Supreme Court

New South Wales

Case Name:	Alto Pty Ltd v General Motors Australia and New Zealand Pty Ltd (formerly GM Holden Pty Ltd)
Medium Neutral Citation:	[2023] NSWSC 759
Hearing Date(s):	16 June 2023
Date of Orders:	16, 29 June 2023
Decision Date:	4 July 2023
Jurisdiction:	Equity
Before:	Meek J
Decision:	The Court approves the plaintiff making applications for orders under § 1782 of Title 28 of the United States Code seeking documents on the condition that any such proposed application be served on the defendants at least 21 days before it is filed in the United States
Catchwords:	CIVIL PROCEDURE — Applicant brings several claims including a misleading and deceptive conduct claim against respondents — Respondents deny representations but say in any event there are reasonable grounds for making any such representations — Lengthy process of discovery between parties — Little or no documents produced by respondents in respect of categories recording their USA parent company’s strategy and documents relating to consideration by the USA parent of shutting down car sales and various operations in Australia — Applicant seeks Court’s endorsement of proposed §1782 application under Title 28 of the United States Code to seek production of documentation — Application granted CIVIL PROCEDURE — Principles of case management — Production of documents — The fact that categories

	of documents do not refer to knowledge of an employee or other relevant person is not decisive in determining the relevance of the document for production purposes — The proposed categories of documents which record or evidence a “comprehensive strategy” of the USA parent and consideration by the USA parent recording or evidencing GM considering shutting downs sales and operations in Australia is important material for the purposes of cross-examination or other testing of a reasonable grounds defence as to (1) what the relevant employees actually knew, and further, what they are to be taken to have known in the circumstances and (2) what the corporate representor in fact took into account and relied upon to make the 2017 express representations and whether its reliance was objectively reasonable in the circumstances CONSUMER LAW — Misleading and deceptive conduct claim — Consideration of legal principles regarding defence of reasonable grounds — Consideration of knowledge of employee extends to what each employee relevantly actually knew and is to be taken to have known in the circumstances — Determination regarding knowledge includes any inferences that may be drawn from circumstances as to each party’s ability to call evidence and any failure to call evidence — Consideration of issues in identifying whether a representor had reasonable grounds for a representation
Legislation Cited:	Civil Procedure Act 2005 (NSW) Competition and Consumer Act 2010 (Cth)
Cases Cited:	Alto Pty Ltd v General Motors Australia and New Zealand Pty Ltd (formerly GM Holden Pty Ltd) [2022] NSWSC 853 Blatch v Archer (1774) 1 Cowp 63; 98 ER 969 City of Botany Bay Council v Jazabas Pty Ltd [2001] NSWCA 94; [2001] ATPR (Digest) 46-210 Crowley v Worley Ltd (2022) 293 FCR 438; [2022] FCAFC 33 Jones v Dunkel (1959) 11 CLR 298; [1952] HCA 8 Jones v Treasury Wine Estates Ltd (2016) 241 FCR 111; [2016] FCAFC 59

	Lavecky v Visa Inc [2017] FCA 454 Liristis v Gadelrabb [2009] NSWSC 441 McAssey & Anor v Nemo (BC) HoldCo & Anor [2020] NSWSC 1893 White Oak Commercial Finance Europe (Non-Levered) Ltd v Insurance Australia Ltd [2022] FCA 1587
Texts Cited:	Title 28 of the United States Code
Category:	Procedural rulings
Parties:	Alto Pty Ltd (Plaintiff / Applicant) General Motors Australia and New Zealand Pty Ltd (formerly GM Holden Pty Ltd) (First Defendant / First Respondent) General Motors Holden Australia NSC Pty Ltd (Second Defendant / Second Respondent) Mark Bernhard (Third Defendant / Third Respondent)
Representation:	Counsel: M Henry SC and D Delany (Plaintiff / Applicant) J Arnott SC (Defendants / Respondents) Solicitors: Dentons (Plaintiff / Applicant) Norton Rose Fulbright (Defendants / Respondents)
File Number(s):	2021/187724

JUDGMENT

1 **HIS HONOUR:** These proceedings involve a dispute about motor vehicle dealership arrangements.

Introduction

2 The plaintiff (**Alto**) is a former Holden motor vehicle dealer. Anthony Altomonte (**Mr Altomonte**) is effectively the controller of Alto: T 7.17.

3 The first defendant (**GM Holden**) appointed Alto as a Holden dealer and supplied Holden motor vehicles and parts to it between approximately 1 January 2012 and 31 December 2017.

4 The second defendant (**GM Holden NSC**) appointed Alto as a Holden dealer from 1 January 2018 to 31 December 2022.

5 The third defendant (**Mr Bernhard**) was, between July 2015 and 3 August 2018, chairman and managing director of GM Holden, and, from 16 January 2017 until 3 August 2018, chairman and managing director of GM Holden NSC.

6 General Motors Company (**GM**) is a corporation based in Detroit, Michigan and listed on the New York Stock Exchange in the United States of America (**USA**). It is the ultimate holding company of GM Holden and GM Holden NSC.

7 Peter Keley (**Mr Keley**) was, from at least 28 April 2016 until 8 March 2017, an executive director of Sales at GM Holden and from 16 January 2017 a director of GM Holden NSC.

8 Stefan Jacoby (**Mr Jacoby**) was in August 2015 the president of General Motors International (**GMI**) and based in Singapore. Mr Jacoby reported to Dan Ammann (**Mr Ammann**), the chief operating officer of GM at the time, and Mr Ammann reported to Mary Barra (**Ms Barra**), the chief executive officer of GM (then and as at November 2021): Exhibit LJM-1 (**ELM**) to the affidavit of Louise Massey (**Ms Massey**) affirmed 19 May 2023 (**ALM**) 565[15]: T 16.9-.12.

Procedural history

9 The proceedings were commenced by summons filed on 30 June 2021. The proceedings have been listed before judges in the Commercial List on approximately 21 occasions between 13 July 2021 and 4 May 2023.

10 On 30 June 2021, Alto filed an amended summons. The amendments to the summons were first to correctly name the first defendant and secondly to add Mr Bernhard's name as third defendant to the first claim for relief.

11 It is evident from the history of the matter that issues regarding discovery, disclosure or production of documents have been debated between the parties since early 2022.

12 On 25 March 2022, Alto filed a notice of motion seeking discovery of documents.

13 By 15 June 2022, the parties had prepared a listing of 31 categories of discovery (**Australian discovery categories**) which listing identified in respect of those categories which categories were agreed and which were disputed (in whole or part): ELM 13-18.

14 On 17 June 2022, Stevenson J heard argument regarding the Australian discovery categories and directed the parties to prepare a schedule setting out their competing contentions as which of those categories remained in dispute. The parties prepared a “Redfern schedule” giving effect to that.

15 On 28 June 2022, Stevenson J delivered short reasons attaching the Redfern schedule in which he populated the schedule with his conclusions in relation to the Australian discovery categories: *Alto Pty Ltd v General Motors Australia and New Zealand Pty Ltd (formerly GM Holden Pty Ltd)* [2022] NSWSC 853 (**Stevenson J’s judgment**).

