IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
GROUP PROCEEDINGS (CLASS ACTIONS)

Not Restricted

S ECI 2023 05830

BETWEEN:

JEREMEY CLARKE — Plaintiff

v

JB HI-FI GROUP PTY LTD (ACN 093 114 286) — Defendant

JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	20 October 2026
DATE OF RULING:	27 October 2026
CASE MAY BE CITED AS:	*Clarke v JB Hi-Fi Group Pty Ltd (No 5)* (Unreported, Supreme Court of Victoria, Delany J, 27 October 2026)

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms R Doyle SC with Ms R Francois, Ms K Morris, Mr J L Page and Mr J Grace	Maurice Blackburn
For the Defendant	Dr M J Collins AM KC with Mr A N McRobert	Herbert Smith Freehills Kramer

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HIS HONOUR:

1 From 1 January 2011 through to 8 December 2023, the defendant, JB Hi-Fi Group Pty Ltd ('JB Hi-Fi'), offered for purchase extended warranties comprising 'Extended Care' and 'Extra Care' in connection with the sale of consumer goods ('Extended Warranties'). Until early 2022, the Extended Warranties were underwritten and administered by Lumley Retail Warranty (and later The Warranty Group Australasia) ('Lumley') and since early 2022, the Extended Warranties have been underwritten and administered by SquareTrade Australia Pty Ltd ('SquareTrade') (together, 'administrators').

2 This ruling concerns the disputed relevance of two categories of evidence:

(a) the first category relates to certain documents (including the subject matter of those documents) said by the plaintiff to be relevant to profit maximisation, that is, documents evidencing, recording or concerning the financial arrangements between JB Hi-Fi and the administrators, including:

(i) the way in which the retail price paid for an Extended Warranty is split between JB Hi-Fi and the administrators of its Extended Warranty program; and

(ii) the use to which the administrators' portion was put in relation to fulfilling claims by way of refunds, replacements and repairs and the payment of one-off payments and rebates to JB Hi-Fi from time to time; and

(b) the second category comprises documents and evidence concerning incentives paid or payable by JB Hi-Fi to sales staff in relation to the sale of Extended Warranties.

3 JB Hi-Fi objected to the tender of documents and the receipt of evidence sought to be relied on by the plaintiff in relation to both categories of evidence on the grounds of relevance. It did so primarily on the basis that the categories of evidence are sought to be relied on by the plaintiff in relation to a case which JB Hi-Fi says is not pleaded. In particular, JB Hi-Fi says the plaintiff advances three matters not found

anywhere in the pleadings (or, for that matter, addressed in the common questions):

(a) the scale of profits said to be derived by JB Hi-Fi and whether the profit margin on the sale of the Extended Warranties served to limit the resources which the administrators were otherwise prepared to devote to managing claims;

(b) the incentives offered and paid to sales staff, including commissions, bonuses and prizes; and

(c) the transfer of risk and cost from JB Hi-Fi to the administrators.

4 The plaintiff submits that based on the pleadings, including the Second Further Amended Statement of Claim dated 14 August 2026 ('2FASOC') and the Further Amended Defence dated 31 August 2026 ('FAD'), both categories of evidence are relevant.

5 After hearing submissions in relation to both categories of evidence it became clear that the contest between the parties involved two separate questions. The first question, whether the documents are relevant applying section 55(1) of the *Evidence Act 2008* (Vic) ('Evidence Act'). The second question, how the documents may be used and relied on by the parties having regard to the issues defined by the pleadings.

6 At the conclusion of argument I informed the parties I considered both categories of evidence are relevant applying section 55(1) of the Evidence Act. It was agreed the trial could proceed with the result of the ruling known and with my reasons for the ruling to follow as soon as practicable. I said at the time that as well as providing reasons in relation to relevance, I would deal with the second question, namely the use to which the disputed categories of evidence might be put having regard to the pleadings.

7 The issue of the use to which the two contested categories of evidence might be put has been live since before the commencement of the trial. It has been unnecessary to rule earlier due to the pragmatic approach cooperatively adopted by the parties.

This meant that from the plaintiff's opening, up to and including the end of the cross-examination of the defendant's first witness, Mr Smith, documents have been referred to and propositions advanced on the acknowledged basis that such documents and evidence received are subject to objection by JB Hi-Fi.

