wheels*, doing a dangerous 180 degree turn uncontrollably.

Again, I had to spray across the contour. Occasionally, at the end of a run, when I was turning downhill whilst making a U-turn, the back of the [Presidio] fishtailed out downhill as it had no traction.

In another paddock at around that time, I crossed a contour bank at a 45 degree angle, following the A-B line, and the right-hand wheel came off the ground and the back left-hand wheel was slightly off the ground. Both of those wheels free spun when I applied power. *The two wheels with contact to the ground refused to turn.* I had to [g]rab the steering, rock the machine to enable me to drive off the contour bank. The contour bank would not pose a problem to any of my FWA tractors or utes with 4WD." (Emphasis added.)

- 55 Mr Hicks was not cross-examined to suggest that on either of these occasions he was driving the Presidio carelessly or incompetently; nor to suggest that the particular terrain into which he drove the Presidio on these occasions was out of the ordinary or otherwise that might reasonably be expected when crop spraying.

⁷ A reference to Roger Cooper, the NSW Territory Manager of Hardi; Mr Cooper did not dispute this conversation in his affidavit.

56 From July or August 2018, Mr Hicks noticed cracking in various parts of the Presidio chassis. He also said he experienced a problem with the foot brake, when the Presidio was used in steeper country.

57 Mr Hicks has continued to retain and use the Presidio. He used it until sometime in 2020, four years after its purchase, and resumed using it “last month”.

58 Thus, he gave this evidence in cross-examination:

“Q. Are you still using your machine, Mr Hicks?

A. I have had to - I have not used it *for the last two years* because I purchased a replacement machine because of the safety concerns but about a month ago I broke that boom and out of desperation I've had to return to the Presidio as a desperate measure to keep ahead of the cropping program.

Q. So you're currently using the Presidio, is that correct?

A. *I have for the last month* but not for the last two years, ma'am. I replaced the machine with another machine.” (Emphasis added.)

59 Although Mr Hicks here said he had not used the Presidio for “the last two years” because of “safety concerns”, he did not suggest that the Presidio did not function adequately when he did use it, including during “the last month”. The matter was not taken up in re-examination. Evidently, Mr Hicks continued to use the Presidio for some time after it got bogged in April 2017 and after it lost traction in July 2019. He did not suggest he had had any other difficulties with the Presidio’s 4WD functionality during that period. And although he said he “purchased a replacement machine”, the cost of that machine does not form any part of Greenshades’ damages claim. I return to this below.

Ritter Investments’ experience with the Presidio

60 Mr Ritter was born and raised on Ritter Investments’ property which has been in the Ritter family since the 19th century.

61 Mr Ritter has been a part of the farming operation on the property since 1992.

62 During that time, Ritter Investments conducted spraying operations using a 2WD self-propelled sprayer.

63 Mr Ritter first read a brochure in relation to the Presidio in 2013 when he attended a "Farm Fest" where he was shown a Presidio and told by a representative of Hardi that "this machine is 4WD".

64 Mr Ritter said:

"Upon inspection of the machine, due to the size of all four wheels and the fact that there were motors on each wheel, I believed the machine was 4WD."

65 Mr Ritter said he read the "2013 Brochure" and that the Presidio appealed to him "as having both 4WD and a precise rate controller greatly increased the efficiency of our sprays".

66 However, Mr Ritter said:

"We don't make rushed decisions when it comes to capital expenditure so it was some years before we decided to get serious about replacing our 2WD Spray Coupe."

67 Thereafter, Mr Ritter read an article in a journal "Trade Farm Machinery", viewed one or other of the Videos and by June 2016 became interested in the possible purchase by Ritter Investments of a Presidio.

68 In June 2016, Mr Ritter and his father attended a dealership in Dalby and was shown a demonstration Presidio.

69 During his negotiations with the dealer Mr Ritter said:

"I want to install a Trimble GPS screen for steering control only but I need to be able to operate the Presidio without the Trimble GPS if need be so that I can use the Trimble in other machinery on the farm and still carry out spraying work by steering the machine myself. If the sprayer can't do that, it is virtually useless to me."

70 In about July 2016 the dealer called in to the farm to discuss the plumbing for the spray boom on the Presidio and said:

“Hardi don’t do the plumbing with 250 mm spacings as standard. It will get confusing dealing with Hardi plumbing it in Adelaide, so I suggest you get a specialty spray boom company called Seris in Toowoomba to plumb the spray system supplied by Hardi. Then you can talk to them direct and you will also be able to see that it’s done right. I’m keen to get one plumbed by Seris anyway.”

71 The plumbing carried out by Seris (QLD) Pty Ltd evidently entailed significant modification including the disassembly and removal of all existing stainless steel spray lines and plumbing from the Presidio, at a cost of \$6,050.

72 The Presidio was delivered to the Ritter Investments property on 27 November 2016, following installation by Seris of the revised plumbing.

73 Mr Ritter also instructed the dealer to install on the Presidio a Trimble GPS screen that Ritter Investments was then using on other machinery.

74 Thus, Mr Ritter gave this evidence:

“I noticed that the Presidio had a normal function monitor located around the steering column which showed the engine revs, speed and temperature. The Presidio also came with an Ag Leader screen installed, which is used for the spray mapping and picks up a signal from the aerial installed on top of the Presidio which the system uses to determine speed and position.

We were already using a Trimble screen in the 2WD Spray Coupe that allowed us to view and upload maps onto it which showed the operator where he had sprayed. During the ordering process, I said to Tony⁸ words to the following effect:

‘I want to install a Trimble GPS screen for steering control only but I need to be able to operate the Presidio without the Trimble GPS if need be so that I can use the Trimble in other machinery on the farm and still carry out spraying work by steering the machine myself. If the sprayer can’t do that, it is virtually useless to me.’

Tony said words to the following effect:

‘Sure.’”

75 Mr Ritter said that the Ritter Investments’ Presidio became bogged on one occasion.

⁸ Tony Osbourne from Wideland Ag.

76 Thus, in his affidavit he said:

“There has been one occasion when I got the [Presidio] bogged on the Property. *The front wheels were not turning* but the back wheels were turning.

During our time using the [Presidio], the conditions have been very dry so we have not yet experienced significant issues in the paddock with the sprayer not being 4WD.” (Emphasis added.)

77 Mr Ritter did not say when this incident occurred.

78 Like Mr Hicks, Mr Ritter was not cross-examined about the particular circumstances of this incident. It was not suggested to him that he was driving otherwise than carefully or that he was using the Presidio in terrain for which it was not suited.

