# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Banks & Anor v Copas Newnham P/L & Ors* [2002] QCA 217 |
| PARTIES: | **RODNEY ROY BANKS & JEANETTE ELLEN BANKS**<br>(plaintiffs/first respondents)<br>**v**<br>**COPAS NEWNHAM PTY LIMITED** ACN 009 893 172<br>(first defendant/second appellant)<br>**GRAHAM NEWNHAM**<br>(second defendant/first appellant)<br>**WONDERLEY AND HALL (A FIRM)**<br>(third defendant/second respondent) |
| FILE NO/S: | Appeal No 9434 of 2001<br>DC No 3792 of 2000 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 21 June 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 21 May 2002 and 22 May 2002 |
| JUDGES: | McMurdo P, McPherson JA, and Mackenzie J<br>Separate reasons for judgment of each member of the Court each concurring as to the orders made. |
| ORDERS: | **(1) Appeal dismissed with costs; (2) Cross-appeal dismissed with costs.** |
| CATCHWORDS: | TRADE & COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - PARTICULAR CLASSES OF CONDUCT - REAL ESTATE TRANSACTIONS - representations made by selling agent with no suggestion the information conveyed contained opinions of others - whether sales agent considered mere 'messenger'<br><br>TRADE & COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - EXCLUSION CLAUSES AND DISCLAIMERS - disclaimers misleading and legally unenforceable - whether defendants can be thereby relieved |

of liability for misleading representations

TRADE & COMMERCE - TRADE PRACTICES AND RELATED MATTERS - ENFORCEMENT & REMEDIES - PENALTIES - PECUNIARY PENALTIES: QUANTUM AND LIKE MATTERS - value of property dropped because representations were misleading - whether quantum assessed by reference to sales occurring after contract date acceptable

INTEREST - RATE OF INTEREST AND COMPOUND INTEREST - RATE IN OTHER CASES - trial judge awarded interest at rate above the statutory rate - whether within judicial discretion to reduce interest to statutory rate.

TORTS - NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - PARTICULAR CASES - OTHER CASES - purchaser received negligent advice from solicitor - whether can be considered contributory negligence by plaintiff

PROCEDURE - COSTS - GENERAL RULE - COSTS FOLLOW THE EVENT - COSTS OF THE WHOLE ACTION - WHERE MONEY PAID INTO COURT OR OFFER OF COMPROMISE MADE - OFFER OF COMPROMISE MADE - plaintiff makes offer to settle - third defendant invites first and second defendants to join in settlement - invitation rejected - whether judge acted reasonably in assessing standard costs where offer was rejected

*Fair Trading Act* 1989 (Qld), s 6(3)
*Trade Practices Act* 1974 (Cth), s 51A, s 51A(1), a 51A(2), s 52, s 52A(3), s 75B(a), s 75B(c), s 75B(1)(c)
*Uniform Civil Procedure Rules*, r 360(1), r 363

*Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 94 ALR 719, 743, referred to
*Brown v Harkins* [2001] NSWSC 15, distinguished
*Brown v Raphael* [1958] Ch 637, referred to
*Gould v Vaggelas* (1985) 157 CLR 215, 220-221, 266, applied
*John G Glass Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR §41-249, referred to
*Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] QCR 436, applied
*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, considered
*Tesco Ltd v Nattrass* [1972] AC 153, 170-171, applied
*Yorke v Lucas* (1985) 158 CLR 661, 666, referred to

COUNSEL: J F Hassett for the appellants
A F Maher for the first respondents
D G Clothier for the second respondent

SOLICITORS: David Prince Solicitors (Brisbane) acting as town agents for

Hassett Dixon Solicitors (Sydney) for the appellants
Quinn & Scattini for the first respondents
Brian Bartely & Associates for the second respondent

[1] **McMURDO P:** I agree with McPherson JA that the appeal and the cross-appeal should each be dismissed with costs for the reasons he has given.

[2] **McPHERSON JA:** This is an appeal against a judgment for $50,356 given in the District Court at Brisbane in favour of the plaintiffs Mr and Mrs Banks against the first and second defendants, who are a real estate agent Copas Newnham Pty Ltd and its principal Graham Newnham, together with the third defendant, who are a firm of solicitors. As between the three defendants, liability was apportioned on the footing that each of them would contribute one third of the damages awarded. There is also a cross-appeal by the plaintiffs which seeks an increase in the interest and an adjustment in the costs awarded in some minor respects.