16 On 1 July 2022, Stevenson J made orders for discovery including Australian discovery categories 1 and 6: T 27.21.

17 There were further court listings and on 4 May 2023, the proceedings were stood over to 16 June 2023.

Motion for approval order and for discovery of documents

18 On 19 May 2023, Alto filed a notice of motion seeking the following orders:

> 1. The Court approves the plaintiff making applications for orders under §1782 of Title 28 of the United States Code seeking the documents identified at paragraph 32 of the affidavit of Louise Massey dated 19 May 2023 on condition that any such proposed application be served on the defendants at least 21 days before it is filed in the United States (**proposed approval order**).
>
> 2. Pursuant to Rule 21.2 of the *Uniform Civil Procedure Rules 2005* (NSW), the Defendants are to give discovery of the following documents to the Plaintiff:
>
>> Documents dated or created from November 2017 to February 2020 that relate to the:
>>
>> (a) source of supply;
>>
>> (b) possible source or sources of supply;
>>
>> (c) cessation of supply; or
>>
>> (d) possible cessation of supply, of vehicles to the second defendant (**proposed discovery order**).

19 On 16 June 2023, the parties appeared before Stevenson J in the Commercial List and the notice of motion was referred to me for hearing.

20 Mr Henry SC appeared with Mr Delany for Alto. Mr Arnott SC appeared for the defendants being the respondents to the notice of motion (**respondents**).

21 On the hearing of the notice of motion, counsel addressed submissions to the proposed approval order and the proposed discovery order.

Background details

22 By way of general background, the following may be noted.

23 In 2009, GM came out of Ch 11 Bankruptcy: ELM 566-567[20].

24 On or about 10 December 2013, GM announced that the manufacture of Holden motor vehicles in Australia would cease at the end of 2017 and that thereafter Holdens sold in Australia would be imported.

25 In March 2017, Alto alleges that Mr Keley on behalf of GM Holden made representations to Alto relating to [and emphasising] GM's commitment to the Holden brand and its business in Australia (**the March 2017 representations**).

26 In May 2017, Alto alleges that Mr Bernhard on behalf of GM Holden made representations to Alto that GM remained "100% committed" to the Holden brand and its business in Australia (**the May 2017 representations**).

27 In 2015, Mr Bernhard was appointed as chairman and managing director of GM Holden by the then president of GM, Mr Jacoby: ELM 565[13].

28 From August 2015, Mr Bernhard indicates that he reported directly to Mr Jacoby and that the processes by which he reported were "both formal and relatively informal". He states they included regular emails but also telephone conferences (weekly or monthly), videoconferences, and "infrequently" face-to-face meetings: ELM 565-566[15]-[16].

29 At least from August 2015, the general structure of reporting was that Mr Bernhard reported directly to Mr Jacoby, Mr Jacoby reported to Mr Ammann, the chief operating officer of GM at the time, and Mr Ammann reported to Mary Barra, the chief executive officer of GM (then and as at November 2021): ELM 565[15]: T 16.9-.12.

30 On 24 November 2017, Alto alleges that GM Holden NSC sent a letter of offer to Alto proposing that Alto enter into a Dealer Sales and Service Agreement for five years commencing on 1 January 2018 pursuant to which GM Holden NSC would appoint Alto to actively promote, sell and service Holden motor vehicles

and sell Holden motor vehicle parts which offer, subject to any lawful termination of any agreement created by acceptance of the offer, included that GM Holden NSC would supply Holden motor vehicles and parts to Alto until 31 December 2022 (**the implied representation**).

31 On or about 16 February 2018, Alto accepted the offer and entered into a Dealer Sales and Service Agreement with GM Holden NSC for five years commencing on 1 January 2018 (**the 2018 agreement**) pursuant to which GM Holden NSC appointed Alto to actively promote, sell and service Holden motor vehicles and sell Holden motor vehicle parts.

32 On 16 February 2020, GM announced that it would, inter alia, "cease Holden sales, design and engineering operations by 2021…" (**2020 press release**). The 2020 press release (ELM 60) also stated as follows:

> "General Motors (NYSE: GM) is taking decisive action to transform its international operations, building on the comprehensive strategy it laid out in 2015 to strengthen its core business, drive significant cost efficiencies and take action in markets that cannot earn an adequate return for its shareholders.
>
> GM announced today that it would wind down sales, design and engineering operations in Australia and New Zealand and retire the Holden brand by 2021 …"

33 Mr Henry SC says that the "comprehensive strategy it laid out in 2015" (T 19.35) provided the basis for what ultimately happened in the decision by GM to exit the Australian Holden market: T 8.24-.27. I will describe this as the "**2015 withdrawal strategy**".

Alto's claims in the proceedings

34 The claims for relief in the proceedings, leaving aside interest and costs, are:

(1) an order that each of the respondents pay to Alto damages under s 236 of the *Australian Consumer Law* (**ACL**) (contained in the *Competition and Consumer Act 2010* (Cth) sch 2); and

(2) an order that GM Holden NSC pay Alto damages.

35 The issues in the proceedings have been formulated by means of the procedures prevailing in the Commercial List with the filing and serving of a commercial list statement and response. The commercial list statement has been amended on a number of occasions. The current form of that document is

a further amended commercial list statement filed on 7 March 2023 (**CLS**) and the response to it filed on 24 March 2023 (**Response**).

36 As the case was explained to me, Alto's claims against the respondents are essentially twofold:

(1) a misleading and deceptive conduct claim; and

(2) a contract claim.

37 I will explain in a bit of detail the misleading and deceptive conduct claim. Ultimately, it is not necessary to explain much detail regarding the contract claim as that only related to the proposed discovery order which relief was ultimately, in light of a clarification by Mr Arnott SC regarding the Response (as to which see below), not pressed by Alto.

Misleading and deceptive conduct claim

38 The misleading and deceptive conduct claim is purely framed under the ACL with no common law basis: T 10.36-.47.

39 It is to the effect that the March 2017 representations, the May 2017 representations (**2017 express representations**) and the implied representation were made as to future matters which Alto relevantly relied upon to enter into a Dealer Sales and Service Agreement with GM Holden NSC.

40 Alto did not suggest that the 2018 agreement was entered into on the basis of the earlier representations (which I took to mean the 2017 express representations): T 9.27-.29.

41 Rather, it is said that Alto, in reliance upon the March 2017 representations, or, alternatively, the May 2017 representations, or, alternatively, the implied representation, inter alia:

(1) refrained from selling, assigning or transferring its Holden dealership to a third person for market value and thereby ceasing to trade as a Holden dealer (or, if it could not so transfer it, refrained from moving its Holden dealership to operate from a smaller site – in Artarmon); and

(2) lost the opportunity to operate as a premium or prestige car dealership selling other brands of cars from a larger site – in Chatswood: CLS [61].

42 Alto asserts that the three sets of representations were made in trade or commerce and were as to a future matter and that by force of subsection 4(1), (2) ACL, the representations are taken to have been misleading, that they were made in breach of s 18 ACL and that Mr Bernhard was a "person involved in the contravention" within the meaning of s 236(1) ACL.

Legal principles regarding a defence of reasonable grounds

43 Mr Arnott SC referred to the provisions of s 4(1) and (2) ACL. Those subsections are qualified by s 4(3) and (4). Accordingly, I set out below the whole of s 4:

> **4 Misleading representations with respect to future matters**
>
> (1) If:
>
> > (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
> >
> > (b) the person does not have reasonable grounds for making the representation;
> >
> > the representation is taken, for the purposes of this Schedule, to be misleading.
>
> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
>
> > (a) a party to the proceeding; or
> >
> > (b) any other person;
> >
> > the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.
>
> (3) To avoid doubt, subsection (2) does not:
>
> > (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
> >
> > (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
>
> (4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:
>
> > (a) a misleading representation; or
> >
> > (b) a representation that is misleading in a material particular; or
> >
> > (c) conduct that is misleading or is likely or liable to mislead;
> >
> > and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely

> because the person has reasonable grounds for making the representation.