79 Like Mr Hicks, Mr Ritter deposed to noticing cracking in the Presidio chassis. He also deposed to spraying issues, to which I will return.

80 Mr Ritter did not say that Ritter Investments has ceased to use, or has disposed of, the Presidio. It is common ground that I should infer from this that Ritter Investments has not disposed of it, and still has it available to use.

The Chassis Issue

81 Relevantly to this issue, the Presidio was advertised as:

- (a) being “rugged and built for demanding conditions with optimised design strength and weight distribution”;
- (b) having a “heavy duty chassis”; and
- (c) having “class leading performance”.

82 As I have said, Mr Hicks and Mr Ritter observed cracking in the chassis of the Greenshades’ and Ritter Investments’ Presidios.

83 Greenshades and Ritter Investments retained Mr Richard Sulman to examine the Presidios purchased by the Group Members and provide expert evidence in relation to this aspect of the case.

84 Mr Sulman has qualifications in agricultural engineering.

85 Mr Sulman stated that eight of the nine Presidios purchased by Group Members had multiple metal fatigue fractures, which had been found after less than 100 hours of operation.

86 In concurrent evidence, Mr Sulman said:

“All the [Presidios] inspected [had] some cracking at some position. So, it's a global effect of cracking on this machine. So, when you see a global effect of cracking, you're not just looking at then one specific design defect; we're looking across the whole machine. There were cracks in certain weld joints, there's cracks - there's bolt[s] that fatigue and fail, there's steering joints that fatigue and fail. These are not the same joint designs, it's different, it's global across the machine ...”.

87 A short time later, Mr Sulman gave this evidence, initially in response to a question from Dr Higgins:

“WITNESS SULMAN: ... So when you've got specific [c]racking of a particular component, that's when you can look at a particular component and you're not now looking at, okay it's overloaded, you're looking at the design of that specific component. In this--

HIS HONOUR: If it's the same component, it's shown to break on more than one occasion.

WITNESS SULMAN: Exactly, your Honour, and so in this case we're looking at a global failure of in terms of cracking, we're witnessing cracking in the steering components, in the front axle, in the rear panhard componentry.

HIGGINS: To clarify, you're talking across various machines at the moment, yes?

WITNESS SULMAN: Yes. I'm talking about the evidence that I collected.”

88 Hardi's CEO, Mr William Franklin, agreed that “a handful or so” of the Presidios sold in Australia had experienced structural cracking. Hardi's National Service and Quality Assurance Manager, Mr Desmond Ramsey, agreed that he was aware that a number of the Presidios had experienced structural cracking.

- 89 Hardi retained Dr Ray Hope, a mechanical engineer, to give expert evidence about this aspect of the case.
- 90 Dr Hope did not inspect any of the Presidios.
- 91 The chassis of the Presidio was manufactured in France by Preciculture SAS.
- 92 Mr Sulman expressed the opinion that the reason for the metal fatigue failures was that Hardi, having imported the Presidio chassis from France, had then made modifications which added substantial weight to the Presidio and thus caused it to be overloaded.
- 93 There is no dispute that Hardi did modify the Presidio by adding a walkway and adding larger spray booms.
- 94 Thus, on 29 May 2012, Mr Denis Lestradet, the “Directeur de Site” at Preciculture, wrote to Mr Franklin and Mr Ramsey:⁹

“We note that the weight added to the PRESIDIO has increased substantially: very wide booms of 36 m, very heavy [walkway],¹⁰ etc.

None of this is designed to make for an easy life ... symptoms appear, broken front axles, breakdowns ...

Could you please organise for some photos of this breakdown to be sent to me as well, **the tare weights front and back and when laden with the booms open and shut**. (Emphasis in original.)

- 95 However, it does appear that Mr Sulman may have expressed his opinion based on a misapprehension of Preciculture’s rated structural capacity of the Presidio tractor frame.
- 96 It is common ground that a “PTAC” value of 9,900 kg was stamped on the compliance plate of all the Presidios. Mr Sulman concluded that this was the maximum weight limit authorised by Preciculture at the time of manufacture.

⁹ As well as a colleague in France, Mr Christophe Benoît.

¹⁰ The French word was “passerelle” which the translator stated, “is ambiguous here and could be translated as ‘bridge’, as on a ship, i.e. the command station in the cab, or as a ‘walkway’”.

- 97 On the other hand, Dr Hope concluded that the rated structural capacity of the Presidio tractor frame was 12,500 kg. Dr Hope based this conclusion on the relevant page of the Preciculture User and Service Manual which appears to state that the maximum axle load for the chassis is 12,500 kg.
- 98 However that may be, the fact remains that, consistently with the evidence of Mr Hicks and Mr Ritter, the Presidios inspected by Mr Sulman have the structural cracking identified in the evidence.
- 99 Dr Hope opined that factors other than overloading of the chassis might explain the structural cracking. Dr Hope nominated incomplete welding, porosity in the welding or possible "misuse" as potential reasons for the cracking.
- 100 However, as to welding, Mr Sulman said that the cracking he observed was not merely at the welding joints. Thus, he gave this evidence:

"Your Honour, the question about just isolating it to a particular weld quality is not useful for the Court because the cracking that was observed in these machines doesn't always crack at a weld joint, it cracks where the steering joint - where the steering knuckle, so where the tie rod connects to a steering lug there's components can - they break off there. There's components such as bolts that hold the steering cylinder, they break off. At the panhard lug, yes, there is cracking around in welds, and there is other areas where there was porosity. That's - there is all sorts of things going on. But, if I just saw cracking at a weld joint that had porosity, or just let's say we had cracking at a particular weld joint, I would agree with Dr Hope, we would start to investigate that particular joint to get to the porosity, or just, let's say, we had cracking at a particular weld joint. I would agree with Dr Hope; we would start to investigate that particular joint to get to the bottom of why [it] is that particular design of this machine or that particular manufacturing method causing cracking. But, based on all of the cracks that are happening in other regions as well, you would ask yourself, cracks are not just occurring in weld joints; some cracks are - steering lugs crack off. There's no welding joint at that point where the crack propagates from."