[3] The plaintiffs' claim against the first and second defendants was based on allegations of misleading conduct under s 52 of the *Trade Practices Act* 1974 (Cth) arising out of a contract executed by the plaintiffs on 31 May 1996 to purchase from Real Investments Pty Ltd for $147,000 a unit in a proposed building to be called Southbank Suites, or alternatively Metro Inn Southbank, located near the William Jolly Bridge in Brisbane. Mr Banks, who acted for the two plaintiffs throughout the transaction, first became aware of the building project on reading an advertisement (ex 2) inserted by the first two defendants in the Toowoomba *Chronicle* for 23 September 1995. It presented an opportunity to invest in 154 brand new strata-titled hotel apartments in the "heart" of Brisbane, and showed, with accompanying illustrations, two buildings designated Building A and Building B comprising numbers of four-star hotel apartments that was described as all "offering 7% return". The units were also described as "fully leased, and to be managed by an established national hotel operator - a guaranteed income under a five year lease with three further five year options". The advertisement displayed a logo subtitled Metro Inn South Bank in conjunction with the words "7% net guaranteed". It carried the header Copas Newnham: First National Real Estate, and a contact telephone number for reaching Graham Newnham himself.

[4] Mr Banks, who knew the second defendant Graham Newnham personally, spoke to him on the telephone, after which Newnham sent a letter dated 3 October 1995 (ex 3) addressed to Mr Rod Banks by name. Under the heading **Metro Inn, Southbank**, the letter enclosed "a brief outline" for perusal and, after explaining that the project was due to commence in six to eight weeks with completion expected in December 1996, went on to say:

> "The investment's main appeal lies in the following benefits -
> (1) Five year lease plus 3 x 5 year options; (2) Guaranteed 7% nett return; (3) High tax benefits; (4) Automatic annual reviews to CPI and market reviews at the end of each 3 years."

Enclosed was an illustrated brochure (ex 4) bearing the Metro Inns logo which extolled some of the advantages of the project already recorded in the newspaper advertisement, as well as the additional benefit of accommodation at reduced rates in Metro Inns throughout Australia. It incorporated in tabular form the tax savings according to income brackets of potential investors that were to be expected to

accrue from investing in the project. It carried the name Copas Newnham and invited prospective investors to call Graham Newnham by telephone at a particular number. Included with this pamphlet was a detailed "Facts and Assumptions Summary" (ex 5), described as "prepared for Mr & Mrs Banks, Property: Metro 79500" containing finance calculations based on returns of 7%. It had been prepared for the first two defendants by Decision Dynamics International Pty Ltd, who claimed copyright in it, for the use of the licensee Copas Newnham and its "client" Mr and Mrs Banks, who were specifically identified as such.

[5] It was in reliance primarily on these representations, and specifically the references in the documents to a 7% net return on purchase price by way of rental payments on the lease of the unit guaranteed by Metro Inns, that Mr Banks said he and Mrs Banks entered into the contract of purchase in May 1996. There was evidence from Mr Banks to that effect at the trial, which it was plainly open to his Honour to accept, as he did, and no reason has been shown for saying that he should have been bound to reject it. As it turned out, there never was in fact any agreement for lease, or any guarantee of the rent payable, whether by Metro Inns or any other entity associated with it; or, if there was, the first and second defendants never produced it or established that it had ever existed. Instead, at settlement on 25 March 1998, there was nothing more than a registrable lease providing for an annual rent of $9,800 from Ballville Pty Ltd, which was a company with a $2 capital associated with the developer and vendor Real Investments Pty Ltd. After settlement of the contract on 25 March 1998 rent amounting to only $2,577 was paid by Ballville Pty Ltd before it defaulted and went into liquidation, following which the plaintiffs received a total of $4,042 in the financial year 1998/99 from other tenants. These proceedings claiming damages were instituted in the District Court in September 2000. The evidence, which was accepted by the trial judge, was that the plaintiffs never knew of Ballville Pty Ltd until after the contract was completed in March 1998. Once again, no reason for setting aside that finding has been shown.