8 The parties agreed that a ruling was required prior to JB Hi-Fi calling its second witness, Mr Browning.

9 It is convenient to deal discreetly with the two categories of evidence. Before doing so, it is important to set out section 55(1) of the Evidence Act and to refer to some of the authorities relied on by the parties.

A Section 55 of the Evidence Act

10 Section 55(1) of the Evidence Act is in the following terms:

> **55 Relevant evidence**
>
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

11 In *Jacara Pty Ltd v Perpetual Trustees WA Ltd*, Sackville J, with whom Whitlam and Mansfield JJ agreed, said as follows concerning that subsection:[1]

> 47 The fundamental principle governing the admissibility of evidence under the regime established by the *Evidence Act* is set out in s 56. The effect of that provision is that irrelevant evidence is inadmissible, while relevant evidence is admissible except as otherwise provided by the Act. Relevant evidence is that which, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact on issue in the proceeding: s 55(1). According to Gaudron and Kirby JJ in *Papakosmas v The Queen* (1999) 196 CLR 297 at 312, the statutory concept of relevance does not involve "any real departure from the common law", a view which receives support from the language used by Dixon J in *Martin v Osborne* (1936) 55 CLR 367 at 375. Nonetheless, the Australian Law Reform Commission ("the Commission"), which recommended a definition of relevance in the terms adopted by s 55(1) of the *Evidence Act*, expressly adverted to the breadth of the definition:
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> > "The definition requires a minimal logical connection between the evidence and the 'fact in issue'. In terms of probability, relevant evidence need not render a 'fact in issue' probable, or 'sufficiently probable' — it is enough if it only makes the fact in

[1] *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886, [47].

> issue more probable or less probable than it would be without the evidence — ie it 'affects the probability'. The definition requires the judge to ask 'could' the evidence, if accepted, affect the probabilities."
>
> Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) ("Interim Report"), Vol 1, par 641. As McHugh J pointed out in *Papakosmas* at 321-322, the words "if it were accepted" in s 55(1) make it clear that a court assesses "the probability of the existence of a fact in issue" on the assumption that the evidence is reliable.

12 Both the Victorian Court of Appeal in its 2017 decision of *Director of Public Prosecutions (Vic) v Paulino* ('*Paulino*')[2] and the New South Wales Court of Appeal in its 2024 decision of *Kmart Australia Ltd v Marmara*[3] described the test of relevance in section 55 as 'undemanding'.[4] In *Paulino*, the Victorian Court of Appeal said:[5]

> 16 When considering whether any given item of evidence satisfies the test of relevance, the question to be asked, under s 55, is whether, if the evidence were accepted, it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding.
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> 17 It has been said that s 55 sets an 'undemanding' definition of relevance. There need only be a 'minimal, logical, connection' between the evidence and a fact in issue. Moreover, it is important not to confuse relevance with sufficiency or weight.
>
> 18 In *HML v The Queen*, Gleeson CJ, though dealing with the test for relevance at common law, and not under s 55 of the Evidence Act, suggested that the test for both would be similar. Certainly, his Honour did not suggest that there was a higher threshold for admissibility under s 55 than that which applies at common law. In his terms, 'relevance' and 'common sense' are to be viewed as closely related. Whether at common law, or under s 55, all that is required to meet the requirement of relevance is that the item in question be 'reasonably capable' of 'rationally affect[ing], directly or indirectly, the assessment of the probability of the existence of a fact in issue'. In particular, it need not be shown that the evidence would actually affect the relevant probability, merely that it be reasonably capable of doing so.

B <u>Confining the parties at trial to their pleaded cases</u>

13 In *Dreamland Development Group v Navadiya Group Pty Ltd* ('*Dreamland*'), the Victorian Court of Appeal canvassed earlier authorities concerning the role of

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2 (2017) 54 VR 109; [2017] VSCA 38.

3 [2024] NSWCA 249.

4 *Director of Public Prosecutions (Vic) v Paulino* (2017) 54 VR 109; [2017] VSCA 38, [17]; *Kmart Australia Ltd v Marmara* [2024] NSWCA 249, [55].