44 Mr Arnott SC referred to the decision of the Full Court of the Federal Court (Perram, Jagot (as her Honour then was) and Murphy JJ) in *Crowley v Worley Ltd* (2022) 293 FCR 438; [2022] FCAFC 33 (**Crowley**).

45 Mr Arnott SC submitted that the effect of s 4(2) is effectively to reverse the onus on the respondents: T 35.24-.25.

46 Mr Arnott SC submitted that in relation to a case framed by reference to a representation as to a future matter, the representor (in this case GM Holden and GM Holden NSC) must show some facts or circumstances, existing at the time of the representation, on which the representor in fact relied, which are objectively reasonable, and which support the representation made: *Crowley* at [117] per Jagot (as her Honour then was) and Murphy JJ (Perram J agreeing at [1]). There is a focus on what knowledge is properly attributable to the representor according to orthodox principles and not merely to knowledge of the board of the representor: *Crowley* at [118].

47 There are various steps in addressing the issue: *Crowley* at [119]-[123].

48 The first step is determining what is the knowledge of the employee or employees (in this case Mr Keley and Mr Bernhard). The knowledge of the employees relevantly extends at least to what each employee actually knew, and, further, what they are to be taken to have known in the circumstances. Determining the employees' knowledge is (or includes) a matter of inference in the ordinary course, including, if applicable, the principles in *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 970 that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" and *Jones v Dunkel* (1959) 11 CLR 298; [1952] HCA 8 at 321 that when a party who is capable of testifying, fails to give evidence without explanation "it may lead rationally to an inference that his evidence would not help his case": *Crowley* at [78], [119].

49 The second step is determining the attribution of knowledge of an employee or employees to the representor. This is resolved on orthodox principles of attribution of knowledge to a corporation: *Crowley* at [119].

50 The third step is determining whether or not the representor had reasonable grounds for the (relevant) representation. Issues in relation to this step include identifying what the representor in fact relied on to make the representation and deciding if those facts in fact relied on are objectively reasonable. In this third step, the relevant issue or enquiry is what the representor in fact took into account, not what the representor ought to have taken into account: *Crowley* at [119] citing *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94; [2001] ATPR (Digest) 46-210 at [85] per Mason P.

51 Determining what the company as the representor relied upon will necessarily be different (in respect of each of the above-mentioned steps) for each relevant employee: *Crowley* at [120].

52 The question of the objective reasonableness of the matters supporting the representation must be evaluated by reference to all of the knowledge properly attributable to the representor by reason of the knowledge of its employees as the company's agents: *Crowley* at [120].

53 The material from which findings may be made regarding knowledge is not limited to oral testimony or documents and may extend to inferences drawn from documents and processes as a whole: *Crowley* at [123].

54 For the purposes of determining the application I was content to proceed on the above outline of principles.

Respondents' reasonable grounds defence

55 The respondents deny the March 2017 representations were made and (if found to have been made) deny they were relevantly future representations. However, in the event that it be found that such representations were made and are properly characterised as future representations, the respondents say that GM Holden had reasonable grounds for making those representations: Response [24].

56 The respondents say that reasonable grounds existed because:

> (i) the President of GM, Mr Dan Ammann, publicly stated on the same day that GM was 100% committed to the business in Australia.
>
> (ii) The statement referred to above was consistent with other actions of GM in relation to the Australian business, including:

1. In February 2015, at the GM Holden dealer conference, GM, through its President GM International Operations, Mr Stefan Jacoby, and its Chief Executive Officer, Ms Mary Barra, confirmed GM's plans for Australia, (including investing millions of dollars to broaden the Holden portfolio by, inter alia, introducing several new models from Europe such as Cruze, Captiva, a successor for the Commodore and a new sportscar) and referred to GM's commitment to the Australian market (including plans for the next 5 years with Holden's operations remaining a key part of the GM global enterprise);

2. In February 2017, GM announced that it would invest US$27m at its facility at Spring Hill (USA) for the assembly of right hand drive vehicles for export to Australia.

(iii) GM Holden's ongoing commitment to its business, including the investments into its future operations as set out in the particulars to paragraph 36(a) below.

57 The respondents say that any statements made by Mr Bernhard in respect of the alleged representations were made by him as a "corporate organ" of GM Holden and not personally and are statements of GM Holden only.

58 The respondents deny that the May 2017 representations were made and were relevantly future representations. However, in the event that such representations were made and are characterised as future representations, the respondents say that GM Holden had reasonable grounds for making the representations.

59 The particulars of those reasonable grounds are as follows:

A. Statements by GM in relation to its commitment to the business in Australia, including:

1. The defendants repeat the particulars to paragraph 24(a);

2. Further, in May 2017, Mr Dan Ammann, President of GM, reiterated during a meeting in Detroit with representatives of GM Holden and Australian dealers at a Holden 'Grand Masters' event GM's commitment to and confidence in the business in Australia.

B. GM Holden's ongoing commitment to its business, including the following investments into its future operations (made with GM's knowledge and support, including through regular updates from GM Holden to the President GM International Operations, Mr Stefan Jacoby):

1. Throughout 2016 and 2017 GM Holden continued announcing and preparing for launches of new models in the period 2016 to 2020. This included the following new models (described in, inter alia, GM Holden News Bulletins including those dated 1 September 2016, 7 October 2016, 28 November 2016, 2 February 2017, 31 March 2017, 25 May 2017, 13 July 2017, 20 July 2017, 20 October 2017):

a. Release date late 2016: Trailblazer, Astra Hatch and Barina;

b. Release date 2017: Trax, Astra Sedan, Astra Sportswagon;

c. Release date 2018: Acadia SUV, Next Generation Commodore, Commodore VXR and Equinox;

d. Release date 2019: Corsa, Acadia and Adam CUV;

e. Release date 2020: Next Generation Colorado, V8 Sports Car, E2UH (Next Generation Equinox) and Mokka;

2. On or about 20 September 2016, during the annual budget review meeting with GM, GM Holden outlined and had approved its plans and related budget for the next three years, including new product launches, related increases in marketing budget and the various new investments and programs which, as described in more detail below, were later implemented by GM Holden in 2017 and subsequently (including 'Maven', 'OnStar' and 'Dealership of the Future');

3. On or about 31 August 2017, again during the annual budget review meeting with GM, GM Holden outlined and had approved its plans and related budget for the next three years, which included GM Holden's focus on its continued brand transformation and launching its new product portfolio;

4. Throughout 2016 and 2017, GM Holden continued to develop sponsorship relationships and other brand initiatives in Australia, including:

a. 2016 Holden brand revamp (including appointment of a new Executive Director – Marketing, Mr Mark Harland, a launch event in Port Melbourne, an update to the Holden logo and website, media events and new customer programs including 'Complete Care' and 'Take Your Time Test Drive');

b. A three-year deal to create Red Bull Holden Racing Team (News Bulletin dated 16 August 2016), and consequential development by GM of a new V6 twin turbo engine for use by that team;

c. Holden as the Support Partner of Collingwood Magpies Netball Team (News Bulletin dated 21 September 2016);

d. Holden as the official 2017 Mardi Gras car in a new partnership with the Sydney Gay and Lesbian Mardi Gras (News Bulletin dated 3 March 2017);

5. GM funded, and GM Holden developed for Australia and launched, the Maven car sharing program involving Holden vehicles ('Maven Gig', 'Maven Campus' and 'Maven Next Steps'):

a. Established in Australia in 2016;

b. Officially launched in Sydney and Melbourne in September 2017;

c. Expanded to Adelaide, Brisbane and Gold Coast in October 2017 (by when it involved 400 cars and 600 members);