[6] On appeal, his Honour's findings leading to judgment for the plaintiffs were challenged at every point by Mr Hassett on behalf of the first and second defendants. He began by questioning the conclusion that the representations contained in exs 2, 3, 4 and 5 amounted to misleading or deceptive conduct within the meaning of s 52 of the Act. There is, however, no doubt that his Honour's findings to that effect were justified. The description in ex 2 of the units as fully leased, having a guaranteed income for a five year period together with three further such options; that each building offered a 7% return that was "guaranteed"; that they were to be managed by an established national hotel operator, which used the Metro Inn logo and name, all combined to create and confirm the impression formed by Mr Banks. Considered objectively, those representations were fairly capable of producing that effect and were plainly designed to do so. It was submitted that each of these matters were mere "puffery"; but, while that description would readily apply to a representation like "a golden opportunity to invest" appearing in ex 1, it cannot diminish the impact of the specific qualities or characteristics that were imputed to the subject matter, such as "leased", or "guaranteed net income". Contrary to the submission of Mr Hassett on appeal, a representation may be misleading even though not confined to matters of "hard physical fact" such as the area of lettable floor space in a building considered in *John G Glass Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR §41-249. What amounts to misleading conduct in relation to a particular matter depends very much on the impression

conveyed by the representation considered in the circumstances and context in which it is made. In this instance there can be no doubt about what its effect on the mind of the reader would be, or, I would add, what effect it was intended to have.

[7] It was nevertheless argued that his Honour's finding was fatally flawed in failing at the outset to define the class to whom the representations were addressed, which it was suggested was a category of persons defined as "off the plan investors". It is not clear why such investors should be denied the protection of the *Trade Practices Act* or the status of consumers under its provisions, except that they were said to be more sophisticated risk-takers than "ordinary mums and dads", which in itself does not appear to accord with the range of tax brackets incorporated in ex 4. Mr and Mrs Banks were said to belong to the "sophisticated" category because they had, over some years, invested money in various properties, mostly residential houses, for the purpose of deriving income. The short answer to this submission, whatever its value in other cases might be, is that the statements in the letter dated 3 October 1995 (ex 3) were not addressed simply to sophisticated risk-takers, but to Mr Rod Banks personally. The letter re-iterated and so gave emphasis to the matters described as the investment's "main appeal", which included the five year lease with options, guaranteed 7% net return, and so on, all under the heading **Metro Inn, Southbank**. There is nothing at all to suggest that it was designed for Mr Banks as a risk-taker, whether sophisticated or otherwise, and, indeed, the principal thrust of the "appeal" lay in its emphasis on the safety of the investment and not on the risks it involved. If the "opportunity" was not intended for people like the plaintiffs, the letter and accompanying material should not have been sent to him at all.

[8] In circumstances like these, there was therefore no reason why it should have been incumbent on his Honour to begin by defining the class of persons likely to respond to the representations in question. That is an approach that has often been used for determining cases under the *Trade Practices Act* involving claims of passing off between traders in the same commodities, as in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, and the many decisions which have followed it in that context. In contrast, the representations here were made directly to the individual who was intended to and did in fact act on them as a consumer. In those circumstances, there can be little or no point in inquiring whether the representee was a member of an innominate class when he has in fact been personally targeted as an identified individual.

[9] It was nevertheless submitted that the plaintiffs could have been expected to have consulted their own solicitor for legal advice before acting on the representation, and that they had in fact done so. This is in substance a complaint that the representation involved in the misleading conduct ought not to have had the effect which was plainly intended of inducing the person to whom it was made to enter into the transaction in question: cf *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 94 ALR 719, 743. As such, it is a proposition as old as fraud itself, and, in the context of s 52 of the Act, has even less cogency or relevance than at common law. Section 52 does not require proof that the representor should have intended his conduct to mislead or induce his victim to act on it, but only that the conduct in question should in fact be misleading and that the consumer should have acted in reliance on it. See *Yorke v Lucas* (1985) 158 CLR 661, 666. In the present case, that issue was determined against the first two defendants by his Honour's finding that the plaintiffs were in fact induced by the representations to enter into the contract

with Real Investments Pty Ltd, and there is, as I have said, no reason for disturbing the finding to that effect.

[10] It was next said that the representations about the five year lease with renewals and the guaranteed 7% return were matters not of present fact, but of future conduct, that entailed no liability in the absence of a contract or warranty to that effect. Certainly such a consideration might have been of great importance in an action founded on fraud or deceit at common law; but s 52 of the *Trade Practices Act* requires no more than that there be conduct that is misleading, which is a concept potentially broader than misrepresentation of fact. Any doubts about that question under the Act were set to rest by the statutory amendment that incorporated s 51A. While the primary meaning of the expression "misleading conduct" was preserved in s 52A(3), the provision in s 51A(1) now renders a representation with respect to any future matter misleading if there are no reasonable grounds for making it; and s 51A(2) provides that there are deemed not to be reasonable grounds for it unless evidence to the contrary is adduced.