- 101 Mr Sulman also said that he saw no sign of misuse of the machines. Thus, he gave this evidence:

"If you have misuse of machines, it will lead to shorter lifespan, but if you - when we heard about impacts from Dr Hope, when you impact things, you don't generally get fatigue cracking, you get deformation. You'll bend things, and that's the tell-tale sign that, yes, they've run into a pothole or they've done something where there's a sudden impact that deforms the steel. What we're

seeing in the evidence that I've - across the machines that I inspected, the cracks, there's no deformation around these cracks. These cracks are just occurring, as you would expect, from a battle fatigue propagation."

- 102 As this evidence is based on what Mr Sulman observed in relation to the Presidios in question, and as Dr Hope did not inspect the machines, I see no reason why I should not accept it.
- 103 Further, Dr Higgins did not, in cross-examination, suggest to either Mr Hicks or Mr Ritter that they drove their Presidios carelessly, or in any other way that might have caused the cracking that Mr Sulman observed.
- 104 As I have said, the Presidios were advertised as being "rugged and built for demanding conditions" and as having "optimised design strength" and a "heavy duty chassis".
- 105 The question is what such a representation would convey to the class of consumers likely to be affected by the conduct in question:¹¹ in this case farmers considering purchasing expensive equipment (the Presidios' purchase price was in the order of \$300,000) for use in "applying agricultural chemicals to farmlands whilst traversing the same to control unwanted herbage and pests".¹²
- 106 Dr Higgins submitted that these representations "fall within permissible puffery and exaggeration".
- 107 That may be so in relation to the representation that the Presidios were "class leading". It is hard to understand what precise message was being conveyed by this statement.

¹¹ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199; [1982] HCA 44 (Gibbs CJ); *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45; [2000] HCA 12 at [105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

¹² Adopting the definition of "Purpose" in the Statement of Claim; which appears to me to be a reasonable description of what consumers of the Presidio would see as being the purpose of such machines.

- 108 However, I do not see that the statement that the Presidios were “rugged and built for demanding conditions”, had “optimised strength” and “had a heavy duty chassis” as being “permissible puffery and exaggeration”. Nor do I agree that, as Dr Higgins submitted, these representations conveyed no more than, at a high level, notions of strength and ability to withstand use.
- 109 The class of persons to whom these representations were directed would, in my opinion, understand that the representation that the Presidios were “rugged and built for demanding conditions” with “optimised design strength” and with a “heavy duty chassis” as meaning that, in all reasonably foreseeable circumstances, the machines would not exhibit the fatigue cracking that Mr Sulman observed, particularly after relatively low hours of use.
- 110 There is no suggestion in the evidence that Mr Hicks and Mr Ritter drove their Presidios otherwise than with reasonable care or in circumstances that it was reasonably foreseeable they would be used.
- 111 The evidence thus establishes that the Presidio was not “rugged and built for demanding conditions”, did not have “optimised design strength” and did not have a “heavy duty chassis”. The representations made by Hardi that the Presidio had these qualities were misleading or deceptive.

The 4WD Issue

- 112 In the Brochures and in the Videos, Hardi represented that the Presidio had:
- (a) a “Bosh Rexroth 4WD transmission”;
 - (b) “4WD 3-speed hydrostatic transmission”;
 - (c) “intelligent electronics, which prevents wheel slippage for superior tractive power”;

- (d) “a traction control valve on the front and rear axles which supplies reliable power to the wheels regardless of the field conditions and slopes”; and
- (e) a “4WD system with plenty of power to get down on the ground when needed”.

113 The question is what these representations would convey to a reasonable member of the class of persons to whom the representations were directed;¹³ that is, experienced farmers contemplating the purchase of expensive machinery, in the order of \$300,000, to apply agricultural chemicals to farmlands, while traversing the same to control unwanted herbage and pests.

114 The representation that the Presidio had “4WD” was not subject to any limiting qualification. On the contrary, Hardi represented that power would be supplied “to the wheels”, that is to all four wheels, “when needed” and “regardless of the field conditions and slopes”.

115 This representation was thus apt to convey to the farmers to whom it was directed that power would be supplied to all four wheels, *at all times*.

116 Not only that, Hardi represented that the Presidio had two special features (the “intelligent electronics” and “traction control valve”) that would enhance the Presidio’s ability to apply power to all four wheels.

117 The representation was not that the Presidio would “mostly”, or “usually” or (to adopt an expression that I suggested during argument) “in reasonably foreseeable circumstances” have 4WD functionality: it was that the Presidio would *always* have such functionality.

118 Presidios do have 4WD functionality in that:

¹³ See, *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*; and *Campomar Sociedad, Limitada v Nike International Ltd* above.

- (a) all four wheels are connected to sources of power; and
- (b) there exists a transmission system which is able to provide power to all four wheels.

119 But the Presidios do not have:

- (a) “intelligent electronics” of any sort, let alone “intelligent electronics” that would prevent wheel slippage; or
- (b) a “traction control valve” of any sort, let alone one “on the front and rear axles” and which played any role in supplying “reliable power to the wheels regardless of the field conditions and slopes”.

120 The representations thus falsely conveyed that the Presidio’s 4WD functionality was enhanced by these features. The representations were misleading or deceptive to this extent.

121 And, critically, there have been occasions when the Presidio’s transmission systems did *not* cause power to be supplied to all four wheels, and where one set of wheels spun freely resulting in no power at all being delivered to the other two wheels.

122 As I have set out above, this happened to the Greenshades Presidio twice and to the Ritter Investments Presidio once.

123 An example of a Presidio in this position is illustrated in the photograph below:



124 The Presidio so pictured is not that of Greenshades or Ritter Investments, but of another Group Member, Mr Tony Good.

125 I have not heard evidence from Mr Good at this hearing, but his communications about this incident, and those of Hardi responding to them, are in the Court Book in these proceedings.

126 On 5 July 2016, Mr Good sent the image at [123] to Mr Ben Murray at South West Tractors with an email:

“Ben, please explain something to me - driving up a wet track today empty!

I was in low, diff lock in and full revs. It got through the wet area, I slowed for a gateway (and) down it went. No sign of a struggle from the front wheels!

This bogging is similar to those when I was spraying! How do I know if it is in 4WD etc?”

127 Mr Murray passed Mr Good’s enquiry on to Mr Steven Lancaster, Hardi’s Product Manager, with the further enquiry:

“Can you tell me why the front wheels aren’t driving when it’s meant to be 4WD?”

128 Mr Lancaster said in his affidavit:

“I recall seeing this at the time it was sent, and observing that the photograph appeared to show extremely wet conditions which, from the information provided, seemed to me to be the likely cause of the problem. I have seen evidence of machines being bogged in conditions similar to this.”