5 *Director of Public Prosecutions (Vic) v Paulino* (2017) 54 VR 109; [2017] VSCA 38, [16]–[18].

pleadings in the conduct of a trial and made a number of observations which are pertinent to the present dispute:[6]

> 84 The significance of pleadings, and the limited circumstances in which a party might depart from its pleaded case, have been long recognised by the High Court. In a passage in *Dare v Pulham* that reflects its longstanding approach, the Court said this:
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> > Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it (*Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In liq.)*); they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial (*Miller v. Cameron*); and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. **Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings**.
>
> 85 Again, in an oft-cited passage from *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd,* Mason CJ and Gaudron J said this:
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> > The function of pleadings is to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, **the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities**. …
> >
> > Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference.
>
> 86 As is revealed by the emphasised sentence, a departure from the pleadings may be permitted where the parties have chosen — that is, mutually agreed — to conduct the trial on a different basis. It is true that such agreement may be inferred from acquiescence. But the corollary of the emphasis on the parties' mutual agreement is that one party cannot unilaterally conduct its case on a different basis from that

[6] *Dreamland Development Group v Navadiya Group Pty Ltd* [2026] VSCA 58, [84]–[86] (emphasis in original).

pleaded. Thus, as Keane CJ, Lander and Buchanan JJ said in *Betfair Pty Ltd v Racing New South Wales*:

> At trial a party is entitled to have the opposing party confined to that party's pleadings because the first party is entitled to come to trial to meet only the issues raised on the pleadings. However, if the first party does not seek to so confine the opposing party but allows the other party to raise other material facts and issues for the determination of the Court, then in our opinion the Court is permitted and possibly obliged to decide the proceeding on the further material facts and issues raised and addressed at trial: *Banque Commerciale* at 296–297; *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517. If it were otherwise, the party who has failed to plead all of the material facts or issues upon which the party's case relies, but has brought those material facts or issues to the attention of his or her opponent at trial, would be denied natural justice if at the end of the trial the Court decided the proceeding on the pleadings without notice to that party. The first party in those circumstances would have been denied the opportunity to apply to amend those pleadings so as to formalise what was in fact addressed at the trial.

87 As the above passage makes clear, where one party objects to attempts by another party to depart from its pleaded case, the party seeking to depart from its pleading has the opportunity to seek to amend its pleading. If an application to amend is made, the trial judge must then determine whether to allow the proposed amendment. If the amendment is allowed (including over the objection of the party that seeks to hold the other party to its pleaded case), then the trial will be decided on the basis of the amended issues. But if no application to amend is made (or if such an application is made but refused), the parties are held to their pleadings unless they expressly or impliedly (including by acquiescence) agree otherwise. As Elliot J observed in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills,* there is a long-established practice in commercial litigation of holding parties to their pleadings. That practice is, generally speaking, consistent with the *Civil Procedure Act 2010* (Vic) because, ordinarily, requiring an opposing party to clearly identify the real issues in dispute facilitates the just, efficient, timely and cost-effective resolution of the dispute.

88 We make these remarks conscious that pleadings are an aid to justice. As Isaacs and Rich JJ said in *Gould v Mount Oxide Mines Ltd (In Liq)*:

> But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.

14 Concerning the use to which the disputed categories of evidence the subject of this ruling may be put, I proceed by reference to the decision of the Court of Appeal in

Dreamland and the earlier authorities cited by the Court in the passages reproduced above.

15 This case has not been conducted and there has been no suggestion by either party that the case should be conducted hereafter other than in accordance with the pleadings. I proceed on that basis.

C Financial evidence of the relationship between JB Hi-Fi and the administrators

16 This first category of evidence encompasses:

(a) the agreement between JB Hi-Fi and Lumley entered into on about 18 May 2011 and titled 'Lumley Retail Warranty Insurance Master Terms' as amended;

(b) the agreement between JB Hi-Fi and SquareTrade entered into on about 18 February 2021; and

(c) related documents which refer to those agreements.

C.1 Relevance

17 For the most part there is and can be no dispute about the relevance of this category of documents. The documents referred to in paragraph 16 are specifically referred to and relied on by JB Hi-Fi in paragraph 15 of its FAD. Those documents are also exhibited to Mr Smith's lengthy witness statement and were tendered by JB Hi-Fi as part of the adoption by Mr Smith of his witness statement.

18 The documents described in paragraph 16(c) include three documents relating to JB Hi-Fi's agreement with SquareTrade which are not referenced by JB Hi-Fi in the FAD and were not tendered as part of Mr Smith's evidence. Those documents comprise an email chain dated 7 September 2023 (JBH.0003.0059.6998), an attachment to that email, parts of which contain figures and percentages claimed by JB Hi-Fi to be confidential (JBH.0003.0139.3991), and another email chain dated 8 September 2023 (JBH.0003.0079.5910).