[11] As to this, the evidence adduced by the first two defendants consisted substantially of a letter dated 17 October 1995 (ex 63) written by Gray & Maloney, solicitors for Real Investments Pty Ltd to a Mr Sorensen, who was a solicitor acting for another potential investor who, it may be inferred, had caused inquires to be made about the correctness of some of the very matters on which the plaintiffs themselves relied on in entering into their own contract of purchase. Exhibit 63 was never seen by the plaintiffs, but Mr Newnham claimed he had been provided with a copy of it at an early stage of the development, and he relied on it at the trial to justify the reasonableness of his and the first defendant's beliefs. The letter contained statements to the effect that Real Investments or Ballville Pty Ltd had arranged for Metro Inns to operate the property as a hotel, and to sublease all units to Metro, which would be guaranteed by the publicly listed company Transmetro Corporation Ltd. It concluded with the statement that Gray & Maloney did not intend "to make representations upon which your clients should rely", but confirmed that these were "their instructions and that heads of agreement were in place, duly signed, between our client and Metro …". His Honour analysed in some detail the statements contained in ex 63 and noted the divergences between some of them and the representations in exs 2, 3 and 4 on which the plaintiffs had relied. It is not necessary to repeat the analysis here, because the fact is that the letter ex 63 is dated 17 October 1995, which is after those representations were made in late September and early October 1995. The first two defendants could therefore not have had a copy of ex 63 or have relied on it to form the reasonable belief that they later claimed to have had at the time those representations were made to the plaintiffs. They accordingly failed to discharge the onus of proof imposed by s 51A(2) of the Act.

[12] The point at issue does, however, raise for consideration another matter relied on by the first two defendants on appeal. This is that the second defendant Graham Newnham was not a corporation within the meaning of the *Trade Practices Act* and that his liability, if any, under s 75B(a) and (c) of Act was only "accessional", and so required proof of knowledge on his part of the essential matters which made up the contravention of s 52: *Yorke v Lucas* (1985) 158 CLR 661. To this, Mr Clothier of counsel for the third defendant solicitors on appeal, who have an interest in maintaining the liability of the first two defendants to its full extent, objected that no such issue had been raised by those defendants at the trial; and that, if it had been, it

would have been possible to assert a primary, rather than accessorial, liability on the part of Graham Newnham founded on his use of the telephone and the postal service in communicating with Mr Banks; that would then have attracted the application of Part V of the Act in its extended application to individuals under s 6(3) of the statute. In addition, the same result would flow from applying the provisions of the *Fair Trading Act* 1989 (Qld), on which the plaintiffs' claim was also based. Not having been raised below, the third defendant would, it was said, be prejudiced if the matter were permitted to be raised for the first time on appeal.

[13] The objection is substantial, but it is not necessary to pursue it because it is demonstrable on the existing evidence that Mr Graham Newnham did in fact know the essential matters that constituted contravention of s 52 by the corporate second defendant and participated directly in them. He was, within the meaning of s 75B(1)(c) of the Act, therefore directly and knowingly concerned in, or party to, the publication of exs 2, 3, 4 and 5 in which the representations were embodied. Indeed, it does not go too far to say that on the evidence as it is, he appears to have been the directing mind and will of the first defendant corporation and, as such, responsible for initiating its contravening conduct. For similar reasons, in applying s 51A, which refers to the corporation not having reasonable grounds for its belief, it is the belief of the third defendant Newnham, or absence of grounds for it on his part, that falls to be imputed to the corporate second defendant as its state of mind: cf *Tesco Ltd v Nattrass* [1972] AC 153, 170-171. If, therefore, s 75B(1) is in any way critical to the liability of Graham Newnham as a participant in the third defendants' action, the requisites for its application were clearly established here.

[14] Some of what was said in *Yorke v Lucas* (1985) 158 CLR 661, 666, prompted from the first two defendants a further submission on appeal, which was that they were no more than a "messenger" acting to pass on information received from others, in this case presumably the developer Real Investments Pty Ltd, about the project and the opportunity for investment in it; or, that at most, those two defendants were simply expressing an opinion based upon the information so received, for the accuracy of which they took no responsibility. The passage in *Yorke v Lucas* on which the submission is based (158 CLR 661, at 666) accepts that "a corporation which purports to do no more than pass on information supplied by another" is not necessarily engaging in misleading or deceptive conduct if the information turns out to be false; but the statement to that effect is predicated on, and immediately qualified by, what their Honours said in the sentence that follows:

> "If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in the its truth or falsity, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive."