129 Mr Lancaster passed the matter on to Mr Jamie Tripodi, then Hardi’s Service Manager.

130 On 11 July 2016, Mr Tripodi wrote to Mr Christophe Benoît at Hardi-Evard (evidently, Hardi’s French parent):

“Morning Christophe, I know Steven [Lancaster] has spoken to you but we have a customer with a Presidio which due to our sales brochures thinks he has a machine with true 4wd capability and a diff lock. But from what we understand this is really not the case.

The customer is driving in very wet conditions and as the rear wheel[l] started to slip he push[ed] throttle more and more and due to the displacement the rear keep spinning ending up with the rear wheels sunk down to it[s] axle. Customer then thought locking the diff would allow front wheels to pull machine out but in fact [it] pulled rear lower in the ground.

Can I please ask you to ask Preciculture to give us more in-depth explanation of this system as I am fearful customer will return machine due to it not working as it is published or believed. Any information would be appreciated.”

131 Mr Benoît replied to both Mr Tripodi and Mr Lancaster on 12 July 2016:

“I just talked to the service manager from Preciculture and he told me the diff lock works in cross between front and rear axle. For him there is not a technical problem and the Presidio *has reached its limit.*” (Emphasis added.)

132 On 29 July 2016, Mr Tripodi wrote to Mr Murray:

“I firstly would like to apologise for any delay on getting information on this issue. We have contacted PRECICULTURE our manufacture[r] of the Presidio, and what they have told us [is] that the machine has reached its limit unfortunately. The horse power and torque on the front and rear motors are at a ratio of 30/70%. When the lock diff is selected the system open[s] a flow divider which causes even flow throughout these two circuits (left front/right rear, right front/left rear). The rear motor require[s] a flow at low pressure to produce power whereas the front motor requires pressure to create power.

Thus as [sic] so as the rear wheels break traction the motors on the front are able to create horse power.”

133 I am not presently hearing Mr Good’s claim against Hardi. I have set out the details of these communications simply to show that it appears that Preciculture’s position was that the circumstances concerning Mr Good’s Presidio, as reported to Mr Benoît by Mr Tripodi in his 11 July 2016 email, did not bespeak a “technical problem” in the Presidio. Rather, the Presidio had “reached its limit”, to adopt Mr Benoît’s expression.

134 Mr Franklin’s internal response to Mr Lancaster, Mr Parker and Mr Tripodi on 19 August 2016 was:

“I have become involved in the matter of the two PRESIDIO customers who have advised that their machines do not appear to have adequate drive to the front wheels when bogged. There have been various superficial arguments advanced as to why this occurs, but I am not convinced that we genuinely understand the hydraulic system and the reason/s for this at present.

Fundamentally, we need to understand how things work to identify how to change/improve. If the information we have from Europe is correct, it would appear that in PRESIDIO’s current configuration, there *may* be questions as to whether the 4WD performance claimed in marketing literature and supporting documentation is in fact delivered. We need to be certain that the specification delivered meets the specification stated. If the mode of 4WD functionality provided is conditional or limited, this needs to be clearly stated in ALL documentation.” (Emphasis in original.)

135 Leaving aside Mr Good’s experience, and Hardi’s reaction to it, Mr Hicks and Mr Ritter have experienced the Greenshades and Ritter Investments Presidios *not* operating as a 4WD vehicle. There were occasions when those Presidios did not provide power to all four wheels.

136 The fact that this occurred on only limited occasions may be relevant to what loss Greenshades and Ritter Investments can show.

137 But it is not relevant to whether the representation that the Presidio was *always* “4WD” was true.

138 It was not.

The experts

139 Both parties adduced expert evidence on this question, which included unhelpful observations by the experts about how 4WD is defined in dictionaries and technical publications. I have paid no attention to that evidence.

140 The expert evidence did explain how it was that Presidios could cease to operate as 4WD.

141 Thus, Mr Sulman and Dr Hope described the Presidio hydrostatic circuit design as follows:

“(a) The Presidio has four wheel motors, one fitted to each of its four wheels. Different wheel motors are used on the front wheels to those on the rear wheels of the Presidio. Axial piston motors with additional mechanical brakes are fitted to the rear wheels. Radial piston motors are fitted to the front wheels.

(b) When the flow divider is engaged, the hydraulic circuit is split into two parts. In one part the front left and rear right wheel motors are connected by a ‘T-joint’ in the hydraulic piping. In the other part the front right and rear left wheel motors are connected by a ‘T-joint’ in the hydraulic piping;

(c) The T-joint arrangement enables flow of hydraulic oil to those wheel motors in each half of the circuit of least tractive resistance;

(d) When the flow divider is engaged, pressurised hydraulic oil from the Presidio’s pump is directed through the flow divider unit to each of the two parts of the hydraulic circuit;

(e) The Presidio’s flow divider does not perfectly split the oil flow 50:50, ... instead the ratio of the split varies as a relationship of pressure differential between the diagonal circuits;

(f) The Presidio uses a hydrostatic transmission with individual wheel motors that allow the wheels to rotate at different speeds. It does not have mechanical linkages to the wheels. Thus, the Presidio does not have, nor need, a differential;

(g) The Presidio is not fitted with a differential lock, commonly called a diff-lock, for the purpose of synchronously locking both front wheels together and both rear wheels together, but rather a ‘flow divider’ to divide the oil from the single pump into the two diagonal wheel circuits, with two wheel motors connected to each circuit;

(h) The Presidio is not fitted with wheel speed sensors on all four wheels and intelligent electronics that prevent wheel slippage.”

142 Mr Sulman and Dr Hope agreed:

“(a) That for wheels to receive power, have power supplied, and have power applied, they must rotate when this is occurring.

(b) When driving the Hardi Presidio on a surface that provides sufficient traction for mobility that the transmission system will provide power to all four wheels when all four wheels are rotating.

(c) That in good tractive condition, all four wheels of the Presidio can receive power, have power supplied to them, and have power applied to them, via the hydraulic pump and four-wheel motors, which connect all four wheels of the machine to the source of power, the diesel engine.

(d) It is possible for the Presidio to experience slippage or spin-out of one or more wheels when driving.

(e) It is possible for the Presidio to experience slippage or spin-out of one or more wheels, to such an extent that the non-slipping wheels do not receive sufficient torque to cause the wheels to rotate, and hence, do not receive power.

(f) The Presidio does not have an electronic traction control system which can monitor wheel slippage and change the power supplied to each wheel, if wheel slippage is detected.”