19 These documents concern the contractual relationship between JB Hi-Fi and SquareTrade, the current administrator of JB Hi-Fi's Extended Warranty program.

They evidence or relate to changes in the pricing of Extended Warranties implemented around September 2023 and how those price changes were dealt with as between JB Hi-Fi and SquareTrade. I accept that the three documents are relevant and satisfy the requirements of section 55(1).

C.2 Use of the documents

20 The real concern of JB Hi-Fi relates not to the tender of this first category of documents, tender for which in large part it bears responsibility, but to the use to which those documents may be put in light of the pleadings.

21 Paragraph 170 of the plaintiff's written opening and various documents referred to by the plaintiff as part of his opening raised issues concerning the financial arrangements, their profitability and the split of revenue from Extended Warranty sales between JB Hi-Fi and the administrators. Paragraph 170 is in the following terms:[7]

> The Extended Warranties sold by JBHF were underwritten and administered by third parties (the insurance underwriters and claims administrators, Lumley, SquareTrade and The Warranty Group). The arrangements with these third parties involved: (1) JBHF receiving the sales revenue for the Extended Warranties, and paying a portion of that revenue to the underwriter (whilst entitled to retain a gross profit margin of at least []%); (2) In exchange, JBHF receiving an indemnity from the insurance underwriter for each Extended Warranty sold, by which the underwriter would cover the costs of any claims made under the warranty; (3) JBHF outsourced the administration of the Extended Warranties to the claims administrator; (4) JBHF receive various other rebates, incentives or other payments from these third parties; and (5) JBHF received commitments that the underwriters would source any "replacement" products (or at least a minimum amount of them) from JBHF.

22 Paragraph 174 of the plaintiff's written opening contained a submission that the split of income from Extended Warranties between JB Hi-Fi and the administrators limited the resources which the administrators were otherwise prepared to devote to managing claims:[8]

> The gross profit margins which JBHF was entitled to receive for the Extended Warranties were substantial, and served to limit the resources which the Administrators were otherwise prepared to devote to managing claims. As an internal presentation in 2022 noted, the pricing model in operation had the effect that on $[] million of sales, JBHF was entitled to $[] million in gross profit,

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7 The redaction relates to a figure in respect of which confidentiality is claimed.

8 The redactions relate to figures in respect of which confidentiality is claimed.

> and the Administrator (after operating costs) would retain only $27 million. This underscores not only the share of profit flowing to JBHF, but also the reality that a significant proportion of the price paid by consumers for Extended Warranty products is not used to settle claims.

23 In its written opening, JB Hi-Fi contended the plaintiff relied on unpleaded matters when advancing his unconscionable conduct case in his written opening, including by seeking to characterise JB Hi-Fi's conduct as unconscionable by reference to the financial arrangements between JB Hi-Fi and its administrators.

24 JB Hi-Fi submitted the proposed uses of the first category of documents to which I have referred are uses relating to unpleaded matters. It submitted the proposed use bears a striking resemblance to the amendment to paragraph 73 of the 2FASOC which the plaintiff proposed prior to the trial but did not pursue after JB Hi-Fi objected to their inclusion. The proposed but abandoned amendment to paragraph 73 was in the following terms:

> [T]he Extended Warranties purchased by the Plaintiff and Group Members were of value to JB Hi-Fi by reason of: (i) the profit it derived from the sale of the Extended Warranties to the Plaintiff and Group Members; (ii) the incentive payments and rebates which were paid to JB Hi-Fi by the Administrators in connection with the sale of the Extended Warranties to the Plaintiff and Group Members; and (iii) the benefit which JB Hi-Fi derived in transferring to the Administrators the risks (and cost) of dealing with claims under the Extended Warranties that otherwise would have been the sole responsibility of JB Hi-Fi as the supplier for the purpose of the ACL.

25 In the course of JB Hi-Fi's oral opening, Mr McRobert submitted that references in the plaintiff's written opening to the portion of Extended Warranty revenue received by JB Hi-Fi and the portion received by the administrators are not relevant to any issues on the pleadings.