6. In 2016-2017 GM allocated regional responsibility to, and directly funded the development by, GM Holden of the OnStar program (offering emergency, security, navigation, connections and vehicle

manager services in GM / Holden vehicles through a subscription model) for launch throughout Asia Pacific and the Middle East and, in October 2017, GM Holden announced that OnStar would be rolled out across its own portfolio from 2019 (GM Holden News announcement "Holden Confirms Game-changing OnStar Technology Coming in 2019" dated 7 October 2017);

7. Commencing in 2017, and by a direct investment by GM, GM and GM Holden developed and established GM Financial in Australia, which made available to GM Holden a captive provider of finance for Holden dealers and Holden purchasers to support future vehicle sales;

8. In 2016/2017, GM Holden continued internal improvements and developments:

a. Three year program 'Dealership of the Future' reimagining and re-developing the design of Holden dealerships (including specifically created customer experience concept and design by external marketing agency, Hoyne, in 2016, implementation of which commenced in 2017) (Holden News announcement 'Holden Invests in the Future of the Company and Dealer Network' dated 27 November 2017);

b. $7million upgrade of the emissions laboratory at Holden's test facility, Lang Lang Proving Ground (Holden News announcement 'Holden Invests in the Future of the Company and Dealer Network' dated 27 November 2017);

c. 2017 Up! Your Service training including over 20 workshops with employees in the first quarter of 2017;

d. Launch, in April 2017, of Holden Business Development Culture Playbook identifying the industry's best practices and potential improvements relating to managing leads and customer conversions;

e. In 2017, plans for a development of a new headquarters and design centre and workshop at Fisherman's Bend, in collaboration with the Victorian Government;

9. When a previous agreement with Premoso, (t/a Holden Special Vehicles), a partner to Holden for over 29 years, expired in 2017, GM Holden, with GM's approval, entered into a new umbrella agreement for future programs including the Colorado and right hand drive conversions of GM vehicles, Camaro and Silverado;

10. In March 2017, GM Holden made written submissions to respond to the Australian Government's 'Draft Regulation Impact Statement - Vehicle emissions standards for cleaner air'.

11. From around 2017, GM Holden was progressing studies into the viability of sourcing products from China for Australia to optimise GM Holden's product portfolio.

C. In its press release entitled 'Opel/Vauxhall to join PSA Group' dated 6 March 2017, PSA Groupe confirmed that "existing supply agreements for Holden … will continue".

60 In relation to the implied representation, the respondents simply deny that any such representation is implied as a matter of business efficacy: Response [54].

61 No reply has been filed to the Response. The parties have joined issue on the above matters.

Evidence of Mr Bernhard and Mr Jacoby

62 A considerable amount of material was read and tendered on the application.

63 It is not necessary to refer to all of that material and indeed each counsel exercised some restraint in taking me to specific aspects of the evidence.

64 For the purposes of the application, it suffices for me to note particular aspects of evidence of Mr Bernhard and Mr Jacoby which Mr Henry SC specifically referred to.

65 Mr Bernhard's affidavit affirmed 26 November 2021 refers to the following:

(1) the directions on matters of policy and strategy that Mr Bernhard received which were mostly delivered to him by Mr Jacoby, primarily in the course of their telephone conferences, emails and one-on-one meetings: ELM 566[16];

(2) an announcement was made by Mr Jacoby at the February 2015 Holden dealers conference in Sydney that "GM is investing millions to broaden the Holden portfolio": ELM 567; and

(3) statements were made by Mr Ammann in a number of Australian media articles after 7 March 2017 that GM was 100% committed to the Holden business in Australia: ELM 570; T 17.9-.15.

66 Mr Jacoby in his affidavit affirmed 26 November 2021:

(1) gives evidence directed at strategy of GM Holden noting that he had primary responsibility for providing GM Holden and GM Holden NSC with strategic direction for management of their business: ELM 573; T 17.24-.26;

(2) indicates that he received directions for his supervision of the operations of GM Holden and GM Holden NSC at monthly GM senior leadership team meetings which he attended in Detroit: ELM 573;

(3) refers to Ms Barra's comments at a Holden dealers conference in February 2015 outlining a commitment to investing in Holden's future success in Australia by broadening the Holden portfolio and delivering a "step-change" in vehicle quality responding to the needs of customers: ELM 575-579;

(4) refers to GM's strategy for GM Holden and GM Holden NSC of transforming and restoring the Holden brand, reinvigorating the dealer network and refining the product portfolio with high-quality GM vehicles noting that it would require significant investment by GM in products, marketing, systems and people and that it was his responsibility as president of GMI to approve these investments on behalf of GM: ELM 580.

Alto's case regarding the misleading and deceptive conduct claim

67 Mr Henry SC gave some context and colour to the way that Alto puts its misleading and deceptive conduct case and its response to the respondents' reasonable grounds.

68 In summary, his submissions were as follows:

(1) Alto claims that that the survival of GM Holden and later GM Holden NSC was always contingent upon support from GM as the USA parent: T 7.50-8.2.

(2) The 2017 representations were unqualified (T 8.11-.21) and conveyed that the commitment was of the character that GM would remain supportive of the Australian subsidiaries: T 9.1-.2.

(3) It is evident from the respondents' particulars of the March 2017 representations that GM Holden's reasonable grounds for making the representations include statements, knowledge and conduct of GM (the parent company). Specifically, he submits that the reasonable grounds of GM Holden are reliant upon the conduct and statements of the USA parent company: T 11.41-12.5.

(4) GM Holden's particulars of reasonable grounds for the March 2017 representations are connected to and reliant upon its particulars of reasonable grounds in relation to the May 2017 representations (referring to [24(a)(iii)] Response when read with [36(a)] Response particulars): T 12.7-.12.

(5) GM Holden's reasonable grounds for making the May 2017 representations included announcements throughout 2016 and 2017 made with GM's knowledge and support through regular updates from GM Holden to Mr Jacoby (Response [36(a)], particulars B): T 12.18-.24.

(6) The respondents' evidence relies upon the conduct of GM for the purpose of establishing or putting forward the argument that there were reasonable grounds for the representations: T 13.7-.90.

(7) A significant part of the respondents' case in contending it had reasonable grounds for making the representations concerned the conduct and knowledge and statements of GM: T 15.40-.43.

69 Essentially, Mr Henry SC emphasised that the evidence that the respondents had served indicated that GM as the USA parent company had a strategy for

the Australian subsidiaries which strategy was based on statements, conduct, provision of funds and support by GM as parent for the Australian subsidiaries: T 19.1-.6.

Elaboration of Alto's case by reference to the 2015 withdrawal strategy

70 As each side's submissions unfolded at the hearing there is clearly some tension between the parties regarding the significance of the 2015 withdrawal strategy in the proceedings.

71 Mr Henry SC submitted that:

(1) Since 2015 there had been a progressive paring back of operations internationally to try to make GM more profitable or profitable and yet GM announced an investment in Australia: T 16.26-.32.

(2) The 2020 press release by GM evidenced, contrary and opposite to the 2017 express representations, that there was a strategy of GM in place since 2015 (to drive significant cost efficiencies and take actions in markets that cannot earn an adequate return for its shareholders) to wind down sales, design and engineering operations in Australia and to retire the Holden brand by 2021: T 19.10-20.5.

72 It was evident from the way that Mr Henry SC outlined Alto's case that the 2015 withdrawal strategy is part of what Alto wishes to advance in the proceedings.