143 Mr Sulman and Professor John Fielke, a professor in mechanical engineering at the University of South Australia retained by Hardi to give expert evidence, agreed that, speaking generally:

(a) there can be pressure at a wheel motor without rotation of the hydraulic motor, but for there to be power at the hydraulic wheel motor, there must be oil flow through the motor;

(b) power at the wheel is a function of torque and angular velocity (speed of rotation) of the wheel; and

(c) there can be torque at the wheel without rotation, but for there to be power at the wheel, the wheel must rotate.

144 Critically, to the question of why the Presidios sometimes do not operate as 4WD, Mr Sulman and Professor Fielke agreed that:

(a) in one half of the hydrostatic circuit described by Mr Sulman and Dr Hope, the front left and rear right wheels are “tee’d” together

and in the other half of the hydrostatic circuit the front right and rear left wheels are tee'd together;

- (b) this characteristic of Presidio's tee'd arrangement means that if a wheel or wheels spin-out, the oil flow will take the easiest path through the tee fitting or fittings and go to the wheel or wheels spinning out; and
- (c) the tee'd arrangement is the primary cause of Presidio wheels losing traction and spinning out on two wheels, while the other two wheels stop rotating.

145 The experts agreed that the result is that when the rear wheels of the Presidio lose traction, no power is transmitted to the ground at the front wheels and they do not turn. The same is true in reverse if the front wheels lose traction.

The Sulman experiment

146 Mr Sulman conducted what he described as a "traction test", using the Greenshades Presidio.

147 Mr Sulman described his "traction test" as an "artificial method ... devised to allow the Presidio to break traction in a controlled manner".

148 Mr Sulman said, in his report:

"The artificial method involved manufacturing two steel channels that were laid in front of [the Greenshades Presidio] in the direction of travel and lubricated with grease and water. This proved to be an effective method in that [the Presidio] lost traction consistently ...

The traction test involved driving [the Presidio] up the slope and engaging the front wheels into the steel channels. The front wheels were controlled by the operator to alternate between full traction loss and stationary, while the rear wheels remained close to stationary.

The same process was carried out for the rear axle by driving [the Presidio] in reverse up the slope without the steel channels.

All traction control tests were conducted in first gear with diff lock engaged."

149 By subjecting the Greenshades Presidio to this admittedly artificial test, Mr Sulman was able to create the circumstances that he and Professor Fielke referred to in their joint report in the passages I have set out at [143] above.

150 Contrary to Dr Higgins' submissions, I do not accept that Mr Sulman devised this test with the sole purpose of showing failure of the Presidio to operate as a 4WD vehicle.

151 Rather, I think Mr Muddle was correct to submit that:

"Mr Sulman designed and used a test which artificially created a break in traction under controlled and measurable conditions, not to all four wheels, but to two wheels. This was done specifically for the purpose of determining, whether by intelligent control of the 4WD, by valves, by a diff lock or otherwise, the [Presidio] would have power at all four wheels. It did not, as only two wheels turned.

... The test was not measuring what was required to lose traction to two wheels. The test was designed to determine under controlled, observable and repeatable conditions, what occurred to the other two wheels which, by virtue of the test design, were assured of having good traction."

"Appropriate driving techniques"

152 Much attention was directed during the experts' concurrent evidence to whether the manner in which a bogged Presidio, or a potentially bogged Presidio, was driven or operated could affect how it performed. This focused on whether the adoption of "appropriate driving techniques" (to use Dr Hope's expression) could minimise or avoid the circumstances in which the Presidio ceased to operate as a 4WD vehicle.

153 Thus, Mr Sulman and Dr Hope gave this evidence:

"WITNESS SULMAN: So – so, when you start going into that conditions – it depends on how long those conditions are. I mean, if – if the condition is a short wet patch, then having that power to four wheels would get you through that. If it's a long wet patch, yes, if you saw that coming, you could – then you would start to lose traction so all wheels would start to spin and you'd stop. That's correct.

HIGGINS: But, if you're in it, you still wouldn't drive in the way you did during the test would you?

WITNESS SULMAN: Well, that's not – that test wasn't set up to simulate that.

HIS HONOUR: So, if this reasonable, competent driver could see ahead of him or her that he or she was about to drive into a circumstance that you've created at your 13.4 – in other words, it was equivalent to be lubricated with grease and water, you say well they probably wouldn't go ahead?

WITNESS SULMAN: No.

HIS HONOUR: But, is your point that it's the circumstance where the driver gets into that circumstance without knowing that that's what's ahead, that this difficulty that you describe?

WITNESS SULMAN: Yes.

HIS HONOUR: And, that you've tried to replicate in your experiment might arise?"

....

"WITNESS HOPE: ... You're in this condition, you've got good traction [of] your rear wheels, no traction in the front wheels, would a competent operator intentionally drive the front wheels so fast that you don't have any torque to those rear wheels that have good traction and could get you through?

HIGGINS: Your Honour, that was the question. Could I just ask it one last time of Mr Sulman and then we can move on? You agree that, finding yourself in the circumstance, you wouldn't accelerate those two front wheels in the manner you did in your test? A competent operator of a Presidio would not accelerate those two front wheels in that manner?

WITNESS SULMAN: No, no."

154 Dr Hope's statement as set out in the preceding paragraph reflected his evidence in his joint report with Mr Sulman:

"The primary cause of loss of power to some wheels during testing of the Presidio was the intentional use of driving techniques to try to make the wheels of the machine slip and spin at very high speed so that the non-slipping wheels would not receive enough torque to make them rotate. A competent operator would never drive the Presidio in such a manner when attempting to drive through slippery or difficult conditions."

155 Dr Hope continued:

"My testing of a Presidio showed that it was difficult to cause a loss of power to some wheels, even when intentionally using driving techniques to try to make the wheels of the machine slip and spin at very high speed so that the non-slipping wheels would not receive enough torque to make them rotate.

My testing ... showed that when using more appropriate driving techniques, the Presidio was able to drive over the same surfaces that had resulted in a loss of

power to the rear wheels when intentionally using driving techniques to try to make the front wheels of the machine slip and spin at very high speed.”

And:

“... had better driving techniques been used, such as setting the engine speed to full power and controlling the movement of the Presidio with the hydraulic control joystick on the right side of the cabin, rather than using the foot accelerator pedal to control the engine speed, and driving the Presidio slowly with some approach speed towards the lubricated test site, rather than using a stationary start and rapidly applying acceleration in order to induce wheel slippage at high speed, then each Presidio would most likely have travelled through the lubricated test sites.”