26 Responding to these complaints, in his oral opening, the plaintiff submitted how much of the profit derived from the sale of Extended Warranties was JB Hi-Fi's profit and how much was used to administer the scheme is relevant to his unconscionable conduct, mistake and total failure of consideration claims, all three of which lead to an engagement with whether JB Hi-Fi was unjustly enriched. Ms Doyle SC submitted:

> When one thinks of the limbs of the plaintiff's case, unconscionable conduct, mistake and total failure of consideration, each of those lead the court to need to enquire whether the defendant has been unjustly enriched by reason of one

> or more of those circumstances, engaging in unconscionable conduct, inducing a mistake under which the group members then laboured or a circumstance in which there's been a total failure of consideration.

27 Later in the course of submissions, Ms Doyle SC directed attention to paragraphs 84(b)–(c) and 87(b)–(c) of the 2FASOC, which allege JB Hi-Fi was unjustly enriched by the receipt of payments for Extended Warranties at the expense of the plaintiff and group members and that it would be unconscionable for JB Hi-Fi to retain the payments. The plaintiff submitted that when considering unconscionability, the Court will look at all relevant circumstances.

28 Separately, the plaintiff submitted a significant theme that permeates all limbs of his case is that the Extended Warranty products possess no or negligible value. In that context, the profit margin in relation to the price point of the Extended Warranties and the way revenue from Extended Warranties is divided between JB Hi-Fi and its administrators is relevant. The plaintiff contended that no one will buy something if they know the majority of the price paid has nothing to do with the risk said to be guarded against and that a very large percentage of the Extended Warranty revenue is being put in someone else's pocket.

C.3 Ruling

29 I accept the submission by JB Hi-Fi that there is no plea in the 2FASOC, whether as part of the unconscionable conduct plea or otherwise, that raises any issue about the financial arrangements between those parties. To the extent that issue is referred to in the plaintiff's written opening, it is well outside any part of his pleaded case.

C.3.1 Unconscionable conduct

30 Turning first to the unconscionable conduct claim in section I of the 2FASOC, I agree with JB Hi-Fi that it is no part of the unconscionable conduct claim as pleaded, a largely self-contained plea that begins at paragraph 73 and ends at paragraph 76 of the 2FASOC, for the plaintiff to rely on any aspect of the contractual and financial arrangements between JB Hi-Fi and the administrators, including their relative entitlements to revenue or profit in relation to the Extended Warranty program. There is no mention of the administrators of the Extended Warranty

program in any of those paragraphs or in any of the paragraphs which are cross-referenced in the particulars to those paragraphs.

31 The closest the unconscionable conduct pleading comes to approaching the topic of the financial arrangements between JB Hi-Fi and the administrators of its Extended Warranty program is paragraph 73(c) of the 2FASOC which, with paragraph 73(d), is in the following terms:

> 73 During the Relevant Period, it was the case that:
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> …
>
> (c) JB Hi-Fi did not price the Extended Warranties by reference to any of the following:
>
> (i) the expected lifespan of the particular Consumer Goods; or
>
> (ii) the likely period during which the Statutory Guarantee would apply to the particular Consumer Goods; or
>
> (iii) the claims profile associated with the particular Consumer Goods.
>
> (d) JB Hi-Fi used unfair sales tactics in connection with the sale of the Extended Warranties by:
>
> (i) engaging in the Longer Cover Misleading Conduct Contraventions; and/or
>
> (ii) engaging in the Additional Benefits Misleading Conduct Contraventions; and/or
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> (iii) engaging in the Material Value Misleading Conduct Contraventions; and/or
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> (iv) engaging in the Cautionary Matters Conduct Contraventions; and/or
>
> (v) engaging in the Specific ACL Misrepresentations Contraventions;
>
> (vi) purporting to provide free of charge with each purchase of Consumer Goods a so called JB Hi-Fi Voluntary Warranty which, by its language, implied the conferral by JB Hi-Fi on the consumer of a benefit which was in fact of no substance given automatic operation of the Statutory Guarantee;
>
> (vii) failing to provide the Extended Warranty Brochures to the Plaintiff and Group Members until either shortly before, during or after the payment was made;

(viii) failing to provide the Refunds and Warranties Brochure at all, or until either shortly before, during or after the payment was made;

(ix) from the period 2011 to 2013, by making provision for a 15 day "cooling off" or refund period in relation to the Extended Warranties, the terms of which were only set out in the Extended Warranty Brochure and the existence of which was only ascertainable by the Plaintiff and Group Members on a close reading of the brochure and at other times outside the window 2011 to 2013, the cooling off period term could only be ascertained online by reading a pop out window on the webpage;

(together, and either any one of (i) to (ix) alone or in any combination, the **Unfair Sales Tactics**).