73 Mr Arnott SC submitted that the 2015 withdrawal strategy has not been pleaded by Alto: T 39.50-40.1, 40.36-.41. That is technically correct.

74 No application was made by Mr Henry SC to seek to further amend Alto's pleadings. I do not propose to make any comment about that.

75 However, the fact that the matter is not pleaded does not necessarily preclude it from being either a real issue in the proceedings or a relevant or material matter bearing upon the real issues in the proceedings.

76 Alto had in its written submissions filed 15 June 2022 for the 17 June 2022 discovery hearing before Stevenson J referred to the 2020 press release in the context of a withdrawal strategy: ELM 3 [6], 9 [27]. Stevenson J, in his Honour's judgment making a decision regarding disclosure, referred to the 2020 press release: *Stevenson J's judgment* at [6].

77 Those earlier submissions and his Honour's judgment suggest to me that the "comprehensive strategy" referred to in the 2020 press release as being a relevant piece of evidence contrary to the representations has at least been previously foreshadowed by Alto as being contrary to the 2017 express representations.

78 When an experienced senior counsel in proceedings informs the Court that his case involves a particular matter (in this case the 2015 withdrawal strategy), the Court can hardly disregard such an announcement in assessing what are the real issues in dispute.

79 In any event, Mr Arnott SC identified the real issue in relation to the liability aspect of the misleading and deceptive conduct claim as being whether the respondents knew of any such strategy, if it existed: T 46.8-.9.

80 In substance, Mr Henry SC has revealed part of his cross-examination strategy which is that the reasonable grounds on which the respondents seek to rely for the representations are disputed by Alto or contestable because they contend or wish to test whether the respondents (or their witnesses) were aware or ought to have been aware of the 2015 withdrawal strategy: T 40.37-.45.

81 Mr Henry SC's outline (on the hearing of the notice of motion) of Alto's case is that the 2020 press release is contrary to the respondents' claim it had reasonable grounds for making the representations. Alto asserts that, contrary to what it says was represented to it, there is a different story namely that GM was not actually 100% committed to Holden's business in Australia and in fact GM had a strategy to costs cut or refine operations for profit purposes and shut down operations in Australia. Effectively, Alto disputes that reasonable grounds existed for the representations, and they wish to test that.

82 Conceptually, if it be the case that GM did have a strategy in 2015 which involved paring down its involvement in Australia leading to either withdrawal or potential withdrawal, and if that was known to the respondents or the witnesses prior to or even after they made representations prior to Alto entering the 2018 agreement, that is a matter which would bear upon Alto's misleading and deceptive conduct claim.

83 Even as a purely evidentiary matter, the 2020 press release is material which is before the Court and would be available to Alto by its counsel to challenge the respondents' witnesses in relation to the respondents' reasonable grounds defence.

84 Whether the alleged 2015 withdrawal strategy is in fact found to have existed and whether the respondents or their witnesses knew of it or were aware of it remains to be seen.

85 I address this in a bit more detail below.

State of readiness for hearing

86 The proceedings have reached a stage at which the evidence in chief has been served on the question of liability and, subject to the outcome of the proposed § 1728 application, discovery has occurred: T 21.17-.19.

87 Alto have two witnesses for the final hearing (Mr Altomonte and Mr Elabassi) and a further four people who have been subpoenaed to give evidence, making a total of six witnesses for Alto: T 47.50-48.1; ALM [19], [22].

88 The respondents (as matters presently stand) propose calling seven witnesses on the final hearing of the proceedings including, relevantly, in relation to the reasonable grounds defence, the respondents intend to call Mr Keley in relation to the March 2017 representations and Mr Bernhard in relation to the May 2017 representations. They also intend to call Mr Jacoby: T 41.28-42.6 (I note 6 deponents for the respondents are identified in Ms Massey's affidavit: ALM [20], [24]).

89 The next step in the proceedings will involve the preparation and service of evidence on the question of loss which Mr Henry SC indicates will include a number of experts not merely quantifying loss of a forensic accounting nature but additionally concerning the motor car market, how the market operated, what opportunities there were and what prices there were at various points of time: T 21.19-.25.

90 My sense of the matter, as confirmed by Mr Henry SC, is that the matter is not even remotely close at this stage to being allocated a hearing date: T 21.27-.36.

91 Whilst Mr Arnott SC understandably indicated that the respondents are keen for the matter to be heard, he did not, as I understood him, cavil with the proposition that the case was not close to being allocated any hearing date.

§1782 of Title 28 of the United States Code

92 §1782 of Title 28 of the United States Code is headed "Assistance to foreign and international tribunals and litigants before such tribunals". It, inter alia, authorises the District Court for a Federal District in the USA to order a person who resides in or is to be "found" in that District to give testimony; or a statement; or to produce documents for use in a foreign proceeding: *McAssey & Anor v Nemo (BC) HoldCo & Anor* [2020] NSWSC 1893 (**McAssey**) at [6] per Stevenson J.

93 It is not necessary to obtain an order from a foreign court in order for the US District Court to make an order for production under § 1782. However, since *Jones v Treasury Wine Estates Ltd* (2016) 241 FCR 111; [2016] FCAFC 59, a practice has developed in the Federal Court of Australia whereby that Court's approval is sought by a party to proceedings in Australia prior to the making by that party of a § 1782 application: *McAssey* at [8].

94 Slightly different terminology is used in judgments in describing the Court's involvement in a case-management sense in approving an applicant's proposed § 1782 application. In *Lavecky v Visa Inc* [2017] FCA 454 (**Lavecky**), Perram J used terminology in describing what was being sought by the applicant including in terms of it being "permission", "endorsement" and "approval": *Lavecky* at [2], [9]-[14], [20], [37], [38], [39]. Ultimately, his Honour made an order in terms of granting the Court's "approval": at [39]. In *White Oak Commercial Finance Europe (Non-Levered) Ltd v Insurance Australia Ltd* [2022] FCA 1587 (**White Oak**), Allsop CJ used the different terminology of "leave": e.g. at [23].

95 Despite the varied terminology, I did not detect that there is any material difference in judgments on § 1782 applications regarding the character of the relief being given to an applicant. Having said that, my sense of the matter is that slightly more neutral terminology such as that of "permission" or "leave" is

preferable to describe the Court's relief rather than terminology such as "endorsement" or "approval".

Case management leave

96 Prior to the making of a § 1782 application, a party proposing to make such an application approaches the local Australian court for leave on notice to the parties in the local proceedings. The application serves two purposes. First, to avoid the possibility of an anti-suit injunction. Secondly, it enables the local court to exercise supervision over its own processes: *McAssey* at [9]; *Lavecky* at [14]-[15] per Perram J; *White Oak* at [19]-[20] per Allsop CJ.

97 In asking the local court for leave the applicant, whilst in a sense asking for a form of endorsement of its proposal to apply to seek orders from courts of the USA, is not regarded as asking the local court to speak to the ultimate outcome of any such application in the USA courts, which is a matter properly for the learned judges of such courts. Rather, it has been said that the applicant is asking for leave or permission to take a procedural step in the local proceedings having regard to the local court's role in the just and efficient management of the cases before it: *White Oak* at [20].