156 On reflection, I find this evidence to be somewhat beside the point. The fact remains that Greenshades’ and Ritter Investments’ Presidios have become bogged with power lost to the unbogged wheels, albeit only on the limited occasions to which I have referred. Dr Higgins did not suggest to either Mr Hicks nor Mr Ritter that they were not using “appropriate driving techniques” or the “better driving techniques” to which Dr Hope referred, let alone that they were “intentionally using driving techniques to try to make the front wheels ... slip and spin at very high speed”.

157 Mr Sulman’s experiment shows that, to adopt Dr Hope’s words, “under certain conditions, machine settings, and driving methods, there are times when the power supplied to all four wheels is not able to be used by all four wheels and all four wheels do not rotate at the same time” and that “there are times when the power supplied to all four wheels is not able to be used by all four wheels”. Mr Hicks’ and Mr Ritter’s experience confirms that this can happen in a real world circumstance; albeit not often in their cases.

Conclusion on 4WD

158 My conclusion is that the representations made by Hardi about the Presidio being 4WD were misleading or deceptive.

159 They were false in that they asserted the existence of the “intelligent electronics” and the “traction control valve” supplying “reliable power to the

wheels regardless of the field conditions and slopes”; and were misleading or deceptive to that extent.

160 They were also false, and thus misleading or deceptive because, as I have set out, sometimes power was not delivered to all four wheels.

161 The Presidios were thus not *always* 4WD.

The Braking Issue

162 Mr Sulman and Dr Hope agreed that the ladder circuit originally connected to the Presidio park brake circuit was a safety hazard, if it operated in the manner that Mr Sulman reported and needed to be disconnected and isolated from the park brake circuit.

163 On the other hand, Dr Hope opined that he had tested a Presidio with an upgraded ladder control circuit, and it operated in a safe manner.

164 In relation to the foot brake, Mr Sulman reported that applying full pressure when the machine was on a slope of 10 degrees, the braking was not sufficient to stop the machine.

165 However, Dr Hope stated:

“There is no requirement for the foot brake to hold the Presidio stationary on slopes up to 10°. The foot brake is not the Presidio’s primary braking mechanism. The hydraulic transmission provides the primary dynamic and static braking mechanism for the Presidio and he witnessed the hydraulic transmission being used to hold the Presidio on slopes up to 22° (40%) with the Presidio facing uphill and again with the Presidio facing downhill. This is more than adequate for safety and far exceeds the 10° requirement opined by [Mr Sulman].”

166 Mr Muddle submitted, although without great enthusiasm, that these circumstances rendered misleading or deceptive the representations made in the Brochures that the Presidio was “built for demanding conditions” and was “class leading”.

167 I cannot see how the matters identified in the evidence concerning braking could lead to that conclusion.

168 As Mr Muddle accepted in closing oral submissions, this is “not going to be a major factor in this case”.

169 I agree.

170 Greenshades and Ritter Investments have not established that Hardi engaged in misleading or deceptive conduct in relation to the braking issue.

The Spray Rate Controller Issue

171 As I have said, this issue arises only in relation to Ritter Investments. That is, neither Greenshades nor any other Group Member contends that it has had this problem.

172 As I have set out above, in the Brochures Hardi represented that its “OnRate fluid system” “delivered precision application every time” and allowed the operator “to obtain the target rate through changing spraying speeds”. Other representations were made about the control of spraying.

173 Mr Ritter said that in August 2017, while spraying wheat using the Presidio, he experienced “pressure fluctuation” from “1.5 to 7 bars”. He said that the:

“... pressure gauge spiked up to 7 bars then dropped to 1.5 bars. The applied output in litres/ha went from 145L to 45L.”

174 He continued:

“I swapped to running the sprayer in manual mode and the gauge was steady but the Hardi HC 9600 screen was jumping all over the place. I recorded some footage of this occurring. My target was to have a spray output of 84 L/Ha. The rate was jumping to 135L/Ha and 137L/Ha and would then drop back to 84 L/Ha. This indicated to me that the speed regulation problem is in the screen or the software.”

175 Mr Ritter said that on 3 March 2018 he was carrying out further spraying using the Presidio and that “the spray rate and pressure fluctuation were the same as before ...”.

176 Mr Sulman conducted what he described as detailed spray rate testing and reported “evidence of a sinusoidal disturbance at liquid flow rates below approximately one litre per second”.

177 Mr Sulman and Dr Hope agreed that any “oscillations” occurred only at flow rates below one litre per second and agreed that “[a]t higher flow rates the spray rate controller performs at a reasonable level of accuracy”.

178 Dr Hope expressed the opinion that Mr Sulman’s testing was “insufficient to show there is a problem with the spray rate controllers in general”.

179 Dr Hope continued:

“(a) ... All system spray rate settings and nozzles used need to be provided for analysis to determine if the tests were performed at spray rates above the minimum recommended for the nozzles and settings.

...

(d) If there is a problem with flow rate control at low flow rates below one litre per second, and it is a problem with the controller, not the setup, plumbing and condition of the components, this should be able to be easily remedied by adjusting the controller algorithm or using smaller nozzles so that the desired spray rate and speed can be achieved while keeping the flow rate above one litre per second.”

180 Dr Hope’s evidence was not challenged during the concurrent evidence.

181 During the concurrent evidence, Mr Sulman gave this evidence:

“HIGGINS: Do you hold any qualifications in electrical engineering?

WITNESS SULMAN: No.

HIGGINS: Do you agree that the automatic spray controller on the Presidio is an electronic system that uses various inputs to calculate and apply a spray flow rate?

WITNESS SULMAN: Yes.

HIGGINS: And the resulting spray flow rate is expressed in litres per hectare?

WITNESS SULMAN: Yes.

HIGGINS: You agree that one of the inputs that feeds into the spray controller is speed data which, on the Presidio, is obtained from an attached GPS?

WITNESS SULMAN: Yes.

HIGGINS: You agree that the speed data received by the spray controller is necessary to ensure that the Presidio stays on rate, in the sense that the speed data is used to adapt the spray rate multiple times per second?

WITNESS SULMAN: It becomes more important as you are changing speeds. Once you're at steady speed, it's relying on that less obviously because it's steady.

HIGGINS: But it's still relying on that speed data received by the spray controller?

WITNESS SULMAN: Yes."