32 The allegation in paragraph 73(c) is directed to a different topic than that to which the first category of documents relates. Paragraph 73(c) alleges that pricing of the Extended Warranties was by reference to a percentage of the price of the good sold, rather than by reference to the matters pleaded in 73(c)(i)–(iii), namely the expected lifespan of the good, the likely period the statutory guarantee would apply to the good or the claims profile of the particular good.

33 It is no part of paragraph 73(c), no matter how broadly read, to bring in to question the contractual and financial arrangements between JB Hi-Fi as the provider of the Extended Warranties and the administrator from time to time of the Extended Warranty program. It is outside the pleaded case to assert that, for example, by reason of the revenue split between JB Hi-Fi and the administrator of the Extended Warranty program, JB Hi-Fi engaged in unconscionable conduct. If the plaintiff intended to rely on such matters as part of or in support of his unconscionable conduct case, he needed to apply to amend paragraph 73. The plaintiff foreshadowed but did not pursue an application to amend his pleading.

34 It was submitted by the plaintiff that unconscionability was at large and that evidence of the type now in dispute could be relied on by the plaintiff in that context. That is not the case. The unconscionable conduct plea in paragraph 73 is not at large. It is pleaded out in detail in each of the subparagraphs. The matters relied on to constitute unconscionable behaviour contrary to statute include an alleged inequality of bargaining power, that the Extended Warranties were of little or no value and that JB Hi-Fi used 'unfair sales tactics'. None of these or the other

matters that form part of the plaintiff's pleaded unconscionable conduct claim raise an issue between the parties as to the financial arrangements between JB Hi-Fi and the administrators.

35 The first category of evidence, while relevant, is not evidence permitted to be used in support of an unpleaded unconscionability case.

36 It is to be observed that section J of the 2FASOC – in which it is alleged the plaintiff and group members suffered loss or damage by reason of statutory contraventions, including alleged contraventions of the statutory unconscionability provisions in the Australian Consumer Law ('ACL') and/or *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') – does not refer to or rely on JB Hi-Fi being unjustly enriched by reason of such contraventions.

37 That being the manner in which section J of the 2FASOC is pleaded, the first disputed category of documents and evidence is also not permitted to be relied on by the plaintiff and group members in support of the loss or damage claim for relief based on statutory contraventions, including alleged contraventions of the statutory unconscionability provisions in the ACL and the ASIC Act.

38 For the avoidance of doubt, the first category of documents and evidence in respect of such documents is also not permitted to be relied on by the plaintiff and group members in support of their claims for misleading or deceptive conduct which are the subject of section H of the 2FASOC and which culminate in the claim for loss and damage in section J to which I have referred.

C.3.2 Mistake

39 The mistake claim in section K of the 2FASOC alleges that by reason of JB Hi-Fi's misleading or deceptive conduct, at the time of their purchase of the Extended Warranties, the plaintiff and relevant group members were labouring under one or more unilateral mistakes. That the mistake relied on is alleged to be a consequence of the misleading or deceptive conduct is apparent from paragraph 79 of the 2FASOC, which pleads what are collectively defined as the 'Specific ACL Mistakes' and the 'Extended Warranty Mistakes'.

40 Paragraph 83 alleges that the plaintiff and group members who laboured under a mistake are entitled, at their election, to rescind the Extended Warranties or that the Extended Warranties are void. That allegation is made by reason of the matters pleaded in paragraph 78–82 above.

41 Paragraph 84 alleges that the payments for the Extended Warranties are monies had and received by JB Hi-Fi to the use of the plaintiff and group members, that JB Hi-Fi has been unjustly enriched by the receipt of those payments at the expense of the plaintiff and group members, it will be unconscionable for JB Hi-Fi to retain the payments and JB Hi-Fi is obliged to make restitution and repay those payments. Those allegations are similarly made by reason of the matters pleaded in paragraphs 78–83 above.

42 Paragraph 85 claims that the limitation period should be extended for certain group members. It is expressed to be by reason of the matters pleaded in paragraphs 78–82 above.