98 The principles to be applied in such approval applications were considered by Perram J in *Lavecky*. His Honour at [19] stated:

> 19. Whilst it is unwise to be definitive about these matters in advance, the following matters are likely to be germane to a consideration of whether to endorse an application made under procedures such as § 1782:
>
> > (1) What is the importance of the material to be sought under the procedure to the applicant's case?
> >
> > (2) Are there other methods available for obtaining it?
> >
> > (3) Does the material sought impinge upon or undermine some important procedural limitation in this jurisdiction such as, for example, the unwillingness of the Court to permit fishing expeditions or, perhaps, the general unwillingness of this Court to order depositions?
> >
> > (4) What is the cost involved in the process for the parties before this Court?
> >
> > (5) Is that cost a proportionate burden having regard to the significance of the material?
> >
> > (6) Is the proposed proceeding under § 1782 in the District Court frivolous or obviously doomed to fail?

> (7) How long might the applications take to resolve and what impact might they have upon the timely preparation of the matter before this Court for trial?
>
> (8) Is there any need to impose conditions upon the endorsement so as to address any issues arising from (1)-(7) above?

99 As Perram J indicated in *Lavecky*, the above eight considerations were not intended by his Honour to be the only relevant considerations in dealing with an application for approval.

100 However, as the matter was argued before me, it was not suggested that other considerations were relevant. In fact, Mr Arnott SC focussed his opposition to the proposed approval order on two of the eight considerations referred to in *Lavecky* namely:

(1) the importance of the material sought to the applicant's case (i.e. *Lavecky* consideration (1)) (**importance consideration**); and

(2) the length of time it might take the applicant to apply to the District Court to obtain the materials and the impact that might have upon a timely preparation of the local proceedings for trial (i.e. *Lavecky* consideration (7)) (**delay consideration**).

Evidence of Mr Kupelian

101 Alto adduced evidence from a USA based attorney (Peter Kupelian (**Mr Kupelian**)) with over 40 years of experience who has regularly represented parties on discovery issues and disputes including requests for production of documents and subpoenas. Mr Kupelian is familiar with the judges' requirements and the procedures for the District Court for the Eastern District of Michigan (**Michigan District Court**). He indicates that once the application is filed with the Michigan District Court the timeframe for the process of obtaining documents may vary upon the assigned judge and any opposition by GM at the application stage. He estimated a timeframe from the filing of the application to a decision by the judge to be in the range of 2 weeks to 5 months: Affidavit of Peter Kupelian sworn 18 May 2023 at 4-5 (part of annexure A).

102 The respondents did not adduce any evidence disputing that timeframe or suggesting an alternative timeframe.

Proposed approval order

103 The proposed approval order identifies the documents sought in the USA by reference to Ms Massey's affidavit: ALM [32].

104 Paragraph 32 identifies those documents as follows:

> 32. By the first order sought in this motion, Alto seeks approval to make the §1782 Application for the following categories of discovery from GM:
>
> > a. *All Key Documents dated or created between January 2015 and February 2020 which record or evidence General Motors' "comprehensive strategy...laid out in 2015" referred to in General Motors' announcement dated 16 February 2020 (**US Category 1**).*
> >
> > b. *All Documents dated or created between September 2016 and February 2018 that refer, relate to, or evidence consideration by General Motors of shutting down Holden's vehicle sales, engineering and design operations in Australia (**US Category 2**).*
> >
> > *Definitions*
> >
> > ***"Documents"*** *means:*
> >
> > a. *all written records of any kind;*
> >
> > b. *electronic files, emails, computer disks or other storage devices of any kind containing electronic files or emails;*
> >
> > c. *any paper or other material on which there is writing or printing or on which there are marks, figures or symbols having a meaning for persons qualified to interpret them and any disk, tape or other article from which sounds, images or other records of information are capable of being produced.*
> >
> > ***"Holden"*** *means General Motors Australia and New Zealand Pty Ltd and/or General Motors Holden Australia NSC Pty Ltd.*
> >
> > ***"Key Documents"*** *means a document or documents which describe and/or confirm the existence, the nature and/or the terms of the "comprehensive strategy… laid out in 2015", for example:*
> >
> > a. a report or other Document, as defined above, prepared for:
> >
> > > *(i) General Motors by or on behalf of an officer or other executive of General Motors; and/or*
> > >
> > > *(ii) one or more directors, managing directors, executives, officers or employees of General Motors; and*
> >
> > b. *any minute or communication recording the distribution of, a consideration of, or a response to, such report or other Document referred to in (a)(i)-(a)(ii) above.*

105 US category 1 seeks production of substantially the same documents as those which the respondents agreed to give discovery of in category 1 of the Australian discovery categories: ALM [33], ELM 13.

106 US category 2 seeks production of substantially the same documents as those which the respondents agreed to give discovery of in category 6 of the Australian discovery categories: ALM [44], ELM 14.

107 It is not disputed that despite the respondents agreeing to provide discovery in respect of Australian discovery categories 1 and 6 (being substantially the proposed US categories 1 and 2) that the respondents did not produce any documents on discovery in response to category 1: T 26.10-.16. It appears that in relation to Australian discovery category 6 a minimal number of documents had been produced by the respondents: T 28.16-.18. (Ms Massey indicating that 12 documents were produced and, on her review, only 4 documents were relevant to Australian discovery category 6: ALM [46]).

108 There is some suggestion in the affidavit of Peter Cash (**Mr Cash**) (the respondents' solicitor) that the proposed US categories were not identical to the Australian discovery categories 1 and 6: Affidavit of Mr Cash affirmed 9 June 2023 at [12]. Mr Henry SC disputed that Australian discovery category 6 was limited to "key documents" rather than "all documents" (as defined): T 27.30-28.3. However, neither counsel suggested that my determination of the matter would materially depend upon any difference between Australian discovery categories 1 and 6 and US categories 1 and 2.

Submissions

109 In addressing the proposed approval order, as noted Mr Arnott SC focussed on two of the eight *Lavecky* considerations, namely the importance consideration and the delay consideration.

110 Mr Arnott SC characterised the case management decision as to whether to make the proposed approval order as being a case-specific test requiring an analysis of many factors including the nature of what is sought by the orders: T 34.11-.13.

111 Subject to what I note below, I accept the submission that a case management decision is a case-specific test.

112 Before addressing the importance consideration and the delay consideration, there are some preliminary matters to address.

113 Mr Henry SC indicated that beyond satisfying itself that what the applicant proposed was not obviously a waste of time this Court should not decline to make the relief on the basis that the applicant's proposed application to the Michigan District Court was frivolous or doomed to fail: *Lavecky* consideration (6): *Lavecky* at [19], [32]. However, Mr Arnott SC did not make any such suggestion and I did not proceed on the basis that the respondents' opposition to the proposed approval order was in any way based on the proposed § 1782 application being frivolous or doomed to fail.

114 There was no particular suggestion that the respondents proposed to involve themselves in the § 1782 application: see e.g. *Lavecky* at [38]. Whether they do or not ultimately remains to be seen.

115 Without going so far as to suggest that the respondents had no right to be heard in relation to the proposed approval order, Mr Henry SC submitted that the case management requirements of the Court do not necessitate the involvement of the respondents in the Michigan District Court (citing *Lavecky* at [38]) and that Alto's desire to go to the USA to obtain documents is not something that should really interest the respondents: T 22.42-23.16.

116 However, I accept that the respondents have an interest in any case management order which impacts upon the effective resolution of the real issues in dispute.

117 It is appropriate to note that neither counsel contended that there were other *Lavecky* considerations seriously bearing upon whether an approval order ought to be made or not.

Importance consideration

Threshold of importance

118 In relation to the proposed approval order and the consideration of the "importance of the material to be sought" to the applicant's case, there was some difference between Mr Henry SC and Mr Arnott SC as to the threshold (for want of a better description) of importance of the material.

119 Mr Henry submitted that I need only be satisfied that the documents to be sought need to be relevant for the proceedings (T 24.28-.29) and that I did not

need to be satisfied that the material sought is important material for the disposition of the proceedings: T 25.19-.21.