[15] Merely to state the qualification is to demonstrate that the primary proposition has no application to the representations that were made here. It may be accepted as apparent from the material or otherwise that the first two defendants were acting in the role of agents in soliciting investment in the project, even though they were not expressly identified as such in the Toowoomba *Chronicle* advertisement ex 2. There is, however, nothing at all in it or exs 3, 4 and 5 to suggest that the information they were conveying was someone else's opinion or impression for which they themselves took no responsibility. If that had been the case, it would have been a simple matter to have said so, and so to have made it recognisable as

such; but nothing of that kind was suggested in any of the advertising material. To have done so would have tended to deter or discourage potential investors, which is no doubt why that course was not followed. Instead, the ordinary reader is left with the distinct, but false, impression that the first two defendants had in their possession information that afforded reasonable grounds for any belief they held in the representations they were making. That has the consequence of bringing the case fairly within the ambit of a misleading representation at common law of the kind considered in *Brown v Raphael* [1958] Ch 637; and also of distinguishing it from *Brown v Harkins* [2001] NSWSC 15, where the representation in question consisted of the portrayal in a coloured brochure of the location of a swimming pool on the site, which is something that selling agents would not ordinarily be expected to know about with any degree of accuracy or precision.

[16] As regards express disclaimers, there were two. One, which is in the smallest possible type size, appears at the foot of the *Chronicle* advertisement ex 2. It says "Every precaution has been taken to establish the above information but does not constitute any representation by the vendor or agent". The problem with it is that it, too, is misleading in that no steps had in fact been taken by the vendor or the agent to establish the accuracy of the information in ex 2. The other was an item incorporated in the "Facts and Assumptions Summary" (ex 3) forwarded with the letter ex 2 dated 3 October 1995 addressed to Mr Rod Banks. It is headed "Disclaimer" and emanates from Decision Dynamics International Pty Ltd, who evidently prepared the computer based calculations it contains. It affects to be derived from information "supplied by you the client", which in that context seems capable of referring only to the first and second defendants and not the plaintiffs; and it contains what purports to be a form of limitation of liability under the *Trade Practices Act*, which, so far as relevant here, it is not legally possible to impose. The result is that the defendants are not relieved of their liability by anything contained in either of those two disclaimers.

[17] What remains to be considered are principally the challenges to his Honour's assessment of the damages sustained by the plaintiffs as a result of entering into the contract, and the propriety of the apportionment between the three defendants. As to damages the plaintiffs are entitled to recover such monetary compensation as would place them in the position they would be in if they had never entered into the contract at all: *Gould v Vaggelas* (1985) 157 CLR 215, 220-221, 266. The starting point is the difference between the price paid, together with necessary outlays incurred in completing the contract, and its market value at the time the contract was entered into. Having considered in some detail the evidence of the three valuers called by the parties, his Honour concluded that the present value of the unit was of the order of $110,000, as compared to the contract price of $147,000, and arrived at a capital loss of $30,000. Much of the difficulty encountered by the valuers in arriving at market value was due to the absence for some time after the sale of any market for units, which was a result of what was described as the "stigma" of the failed project South Bank Suites (as it was eventually named). It became known to potential investors that purchasers of units were receiving no rent from Ballville Pty Ltd and they shied away from it. In these circumstances, it was legitimate for the learned judge to assess the loss, as he did, by reference to sales occurring after the contract date, provided, as was the case here, that the loss those sales demonstrated was not due to extraneous factors such as general conditions in the real estate market for those or other comparable units elsewhere in the city. The authorities were recently considered by this Court in *Manwelland Pty Ltd v Dames & Moore*

*Pty Ltd* [2001] QCA 436, and there is little to be gained by repeating all that was said there. In the result, there is no substance in the criticisms levelled at the assessment at $30,000 of the capital loss sustained by the plaintiffs from the transaction into which they entered.

[18] In addition, the plaintiffs were awarded a sum totalling $21,332 which, as updated, consisted of costs of acquisition ($4,820), net income losses ($5,689), loss of investment returns ($7,155), and future costs ($2,934). The plaintiffs by their cross-appeal originally sought to have this total increased by the addition of $6,300 representing interest on their capital loss. On appeal the claim to that sum was withdrawn, but a claim to an additional amount of the order of $300 continued to be pressed. The first two defendants also contested the award of interest, but on the ground that there was no evidence to support it. The issue arose from the fact that interest had originally been provisionally allowed at 10% pa on a set of figures that were prepared by plaintiffs' accountants. When those figures were updated, and slightly increased interest was again claimed at the rate of 10%, which exceeded the statutory rate of 6% which was claimed in the plaintiffs' pleadings. After hearing submissions on the matter, the trial judge concluded that whether considered as damages (as to which there was a dearth of evidence) or as an award of interest under the statutory power, the provisional rate which he had applied to the lesser figure might have been somewhat generous. He therefore declined to apply the rate of 10% to the updated figure, preferring to regard the plaintiffs as already sufficiently compensated by the award of that higher rate on the lesser amount. It is not possible to regard his Honour's decision in that particular as being outside the exercise of a proper discretion, and, to that extent, the amount of damages or interest awarded should not be disturbed on appeal.