43 Finally, loss or damage alleged to have been suffered by reason of the mistake (or alternatively by reason of a total failure of consideration, discussed below) is pleaded in paragraph 88. The loss or damage alleged is the payment by the plaintiff and group members of the cost of Extended Warranties and, in the case of the lead plaintiff, loss or damage of $62.67, being the cost of the Extended Warranty he purchased which is alleged to have been of no material value. The loss and damage plea in paragraph 88 refers back to paragraphs 78–85.

44 For the reasons that follow, the first category of documents and evidence are not referred to or relevant to the matters alleged at paragraphs 78–82. Those documents and matters may not be referred to or relied on by the plaintiff in support of the mistake claim in section K of the 2FASOC, including the pleas in paragraphs 83, 85 and 88.

45 None of paragraphs 78–85 or 88 refer to the involvement of the administrators or the financial arrangements between JB Hi-Fi and the administrators.

46 The reason it is alleged JB Hi-Fi has been unjustly enriched in paragraph 84 is because of the receipt by JB Hi-Fi of payments for the Extended Warranties.

Paragraph 84(b) of the 2FASOC does not allege that JB Hi-Fi has been unjustly enriched by reason of the existence of the particular terms of the financial arrangements between JB Hi-Fi and the administrators. The same is the case concerning the allegation it would be unconscionable for JB Hi-Fi to retain the payments for the Extended Warranties alleged in paragraph 84(c). The payments alleged are the payments for the Extended Warranties, not payments received as a result of arrangements between JB Hi-Fi and the administrators.

47 Likewise, the damages claimed for mistake are not damages referrable in any way to the financial arrangements between JB Hi-Fi and the administrators. The damages claimed are damages for the total amount paid for the Extended Warranties. That being the case, the first category of documents and evidence in respect of such documents is not relevant to, and may not be relied on at trial in support of, the plaintiff's mistake claim, including insofar as unjust enrichment and unconscionability form part of or are sought to be relied on in support of that claim.

C.3.3 Failure of consideration

48 Section L of the 2FASOC alleges a total failure of consideration. Having regard to the manner in which the plaintiff has pleaded his total failure of consideration case, I do not accept that the evidence to which objection has been taken is open to be relied on by the plaintiff in support of that case.

49 Fundamental to the total failure of consideration case, as particularised in paragraph 86, is that the Extended Warranties provided little or negligible benefit to the plaintiff and group members. It is alleged that when the benefits of the statutory guarantee in section 54 of the ACL and the benefits provided by the Extended Warranties are compared, it can be seen that the plaintiff and group members received little or negligible benefit from the Extended Warranties beyond those provided for under the ACL.

50 The failure of consideration claim includes paragraphs 87(b) and (c), which are in the same terms as paragraphs 84(b) and (c). Paragraph 87 begins by saying '[b]y reason of the matters pleaded in paragraph 86 above'. Paragraph 86 refers to a number of earlier paragraphs in the pleading including paragraphs 73–85.

51 The particulars to paragraph 86 refer to the Extended Warranties conferring no additional benefits upon the purchasers of those warranties beyond those which applied by reason of the statutory guarantee. The loss or damage claimed to have been suffered by the plaintiff and group members by reason of the failure of consideration is pleaded in paragraph 88, to which I have previously referred. It concerns loss suffered due to the payment of the purchase price of Extended Warranties.

52 There is no express reference in section L of the 2FASOC to the administrators or to the arrangements between JB Hi-Fi and the administrators. The reference to unjust enrichment in paragraph 87(b) is a reference to unjust enrichment by the receipt of payments for the Extended Warranties at the expense of the plaintiff and the relevant group members. If it had been alleged that JB Hi-Fi was unjustly enriched by reason of the proportion of those payments retained by it, then, how that proportion is calculated and the financial arrangements between JB Hi-Fi and the administrators might be permitted to be relied on in support of such an unjust enrichment plea. The same is the position concerning the payments the retention of which is alleged to be unconscionable in paragraph 87(c). However, that is not how the plaintiff has chosen to plead and put the unjust enrichment and unconscionable parts of his total failure of consideration claim.

53 In those circumstances, the first category of documents and evidence in respect of such documents may not be relied on by the plaintiff in support of his total failure of consideration claim.

D <u>Incentives offered to sales staff</u>

D.1 Relevance

54 This second category of evidence principally encompasses documents and evidence relating to incentives offered to sales staff in relation to the sale of Extended Warranties, including the payment of commissions, bonuses and prizes.