120 Mr Arnott SC disputed that the Court's satisfaction involved any low threshold and disputed that it was an issue in which the respondents had no real interest: T 34.8-.16.

121 Mr Arnott SC submitted that the proposed US categories 1 and 2 were not "sufficiently" important to warrant an approval order: T 14.21.

122 Later, Mr Arnott SC elevated that threshold to indicating that I would need to be satisfied that the documents sought "will materially assist on an identified pleaded issue", be satisfied that the categories are not "impermissibly broad" and that the "necessity of the documents is sufficient so as to justify any delay or other impact on the proceedings" (T 34.36-.43) for the Michigan District Court to be troubled by an application to aid the proceedings in this Court: T 34.43-.46.

123 It seems to me that in expressing the importance consideration as requiring that the categories of documents sought "will materially assist on an identified pleaded issue", Mr Arnott SC arguably overstates the level of satisfaction required for this Court to approve the plaintiff making applications to the Michigan District Court when regard is had to the way that courts in this country, in particular the Federal Court in *Lavecky* and *White Oak*, have described the approach to the approval or grant of leave.

124 In particular, I do not accept that the importance of the material must be referable to a "pleaded issue" as distinct from being important at least in some proper forensic way to a "real issue in dispute" (s 56 *Civil Procedure Act 2005* (NSW)).

Alto's submissions

125 Mr Henry SC submitted that:

(1) US category 1 is squarely based on the 2020 press release and Alto seeks documents which reveal what the "comprehensive strategy" was and information about the strategy: T 25.44-.49.

(2) US category 2 documents are squarely relevant to Alto's claim regarding the 2015 withdrawal strategy (which he submits was in

accordance with the 2020 press release implemented in shutting down operations in Australia) – the category seeks to answer the following questions: when was that first contemplated and how did it happen?: T 26.4-.6.

126 Essentially, Mr Henry SC wished to have the opportunity to seek the material to challenge the respondents' Response and to test the respondents' witnesses in particular in relation to the reasonable grounds defence.

Respondents' submissions

127 Mr Arnott SC submitted that the categories of documents to be sought in relation to the proposed application were not targeted at the real issues in dispute in the proceedings: T 46.9-.11.

128 Mr Arnott SC indicated that the respondents accept that anything that Mr Keley or Mr Bernhard knew should be attributed to the corporate respondents: T 37.39-.42.

129 Mr Arnott SC submitted that:

(1) Alto has the benefit of the "deeming provision" in s 4 ACL and thus the issue in the proceedings involves an analysis of what the respondents say they relied upon and an analysis of whether it was objectively reasonable for them to do so: T 36.25-.47.

(2) The proceedings will turn on the third step of the analysis referred to in *Crowley* and that what is relevant is what the representor in fact took into account not what the representor ought to have taken into account: T 45.19-.31.

(3) It would be permissible for Alto by its counsel to test what the representor was aware of indicating that the Australian discovery categories 1 and 6 were appropriate in terms of Alto seeking documents to do that: T 37.5-.15.

130 However, Mr Arnott SC submitted that:

(1) Alto (by its counsel) would not be entitled to test at the hearing the propositions of what the respondents' witnesses (including Mr Keley, Mr Bernhard) say they relied upon because they have the benefit of the deeming provision: T 36.49-37.2.

(2) It is not relevant in these proceedings to seek documents as to what any third party knew or was aware of or whether they had a different state of knowledge: T 37.5-.28.

(3) The US categories do not bear upon what Mr Keley or Mr Bernhard actually knew or are taken to have known: T 37.44-.47, T 46.6-.11.

(4) Specifically, US category 2 provides no connection with the knowledge of Mr Bernhard or Mr Keley at the time that they made the alleged representations: T 38.1-.21.

(5) Whilst Alto would be permitted to test the knowledge of Mr Bernhard, that (testing) had already been done by means of the discovery process through the Australian discovery categories: T 45.33-.35.

Delay consideration

131 Mr Henry SC disputed that there was or would be any relevant delay such as would incline the Court to refuse the grant of leave or approval for the proposed §1782 application.

132 Further, Mr Henry SC submitted that the respondents had not previously been concerned regarding any such delay.

133 He noted that:

(1) Between 5 and 18 August 2022, consequent upon the respondents producing little or no documents in relation to Australian discovery category 1 there was correspondence between Mr Cash and Ms Massey regarding this: ELM 66-76.

(2) Ms Massey requested Mr Cash to confirm what steps the respondents had taken to make enquiries with their parent company to confirm what strategy the parent company was referring to in the press release: ELM 68.

(3) Ms Massey's request was effectively ignored: ELM 69.

134 Mr Henry SC submitted that that material relevantly showed that there was no evidence from the respondents or GM indicating anything about time problems or delay in documents being obtained from the USA or indeed whether the application would be resisted in the USA: T 31.3-.17.

135 Mr Arnott SC submitted that:

(1) The time that the § 1728 application would take in the USA both to apply to the Michigan District Court and then have the application determined in favour of the applicants and for GM to produce any responsive documents "will completely derail these proceedings when the only thing that is left to occur before the trial are [sic] for the plaintiffs [sic] to serve their evidence on damages and for [the respondents] to put on anything in response": T 14.26-.32, 15.8.

(2) The present proceedings are not the only proceedings between the Holden corporate respondents and dealers. He noted that there are two other proceedings in the Victorian Supreme Court (one being a class action and another an action brought by a dealer which has been set

down for trial). He submitted that the respondents wish to have this matter set down for trial with a view to bringing the case on in the "near term": T 46.13-.19.

Determination regarding the proposed approval order

Importance consideration

136 Essentially, Mr Henry SC submits, and I accept, that he is entitled to test the respondents' evidence regarding what they say their strategy was and whether it was different to what was allegedly represented to Alto: T 44.16-.35, 44.40-.43. In addition, he submits, and I accept, that Alto is entitled to investigate the objective circumstances that in fact existed at the time the representations were made: T 44.37-.39.

137 Mr Arnott SC accepted that the fact that the respondents had not discovered any documents did not mean that there are no documents held by other parties: T 45.47-46.1.

138 It seems to me that Mr Arnott SC's submissions fail to sufficiently distinguish between what must be proved on the final hearing of the proceedings as material elements in the misleading and deceptive conduct claim with prior interlocutory processes.

139 Alto seeks by interlocutory processes to explore what material exists which may potentially bear upon its testing of the respondents' witnesses at the hearing of the matter of what they either actually knew or ought to be taken to have known of the 2015 withdrawal strategy and how that and materials relating to the ceasing of operations may bear upon the respondents' reasonable grounds for making the representations.

140 It is permissible having regard to the overriding purpose for a party to seek documents which may be relevant to a fact in issue but not merely because the documents would be direct evidence on any issue.

141 The fact that in this case the description of categories of documents do not refer to "knowledge" of an employee or other relevant person is not decisive in determining the relevance of the document for production purposes. I consider that the US categories 1 (which is apt to elicit documents addressing the "comprehensive strategy") and 2 (which is apt to elicit documents recording or

evidencing GM considering shutting down sales and operations in Australia) both of which on the applicant's case are relevant to the 2017 express representations and the alleged 2015 withdrawal strategy are important material for the purposes of cross-examination or other testing of:

(1) in relation to the first step (as put by Mr Arnott SC) what Mr Keley and Mr Bernhart actually knew, and further, what they are to be taken to have known in the circumstances; and

(2) in relation to the third step (as put by Mr Arnott SC) what GM Holden in fact took into account and relied upon to make the 2017 express representations and whether its reliance was objectively reasonable in the circumstances.