182 A short time later, Mr Sulman gave this evidence:

"HIGGINS: Did you understand that Ritter Investments did not use the HARDI GPS system on their Presidio and instead transferred an existing Trimble GPS unit that was perhaps five years old from their existing two-wheel drive tractor?

WITNESS SULMAN: Well where they changed the GPS unit, yes.

HIGGINS: You were aware of that change?

WITNESS SULMAN: Yes.

HIGGINS: Were you aware it was about five years old?

WITNESS SULMAN: I wasn't sure of the age. I didn't know.

HIGGINS: You don't mention GPS at all in your [Ritter Presidio] report, is that correct?

WITNESS SULMAN: No.

HIGGINS: You didn't consider the effects of the use of a dated third party GPS system in analysing the spray application patterns of [the Ritter Presidio]?

WITNESS SULMAN: No."

183 Earlier, Mr Sulman agreed that he knew that Ritter Investments had purchased its Presidio with "non-Hardi plumbing".

184 Thus, he gave this evidence:

“HIGGINS: I can clarify that. Are you aware that third party plumbing was put on to the machine?

WITNESS SULMAN: Yes.

HIGGINS: You are?

WITNESS SULMAN: Correct.

HIGGINS: What do you know about that plumbing?

WITNESS SULMAN: That it’s a polymer material, so it’s very – it would be very light because additional – if it was steel componentry added, then – then it would obviously [be] heavier, it’d have a high density.”

185 But later, in relation to the question of that plumbing, Mr Sulman gave this evidence:

“HIGGINS: ... Now, we discussed earlier the plumbing that the Ritters had done to their machine ... Are you aware of the details of that plumbing other than the material of which it was made?

WITNESS SULMAN: No.

HIGGINS: Are you aware that the plumbing was at one stage fully redone on the [Presidio]?

WITNESS SULMAN: I’m aware that they did some additions but not – I don’t see – I couldn’t see whether it was material to the test because--

HIGGINS: I’m just asking about whether you know about it at the moment. So you don’t know the details of the original plumbing?

WITNESS SULMAN: Not the details, no.

HIGGINS: You didn’t know that the plumbing was at one point fully redone, is that correct?

WITNESS SULMAN: No. No.

HIGGINS: Did you consider the effects of the use of third party plumbing in analysing the spray rate controller on [the Ritter Presidio]?

WITNESS SULMAN: No.”

186 There were thus two potentially significant factors that may have played a role in causing the spray rate fluctuations to which Mr Ritter deposed, that were not taken into account by Mr Sulman; installation of the Trimble GPS and the revised plumbing installed by Seris.

187 In those circumstances, while I have no reason to doubt Mr Ritter's evidence as to his experience with spray rate fluctuations, nor Mr Sulman's experimental results, I do not feel able to conclude that these matters are the consequence of some inherent defect in the Presidio itself. The fluctuations may have been preventable by making the adjustments to which Dr Hope referred. They may be because of the factors that Mr Sulman did not consider. Ritter Investments has not satisfied me that I should exclude these possibilities.

Reliance

188 Mr Hicks gave evidence that, prior to Greenshades' purchase of the Presidio, he was:

“... quite impressed with the Presidio's manoeuvrability and its layout and functionality, as a result of its 4WD capacity, and was confident because of my five previous Hardi machines that it would perform as it should.”

189 Mr Hicks said that he was “set on getting the 4WD, high-clearance Presidio” and that:

“Had I been advised that the Presidio was not a 4WD spray unit, I would never have even considered buying it.”

190 As I have set out above Mr Ritter said that the advertised features of 4WD and precise spray rate controller appealed to him.

191 Neither Mr Hicks nor Mr Ritter gave evidence that they relied on anything Hardi said in its promotional material about the Presidio chassis strength (“rugged and built for demanding conditions”) or braking capacity.

192 Otherwise, as the statements made by Hardi in its promotional material concerning the Presidio being a 4WD vehicle and, in Mr Ritter's case concerning the spray rate, were evidently calculated to induce parties such as

Greenshades and Ritter to purchase a Presidio, I am prepared to infer that they were in fact induced to do so by reason of those statements.¹⁴

Loss

193 The loss for which Greenshades and Ritter Investments contend is:¹⁵

- (a) payment of the purchase price;
- (b) loss of value on resale of the Presidio due to it “not being new at the time of its acquisition by each Group Member”; and
- (c) loss of income.

Payment of the purchase price

194 Mr Muddle submitted:

“Ultimately, the Court has to ask whether the Plaintiffs would have paid over the purchase price had they been told the true position: the [Presidio] was not rugged, heavy duty or class leading, but was prone to early systematic structural failures; the [Presidio] was not a 4WD with intelligent electronics which prevented wheel slippage regardless of field conditions and slopes, but rather, if its rear wheels got bogged, its front wheels would not even turn due to the absence of any mechanism independently to supply power to the front wheels. The answer with respect is obviously ‘no’.”

195 Assuming that the answer to this question is that Greenshades and Ritter Investments would not have purchased the Presidio, that cannot be the end of the inquiry. The further question arises as to what Greenshades and Ritter Investments would have done, had the alleged misleading or deceptive conduct not occurred. And if, as Mr Muddle submitted, part of the answer to that question is that they would not have purchased the Presidio, the further question arises: what would they have done?

196 The evidence is silent on that topic.

¹⁴ For example, *Gould v Vaggelas* (1985) 157 CLR 215 at 236; [1985] HCA 75 (Wilson J).

¹⁵ Third Further Amended Statement of Claim at par 23.

197 I took this matter up with Mr Muddle in closing submissions:

“HIS HONOUR: There is no evidence, is there, as to what they would have done but for the representations? If the representations hadn't been made they wouldn't have bought this one. They say they would have done what? Bought another one?

MUDDLE: My submission your Honour is that one doesn't need to go beyond that in the counterfactual. The counterfactual arises in particular where you have a case that the contract would - not that the contract wouldn't have been entered, but the contract wouldn't have been entered at that value. Had I known that, I might have still bought it but I would've negotiated for a different price or I would have asked for a different feature or I would have done this or that. This is a simple case that I wouldn't have bought this machine and I still would have had the money, and that's all the plaintiff has to demonstrate. The damages which are available in both--

HIS HONOUR: The short answer is you have to add to that and would have done something else, would have bought another machine in which case which one? How would it have performed? Any better, any worse?