55 As I indicated at the conclusion of argument on 20 October 2026, I accept that documents and evidence relating to or recording incentives offered and paid to sales staff are relevant.

56 Under the heading 'Incentivisation of sales', the plaintiff's opening submissions at 178–182 refer to the methods and culture which JB Hi-Fi promoted amongst its sale staff and management, and the manner in which that culture may have impacted the sales process, as a matter relevant to whether JB Hi-Fi acted unconscionably. Amongst the matters referred to are incentives and bonus payments offered to staff in relation to the sale of Extended Warranties. The submissions also refer to 'attachment rates', being the percentage of Extended Warranties sold by reference to total product sales.

57 The 'Extra Mile' document to which reference was made in the plaintiff's written and oral opening and in the cross-examination of Mr Smith, and to which JB Hi-Fi objected on the ground of relevance, is an example of a document which falls within the second category of documents and evidence (JBH.0021.0002.7160).

D.2 Use of the documents

58 Mr McRobert submitted the issues concerning the incentivisation of sales referred to at paragraphs 178–182 of the plaintiff's written opening and the subject matter of documents such as the 'Extra Mile' document fall outside the pleaded case. JB Hi-Fi submitted the unconscionability pleading in paragraph 73, which includes the allegation of unfair sales tactics at paragraph 73(d), makes no reference to incentives offered and paid to sales staff in connection with the sale of Extended Warranties.

D.3 Ruling

59 Paragraph 28 of the 2FASOC contains a number of allegations about JB Hi-Fi's sales process concerning Extended Warranties. The allegations include that the sales of Extended Warranties occurred in circumstances where the system or process involved the salesperson recommending to the consumer that they purchase an Extended Warranty, that the salesperson did not explain, or did not fully or accurately explain, the operation of, and rights automatically conferred by, the statutory guarantee, and the salesperson usually did not provide the consumer with a copy of the 'Yellow Brochure' the until shortly before, during or after the purchase of the Extended Warranties.

60 Paragraphs 34 and 35 of the 2FASOC allege that JB Hi-Fi did not disclose the 'Cautionary Matters' to customers who purchased Extended Warranties. Such 'Cautionary Matters' include that Extended Warranties provided for a period of cover in relation to consumer goods which substantially (and in some cases wholly) overlapped with the period during which rights under the statutory guarantee automatically applied.

61 Paragraphs 28 and 35 of the FAD, advance a series of positive propositions, including concerning matters that JB Hi-Fi says employees were instructed to do. They allege regular training was provided to employees and identify procedures they were instructed to follow when offering Extended Warranties for sale to customers.

62 The second category of documents satisfies the test for relevance in section 55(1) of the Evidence Act. I accept the plaintiff's submission that the fact of incentivised sales, how staff were incentivised and evidence relating to attachment rates is evidence that satisfies the requirement for a minimal logical connection between the evidence and a fact in issue in the proceeding. Such evidence is relevant to the question of whether or not it is likely that the 'Cautionary Matters' were or were not disclosed to consumers by JB Hi-Fi employees and to the question of whether JB Hi-Fi's employees followed the instructions, processes and procedures positively alleged by JB Hi-Fi.

63 The fact the second category of evidence is relevant and admissible does not determine the use to which such evidence may be put.

64 As part of the plaintiff's unconscionable conduct plea, paragraph 73(d) alleges JB Hi-Fi used 'unfair sales tactics' in connection with the sale of Extended Warranties. To the extent the plaintiff might seek to rely on the incentivisation of staff as part of its unconscionable conduct case, whether as part of the allegation of the use of 'unfair sales tactics' in connection with the sale of the Extended Warranties or otherwise, any such use of this category of evidence is outside the pleaded case. It is no part of the plaintiff's pleaded case, including his allegation of unfair sales tactics in paragraph 73(d) of the 2FASOC, to refer to or rely on the incentives paid to staff in connection with the sale of Extended Warranties. None

of subparagraphs 73(d)(i)–(ix) refer to or are broad enough to cover the payment of incentives to sales staff. The same is the position concerning the remaining subparagraphs of paragraph 73.

65 Although the issue of incentives paid or payable to staff in connection with the sale of Extended Warranties is relevant, evidence directed to that subject matter may not be relied on by the plaintiff as a separate independent basis of unconscionability.

CERTIFICATE

I certify that this and the 18 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 27 October 2026.

DATED this twenty seventh day of October 2026.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

C. Pagliaro
.....
Associate