142 Certainly, in New South Wales, documents may be requested to be produced pursuant to a subpoena or notice to produce which may bear upon the knowledge of a witness or credit of witness: e.g. *Liristis v Gadelrabb* [2009] NSWSC 441. It seems to me that the proposed US category 1 and category 2 are sufficiently linked to and relevant to the case which Alto wishes to advance to be regarded as being important to Alto's case or in any event sought for a legitimate forensic purpose.

143 Mr Arnott SC gave an example of a document which might fall within US category 2 being an email between two executives in the Michigan office of GM that might refer to shutting down operations in Australia which email did not come to the attention of Mr Keley or Mr Bernhard. He submitted that that would tell one nothing about the knowledge of Mr Keley and Mr Bernhard at the time that they made the alleged representations: T 42.15-43.39.

144 Phrasing the example in that way seems to me to impermissibly use a final conclusion about a matter (that a document did not come to the attention of an employee) to determine a question arising at an earlier point of whether Alto ought to be permitted to seek documents which address strategy or consideration by GM of decisions which on an applicant's case involved the implementation of such strategy.

145 To modify Mr Arnott SC's example, if one supposes that an email about strategy exists but in and of itself does not refer to the fact that Mr Keley and Mr Bernhard have been told certain things or certain things have been communicated with them, that of itself would not deprive the proposed request

for the US categories of documents of importance within the *Lavecky* consideration (1).

146 Cross-examination is an art. A statement in an email between two executives in the Michigan office of GM referring to the shutting down of operations in Australia might well be highly material to a cross-examination of Mr Keley and Mr Bernhard as to what they knew about any shutting down of operations.

147 Quite apart from emails it is clear that Mr Bernhard had telephone conferences, videoconferences, and face-to-face meetings with Mr Jacoby. It is also clear that Mr Jacoby received strategic direction as to the management of GM Holden. It is not beyond the realm of possibility that GM executives informed Mr Jacoby of strategy, and recorded what they informed him, which information was relayed by Mr Jacoby to Mr Bernhard and or other GM Holden employees in conferences or meetings.

148 If Mr Bernhard and Mr Keley and even Mr Jacoby are cross-examined on a document about strategy or shutting down of operations, there are various possibilities. One is that one or more of them indicate that they were aware of such a strategy or consideration by GM of a shutting down or cessation of operations in Australia and communicated this in a way such as to give rise to relevant knowledge of Mr Bernhard and Keley. Another possibility is that they deny that. What final conclusion is made by the Court about the knowledge of Mr Keley and Mr Bernhard is a different question as to whether Alto should be permitted to seek a document which bears upon its stated case regarding the respondents' reasonable grounds defence.

149 I did not understand Mr Arnott SC to expressly challenge the particular dates referred to in the US categories.

150 However, even in relation to US category 2, the mere fact that a document might be created after the date of the representations but prior to February 2018 when the 2018 agreement was entered into does not mean that it is irrelevant to the question of the knowledge of Mr Keley or Mr Bernhard. Nor does it mean that US category 2 is not important to Alto's case.

151 It may well be that, for example, a document which postdates the representations but predates February 2018 indicates that a GM executive told Mr Keley or Mr Bernhard certain matters regarding shutting down operations in Australia prior to them making the representations. It is certainly not unusual in commercial life or in other areas of life for documents to be created at a point of time which record relevant information or events which have occurred at some previous point.

152 Overall, I am satisfied that the material which Alto wishes to seek pursuant to the proposed § 1782 application has direct relevance to and is important for the purposes of the real issues in the proceedings.

Delay consideration

153 I reject Mr Arnott SC's submission that approval of the proposed §1782 application "will completely derail these proceedings" in the sense of unacceptably delaying the proceedings.

154 The submission was at least in part predicated on an underlying premise that what remained to be done by means of pre-trial interlocutory steps would not take very long. That is something which for reasons I have outlined above I do not accept.

155 My impression is that a period of 2 weeks to obtain a decision from the Michigan District Court might be regarded as being overly hopeful. However, even if the period were 5 months, I do not regard the delay that might be occasioned to these proceedings by reason of the proposed application to the Michigan District Court as being unacceptably long within the overriding purpose case management consideration of facilitating the just, quick and cheap resolution of the real issues in dispute in the proceedings: T 32.

156 First, it is evident that documentary evidence will be important in the proceedings. This is reinforced by the fact that discovery issues have been raised and debated between the parties since early 2022.

157 Secondly, it is clear that the testing of the respondents' defence of reasonable grounds and the defendants' knowledge of strategy of GM is a real issue in dispute in the proceedings and the seeking of documentation that may be said

to bear upon the 2015 withdrawal strategy as described by Mr Henry SC and the cessation of operations in Australia is, in my estimation, important to Alto's case in the proceedings.

158 Thirdly, for the reasons I have indicated above, I doubt that the evidence regarding "damages" will be able to be marshalled by both sides in any short space of time.

159 Fourthly, in any event, I am of the view, and indicated as such during the hearing of the motion, that there is no reason why the further preparation of these proceedings in particular the materials going to damages should be delayed whilst at the same time the application to the Michigan District Court was made. If both were done concurrently, proceedings in this Court could still continue in a timely manner consistent with the overriding purpose: T 48.15-49.8.

Proposed discovery order

160 Towards the end of the hearing of the notice of motion in the context of counsel making submissions in respect of the proposed discovery order, it appeared that part of the dispute between the parties in respect of that proposed order involved the question of what was understood by Alto to be contended by the respondents in their Response.

161 I raised with counsel whether the matter could be solved by Mr Arnott SC making an appropriate statement that could be noted for the purposes of the proceedings regarding the Response. Counsel indicated that that was an acceptable course: T 53.47-55.3.

162 For the sake of clarity, Mr Arnott SC indicated that for the purposes of the proceedings he did not dispute that in the event that the 2018 agreement obliged GM Holden NSC to make available Holden motor vehicles and parts to Alto for the duration of the term, namely, until 31 December 2022 (which obligation the respondents deny), the respondents do not dispute that GM Holden NSC would be able to acquire Holden branded vehicles prior to February 2020. Specifically, the Response is not intended by the respondents to suggest that GM Holden NSC could not get supply prior to February 2020 from other GM subsidiaries with whom it had distribution agreements.

163 The above statement of Mr Arnott SC resolved the relief in respect of the proposed discovery order.

Conclusion

164 At the end of the hearing, having indicated that I would grant the necessary leave in respect of the proposed approval order, I requested the parties to prepare and submit to my Associate a draft of proposed orders to give effect to my announced decision.

165 Counsel for the parties provided draft orders on 19 June 2023 and later on 29 June 2023, following correspondence with counsel, I made orders as follows:

(1) The Court notes that the defendants do not by paragraph 67(c)(ii) of their commercial list response filed 24 March 2023 contend that the second defendant was unable to acquire new Holden branded motor vehicles prior to 14 February 2020.

(2) The Court approves the plaintiff, at its own cost, making applications for orders under § 1782 of Title 28 of the United States Code seeking the documents identified at paragraph 32 of the affidavit of Louise Massey dated 19 May 2023 on condition that any such proposed application be served on the defendants at least 21 days before it is filed in the United States.

(3) The costs of the plaintiff's motion filed 19 May 2023 be the plaintiff's costs in the cause.

(4) The plaintiff's motion filed 19 May 2023 is otherwise dismissed.

(5) The matter is listed for directions on 7 July 2023.

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