[19] On behalf of the first and second defendants on appeal, it was further submitted that the plaintiffs had failed to establish that those defendants had caused the loss and damage assessed; or that, if they had done so, some allowance should have been made for contributory negligence on their part. So far as causation is concerned, the proposition urged on appeal seems to be that the cause of the loss was the failure of the project and not any misleading conduct on the part of the first two defendants. This ignores the fact that it was the misleading conduct that induced the plaintiffs to enter into a transaction which they would otherwise not have undertaken, and that they are entitled, so far as money can do it, to be extricated from the consequences of doing so. The safety of the investment was at the centre of the misleading conduct, and it was the absence of the very safeguards which they had been led by that conduct to expect that produced their loss.

[20] As regards contributory negligence, the submission was that the plaintiffs ought to have engaged competent solicitors to advise them on the contract before it was executed, and their failure to do so amounted to a failure to take proper care for their own interests, which it was said should have resulted in a reduction of the damages awarded to them. There are several responses to this submission. One is that in Queensland it is not the practice in contracts of this sort for purchasers to exchange counterparts or to consult solicitors before signing such a contract. Simple contracts of this kind are commonly prepared by estate agents and signed by the parties without the intervention of professional legal assistance. As it happens, Mr Banks did in this instance consult the third defendant solicitors, who ultimately acted for the plaintiffs in the conveyance. The advice given appears to have been somewhat perfunctory and did not descend to the detail involved in the identity of

the lessee, or the guaranteed 7% return on the investment, or the mechanics of how it would or should be achieved. It may, as his Honour found, have involved a failure on the part of the third defendants in their duty to take care but cannot be considered as constituting contributory negligence on the part of the plaintiffs.

[21] Finally, there is the appellants' challenge to the mode of apportionment among the three sets of defendants. The question was one of division of liability for a loss for which all three shared co-ordinate responsibility. There is no basis on which it could have been apportioned other than that they shared it in equal proportions, which, as his Honour considered, in fact accorded approximately with their respective contributions to the ensuing loss. Even if the matter had been at large, there would be no basis for interfering with the exercise of a discretion which led to the result arrived at.

[22] Ground B of the plaintiffs' cross-appeal complained that the learned trial judge had misapplied or failed to give effect to the provisions of r 360(1) of the *Uniform Civil Procedure Rules*. It applies if an offer to settle made by a plaintiff is to accepted by the defendant, and the plaintiff obtains a judgment no less favourable than the offer to settle. In this instance the relevant offer that was made before trial was to settle for $34,000 with costs on the standard basis, and in the event the plaintiffs recovered more than that amount. The problem, however, is that the offer was directed to all three defendants, and so should have invoked r 363, which caters for offers to settle where there are two or more defendants alleged to be jointly or jointly and severally liable to the plaintiff who have potential rights of contribution *inter se*. Some time after receipt of that offer solicitors for the third defendants wrote to solicitors for the first and second defendants inviting them to join in offering to settle the plaintiffs' claim for $40,000 with costs, subject to a division of that liability between them in the proportion 40:60% which was subsequently increased by the third defendants to 50:50. The other two defendants rejected this proposal announcing that the action would be strenuously defended. There was not very much more that the third defendants could do. In the circumstances, it was not unreasonable for the judge to be satisfied that an order for the plaintiffs' costs to be assessed should be made on the standard rather than an indemnity basis, and he made no error in so ordering. I have not thought it necessary for the purpose of determining this question to decide whether or not the plaintiffs were entitled to appeal against the costs order without first obtaining leave; but there is arguably a strong case that leave, which was not obtained, was needed in order to pursue the cross-appeal against that order.

[23] The outcome of these reasons is that in my opinion the appeal and the cross-appeal should each be dismissed with costs.

[24] **MACKENZIE J:** I agree with the orders proposed by McPherson JA for the reasons given by him.