MUDDLE: No, we respectfully submit not in the case of an inducement to enter into a contract your Honour because then your Honour would be invited to conduct a hearing about the merits of another machine, and to try and compare the virtues of that machine and its price to this machine and its price; and where would the--

HIS HONOUR: To show the damage caused by or because of the misrepresentation.

MUDDLE: The damage caused by the misrepresentation is the paying over of the purchase price.

198 Without knowing what Greenshades and Ritter Investments would have done had they not purchased a Presidio, I am not able to determine the loss they have suffered “because of”¹⁶ the misleading or deceptive conduct I have found.

199 The difficulty is particularly acute in this case because both Greenshades and Ritter Investments retain their Presidios and have used them, or had them available for use, for some six years. Their Presidios have lost power to the front wheels once or twice during that time and have developed the cracking to which I have referred.

¹⁶ Section 236(1) of the Australian Consumer Law.

200 Mr Muddle submitted:

“Hardi has not attempted to demonstrate any appropriate adjustment for the (defective) use which the Plaintiffs have potentially had during the period [in] which Hardi has refused them any relief. In those circumstances, the Court would not make any adjustment.”

201 But it was not for Hardi to establish any “appropriate adjustment”. It was for Greenshades and Ritter Investments to establish that they have suffered loss “because of” the impugned conduct. Their loss cannot simply be the purchase price, because loss so calculated assumes, in effect, that they got nothing of value for the purchase price of the Presidio. But they did. As I have set out, Mr Hicks’ evidence was that Greenshades used its Presidio for some four years and was actually using its Presidio “for the last month”.¹⁷ And for the reasons I have set out, it is agreed that I should infer that Ritter Investments still has its Presidio which remains available for it to use.¹⁸

202 They may have some shortcomings. The evidence shows they have fatigue cracking. But there is no evidence that this has impeded the use Greenshades and Ritter Investments has had, and will have, of the machines.¹⁹ Nor is there evidence of whether and to what extent the cracking has diminished the value of the Presidios, nor as to whether the cracking can be repaired and if so, at what cost.

203 To ascertain whether Greenshades or Ritter Investments has suffered loss “because of” Hardi’s misleading or deceptive conduct by reason of purchasing the Presidios that they still own, they would have had to show either that they could and would have purchased for the same price a 4WD self-propelled crop sprayer that did not have the Chassis and 4WD Issues I have described or, alternatively, that the Presidios they did purchase are worth less than they would be had they not had those issues. Either way, calculation of loss would

¹⁷ See [57]-[58] above.

¹⁸ See [80] above.

¹⁹ Although Mr Hicks gave evidence of installing cameras on the Presidio to “monitor the cracking”: see [210] below.

have to take into account the use that Greenshades and Ritter Investments have made of the machines.

204 There is no evidence before me about any of these matters.

205 As Greenshades and Ritter Investments have not sought to prove loss on any other basis, I am unable to find they have suffered any loss on this account.

Loss of value on resale

206 Mr Muddle did not point to any evidence as to the resale value of the Greenshades' and Ritter Investments' Presidios. He did not mention "resale" at all in closing submissions.

Loss of income

207 In an affidavit sworn during the hearing, and adduced with leave following my rejection of certain passages in Mr Hicks' earlier affidavits, Mr Hicks said:

"... because I could not get the [Presidio] to go more than 6 km per hour in some places and adopted the practice of spraying across the slope rather than up and down the slope, the number of turns I had to do were significantly higher and it meant that the maximum area sprayed was no more than 10 hectares per hour. As such, although we got paid the agreed rate for all of the hectares, the time it took our company to perform the spraying of those hectares was more than twice as long which meant that the company was paying the fuel to have the [Presidio] going for at least twice the number of operating hours and from my experience the [Presidio] consumes on average 22.5 litres per hour which, for a job that took some 60 hours, meant that there were at least 30 hours more than should have been required which resulted in the company spending an average of \$1.40 per litre for the diesel to run the [Presidio] for the extra 30 hours at 22.5 litres per hour which equates to \$945.00."

208 Mr Hicks appears to be saying that a particular contract spraying job took 30 hours longer than it otherwise would have because Mr Hicks "could not get the [Presidio] to go more than 6 km per hour in some places" and because Mr Hicks adopted a practice of "spraying across the slope rather than up and down the slope"; with the consequence that extra fuel was used.

209 In closing written submissions Mr Muddle submitted²⁰ that this was “presumably due to the 4WD limitations of the [Presidio], and having to adopt a slow speed to avoid loss of traction”. But there was no evidence from Mr Hicks to prove this. I rejected inadmissible assertions by Mr Hicks on this subject and granted leave to adduce evidence in proper form. That leave was taken up by the affidavit to which I have referred. There is nothing in that affidavit to the effect of Mr Muddle’s conjecture. I am not prepared to draw that inference, absent such evidence.

210 Mr Hicks also said:

“On 3 December 2018, due to my concerns over the three areas of cracking on the [Presidio], I purchased a four-camera monitoring system at a cost of \$1,395.02 from Central Wheatbelt Imports. I installed this unit into the cabin of the boom to be able to continually monitor the cracking areas for any worsening of the cracks.”

211 However, as I have said, Mr Hicks gave no evidence of having relied on the statements by Hardi concerning the Presidio being “rugged and built for demanding conditions”. And even if such reliance could be inferred, I cannot see how this particular cost could be said to be one caused by any such statement.

212 The only evidence Mr Ritter gave concerning loss was also given in an affidavit adduced with leave during the hearing, following my rejection of certain passages in earlier affidavits.

213 That evidence was directed to costs said to have been incurred by reason of the Spray Rate Controller Issue. As I have concluded that Ritter Investments has not made out its case on that issue, such costs are not recoverable.

²⁰ By way of interpolation into the passage I have set out above.

Conclusion on loss

214 Neither Greenshades nor Ritter Investments has shown it has suffered loss “because of”²¹ the misleading or deceptive conduct I have found.

215 It is therefore not necessary for me to consider Hardi’s submissions on the question of whether the amount of any recoverable loss or damage should be reduced by reason of Greenshades’ or Ritter Investments’ “share of the responsibility for the loss or damage”.²²

Answers to the common questions

216 I will now invite submissions as to how, in the light of these findings, the common questions should be answered. The parties should also consider whether all of the common questions remain relevant to the case pleaded by the plaintiffs.

²¹ Section 236(1)(a) of the Australian Consumer Law.

²² Section 137B *Competition and Consumer Act 2020* (Cth).